PANORAMIC

Merger Control

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Modernising merger control means more unpredictability

Charlotte Colin-Dubuisson, Ilka Oberländer, Justin Stewart-Teitelbaum, Vanessa van Weelden and **Janet Jones-Duffey**

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'More likely to challenge' has been the common antitrust prediction for years now, with no change in direction on the horizon. Underpinning that trend is an increased risk of review across several major jurisdictions, with authorities going back to the toolshed to ratchet up their scrutiny of deals. Recent departures from traditional enforcement pathways have introduced uncertainty, and have even called into question the long-term stability of deals. Alongside an expanding scope of review, new theories of harm are being put forward by regulators. Competition authorities are taking a closer look at related markets, network effects and barriers to entry, while also exploring the role of innovation and labour in harm to competition. While digital markets and, even more presently, artificial intelligence (AI) are largely responsible for driving this trend, the implications may be far reaching.

Dealing with these shifts at a global level has made navigating multi-jurisdictional transactions more complicated than ever before. With authorities in the United States, the European Union and the United Kingdom, in particular, each attempting to adapt to today's market realities in their own way, major deals are having to address different lines of attack simultaneously. Even parties that manage to meet this burden, which often requires extensive production of economic and ordinary course evidence, end up facing divergent remedies. Although success is not off the table, firms contemplating any deal of scale should invest upfront in developing a coordinated strategy and prepare for a long road. Finally, despite agencies' convictions that their enforcement policies are apolitical, the 2024 election supercycle across key jurisdictions could bring further disruption.

Increased risk of review

Antitrust authorities are increasingly examining ways to review deals that may otherwise fall below notification thresholds. In a common move, the United States, the United Kingdom and the European Union have swept certain mergers into claims of monopolisation or abuse of dominance, targeting serial acquisitions or acquisitions of nascent competitors. Taking a detour from traditional merger control under the Clayton Act, the Department of Justice (DOJ) and Federal Trade Commission's (FTC) 2023 US Merger Guidelines also specifically assert that mergers can violate the law when they entrench or extend a dominant position in violation of Section 2 of the Sherman Act. In the European Union, the European Court of Justice's 2023 Towercast judgment empowers national competition authorities to conduct ex post review of acquisitions by dominant entities under abuse of dominance

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rules, where the acquisition would potentially strengthen the acquirer's dominant position and would lead to a significant impediment to effective competition. The risk of ex post review strongly depends on the likelihood of complaints by customers or competitors, who also have the right to challenge such transactions in court. Similarly, in the United Kingdom, the concept of dynamic competition under the Competition and Markets Authority's (CMA) Merger Assessment Guidelines provides significant flexibility to interrogate the acquisition by large companies of nascent players in adjacent markets, which has many parallels with the concept of leveraging dominance into new markets.

New regulations in the European Union focusing on tech have doubled down on this approach. Article 14 of the Digital Markets Act, compliance with which became effective for so-called 'gatekeepers' – large online platforms – in March 2024, requires gatekeepers to inform the European Commission of all transactions resulting in a concentration, and which involve core platform services or any other services in the digital sector, or enable the collection of data, regardless of the counterparty or whether the transaction would be otherwise notifiable. At a national level, Section 19A of the German Competition Act requires that large digital companies which are of 'paramount significance for competition across markets' notify mergers even if they do not reach the turnover thresholds, subject to specific conditions including a sector inquiry. Similarly, in the United Kingdom, the Digital Markets, Competition and Consumers Act (DMCC) gives greater authority to the CMA to oppose mergers, even when they have a limited connection to the United Kingdom, in an apparent attempt to address serial acquisitions with extremely low thresholds. This is sure to hit major tech companies, some of which will be required to report nearly all mergers to the CMA.

Alongside the 2023 US Merger Guidelines that articulate competition concerns regarding serial acquisitions, the FTC continues to expand its enforcement approach by relying on as many tools as possible, such as a reinvigorated use of Clayton Act Section 8, which prohibits interlocking directorates, and FTC Act Section 5, which prohibits unfair methods of competition (UMC), and which may not require a separate showing of market power or market definition for the FTC to find liability. The FTC signalled its desire to expand its use of this traditional tool by releasing an updated policy statement in November 2022, asserting broad discretion to challenge a wide range of business practices as UMC. Since the release of the policy statement, the FTC has used this legal power in conjunction with other claims in 12 cases. Some of the resulting consent orders demonstrate the agency's resolve to use as many tools as are available to it in its enforcement toolkit, eg, both Section 8 and Section 5: the EQT/Quantum order prevents entanglements and the exchange of confidential, competitively sensitive information, while the Exxon/Pioneer proposed order prevents the founder and former CEO of Pioneer from gaining a seat on Exxon's board of directors or serving in an advisory capacity at Exxon once it acquires Pioneer – to head off collusive activity.

The United States is not alone in seeking to apply every tool outside of merger review thresholds – and applying them beyond the context of digital markets. In the European Union, the Article 22 saga born from Illumina/Grail remains underway, with the Advocate General's (AG) opinion delivered on 21 March 2024 providing the most recent inflection point. After the European Commission (Commission) famously changed its European Union Merger Regulation (EUMR) policy and called in the Illumina/Grail transaction, which fell below EU merger review thresholds, AG Nicholas Emiliou proposed to set aside the General Court judgment and annul Commission decisions on referral requests. According to him, member states may not request the Commission to examine a concentration that does not have

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a Community dimension where they have no competence to review such a concentration under national law. If the Court of Justice of the European Union (CJEU) reverses, the Commission's call-in powers would be scaled back, which could lead the Commission to revisit the existing EU notification thresholds. Member states may also lower their own thresholds to expand opportunities for review and referral. Countries with transaction-based thresholds, such as Germany and Austria, are already well positioned to exercise jurisdiction. Others have generally expanded their call-in powers or are contemplating doing so – for example, Italy established a new call-in power to review below-threshold transactions in 2022 and France has expressed its intention to switch if the CJEU were to follow AG Emiliou.

With new avenues for ex post review of transactions in multiple jurisdictions, many are speculating about long-term deal certainty. Meta's press release accompanying its motion for summary judgment on Sherman Act claims brought by the FTC regarding its acquisitions of WhatsApp and Instagram captures many concerns: 'The decision to revisit done deals is tantamount to announcing that no sale will ever be final. This lawsuit not only sows doubt and uncertainty about the US government's merger review process and whether acquiring businesses can actually rely on the outcomes of the regulatory review process, but it will also make companies think twice about investing in innovation, since they may be punished if that innovation leads to success.'

That said, challenges of consummated transactions are still rare in the US, with only three under President Biden and three under President Trump. This follows a downward trend from six challenges during President Obama's first term and four in the second. Similarly, since the Illumina/Grail decision, the European Commission has accepted referrals relying on the controversial reading of Article 22 in only two cases where EUMR thresholds were not met. Since Towercast, only two mergers have been investigated under Article 102 by national competition authorities: in Belgium (Proximus/EDPnet) and in France (Akiolis/Saria/Verdannet). The Commission has opened only four Article 102 investigations of mergers more generally.

Even with these creative approaches, authorities are grappling with how to legally review certain types of collaborations that do not fit squarely into the definition of an acquisition but are likely to impact competition, with AI sitting centre in the spotlight. Microsoft's minority investments in OpenAI (and Mistral AI) have specifically sparked attention. After a January 2024 announcement that it was investigating whether the OpenAI investment was reviewable under the EUMR, the European Commission did not pursue a formal review under merger control rules but is said to be investigating under antitrust rules. The partnership has already drawn scrutiny from the CMA, the FTC and DOJ, the French Competition Authority and Germany's Federal Cartel Office (which has closed its investigation). So far, no authority has found the basis for a challenge under their merger rules. On 21 May 2024, the CMA published its decision on Microsoft/Mistral AI, ruling out that the minority investment constituted a merger situation. Nevertheless, the decision offers helpful guidance to AI investors on what could confer decisive influence on the AI investor, focusing on compute and distribution dependency and lock-in mechanisms. The CMA has also launched an inquiry into whether Amazon's partnership with Anthropic qualifies as a 'relevant merger situation' under UK merger rules.

At the forefront of competition authorities grappling with AI, the CMA published an initial review of AI foundation models in September 2023, and an updated paper and technical

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report in April 2024, which have helped develop an understanding of markets created or impacted by the development of foundation models, the associated opportunities and risks for competition and consumer protection, and the relevant principles that can be applied to foster innovation and ensure widespread benefits to people, businesses and the economy. Following the CMA's lead, the FTC issued orders in January 2024, under Section 6(b) of the FTC Act, requiring five companies (Alphabet, Amazon, Anthropic, Microsoft and OpenAI) to provide information regarding recent investments and partnerships involving generative AI companies and major cloud service providers. With the goal of building a better internal understanding of these relationships and their potential impact on the competitive landscape, FTC chair Lina Khan emphasised, 'Our study will shed light on whether investments and partnerships pursued by dominant companies risk distorting innovation and undermining fair competition.' Other key jurisdictions have also launched sector inquiries on AI and competition, including the European Commission, the French Competition Authority and the Australian Competition and Consumer Commission. As authorities consider the potential anticompetitive effects of combining AI with other tech assets, such as cloud computing, data, technical expertise and capital, for deployment in search, productivity software, social media, healthcare and robotics (just to name a few applications), AI is sure to remain under the microscope.

Examination of modern market dynamics and theories of harm

Gone are the days when non-horizontal mergers were presumed less risky. Authorities in many jurisdictions have signalled a willingness to go beyond the traditional HHI and SSNIP analyses and to take a closer look at asserted real-life competitive dynamics. Top EU, UK and US officials are exploring conglomerates and 'related' or 'adjacent' markets theories of harm, with a focus on entry and innovation effects. At the Annual CRA Brussels Conference in December 2023, Olivier Guersent, Director-General for DG Competition at the European Commission, indeed emphasised that the EU merger control rules 'put harm to innovation on an equal footing with increased prices and reduced output.' With this expanded focus, agencies are taking aim at deals that may not have been expected targets in previous years.

In the European Union, for example, the Commission's Booking/eTraveli decision caught some by surprise and certainly sparked debate across competition law forums. In blocking the deal, the Commission cited concerns with the combination of Booking, the leading hotel online travel agency (OTA), and eTraveli, one of the main providers of flight OTA services in Europe. The Commission specifically found that Booking already benefits from network effects, and the proposed transaction would have allowed Booking to acquire a main customer acquisition channel in the related market of flight OTA services. According to the Commission, the transaction would have allowed Booking to expand its travel services ecosystem, in particular, as flights have the highest chance of leading to cross-selling accommodations. Along with 'network effects' and 'ecosystems' theories, the Commission cited 'customer inertia' effects and the risk of increased difficulty for potential competitors to develop a customer base capable of supporting a hotel OTA business that could rival Booking. As such, the Commission decided that the transaction would have strengthened Booking's dominant position in the hotel OTA market, leading to higher costs for hotels and, possibly, consumers. While some consider the theory to be misapplied, the decision reflects the Commission's attention to 'ecosystems' and willingness to consider harm from a constellation of products and services that span multiple markets and which are connected via a single actor through technical interoperability.

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The Commission's examination of Amazon/iRobot, ultimately resulting in the parties abandoning the deal, likewise reflects increasing scrutiny of non-horizontal mergers. Citing vertical foreclosure theories of harm in its statement of objections, the Commission found that the transaction threatened to restrict competition in the market for robot vacuum cleaners, leading to higher prices, lower quality and less innovation for consumers. In the Commission's statement following the parties' decision to terminate, Executive Vice President Margrethe Vestager emphasised the need to take into account the transaction's potential effects on rivals and customers especially where 'large, established sales channels acquire suppliers that are heavily dependent on the acquirer's infrastructure and customer reach to be successful in the EEA market.'

While the CJEU may ultimately rein in the Commission's Article 22 scope of review, the Court affirmed the Commission's substantive breadth of review of transactions, particularly those involving oligopoly markets, in its CK Telecoms ruling addressing 'gap cases'. Therein, the Court found that the same standard of proof for the Commission to challenge a merger posing a 'significant impediment to effective competition' applies to all transactions and does not require a showing that the transaction will result in the creation or strengthening of a dominant position.

As reflected in the FTC and DOJ's updated 2023 Merger Guidelines, US officials are also seeking to enhance their enforcement approach. Highlighting highly concentrated markets, elimination of entry, industry trends towards consolidation, multi-sided platforms and related markets, and acquisitions involving partial ownership or minority interests, the Guidelines signal enforcers' desire to account 'for market realities associated with platform competition' and an increasingly digital economy. US agencies also continue to focus on innovation and labour markets alongside pricing effects. The 2023 US Merger Guidelines notably enumerate theories advanced in recent merger cases. For example, in Amgen/Horizon, the FTC asserted a complex 'portfolio effects' theory of harm, alleging that Amgen could leverage blockbuster drugs in its existing portfolio in negotiations with insurance companies and pharmacy benefit managers to insulate Horizon products from competition; and the FTC's lawsuit involving private equity firm Welsh, Carson, Anderson & Stowe, a minority investor, alleged an anticompetitive scheme to consolidate anaesthesiology practices.

As its first challenge under the new Merger Guidelines, the FTC filed a lawsuit to block major supermarket Kroger's proposed acquisition of its competitor Albertsons. In addition to traditional merger concerns, eg, a horizontal deal that allegedly exceeds presumptive market concentration thresholds, the complaint notably asserted that the elimination of head-to-head competition could not only result in higher prices for food and grocery products but could also harm thousands of unionised grocery workers. The FTC's April 2024 lawsuit seeking to block Tapestry's acquisition of Capri Holdings confirms that the US focus on labour effects is not a fad. The FTC's complaint alleges that the deal threatens to eliminate the companies' incentives to compete for employees and could negatively affect their wages and workplace benefits. How the new theories endorsed by the 2023 Merger Guidelines will fare in court is yet to be seen, but the outcome in the FTC's lawsuit against Welsh Carlson is no sign of sure success. On 13 May 2024, the District Court dismissed Welsh Carson from the suit while allowing the case against US Anesthesia Partners to go forward, stating: 'Welsh Carlson's ongoing conduct must reduce competition. It is not clear how owning a minority share in a company that reduces competition satisfies the statute.'

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Despite commonly held beliefs that digital markets and life sciences will continue to be targets for expansive and novel theories of harm, these 2024 challenges caution that no industry can ignore unique competitive dynamics during deal risk assessments. Furthermore, proposed changes to HSR filings in the US will seek to facilitate early examination of these theories across industries through additional obligations to provide expanded data, documents and other information, including narratives, prior to any clearance decisions.

While recent enforcement actions have left some practitioners reeling, agencies across the globe are making efforts to bring transparency and predictability to their merger review processes. In addition to the US 2023 Merger Guidelines, the CMA announced reforms to its in-depth merger control review process, the European Commission published its 2024 Market Definition Notice, Brazil's Administrative Council for Economic Defence (CADE) released new non-horizontal merger guidelines, and the South African Competition Commission issued Revised Public Interest Guidelines relating to Merger Control, just to name a few. Canada also broadly amended its Competition Act in December 2023, notably introducing a new framework and information-gathering powers for market studies, expanding the scope of reviewable collaborations between firms that are not 'competitors' and removing the efficiency defence in merger reviews.

Increased complexity in navigating global deals

With increasing risk of review across jurisdictions, and each increasingly inclined to apply new theories of harm to actual competitive dynamics within their own relevant markets, cross-border deals are becoming more difficult to navigate. Major transactions in 2023, such as Microsoft/Activision, Adobe/Figma or Booking/eTraveli, illustrate this challenge.

The parties in Adobe/Figma announced the deal in mid-September 2022. Over a year later, the transaction still faced scrutiny in the United States, United Kingdom, and the European Union, culminating in the parties' decision to terminate in December 2023, as there was 'no clear path' to obtain clearance from EU and UK antitrust regulators. The United States led the review of the merger with the DOJ issuing a second request in November 2022, followed by European Union, where the Commission called for feedback and an in-depth investigation after Germany and Austria referred review in early 2023. Meanwhile, the CMA entered the scene and referred the deal for a UK Phase II probe in July. Amidst all this, the deal was also under review by the Japan Fair Trade Commission, which announced it was opening the review for public comment in April 2023.

Authorities examined antitrust issues involving close competitors across the board. But the exact concerns expressed and how they might be remedied did not perfectly line up. The Commission said the deal would be a 'reverse killer acquisition', as Adobe would be likely to discontinue its own design tool. It also said the transaction would eliminate Figma as a rival for two of Adobe's editing tools, and, absent the transaction, Figma would be 'likely to enter these markets and grow into an effective competitive force'. Focusing on the elimination of an important rivalry in screen design software and creative design tools, the CMA determined that a divestiture would be required to clear the deal, after expressing specific concerns about the UK app economy and other businesses that rely on the software products provided by Adobe and Figma, and the potential harm to innovation in digital tools. With no room provided to negotiate, the parties, just days after a high-profile meeting with US DOJ

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Assistant Attorney General Jonathan Kanter to address the agency's concerns and secure US approval, mutually agreed to terminate.

Booking/eTraveli similarly faced multi-jurisdictional challenges. After receiving unconditional clearance from the DOJ, UK and EU investigations continued. The CMA eventually followed suit, primarily reasoning that flight OTAs account for only a small share (approximately 12 per cent) of total flight bookings online. As explained earlier, the Commission took a divergent approach, focusing instead on Booking's alleged dominant position (approximately 60 per cent market share) in the accommodation OTA space, and ultimately blocked the deal on an ecosystem theory of harm, which is pending appeal by the parties.

The Microsoft/Activision US$69 billion transaction is another example of a challenging global deal that resulted in divergent regulatory approaches both on the substance and the remedies. While the Commission and the South African Competition Tribunal approved the merger, the CMA initially blocked the deal and then allowed it to go forward once restructured in a way that forced Microsoft to give up key cloud gaming rights in many markets. Whether this twist of fate was due to changed circumstances or political pressure is hotly debated. Meanwhile, the FTC continues to appeal a US federal court decision that found the deal did not pose any competition concerns.

These examples are cautionary tales for transactions involving multiple jurisdictions. At a minimum, do not expect a short road to success. The emergence of non-traditional theories of harm has also increased pressure on the types of evidence being developed. To better understand relevant competitive dynamics, enforcers heavily rely on internal documents (which played a critical role in Adobe/Figma) and stakeholder feedback, making it increasingly difficult for the parties to develop rigorous economic strategies to counter such evidence that often incorporates third-party non-merger-specific opinion or centres on a single 'smoking gun' document. While the Commission has signalled a scale-back of requests, that shift is yet to be observed for deals under Phase II review. Not only are reviews increasingly burdensome, but they are also proceeding along different timelines, as authorities watch and learn from one another mid-deal, and sometimes even directly coordinate. Theories of harm can develop and pivot in real time, with authorities taking note from reports and preliminary findings outside of their own jurisdictions.

At the same time, agencies keep a close eye on what matters at home, which can lead to divergence in priorities and remedy outlooks. The United States, European Union and United Kingdom have all demonstrated commitment to charting their own enforcement course. In the United States, there has been an uptick in abandoned deals and at 'a historic rate' – with 21 abandoned deals (only seven of which were previously made public) since DOJ Assistant Attorney General Kanter took office in 2021. Obtaining clearance in any key jurisdiction provides little comfort that the other two will follow. Other jurisdictions have not shied away from taking a hard look either. Asia, in particular, is not to be overlooked. With Australia becoming a mandatory regime, more ACCC activity can be expected. Although China has recently increased its thresholds in recognition of today's economic realities, consideration of local sector regulators and competitor and customer stakeholders is ever-relevant to obtaining clearance from the State Administration for Market Regulation (SAMR). Other jurisdictions, such as South Korea, Mexico and Brazil, are building a reputation for their willingness to probe, as well.

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Authorities taking tougher stances on remedies does not make navigating global enforcement risk any easier. In the United States, where structural remedies were already favoured over behavioural ones, the DOJ has signalled a preference to litigate over any form of settlement, which DOJ Assistant Attorney General Jonathan Kanter asserts should be the exception. Nonetheless, as demonstrated by Amgen/Horizon's settlement with a behavioural remedy, formal settlements coming off the table in the United States should not be taken as a death sentence for deals. In the European Union, parties have also failed to obtain clearance through proposed remedies, including in the high-profile block of Booking/eTraveli. In reverse course, the Commission approved the behavioural commitment offered in Microsoft's acquisition of Activision, but the CMA, unconvinced of the remedy's sufficiency, blocked the deal outright before approving the restructured version. Consequently, advisors will need to think through jurisdiction-specific strategies in advance and prepare for a long road to get complex deals through. Parties may also consider higher break fees and longer termination dates that reflect their interests in reaching closing, taking the costs of cross-jurisdictional merger control fully into account.

Elections in 2024: will politics shape merger control enforcement?

With a record number of elections taking place in 2024 across at least 50 countries, the future of policymaking and geopolitical relationships affecting merger control is far from settled. Critics in the European Union and the United States have recently admonished the perceived politicisation of competition policy. Under the leadership of US FTC Chair Lina Khan and DOJ Assistant Attorney General Jonathan Kanter, the FTC and DOJ have overhauled their enforcement policies. In its wake, many insiders have lamented the erosion of legal certainty on which the agencies had historically prided themselves by resisting political currents brought on by changing administrations. With the agencies no longer moored in disciplined enforcement, the 2024 presidential elections may send the pendulum swinging again.

In the European Union, competition policy is increasingly seen by policymakers as a potential tool to steer other goals. With recent legislation, such as the Digital Markets Act or the Foreign Subsidies Regulation, serving as examples, the European Parliament has indeed supported this trend. In its recent report on competition policy, it clearly stated that 'competition policy could contribute to bolstering the resilience, integrity and competitiveness of the internal market, as well as achieving the goals of the European Green Deal and the Digital Compass and the EU's objectives as enshrined in Article 3 of the Treaty on European Union (TEU)'. Despite surrounding rhetoric that deals have become more political in light of this expanding agenda, there is little indication that the merger review process itself has become politicised. The new political mandate slated to commence in 2024 could test this, with a populist right coalition threatening to form the majority of Parliament for the first time ever.

In the United Kingdom, the DMCC was accelerated through Parliament in the final days before it broke for the election. The DMCC brings in a number of reforms to the UK merger control regime and the CMA's broader enforcement toolkit, including new thresholds to capture so-called 'killer acquisitions' and purely vertical mergers. There has been broad cross-party support for the CMA's interventionist approach to merger control and therefore no indication of a change in strategic direction (by virtue of the UK government's new strategic steer to the CMA) regardless of the election result. Consumer-facing industries, in particular, should continue to be wary of the CMA, as the cost-of-living crisis remains top of the agenda across the political spectrum.

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Timelines

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The timelines provide a high-level overview of the duration of the merger control process and the procedural steps in the 59 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 suspend a deadline 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 their full names in the relevant country chapters.
- The timelines do not take into account the effect on timing of pre-merger contact with competition authorities, which may be expected to occur in some jurisdictions.
- The timelines do not take into account ministerial authorisations after prohibition decisions, 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.

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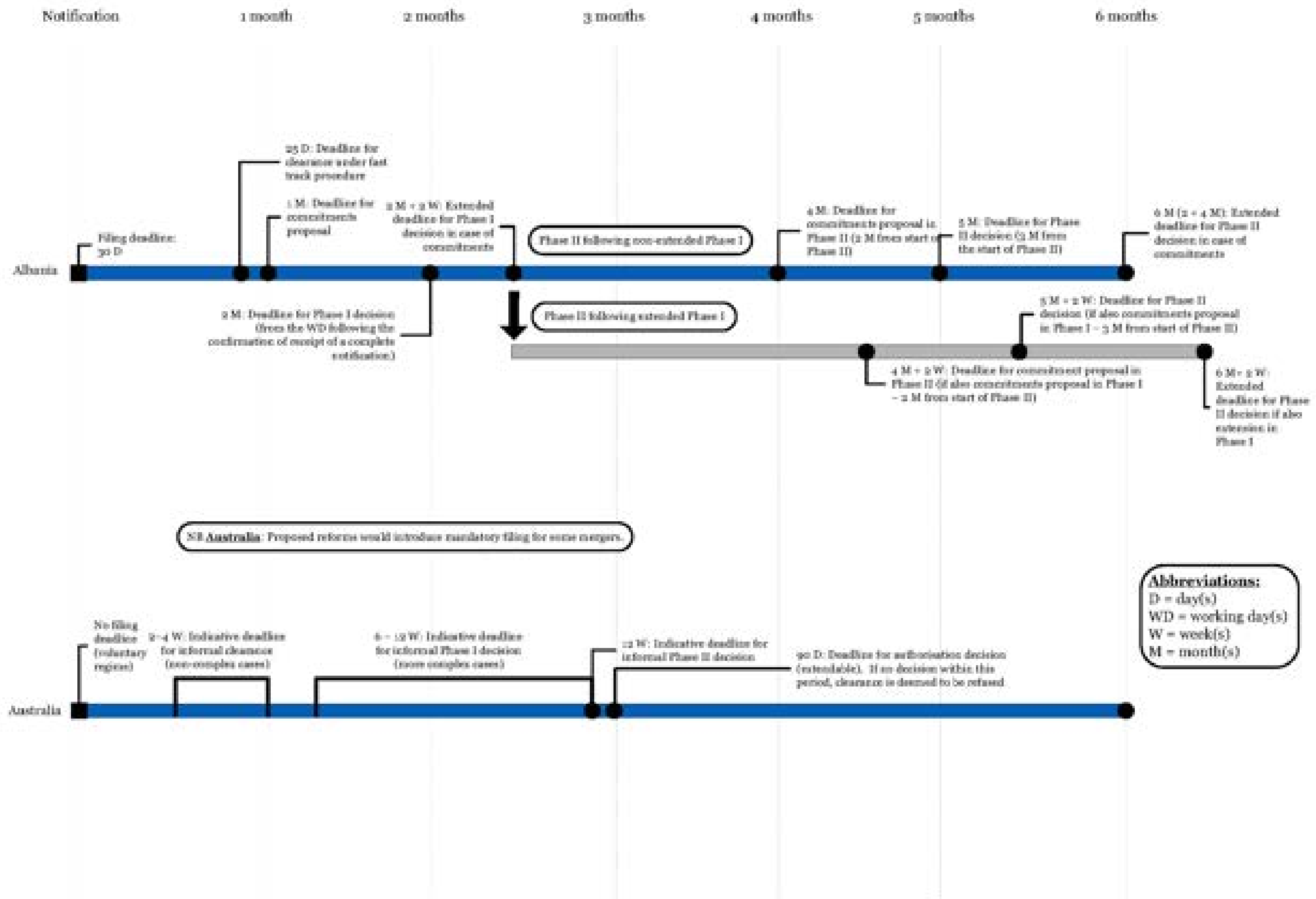

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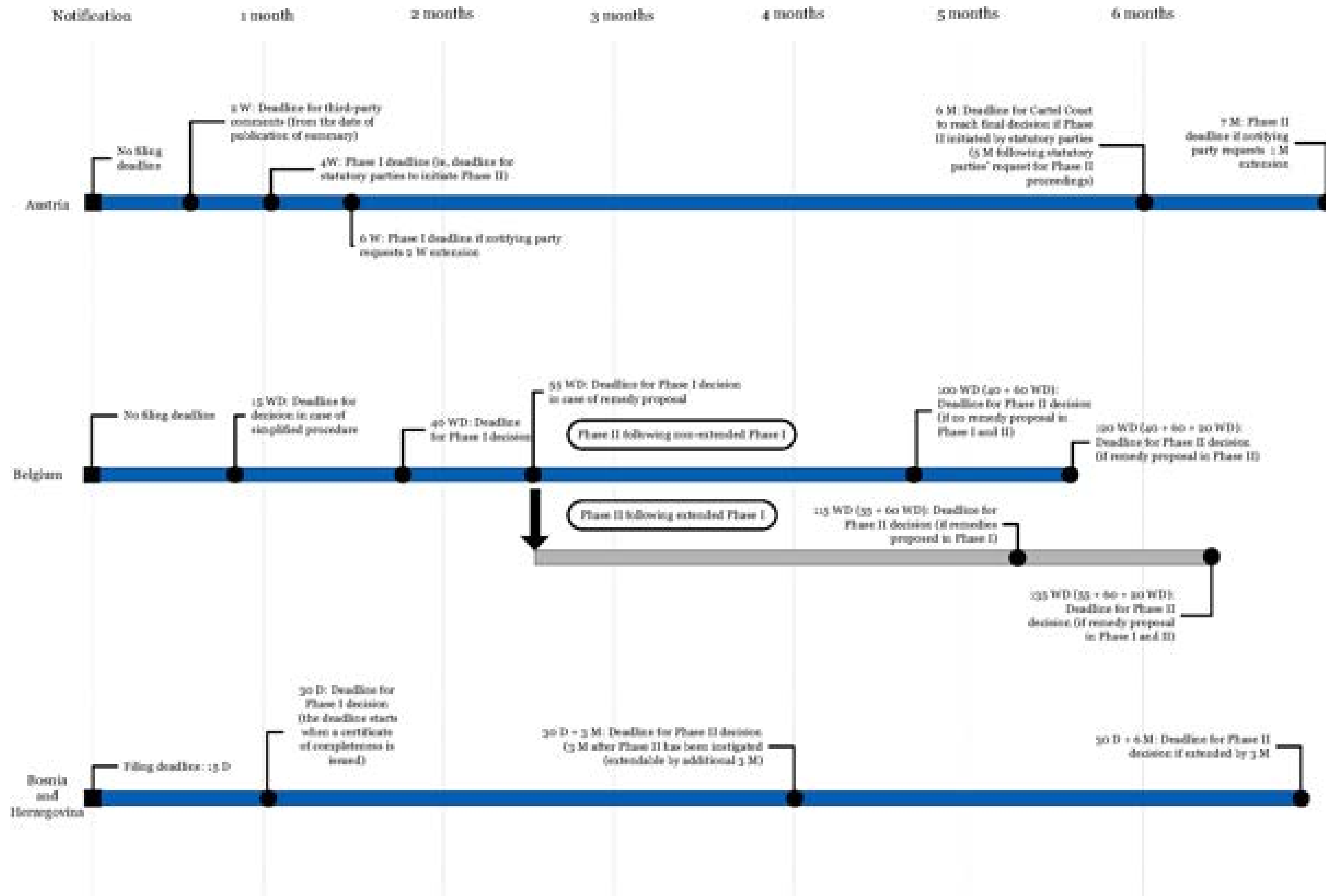

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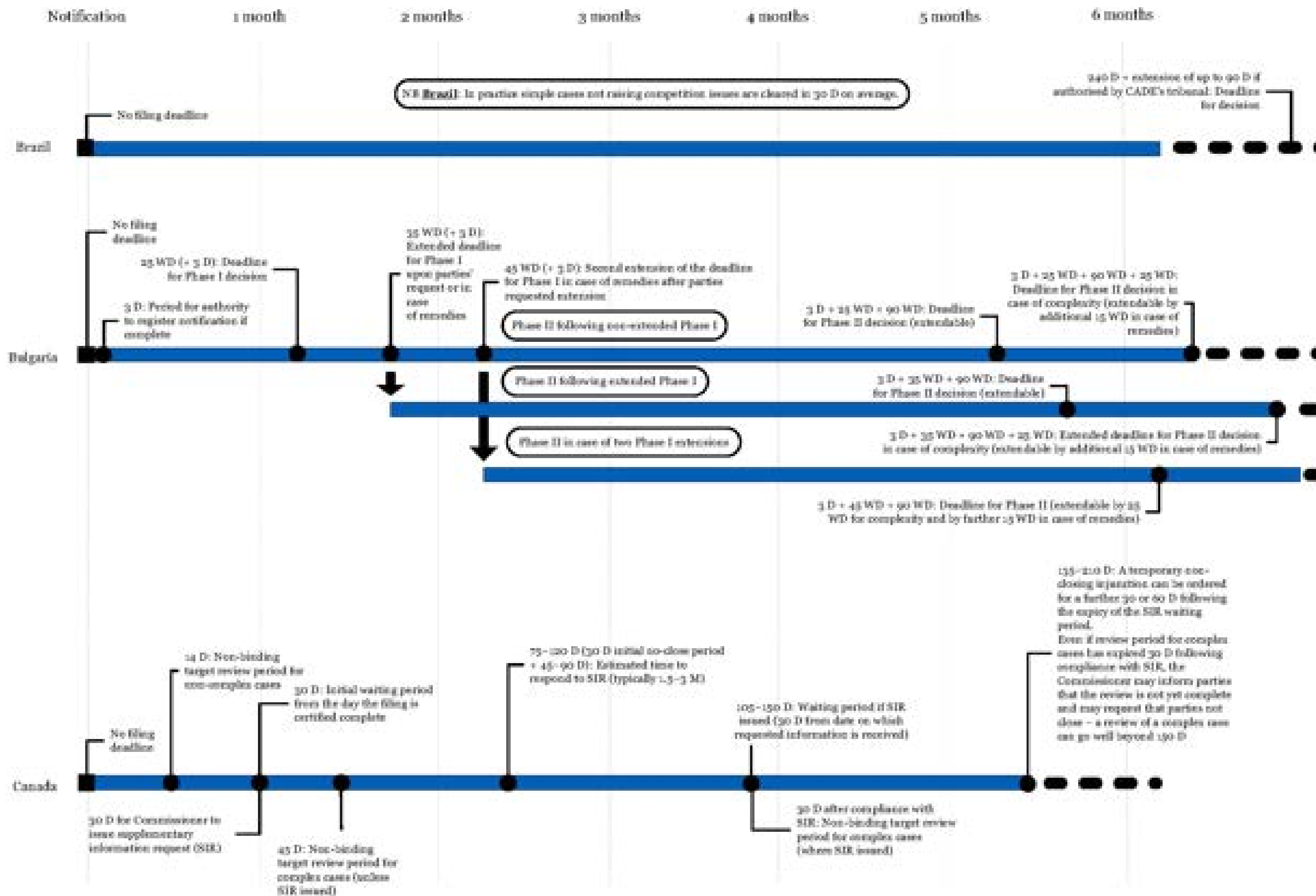

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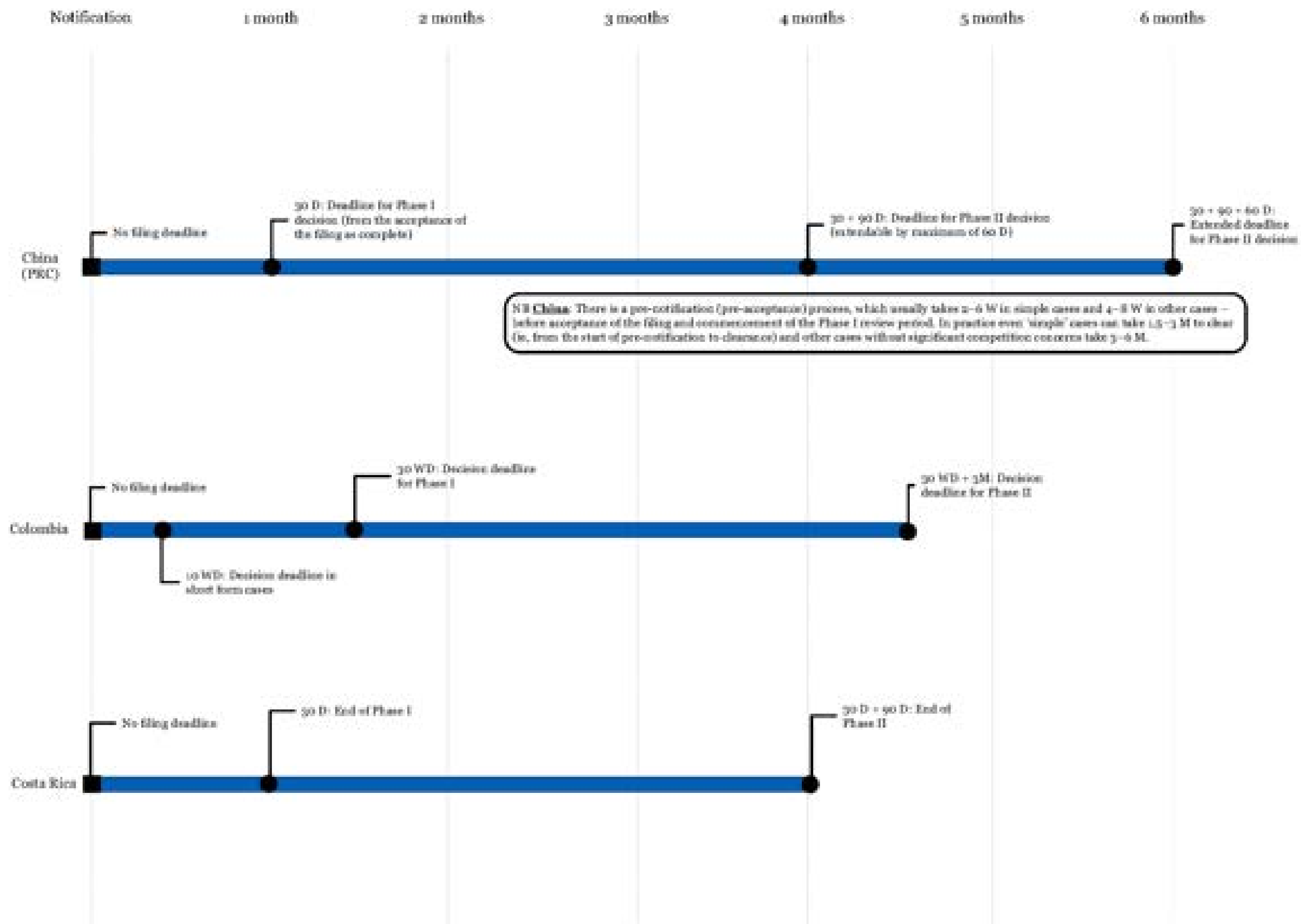

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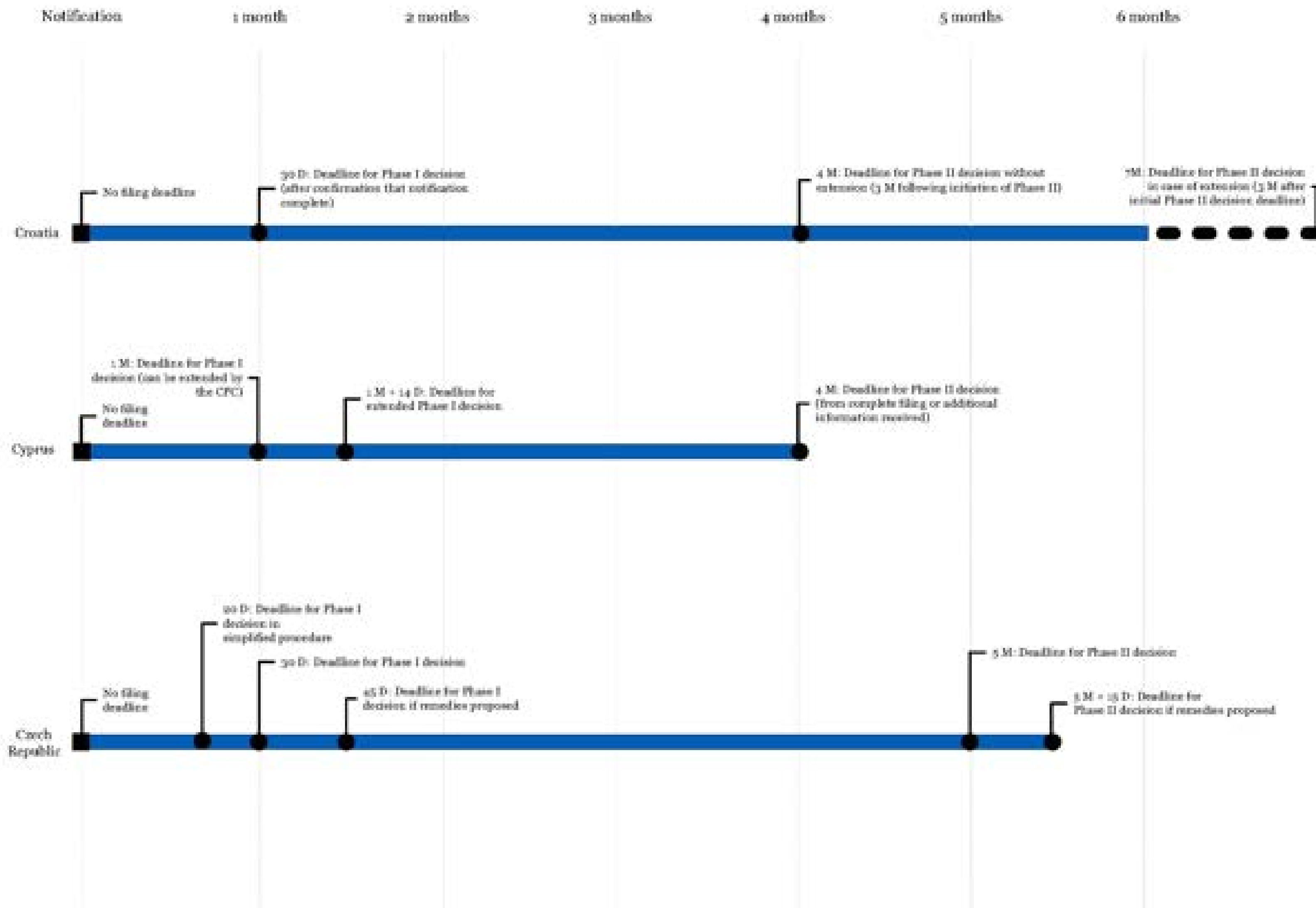

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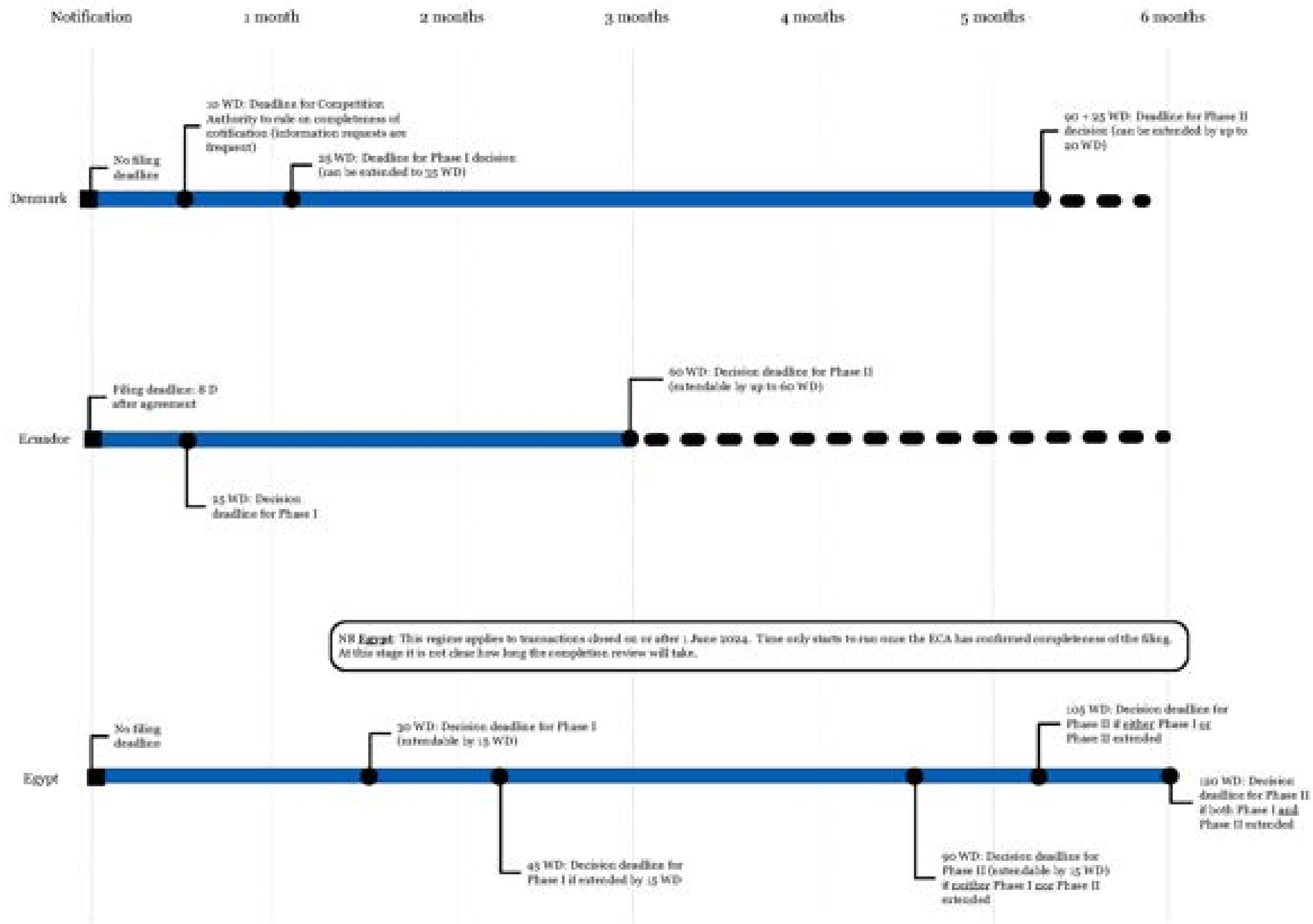

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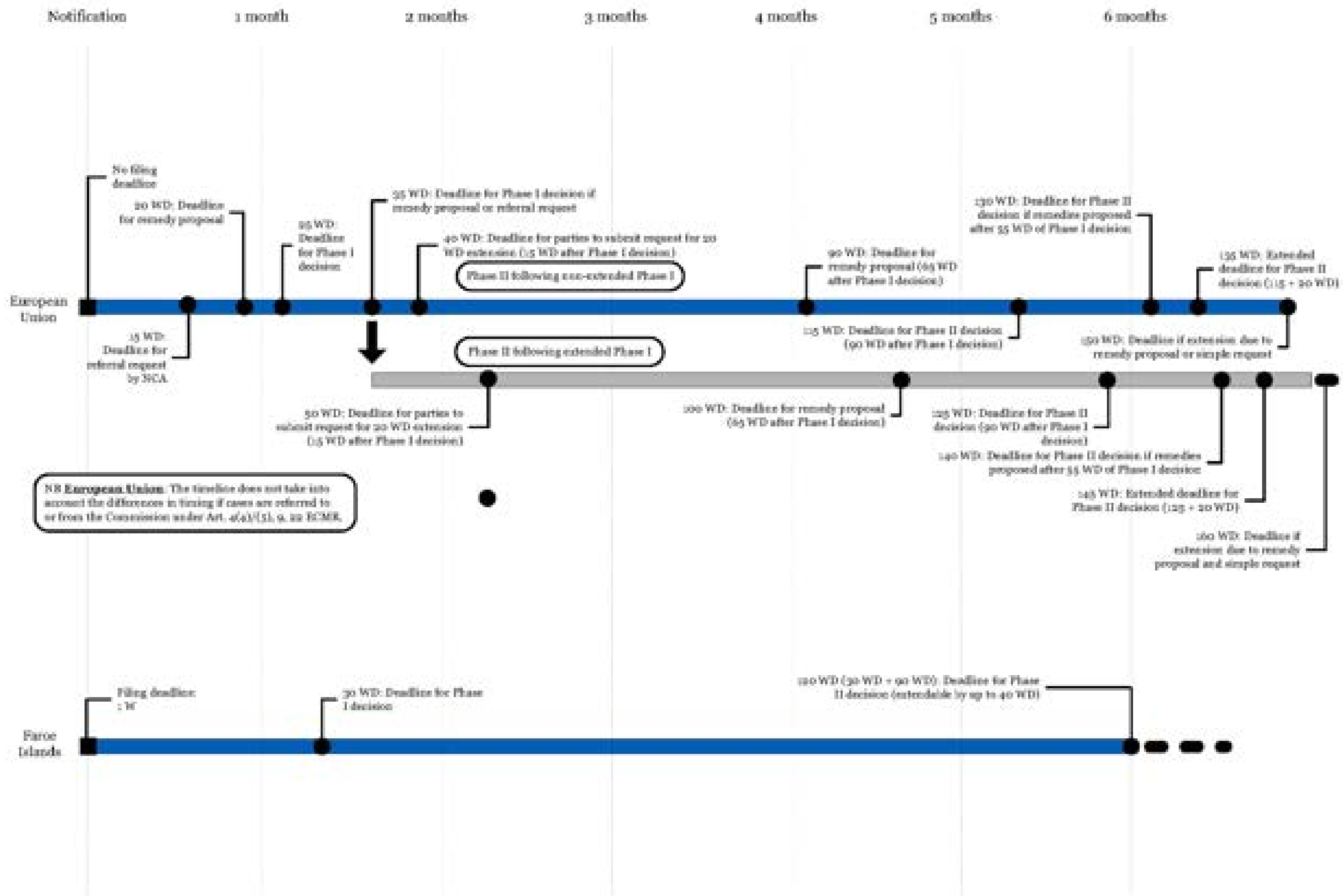

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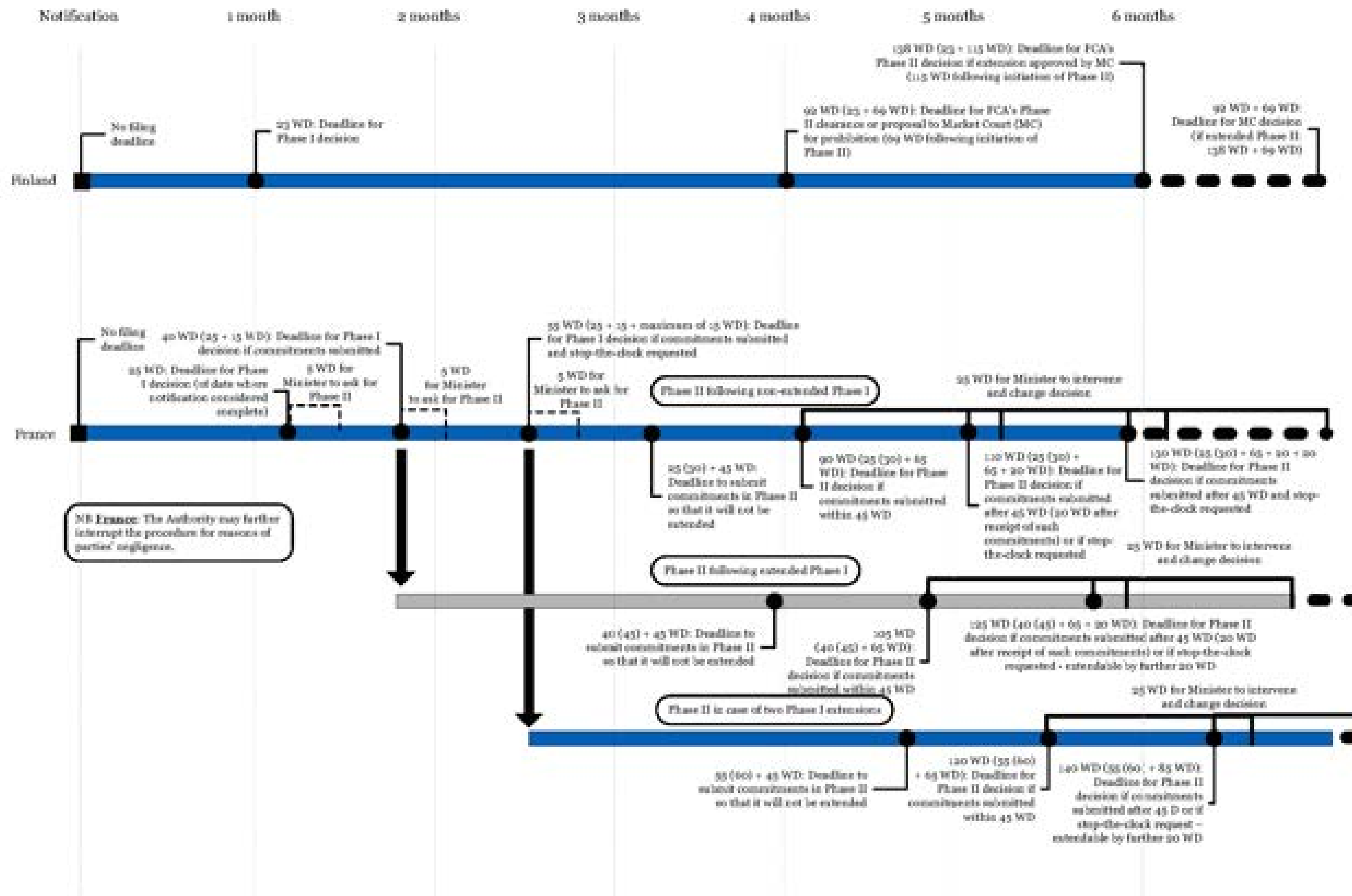

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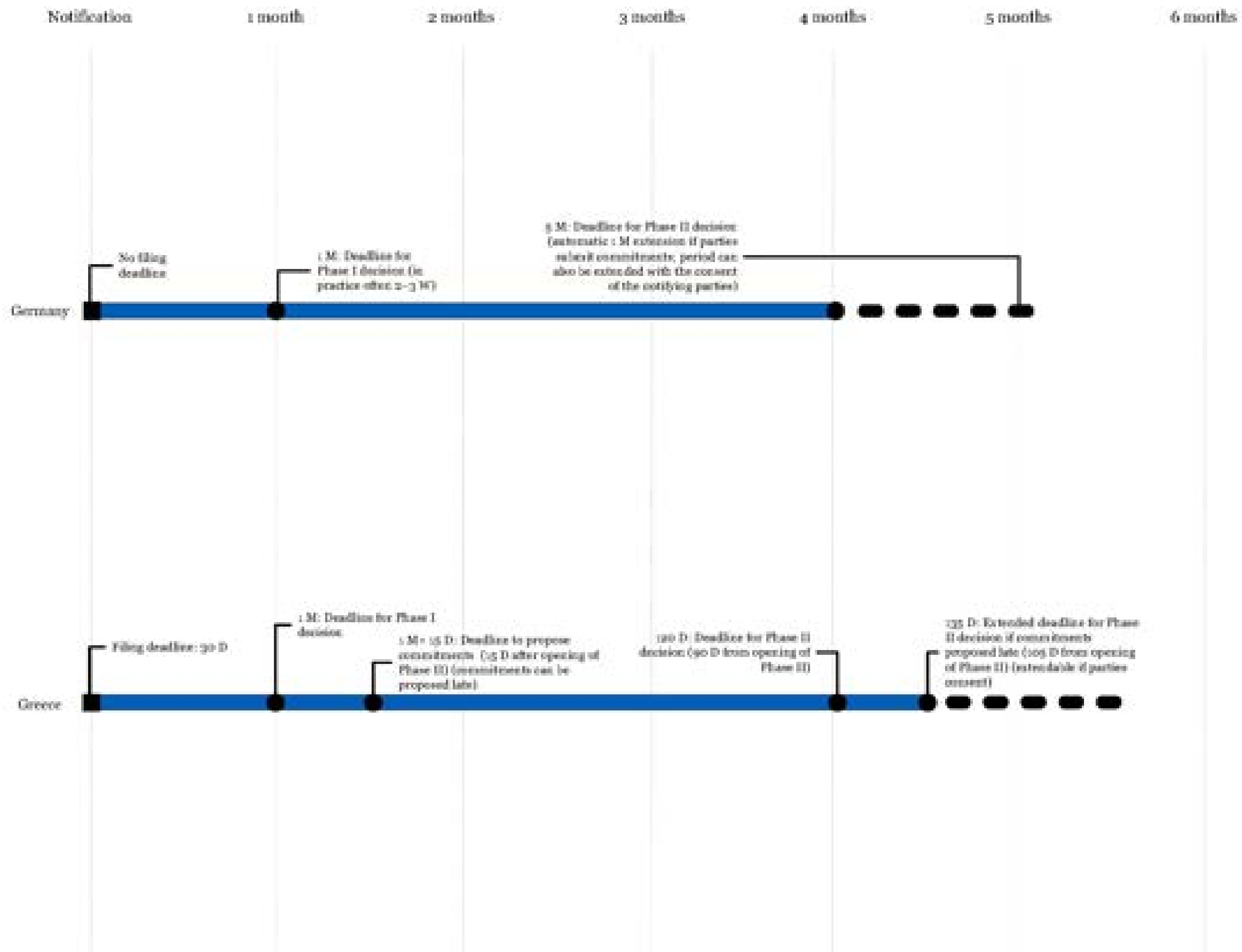

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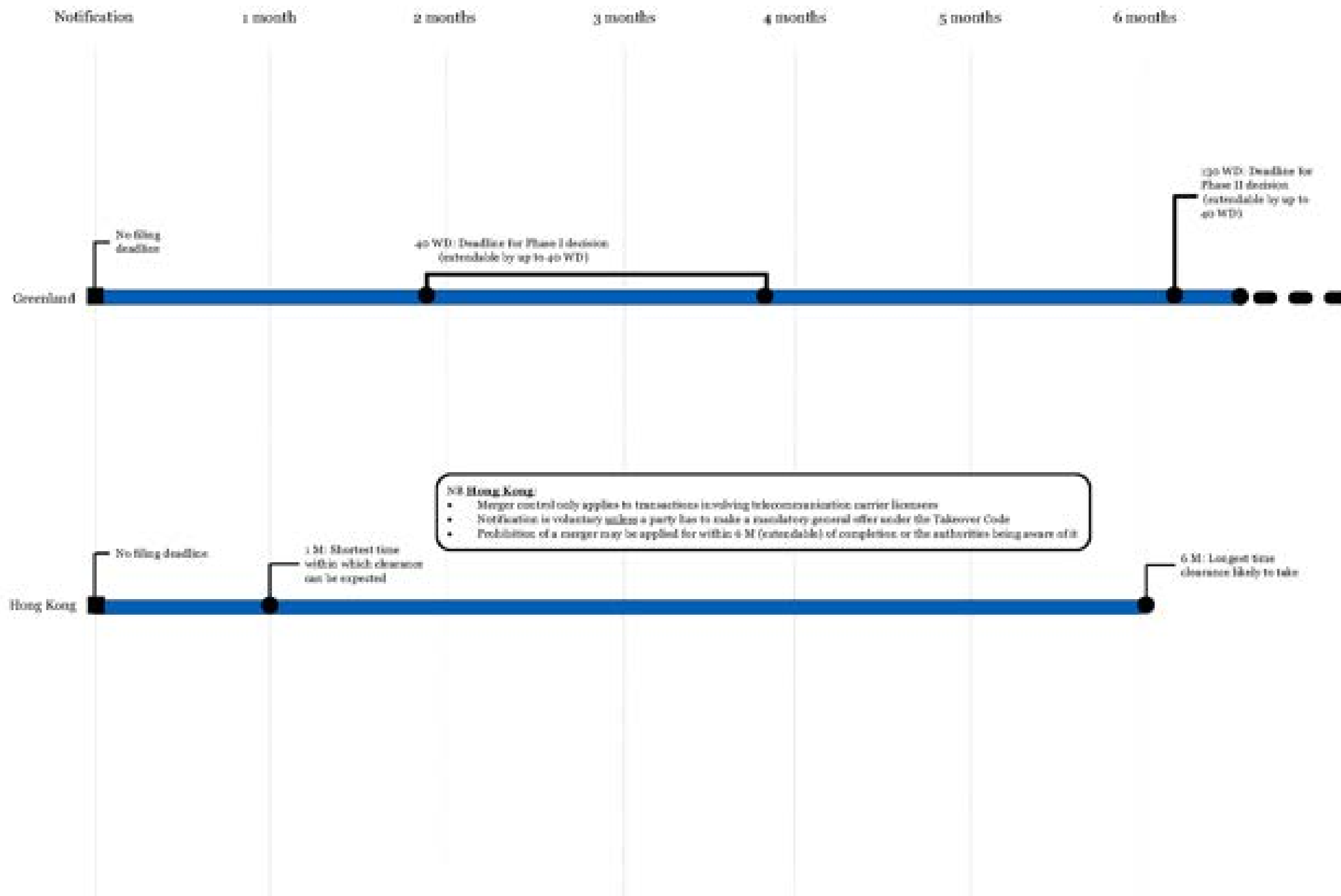

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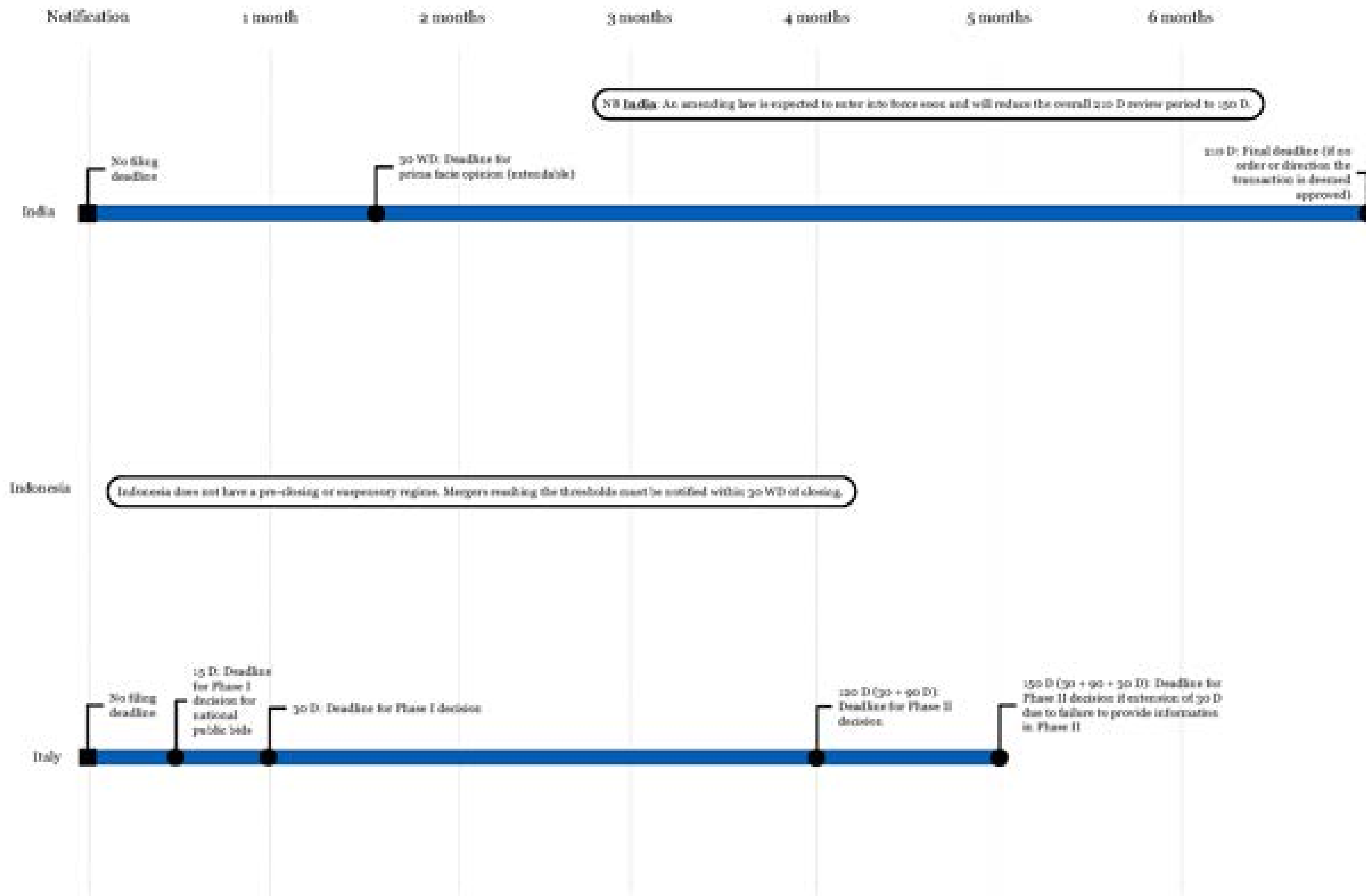

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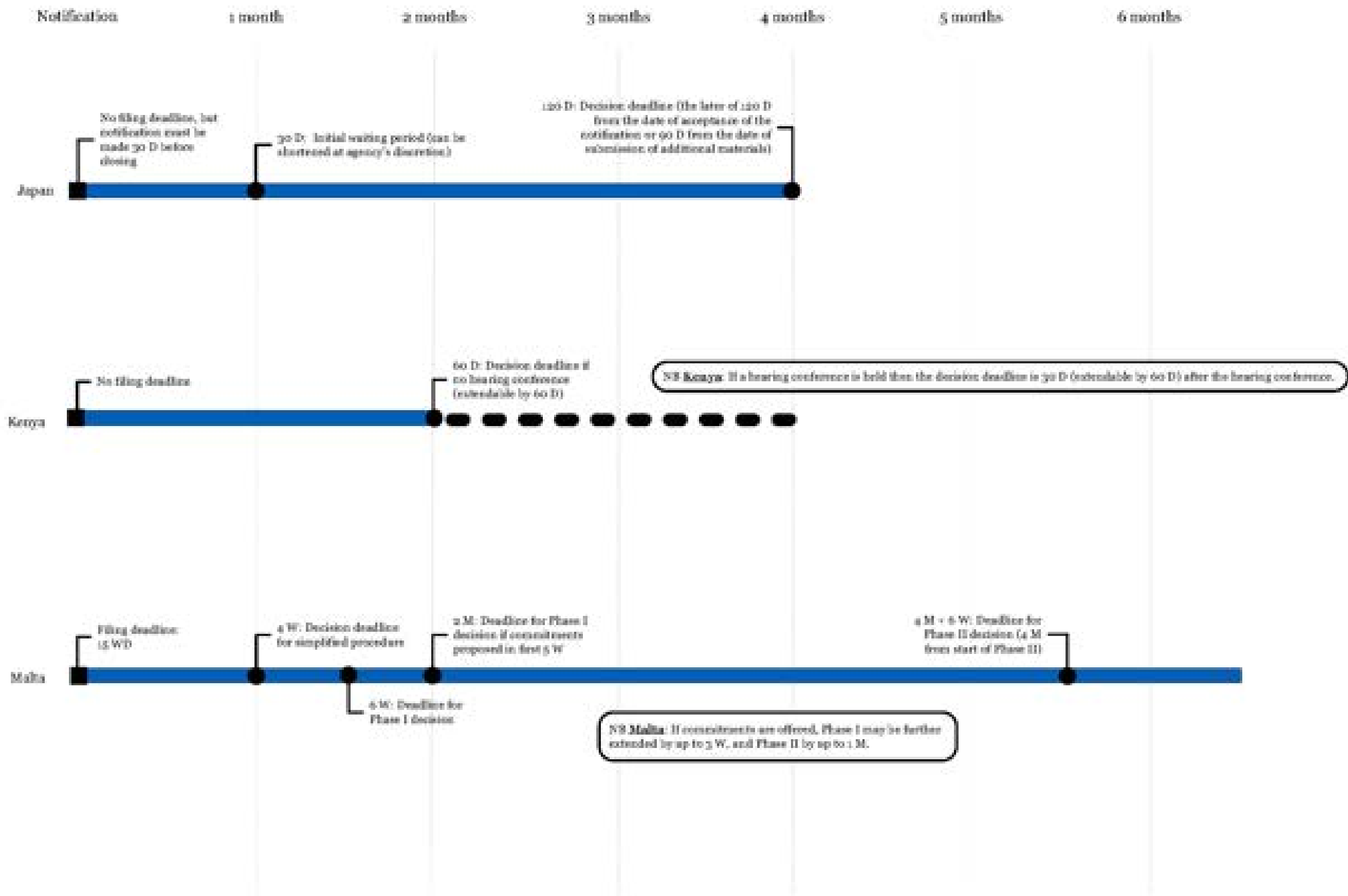

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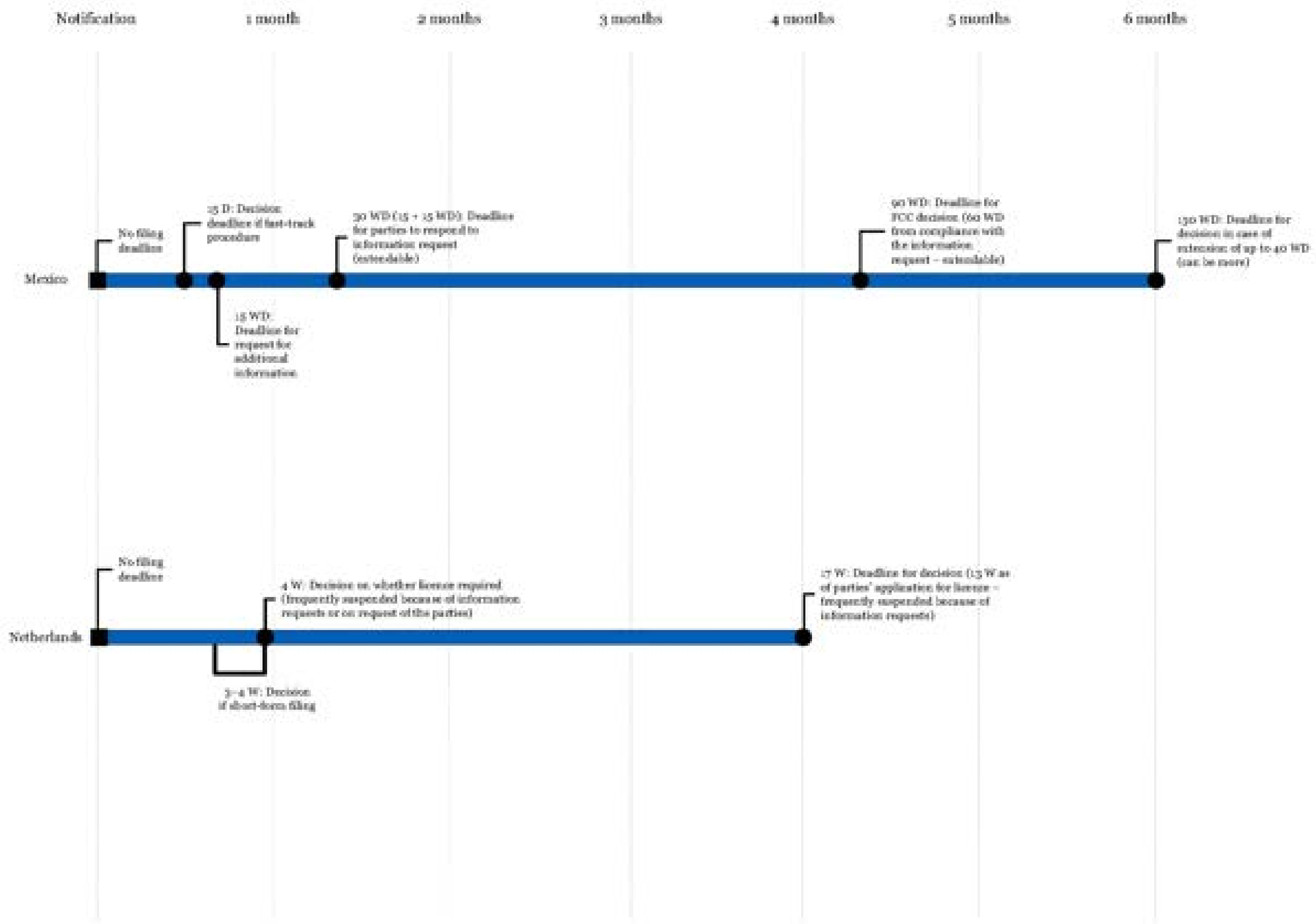

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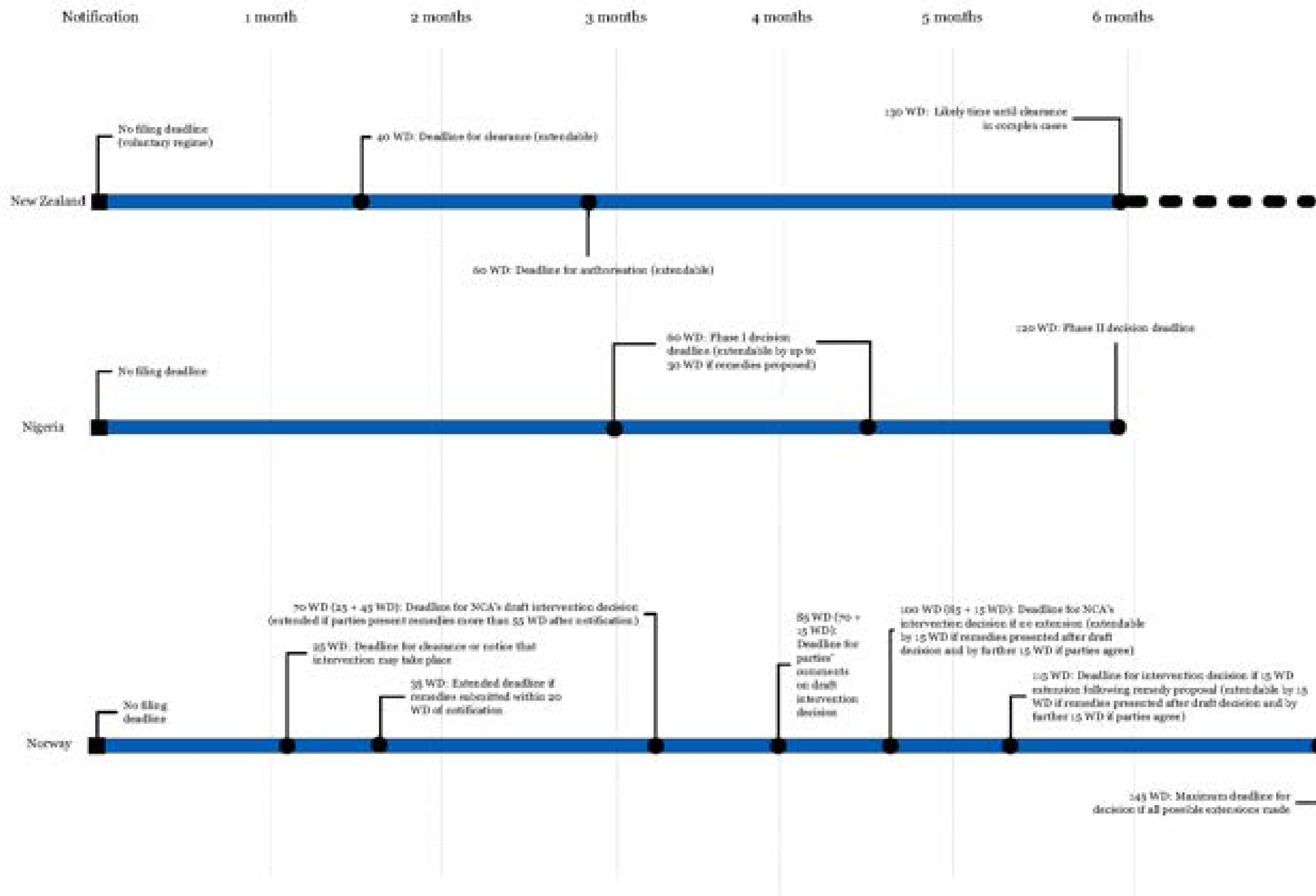

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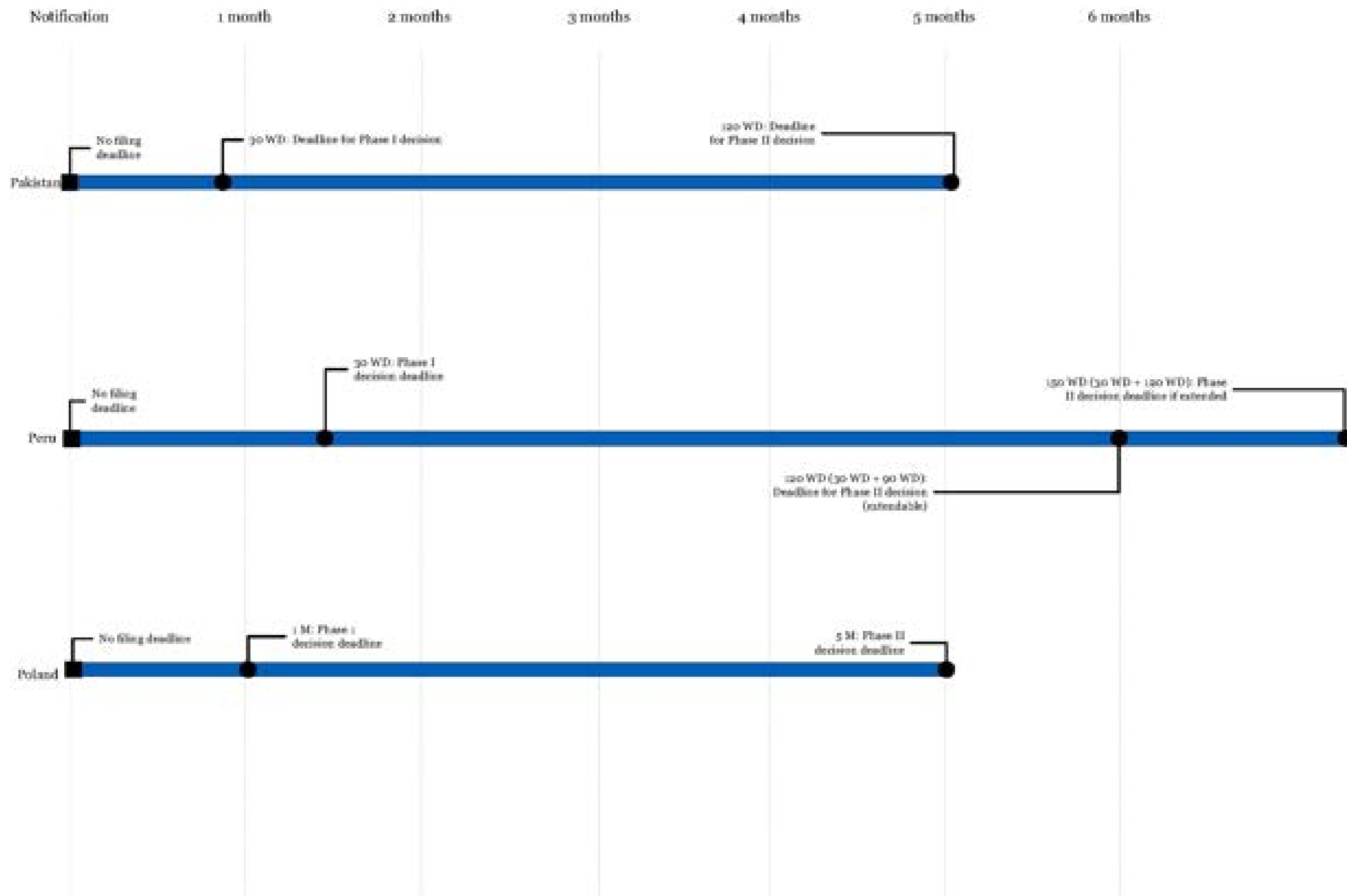

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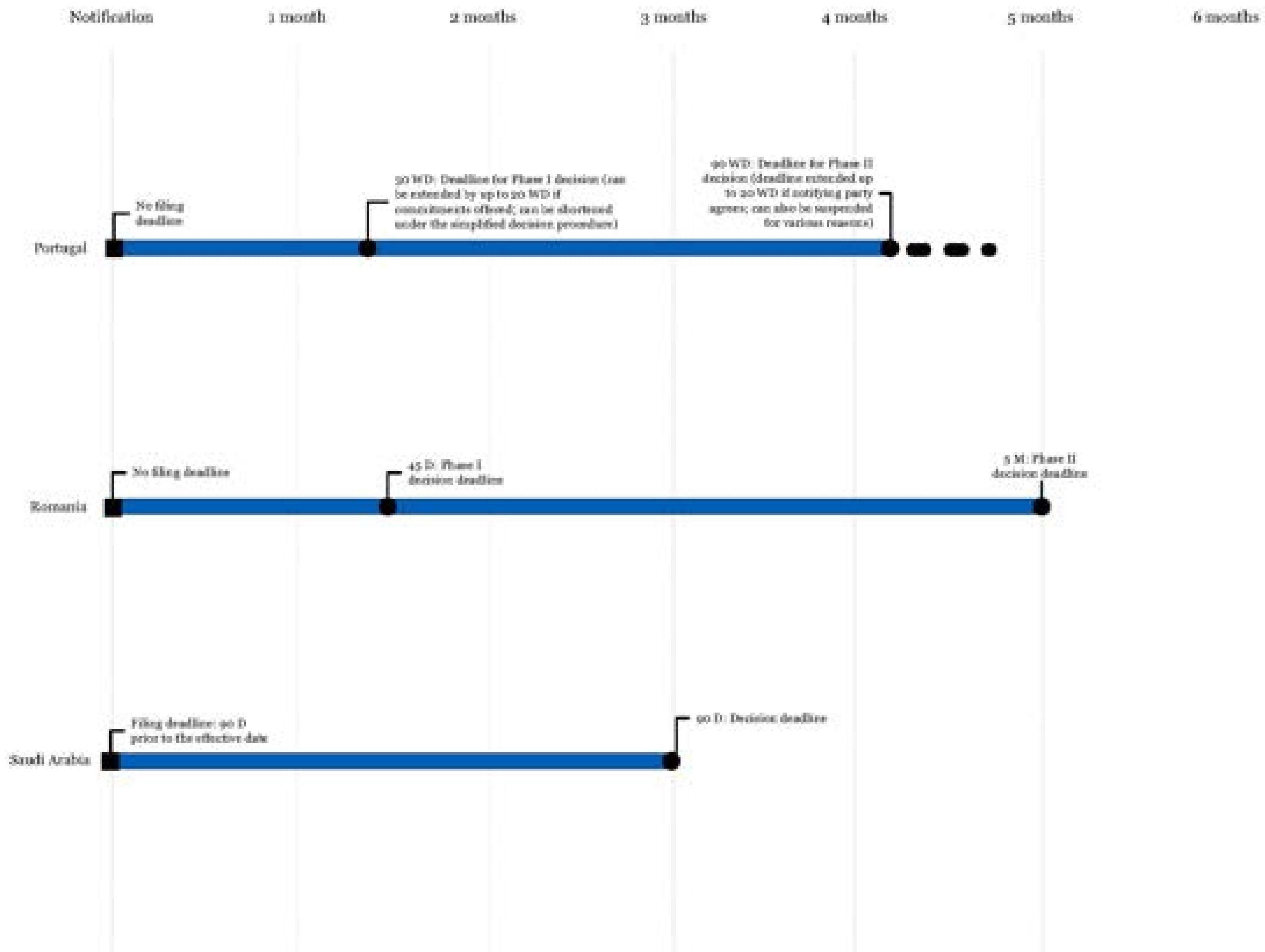

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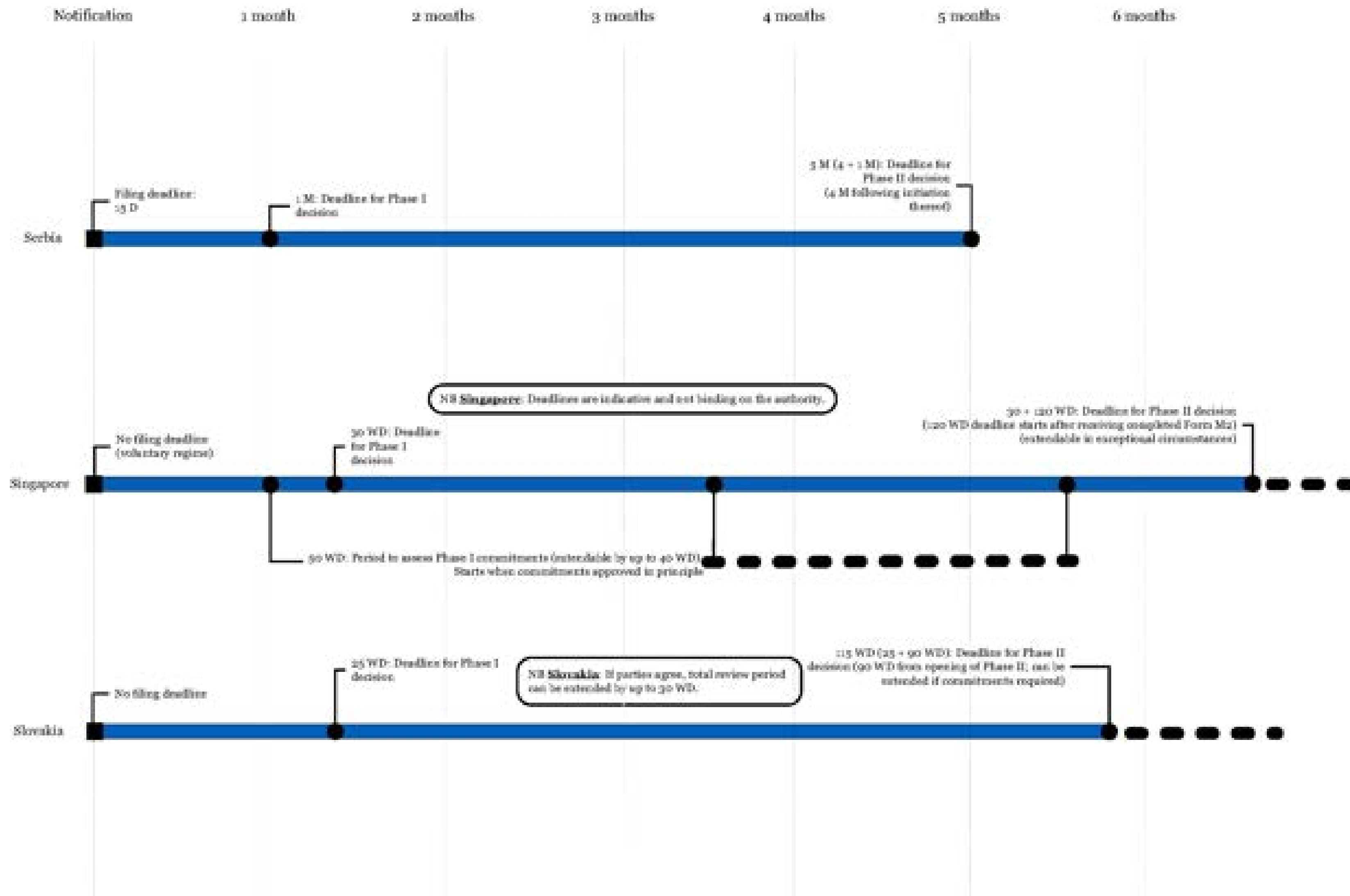

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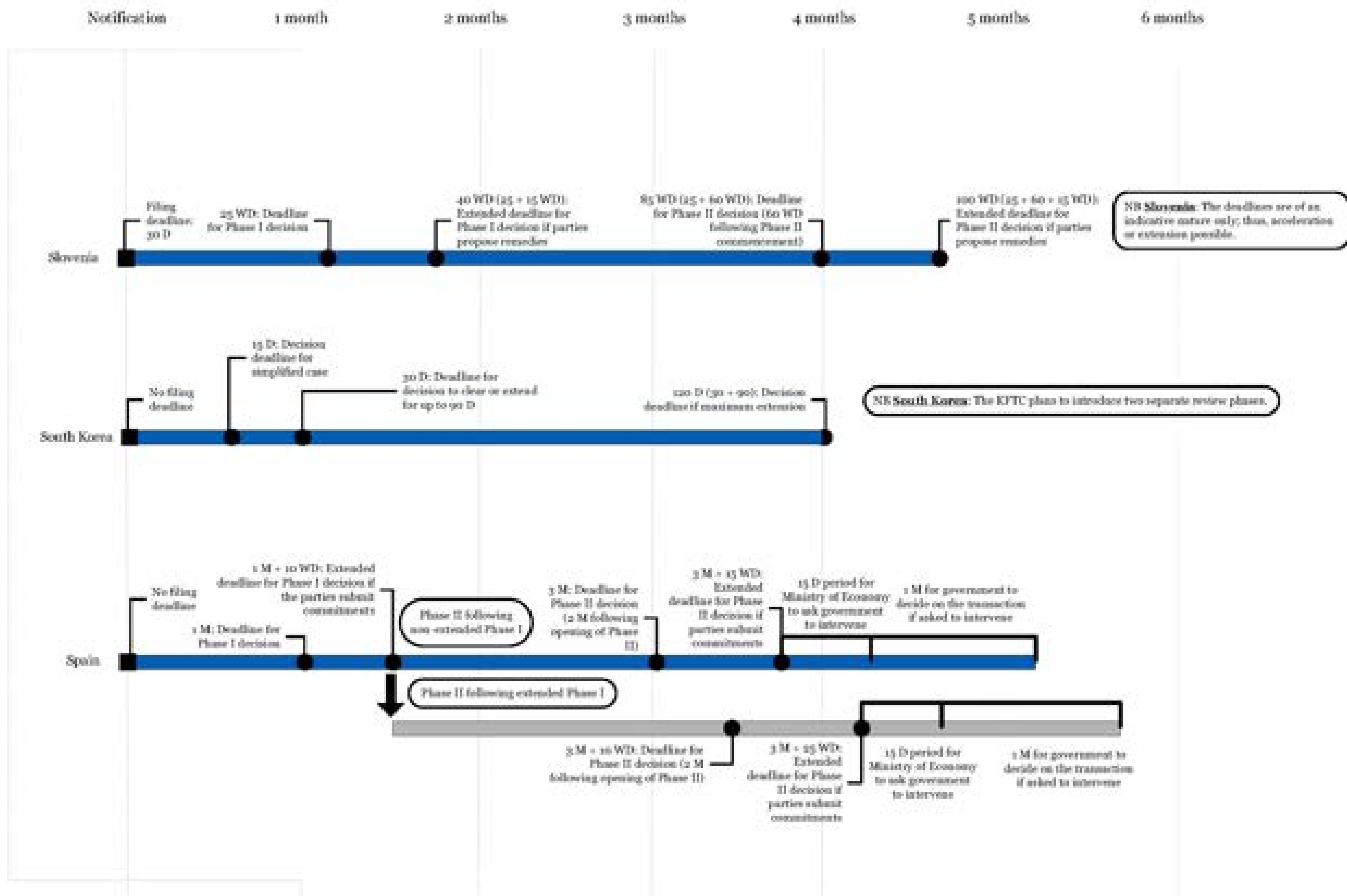

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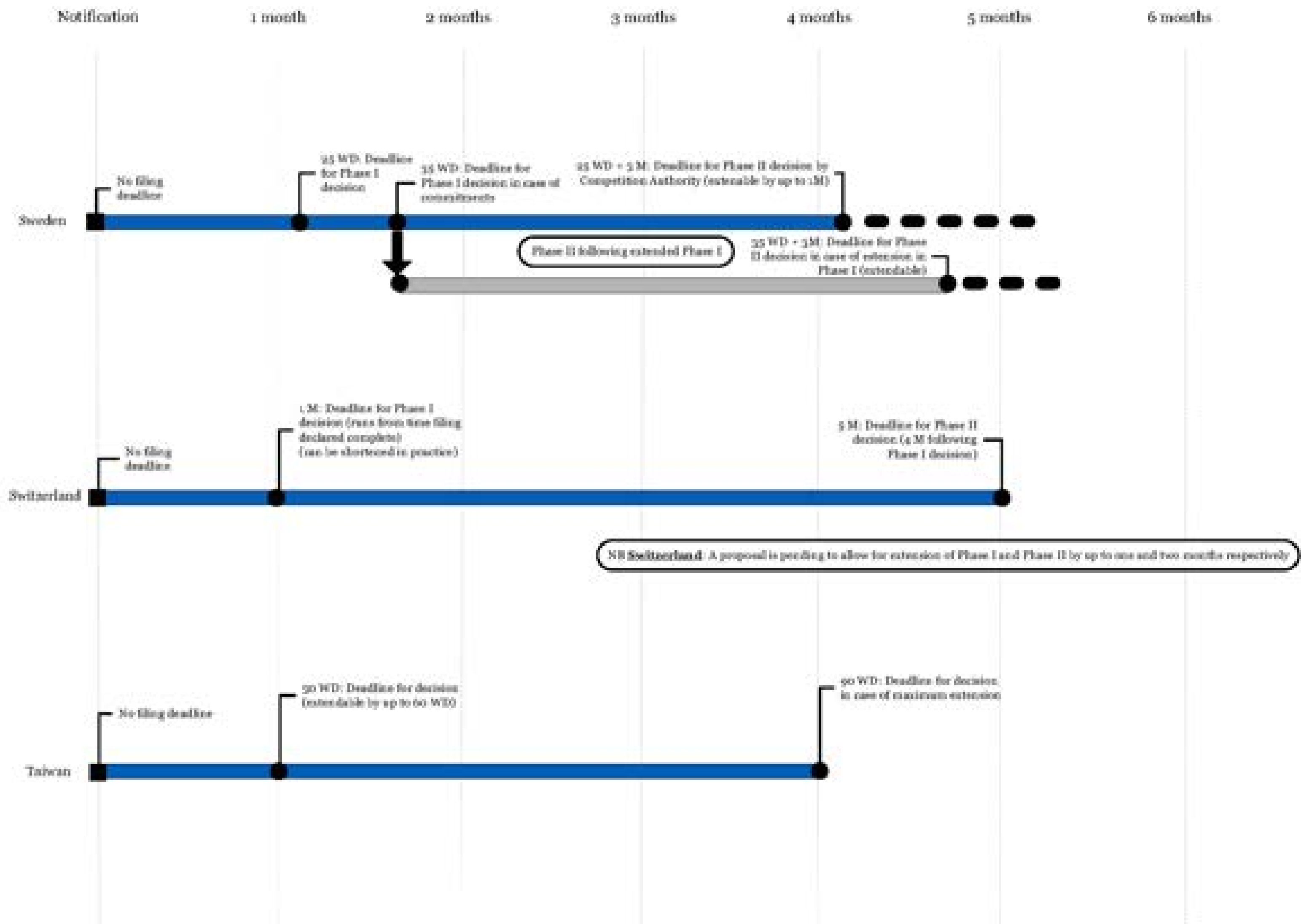

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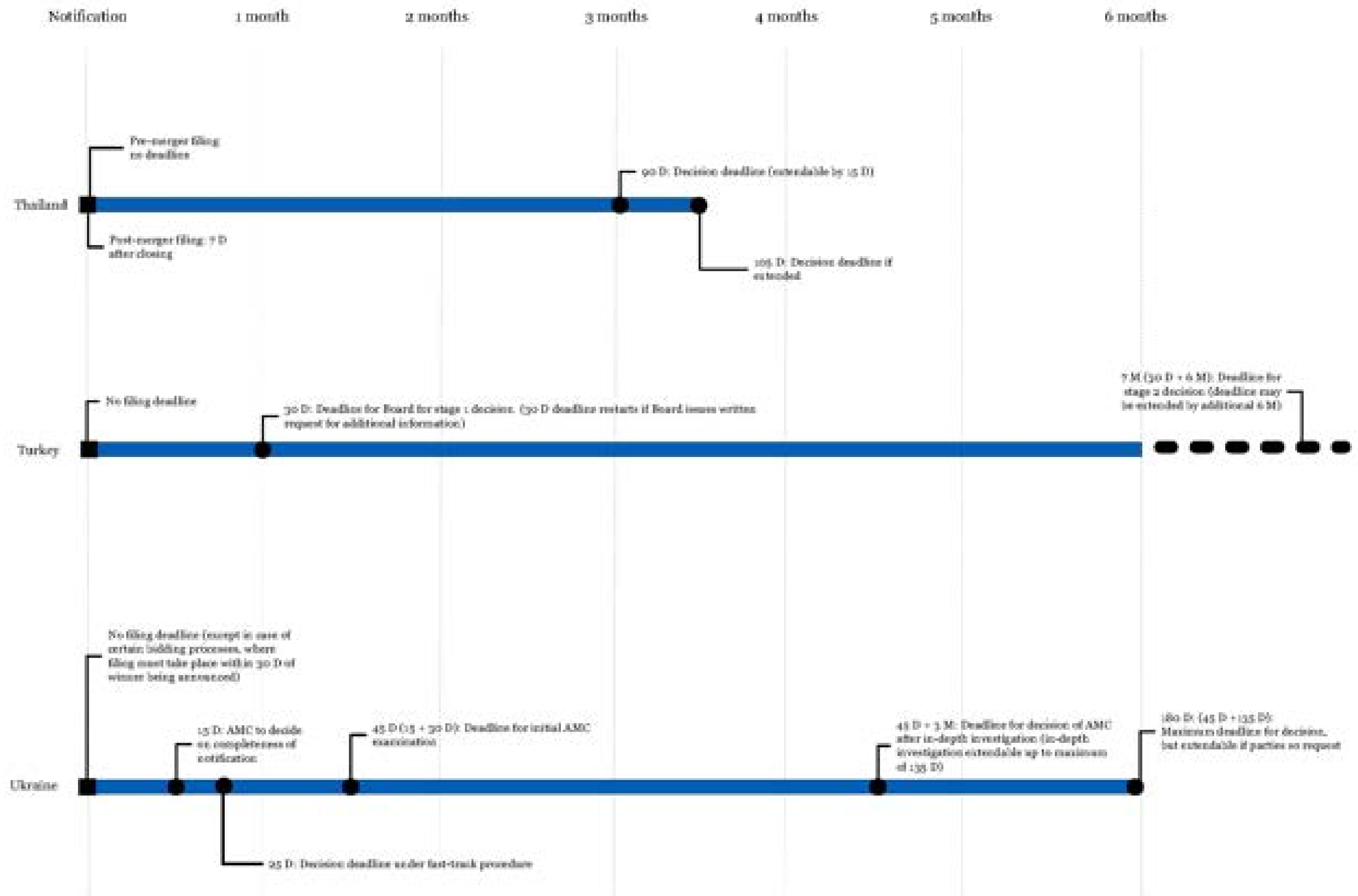

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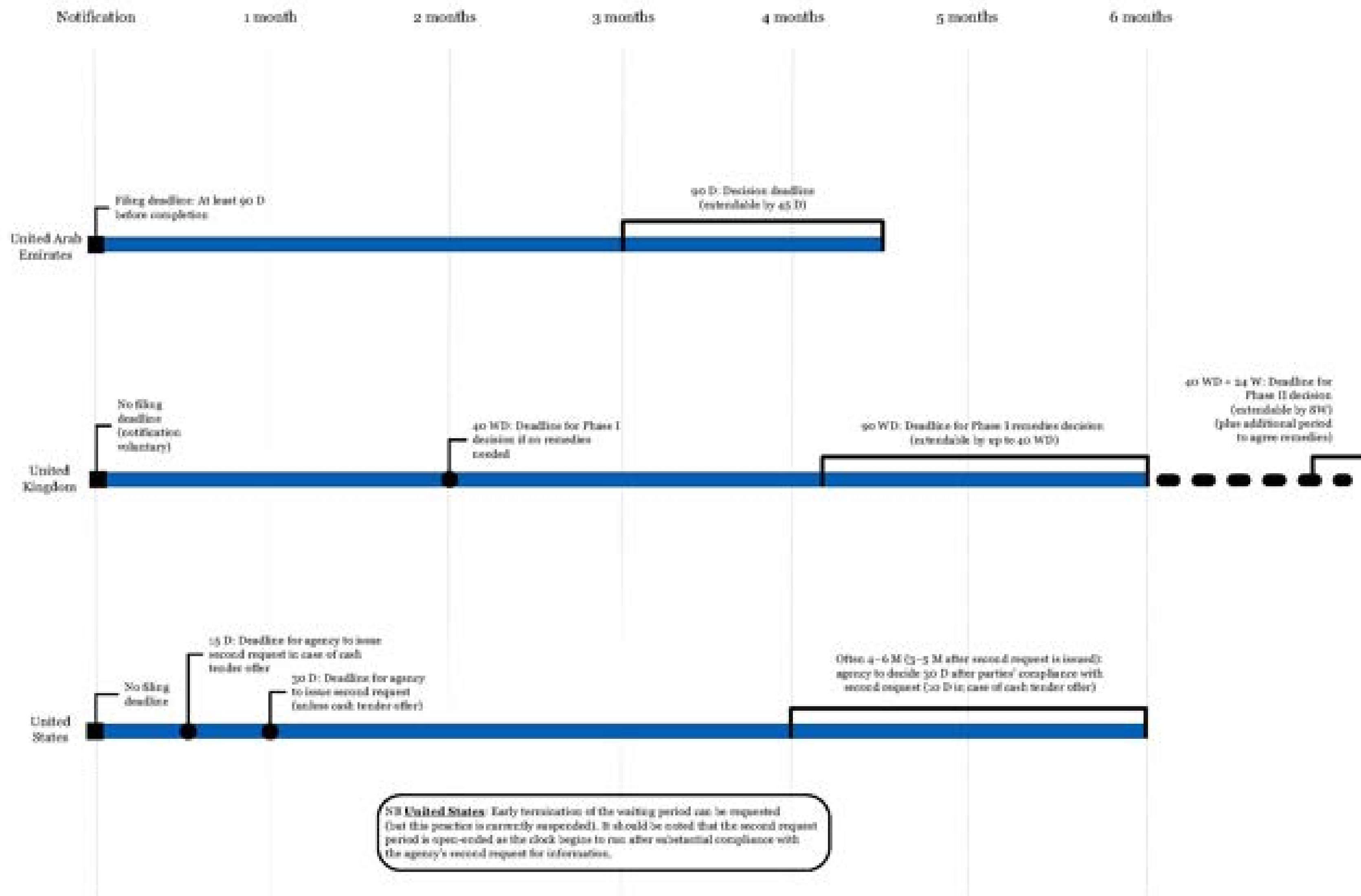

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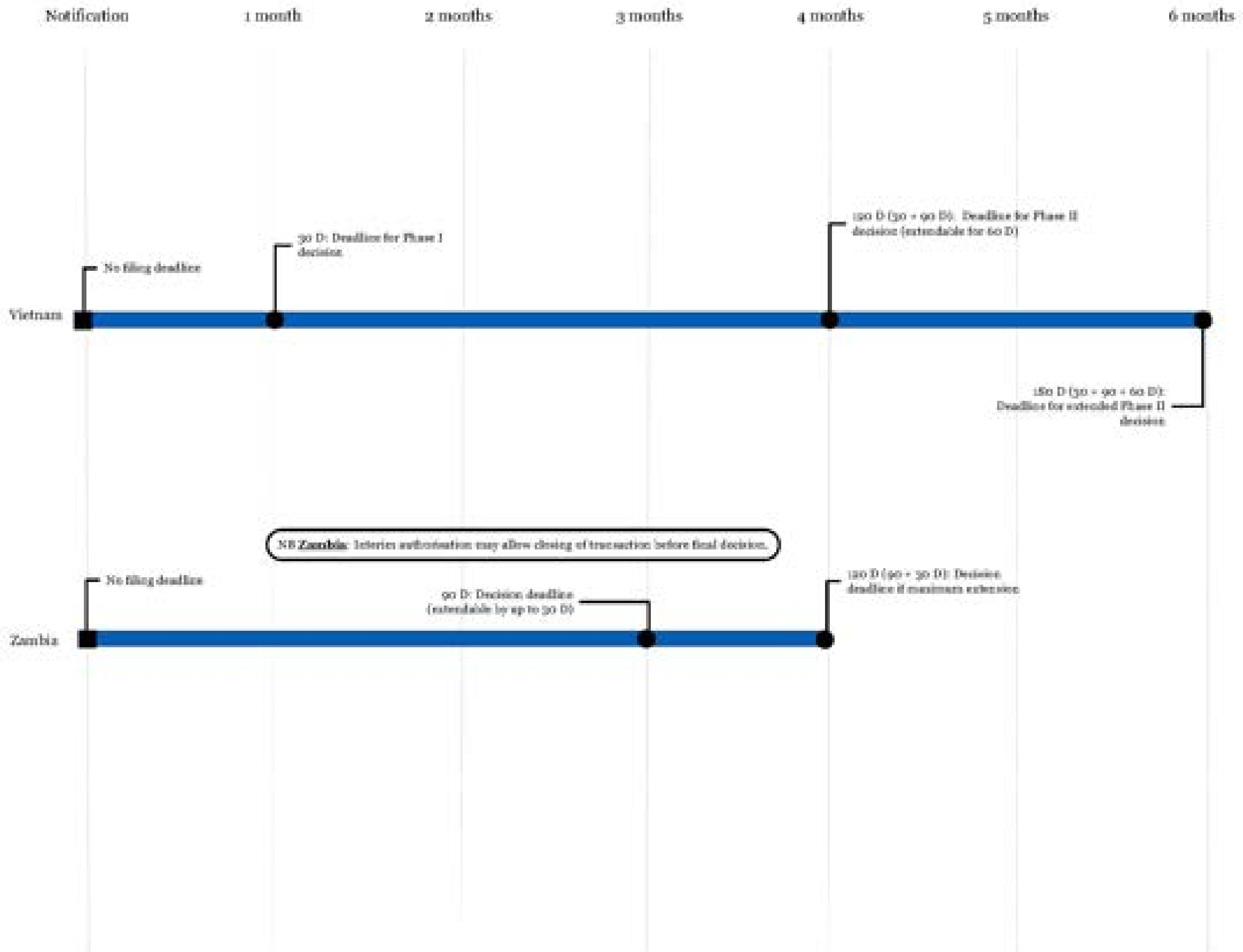

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We would like to offer our thanks to the following competition enforcement agencies for their assistance in the verification of the factual information contained in the chapter relating to their jurisdiction.

Country	Agency	Contact
Australia	Australian Competition and Consumer Commission	Sam Lucas, Analyst, Mergers, Exemptions & Digital Division
Austria	Federal Competition Authority	Abanoub Tadros, Case Handler
Brazil	Administrative Council for Economic Defence	Patrícia Alessandra Morita Sakowski
Bulgaria	Commission for Protection of Competition	Albena Dincheva, Head of Unit – Concentrations, Antitrust and Concentrations Directorate
Colombia	Superintendence of Industry and Commerce	Diana Patricia Rodríguez Ortiz, Coordinator of Merger Working Group
Croatia	Croatian Competition Agency	Ana Pavlaković Skočić, Senior Advisor, Mergers Department, Competition Division
Czech Republic	Office for the Protection of Competition of the Czech Republic	Lumír Břínek, Merger Department
Denmark	Danish Competition and Consumer Authority	Sinan Cenk Ozcan, Head of Section
European Union	European Commission	Eline Vanhollebeke, Policy Officer
Greece	Hellenic Competition Commission	Panagiotis Fotis, Commissioner/ Rapporteur
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Malta	Office for Competition	Bernice Bianchi, Senior Legal Officer
Mexico	Cofece - Comisión Federal de Competencia Económica	José Luis Ambriz Villalpa, General Director for Mergers José Rodrigo Ríos Dordelly, Executive Director of International Affairs
New Zealand	New Zealand Commerce Commission	
Norway	Norwegian Competition Authority	Tormod S Johansen, special adviser
Slovakia	Antimonopoly Office of the Slovak Republic	Erika Lovasova
South Korea	Korea Fair Trade Commission	Seekwoo Ahn
Sweden	Swedish Competition Authority	Maria Ulfvensjö Baltatzis, Head of Unit
Taiwan	Fair Trade Commission	Chiaming Tsou (Tom Tsou)

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Albania

Mei Todhe
Wolf Theiss

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Quick Reference Table	
Voluntary or mandatory system?	Mandatory system. The filing of a notification with the Competition Authority (the Authority) is mandatory in cases where the applicable turnover thresholds are met.
Notification trigger/ filing deadline	Concentrations have to be notified within 30 days of the date of entering into the merger agreement or the agreement pursuant to which a controlling interest is acquired, or of the date of publication of the public offer to purchase or exchange shares.
Clearance deadlines (Phase I/Phase II)	PA preliminary proceeding (Phase I) applies where a merger is unlikely to restrict competition in the relevant market, especially through the creation or strengthening of a dominant position. The Authority has to decide on the merger within two months of the working day following the confirmation of receipt of a complete notification. A fast-track proceeding has been available since June 2016. 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 of the start of such Phase II proceeding (which can be extended by up to one month). If, within these time limits, the Authority does not issue a decision, the concentration is deemed to have been approved.
Substantive test for clearance	The Authority assesses whether the concentration may lead to a substantial lessening of competition in the market or a part thereof, especially by the creation or strengthening of a dominant position in 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 most recently completed business year. If the undertakings concerned fail to notify or close the transaction prior to clearance and the transaction leads to lessening of competition in the market, 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 rather young, it has recently experienced a clear increase in activities by the Authority in enforcing merger control law (and competition law in general).

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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 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 1 August 2003, which aims to protect free and effective competition. The Competition Act was amended by Law No. 10,317 of 16 September 2010, published in Official Gazette No. 135 of 7 October 2010. The amendments became effective on 23 October 2010. There are also guidelines and regulations that supplement the legislation, which are based on EU regulations and guidelines.

The Competition Authority (the Authority) is principally responsible for enforcing the Competition Act. It consists of the Commission as its decision-making body, and the Secretariat as the executive body. The Commission is responsible, among other matters, for overseeing the Secretariat, making decisions and drafting the guidelines and regulations. The Secretariat monitors market conditions to ensure effective competition, conducts investigations and oversees the implementation of the Commission's decisions.

Scope of legislation

2 | What kinds of mergers are caught?

Articles 10-17 of the Competition Act are responsible for regulating mergers. Under the Competition Act, any of the following causing a lasting change of control constitutes a merger:

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

3 | What types of joint ventures are caught?

The establishment of a joint venture is caught by 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.

Joint ventures will not be considered as concentrations under the Act if its objects include, or it results in, the coordination of competitive activities between two or more independent undertakings. In this case, the joint venture would be assessed under the agreements section, equivalent to Art 101 TFEU.

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 provisions are only applicable in cases of acquisition of joint or sole control. Acquisition of non-controlling minority participation in an undertaking and other interests less than control do not fall within the scope of the Albanian 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?

A merger will be subject to Albanian merger control law and must 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 leke and domestic turnover of at least one of the undertakings concerned of at least 200 million leke; or
- combined domestic turnover of more than 400 million leke and domestic turnover of at least one of the undertakings concerned of at least 200 million leke.

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 must be taken into account.

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

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

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

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

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

The Competition Act expressly states that it applies to all undertakings, regardless of whether domestic or foreign, of which the 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 in cases 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 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 insurance sectors, and 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 of the date of publication of the public offer to purchase or exchange shares, according to Article 10 of the Competition Act (the Act). The Act does currently not foresee any possibility of bypassing the requirement for an agreement to be concluded before filing.

The sanctions for not filing are laid out in Article 73 of the Act, where subsection (dh) addresses failure to notify a transaction as per Articles 10 and 12. If the undertakings that are required to notify the merger fail to duly file within the set deadline (late filing), Article 73 foresees a fine of up to 1 per cent of the undertakings' annual turnover generated in the most recently completed business year. For the purposes of calculating the amount of the fine, if the undertakings belong to a corporate group, the turnover of the group will be taken into account.

The Competition Authority (the Authority) has previously imposed a fine on a foreign company for failure to file in time with respect to a merger that involved the acquisition of an Albanian company. The Authority has also previously 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 allowed by the Authority.

More recently, the Authority fined three undertakings for failing to notify their joint acquisition of control over another undertaking. One month later, another fine was administered to an undertaking for failing to notify a merger agreement. The fines imposed by the Authority in these two cases were not made public in the decisions published on the Authority's website.

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

The parties responsible for filing a notification with the Authority are set out in the Authority Guideline 'On the Form of the Concentration Notification'. According to this regulation, responsibility rests with the merging parties or the undertaking acquiring a controlling interest in (the whole or part of) one or more other undertakings. In cases of a joint venture, the participating undertakings are jointly responsible for filing.

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 fees accompanying a notification are set out in the Regulation 'On the approval of expenses relating to Competition Authority procedures,' which was updated in 2021. According to this Regulation, the following fees are due:

- simplified-form merger filing fee: 15,000 leke;
- long-form merger filing fee: 50,000 leke;
- authorisation of a temporary implementation of a merger: 300,000 leke;
- approval of a Phase I merger: 500,000 leke;
- approval of a Phase II merger:
    - 0.03 per cent of the annual turnover in the preceding financial year of all the participating undertakings, when the conditions laid out in Article 12, subsection 1(a)of the Act are met, but nonetheless the fee must not exceed 2,000,000 leke; or
        - 0.03 per cent of the annual turnover in the preceding financial year of all the participating undertakings when the conditions laid out in Article 12, subsection 1(b)of the Act are met, but nonetheless the fee must not exceed 2,000,000 leke;
- in cases where the Authority determines that the notification does not require approval: 150,000 leke.

These fees are non-refundable, even in cases where the Authority determines that no approval is necessary.

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. Article 14 of the Act mandates that the transaction is suspended prior to clearance.

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

Phase I proceedings apply to mergers that do not present any indications of a substantial lessening of competition in the relevant market or a part of it. In preliminary proceedings, the Authority decides on the merger within two months of the working day following the confirmation of receipt of a complete notification. If the filing is considered incomplete due to the parties supplying wrong or missing information, the procedure start date will be delayed until the notification is complete.

In June 2016, the Authority introduced fast-track proceedings for certain types of concentrations that do not raise competition concerns. These fast-track proceedings enable the Authority to clear straightforward concentrations within 25 days of the working day following the confirmation of receipt of a complete notification.

If, 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), the lack of communication shall be constituted as clearance, and the transaction may be completed.

In Phase II, the Authority investigates the case and issues 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 proceedings – offer to take certain steps to mitigate the possible effects of the merger on the market.

The Authority may suspend the time frame of the proceedings if the proceedings are impeded by the undertakings concerned, in particular if the parties:

- do not provide the information requested by the Authority within the set time limit;
- refuse to submit to investigations carried out by the Authority; or
- 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 the 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 undertakings if they close the transaction and fail to notify. Under Article 73 of Law No. 9,121 on the protection of competition dated 28 July 2003, amended on 16 September 2010 (the Competition Act), late filing of a transaction and the submission of incorrect, incomplete or misleading information are considered non-serious infringements, and this section foresees a penalty in the form of a fine of up to 1 per cent of the undertakings' aggregate turnover for the preceding financial year.

Article 74 of the Law addresses closing a transaction before obtaining clearance, failure to notify and integrating the activities of the merging businesses when the merger has been blocked by the Authority. In the absence of a filing, the implementation of concentrations that result in a restriction of competition in the market is considered a serious infringement and may be subject to fines of up to 10 per cent of the aggregate turnover in the previous financial year.

Albanian law does not specify any further requirement other than that the implementation of the concentration must result in a restriction of competition to qualify as a serious infringement. It remains to be seen how the Authority will interpret this requirement in practice.

In determining the amount of the fine, the Authority will take into account the financial gain resulting from violating 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, a merger is deemed to be void if it is 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 leke on a company that had violated the merger filing obligation. Other possible remedies, such as structural sanctions, were not imposed.

In 2014, the Authority imposed a fine of 100,000 leke on a company for failure to notify. This is in line with two cases in 2012 in which the Authority imposed fines of 100,000 leke each on two companies for failure to notify.

In 2023, the Authority imposed a fine of 0.05 per cent of the annual turnover of the preceding year on three undertakings for failure to notify.

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

The sanctions for closing before clearance also apply to foreign-to-foreign mergers, if they meet the notification thresholds; however, in practice, 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 Competition Act does not provide any specific solutions for foreign-to-foreign mergers. However, Article 60 of the Act provides the solution of obtaining a temporary authorisation before clearance. A temporary clearance may be granted if the undertakings involved in the merger would otherwise suffer irreparable damage, and it may 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 that are also seated in Albania and that are listed at the Albanian stock exchange. As there is no operational stock exchange in Albania, the Law is inapplicable at present.

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 be prepared on the basis of a standard filing form. Reference can be made to the guideline issued by the Authority on the relevant filing formalities, which was most recently updated on 23 June 2008.

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

The notification must, among other things, provide the following:

- information on:
  - the identity of the undertakings concerned and their authorised representatives (eg, names and addresses);
    - the form of the concentration (merger, acquisition of control, etc);
    - the value of the transaction;
    - the controlling interests in the undertakings concerned; and

- the relevant product and geographical market and, where applicable, the market affected by the concentration;

- turnover of the undertakings concerned in the domestic market and worldwide; and
- an outline or list of the corporate group the undertaking belongs to, and the entities or persons that control the parties to the transaction; and
- market shares of the undertakings concerned, including information on the methods for their calculation or estimation.

The applicant must 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 on 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 (legalisation) by the Albanian embassy in the applicable 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.

Supplying wrong or incomplete information is considered a non-serious infringement under Article 74 of the Act and is subject to a penalty in the form of a fine of up to 1 per cent of the responsible undertaking's annual turnover of the preceding year. Additionally, this can prolong the timeframe for a decision from the Authority. In 2023, one fine was issued for supplying insufficient and incorrect information during a filing. The amount of the fine was not made public.

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 the 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. If it does not identify any indications of a significant restriction of competition in the market, it will approve the transaction during the preliminary procedure stage (Phase I). If the transaction presents such restrictions, the

Authority can decide to either authorise the transaction at the preliminary stage based on conditions and obligations, or to initiate an in-depth investigation (Phase II). Following an in-depth investigation, the Commission can then decide to clear the transaction with conditions and obligations, or to prohibit it.

Section 6 of the Regulation 'For the implementation of the concentration procedures' provides undertakings with the option to undertake pre-filing consultations on a voluntary basis. The consultations allow the undertakings to discuss with the Authority their intention to complete a transaction that could lead to a concentration, and to address any questions or queries they might have regarding filings. The consultation process, therefore, is done on a voluntary basis for undertakings that may wish to address any queries to the Authority before they conclude an agreement.

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

In Phase I proceedings, the Authority decides 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, the Authority strives to decide on a transaction within one month of 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 that acquire joint control of a joint venture, provided that the joint venture has no actual or anticipated activities in Albania – such cases occur when:
    - the turnover of the joint venture or of the activities contributing to the joint venture is less than 300 million leke in the territory of Albania at the time of notification; and
        - the total value of the assets transferred to the joint venture is less than 300 million leke in the territory of Albania at the time of notification;
- two or more undertakings merge, or one or more undertakings acquire sole or joint control over another undertaking, provided that none of the parties to the concentration engage in business activities in the same product and geographic market, or in a product market that is an upstream or downstream market in relation to the product markets in which any other party to the concentration is engaged; or
- two or more undertakings merge, or one or more acquire sole control of an enterprise or joint company, when the following two 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.

At 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, when both of the following conditions are met:

- the combined market share of all the parties to the concentration that are in a horizontal relationship is less than 50 per cent; and
- the increase (delta) of the Herfindahl-Hirschman Index resulting from the concentration is below 150.

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

In in-depth proceedings (Phase II), the Authority issues a decision within three months of the start of the in-depth proceedings. This period may be extended by up to one month if the parties – within two months of the start of proceedings – offer to take steps to mitigate the possible effects of the merger on the market.

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

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Law No. 9,121 on the protection of competition dated 28 July 2003 (the Competition Act) provides that a merger shall be prohibited if it leads to a significant impediment to effective competition in the market or a part of it, especially if this results from the creation or strengthening of a dominant market position. To be declared compatible with Albanian competition law, a transaction must not significantly restrict competition in the market, or in a part of it, in particular by the creation or strengthening of a dominant 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 and demand substitutability.

Article 13 of the Act provides a failing firm defence, stating that the Competition Authority (the Authority) may sometimes authorise certain transactions when one of the parties to the transaction is at serious risk of failing and there is no other less anti-competitive alternative. To benefit from the failing firm defence in Article 13, the undertaking must be on the verge of exiting the market, if not for the transaction, and unable to reorganise its activity to save it from failing.

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We are not aware of any decision in which the Authority has applied the failing firm defence in practice.

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

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

Theories of harm

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

In general, the Authority will assess whether a merger leads to a substantial lessening of competition in the relevant market or part of it. The Authority's assessment is based on a series of factors, including:

- the market share of the companies participating in the merger and of their competitors;
- barriers to market entry;
- potential competition;
- the economic and financial power of the undertakings concerned;
- the economic dependency of suppliers and customers;
- the development of the distribution networks;
- economic relationships with other undertakings; and
- demand substitutability.

Neither the Competition Act nor the guideline issued by the Authority on the relevant filing formalities (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. The Competition Act and the enforcement activity of the Authority mainly seem to focus on market dominance and unilateral effects as the main theories of harm in merger control. The Competition Act continuously reiterates the importance of the parties having a dominant position in the market for the purposes of assessing the transaction. Unilateral effects have also been at the forefront of the Authority's concerns, with exploitative abuses, such as excessive pricing, and exclusionary practices, such as price discrimination or unfair trading conditions, being the most common theories of harm brought by the Authority.

As the Albanian competition framework and the activity of the Authority tend to be in line with the EU competition framework and the activity of the European Commission, it is therefore not unlikely that the Authority would look at theories of harm, such as coordinated effects, foreclosure and harm to innovation, as Albanian competition law enforcement continues to develop and the market continues to expand.

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 in the assessment process.

If they are taken into account in practice, it is difficult to ascertain to what extent, as many decisions and investigations are not made public.

The enforcement of Albanian competition law is still relatively new, and therefore non-competition issues have yet to be woven into the system.

Economic efficiencies

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

Article 13 of the Competition Act allows the Authority to take into account economic efficiencies resulting from the merger when reviewing a transaction. Such economic efficiencies may be the rationalisation of production, economies of scale, purchasing economies and technological progress.

To be considered in the review process, the economic efficiencies brought by the merger must:

- contribute to the improvement of consumers' wellbeing, or at least offset any potential negatives it may produce;
- be derived from the transaction, and no other less anti-competitive alternative must be available to achieve the same efficiencies;
- be verifiable and quantifiable.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

The Competition Authority (the Authority) is empowered by Law No. 9,121 on the protection of competition dated 28 July 2003 (the Competition Act) to prohibit or interfere with a transaction. If the transaction is deemed to significantly reduce effective competition on the market, especially as a result of the creation or strengthening of a dominant position, the Authority may decide to either approve the transaction with conditions and obligations to eliminate anti-competitive effects and re-establish competition, or to block the transaction. The implementation of a notifiable concentration without prior clearance from the Authority renders the transaction null and void.

Article 61 of the Competition Act sets out the possible conditions and obligations which the Authority can impose on undertakings. Sections (dh) and (e) of this Article provide the Authority with vast power to interfere with a transaction, allowing it to impose any other remedies enabling 'the elimination of anti-competitive effects' and 'the correct application of conditions and obligations'. The vague wording of these two sections provides great power to the Authority to interfere in transactions, and allows it to impose any remedies it might see fit, provided that they are proportional to the anti-competitive effects of the concentration.

Where a transaction has been implemented without the Authority's prior clearance, or where the transaction presents competitive concerns, the Authority, besides the possibility of imposing fines, undertakes a review of the transaction on its own initiative. It may require the undertakings to take the steps necessary to re-establish the situation to that which existed prior to the transaction and, where relevant, may impose the separation of the merged undertakings or the sell-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?

Article 61 of the Competition Act allows the undertakings to remedy competition issues and avoid the prohibition of the transaction. The proposed remedies by Article 61 include: the sale of parts of the undertakings, the sale of any kind of participation in an undertaking activity (for example, divestment), concluding contractual relationships, giving licences, and the imposition of behavioural remedies by obliging the stoppage of a certain activity.

Article 62 also provides the opportunity for the undertakings to propose their own remedies to re-establish normal competition, within a set deadline appointed by the Authority. This can only be done at the request of the Authority. The Authority does not impose any conditions or remedies unilaterally. If the Authority agrees to the proposed remedies, it may further decide on any deadlines and on how implementation should be carried out. It is the duty of the undertakings to provide detailed information regarding the proposed remedies, how they might be carried out and how they would restore competition. The remedies must be wholly achievable by the parties within a tight timeframe and must be able to eliminate all concerns the transaction presents.

If, however, the Authority rejects the undertakings' proposals, it will then produce its own measures to restore competition. If the parties do not present any measures to re-establish competition on the market, the Authority will be obligated to prohibit the transaction.

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

The Competition Act does not currently address any timeframes for divestment or other remedies. The timeframes are appointed by the Authority, depending on the circumstances of the case and the nature of the proposed remedies. The guideline 'On conditions and obligations in cases of concentrations' states that the proposed remedies must be able to be carried out quickly and within a short timeframe, as the conditions of competition on the market will not remain static until the remedies are fulfilled.

The basic conditions for remedies are laid out by the same guideline. The two biggest conditions states that they must be realistically achievable within a short period of time and the Authority must be able to effectively monitor their application.

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)?

Ancillary agreements are addressed by the guideline 'For the related and necessary restrictions in concentrations'. According to this guideline, restraints must be closely related to the concentration to be considered as 'directly related to the implementation of a concentration', and therefore be deemed as a single restriction and not an ancillary one. 'Closely related to the concentration' is defined as having economic links to the main transaction and enabling a smooth transition to the new undertaking structure following the merger. Additionally, to avoid being considered ancillary restrictions, agreements must be necessary to the implementation of a merger, meaning that in their absence, the transaction cannot go ahead, or can only be completed at high cost, in a longer time frame, or with greater difficulties. In assessing whether an agreement amounts to an ancillary restriction, the Authority will take into account the nature of the agreement and its object, and the effects that it has on its timeframes, costs, the security of the transaction and more.

If the agreements are found to be ancillary, the Authority will issue another decision on their effects and they will not be included in the transaction 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?

Law No. 9,121 on the protection of competition dated 28 July 2003 (the Competition Act) requires the Competition Authority (the Authority) to publish the fact that it has received a notification.

On that basis, third parties may submit their comments, claims or objections to the Authority. In general, third parties can bring facts that they consider to be infringements of the Competition Act to the Authority's attention. Article 29/1 of the Competition Act addresses complaints, stating that third parties that have an interest in the transaction or are affected by it, may submit a complaint to the Authority, which will maintain confidentiality if requested by the party. Complaints will be forwarded to the Secretariat, which will handle the situation according to the regulation 'On the functioning of the Albanian Competition Authority'.

Publicity and confidentiality

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

The notifying undertakings may request that the Authority treat the information provided with the notification or obtained in the course of the review process in a confidential manner. All members and employees of the Authority are subject to professional secrecy and shall not disclose confidential information acquired during their duty under any circumstances, except for when they might be required to testify before a court.

Additionally, when submitting a merger filing, the Authority requests that the parties identify any confidential information and business secrets and specify this in the filing. Any publications produced by the Authority, including decisions, shall not contain any confidential information or business secrets.

Cross-border regulatory cooperation

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

Article 71 of the Competition Act permits the Authority to cooperate with antitrust authorities in other jurisdictions on the basis of bilateral agreements or simply in response to their requests.

The Authority may 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?

Article 40 of Law No. 9,121 on the protection of competition dated 28 July 2003 (the Competition Act) provides undertakings with the possibility of appealing the decisions of the Competition Authority (the Authority). Decisions by the Authority may be challenged before the District Court of Tirana. 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.

Lodging an appeal does not suspend the application of decisions which authorise the concentration, or decisions to impose interim measures on the transaction.

We are not aware of any recent cases in which merger control decisions of the Authority have been subject to judicial review by the District Court of Tirana.

However, a recent case from 2023 involved the challenging of a fine imposed by the Authority on three undertakings for failing to file an acquisition within the required framework. The undertakings appealed the Authority's decision to impose a fine, arguing that the Authority had failed to notify the undertakings about the proceedings, that the Authority had breached the principle of proportionality when imposing a fine, and that the data analysed by the Authority was incorrect. The Authority rebutted all the arguments in turn and remarked that the fine initially imposed on the undertakings was significantly higher than those imposed for similar offences, but that it seemed that the level of fines imposed was not enough to prevent further offences. For this reason, the Authority decided to adjust the fines imposed on the undertakings to ensure that the sanctions will deter any further breaches of the law. All three undertakings were fined 0.05 per cent of their annual turnover.

Time frame

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

The time frame for appeal or judicial review depends 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 Competition Authority (the Authority) has previously shown its general willingness to impose fines on undertakings that violate the filing obligation or the prohibition on completing concentrations prior to receipt of Albanian merger clearance; in 2023, two fines were issued for failure to file a transaction, and one fine was issued for supplying insufficient and wrong information and for failure to notify within the 30-day deadline.

Besides the area of merger control, the Authority has shown specific interest in, and has launched investigations into, alleged infringements of competition law in sectors and products including telecommunications, airport taxi transport, internet service in residential buildings, and chemical waste.

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 the changes qualify as a notifiable concentration.

Reform proposals

35 Are there current proposals to change the legislation?

There is currently a proposal to amend Law No. 9,121 on the protection of competition dated 28 July 2003 (the Competition Act), which is still at the draft stage. There is no scheduled timeframe as to when this change might be expected to come into force.

The proposed legislation is expected to introduce changes to prohibited agreements, such as concerted practices and agreements in public procurement, but it is yet unknown whether any amendments will be made to the merger control regime.

UPDATE AND TRENDS

Key developments of the past year

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

In 2023, the Competition Authority (the Authority) reviewed and cleared 60 concentrations, the majority of which were not related to the domestic market; this marks a significant increase from 31 concentrations in 2022. The Commission also imposed three fines on undertakings in 2023 for concentration-related infringements.

Further, in 2023, the Authority has shown specific interest in, and has launched investigations into, alleged infringements of competition law in sectors and products including telecommunications, airport taxi transport, internet service in residential buildings, and chemical waste.

inflation is being felt in Albania; however, we are not aware of this having had any effect on the Authority's practice in merger control cases or having led to any connected policy statements.

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Australia

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Voluntary or mandatory system?	No specific notification triggers or filing deadlines; however, the Australian Competition and Consumer Commission (ACCC) expects notification where the products of the merger parties are either substitutes or complements and the merged firm will have a post-merger market share greater than 20 per cent in the relevant market (but this is not a safe harbour).
Notification trigger/ filing deadline	No specific notification triggers or filing deadlines; however, the Australian Competition and Consumer Commission (ACCC) expects notification where the products of the merger parties are either substitutes or complements and the merged firm will have a post-merger market share greater than 20 per cent in the relevant market (but this is not a safe harbour).
Clearance deadlines (Phase I/Phase II)	Informal merger reviews: no statutory deadlines. Mergers can be 'pre-assessed' within two to four weeks, but the pre-assessment period usually takes between four and 10 weeks. If a public review is required, the review will typically take a further six to 12 weeks. Complex mergers that require a statement of issues are likely to take an additional six to 12 weeks. Merger authorisations: statutory deadline to make a decision in respect of an application within 90 days, which can be extended with the applicant's consent. If the ACCC has not made a decision before the deadline, it is taken to have declined the application.
Substantive test for clearance	Informal merger reviews: whether the acquisition will have the effect or likely effect of substantially lessening competition in a market. Merger authorisations: granted if the acquisition either does not substantially lessen competition in a market or if the likely public benefit from the acquisition outweighs the likely public detriment.

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Penalties	The ACCC can seek injunctions to prevent potential mergers that it considers likely to result in a substantial lessening of competition or in cases where informal clearance has been sought and the ACCC has not yet completed its review. It may also seek other remedies following completion of an acquisition, including damages, divestiture, an order declaring the transaction void and pecuniary penalties up to a maximum of:
	• for individuals, A$2,500,000; and
	• for corporations, the greater of:
	    • A$50 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, 30 per cent of the body corporate's adjusted turnover during the breach turnover period for the act or omission.

Remarks	Although merger clearance in Australia is voluntary, it is market practice for merger parties to notify transactions to the ACCC that are likely to be of interest to it. Where parties choose not to make a voluntary merger notification to the ACCC, it is not uncommon for the ACCC to commence an investigation to determine if the transaction raises competition concerns.

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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. It is enforced by an independent statutory authority, the Australian Competition and Consumer Commission (ACCC).

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

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

There are a number of other important laws in Australia that relate to other aspects of merger control, in particular the Foreign Acquisitions and Takeovers Act 1975 (FATA), which is administered by the Foreign Investment Review Board (FIRB). The FATA provides for mandatory notification and application for prior approval of transactions exceeding specified thresholds. The Commonwealth Treasurer has the power to prohibit such transactions if they are considered contrary to the national interest.

In addition, there are other industry-specific or entity-specific laws and regulations dealing with acquisitions in certain sectors, including the financial services, media, civil aviation, shipping and telecommunications industries.

Scope of legislation

2 | What kinds of mergers are caught?

Section 50 of the CCA prohibits the acquisition of shares or assets where the acquisition would have the effect or be likely to have the effect of substantially lessening competition in any market in Australia. The definition of 'market' includes a market for goods or services in Australia, or in a region, territory or state of Australia. The market does not need to be substantial and can include local markets.

In addition, while section 50 refers to a market in Australia, the ACCC recognises the existence of markets that are global or regional in nature and, in such cases, will examine the

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

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

3 What types of joint ventures are caught?

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

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

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

While the concept of control is not specifically defined for merger control purposes, ACCC practice is to treat an acquisition by one company of a controlling interest in another company in the same way as an acquisition of all shares of the target company. Although a majority shareholding will in many cases ensure control, the acquisition of a minority shareholding may nonetheless be found to give rise to effective control.

Factors that will be taken into account by the ACCC when considering whether the acquisition of a minority shareholding is sufficient to deliver control of a company include:

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

Further, the ACCC may raise issues under section 50 even where no control is achieved, if it regards the transaction as leading to a substantial lessening of competition, for example, by reducing competitive tension between parties in the market or increasing the potential for coordinated conduct. In March 2022, the ACCC expressed preliminary concerns about the proposed acquisition of the Port of Geelong by a consortium of investors that included Palisade Investment Partners (Palisade). A Palisade-managed fund also owned a 100 per cent interest in the Port of Portland. The ACCC expressed concerns because the Port of Geelong and the Port of Portland are the two largest Victorian ports that handle bulk cargo

and account for more than half of the bulk cargo in Victoria. The ACCC was concerned that Palisade's management of these funds (and its influence over the funds) might harm competition between the two ports. The ACCC held these concerns even though Palisade was not acquiring a controlling interest in the Port of Geelong and that the ultimate owners of the investments managed by Palisade were different. In August 2022, the consortium withdrew its request for merger clearance. The ACCC indicated that the identity of the manager was critical due to the possibility of investment managers influencing the strategic decisions of the assets of the funds they manage, even if the ultimate owners are different.

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

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

Thresholds, triggers and approvals

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

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

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

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

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

The notification of mergers and acquisitions in Australia is voluntary, and there is no minimum turnover or other monetary threshold for notifying mergers to the ACCC; however, the ACCC's Merger Guidelines indicate that the ACCC expects to be notified of mergers in advance where the products of the merger parties are either substitutes or complements

and the merged firm will have a post-merger market share greater than 20 per cent in the relevant market.

Parties are also encouraged to notify the ACCC in situations where these thresholds are not met, but there are other reasons to consider that the transaction may raise competition issues.

If a decision to file is made, there are two available options for obtaining the ACCC's view on the competition effects of a merger:

- An informal review system under which parties approach the ACCC on an informal (and sometimes confidential) basis for the ACCC's view: there is no statutory basis for this view, 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 for reviewing mergers 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 notify the ACCC 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 an 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 the merger is notified. It will become aware of any transaction that is notified to FIRB, which can trigger an ACCC examination of the transaction if it has not previously been notified to the ACCC. FIRB will often withhold its approval until the ACCC advises FIRB that it has no objections.

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

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

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

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

There are a number of important laws in Australia that relate to other aspects of merger control, in particular the FATA, which is administered by FIRB. The FATA provides for mandatory notification and application for prior approval of transactions exceeding specified thresholds.

Significant revisions to Australia's foreign investment regime came into effect in December 2015. Other legislation imposes additional requirements and limits on certain foreign investments, including in the financial services, media, civil aviation, shipping and telecommunications industries.

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

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

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

There are no deadlines as filing is voluntary; however, if a decision is made to file, the timetable will depend on which of the available clearance options is chosen:

- Informal review: the ACCC encourages parties to approach the ACCC as early as possible when a merger is contemplated and before a merger is completed, to ensure that the ACCC has sufficient time to consider whether a review is necessary and, if so, to conduct the review. Parties will often approach the ACCC on a confidential basis prior to the public announcement of a transaction.
- Merger authorisation: parties cannot lodge an application for merger authorisation after the transaction is completed. As the parties are required to provide an undertaking that the transaction will not complete until after the ACCC's decision, the application should be made well in advance of completion to allow for the statutory time periods.

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

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

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

In relation to the informal review process, there is no set time frame for an ACCC decision. There are also different stages of the informal review process that influence its duration.

In general, an initial assessment of a merger will be conducted to determine whether a public review will be required. Where the ACCC is satisfied, based on that initial assessment of the information provided, that there is a low risk of the merger substantially lessening competition, the ACCC may decide that it is not necessary to conduct a public review – these mergers are described as having been 'pre-assessed'.

Pre-assessment can be conducted for both confidential and non-confidential mergers. A significant proportion of the mergers notified to the ACCC are able to be pre-assessed expeditiously within two to four weeks. In some cases, the ACCC may conduct targeted confidential market inquiries as part of the pre-assessment process, with the consent of the applicant, which may add an additional two to four weeks to the pre-assessment process.

If the ACCC decides that a public review is necessary, the review will typically take a further six to 12 weeks from the time the public review commences. Complex mergers that result in the publication of a statement of issues are likely to take an additional six to 12 weeks after the statement of issues is published, but this can vary depending on factors such as the responsiveness of the merger parties to information requests and whether remedies are proposed.

Seeking the ACCC's informal view does not require the transaction to be suspended prior to the ACCC's decision, but in some cases where the ACCC identifies competition concerns, the ACCC will request that the acquirer provide 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 such an undertaking is not provided, the ACCC may seek a court injunction to stop the transaction from being completed until it has completed its review.

In relation to the merger authorisation process, the ACCC must reach a determination on an application for merger authorisation 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 lodged with the ACCC, it is not possible to close the transaction before the ACCC makes its determination 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 the ACCC's informal view is sought, 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 the ACCC's review is completed; however, the ACCC is able to seek an injunction to prevent this from occurring.

In October 2021, the ACCC filed successful legal proceedings against Virtus Health in the Federal Court of Australia, obtaining an interlocutory injunction to stop Virtus Health's acquisition of Adora Fertility from completing until the determination of the ACCC's section 50 case. In granting the injunction, Justice Michael O'Bryan noted that 'an injunction applies pre-acquisition and prevents the acquisition occurring. It is therefore the most effective remedy to prevent anti-competitive harm from an acquisition that would otherwise contravene [section] 50' of the CCA.

Alternatively, if the parties proceed with the transaction without seeking the ACCC's view, the ACCC may seek remedies – including pecuniary penalties, divestiture of the shares or assets acquired – or an order that the transaction is void and that monies should be refunded to the vendor. The ACCC has rarely sought these remedies in relation to mergers.

More commonly, if the ACCC is concerned that the transaction raises serious competition issues, it will seek an undertaking from the parties not to complete the transaction until the completion of the ACCC's review. Often, this undertaking will be provided if the transaction is one in which there are complex competition issues, given the potential for the ACCC to obtain an injunction if the undertaking is refused.

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

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

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

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

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

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

In exceptional circumstances, the ACCC may accept the following:

1. if possible, carving out the acquisition of shares or assets that relate to Australia from the global transaction so that completion in relation to the Australian aspects does not occur until after the rest of the transaction; or
2. if a carve-out is not possible, providing 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.

Regarding point (2), 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.

The ACCC has publicly stated that it considers there to be risks associated with investigations that occur after completion, even where a hold-separate remedy is in place. Concerns about the effectiveness of hold-separate arrangements were also expressed by Justice O'Bryan when granting the injunction to restrain the completion of Virtus Health's proposed acquisition of Adora Fertility. Justice O'Bryan noted that 'completion of the acquisition, even on a temporary basis, may harm competition because the acquiring company may gain access to information or other competitive advantages through its ownership of the target business and the target company may be weakened as an independent competitor in that period'.

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 review process, the ACCC's Informal Merger Review Process Guidelines recommend that the party lodge an initial written submission that includes:

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

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

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

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

The ACCC may also revisit its decisions under the informal review process if it determines that the information provided to it was false or misleading. Similarly, the ACCC may take steps to revoke merger authorisation granted on the basis of false or misleading information. The ACCC may also seek orders from the Federal Court of Australia to stop the proposed acquisition from proceeding or divestiture 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 ACCC review and the phases depend on which of the two options is chosen.

Where a party seeks informal review:

- 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 having been pre-assessed. The notifying parties will be informed that the ACCC does not intend to conduct a public review.
- If the ACCC decides that a merger requires a public review, it will commence a public review of the transaction once the 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 publish a statement of issues 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 form approved by the ACCC. Before lodgement of the application, the ACCC encourages applicants to contact it for informal discussions and guidance. The ACCC recommends that applicants provide a draft application before the pre-lodgement meeting so that the ACCC can provide specific guidance about the issues the applicants should address in their application.

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

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

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

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

Informal review

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

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

- initial market inquiries, which take approximately two to five weeks as of the commencement of the public review;
- assessment of the information provided during market inquiries, which will be completed approximately two to four weeks after the close of market inquiries; and
- an announcement by the ACCC of its views upon completion of the assessment of information, which 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).

The 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.

The publication of a statement of issues is likely to extend the timeline by six to 12 weeks (excluding periods where information is outstanding), but this will vary on a case-by-case basis. This allows the ACCC to conduct additional consultations 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 view on whether it opposes, does not oppose, or does not oppose subject to the acceptance of remedies.

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

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

Merger authorisation

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

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

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

- the proposed acquisition will not result, or be likely to result, in a substantial lessening of competition; or
- the public benefit resulting, or likely to result, from the proposed acquisition would outweigh the public detriment that would result, or be likely to result, from the proposed acquisition.

In evaluating whether a proposed acquisition is likely to have the effect of substantially lessening competition, the ACCC uses the 'with-or-without' test; it assesses the likely future state of competition with the merger and the likely future state of competition without the merger. In conducting this analysis, the ACCC is required to take into account various merger factors set out in section 50(3) of the Competition and Consumer Act 2010 (Cth) (CCA), 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, 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 informal merger reviews and merger authorisations, the analytical and evaluative framework the ACCC will apply when assessing whether a merger is likely to give rise to a substantial lessening of competition is set out in the ACCC's Merger Guidelines. Although the Merger Guidelines do not have legal force when determining whether a proposed transaction would breach Australian merger law under sections 50 and 50A of the CCA, they formally reflect the ACCC's approach and indicate the analytical and evaluative framework that the ACCC applies when reviewing the competitive effects of a transaction on a market in Australia.

A merger may be authorised where the ACCC is satisfied that it would not be likely to have the effect of substantially lessening competition or 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 that the ACCC will apply when assessing the public benefits of a merger.

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

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

Theories of harm

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

The ACCC assesses prospective mergers from the viewpoint of whether 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 that 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 taken into account when determining whether the likely public benefit from the merger outweighs the public detriment. They are also relevant if the merger occurs wholly outside Australia and falls for review under section 50A of the CCA. For example, increased efficiency, industry rationalisation, employment growth and protection of the environment.

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?

In the informal process, the ACCC generally only takes into consideration merger-related efficiencies where the resulting efficiencies directly affect the level of competition. The Merger Guidelines recognise that an acquisition that increases the competitiveness of the merged firm may also increase competition in the market.

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Although the ACCC's focus on the merger analysis under section 50 of the CCA 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, there is clear and compelling evidence that the resulting efficiencies directly affect the level of competition in a market, and these efficiencies will not be dissipated post-merger. Economic efficiencies can be considered if the transaction is reviewable under section 50A, as part of the public benefit assessment.

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

Economic efficiencies that are likely to result from a proposed acquisition may be relevant to the ACCC's assessment of public benefits in the merger authorisation process.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

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

- for individuals, A$2,500,000; and
- for corporations, the greater of:
  - A$50 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, 30 per cent of the body corporate's adjusted turnover during the breach turnover period for the act or omission.

The ACCC will usually 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; it must apply to the Federal Court of Australia.

Remedies and conditions

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

In relation to informal reviews, the ACCC may decide not to oppose a transaction subject to accepting remedies in the form of undertakings. Where the ACCC raises concerns about a transaction, the parties may modify the proposal by providing a court-enforceable undertaking, which may include divestment or behavioural undertakings. The ACCC's Merger Guidelines indicate that the ACCC has a strong preference for structural (divestment) undertakings and that behavioural undertakings will only occasionally be appropriate, as an adjunct to a structural remedy. It is rare for the ACCC to accept behavioural undertakings that apply on a permanent basis. In addition, the Merger Guidelines state that the ACCC will generally prefer divestiture to occur on or before the completion date of a merger.

In relation to merger authorisations, the ACCC may grant authorisation subject to conditions specified in the authorisation. The conditions may include a condition that a person give and comply with a section 87B undertaking under the Competition and Consumer Act 2010 (CCA). 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. 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 the completion of a merger and the subsequent divestment of any business or assets required to obtain competition clearance.

Although the period in which divestment must take place will depend on the circumstances, the ACCC's preference is for a divestment period of one to three months where divestment post-completion is required.

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

Where the ACCC considers that a transaction has, or is likely to have, the effect of substantially lessening competition in a market in Australia, including in cases where the parties are proposing a global remedy to resolve the ACCC and other regulators' concerns, it is not uncommon for the ACCC to require a court-enforceable undertaking from the parties before deciding that it would not oppose the transaction. For example:

- In April 2023, the ACCC accepted an undertaking from Sika in connection with Sika's proposed acquisition of the MBCC Group. The ACCC was concerned about the effects of the proposed acquisition on competition in the market for the supply of chemical admixtures in Australia. To address these concerns, Sika undertook to divest all of the MBCC Group's business in Australia and New Zealand, as well as the MBCC Group's Admixtures Systems business in Europe, the United Kingdom, Canada and the United States.
- In May 2022, the ACCC accepted an undertaking given by Osmosis in connection with its proposal to acquire all issued shares of Firewall (the holding company of Waterlogic). Osmosis and Waterlogic operated in Australia through their subsidiaries (respectively, Zip and Billi). The ACCC was concerned that the proposed acquisition would have the effect or likely effect of substantially lessening competition in the markets for the manufacture, supply and servicing of multifunctional taps in Australia. To address the ACCC's concerns, Osmosis undertook to divest the Billi business.
- In December 2021, the ACCC accepted three undertakings from waste management company Veolia in relation to its proposed acquisition of Suez. Veolia and Suez were two of the largest vertically integrated waste management companies in Australia. The ACCC did not oppose the transaction subject to undertakings requiring Veolia to sell water services assets, commercial and industrial waste collection assets, and medical waste assets in Sydney, Perth and Adelaide.

In some instances, the ACCC has rejected undertakings offered by the merging parties on the basis that the remedies included were insufficient to address competition concerns in Australia. In December 2020, the ACCC did not accept a long-term behavioural undertaking offered by Google LLC (similar to that offered to and accepted by the European Commission) that sought to address competition concerns about its proposed acquisition of wearables supplier and manufacturer, Fitbit Inc. The transaction was completed on 14 January 2021, before the ACCC had finished its investigation. The ACCC undertook an enforcement investigation but has not challenged the matter in court.

The ACCC may decide not to seek stand-alone remedies in circumstances where the remedies provided to other regulators have resolved the competition concerns in Australia. For example, in April 2024, the ACCC announced that it would not oppose the acquisition of Oticon Medical's cochlear implants business by Cochlear. The ACCC previously had competition concerns in relation to Cochlear's proposed acquisition of Oticon Medical's bone conduction solutions business as part of a broader transaction. However, the parties revised the transaction structure to remove the bone conduction solutions business and Cochlear offered an undertaking to the UK Competition and Markets Authority (CMA) that prevents it from acquiring the bone conduction solutions business of Oticon Medical. The revised transaction structure and undertaking to the CMA resolved the ACCC's competition concerns.

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 in informal reviews, 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 decide not to oppose 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 ordinary provisions of the CCA, but may benefit from an exemption in certain circumstances.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

For non-confidential mergers that require a public review, the Australian Competition and Consumer Commission (ACCC) will generally invite market participants to make submissions in relation to the proposed merger and, where applicable, in response to a statement of issues or proposed undertakings. These inquiries may include consultations with competitors, suppliers, customers, industry associations, government agencies and departments, overseas agencies and departments, and consumer groups. Information provided to the ACCC under the informal review process by the parties to the transaction or third parties is usually confidential and, with limited exceptions, is rarely made public.

If the ACCC decides not to oppose a transaction in the informal review process and the merger proceeds, this does not prevent any person from bringing an action in the Federal Court of Australia claiming damages or seeking divestiture of the shares or assets acquired on the basis of a contravention of section 50 of the Competition and Consumer Act 2010 (Cth) (CCA). 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, an action cannot be brought by the ACCC or third parties on the basis that the acquisition contravenes section 50, provided that it was completed in the relevant time frame and in compliance with any conditions imposed.

However, a third party with sufficient interest may apply to the Australian Competition Tribunal (the Tribunal) for a review of the ACCC's determination. The scope of the Tribunal's review is limited to the information before the ACCC, although it may consider new information not in existence at the time of the ACCC's determination and information sought by the Tribunal to clarify the information before the ACCC.

Publicity and confidentiality

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

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

During the initial assessment of a matter to determine whether a public review will be required, the ACCC may seek the consent of the merger parties to conduct targeted inquiries. If the ACCC decides that a public review is required, the ACCC will disclose its consideration of the public proposal, but information that is provided to the ACCC either by the parties to the transaction or by third parties on a confidential basis will not be disclosed.

The ACCC actively seeks to protect the confidentiality of information provided to it on a confidential basis, so that potential acquirers as well as other interested parties feel comfortable providing commercially confidential information to the ACCC to assist in its assessment of the transaction; however, the ACCC may provide such information to other regulators, both in Australia and overseas, pursuant to section 155AAA of the CCA.

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

The merger authorisation process is a public process wherein 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 antitrust division of the Department of Justice (DOJ) and the Federal Trade Commission in the United States, the Competition Bureau in Canada, the European Commission, and the Competition and Markets Authority (CMA) in the United Kingdom.

In September 2020, the ACCC entered into the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (MMAC) alongside the US DOJ, the Canadian Competition Bureau, the UK CMA and the NZCC. The MMAC is a memorandum of understanding that aims to improve coordination and informal cooperation between the five agencies. The MMAC provides for the sharing of information and experience, the establishment of inter-agency working groups to consider specific issues, and includes a model agreement that agencies can use to establish formal cooperation arrangements.

The ACCC has issued joint statements and signed a number of memorandums of understanding (MOUs) with foreign competition authorities, including:

- In March 2024, the ACCC and the Vietnam Competition Commission (VCC) signed a MOU to facilitate cooperation and information-sharing between the two authorities and promote the delivery of technical assistance activities;
- In February 2024, the ACCC and the Philippine Competition Commission signed a new MOU. The new MOU includes arrangements to cooperate on certain activities, including sharing best practices through the exchange of officials, non-confidential information, and experiences on matters of mutual interest, conducting workshops or training courses for staff, collaborating on projects of mutual interest and notification of investigations and activities that significantly affect either authority's interests.
- In February 2023, the ACCC and the Italian Competition Authority (the Autorità Garante della Concorrenza e del Mercato, AGCM), signed the first-ever MOU between the two regulators. It provides for the sharing of information on issues of common interest and exchanges of staff. The key areas of interest identified for collaboration between the ACCC and the AGCM include cartels, digital platforms and market studies.
- In April 2021, the ACCC issued a joint statement on merger control enforcement with the UK CMA and the German Federal Cartel Office, which emphasises the ‘common understanding across competition agencies’ on a number of issues relating to mergers. Further, in February 2023, the ACCC and the AGCM signed a memorandum of understanding to create a framework for the two agencies to voluntarily cooperate on key areas of interest, such as cartels, digital platforms and market studies.

Where the ACCC seeks to engage in such exchanges through the sharing of confidential information and documents obtained from the merger parties, it is common practice to obtain consent for such disclosure from the parties through its standard form waiver. The exchange of information between these regulators is subject to the confidentiality restrictions

under which the regulator operates. The ACCC is also actively involved in the International Competition Network, through which it is able to liaise with individual competition agencies.

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

JUDICIAL REVIEW

Available avenues

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

There is no statutory right under the Competition and Consumer Act 2010 (Cth) to appeal an Australian Competition and Consumer Commission (ACCC) informal review decision. If the ACCC indicates that it will oppose the merger at the completion of its review, the acquirer may seek a declaration in the Federal Court of Australia that the proposed acquisition does not have the effect or likely effect of substantially lessening competition.

In 2019, Vodafone Hutchison Australia sought such a declaration from the Federal Court of Australia after the ACCC opposed its proposed merger with TPG. The Federal Court subsequently declared that the merger would not substantially lessen competition.

If the parties decide to proceed with the transaction in the absence of an ACCC view that it does not intend to oppose a transaction or a Federal Court declaration, the ACCC may seek an injunction to prevent the merger from going ahead.

If the ACCC opposes a merger through the informal merger review process, the acquirer also has the option of applying to the ACCC for merger authorisation. Unlike the informal review process, merger authorisation allows for net public benefits to be considered as part of the ACCC's assessment and offers additional review rights following the ACCC's determination.

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 another interested person may apply to the Australian Competition Tribunal (the Tribunal) for a merits review of the determination. For example:

- In 2023, the Tribunal considered a regional network-sharing agreement between Telstra and TPG after the ACCC decided not to grant merger authorisation. A third party, Singtel Optus, intervened in those proceedings (as a party with no conditions or limitations imposed on its participation as the 'substantive contradictor' to Telstra and TPG). In June 2023, the Tribunal upheld the ACCC's decision not to grant authorisation.
- In 2024, the Tribunal set aside the ACCC's decision not to grant authorisation for ANZ to acquire Suncorp's banking business. ANZ appealed the decision after the ACCC denied

authorisation based on concerns that the acquisition would substantially lessen competition in the supply of home loans nationally, to small-to-medium enterprise banking in Queensland, and to agribusiness banking in Queensland.

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. Applications for judicial review of Tribunal decisions 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 reviews, if a declaration is sought from the Federal Court of Australia, there is no set time frame for the case to be determined. Federal Court proceedings in respect of mergers can be protracted, although the Federal Court attempts to deal with such issues expeditiously.

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

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

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

In the financial year ending in June 2023, the Australian Competition and Consumer Commission (ACCC) considered a total of 305 mergers under its informal review process. The majority of these mergers (284) were pre-assessed, and only 21 mergers were subject to public review by the ACCC. Of the mergers that went to public review, ten were unconditionally cleared, six were cleared after acceptance of a remedy, three were withdrawn and two were opposed outright. The ACCC granted merger authorisation in two matters: the merger between Linfox Armaguard and Prosegur Australia, and Brookfield LP and MidOcean's proposed acquisition of Origin Energy Limited. The ACCC decided not to grant merger authorisation in two matters: Telstra and TPG's proposed spectrum-sharing agreement, and ANZ's proposed acquisition of Suncorp Bank.

The ACCC's current enforcement priorities for 2024-25 that relate to mergers are varied and include:

- Competition in the supermarket sector, with a focus on food and groceries;
- Promoting competition in essential services with a focus on telecommunications, electricity, gas and financial services; and
- Competition issues in the aviation sector.

It is rare for the ACCC to commence court proceedings to prevent a merger from completing. However, the ACCC took this measure in 2021 when it sought an injunction from the Federal Court of Australia to stop the proposed completion of Virtus Health's acquisition of Adora Fertility. In this case, the parties had notified the merger to the ACCC but later informed the ACCC of their plan to complete the transaction before the ACCC had concluded its review. The ACCC was primarily concerned about the limited time it had to consider the merger, the limited information provided by the parties and what it perceived to be the parties' disregard for its processes. Ultimately, the ACCC obtained the injunction, which was the first successful injunction that the ACCC has obtained to restrain a merger since 1994.

The ACCC does not always seek injunctions when it has concerns about a merger's completion and it can also investigate completed mergers on an enforcement basis. In the financial year ending June 2023, the ACCC commenced investigations into eight completed acquisitions. For example, in March 2023, the ACCC opened a public investigation into historical acquisitions by Petstock that had not been notified to the ACCC at the time they occurred (between 2017 and 2022). The ACCC became aware of these acquisitions through its review of a proposed acquisition of a 55 per cent interest in Petstock by Woolworths. The ACCC found that these transactions raised substantial competition issues. To address these concerns, Petstock offered divestiture undertakings that were accepted by the ACCC in December 2023.

Reform proposals

35 | Are there current proposals to change the legislation?

In April 2024, the Australian government announced significant reforms to Australia's merger control regime. It is proposed that draft legislation in relation to these reforms will be put before the parliament in late 2024, with the changes to apply from 1 January 2026. Key aspects of the proposed reforms are:

- Notification – mandatory: If the notification thresholds are met, the person or people acquiring control of the business or assets will be required to notify the ACCC. This will include minority acquisitions that may provide de facto control or the ability to materially influence the target business.
- Suspensory regime: Merger parties will be prohibited from completing a transaction until the ACCC (or the Australian Competition Tribunal (the Tribunal)) grants clearance. This would apply to transactions that meet the filing thresholds, or where a party opts into the process by notifying. Merger parties and individuals will face fines for implementing a proposed transaction before receiving regulatory approval.
- Notification thresholds: Thresholds will be both monetary and based on share of supply or market share, with consultations on appropriate thresholds during 2024.

- Monetary thresholds: These thresholds will be based on revenue, profit and deal value. In 2023, the ACCC called for merger parties to be required to notify a merger if the acquirer or target has an annual turnover of A$400 million or more, or if the global transaction value is A$35 million or more.

  - Market share thresholds: The ACCC will be required to issue guidance to assist merger parties to determine whether their combined market share is higher than the set threshold.
  - Serial/creeping acquisitions: To respond to concerns around 'serial' or 'creeping' acquisitions, all mergers within the preceding three years (by the acquirer or the target) will be aggregated to determine whether a merger meets the notification threshold, irrespective of whether those mergers were themselves individually notified.
  - Opt in: where a transaction does not meet the thresholds, parties may themselves 'opt in' to the process by notifying the ACCC.
  - Call-in powers: The ACCC will not have 'call-in' powers to review acquisitions below these thresholds (as was contemplated in treasury's consultation paper). However, the ACCC can investigate transactions below the thresholds for breach of any other relevant provisions of the Competition and Consumer Act 2010 (Cth) (CCA).

- Legal test: The current legal test under section 50 of the CCA – whether the proposed transaction would have the effect, or is likely to have the effect, of substantially lessening competition – has been retained. However, it is proposed that this test would be clarified to include mergers that create, strengthen or entrench substantial market power.
- Merger factors: The merger factors in section 50(3) of the CCA will be replaced with principles that the ACCC must consider (to the extent possible). At this stage, the government has flagged that these principles will likely include considerations such as:

  - the need to maintain and develop effective competition within markets in view of, among other things, the structure of all the markets concerned and the conditions for competition, and the actual or potential competition from businesses carrying on business in Australia, whether located in Australia or elsewhere; and

    - the market position of the businesses concerned and their economic and financial power, including commercial relationships, the alternatives available to suppliers and users, their access to supplies, inputs including data, or markets, any 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 it is to consumers' advantage and does not form an obstacle to competition.

- Effect of the ACCC's decision: The ACCC will be the primary decision-maker under the proposed new regime. If it grants clearance in relation to a transaction, the merger parties will receive legal 'immunity' to proceed. If the ACCC does not provide clearance, the merger will be prohibited from proceeding (subject to review rights).
- Appeal rights: Merger parties will have the following review options:

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- Limited merits review: Merger parties may apply to the Tribunal for limited merits review of ACCC decisions. The scope of the Tribunal's merits review will be the same as the appeal currently available for merger authorisations—the Tribunal will apply the same test as the ACCC and its review of ACCC determinations will be limited to the material that was before the ACCC. However, the Tribunal will be able to seek new evidence to clarify or permit the parties to lead new evidence that was not in existence at the time of the ACCC decision.

  - Judicial review: Merger parties may apply to the Federal Court of Australia for judicial review of decisions by the Tribunal (ie a review of whether the Tribunal's decision was made in accordance with the law).

- Information requirements: There will be prescribed upfront information requirements that merger parties will need to satisfy under the new regime. For mergers that are unlikely to raise competition concerns, merger parties will be required to submit a short form notification filing. By contrast, merger parties will be required to submit a more detailed filing for more complex mergers.
- Timeframes: The ACCC will have a 'Phase I' review period of 30 working days. Mergers may proceed after this period where no competition concerns are raised by the ACCC, with the option of 'fast-track' determination if no concerns are identified after 15 working days. Where competition concerns are raised by the ACCC, it will then complete an in-depth 'Phase II' assessment within 90 days.
- Filing fee: Merger notifications will need to be accompanied by a fee. The proposed filing fee is expected to be A$50,000-A$100,000 for mergers notified to the ACCC, with additional fees for a public benefit review and Tribunal review. It is proposed that there will be an exemption from these fees for small businesses.
- Transparency: All mergers considered by the ACCC will be listed on an ACCC public register. This register will provide information regarding each merger, including the names of the merger parties, a short overview of the transaction and the review timeline. Treasury has not indicated whether merger parties will have full access to ACCC documents in relation to a transaction as merger parties do in some overseas jurisdictions.
- Penalties: Merger parties will face substantial penalties for failing to notify the ACCC of a notifiable merger or for proceeding to complete a merger ahead of the ACCC's decision. The ACCC must seek such penalties in the Federal Court. The ACCC will retain its existing powers to apply for remedies in the Federal Court, including pecuniary penalties, divestiture of the shares or assets acquired, or an order that the transaction is void and that monies should be refunded to the vendor.

UPDATE AND TRENDS

Key developments of the past year

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

Merger authorisation

In 2023, the Australian Competition and Consumer Commission (ACCC) considered three merger authorisation applications. This is a significant increase on previous years as, historically, the ACCC has only received a small number of authorisation applications. Prior to financial year 2022-23 (ending June 2023), the ACCC had only received four merger authorisation applications since the merger authorisation process commenced in 2017.

- *Linfox Armaguard/Prosegur*: In June 2023, the ACCC granted authorisation for the proposed merger between Linfox Armaguard and Prosegur, subject to a condition that the parties provide and comply with a court-enforceable undertaking pursuant to section 87B of the Competition and Consumer Act 2010 (Cth) (CCA). The applicants were the two largest suppliers of cash-in-transit services in Australia (with a combined market share of approximately 90 per cent) and were also the only suppliers who provide such services nationally. The undertaking imposes obligations for the next three years on the combined Armaguard-Prosegur to, among other things, continue offering cash-in-transit services at prices determined by the undertaking. However, in October 2023, Armaguard stated concerns that there was a real risk that it would cease to supply services in the short term without further financial support. The issues are ongoing and the ACCC has granted interim authorisation to the Australian Banking Association, member banks and other industry participants to discuss and develop arrangements to maintain the physical distribution of cash throughout the Australian economy.
- *ANZ/Suncorp Bank*: In August 2023, the ACCC denied ANZ's authorisation application to acquire Suncorp Bank based on concerns that the acquisition would substantially lessen competition in the supply of home loans nationally, the supply of loans to small-to-medium enterprise banking in Queensland, and to agribusiness banking in Queensland. ANZ and Suncorp subsequently applied to the Tribunal for a review of the ACCC's determination. In February 2024, the Tribunal set aside the ACCC’s decision not to grant authorisation, being satisfied that the merger: (i) would not substantially lessen competition in any market; and (ii) would result, or be likely to result, in a benefit to the public that would outweigh any potential detriment.
- *Brookfield and MidOcean/Origin*: In June 2023, Brookfield and MidOcean lodged an application for merger authorisation. Origin is an integrated energy company with electricity generation, retailing and gas operations. Brookfield has an interest in AusNet, which owns electricity transmission, electricity distribution and gas distribution networks in Victoria. The applicants provided a draft court-enforceable section 87B undertaking – a draft ring-fencing undertaking offered by three Brookfield entities – upfront to the ACCC with the authorisation application. The ACCC found that these undertakings were not sufficient to mitigate its competition concerns. Nonetheless, the ACCC authorised the proposed merger on the basis that certain section 87B undertakings – as negotiated during the process and given by the parties – did one or more of reducing the likelihood of some public detriments and increasing the likelihood of some public benefits resulting

from the proposed acquisition, such that the proposed acquisition was likely to result in a net public benefit. This was the first time the ACCC had approved a merger on the basis of environmental benefits. Ultimately, the deal collapsed due to shareholders voting it down (despite the fact that the Origin board had recommended accepting the offer).

Merger litigation

The ACCC did not commence any new substantive merger litigation cases in the past year. In recent years, the ACCC has:

- 2021: commenced proceedings and successfully sought an interlocutory injunction from the Federal Court of Australia to restrain the *Virtus/Adora* merger from being completed. This matter is an example of the ACCC obtaining an interim injunction to stop completion until a determination is issued regarding the ACCC's case. Although obtaining an interlocutory injunction requires (among other things) the establishment of a prima facie case, it does not require the ACCC to establish that the merger will necessarily contravene section 50 of the CCA.
- 2020: challenged the acquisition by Pacific National of the Acacia Ridge rail terminal owned by Aurizon, which was finalised in December 2020, on the basis that it contravened section 50 of the CCA. A central issue in this case was whether – as the ACCC alleged – the proposed acquisition would deter the new entry of a rail line haul service provider by reason of providers due to Pacific National's ability to discriminate against that entrant. At first instance, the Federal Court allowed the merger, subject to an undertaking guaranteeing other operators access to the rail terminal and fair prices. The ACCC's appeal of this decision was dismissed by the Full Federal Court in May 2020. Releasing Pacific National from the undertaking, the majority of the Full Federal Court found that the prospect of new entry was only a mere possibility and speculative. In December 2020, the ACCC was denied special leave to appeal the Full Federal Court's decision to the High Court of Australia.

Digital markets

In recent years, the ACCC has been increasingly focused on the impact of mergers undertaken by digital platforms, particularly with respect to the control of data. The ACCC has taken a more stringent approach to mergers involving digital platforms than some other regulators.

For example:

- In February 2024, the ACCC raised competition concerns with realestate.com.au's proposed acquisition of Dynamic Methods. Realestate.com.au is a wholly-owned subsidiary of the REA Group and provides digital advertising services for residential and commercial real estate. Dynamic Methods provides a service to facilitate the digital use of common real estate forms. The ACCC was not notified of the proposed acquisition and undertook a public review of the transaction. However, the ACCC discontinued its review in March 2024 after the REA Group advised that the proposed acquisition would not be proceeding.
- In December 2020, the ACCC announced it had rejected the behavioural undertaking offered by Google LLC in respect of its proposed acquisition of Fitbit Inc. This came days

after the European Commission had cleared the acquisition subject to an undertaking in near-identical terms. Among other things, the 10-year undertaking offered not to use any data collected through Google or Fitbit health and fitness apps in or for Google Ads. The ACCC considered that the behavioural undertaking offered did not address its concerns that the acquisition may result in Fitbit's rivals (other than Apple Inc) being squeezed out of the wearables market. Ultimately, the review was completed with no decision made because Google completed its acquisition of Fitbit on 14 January 2021. The ACCC undertook an enforcement investigation but has not challenged the matter in court.

In November 2022, the ACCC released its fifth interim report for the Digital Platform Services Inquiry (DPSI). The report considered that current competition and consumer laws are not sufficient to address the harms that it has identified since 2017. Such harms include scams, harmful apps, fake reviews, inadequate dispute resolution, increased market concentration and instances of anticompetitive conduct. Although the ACCC considered potential reforms to merger laws relating to digital platforms in its February 2022 issues paper, the ACCC did not make any specific recommendations related to merger reform in its fifth interim report and considered that this should be examined in the context of a broader economy-wide review of Australia's merger regime.

The sixth interim report for the DPSI, released in April 2023, examined competition and consumer issues in social media services. The sixth interim report identified a range of competition and consumer issues, including the significant market power of Meta and data collection and use practices (among others). The report noted the use of strategic acquisitions by social media platforms and the challenges they present for competition agencies in having to speculate about changing consumer habits and the future state of markets, resulting in greater scrutiny globally. While the report did not specifically address merger reform for digital platforms, it stated that the consumer and competition measures recommended in its fifth interim report could address many of the harms identified in social media services.

In November 2023, the ACCC released its seventh interim report for the DPSI, which considered competition and consumer issues from the expanding ecosystems of Amazon, Apple, Google, Meta and Microsoft in Australia. The report found that the continued expansion of these digital platforms is exacerbating risks of harms to competition and consumers. In particular, the ACCC considered the risks to competition posed by strategic mergers and acquisitions by digital platform service providers. It recognised the efficiency or pro-competitive drivers behind acquisitions, but identified the following three key competitive concerns:

- First, acquisitions that allow digital platform service providers to expand into markets that give them access to additional key inputs – such as data and data sources and users – may have the effect of strengthening existing economies of scale and scope, and/or network effects. This could raise barriers to entry and expansion, and/or strengthen certain competitive advantages held by digital platform service providers, potentially increasing their market power in certain core markets.
- Second, an acquisition may raise concerns if the acquired firm operates in a market that has the potential to be used as a launch pad for competitor entry into the platform's core markets. This is in addition to the usual concerns about reducing competition in the target market.

- Third, expansion through acquisitions may give rise to vertical and conglomerate concerns where the acquisition provides the digital platform service provider with the ability and incentive to misuse its existing dominant position in a market to harm rivals.

The ACCC stated that the report was further evidence to support its earlier recommendations (in its fifth interim report) to update competition and consumer laws to address conduct by particular designated digital platforms.

In May 2024, the ACCC released its eighth interim report for the DPSI, which considered competition and consumer issues in the supply of data products and services by data firms in Australia. The report observed that competition concerns may arise under the CCA if a firm places restrictions on access to unique or exclusive datasets by rivals or potential down-stream buyers, in a way that deters, hinders, or prevents competition. The report observed that the acquisition of data firms could facilitate the expansion and enhancement of data products and services supplied by the acquirer, or provide it with a competitive advantage in other markets. The report also considered the potential for acquisitions of data firms to raise data-related input foreclosure competition risks.

Notwithstanding the findings of the ACCC in its fifth, seventh and eighth interim reports for the DPSI, the Australian government has not yet recommended any specific changes to the merger control regime as it relates to mergers undertaken by digital platforms.

Ex-post merger review

In February 2024, the ACCC published its report on ex post reviews of three past merger decisions, being AP Eagers acquisition of Automotive Holdings Group, ANZ Terminals' acquisition of GrainCorp Liquid Terminals Australia and Bauer Media's acquisition of Pacific Magazines. The findings of this report (as well as past and subsequent reviews) inform the ACCC's current and future merger reviews and analysis. Key takeaways of the 2024 report include the following:

- Market dynamics post-acquisition are difficult to predict. The ACCC compared two deals, one in which the market dynamics following the acquisition played out in a manner consistent with the prediction of the ACCC (*Bauer/Pacific*), the other where the market dynamics may have played out differently to the ACCC's expectations based on the public review (*ANZ Terminals/Graincorp*).
- Remedy outcomes can vary. The review found contrasting results in the effectiveness of undertakings provided to the ACCC. The ACCC also noted how unanticipated complexity may arise in relation to a divestiture. In one deal reviewed (*ANZ Terminals/Graincorp*), certain elements of the divestiture that the ACCC would have expected to have been resolved at divestiture remain outstanding more than four years after the undertaking was accepted.
- Outcomes are not always consistent with expectations. The review looked at the compet-itive constraints claimed by the parties and how they played out post-acquisition. The ACCC highlighted the difficulties in making predictions about competitive constraints post-acquisition and emphasised the significance of market power and customers' alternative options on competitive outcomes. In particular, the ACCC highlighted the importance of the threat of losing customers as a constraint on market power and the need for the ACCC to thoroughly understand the relationships between customers and suppliers.

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Voluntary or mandatory system?	Mandatory, based on turnover thresholds and specific legal definitions for transactions constituting notifiable concentrations.
Notification trigger/ filing deadline	A merger must be notified prior to its completion if, in the previous business year: • the combined worldwide turnover of all undertakings concerned exceeded €300 million; • the combined Austrian turnover of all undertakings concerned exceeded €30 million; • the individual Austrian turnover of at least two of the undertakings concerned each exceeded €1 million; and • the individual worldwide turnover of at least two of the undertakings concerned each exceeded €5 million. Even where these thresholds are met, mergers are exempt from the notification obligation where the domestic turnover of only one of the undertakings concerned exceeded €5 million and where the worldwide combined turnover of the other undertakings concerned did not exceed €30 million. A merger must be notified in any case if: the combined worldwide turnover of all undertakings concerned exceeded €300 million, the combined Austrian turnover of all undertakings concerned exceeded €15 million, the value of consideration exceeds €200 million and the target is active in Austria to a significant extent. It is possible to file a pre-merger notification even prior to the signing of the relevant agreement, provided that the parties have, in principle, agreed on the structure and timing of the transaction, and intend to enter into this agreement in the foreseeable future. There is no filing deadline but mergers subject to merger control must not be completed before clearance.
Clearance deadlines (Phase I/Phase II)	Phase I: four weeks from filing (six weeks in the case of extension upon request by the notifying party). Phase II: five months from receipt by the Cartel Court of a request of Phase II proceedings (six months in the case of extension upon request by the notifying party).
Substantive test for clearance	Whether the merger will create or strengthen a dominant market position or otherwise lead to a significant impediment to effective competition.

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Quick Reference Table	
Penalties	The Cartel Court can impose on each party that has intentionally or negligently violated the standstill obligation a fine of up to 10 per cent of the worldwide turnover achieved by that party in the previous 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 apply for media mergers regarding the calculation of turnover and the substantive test for clearance. Special rules also apply for the 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 Federal Competition Authority and the Federal Cartel Prosecutor having a right to appeal against court decisions), long-stop dates need to be carefully considered in (potentially) problematic cases.

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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) 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 ensuring well-functioning 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 the recommendation is not binding, the FCA has to publish a reasoned statement on its website if it does not intend to follow the recommendation.

An amendment to the ACA entered into force in September 2021. The amendment brought about substantial changes to the Austrian merger control regime, in particular by introducing a new turnover threshold, which applies to mergers notified after 31 December 2021.

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 another undertaking, especially by merger or conversion;
- the acquisition of rights by one undertaking in the business of another undertaking by means of operational lease or management agreements;
- the direct or indirect acquisition of shares in one undertaking by another undertaking if, as a result, the participation held after the acquisition is or exceeds 25 per cent or 50 per cent (in terms of capital or voting rights) (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 dominant influence over another undertaking; and
- the establishment of a full-function joint venture.

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 provisions.

Bank exemption - Section 19 ACA

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 relevant 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 (ie, 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 provisions. 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 merger proceedings.

Leading commentators nevertheless argue that the coordinative effects of a joint venture will 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 matter.

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'. 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 in accordance with 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;

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:

1. the combined worldwide turnover of all the undertakings concerned exceeded €300 million;
2. the combined Austrian turnover of all the undertakings concerned exceeded €30 million;
3. the individual Austrian turnover of at least two of the undertakings concerned each exceeded €1 million; and
4. the individual worldwide turnover of at least two of the undertakings concerned each exceeded €5 million.

The second domestic turnover threshold (ie, point (3)) was introduced in September 2021 by way of an amendment to the ACA. It applies to all transactions notified after 31 December 2021.

A concentration that meets these thresholds is still exempt from the notification obligation if:

- only one undertaking concerned generated sales in excess of €5 million in Austria; and
- the other undertaking concerned generated worldwide turnover of less than €30 million.

A notification threshold based on transaction value came into force in late 2017, under which 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 the consideration exceeds €200 million; and
- the target is active in Austria to a significant extent.

This threshold is intended to catch transactions involving early-stage technology targets with a high purchase price despite low turnover, but it applies to all sectors. The number of transactions that are being notified under the transaction value threshold is not insignificant (eg, 26 out of a total of 340 notifications in 2022). In a position paper on competition law and digital challenges, the FCA stated in 2020 that most concentrations notified under this threshold have not been transactions that were intended to be captured (ie, concentrations in digital markets).

In light of the practical uncertainties regarding this threshold, in 2018, the FCA published a joint guidance paper with the German Federal Cartel Office on the transaction-value based threshold (which was introduced in a very similar fashion in Germany), which was updated in 2022. 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, the local nexus of domestic activity, market relevance and significance. Domestic activity is generally not measured on the basis of domestic turnover but rather various indicators such as production facilities, branches, sales forces, research and development activities or (regarding the digital economy) numbers of monthly active users.

The regulators and courts apply a broad interpretation and confirm that indirect users can also be relevant for the assessment. For example, the Austrian Cartel Court, in its decision of 22 July 2021 on Facebook's acquisition of Giphy (28 Kt 6/21y), concluded that Giphy's digital services, which are commonly integrated into third-party platforms and used by customers or users via those third-party platforms (including in Austria) constitute a (significant) domestic activity on behalf of the target.

For the transaction value threshold to be met, the level of activity in Austria has to be significant. Based on its guidance paper, the FCA will generally find that there is no significant domestic activity if the Austrian turnover of a target is below €1 million (this was increased from an initial €500,000 to the current level of €1 million in the 2022 update to the FCA's guidance paper), provided that this turnover adequately reflects the market position and competitive potential of the target company.

However, not all cases in which the target has generated more than €1 million automatically trigger a filing requirement under the transaction value threshold. The FCA has emphasised that this requires a case-by-case assessment, taking into account a number of factors such as local customer relationships.

Significant domestic activity may also be assumed if the target has a market share of above 10 per cent in any relevant market in Austria (see Cartel Court, 27 Kt 9/21g *Salesforce/Tableau*, decision of 22 April 2021; also reflected in the FCA's updated guidance paper). The FCA encourages companies and their advisers to contact the statutory parties and discuss the application of this filing threshold in case of doubt. While not mandatory, pre-notification contact can be an option in this context to clarify any queries that the statutory parties may have in relation to the notifiability of a transaction.

Even where the original thresholds (see points (1) to (4) above) 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 exemption).

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 an upstream or downstream shareholding of at least 25 per cent). From a geographic point of view, the FCA allocates turnover in accordance with the principles applied by the European Commission. In 2020, a gun-jumping fine was imposed in a case where the acquirer incorrectly attributed turnover to the billing address (in Germany) but not to the place of delivery (in Austria), which resulted in the acquirer wrongly concluding that the thresholds had not been met.

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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, in recent years the Cartel Court has imposed a (comparatively low) fine for the violation of the statutory standstill obligation in cases 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. In such a case, a media merger may, under the Austrian merger control regime, only be assessed in respect of whether it will impair media diversity, as permitted by article 21(4) of the EUMR. For instance, in December 2022, an Italian media company notified a merger to gain de facto sole control of the media company ProSiebenSat.1 Media SE. Having concerns regarding media diversity within Austria, the FCA made a request before the Cartel Court to examine the notification (in-depth review). The transaction was ultimately cleared subject to behavioural remedies specifically aimed at remedying these concerns with respect to media diversity in Austria.

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

If a transaction constitutes a concentration within the meaning of the ACA and exceeds the notification thresholds, filing is mandatory. However, even if the thresholds are technically exceeded, no notification is required if a merger cannot have any effects whatsoever on the Austrian market.

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

Foreign-to-foreign mergers are subject to Austrian merger control if the turnover of the undertakings concerned exceeds the turnover thresholds and the transaction does not qualify for the de minimis exception. The previously very broad reach of the Austrian merger control regime was narrowed with the introduction of a second domestic turnover threshold in 2021; therefore, a filing requirement is not triggered in most cases where the target does not generate turnover in Austria.

However, even without Austrian target turnover, a filing requirement can still be triggered, such as in joint venture cases (if a local nexus cannot be excluded based on the joint venture's relevant market) or cases that come in under the transaction value threshold.

In addition to the new domestic turnover threshold, certain limits to the broad reach of Austrian merger control have been recognised in case law. The Austrian Supreme Court has held that merely indirect effects on competition in the domestic market were insufficient to trigger Austrian merger control. According to the Supreme Court, a transaction is not notifiable if the foreign target company neither actually nor potentially (ie, in the foreseeable future) provides services in Austria. Three caveats are, however, in order:

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

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

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

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

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

Following a worldwide trend towards tightened regulatory frameworks for investment control, and to implement the EU foreign investment control cooperation mechanism in Regulation (EU) 2019/452 on foreign direct investment, Austria has adopted a foreign investment control regime that significantly widens the scope of foreign investment review rules. Authorisation from the Austrian Minister of Labour and Economy is required if there is indirect or direct acquisition of:

- 10, 25 or 50 per cent of voting rights (staggered approval model where approval is needed each time one of those thresholds is exceeded);
- a controlling interest irrespective of specific shares of voting rights; or
- a controlling interest in a substantial amount of the assets of the undertaking in an Austrian business by a non-EU, European Economic Area (EEA) or Swiss investor if the target is active in a sector considered sensitive from a foreign direct investment perspective.

The sensitive sectors are split into two groups. The first group includes:

- defence equipment and technologies;
- the operation of critical energy infrastructure;
- the operation of critical digital infrastructure (including 5G);
- water;
- data sovereignty systems; and
- research and development with regard to pharmaceuticals, vaccines, medical devices and personal protective equipment.

Any investment by non-EU, EEA or Swiss investors in these sectors exceeding 10 per cent would trigger an approval requirement.

The second group includes:

- critical infrastructure (energy, IT, telecommunications, etc);
- critical technologies (AI, robotics, semiconductors, cybersecurity, etc);
- critical resources (food, pharmaceuticals, etc); and
- sensitive data.

Investments by non-EU, EEA or Swiss investors in these sectors exceeding 25 per cent would trigger an approval requirement.

Approval must be obtained immediately after signing the transaction. The regulator must decide within a month of the deadline provided by the European cooperation mechanism (which typically ends one-and-a-half months after submission of the application) whether the application is approved or rejected or whether in-depth investigations should be started (the start of in-depth investigations may extend the proceedings for another two months).

In its assessment, the Ministry of Labour and Economy considers whether:

- an investment could pose a threat to security or public policy;
- the purchaser is a state-owned entity, or is otherwise controlled or financed by a third country; and
- the purchaser has been involved in activities that could pose a threat to security or public policy in another EU member state, or is or has been involved in illegal or criminal activities.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

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

In complex cases (especially where the need for remedies may already be anticipated by the notifying parties), it can also be helpful for the parties to engage in pre-notification discussions with the statutory parties (the Federal Competition Authority (FCA) and the Federal Cartel Prosecutor (FCP)) prior to formal filing. Likewise, in the telecommunications sector, it is advisable to engage in pre-notification discussions and provide the statutory parties with regulatory data at an early stage in Phase I. The FCA has published guidelines regarding

pre-notification procedures ('Guidance on pre-notification procedures in merger control (2023)').

In the proceedings regarding the acquisition of Tele2 Austria, a provider of fixed-line telecommunications services, by Hutchison Drei Austria, one of the major Austrian mobile telecommunications operators, the parties reached out to the statutory parties at an early stage of the transaction process, engaging in pre-notification contacts to discuss the scope of information and data required. The case showed that clearance within the four-week Phase I window can be obtained even in complex cases if the parties actively engage with the statutory parties.

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, although it is usually the acquirer that files the notification. Joint notifications with the target are permissible but rare in practice. The Supreme Cartel Court has explicitly held that the seller is not competent to submit a merger control filing.

In Phase I proceedings, there is a fixed filing fee of €6,000. 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 for expert opinions ranged between €150,000 and €300,000).

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

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

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

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

Pre-clearance closing

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

The implementation of a transaction that is subject to merger control is void if it is closed before clearance. The same applies to the underlying agreement.

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 violated the standstill obligation a fine of up to 10 per cent of the worldwide turnover achieved by that party in the previous business year.

The statutory parties pursue a zero-tolerance policy in relation to infringements of the standstill obligation and request fines in every case. In a settlement decision in August 2021, the Cartel Court imposed a fine of €9.6 million on Meta (Facebook) for not having notified its acquisition of Giphy in 2020. A filing requirement was only considered to be triggered in this case because the FCA and the Cartel Court found the target to be active in Austria to a significant extent (solely based on its indirect customer base in Austria), so it met the transaction-value based filing threshold (but not the traditional turnover-based thresholds).

The second-highest fine imposed by the Cartel Court for violation of the standstill obligation to date was €1.5 million (*Lenzing/Tencel*). Fines in other cases have been significantly lower, typically ranging between €30,000 and €200,000.

In a recent judgment concerning food retailer REWE's failure to notify its acquisition (by way of a long-term lease) of a new supermarket location, the Austrian Supreme Court partially overruled the Cartel Court's ruling and approved the authority's strict approach towards fines for failure to notify. In particular, the Supreme Court stated that difficulties in obtaining accurate turnover data cannot justify a decision not to file a (potentially) notifiable transaction (ie, companies should rather err on the side of caution and submit a precautionary filing in case of doubt as to whether the turnover thresholds are met). The Supreme Court also confirmed that 'a fine must reach such an amount that it is noticeable and expresses that the failure to notify concentrations in Austria is not a trivial offence', ie, 'quasi symbolic' fines are not sufficient.

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

Sanctions for violating the standstill obligation through the early implementation of a notifiable transaction are also applied in foreign-to-foreign cases. The highest fine to date for failure to notify (€9.6 million) was imposed in a foreign-to-foreign case.

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

In principle, any structural or behavioural remedy is acceptable under Austrian law, including local hold-separate agreements. However, given the lack of precedent decisions by the

Supreme Court in this area, it is unclear which solutions would be considered sufficient by the Austrian authorities.

Public takeovers

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

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

Documentation

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

The merger control notification must contain precise and comprehensive information on all factual aspects that are relevant for the assessment of whether the transaction is notifiable and whether the transaction could give rise to the creation or strengthening of a dominant position or a significant impediment to effective competition (SIEC), 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 Austrian Cartel Act 2005 (ACA);
- the turnover (by volume and value) achieved by these undertakings in the previous business year (to be provided separately for each relevant product or service market);
- if a filing requirement is (only) triggered under the transaction value test, information confirming this assessment (eg, the transaction value and, where relevant, a description and valuation of the various price elements that make this up), as well as detailed information on the significance of the target's domestic activities – simply referring to the target's Austrian turnover may not always be sufficient;
- the market shares of these undertakings in each relevant product or service market;
- information on general market conditions;
- in the case of a media concentration, precise and comprehensive information on other factors that could impair media plurality; and
- if there are affected markets, internal documents on the transaction prepared by the parties and internal documents that could be relevant for assessing the affected markets (similar to 5.4 documents in EU cases).

The FCA publishes a form for merger notifications on its website. The use of this form is not compulsory but is strongly recommended by the statutory parties. As at April 2024, this form was last updated in October 2020 and does not yet reflect the amendments to the ACA that entered into force in September 2021, which led to significant changes to the Austrian merger control regime. These changes particularly relate to:

- the introduction of a second domestic turnover threshold;
- the introduction of a SIEC test (in addition to the traditional dominance test);

- the introduction of additional grounds for justification to clear mergers that create or strengthen a dominant position or lead to a SIEC (section 12, paragraph 2 of the ACA); and
- an increase of the filing fee from €3,500 to €6,000.

Although these changes are not yet reflected in the filing form on the FCA's website, they need to be covered in the notification (to the extent relevant to the specific case).

In 2016, the Cartel Court fined an applicant €750,000 for providing inaccurate and misleading statements in the notification, which resulted in an incorrect description of the proposed transaction (the transaction actually constituted another type of concentration). The Cartel Court also held that a very high standard of care was required when preparing merger control notifications.

Recent experience suggests that a thorough analysis of the filing structure itself is advisable in cases where transactions consist of various acquisition steps (in some cases, a joint filing may be required, whereas in others separate filings may be possible or required). In the absence of specific legislation, the Austrian authorities will take into account the European Commission's Jurisdictional Notice when assessing such issues.

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. This summary contains the names of the parties, a brief description of the type of the concentration (eg, merger or 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 (competitors and customers, in particular) may submit written comments to the statutory parties. Third parties do not have procedural rights and cannot challenge a clearance decision.

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

The Competition Commission, an independent advisory body, may recommend that the FCA request a Phase II review of the merger from the Cartel Court. The recommendation must be issued within three weeks of the filing of the notification. If either of the statutory parties 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 to six 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 through 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 on the Ediktsdatei electronic database, which is 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 (€6,000) has been paid.

Early clearance is possible if the transaction clearly does not raise competition concerns. However, this procedural option is rarely used, and the parties and their advisers should generally expect the case to take the full four-week review period. Early clearance will be granted in exceptional circumstances and requires that both statutory parties waive their right to apply for an in-depth review of the transaction to the Cartel Court. The earliest that 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 the request being made (if both statutory parties issue such requests, the date of the first request is decisive). After the expiry of the five-month period (without a final decision) or, before that, after withdrawal of the requests by the statutory party or parties, the Cartel Court must close its review proceedings and the standstill obligation is lifted. The notifying party may apply for a one-month extension of the five-month period. According to the applicable 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 by 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 or a significant impediment to effective competition (SIEC). The SIEC test, which was introduced to Austrian merger control in 2021, does not replace the traditional dominance test (unlike at the European level, both exist in parallel as alternative tests). If a

merger is found to create or strengthen a dominant position, it can be prohibited without the Cartel Court having to conduct a SIEC test.

An undertaking will be considered to be dominant under the Austrian Cartel Act 2005 (ACA) if it faces no or only insignificant competition, or if it is in a superior market position in respect of its competitors, customers or suppliers. The ACA provides for a number of rebuttable presumptions of dominance. The concept of collective dominance was formally introduced to the ACA through a 2013 amendment.

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.

There have not yet been any cases on the application of the SIEC test in Austria. According to the Austrian legislator, the test is meant to catch exceptional cases where a merger, although not creating or strengthening a dominant position, significantly impedes competition (eg, this may be the case where the second- and third-largest undertakings in a given market merge). It can be assumed that the Federal Competition Authority (FCA) and the Cartel Court will largely apply the same principles as the European Commission when conducting a SIEC test.

A concentration leading to the creation or the strengthening of a dominant position or to a SIEC will be prohibited unless:

- there is an improvement of competitive conditions that outweighs the disadvantages of market dominance;
- the concentration is necessary to preserve or enhance the international competitiveness of the undertakings involved and is justified by national economic considerations; or
- the positive effects of the concentration on the national economy significantly outweigh its negative effects on competition.

The latter criterion was introduced in 2021. According to the Austrian legislator, positive effects on the national economy may relate to factors such as economic growth, innovation, full employment, or an increase in prosperity or a sustainable improvement in the quality of life for Austrian citizens.

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A concentration that otherwise does not meet the requirements for clearance may be cleared by the Cartel Court subject to conditions and obligations. Media mergers are subject to a specific public interest regime (see article 21(4) of the EU Merger Regulation (EUMR)). Media mergers that meet the EUMR thresholds will be assessed by the Austrian authorities in respect of their effect on media plurality.

The ACA 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 created or strengthened (or the concentration, while not creating or strengthening a dominant position, might still lead to a SIEC).

Overall, merger control practice in recent years has shown that the statutory parties also tend to scrutinise the 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 between the parties' businesses).

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 or (alternatively) to a SIEC. Within the scope of these tests, the statutory parties may rely on a number of theories of harm (eg, vertical foreclosure, conglomerate effects and collective dominance) to prove that a dominant position would be created or strengthened by the concentration or that the concentration would lead to a SIEC. The FCA has also raised the issue of existing structural links enhancing coordination between the acquirer and a competitor of the target.

Notwithstanding the above, 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 that has 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.

Moreover, the 2021 amendment to the ACA introduced a new provision according to which a merger that would otherwise have to be prohibited may be cleared if its positive effects on

the national economy significantly outweigh its negative effects on competition (eg, in terms of economic growth, innovation or full employment).

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 that gives rise to the creation or strengthening of a dominant position (or to a SIEC) provided that there is:

- an improvement of competitive conditions that outweighs the disadvantages of market dominance;
- the concentration is necessary to preserve or enhance the international competitiveness of the undertakings involved and is justified by national economic considerations; or
- the positive effects of the concentration on the national economy significantly outweigh its negative effects on competition (eg, in terms of economic growth, innovation, full employment, or increased prosperity or sustainable improvements in the quality of life for Austrian citizens).

Under all elements of this provision, the Cartel Court must take account of economic efficiencies. However, to date, 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 or a significant impediment to effective competition but does not lead to an improvement of competitive conditions that could outweigh the disadvantages of market dominance;
- is not necessary to preserve or enhance the international competitiveness of the undertakings involved and is not justified by national economic considerations; or
- does not have positive effects on the national economy that significantly outweigh its negative effects on competition and the remedies offered by the parties are not sufficient to alleviate competition concerns.

Even after a transaction is cleared, 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 by 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 previous business year in cases of:

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

Remedies and conditions

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

According to the Austrian Cartel Act 2005 (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 on 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 previous business year.

There are no firm rules on the types 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 shown a marked increase in recent years, although behavioural remedies still play the primary role in practice. Further, different types of remedies may be combined to fully remove competition concerns.

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

In 2023 and the first quarter of 2024, five cases were cleared subject to remedies:

In *MFE/ProSiebenSat1 (P7S1)*, the Austrian authorities (only) assessed the effects of the transaction on media diversity given that the transaction was notifiable at European level (ie, the European Commission had jurisdiction to review the case for its effects on competition and unconditionally cleared the transaction in September 2023). After a previous notification had been withdrawn, the parties re-filed in Austria in late 2023 and the transaction was cleared in Phase I in early 2024 subject to behavioural remedies to address concerns regarding media diversity in Austria. Most notably, MFE committed to (i) keep the focus of P7S1-Austria on local content and news; (ii) maintain the independence of the management

and chief editorship of P7S1-Austria; (iii) maintain a separate budget and advertising revenue streams for P7S1-Austria; and (iv) keep the headquarters and administration of P7S1-Austria in Austria.

In *Wienerberger/Terreal*, the Cartel Court imposed remedies in Phase II to ensure that the South-East Europe Business of Terreal (including Austria), which was carved out and not acquired by Wienerberger, became/remained a viable competitor in Austria. These included, among others, certain supply commitments by Wienerberger as well as commitments by Terreal to retrofit a carved-out Hungarian plant for the production of certain products for the Austrian market and equip the carved-out Austrian sales team with sufficient resources.

In *Saubermacher/Pölzleitner*, only the Federal Cartel Prosecutor (FCP) (but not the Federal Cartel Authority (FCA)) requested an in-depth review by the Cartel Court. In the course of Phase II proceedings, the parties (both active in scrap wood recycling) agreed on behavioural commitments and the FCP subsequently withdrew its request for an in-depth investigation in early 2023. The commitments included ring-fencing obligations, a temporary ban on further acquisitions in the same markets and the granting of non-discriminatory access to the parties' storage capacity to third parties.

In *ORF/RIG Radio*, behavioural remedies were imposed in Phase I to ensure non-discriminatory access to the services of the target (a technology platform for the online distribution of radio content) for third-party radio operators.

In *Dr. Oetker/Galileo*, the FCP requested Phase I remedies (while the FCA had not identified competition concerns in its Phase I investigation). Dr. Oetker committed to continue the target's private label business in Austria for four years.

In 2022, structural remedies were imposed by the Cartel Court on Metro Cash & Carry Österreich GmbH in relation to its acquisition of another wholesaler, C&C Abholgroßmärkte Gesellschaft mbH (divestment of some of the target's sites to remedy high combined local market shares in some regions). Two other cases were cleared in Phase I subject to behavioural remedies. In *Salzburger Alpenmilch/Gmundner Molkerei*, the parties (two dairies) gave certain guarantees aiming to protect dairy farmers for a term of six years (eg, purchase guarantees, protection of farmers' right to sell directly to end customers and termination rights in supply contracts to the benefit of farmers) but the transaction was ultimately abandoned. *Gmundner Molkerei/Milchwerk Jäger GmbH*, another transaction between dairies, was cleared subject to behavioural commitments similar to the ones imposed in *Salzburger Alpenmilch/Gmundner Molkerei*.

In 2021, the *Meta (Facebook)/Giphy* transaction was cleared by the Cartel Court in Phase II subject to behavioural remedies (this decision was confirmed by the Supreme Court in 2022 on appeal by the statutory parties). In particular, Meta committed to:

- ensure non-discriminatory access to Giphy's GIF database for competing social media platforms for a term of five years; and
- offer alternative GIF databases access to Giphy's GIF database for a term of seven years (subject to certain conditions) to facilitate the establishment of alternative GIF providers next to Giphy and Tenor (Google).

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

Further, according to statements by 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 for solutions based on behavioural remedies. In this context, the FCA will particularly rely on self-monitoring involving competing players in 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, are published on the FCA's website once the decision is final and binding. Non-confidential (full text) versions of the Cartel Court's decisions are published on the Ediktsdatei electronic database, which is 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 if the measures sufficiently address the competition concern identified by the statutory parties.

There is no specific time frame in which remedies may be offered and discussed. In practice, the parties may approach the statutory parties at any time before 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 early termination of the ongoing Phase II proceedings.

The statutory parties have in some cases insisted on upfront buyer solutions where divestments were necessary; that is, they wanted to approve the acquirer of the assets to be divested before withdrawing their request for a Phase II review of the merger by the Cartel Court. However, in several recent cases, the implementation of remedies was only required within a certain period starting from clearance (eg, six months). In the case of a material change of circumstances after a transaction is cleared 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 generally only very limited experience regarding remedies in foreign-to-foreign mergers. That said, the recent *Meta (Facebook)/Giphy* case was cleared by the Cartel Court in February 2022 subject to behavioural remedies. The FCA appealed, but the Supreme Court confirmed the decision of the Cartel Court, clearing the merger under conditions.

Ancillary restrictions

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

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

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

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

With regard to 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 statutory parties. 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 do not have a right to any specific treatment of their submission.

In the course of Phase II proceedings before the Cartel Court, third parties may at any time submit written comments to the court. The Austrian Cartel Act 2005, however, explicitly provides that third-party interveners do not acquire party status in the proceedings by virtue of their submission. The Supreme Cartel Court held in early 2021 that the seller does not have party status in merger proceedings.

Publicity and confidentiality

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

The FCA only publishes a short, non-confidential summary of each notification on its website. If a statutory party requests the initiation of a Phase II review of the merger by the Cartel Court, the fact that such a request has been made is also published on the FCA's website. In some cases, this publication consists of a single sentence that names the statutory party as 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.

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

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

Business secrets are generally protected by way of a restriction on third-party 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?

At the European level, the FCA is a member of the European Competition Network (ECN) and participates in 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 (eg, the FCA and the German Federal Cartel Office developed and published joint guidance on the interpretation of the transaction-value-based threshold in July 2018).

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.

In a decision in early 2021, the Supreme Court explicitly held that the seller is not entitled to appeal decisions of the Cartel Court.

Time frame

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

Appeals may be lodged within a period of four weeks as of the day on which the decision is served on the parties. The 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?

With 294 merger control filings in 2023 (slightly fewer than in 2022), the statutory parties have remained busy with merger review and significant enforcement action (eg, several fines for failure to notify have been imposed by the Cartel Court at the request of the statutory parties).

The Federal Cartel Authority (FCA) also issued a guidance paper on pre-notification procedures for merger control in February 2023, in which it specifies the circumstances in which it will usually engage in pre-notification discussions and the purpose and scope of those proceedings. Most notably:

- pre-notification discussions require the notifying parties to submit a comprehensive draft filing and to provide information on:
    - the anticipated timeline of the transaction;
        - why pre-notification is considered necessary or helpful; and

        - other competition authorities that will be competent to review the case (including, at the FCA's request, a confidentiality waiver to allow for information exchange between the FCA and other authorities);

- notifying parties should reach out early enough to allow for a meaningful pre-notification process (also considering that there is no right to a pre-notification phase and that the FCA will only engage in pre-notification subject to available capacity);
- the FCA is likely to engage in prenotification if:

    - the transaction is likely to raise competition concerns;

        - there are affected markets within the meaning of section 5 of the filing form (ie, horizontal overlaps with combined shares of greater than 15 per cent or vertical overlaps with combined upstream or downstream shares of greater than 25 per cent, or both); or
        - the transaction is likely to attract the FCA's attention for other reasons (eg, because the transaction relates to a sector that is subject to an ongoing sector inquiry or otherwise linked to an FCA focus area); and

- remedies can only be formally offered after submission of the filing, although the FCA is open to informal remedy discussions already if they would be helpful to expedite the process.

Reform proposals

35 | Are there current proposals to change the legislation?

In October 2021, an amendment to the Austrian Cartel Act 2005 (ACA) entered into force. In addition to the introduction of a second domestic turnover threshold of €1 million for at least two undertakings concerned, changes to the substantive examination of mergers were introduced.

Previously, the only substantive test was whether a dominant position was created or strengthened. This test is now complemented by the significant impediment to effective competition (SIEC) test, which exists in parallel to the dominance test.

According to the Austrian legislator, the dominance test will remain the main standard, but it is now possible to alternatively examine whether a transaction that does not lead to the creation or strengthening of a dominant position still leads to a SIEC.

Specific factors to be considered in the analysis of dominance in digital markets were introduced, including the importance of the intermediary services of the allegedly dominant undertaking for market access by other companies, access to data that is relevant for competition and network effects. There is also a separate section on relative market dominance, motivated by the intention to apply the concept of relative market dominance more often both in digital and conventional markets.

The scope to clear an otherwise anticompetitive transaction has been widened, increasing the number of grounds for this from two to three, namely if:

- it is to be expected that the concentration will also lead to improvements in the conditions of competition;
- the transaction is necessary to maintain or improve the international competitiveness of the undertakings concerned; or
- the concentration is necessary for the national economy.

In all three cases, the expected advantages must outweigh the disadvantages of the transaction.

There are currently no legislative proposals for further significant amendments to the ACA.

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 notified mergers has further decreased, from 340 in 2022 to 294 in 2023. These lower numbers compared to earlier years are largely the result of the new filing thresholds that require at least two parties with Austrian turnover (enabling the Federal Competition Authority (FCA) to manage its resources better and focus on mergers that are most relevant to Austria).

In 2023 and the first quarter of 2024, five cases have been cleared subject to (behavioural) remedies - three of them in Phase I, while *Wienerberger/Terreal* was conditionally cleared in Phase II and the Federal Cartel Prosecutor (FCP) withdrew its request in *Saubermacher/Pölzleitner* during Phase II once the parties agreed to remedies. As at April 2024, three cases are pending in Phase II at the Cartel Court. In another case - *Strabag/D+B* - the FCA and the FCP had initiated Phase II proceedings but subsequently withdrew their requests given that competition concerns could not be substantiated in Phase II.

One case in 2023 (*Adobe/Figma*) was referred by the FCA to the European Commission, which accepted the referral. Notably, the request was joined by 15 other European Economic Area member states, 14 of which did not have original jurisdiction to review the case (the 15th being Germany, where the transaction had also been filed). The case went to Phase II and has in the meantime been abandoned by the parties.

The FCA continues to vigorously pursue and fine violations of the standstill obligation. In recent years, there have been a large number of fining decisions; fines typically range between €30,000 and €200,000, but they can also be significantly higher. In 2023, the Supreme Court partially overruled the Cartel Court's ruling concerning food retailer REWE's failure to notify its acquisition of a new supermarket location and confirmed the FCA's strict approach towards fines for failure to notify. In particular, the Supreme Court stated that fines must reach an amount that is noticeable and that 'quasi symbolic' fines are not sufficient.

In 2022, the Supreme Court confirmed the Cartel Court's 2021 conditional clearance of *Meta (Facebook)/Giphy*, which had been appealed by the FCA. This transaction was noteworthy

because it was deemed notifiable in Austria only on the basis that the FCA (confirmed by the Cartel Court) considered the indirect use of Giphy's GIF database by Austrian users via third-party platforms sufficient to constitute a significant domestic activity under the transaction value test. This demonstrates that the FCA and the Cartel Court adopt a broad interpretation of the transaction value threshold and extend their enforcement focus to foreign-to-foreign cases.

The FCA's filing form was updated in 2020 and now provides that internal documents have to be submitted in cases with affected markets in every filing. The latest amendment to the Austrian Cartel Act 2005, which also brought about significant changes to the Austrian merger control regime, is not yet reflected in the filing form published on the FCA's website as at April 2024. It should be kept in mind that – to the extent relevant to the case – the new legislative framework must already be reflected in filings made to the FCA (eg, arguments in respect of why the transaction does not lead to a significant impediment to effective competition).

For complex cases, it is advisable to provide economic evidence, at least in Phase II, and potentially earlier to avoid a Phase II referral. The acquisition of Tele2 Austria by Hutchison Drei Austria is a prime example of good procedural cooperation with the statutory parties (the FCA and the FCP). This case showed that a detailed economic analysis of a transaction within the four-week Phase I window is possible if the parties contact the statutory parties at an early stage of the transaction process, engage in pre-notification discussions of the scope of information and data required, and maintain dialogue with the statutory parties throughout Phase I to swiftly provide any additional evidence required for the analysis.

The same applied in the *Comcast/Sky* case, which, because of the close cooperation regarding the statutory parties' media merger review, could be cleared unconditionally in Phase I 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 statutory parties.

In Phase II proceedings, the Cartel Court usually appoints an independent economic expert to review the evidence or conduct its own market investigations on which it will then report to the Cartel Court. It is also quite common for the FCA to send out questionnaires to market participants (eg, in *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). Despite this, third parties still have a limited role in the Austrian merger control regime, especially compared with the EU regime; in Austria, they have no procedural rights and cannot challenge a clearance decision.

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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 (Phase I/Phase II)	Phase I decisions must be adopted within 15 working days (for simplified cases) and 40 working days (for non-simplified cases). Phase II decisions must be made within an additional 60 working days. If the parties offer commitments to meet competition concerns, the Phase I review period can be extended by 15 working days and the Phase II review period 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 thereof, 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 from the preceding financial year where the notifying parties provide incorrect or incomplete information, or impede or obstruct the merger control investigation. Where parties implement the concentration without clearance, a fine of up 10 per cent of the total turnover from the preceding financial year can be imposed.
Remarks	Not applicable.

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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 (CEL) and the Royal Decree of 30 August 2013 on the notification of concentrations. On 2 May 2019, a law was adopted that replaced Book IV of the CEL in full, resulting in an update to the numbering of its articles.

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

The Authority has recently redesigned its internal organisational structure by setting up a specific merger task force with the aim of handling merger control notifications more efficiently. In addition to reviewing notifications, the merger task force will:

- support the Authority's legal service in appeals brought against merger control decisions;
- monitor concentrations notified to the European Commission; and
- contribute to merger work groups under the European Competition Network framework.

Scope of legislation

2 | What kinds of mergers are caught?

The definition of 'concentration' in Book IV of the CEL is similar to that under the European Union Merger Regulation (EUMR). A concentration occurs where:

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

3 | What types of joint ventures are caught?

The merger control provisions of Book IV of the CEL apply only to full-function joint ventures (ie, those that perform 'on a lasting basis all the functions of an autonomous economic entity'). 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 CEL (ie, the Belgian equivalent to article 101 of the Treaty on the Functioning of the European Union (TFEU)) during the merger review process.

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

Book IV of the CEL defines 'control' fairly broadly, so the acquisition of a minority shareholding can be caught in certain circumstances. As is the case under EU law, having control enables the exercise of decisive influence on an undertaking, whether by contract or otherwise. For example, in cases where outright legal control is not acquired, rights attaching to use or ownership of assets, shareholders' agreements and board representation will be considered.

In its *Belgacom SA/Vodafone Belgium SA/Belgacom Mobile SA* decision of 30 October 2006, the Authority confirmed that joint control may exist where minority shareholders have additional rights that allow them to veto decisions that are essential for the strategic commercial behaviour of the joint venture.

In its *Picanol NV/Tessenderlo Chemie NV* decision of 21 October 2013, the Authority found that Picanol NV, by purchasing 27.6 per cent of the shares in Tessenderlo Chemie NV, acquired *de facto* control over the latter 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 CEL, for the purpose of establishing jurisdiction, Belgian turnover is the total turnover during the previous financial year attributable to the Belgian national market.

The Authority seeks to align its approach regarding the geographic allocation of turnover with the practice of the European Commission. The Belgian rules for the calculation of turnover credit institutions and other financial institutions are the same as the EUMR rules (see article IV.8 of the CEL).

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 bringing about the merger.

On 22 March 2023, the Authority opened an investigation into a possible abuse of dominance by Proximus in the context of its proposed acquisition of edpnet, despite the proposed transaction not meeting the relevant jurisdictional thresholds. This followed the recent *Towercast* judgment of the Court of Justice of the EU, issued on 16 March 2023.

On 20 April 2023, the Competition Prosecutor General requested interim measures to ensure the continuity of edpnet's activities as well as its operational and commercial independence for the duration of the investigation. On 21 June 2023, the Competition College imposed

provisional measures on Proximus to halt the effects of a potential breach of competition law in relation to the acquisition of edpnet. In its decision, the Competition College considered that the Prosecutor General had proven the prima facie existence of an abuse of dominance by Proximus resulting from the takeover of edpnet. The interim measures imposed on Proximus consist of the following obligations:

- maintaining the viability and competitiveness of edpnet;
- segregating the activities of Proximus and edpnet; and
- ensuring that Proximus does not obtain any confidential information from edpnet.

Following an agreement between Proximus and Citymesh, pursuant to which Proximus divested edpnet Belgium to Citymesh, the Authority terminated the proceedings.

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

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

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

In March 2021, the Belgian legislator exempted the creation of local-regional clinical hospital networks in Belgium, and any subsequent change in their structure, from Belgian merger control rules.

On 28 March 2024, the Belgian legislator approved a general exemption excluding accredited hospital mergers from the scope of Belgian merger control rules. However, a mandatory and suspensory notification will still be required for concentrations between accredited hospitals, if at least two of the parties individually achieve a turnover of at least €250 million in Belgium and all parties achieve a combined turnover of at least €900 million in Belgium.

These laws also specify that these exemptions for hospital mergers are without prejudice to the application of the European merger control rules.

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

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

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

There are special rules applicable to investment in certain sectors – including banking, insurance and media – but these generally apply irrespective of whether the investor is foreign. Also, the works council or employees' organisation of a Belgian company must be informed

in advance of certain structural or other changes that will affect the company, including mergers and takeovers. In specific circumstances, consultation with the works council or union representatives concerning employment prospects and the organisation of work is mandatory.

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

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

On 1 July 2023, the cooperation agreement of 30 November 2022 for the establishment of a general screening mechanism for foreign direct investment in Belgium entered into force. This cooperation agreement introduces a mandatory, suspensory general foreign investment regime in Belgium. The regime captures all transactions by foreign investors signed after 1 July 2023 that meet the following materiality thresholds:

- Direct or indirect acquisitions of 10 per cent or more of the voting rights of an undertaking or entity established in Belgium that is active in the defence sector, including dual-use goods, energy, cybersecurity, electronic communication or digital infrastructure, provided that the turnover of that entity from the preceding financial year exceeded €100 million.
- Direct or indirect acquisitions of 25 per cent or more of the voting rights in Belgian entities active in the following sectors, irrespective of the size of the target or the turnover the target generates (except for investments in certain sectors, as specified below):

    - critical infrastructure (including energy, transport, water, health, electronic communications and digital infrastructures, media, data processing or storage, aviation, aerospace, defence, electoral or financial infrastructure, and sensitive facilities), as well as land and real estate critical for the use of such infrastructure;

        - technologies and raw materials that are of essential importance to:

            - safety, including health-related safety;
            - defence and public security;
            - military equipment subject to the Common Military List and national control;
            - dual-use goods; and
            - technologies of strategic importance (e.g., artificial intelligence, semiconductors, robotics, cybersecurity, aerospace, defence, energy storage, quantum technologies, nuclear technologies and nanotechnologies);

        - supply of critical inputs, including energy or raw materials and food security;
        - access to sensitive information, including personal data, or the ability to control such information;
        - private security;

- freedom and pluralism of media; and
- technologies of strategic interest in the biotech sector, provided that the turnover of the target exceeded €25 million in the previous financial year.

The cooperation agreement has created the Interfederal Screening Commission (the ISC), which assesses whether investments that meet these thresholds could have an impact on public order, national security or any other strategic interests of Belgium's federal and federated entities. As is the case in other EU member states, the regime allows the parties to negotiate remedies to address any concerns identified during the review. The ISC issued new guidelines on 4 April 2024, which provide additional clarifications on the interpretation of the new rules.

There are also specific merger control rules with regard to certain sectors:

- Credit and financial institutions: For the calculation of turnover of credit and financial institutions as well as for insurance undertakings the rules are in line with EU rules.
- Hospitals: please refer to question 1.3.2 above.

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 that 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 to 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 a delay to the review, and a 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 from 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 an acquisition of joint control. In the case of an acquisition of sole control, the acquirer alone must notify.

On 28 February 2022, a new law introduced filing fees for merger control notifications made to the Belgian Competition Authority (the Authority), effective since 17 March 2022. The filing fees amount to €52,350 for notifications under the normal, long-form procedure and €17,450 for notifications under the simplified procedure. These amounts are now automatically indexed (using the consumer price index) and may be amended from time to time by royal decree.

The filing fee is payable by the notifying parties. In the case of multiple notifying parties, the filing fee will be payable by each party in equal parts.

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

As is the case under the EU Merger Regulation (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 of the Authority.

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

An exemption from the suspension obligation was granted for the first time in 2008 when the Belgian state, through the Federal Participation and Investment Company, acquired a stake in Fortis and requested a derogation from the suspension obligation to implement a transaction aimed at rescuing a failing bank where further delay would have compromised the survival of the bank. Since then, a few derogations to the suspension obligation have been granted (eg, *Dexia Bank Group* (2011), *bpost* (2013), *Imtech* (2015), *Pluimvee Slachterij Lammens* (2019), *Maxi-Toys* (2019) and *Euronics+* (2019)).

On 17 November 2022, the Authority also granted an exemption from the suspension obligation in the *Sligro/Metro Cash & Carry* case, on the following grounds:

- Serious time constraints: without approval from the Authority, Sligro could not fully participate in the bidding process for the loss-making target.
- Level playing field between bidders: the suspension obligation would prevent Sligro from making a full bid compared to other bidders.
- Continuity: the bids were subject to conditions relating to the continuity of operations and employment of the acquired company, and the suspension obligation would ultimately lead to a discontinuation of these activities and would be a threat to the related employment.
- No serious doubts: the concentration was unlikely to raise serious doubts regarding the creation of a significant impediment to effective competition and was likely to qualify for treatment under the simplified procedure.

Most recently, in 2023, the Authority granted a partial exemption from the suspension obligation in two cases:

- First, in context of the merger between two hospitals, Centre Hospitalier Universitaire et Psychiatrique de Mons Borinage and Pole Hospitalier Jolimont, where it was granted to allow the parties to proceed with the execution of all the required deeds for the merger.
- Second, in context of the acquisition of sole control by BelOrta of Belgische Fruitveiling in order to allow BelOrta to take all actions necessary to ensure the financial and commercial strength and continuity of Belgische Fruitveiling, on the condition that the latter continues to exist as a separate entity until completion of the transaction.

Pre-clearance closing

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

If a transaction is properly notified but implemented before clearance has been obtained (gun jumping), the Competition College may impose fines not exceeding 10 per cent of total turnover and, in addition, periodic penalty payments not exceeding 5 per cent of the average daily turnover from 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, 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 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 of the Authority grants a derogation.

Public takeovers

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

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

Documentation

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

A considerable amount of detailed information (comparable to the information that is required for an EU Form CO filing) must be provided, including information concerning the parties, the relevant market or markets, details of the transaction, and the personal and financial links of the parties with other companies. The information must be provided in accordance with Form CONC C/C. Derogations in respect of 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 an official language of Belgium (French or Dutch). 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 an official language of Belgium or English, versions translated into the language of the proceedings may be requested. Notifying parties should indicate in their notification which information constitutes business secrets for such information to be treated as strictly confidential.

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

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

Investigation phases and timetable

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

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

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

usually conduct their investigation by consulting online databases and contacting suppliers, customers and competitors.

In non-simplified cases, the prosecutor is required to submit a draft decision to the president of the Authority and send copies 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 2022, all 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). It is not possible to speed up this process, but the time limits may be prolonged at the request of the parties. If the parties offer commitments, the first phase will be increased by 15 working days and the second phase by 20 working days.

The law of 2 May 2019 that modified Book IV of the Code of Economic Law left the time frames unchanged, but the prosecutor now has an extended deadline to submit its comments to the Competition College when the parties offer remedies. The amended rules also introduced the possibility for the prosecutor to stop the clock at any stage of the proceedings.

For both simplified and non-simplified cases, depending on the complexity of the case, pre-notification discussions with the Authority can last several months, which may have an impact on the clearance timetable. In 2023, the average pre-notification period for non-simplified cases was between 3.5 and 4.5 months.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test in Belgian merger control is aligned with the EU Merger Regulation, as it provides that concentrations that do not significantly impede effective competition in the Belgian market or in a substantial part thereof 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 significant impediment of effective competition (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' combined share of 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 CEL does not provide for a special substantive test for the joint ventures it governs (i.e., 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 CEL, which is the Belgian equivalent to article 101 of the TFEU.

Theories of harm

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

Under the SIEC test, the Belgian Competition Authority (the Authority) can examine the various types of harm that result from a merger (single dominance, unilateral effects, coordinated effects, conglomerate effects and vertical foreclosure).

To date, its focus has been mainly on single dominance that is based primarily on a market share analysis. Increasingly often, however, it 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 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 based purely on competition criteria, which 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 were abolished in 2013.

Economic efficiencies

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

In its assessment, the Competition College must take into account factors such as the effectiveness of actual or potential competition (whether at a national or an 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 of the relevant market in Belgium does not exceed 25 per cent.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

The Competition College may clear a transaction subject to certain conditions. If the notifying party fails to provide an acceptable remedy to address the competition concerns of the Belgian Competition Authority (the Authority), 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?

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 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 approved several concentrations subject to structural remedies, including the following:

- 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; and
- in 2016, the Authority made the merger between supermarket chains Delhaize NV and Koninklijke Ahold NV conditional upon the divestment of up to 23 stores and cleared the acquisition of Utopolis NV by Kinepolis NV subject to the divestment of two out of the four Utopolis cinemas.

In multiple cases, the Authority has been receptive to behavioural commitments rather than relying solely on structural remedies to address concerns (eg, *De Persgroep/Humo-Vitaya-Story-TeVeblad* (2015), *bpost/AMP-LS Distribution* (2016), *Telenet/Coditel Brabant* (2017), *Telenet/De Vijver Media* (2019), *Delorge/Groep Coox* (2020), *IPM/Editions de l'Avenir* (2020)).

In 2022, the Authority conditionally approved the acquisition by groups DPG Media and Rossel & Cie of joint control over RTL Belgium SA, Audiopresse SA, New Contact SA, Radio H SA, RTL BELux SA and RTL BELux SA & Cie SECS, and indirectly of IPB, Inadi SA and Cobelfra SA. The parties offered commitments with respect to the market for the sale of advertising space on national radio channels in the Flemish Community, and the market for radio programmes and broadcasting services for national radio that are freely accessible to end users in the Flemish Community. In particular, the parties agreed that RTL's subsidiary in Belgium would continue to be responsible for the sale of national advertising on radio station Nostalgie. In addition, the parties agreed to put in place information barriers to avoid the exchange of competitively sensitive information regarding Nostalgie between the advertising sales team and the programming team.

In 2023, the Authority conditionally approved the acquisition by ACE Pharmaceuticals Belgium and Febelco of Pannoc Chemie. The parties agreed to continue to supply 'Pannoc' semi-solid medical raw materials to the distributors and to continue to distribute semi-solid medical raw materials that compete with the 'Pannoc' semi-solid raw materials on fair, reasonable and non-discriminatory (FRAND) terms. Furthermore, the parties agreed to information barriers to avoid the exchange of competitively sensitive information.

In the same year, the Authority conditionally cleared the acquisition by AG Insurance of the commercial activities of Touring Club Royale de Belgique, a non-profit association. AG Insurance agreed to take concrete measures to ensure an operational and structural separation between the inspection and examination activities and its other commercial activities. In addition, AG Insurance agreed to implement information barriers, with separation of IT systems, staff and offices.

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 on or before working day 20 at the latest) to formally offer remedies. In the second phase, they have 20 working days from the opening of the second-phase investigation to do so. The notifying parties also have the possibility to anticipate any competition concerns by offering Phase Zero or

informal commitments prior to the Investigation and Prosecution Service (IPS) submitting its reasoned proposal to the Competition College (see *IPM/EDA-LAH*).

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

DPG Media and Rossel & Cie

On 12 February 2024, the Authority approved DPG Media and Rossel & Cie's request to lift the commitments entered in the context of their acquisition of joint control over RTL Belgium. As the commitments were related to the execution of an agreement, which came to an end on 31 December 2023, the Authority agreed that the commitments were without object and should therefore no longer be complied with by the notifying parties.

Bpost

On 20 July 2022, the Authority lifted two commitments imposed on bpost in 2016 when approving its acquisition of sole control over LS Distribution Benelux NV/SA and AMP NV/SA. Following bpost's recent sale of Ubiway Retail, the Authority lifted the commitments that related to the obligation not to discriminate against third parties active in press distribution services and to the procedure for selecting press outlets, both of which had become unnecessary.

Kinepolis

In February 2020, the Authority determined an 18-month transitional period terminating the commitment imposed on movie theatre company Kinepolis to notify the Authority of any organic growth. This commitment was imposed at the time of the approval of the 1997 merger leading to the creation of Kinepolis. The decision by the Authority to lift this commitment was annulled twice before, in 2018 and 2019.

Proximus

In 2015, the Authority lifted the commitments imposed on incumbent telecommunications operator Proximus (formerly Belgacom) in the context of its 2011 acquisition of Wireless Technologies BVBA and its subsidiary The Phone House (TPH). The commitments related to divestments of TPH shops and safeguarding the latter's multi-operator model for a five-year period. The commitments were lifted, as the importance of TPH shops as distribution channels for Proximus' competitors had decreased considerably, which made customer foreclosure by Proximus very unlikely. Nevertheless, 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 information barriers to protect any sensitive information available to TPH shops.

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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 Book IV of the Code of Economic Law (CEL) does not provide any explicit reference to ancillary restrictions, its approach should be the same as that under the EUMR; competition restrictions (such as non-compete clauses) agreed in connection with a concentration will be covered by the clearance decision, provided that they are directly related and necessary to the implementation of the concentration.

However, competition restrictions are not expressly covered in the decision, so the risk of incorrectly categorising them as ancillary lies with the parties. Where they are not covered by the decision, they remain subject to the usual competition rules on restrictive agreements.

The Authority confirmed this approach in its 2017 decision approving the acquisition by Brussels Airlines of Thomas Cook. Following the merger approval, the Authority opened an investigation regarding potentially anticompetitive practices resulting from certain clauses included in the commercial service agreement concluded between Brussels Airlines and Thomas Cook Belgium, of which the Authority became aware when it examined the acquisition.

On 1 July 2020, the Authority found that the relevant clauses gave rise to an infringement by object and by effect, but it decided not to impose a fine given that the problematic clauses were never implemented and that the agreement had been terminated following the bankruptcy of Thomas Cook Belgium.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

Any individual or legal entity that shows sufficient interest can intervene during the investigation. Book IV of the Code of Economic Law (CEL) allows the Belgian Competition Authority (the Authority) to consult any person it deems appropriate for the purpose of its investigation. Contact with third parties, including not only competitors and customers, but also other regulatory bodies (eg, the Belgian Institute for Postal Services and Telecommunications was consulted by the Authority and later intervened in *Proximus/Mobile Vikings*), is routinely made.

It has become standard practice in cases that give rise to potential competition concerns for the Authority to hear interested third parties (see *ACE Pharmaceuticals-Febelco/Pannoc*

Chemie, *Sligro/Metro Cash & Carry*, *Proximus/Mobile Vikings,Delorge/Coox, AVS Group GmbH/De Fero*, *Conway/Alvadis*, *Telenet/De Vijver Media* and *Ineos Oxide/RWE Generation Belgium*). In recent years, the Authority has been using online investigation tools to collect feedback from customers and competitors (eg, in *ACE Pharmaceuticals-Febelco/Pannoc Chemie*, *Sligro/Metro Cash & Carry* and *Volvo Belgium/Kant Group*).

In a judgment of 5 October 2022 ruling on interim measures in the appeal by IPM and Ads & Data against the *RTL JV/Rossel/DPG Media* decision, the Market Court clarified the rights of third parties to access certain non-confidential documents from the Authority's file. The Market Court made a distinction between the rights of third parties during the investigative phase before the Authority and the litigation phase before the Market Court.

During the administrative phase, third parties are not entitled to access the Authority's file unless the president of the Competition College decides otherwise with respect to certain parts of the designated file.

Third parties have broader access rights when appealing a decision before the Market Court. In that context, third parties have the right to access certain documents in the file if:

- access to these documents is required to ensure equality of arms between the parties, the effectiveness of the appeal and the proper exercise of its jurisdiction by the Market Court; and
- at least one plea raised by the applicants is serious and may prima facie lead to the annulment of the decision of the Authority.

Even where these conditions are met, the Market Court has a margin of discretion; such requests should be assessed on a case-by-case basis. The Market Court recently reconfirmed these principles when it ruled on third-party access in an appeal against the *ITM/Mestdagh* decision on 15 March 2023.

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 on the Authority's website.

Members of the Investigation and Prosecution Service or 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 collaborative body and the International Competition Network.

Book IV of the CEL 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 EU member states, and use in evidence information received from them.

Most recently, in *Proximus/MobileVikings*, the European Commission granted the Authority access to the confidential versions of its recent decisions in the telecommunications sector (eg, *T-Mobile NL/Tele2 NL* and *Hutchison 3G UK/Telefonica UK*) to enable the Authority to compare the price effects resulting from the concentration. Such effects had been deemed acceptable by the European Commission in those decisions.

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 (IPS) under the simplified procedure, can be appealed to the Market Court, which is a specialised chamber of the Brussels Court of Appeal. Interested third parties can appeal decisions if they had requested to intervene during the proceedings before the Competition College prior to such decisions.

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

A judgment by the Market Court can itself be reviewed on points of law and procedure only by the Supreme Court. The president of the Authority 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.

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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 (within 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 with regard to foreign-to-foreign mergers.

Mergers and acquisitions in the healthcare, financial, agri-food, energy, digital economy, and telecommunications sectors may attract particular attention from the Belgian Competition Authority (the Authority).

Reform proposals

35 Are there current proposals to change the legislation?

On 17 March 2022, a new law entered into force that introduced filing fees of €52,350 for merger control notifications under the normal procedure and €17,450 for notifications under the simplified procedure.

On 28 March 2024, the Belgian legislator approved a general exemption excluding accredited hospital mergers from the scope of Belgian merger control rules. However, a mandatory and suspensory notification will still be required for concentrations between accredited hospitals, if at least two of the parties individually achieve a turnover of at least €250 million in Belgium and all parties achieve a combined turnover of at least €900 million in Belgium. The law also specifies that this exemption for hospital mergers is without prejudice to the application of the European merger control rules.

On that same date, the Belgian legislator also designated the Authority as the competent authority in Belgium to deal with the issues related to the Digital Market Act (DMA). This will allow the Authority to be informed by the European Commission of any intended concentration by gatekeepers designated pursuant to the DMA, and the Auditor General will be authorised to open an investigation regarding the non-compliance of a gatekeeper with Articles 5, 6 and 7 of the DMA.

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UPDATE AND TRENDS

Key developments of the past year

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

Key legislative developments

On 28 March 2024, the Belgian legislator approved a general exemption excluding accredited hospital mergers from the scope of Belgian merger control rules. However, a mandatory and suspensory notification will still be required for concentrations between accredited hospitals, if at least two of the parties individually achieve a turnover of at least €250 million in Belgium and all parties achieve a combined turnover of at least €900 million in Belgium. The law also specifies that this exemption for hospital mergers is without prejudice to the application of the European merger control rules.

On that same date, the Belgian legislator also designated the Belgian Competition Authority (the Authority) as the competent authority in Belgium to deal with issues related to the Digital Market Act (DMA). This will allow the Authority to be informed by the European Commission of any intended concentration by gatekeepers designated pursuant to the DMA and authorise the Auditor General to open an investigation into the non-compliance of a gatekeeper with Articles 5, 6 and 7 of the DMA.

Merger control decisions

In 2023, the Authority adopted 35 decisions – slightly more than the 31 decisions adopted in 2022 – five of which were not cleared in a simplified review procedure, including the below. In the first four months of 2024, the Authority cleared 11 concentrations, with all but one being cleared after a simplified review procedure.

- *Sligro MFS Belgium NV/Metro Cash & Carry*. On 3 April 2023, the Authority unconditionally cleared the acquisition by Sligro of nine Metro Cash & Carry outlets after a Phase I investigation. The investigation focused in particular on the impact of the acquisition on the market for the wholesale sale of food and related non-food products for out-of-home consumption and the market for the procurement of daily consumption goods.
- *AG Insurance/Touring Club Royale de Belgique VZW-ASBL*. On 22 May 2023, the Authority conditionally cleared the acquisition by AG Insurance of the commercial activities of Touring Club Royale de Belgique, a non-profit association, after a Phase I investigation. The investigation focused on the different Belgian markets for vehicle and travel insurance, and the local markets for statutory vehicle inspection and the organisation of the statutory driver's licence examination. The Authority accepted commitments to ensure an operational and structural separation between AG Insurance's inspection and examination activities and its other commercial activities. In addition, AG Insurance agreed to implement information barriers with separation of IT systems, staff and offices.
- *ACE Pharmaceuticals Belgium BV-Febelco CV/Pannoc Chemie NV*. On 8 November 2023, the Authority conditionally cleared the acquisition by ACE Pharmaceuticals Belgium and Febelco of Pannoc Chemie, after a phase I investigation. The acquisition was referred to the Authority by the European Commission on 28 February 2023, at the request of

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the Authority, under the procedure in Article 9 of the EU Merger Regulation (EUMR). The investigation focused on the Belgian markets for the production and distribution of semi-solid medical raw materials, the full-line wholesale distribution of pharmaceutical products, and the local retail markets of pharmaceutical products. The Authority concluded that the transaction gave rise to a vertical concentration that posed risks to competition with regard to the production and distribution of semi-solid medical raw materials, but accepted commitments from the parties to alleviate its concerns. As part of the commitments, the parties agreed to continue to supply 'Pannoc' semi-solid medical raw materials to the distributors and to continue to distribute semi-solid medical raw materials that compete with the 'Pannoc' semi-solid raw materials at fair, reasonable and non-discriminatory (FRAND) terms. Furthermore, the parties agreed to information barriers to avoid the exchange of competitively sensitive information.

- *RG Safety SAS/V12 NV and Prosafco NV.* On 8 December 2023, the Authority unconditionally cleared the acquisition of sole control by RG Safety SAS of V12 and Prosafco, after a phase I investigation. The investigation focused on the different Belgian procurement and distribution markets for personal protection equipment.
- *Centre Hospitalier Universitaire et Psychiatrique de Mons Borinage SCRL/ASBL Pole Hospitalier Jolimont.* On 21 December 2023, the Authority unconditionally cleared the merger between two hospitals, Centre Hospitalier Universitaire et Psychiatrique de Mons Borinage and Pole Hospitalier Jolimont, after a phase I investigation. The investigation focused in particular on the impact of the merger on the local markets for hospitalisation and specialised ambulatory care. The decision was preceded by an interlocutory decision dated 28 June 2023 in which the Authority partially lifted the suspension obligation to allow for execution of all required deeds.
- *ITM/Mestdagh.* On 14 June 2023, the Market Court upheld the Authority's decision of 9 November 2022 in which it had unconditionally cleared the acquisition of sole control of Mestdagh by Intermarché AB (ITM), resulting in the integration of the Mestdagh supermarket network into ITM's existing network. The *ITM/Mestdagh* concentration was reviewed by the Authority after a referral by the European Commission under article 4(4) of the EUMR.

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Bosnia and Herzegovina

Naida Čustović

Wolf Theiss

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Voluntary or mandatory system?	Mandatory.
Notification trigger/ filing deadline	Signing of the applicable agreement, the announcement of a public offer of shares or an acquisition of control: 15 days.
Clearance deadlines (Phase I/Phase II)	Phase I: 30 days from the issuance of the certificate of completeness for the approval of the concentration or initiation of Phase II. Phase II: three months from the initiation of Phase II, possible extension by an additional three months.
Substantive test for clearance	Concentration resulting in the creation or strengthening of a dominant position that may restrict competition in the market.
Penalties	Failure to notify within due time: • a fine of up to 1 per cent of the total turnover of the undertakings concerned, realised in the business year preceding the concentration; and • a fine of between 5,000 and 15,000 convertible marks for the responsible individuals. Closing a concentration without obtaining prior clearance: • a fine of up to 10 per cent of the parties' total turnover in the year preceding the closing; and • a fine of between 15,000 and 50,000 convertible marks for the responsible individuals.
Remarks	Not applicable.

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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 (the Act). The Act became effective on 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 Republika Srpska) and in the Brčko District. The Act was amended in 2007 and 2009.

In addition to the Act, numerous regulations have been adopted by the Competition Council (the Council), which is the authority responsible for enforcing the Act and 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 (the Notification Regulation), and the Regulation on the Definition of Relevant Markets.

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 on 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 Bosnia and Herzegovina, and one member is appointed by the government of Republika 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.

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;
        - a group of undertakings or a part thereof through the acquisition of a majority shareholding;
        - the acquisition of a majority of voting rights; or

    - 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 Act, an agreement or any other source, 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;
- a majority of the voting rights; or
- 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, the acquisition of a minority interest that enables the holder to exercise a dominant influence over an undertaking or a group of undertakings is subject to the merger control regime.

Thresholds, triggers and approvals

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

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

1. the combined worldwide turnover of the undertakings concerned exceeds 100 million convertible marks; and
2. either:
    - the individual turnover of each of at least two undertakings concerned in Bosnia and

Herzegovina amounts to at least 8 million convertible marks; or
- 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 Notification Regulation adopted by the Council, effective as of 5 May 2010, stipulates that if the undertakings concerned have registered corporate seats in Bosnia and Herzegovina, the concentration shall be notified to the Council if the local threshold in point (2) is satisfied, regardless of whether the worldwide threshold in point (1) is also met.

The Council intended to clarify the wording of the Act with this provision; however, its interpretation has led to confusion. In particular, it was unclear whether the Council is at all competent to interpret the Act in such way in a legally binding manner and whether this provision would also have an impact on foreign-to-foreign mergers; therefore, we filed a request for clarification to the Council.

In its rather broad reply, the Council stated that if some of the undertakings concerned have their registered corporate seat outside Bosnia and Herzegovina, or some undertakings concerned have their registered corporate seat abroad but have subsidiaries in Bosnia and Herzegovina, both the local threshold in point (2) and the worldwide threshold in point (1) must be met to trigger a filing obligation. One may conclude that the 'clarification' provided by the Council in the Notification Regulation (ie, notification is required if only the local threshold in point (2) 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 the 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 a 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 a financial institution, the turnover comprises 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 comprises 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 has appeared to be unwilling to consider arguments in this 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 telecommunications provider require 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 Council, if any.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

According to the Competition Act (the Act), the Competition Council (the Council) has to be notified of an intended concentration within 15 days of the signing of the applicable agreement, the announcement of a public offer of shares or an acquisition of control, whichever of the three occurs first.

The undertakings have the option to notify the concentration 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 that was realised in the business year preceding the concentration. In addition, a fine of between 5,000 and 15,000 convertible marks may be imposed on the responsible persons within the undertakings concerned.

The fines may be imposed regardless of whether the concentration was implemented at the moment the Council learned of the concentration; therefore, fines for 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 has imposed fines for late filing in several cases ranging between 10,000 and 310,000 convertible marks. The Council may also impose fines for the implementation of a concentration before or without clearance.

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

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

An initial filing fee of 2,000 convertible marks is payable prior to the submission of the notification, and proof of payment must be submitted to the Council with the notification. In addition, a fee of 5,000 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 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 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 Council first assesses the completeness of the filing. The Act does not provide a specific time frame for this stage. In practice, it is recommended to be in contact with the Council 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 the 30-day period, the concentration is deemed to have been 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. Phase II investigations may take up to three months, meaning that the Council must issue a final decision within three months of the day of the adoption of a decision on initiating 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 before the above-mentioned deadline, the concentration is deemed to have been 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 applicable 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 convertible marks.

These fines were introduced with the amendments to the Act adopted in October 2009. Previously, there were no sanctions prescribed by the Act 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 the 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 a concentration before obtaining prior clearance from the Council. The fine amounted to 200,000 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, in three more cases, the Council imposed 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 convertible marks, respectively). In 2012, the Council did not impose any sanctions for closing before clearance.

In 2013, in one case, a fine of 656,667 convertible marks was imposed on the undertakings for late filing and closing before clearance. In this case, however, the decision of the Council was challenged by one of the undertakings concerned, and the fine was consequently substantially lowered.

In 2014, in one case, the Council imposed a fine of 26,500 convertible marks for failure to notify the concentration and closing before clearance.

In 2015, 2017, 2018 and 2019, the Council did not impose any sanctions for closing before clearance or failure to notify a concentration. In 2016, fines were imposed in two cases for failure to notify the concentrations and for implementation of the concentrations without the decision of the Council. In one case, two undertakings were sanctioned with fines of 30,000 and 7,500 convertible marks, respectively, for failure to notify the concentration, and with fines of 60,000 and 15,000 convertible marks, respectively, for implementation of the concentration without the decision of the Council.

In the second case, a fine of 10,000 convertible marks was imposed on the undertaking for failure to notify the concentration within the statutory deadline.

In 2020, the Council imposed fines in two instances:

- in the first case, four undertakings were fined for implementing the concentration without the decision of the Council in the payment platforms and other electronic services market in Bosnia and Herzegovina (the amounts of the fines are not publicly available); and
- in the second case, one undertaking was fined 20,000 convertible marks for failing to notify the concentration before the statutory deadline in the bus transportation of passengers services market in Bosnia and Herzegovina.

In 2021 and 2022, the Council did not publish any decisions on concentrations through which fines were imposed on undertakings.

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

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

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

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

Public takeovers

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

The suspension obligation does not prevent the implementation of a takeover bid of which the competent authority has been notified in accordance with the applicable 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, among other things, must 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 a detailed description of the expected benefits for customers.

The documents that must be enclosed in a notification are, among other things:

- 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 a brief reasonable explanation of 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 realised in the business year preceding the concentration. In addition, a fine of between 5,000 and 15,000 convertible marks may be imposed on the responsible persons within the undertakings concerned.

Investigation phases and timetable

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

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

Following the submission of the notification, the Council first assesses the completeness of the filing. The Act does not provide a specific time frame for this stage. In practice, it is recommended to be in contact with the Council 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 the 30-day period, the concentration is deemed to have been 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. The investigation may take up to three months, meaning that the Council must issue a final decision within three months of the day of the adoption of a decision on initiating 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 before the above-mentioned deadline, the concentration shall be deemed to have been 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 applicable public takeover bids regulations, as provided in article 18, paragraph 10 of the Act.

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

Once the Council issues a certificate of completeness, it has 30 days to decide 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 is deemed to have been 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 Council must issue a final decision within three months of the date on which the resolution authorising the Council 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 or an examination of evidence. If the Council initiates a Phase II investigation but does not issue a decision before the defined deadline, the concentration shall be deemed to have been 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 the 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 (or even longer).

The Act 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 Competition Council (the Council) will assess the effects that the intended concentration is likely to have (ie, whether the intended concentration results in the creation or

strengthening of a dominant position of one or more undertakings that may restrict competition in the market).

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

- the structure of the relevant market;
- concentration effects on other actual and potential competitors;
- the market position of the undertakings concerned and their market shares, and their 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 the EU Merger Regulation from that of the Act, 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 the parties can establish 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 Competition Council (the Council) may, in addition to monetary penalties, order the parties to sell the acquired shares or restrict the voting rights of the undertakings concerned, or order the cessation of the joint venture or any other form of acquired control that restricts competition in the market.

Remedies and conditions

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

The Competition Act (the Act) recognises structural and behavioural remedies as ways 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 Act does not regulate that aspect, and 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 Competition Council (the Council) is competent to gather information ex officio and require from the parties, as well as from third parties, additional information and documentation that the Council considers necessary or useful for an assessment of the concentration. Moreover, third parties that have a legal or economic interest in the concentration (eg, competitors) are invited to submit their observations and concerns regarding the intended concentration. This invitation is published on the Council's website and in daily newspapers.

Access to the Council's file is only granted to the parties to the proceedings. The Competition Act is not clear in respect of 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 be, among others, a person that has a right to be such a party to protect its legal interests.

In general, only the 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.

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

All other communication between the Council and the 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 member countries.

The Council also actively promotes cooperation with antitrust authorities from the surrounding 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, and the competition authorities of Turkey, Bulgaria and North Macedonia.

In the upcoming years, 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?

A Competition Council decision can be challenged in an administrative court procedure before the Court of Bosnia and Herzegovina. The claim must be brought within 30 days of 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 for up to one year, but can take longer depending on the complexity of the case.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

According to the activities report of the Competition Council (the Council) published on its website, in 2023, the Council received 16 cases relating to merger control, out of which:

- four concentrations were approved in Phase I;
- five cases were dismissed because they were deemed not to qualify as notifiable concentrations under the relevant regulations; and
- one concentration was deemed approved owing to the Council's failure to decide upon the notification before the statutory deadline.

The remaining cases have been transferred to 2024.

Reform proposals

35 Are there current proposals to change the legislation?

There are currently no proposed amendments to the Competition Act or the pertinent by-laws.

UPDATE AND TRENDS

Key developments of the past year

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

According to the activities report of the Competition Council (the Council) published on its website, in 2023, the Council was predominantly focused on cases relating to restricted competition activities, in particular abuse of dominant position and forbidden agreements. The Council received only 16 cases relating to merger control, out of which:

- four concentrations were approved in Phase I;
- five cases were dismissed because they were deemed not to qualify as notifiable concentrations under the relevant regulations; and
- one concentration was deemed approved owing to the Council's failure to decide upon the notification before the statutory deadline.

The remaining cases have been transferred to 2024.

In all proceedings, the Council mostly relied upon the market data submitted by the notifying parties in their merger notifications.

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TozziniFreire Advogados

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Voluntary or mandatory system?	Mandatory.
Notification trigger/ filing deadline	No deadline for filing, but transactions cannot be closed or implemented before clearance. Notification with the Administrative Council for Economic Defence (CADE) should preferably be made after the signing of a binding document.
Clearance deadlines (Phase I/Phase II)	Fast-track and non-fast-track cases that are not challenged by the General Superintendence do not go to CADE's Tribunal and are approved at the General Superintendence level. Complex cases that are challenged by the General Superintendence are reviewed by the General Superintendence, then sent to CADE's Tribunal for analysis and decision. Clearance time is an average of 21 days for simple cases, but can take six or more months for complex cases (up to 240 days, plus possible extensions of 60 or 90 days). In non-fast-track cases, pre-filing meetings with CADE are required.
Substantive test for clearance	Brazilian law provides for both dominance and substantial lessening of competition tests, although the former has implicitly been used more by CADE. CADE may approve transactions, despite any anticompetitive effects, if the merger results in: • an increase in productivity or competitiveness; • an increase in the quality of goods and services; and • a contribution to efficiency and technological and economic development. A relevant part of those results must be shared with consumers.
Penalties	Pecuniary penalties that may range from 60,000 to 60 million reais; the act being null and void; or administrative proceedings.
Remarks	Four new commissioners took office in December 2023 and January 2024, ending the lack of quorum that occurred in 2023. The terms of the General Superintendent and the Attorney General ended in April 2024. The General Superintendent was appointed for a second term and a new Attorney General is soon to take office.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

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

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

- the Statutes of CADE, as amended in February 2021;
- Resolution No. 33 of 2022, which regulates the notification of mergers and acquisitions, outlining economic groups, cases eligible for fast-track proceedings, required information under both the fast-track and non-fast-track proceedings, and stake acquisition rules.
- Resolution No. 12 of 2015, which establishes the rules for consultation on CADE's position on the application of merger control rules in specific cases;
- Resolution No. 17 of 2016, which outlines associative agreements of mandatory filing;
- Resolution No. 24 of 2019, which sets out procedures for gun-jumping investigations and the reporting of transactions that do not meet the threshold for mandatory reporting.

CADE includes three distinct bodies: the Tribunal, the General Superintendence (in charge of merger analysis and antitrust investigations) and the Department of Economic Studies.

The General Superintendence reviews and clears transactions that do not raise antitrust concerns and challenges other cases before the Tribunal. The Tribunal decides on the cases challenged by the General Superintendence, the Tribunal or interested third parties and regulatory agencies admitted in the procedure.

CADE has issued a series of guidelines to establish directives on issues related to competition policy in terms of merger control, including the Guidelines on Gun Jumping, the Guidelines on the Assessment of Horizontal Mergers, the Guidelines on the Assessment of Non-Horizontal Mergersand the Guidelines on Remedies, as well as further or specific procedural aspects.

Scope of legislation

2 | What kinds of mergers are caught?

Transactions that constitute a concentration act, as defined by Law No. 12,529 of 2011 (ie, mergers, acquisition of sole or shared control, certain equity and assets acquisitions, incorporations, joint ventures, consortia and associative agreements) are caught, provided that they produce effects in Brazil and meet the double turnover jurisdictional threshold.

An asset acquisition is deemed a concentration act if it involves assets considered essential to the activities of the acquiring economic group and if the transaction results in an increase in the capacity of the acquirer in the relevant market (eg, in transactions involving rural properties, purchases and sales of property for real estate incorporation).

3 What types of joint ventures are caught?

All types of joint ventures are considered concentration acts. The only exception concerns joint ventures, consortia, or associative or collaborative agreements for the specific purpose of participating in public bids.

As stated in Resolution No. 17 of 2016, an associative or collaborative agreement is considered a concentration act if it will last for at least two years and aims to create a joint enterprise to develop an 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.

Recent transactions that have been considered associative agreements include RAN-sharing agreements in the telecommunications market, joint business agreements between airline companies, vessel-sharing agreements relating to shipping lines and direct sea routes, and joint research and development, commercialisation or operation agreements in several sectors.

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

There is no firm definition of 'control'. CADE states broadly that control involves the ability to (i) establish business guidelines and direct the activities of the company; and also (ii) guide the functioning of the management and decision-making bodies of the company; for example, owing to either the possession of a majority of the equity interest or when a minority shareholder has control powers as a result of contractual arrangements (such as the ones that grant veto rights). Control can be sole or shared, and there is no set shareholding threshold below which the assumption of control is waived (a joint venture with six partners holding an equal stake of under 20 per cent was found to be under 'joint control' in Merger Review no. 08700.000256/2022-55, *Marubeni/ADM/Bunge/Cargill/COFCO/Viterra/LDC)*.

Control can also be external when exercised by a party that does not actually hold a shareholding interest in another, but has the ability to direct the development of a business, such as in franchiser-franchisee relationships (Merger Review No. 08700.000395/2019-83, *Sonic/Chilli Beans/GIF IV*) or as in a construction management agreement in the context of project finance (Merger Review No. 08700.001750/2020-75, *Petróleo Brasileiro/CDMPI Investment Co/CDMPI Holding Co*).

In addition to the acquisition of sole or shared control, the acquisition of minority and other interests is also caught by merger control if the acquisition (or successive acquisitions) adds up to:

- 5 per cent or more of the target's capital when there is a vertical or horizontal overlap between the purchaser group and the target; or
- 20 per cent when there is no overlap between the purchaser group and the target.

Shareholding acquisitions made by the sole controller do not trigger a filing obligation. CADE considers 'sole control' to mean the ability to direct the activities of a company regardless of any voting rights exercised by other shareholders, and to unilaterally guide the company's management and decision-making bodies with respect to competitively relevant matters.

Debentures and other debt securities convertible into stock trigger a filing only when conversion occurs, if the conversion is a mandatory filing transaction based on the criteria set out above. If the debentures grant the lender rights to exercise political or veto rights or to appoint members of the management or decision-making bodies of the company, then CADE needs to approve the transaction before such rights can be exercised.

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 legal thresholds for mandatory notification are:

- the turnover or volume of sales in Brazil by one of the parties is equal to or greater than 750 million Brazilian reais in the year preceding the transaction; and
- the turnover or volume of sales in Brazil by another party is equal to or greater than 75 million reais in the year preceding the transaction.

'Parties' refer to the consolidated economic groups of each of the companies involved in the transaction.

Companies that are subject to common control and companies in which any of the companies under common control have, directly or indirectly, at least 20 per cent of the voting or share capital are considered part of the same economic group.

State-owned companies are considered part of separate or autonomous economic groups, meaning that other state-held interests are not considered part of the economic group if there is no coordination with these other companies. Transactions between two separate state-owned companies are subject to normal merger control regulations.

For investment funds, the following are considered part of the same economic group (another definition for economic group applies for assessing the merits of the case):

- 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
- companies in which the fund involved in the transaction holds an interest of 20 per cent or more.

CADE can request the filing of transactions that do not reach the jurisdictional thresholds up to one year after closing.

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

Filing is mandatory whenever the transaction constitutes a concentration act, can produce any effects in Brazil and meets the double Brazilian turnover jurisdictional threshold. The only exceptions are 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.

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

Foreign-to-foreign mergers trigger a notification requirement whenever they constitute a concentration act, produce or can potentially produce effects in Brazil and the double Brazilian turnover jurisdictional threshold is met. Effects 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 de minimis exception rule.

On certain occasions, CADE has decided that it has jurisdiction over foreign-to-foreign or international transactions where a worldwide relevant market definition is possible and the economic groups are active in the directly affected or related markets in Brazil.

CADE also has, on other occasions, decided not to assess foreign-to-foreign transactions when their effects in Brazil were sufficiently demonstrated not to be concrete or plausible. An assessment of the potential effects of the envisaged transaction in the Brazilian territory is recommended whenever the parties reach turnover thresholds.

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

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

CADE and the Central Bank have a memorandum of understanding in force regulating each agency's jurisdiction in merger control cases involving the banking sector. Mergers in the banking sector must be submitted to both agencies. The Central Bank may unilaterally approve transactions, whenever prudential aspects indicate there are relevant and imminent risks to the solidity and stability of the national financial system. In this case, CADE will approve the deal without restrictions as well.

Mergers in other regulated sectors may require not only the standard merger review clearance by CADE, but also autonomous clearance by the applicable sector regulators or agencies. This may be the case for the telecommunications, insurance, oil and gas, electricity, aviation, health insurance, securities, and hydro transportation industries, for example.

CADE has cooperation agreements in place with several other government agencies, including most regulatory agencies. Cooperation between CADE and regulatory agencies has been a legal requirement since the enactment of Law No. 13,848 of 2019.

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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 transactions in which filing is mandatory cannot be closed or implemented before clearance. Failure to notify or gun jumping is subject to penalties that can include rendering the deal null and void. On 20 May 2015, the Administrative Council for Economic Defence (CADE) published gun-jumping guidelines outlining conduct that may be interpreted by CADE as gun jumping and suggesting measures to mitigate risk, such as the creation of an antitrust protocol and clean teams.

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 other anticompetitive behaviour. The parties of the transaction will be jointly liable for the payment of the fine. Failure to pay the fine will lead CADE to start proceedings for collection in a federal court.

Carve-out agreements (to hold Brazil-related assets separate and consummate the transaction elsewhere) are not acceptable under CADE's current case law.

Filing should occur preferably after the execution of a formal binding document between the parties and before the consummation of any act associated with the transaction. It should also be submitted, whenever possible, jointly by the parties participating in the transaction.

CADE has been increasingly strict in enforcing its gun-jumping regulations. In 2023, there was an increase in the number of gun-jumping rulings and most cases resulted in settlements involving payment of fines. CADE also reviews complaints by third parties about transactions that have not been filed, which includes complaints by regulatory agencies (eg, the National Petroleum, Natural Gas and Bio-Fuel Agency in Merger Review No. 08700.003028/2022-37, *3R Fazenda/Petrobras*).

In 2022, Veolia settled a gun-jumping investigation with a record 60 million reais pecuniary fine (Merger Review No. 08700.005713/2020-36, *Veolia/Engie*), after a complaint by competitor Suez.

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

All parties (including the seller) are responsible for filing (one filing per deal only) and any party can be punished for non-compliance. The flat filing fee is 85,000 reais and the receipt must be submitted at the filing date.

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

Parties cannot close transactions before clearance. Transactions carried out in over-the-counter or 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.

After the clearance decision is published, a 15-day waiting period applies during which the parties cannot close the deal.

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 penalties for gun jumping are:

- nullification and voidance of the deal;
- a penalty ranging from 60,000 to 60 million reais; and
- the launch of administrative proceedings if the deal is considered harmful to competition.

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

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

CADE will not accept carve-outs of Brazilian assets or businesses as a means of avoiding gun-jumping penalties and there have been gun-jumping investigations opened against foreign-to-foreign mergers.

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

CADE may authorise parties to close a notified transaction at least partially 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. This exception has been granted only once (Merger Review No. 08700.007756/2017-51, *Excelente BV/Rio de Janeiro Airports*).

Public takeovers

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

Public takeover bids do not require clearance before the offer is consummated, but voting rights may not be exercised by the new owner before clearance. This provision was actively enforced by CADE in 2023, when it decided that a violation occurred on the date such rights were exercised without prior clearance following a public takeover (Gun Jumping Investigation no. 08700.007096/2021-94, *HAL Investments/SBM Offshore*).

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: a simple form for transactions that are eligible for fast-track proceedings or a complete form for non-fast-track transactions. Both forms require corporate information on the parties, the economic groups to which the parties belong and the transaction itself.

In contrast to some other jurisdictions, Brazil requires the parties to a transaction 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 takes the parties considerable time to prepare.

The parties are also required to present transaction documents, annual reports, available market reports and relevant internal documents (in non-fast-track cases).

The payment receipt for CADE's fee must be submitted along with the filing form on the filing date. CADE's filing fee is the same for, and applies to, both fast-track and non-fast-track proceedings.

There are legal sanctions for supplying wrong or missing (labelled 'false or misleading') information in merger reviews to CADE, which range from 5,000 to 5 million reais in fines. If the misleading information is the basis of an approval, the applicable fine varies from 60,000 to 6 million reais and the decision can be reviewed.

CADE is becoming especially sensitive with regard to the submission of information that is central to the antitrust assessment and it has sanctioned parties on several occasions for supplying misleading or incomplete information.

Providing accurate information to CADE should be a priority even during pre-notification contacts since the same regulations apply. CADE has previously applied fines to inaccurate information presented during pre-notification contacts.

Investigation phases and timetable

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

The review starts at CADE's General Superintendence, which oversees merger investigations. Fast-track cases are reviewed by a dedicated unit.

Non-fast track cases usually follow a pre-notification procedure, in which CADE provides initial feedback on the merger filing which the parties should address before submitting the formal filing; review periods are not running at this stage. Fast-track cases are submitted directly without pre-notification procedures. Non-fast-track mergers are sent to one of CADE's other specialised units (according to the market area involved) for analysis.

The final decision on either path comes from the General Superintendence, which can approve the merger outright as it normally does for fast-track or non-fast-track cases that are not considered harmful to competition.

If the General Superintendence believes the merger cannot be cleared or needs remedies, it challenges the merger to the Tribunal; complex cases will take longer and are usually analysed by CADE's Tribunal. Mergers can also be sent to CADE's Tribunal for analysis when interested third parties (admitted by CADE) challenge CADE's clearance decision.

If the merger review is to be analysed by the Tribunal, a commissioner will be assigned to the case by draw. The commissioner may request the parties to provide further additional information. The commissioner will then prepare a report and the final vote, which is then submitted to the full Tribunal 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 with little impact on competition are subject to fast-track proceedings. Fast-track treatment is granted at CADE's discretion - for example, for mergers involving no overlaps, horizontal overlaps of less than 20 per cent or with a small market share increment (Herfindahl-Hirschman Index delta of less than 200, provided that the transaction does not generate over 50 per cent market share), and for mergers involving vertical overlaps in which none of the parties have more than 30 per cent market share in any of the vertically related markets.

The General Superintendence's decision on fast-track cases should be issued within 30 days of filing or amendment (plus 15 waiting days after the publication of the General Superintendence of CADE's approval, during which clearance can be challenged at CADE's Tribunal). Non-fast-track cases usually take longer (up to the 330-day legal limit), although the average review period is 117 days. Cases in which remedies had to be negotiated took an average of 277 days in 2023.

Providing the relevant information as completely, clearly and timely as possible, and arranging pre-notification meetings with the authorities to try to anticipate discussions with case handlers can help speed up the clearance procedure. Also, in complex cases, offering remedies earlier on in the process may be helpful.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Law No. 12,529 of 2011 contains both a dominant position test and a lessening or restriction of competition test.

CADE's Guidelines on the Assessment of Horizontal Mergers provide the main principles underlying the assessment of anticompetitive risks, while the Guidelines on the Assessment

of Non-Horizontal Mergers (the final version of which was released in April 2024) do the same for vertical and conglomerate transactions, listing potential theories of harm.

Recent case law of the Administrative Council for Economic Defence (CADE) and its Guidelines on the Assessment of Horizontal Mergers show particular concern for the loss of firms through transactions that may facilitate coordination among the remaining firms in the industry, leading to reduced output, increased prices or diminished innovation. Further, CADE recognises the principle that a reduction in the number of firms in a market increases the potential for coordinated conduct, including both overt and tacit collusion.

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

No; the same tests as those applicable to mergers apply. There is an exemption for joint ventures that aim to take 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?

CADE will investigate transactions that lead either to market dominance or to a lessening of competition. For those purposes, CADE will analyse both unilateral effects and coordinated effects.

Vertical issues are equally important in the review and remedies have already been imposed in several cases based on input/customer foreclosure, essential facility-like theories and non-price effects. CADE's Guidelines on the Assessment of Non-Horizontal Mergers also raises concerns over access to competitor information and concerns common to digital markets (ie impediments to interoperability and multi-homing, or incentives to foreclosure in digital ecosystems). CADE may even seek structural remedies in vertical cases. Occasionally, CADE might also investigate conglomerate effects.

Non-competition issues

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

As a rule, issues that are not strictly related to competition (eg, regulatory, data-related and private disputes) are only assessed for their specific and potential impacts on the antitrust review of a transaction.

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 Law No. 12,529 of 2011 with certain conditions, including evidence that the gains will also benefit consumers. Although efficiencies are regularly analysed and considered in substantially complex transactions, it is uncommon for CADE to authorise a deal based on efficiencies alone.

In CADE's opinion, efficiencies presented by the parties in merger transactions are rarely accepted because they are normally unproven, not specific to the transaction or insufficient to justify approval, or there is no evidence that the benefits of such efficiencies will be passed on to consumers.

CADE adopts rigorous standards of proof in its examination of efficiency claims, which are often scrutinised by the Department of Economic Studies.

Although efficiency claims are rarely accepted, CADE actively encourages firms to thoroughly present the transaction's rationale and justifications. These details often provide valuable insights into the transaction, thereby facilitating the review process.

CADE usually assesses 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 traditional analyses of merger control, especially in vertical mergers) to give the parties the opportunity to demonstrate that the transaction does not negatively impact competition. However, parties can present efficiencies claims from the filing of the transaction.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

The Administrative Council for Economic Defence (CADE) has very broad enforcement powers; Law No. 12,529 of 2011 expressly allows it to take whatever measures deemed necessary to remedy damages caused by a transaction, including the dissolution or break-up of a company. CADE can, and has in the past, ordered consummated transactions to be unwound or suspended. 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.

CADE has the authority to negotiate or impose remedies in complex deals or transactions reviewed under non-fast-track proceedings. Remedies have usually been negotiated between CADE and the parties, and unilateral impositions of restrictions on deals by CADE are rare.

CADE can request the filing of transactions that do not fulfil the jurisdictional thresholds up to one year after closing.

Remedies and conditions

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

CADE tends to attempt, whenever possible, to remedy specific competition problems rather than blocking a whole deal. Divestment and behavioural commitments have been adopted

that are tailored to the characteristics of the markets affected (eg, by targeting brands, production facilities and distribution networks).

CADE tends to favour structural remedies owing to their liquidity (as indicated in 2018 its Guidelines on Remedies). For more complex cases, fix-it-first-type solutions may be preferred and may lead to faster outcomes. CADE's practice shows that remedies negotiated by CADE may be behavioural, particularly in vertical mergers, although remedy discussions always occur on a case-by-case basis. Behavioural remedies may include objective pricing criteria, transparent commercial policies and prohibitions against imposing exclusivity clauses, discriminatory conditions or tying and bundling strategies.

If CADE ultimately decides that remedies have not been complied with, it can order a deal to be undone. This has happened on a few exceptional occasions.

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

Remedies must address the competition problems raised by the deal and be proportional, timely, feasible and verifiable.

CADE is usually concerned with the effects of the remedies on consumers rather than on competitors.

Timing will depend on the specific remedy being adopted by the authorities, but offering remedies earlier on in the process in complex cases may increase the likelihood of successfully negotiating remedies with CADE.

CADE may receive proposals for remedies from the parties from the moment of filing up to 30 days after the General Superintendence challenges the transaction at CADE's Tribunal.

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

Recently, the constitution of a foreign-to-foreign joint venture (Merger Review No. 08700.004293/2022-32, *BASF/BMW/Henkel/Mercedes-Benz/Bosch/SAP/Schaeffler/Siemens/T-Systems/Volkswagen/ZF*) was blocked by CADE's Tribunal, since the parties did not comply in due time with the unilateral conditions and remedies imposed by CADE's Tribunal. This was the first foreign-to-foreign case that involved remedies and was ultimately blocked by CADE.

Ancillary restrictions

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

Clearance decisions routinely include non-compete provisions, which are accepted by CADE when limited to the scope of the relevant market and limited to a five-year term. CADE also accepts non-compete provisions for shareholders for the duration of a joint venture.

CADE has frequently ordered the parties, even in foreign-to-foreign mergers, to change their original agreement if a non-compete or exclusivity clause provides for a longer period, or covers a broader market or territory.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

Clients, suppliers and competitors are often involved in non-fast-track cases, voluntarily or upon being summoned by the authorities. Third parties can present submissions, request meetings with officials or even challenge the clearance made by the General Superintendence of the Administrative Council for Economic Defence (CADE) if they are accepted in the procedure.

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, a summary of the notification is published in the Official Gazette, including the names of the parties, to invite comments from anyone. The parties to the transaction and third parties can require confidential treatment of certain information, but the remaining files are public and can be accessed on CADE's website.

If relevant business information, such as business secrets, is requested during the review, the parties may request restricted access to, or confidential treatment of, that information. The decision is published in the Official Gazette.

For merger reviews that reach CADE's Tribunal, the decision is taken in an open public session streamed in real time on CADE's website.

Cross-border regulatory cooperation

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

CADE has cooperation agreements with several jurisdictions and frequently cooperates with other jurisdictions (provided that a waiver is given by the parties), including Mercosur countries (specifically, Argentina, Uruguay and Paraguay), Chile, Peru, Ecuador, Colombia, Costa Rica, Mexico, the United States, Canada, the European Union, Portugal, the United Kingdom, the Netherlands, Poland, Italy, Türkiye, Israel, Egypt, Mozambique, the United Arab Emirates, South Africa, BRICS countries (specifically, China, Russia, India and South Africa), South Korea and Japan. CADE has also signed similar agreements with the Inter-American Development Bank and the World Bank Group.

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In 2019, the Organisation for Economic Co-operation and Development accepted Brazil's application for membership as an associate member of the entity's Competition Committee. CADE also plays a prominent role in other international forums, such as the ICN (International Competition Network), UNCTAD and BRICS. In 2024, CADE hosted the 23rd ICN Annual Conference in Brazil.

Cooperation with other agencies happens more often in higher profile cross-border merger cases, including for remedies discussions. Standard procedure at CADE requires the parties to grant an express and formal waiver so the case may be discussed with other agencies.

JUDICIAL REVIEW

Available avenues

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

Administrative appeals against the decisions of the Administrative Council for Economic Defence (CADE) are submitted to the same panel of commissioners, as it is a one-tier agency within the public administration. Decisions are rarely changed in the administrative arena unless there is evidence of a new fact or document that could result in a more favourable decision.

Parties always have the right to go to court to challenge a CADE decision. The Constitution provides for the judicial review of administrative acts. If the capacity of the courts to go over procedural aspects is unlimited, the extent to which they can review the merits of CADE decisions remains unclear and will only be decided by the judiciary itself as more appeals reach the higher courts in the next few years.

Time frame

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

Judicial review begins with a court of first instance and may ascend to the Supreme Court. A final judicial decision on an administrative act may take several years, but an injunction suspending the effects of a CADE decision may be obtained in a few weeks. This will tend to be a crucial judicial battle; if the appealing parties do not get an injunction suspending a CADE order immediately, they will have to comply with it first and wait for years until a final judicial decision is issued.

The number of court challenges to CADE decisions on merger cases is still low but, in some high-profile cases, parties have been 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?

The enforcement practice of the Administrative Council for Economic Defence (CADE) in merger reviews has remained stable in the recent past. CADE has enforced its jurisdiction by imposing restrictions on mergers in several markets (recently, the food, transportation, telecommunication and natural gas markets).

Transactions related to digital platforms have recently been in CADE's spotlight. The authority recently determined that the purchase of travel miles broker MaxMilhas by competitor 123Milhas should be submitted to CADE even though the parties did not meet the mandatory notification thresholds.

Reform proposals

35 Are there current proposals to change the legislation?

No.

UPDATE AND TRENDS

Key developments of the past year

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

Merger activity remains relatively stable, with 594 merger filings submitted to the Administrative Council for Economic Defence (CADE) in 2023 (a 10 per cent decrease from 2022, which had been a record year), with an average review period of 21.5 days (significantly down from the 2022 average of 33 days). High-profile cases in 2023 have included the constitution of a joint venture to develop sustainability measurement standards, in which CADE undertook an analysis of how cooperation for sustainability purposes and traditional antitrust merger analysis may be made compatible (Merger Review no. 08700.009905/2022-83, *SustainIt/Cargill/LDC/ADM)*.

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Bulgaria

Adriana Bakalova and **Peter Petrov**
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Voluntary or mandatory system?	Mandatory.
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 (Phase I/Phase II)	Phase I: five working days for preliminary control plus 25 working days, which starts counting on the day following the initiation of the case (with the possibility to extend by up to 20 working days). Phase II: 90 working days (with the possibility to extend by up to 40 working days). Information requests stop the clock. The deadlines are instructive.
Substantive test for clearance	Significant impediment to effective competition (SIEC) test, in particular as a result of the creation or strengthening of a single or collective dominant position. Clearance is possible despite a SIEC, in particular as a result of the creation or strengthening of a single or collective dominant position, 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.
Remarks	Not applicable.

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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), is entrusted with enforcing merger control rules under national law. It has issued a standard notification form (adopted by Decision No. 384 dated 19 December 2019, updated by Decision No. 603 dated 10 June 2021) and guidance on its completion, which are available on the Commission's website.

Scope of legislation

2 | What kinds of mergers are caught?

Under the PCA, a merger (concentration) among undertakings is:

- a lasting change of control that results from the legal merger or amalgamation of two or more previously independent undertakings; or
- where one or more persons who originally control 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 provisions. 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 or a short-term lease of a business. Conditional transactions (such as those related to put and call options) are also generally not considered to cause concentrations upon their entry, but rather upon the fulfilment of the relevant conditions. A different conclusion may be drawn where there is no uncertainty on the completion of the relevant condition and the consummation of the transaction is, in fact, just a matter of time.

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 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 of 'undertaking' in this context.

Similarly to other jurisdictions, transactions where credit and other financial institutions or insurance undertakings, which deal in securities on their 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 that 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 concentrations.

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. 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, use of all or part of its assets, or rights – including on the basis of an agreement – that 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 that joint control is not present otherwise.

Joint control results from the ability of several independent parents to jointly 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 thresholds are met, provided, however, that the concentration is not subject to notification and clearance by the European Commission under the EU Merger Regulation. The thresholds are 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 exceeded 25 million levs; and
- either:
  - the aggregate annual turnover of each of at least two of the participating undertakings in the concentration in the territory of Bulgaria during the preceding financial year exceeded 3 million levs; or
    - the aggregate annual turnover in the territory of Bulgaria during the preceding financial year of the undertakings subject to acquisition exceeded 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 to notify such transactions on a voluntary basis if in doubt. 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 this 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 that the Bulgarian notification threshold has been exceeded.

No exceptions to the mandatory filing obligation are currently available.

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

Foreign-to-foreign mergers have to be notified where the thresholds for notification are met. In this respect, there is no distinction between foreign-to-foreign and purely local mergers. The fact that the Bulgarian jurisdictional thresholds are met has been considered sufficient by the Commission to assert jurisdiction irrespective of any local effects or nexus considerations. Such considerations, the Commission has held, are relevant to the assessment of the concentration as part of the merger control proceedings, but not to the obligation to notify.

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

At the beginning of March 2024, a general foreign direct investment screening regime was introduced in Bulgaria in accordance with the EU FDI Screening Regulation 2019/452. The local screening regime requires prior notification and approval of foreign investments that trigger certain minimum thresholds (€2,000,000 or 10 per cent of the capital of the target) and are made in designated sectors of national security interest. Specific rules apply to government investors, whose investments may need to be notified in advance, even when below the thresholds (except for some low-risk countries enjoying preferential treatment). Certain foreign investments may also be reviewed ex officio, irrespective of whether the statutory thresholds are met. There are also possibilities for ex post screening of already completed investments. The regime is expected to fully come into effect within the six months following the enactment of the primary legislation, when the secondary regulation is expected to be issued.

In addition, there are parallel sector-specific restrictions on foreign investments in the real estate sector, and investments and activities by offshore companies and their affiliates. However, neither the general foreign investment screening regime, nor the sector-specific restrictions factor into 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 factual and legal actions to implement the transaction, the parties would be well advised to submit

their filing sufficiently in advance to allow the decision of the Commission on Protection of Competition (the Commission) to be issued in time.

As there is no filing deadline, there are no sanctions related to late filing.

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 preceding financial year would apply where a clearance decision is issued. This fee is capped at 60,000 levs.

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

Where notification is mandatory, implementation of the transaction must be suspended prior to clearance. The suspension does not apply in the case of a tender offer or a series of transactions in securities admitted to trading in regulated markets of financial instruments, by which control is acquired from different sellers, provided that the Commission is notified without delay and the acquirer does not exercise the rights attached to the securities, except to the extent necessary to protect the value of the investment made.

After submission of the notification, the Commission has five working days to review the filing to assess whether it is complete. If the Commission considers the filing complete, the chair 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 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 proposals for changes to the concentration.

Where, during the Phase I proceedings, the Commission has come to the conclusion that the concentration raises serious concerns that, as a result of its implementation, effective competition in the relevant market will be significantly impeded (in particular as a result of

the creation or strengthening of dominant position), it may initiate an in-depth (Phase II) investigation into the case.

The Phase II investigation must be completed within 90 business days of the publication in the Commission's online electronic register of the decision to open the Phase II investigation. In complex cases, this period can be extended by up to an additional 25 working days. In the 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 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 carving out 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 on 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 in respect of Bulgaria until the Commission has issued its decision.

The Commission does not have the authority to waive the standstill obligation neither of its own initiative nor at the request of the parties.

Public takeovers

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

In the case of public takeover bids 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 that the acquirer of control does not exercise the voting rights attached to the securities, except where necessary to protect the value of the investment. In this context, notification without delay would normally mean that the

notification should be submitted as soon as possible and, in any case, before the actual acquisition of control has taken place.

Planned concentrations should normally be notified after the publication of the bid, but may occasionally be notified before that if the parties can demonstrate a good faith intention to make such a bid. It must be underlined, however, that no exception to the notice publication requirement has been provided for such cases.

Documentation

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

The notification must contain information on:

- the undertakings concerned and their groups;
- the nature of the concentration;
- 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 main competitors, suppliers and customers; and
- the parties' views on why the transaction will not lead to a significant impediment to effective competition, in particular as a result of the creation or strengthening of a dominant position in any relevant market.

Usually, documents evidencing the corporate existence of the parties are attached to the notification, the transaction documents giving rise to the change of control on a lasting basis, the annual reports of the undertakings concerned, a power of attorney, organisational charts of the parties' groups, a draft public notice on the transaction and various other documents that reflect the parties' positions in the relevant markets before the concentration.

A significantly higher level of detail is required in respect of significantly affected markets, which arise if there is:

- a horizontal overlap leading to a combined market share of 15 per cent or more; or
- a vertical overlap or conglomerate effects raising an individual or combined share of 25 per cent or more in any affected product markets.

Less detailed information is required for markets that are not considered significantly affected.

Investigation phases and timetable

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

After submission of the filing, the Commission's administration will review the notification and attachments and, where they are complete, the chair 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 Commission's website (a draft of which is provided by the parties to the merger control proceedings).

During the proceedings, the Commission often sends questionnaires to the parties as well as to their major competitors, suppliers and customers who, in addition to providing information, are invited to express their views concerning the merger. This specifically refers to cases where significantly affected markets arise.

At this stage or with the notification, the parties can offer remedies to address specific competition concerns that arise out of the transaction.

After the Phase I review, the Commission will issue a decision by which it:

1. declares that the transaction does not constitute a concentration or does not fall within the scope of the mandatory notification obligation;
2. clears the transaction unconditionally;
3. clears the transaction subject to conditions and obligations; or
4. initiates in-depth (Phase II) proceedings on the case.

The decision under point (4) 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 a Phase II investigation follow a similar pattern to those under Phase I proceedings. Interested third parties can submit observations within 30 days of publication of the decision opening the Phase II investigation on the Commission's website.

At the end of the review, the Commission will either issue an unconditional clearance or adopt a statement of objections addressed to the notifying party or parties.

The parties will have 14 days or more to respond to the statement of objections and access the file. After they submit their response, they also have the right to be heard in an open sitting of the Commission, which can take place no sooner than two weeks after the expiry of the deadline for the submission of the response.

At the end of the Phase II investigation, the Commission will issue a decision by which it:

- approves the transaction unconditionally;
- approves the transaction subject to conditions and obligations; or
- prohibits the transaction.

Where the transaction is approved subject to conditions and obligations, the Commission may appoint a monitoring trustee to oversee their implementation.

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

In practice, most mergers are reviewed within the 25-working-day review period prescribed by the Protection of Competition Act (PCA) for Phase I (accelerated) proceedings. The

Commission rarely shortens its review and also rarely extends it beyond it by any significant amount of time. It may shorten it in some straightforward cases raising no competition concerns (eg, given the parties' negligible market shares, lack of or very minor horizontal and/ or vertical overlaps). However, it takes additional time, after the adoption of the Commission's decision, for the parties to be notified.

In almost all cases, the Commission makes use of its ability to request additional information during the preliminary review process (after submission of notification), which extends the period for initiation of the case itself and the deadlines for the decision.

In Phase II proceedings, in most cases, the Commission has issued its decision sooner than the expiry of the 90-working-day period prescribed by the PCA.

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 in 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 a significant impediment to effective competition (SIEC), in particular as a result of the creation or strengthening of a single or collective dominant position.

The Commission on Protection of Competition (the Commission) may clear a concentration that may impede effective competition, including one that may lead to the creation or strengthening of dominance, where it aims to modernise the relevant economic activity, improve the structures of the market and better meet the interests of consumers and where overall the positive effects would outweigh any negative effects on competition in the relevant markets.

Following the conversion to the SIEC test in February 2021, the primary focus of the Commission's analysis is the loss of competition that is expected to result from the transaction and to what extent it can affect the proper functioning of the competitive process in the relevant markets. The Protection of Competition Act contains a specific list of factors that the Commission may take into account in its assessment. These include:

- market structure;
- the economic and financial strength of the undertakings concerned;
- buyer power;
- available alternative sources of supply and demand;
- technical and economic progress providing benefits to consumers;
- trends in supply and demand;
- consumer interests;
- barriers to market entry; and

- any other relevant circumstances.

Although some of those additional factors appear to imply assessment criteria that are external to a strictly competitive analysis, they must be read in conjunction with the merger test itself.

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

No, the SIEC test also applies to joint ventures.

Theories of harm

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

Previously the Commission's analysis was essentially focused on dominance and, by extension, any horizontal or vertical non-coordinated effects that would arise as a result of the transaction to the extent that these are a direct result of the creation or strengthening of a dominant position. Conglomerate issues and coordinated effects have rarely, if at all, featured in the reasoning of the Commission's decisions.

Following the introduction of the SIEC test, dominance remains the primary focus of the Commission's analysis. This is also the primary theory of harm under the SIEC test; however, this test allows intervention in the rare cases where effective competition is significantly impeded, even where dominance is not created or strengthened.

This has been confirmed by recent judgments, which underlined the fact that, in certain cases, the Commission should explore SIECs other than as a result of the creation or strengthening of dominance. While the courts provided fairly broad guidance on this topic, they noted that the Commission should take into account all circumstances of each case and explore the impact on competition of the overall change in market structure resulting from the concentration. It is yet to be seen what theories of harm, if any, the Commission will explore in this context.

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 of mergers except where such non-competition issues constitute positive effects of the transaction, which have to be considered on balance with any factors impeding competition as a result of the transaction.

Economic efficiencies

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

Economic efficiencies are considered only to a limited extent; normally, the analysis is focused on the possible harm to competition as a result of the transaction and ways to address this.

Only once they have been addressed or mitigated to a significant extent can any efficiencies come into play to finalise the Commission's overall assessment. Where serious competition issues arise, efficiencies alone have never been sufficient to tip the balance between prohibiting and clearing the transaction.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

The Commission on Protection of Competition (the Commission) has the power to prohibit a concentration. It also has the power to clear the transaction subject to conditions and obligations. The conditions and obligations should correspond to the proposals for changes to the concentration offered by the parties. The Commission can offer guidance to the parties in this respect by pointing out the issues they need to address in their remedies offer.

Where a notifiable concentration was completed in contravention of a prohibition decision or without clearance, where it finds that the transaction should have been prohibited or cleared subject to conditions and obligations, in addition to imposing any sanctions, the Commission can impose any measures it deems necessary to restore effective competition in the relevant markets, including separation of capital, shares or assets and termination of joint control.

The Commission may withdraw its clearance decision where it is based on incomplete, incorrect, untrue or misleading information, or where the parties have failed to comply with the conditions and obligations attached to the clearance decision aimed at preserving effective competition and limiting its negative impact on the market concerned.

Commission decisions may also be revoked by the courts. The first instance court for judicial review of Commission decisions is the Administrative Court of Sofia District. Its decisions are subject to cassation review by the Supreme Administrative Court.

Remedies and conditions

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

The parties are free to offer any remedies, behavioural or structural, that they consider capable of addressing any competition issues that may arise as a result of the merger.

Taking into account the specific details of each case, the Commission only approves proposals (structural or behavioural, or both) made by the parties that it deems the most efficient for preserving the competition environment in the markets concerned.

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 the rules for approving measures to safeguard competition in the case of concentrations between undertakings, which are adopted by the Commission considering the implications from the introduction of the significant impediment of effective competition test.

Where accepted, the remedies become binding on the notifying party as conditions and obligations attached to the clearance decision. The obligations usually have a specific deadline by which they need to be fulfilled, but there are also cases where open-ended obligations have been adopted.

The Commission has the power to control the fulfilment of the conditions and obligations, with a corresponding obligation of the parties to inform the Commission about the performance of its decision. It may appoint a monitoring trustee to help supervise the remedies imposed. Where the parties have failed to comply, the Commission may impose sanctions on 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; 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 the European Commission's practice closely with regard to 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 that they are deemed directly related and necessary to the implementation of the concentration. Where the Commission is seised 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 involved in the review process by being invited to provide their position on the transaction, along with any specific information and documents that the case handlers deem necessary, where the transaction gives rise to significantly affected markets.

Unless they are constituted as parties or interested third parties in the proceedings, such customers and competitors would not normally have access to the file.

However, where they have a legal interest, they can appeal the final decision of the Commission on Protection of Competition (the Commission) in the framework of a judicial review.

Publicity and confidentiality

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

Shortly following the opening of the proceedings on the case, a brief notice of the notified transaction is published on the Commission's website. This notice is drafted by the parties and attached to the notification, but may be amended by the Commission before it is published; therefore, the parties must expect that the transaction will become public shortly after they have submitted the merger notification to the Commission.

Documents containing commercial and other secrets must be noted accordingly (by placing a stamp or written note that the document is confidential on each page) at the time of their submission to the Commission. 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 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 them not to be confidential if necessary to prove an infringement or for the 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 a judicial review.

Cross-border regulatory cooperation

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

The Commission is a member of the European Competition Network (ECN) – the information-sharing network of all competition authorities in the European Union. In the ECN, the

Commission actively cooperates with other authorities, particularly on multi-jurisdictional merger filings. Cooperation may be limited to exchanging information or extend to sharing views on the scope of relevant markets, the effect that the particular concentration may have on 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 an information exchange within the ECN.

The Commission has also entered into bilateral memorandums on cooperation with the competition authorities of Azerbaijan, Albania, Bosnia and Herzegovina, Croatia, Cyprus, Kosovo, Moldova, Montenegro, North Macedonia, 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 the United Nations Conference on Trade and Development, and certain other international initiatives.

JUDICIAL REVIEW

Available avenues

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

All decisions of the Commission on Protection of Competition (the Commission) that end 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 a judicial review.

Time frame

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

The time frame for submitting an appeal is 14 days, which, for the parties to the proceedings, starts at the moment they are notified of the decision and, for third parties, at the moment the decision is published on the Commission's website.

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. Although the review periods vary depending on the complexity of the case and the workload of the relevant court at the time, normally proceedings on a case are completed 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 Protection of Competition Act or the Commission's ruling, unless the relevant court explicitly orders the suspension of its implementation.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

The Commission on Protection of Competition 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 foreign-to-foreign mergers.

Another notable recent development has been the imposition of fines for failure to supply complete and non-misleading information during the merger review process. This development follows similar cases at the EU level.

Reform proposals

35 Are there current proposals to change the legislation?

Currently, there are no proposals to amend the merger control legislation in Bulgaria.

UPDATE AND TRENDS

Key developments of the past year

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

The change of the merger test has been the most fundamental reform of Bulgarian merger control in the past few years. The Commission on Protection of Competition has recently been moving towards a mature and economics-based approach to merger control, where clearly non-problematic mergers are allocated fewer enforcement resources, and potentially problematic cases are reviewed in much greater detail.

There has been increasing appetite for challenges to merger decisions by competitors under judicial review. The courts have seized the opportunity to comment on the application of the new merger test in these cases. Case law is bound to develop further over the next few years.

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Voluntary or mandatory system?	Notification is mandatory for transactions that exceed certain thresholds. In addition, the Competition Act's substantive jurisdiction extends to mergers of any size that have an effect on the Canadian marketplace.
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 (Phase I/Phase II)	A mandatory 30-day no-close period is triggered by submission of a notification. If the Commissioner of Competition 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 the 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.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

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

In Canada, the federal Competition Act (the Act) establishes jurisdiction for the review of mergers affecting markets in Canada. The Act is enforced by the Commissioner of Competition (the Commissioner), who is appointed by the Federal Cabinet, typically for a five-year renewable term. The Commissioner is supported by the Competition Bureau (the Bureau), an independent law enforcement agency within the federal Department of Innovation, Science and Economic Development.

The Commissioner and, by extension, the Bureau have broad powers to investigate, evaluate and, where appropriate, challenge mergers. Should the parties to a merger not be prepared to remedy competitive concerns identified by the Bureau, the Commissioner can apply to the Competition Tribunal (the Tribunal) for a remedial order.

The Tribunal, created by the Competition Tribunal Act (the Tribunal Act), is a specialised adjudicative body composed of judicial members and business and economic experts. The Tribunal is the forum of first instance for any merger challenged by the Commissioner. While the Tribunal Act requires that the Tribunal conduct its hearings 'as informally and expeditiously as the circumstances and considerations of fairness permit', the Tribunal operates with many of the procedures of an ordinary court. Proceedings take a number of months – often up to a year or even more – to complete, although the recent *Rogers/Shaw* merger case was heard through to appeal within nine months of the case being filed.

The Investment Canada Act applies whenever a non-Canadian, directly or indirectly, establishes or acquires control of a Canadian business, regardless of whether it was previously owned by Canadians or other non-Canadians. A non-Canadian acquirer must either file an application for review or a post-closing notification of the investment (depending on the size of the transaction) unless a specific exemption applies. The Investment Canada Act also has national security provisions, which can apply to minority investments and to investments in entities with Canadian operations that do not meet the definition of a business.

Scope of legislation

2 | What kinds of mergers are caught?

All mergers that have a sufficient Canadian nexus (ie, a real and substantial connection to Canada), regardless of size, are subject to the substantive jurisdiction of the Act, and therefore to potential investigation and evaluation by the Commissioner and possible referral to the Tribunal. The definition of 'merger' is broad and includes the acquisition of control or a significant interest in the business of another person; however, the Act's pre-merger notification regime is of more limited scope.

Part IX of the Act creates five broad categories of transactions that are subject to pre-merger notification if they meet certain party and transaction size thresholds. These are:

- asset acquisitions;
- share acquisitions;
- acquisitions of an interest in an unincorporated combination;
- amalgamations; and
- the formation of unincorporated combinations.

There is also an anti-avoidance provision that includes a requirement to notify transactions that are 'designed to avoid' the notification provisions (section 113.1 of the Act).

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 an asset acquisition, or a corporate amalgamation.

There are exemptions for joint ventures that meet certain conditions. There are also provisions in the Act that address competitor agreements even if they do not constitute mergers, which may apply to joint ventures.

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

The Act contains an unambiguous 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 – or 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' (section 110(2) of the Act) (other than in the ordinary course), of shares yielding cumulative ownership of more than 20 per cent of the voting shares of a public company (or more than 50 per cent if the acquirer already owns 20 per cent or more before the proposed transaction) or of more than 35 per cent of the voting shares of a private company (or more than 50 per cent if 35 per cent or more was owned before the proposed transaction) is sufficient to trigger a notification obligation, provided that the other criteria are met. There are similar thresholds for acquisitions of interests in combinations.

Additionally, minority interests lesser than outright control may be caught by the substantive (as opposed to notification) provisions of the Act because, under the Act, a merger includes any transaction by which a party acquires a significant interest in the business of another person. The term '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 in 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 unambiguous thresholds designed to give certainty to merging parties regarding filing obligations.

The transaction must involve an operating business in Canada (ie, there must be employees that regularly report for work within Canada in relation to the business) as opposed to merely a passive investment; however, in the Commissioner's view, the employees may be those of an agent or contractor.

The obligation to notify is also contingent on the satisfaction of both a party-size threshold and a transaction- or acquiree-size threshold.

Party-size threshold

The parties to the transaction, together with their worldwide affiliates (defined generally as 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 (ie, domestic sales plus exports and imports) in excess of C$400 million in the most recently completed fiscal year.

For share acquisitions, the acquiring corporation and the acquired corporation (rather than the vendors of the shares) are deemed to be the parties to the transaction.

In the case of the acquisition of an interest in a combination, the parties are the person or persons who propose to acquire the interest and the combination whose interest is to be acquired. A vendor that owns more than 50 per cent of the shares in a corporation, or the interests in a combination, to be acquired would be included in the party-size threshold calculation as an affiliate of the entity being acquired.

Transaction-size threshold

The transaction-size threshold (sometimes referred to as the acquiree-size threshold) is based on the book value of assets in Canada of the entity that is the subject (target) of the transaction, or of the assets that are themselves the subject of the transaction, or the gross revenues generated from those assets (domestic plus export sales). For 2024, the threshold

(for assets or revenues) remained at C$93 million – the same level as the prior three years – as a result of a ministerial decision not to follow the established policy of adjusting in line with changes to the GDP. There is currently a proposed amendment before Parliament that will also include within that transaction-size threshold (C$93 million) the value of sales into Canada generated by the assets to be acquired. Consequently, sales in, from or into Canada generated by the assets to be acquired will count for the transaction-size, as well as the party-size, threshold.

If the underlying party-size and transaction-size thresholds are met, the acquisition of more than 20 per cent of the voting shares of a public company (more than 50 per cent if the acquirer already owned 20 per cent or more before the proposed transaction) or more than 35 per cent of the voting shares of a private company (more than 50 per cent if 35 per cent or more was owned before the proposed transaction) will trigger a notification obligation.

Similarly, a proposed acquisition of an interest in a combination of two or more persons to carry on business other than through a corporation (eg, a partnership) is also notifiable if the party-size and transaction-size thresholds are met, and if it will result in the acquiring party and its affiliates being entitled to more than 35 per cent (or more than 50 per cent if the entitlement was already 35 per cent) of the profits of the combination or of its assets on dissolution.

Similar, but more complex, thresholds apply to amalgamations.

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

Notification is mandatory for transactions that exceed the party-size and transaction-size thresholds. A narrow exemption exists for asset securitisations that meet certain criteria. There are also other exceptions of limited scope (such as transactions involving affiliated entities).

Parties occasionally notify voluntarily (eg, by applying for an advance ruling certificate), where a transaction falls below the notification thresholds, if there is significant concern about the competitive impact of a transaction. Doing so allows the parties to seek confirmation from the Commissioner as to whether he or she will challenge the merger.

If a non-notifiable merger comes to the Bureau's attention from other sources (eg, marketplace complaints or market surveillance by the Bureau's Merger Intelligence and Notification Unit), a notification is not required, but the Bureau may request or compel the production of relevant information to carry out an assessment under the substantive merger provisions of the Act.

The Bureau gathers intelligence to identify and review below-threshold, potentially anticompetitive transactions. A number of below-threshold transactions have been reviewed in depth since June 2019, including one that resulted in a divestiture. Transactions may be challenged by the Bureau for up to one year after closing. There is currently a proposed amendment before Parliament that would extend that one-year limitation period to three years, in the case of transactions that were not subject to advance notification.

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 over mergers; thus, mergers may be subject to substantive review under the Act even if they occur outside Canada if competitive effects from the transaction will be experienced within Canada, although the ability to obtain relief may depend on the parties' other connections to the jurisdiction. The competitive effects of primary interest are the impacts on customers – or in some cases suppliers – located in Canada. Such effects could arise in relation to current or future sales into Canada when one or both merging parties are located outside Canada.

Foreign-to-foreign transactions are subject to pre-merger notification if the financial thresholds for notification are exceeded and the target has an operating business in Canada. (The asset value branches of the thresholds focus only on assets in Canada; however, the revenue branches of the thresholds include exports in addition to domestic sales and, in the case of the party-size threshold - and soon the transaction-size threshold – imports as well.)

For example, the acquisition of more than 20 per cent of the shares of a foreign public corporation that has a subsidiary that carries on an operating business in Canada would trigger a notification obligation if the subsidiary's assets or revenues exceed the transaction-size threshold, and the parties and their affiliates collectively have assets or revenues exceeding the party-size threshold.

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

The Investment Canada Act applies whenever a non-Canadian directly or indirectly acquires control of a Canadian business, regardless of whether it was owned before the acquisition by Canadians or by non-Canadians. If the transaction exceeds a certain size threshold, it will require advance approval and, if it is below that threshold, the purchaser must file a notification of the investment, unless a specific exemption applies in either case.

The Investment Canada Act's provisions with respect to national security also apply to transactions both above and below the thresholds, to acquisitions of interests lesser than controlling interests and to acquisitions of entities with Canadian operations that do not meet the definition of a business.

There are a number of financial thresholds that determine whether a transaction is subject to review and approval or merely requires notification (notification can be given either before or after closing) under the Investment Canada Act. The applicable financial threshold turns on, among other things:

- whether the acquirer is a state-owned enterprise (SOE); or
- whether the target is currently owned or to be acquired by an investor from:
    - a World Trade Organization (WTO) country; or
        - a country with which Canada has entered into a trade agreement (a Trade Agreement Investor).

A Trade Agreement Investor is:

- an entity controlled by citizens of states that are party to the Comprehensive Economic and Trade Agreement between Canada and the European Union;
- an entity controlled by citizens of states that are party to (and have ratified) the Comprehensive and Progressive Agreement for Trans-Pacific Partnership; or
- an entity controlled by citizens of states that are party to the Agreement between the United States of America, the United Mexican States, and Canada, as well as citizens of Chile, Colombia, Honduras, Panama, Peru, South Korea and the United Kingdom.

There is a separate (lower) threshold applicable to firms controlled by WTO investors, which are entities controlled by citizens of WTO member states. There are also alternate thresholds that apply if the investor is an SOE, as well as separate and very low thresholds that apply where the Canadian business being acquired engages in cultural activities (eg, those involving books, magazines, film, television, audio or video recordings, or radio or television broadcasting).

The threshold test changed, for non-SOE WTO investors, from an asset value test to an enterprise value test in 2015. As of 2024, 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 in excess of C$1.326 billion.

Further, as of 2023, 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 in excess of C$1.989 billion. Both the WTO investor threshold and the Trade Agreement Investor threshold typically undergo annual adjustments each January or February, based on changes to the GDP.

Where the investment involves the acquisition of publicly traded shares, the 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, the 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, the 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$528 million. This threshold also typically undergoes an annual adjustment towards the beginning of each year.

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 (except on national security grounds), regardless of size.

Where the Canadian business engages in any of the activities of a cultural business, or if both the investor and the vendor are not WTO investors, the applicable thresholds for direct and indirect investments are assets with a book value in Canada of C$5 million or C$50 million, respectively.

If the transaction is subject to review, an application for review is made to the Investment Review Division of the federal Department of Innovation, Science and Economic Development (or the Department of Canadian Heritage, where the merger involves 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 Minister of Innovation, Science and Industry 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 in Canada may be considered, including employment, investment, productivity, research and development, 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 Act reviews (in cases subject to an Act review). In addition, the Bureau provides input into the Investment Canada Act review process with respect to a transaction's effects on competition, in addition to completing its own review. Very few transactions are rejected under the Investment Canada Act net benefit to Canada test, but it is typical for investors to provide undertakings to the government to confirm that the net benefit test will be fulfilled.

An acquisition of control of a Canadian business by a non-Canadian that falls below the thresholds for review under the Investment Canada Act does not require an application for review. However, there are proposals currently before Parliament that would permit the government to require net benefit reviews of transactions involving SOE investors, even if the transaction falls beneath the relevant size thresholds, unless the SOE involved is a Trade Agreement Investor.

Even where the transaction falls below the approved thresholds, however, it must still be notified by way of a filing with the Investment Review Division of the Department of Innovation, Science and Economic Development (or the Department of Canadian Heritage for cultural cases).

Notifications may be submitted by the acquirer any time before or up to 30 days after consummation of the transaction. If the transaction is in the cultural sector, a review may then be ordered (regardless of the asset value) by the federal Cabinet within 21 days of receipt of the notification.

The Investment Canada Act also establishes a national security review regime, under which transactions can be reviewed regardless of the size of the business or transaction, the nationality of the acquirer (except Canadians), whether the transaction involves an acquisition of control or of a minority interest, or whether the transaction has closed. In addition, acquisitions of entities with Canadian operations that do not rise to the level of being a business in Canada can nevertheless be reviewed under this regime.

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In December 2016, the Canadian government published its Guidelines on the National Security Review of Investments (the National Security Guidelines), which were subsequently revised in March 2021. They set out the types of investments that may trigger national security reviews. Factors that the government considers in determining whether to review an investment for national security reasons include:

- the potential for injury to Canada's defence capabilities;
- transfer of sensitive technology or know-how outside Canada – sensitive technologies can include (but are not necessarily limited to), advanced materials and manufacturing, advanced ocean technologies, advanced sensing and surveillance, advanced weapons, aerospace, artificial intelligence, biotechnology, energy generation, storage and transmission, medical technology, neurotechnology and human-machine integration, next-generation computing and digital infrastructure, positioning, navigation and timing technologies, quantum science, robotics and autonomous systems and space technology;
- enabling foreign surveillance or espionage;
- the investment to hinder current or future intelligence or law enforcement operations;
- injury to Canada's international interests;
- facilitation of organised crime;
- provision of access to sensitive personal data that could be leveraged to harm Canada's national security through its exploitation (sensitive personal data includes personally identifiable health or genetic data, biometric data, financial data, communications data, geolocation data, and personal data concerning government officials, including members of the military or intelligence community);
- the access to research regarding manufacturing or selling goods or technology that may be needed for Canada's national defence;
- impact on the supply of critical goods and services to Canadians;
- impact on, or business involvement with, critical minerals and critical supply chains (comprising minerals that are essential for renewable energy and clean technology applications, including batteries, permanent magnets, solar panels and wind turbines, and minerals used for advanced manufacturing supply chains, including defence and security technologies, consumer electronics, agriculture, medical applications and critical infrastructure); and
- impact on Canada's critical infrastructure, which includes energy and utilities, finance, food, transportation, government, information and communication technology, health, water, safety and manufacturing.

The National Security Guidelines emphasise that all investments by SOEs and by investors subject to the influence of SOEs will be subject to enhanced scrutiny related to potential national security concerns.

In October 2022 the government adopted the Critical Minerals Policy, which provides that investments by SOEs would be given particularly careful screening and will be found to be of net benefit to Canada only in exceptional circumstances.

Between fiscal year 2019 and fiscal year 2023 59 transactions were subject to full-scale national security reviews. 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 near a Canadian Space Agency facility. One transaction has been blocked because the geo-mapping assets at issue were sensitive on a national security basis.

In late 2020, a Chinese acquisition of a Canadian mining company with a mine site on the North-West Passage was prohibited.

In late 2022, three investments by Chinese companies in Canadian firms engaged in lithium mining both inside and outside Canada were challenged, and the investors were required to divest their interests in the companies.

There are proposals currently before Parliament that will require investors to file advance notice of transactions in specific, but not yet specified, sectors, to permit advance national security reviews in such cases.

In addition to the general reviews under the Act and, if applicable, the Investment Canada Act, there are sector-specific ownership limits and review regimes in areas such as financial services, transportation, broadcasting and telecommunications.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

The Competition Act (the Act) does not set out deadlines for filing. The timing for submission of a filing is a decision of the parties; however, a transaction that is notifiable may not be completed until the waiting period in the Act has expired.

Failure to comply with the pre-merger notification requirements in the Act is a criminal offence, with possible fines of up to C$50,000 as well as the possibility of civil penalties of up to C$10,000 per day. The Competition Bureau (the Bureau) monitors financial press accounts of transactions and may also be made aware of transactions through competitor, customer or supplier complaints.

There have been no convictions or penalties imposed for failure to notify (other than agreements to implement compliance programmes).

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

All parties to the transaction have filing obligations. Where the transaction involves the acquisition of a business combination, the obligations lie with the purchaser and target. In the case of asset acquisitions, the vendor has the filing obligation along with the purchaser.

The filing fee for a notification is currently C$86,358.76 and adjusted annually based on inflation measures. 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-calendar-day no-close waiting period from the day the filing is certified complete (usually the same day as the filing by the last of the parties occurs). In hostile or unsolicited takeover bids, the 30-day waiting period begins on the date that the bidder's filing is certified as complete.

The Commissioner may, within the initial 30-day waiting period, issue a supplementary information request (SIR) (similar to a US second request), requiring the parties to submit additional information that the Commissioner believes to be relevant to the assessment of the proposed transaction.

When the Commissioner issues a SIR, a second 30-calendar-day waiting period restarts when both parties submit complete responses to the SIR (except in the context of hostile or unsolicited takeover bids, where the waiting period restarts once the Commissioner receives the certified complete SIR response from the purchaser).

Consummation of the transaction is not permitted during the waiting periods. The Act provides for early termination of either waiting period by the Commissioner. This can be expected to occur if the review has been completed but not when the review is ongoing.

If the parties proceed by way of an application for an advance ruling certificate instead of filings, there is not a fixed timeline. The no-close period effectively runs until the Commissioner has either issued such a certificate or provided a no-action letter confirming the Commissioner's lack of intention, at that time, to make an application under section 92 of the Act in respect of the proposed transaction, together with a waiver of the filing requirements.

In complex cases, reviews may extend beyond the statutory waiting periods. In those cases, the Commissioner sometimes requests that the parties refrain from closing their transaction until the review is complete or seeks undertakings from the parties that they will not close the transaction without providing the Commissioner with an agreed amount of advance notice. There is no obligation to accommodate such a request, but merging parties often do so, typically in an effort to ensure that the Commissioner remains focused on assessing the evidence related to the transaction, rather than preparing for litigation or seeking an injunction.

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 the expiry of the applicable waiting period is a criminal offence that can be subject to a fine of C$50,000 (for failing to provide the proper notification) and a civil penalty of up to C$10,000 for each day of non-compliance (for improperly closing a deal requiring notification). Additionally, where the parties are competitors, the Commissioner can refer the matter to the Public Prosecution Service of Canada for a possible criminal conspiracy charge, which carries the possibility of jail time and fines in the millions of dollars. There have been no reported cases of such prosecutions.

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

To be subject to the Canadian notification provisions, and therefore subject to a no-close period in Canada, there must be a local nexus, including an operating business in Canada. While foreign-to-foreign transactions with no on-the-ground Canadian nexus may be subject to substantive review if there are expected to be substantive effects in Canada – likely by way of diminished import competition to Canada, if there is no operating business in Canada – the transaction is not subject to notification and consequently not subject to a suspension period.

Subject to crafting a local hold-separate resolution (which is extremely rare), if the transaction is notifiable in Canada, the penalties for early closing outlined above could apply to foreign-to-foreign transactions.

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

The parties may proceed with closing if the no-close waiting periods have expired but the review process is ongoing and the Commissioner has not obtained an injunction or entered into a timing agreement with the parties.

The Commissioner will focus primarily on Canadian issues in all cases. In a foreign-to-foreign merger, the Bureau (and the Tribunal) will typically be receptive to local divestiture or possibly behavioural remedies if they are sufficient to address the domestic anticompetitive effects.

Local hold-separate arrangements pending resolution of a Bureau review or Tribunal proceeding have very 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 arrangements are narrow.

Public takeovers

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

Solicited public takeovers are subject to the same rules as transactions involving a private company. For unsolicited public takeover bids, the 30-day no-close waiting period commences upon the submission of the acquirer's filing, even if the target has not yet submitted its information.

The Act provides for mechanisms to require the target of an unsolicited transaction to file information within 10 calendar days.

For hostile or unsolicited takeover bids that result in SIRs being issued by the Commissioner, the second 30-day no-close waiting period commences upon the Commissioner's receipt of a certified response to the SIR from the acquirer.

Documentation

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

The main requirements of the pre-merger notification filing are:

- an overview of the transaction structure;
- an executed copy of the legal documents to be used to implement the proposed transaction (or the latest draft thereof, if not yet finalised);
- a description of the business objectives of the transaction;
- a list of the foreign antitrust authorities that have been notified of the proposed transaction;
- a summary description of the principal businesses carried on by each party (on an affiliate-by-affiliate basis) and of the principal categories of products (or services) supplied by such businesses in their various markets, including contact information for the top 20 customers and suppliers for each such product category;
- basic financial information for each party;
- business, product, customer, supplier, financial and geographic scope of sales information of each of the party's principal businesses;
- all studies, surveys, analyses and reports prepared or received by an officer or director for the purpose of evaluating or analysing the proposed transaction that contain market-related or competition-related information (similar to the 4(c) documents under the US Hart-Scott-Rodino Antitrust Improvement Act of 1976 (the HSR Act)); and
- similar information related to each affiliate of the notifying party with significant Canadian assets or sales.

If the Bureau concludes during the initial 30-calendar-day review period that a more detailed review is warranted, it may issue a SIR requiring the production of additional documents and data. The Bureau's (non-binding) guidelines related to the merger review process state that, in all but exceptional cases, the Bureau will limit the number of custodians to be searched in preparing a response to a SIR to a maximum of 30 individuals.

The default search period for hard copy and electronic records in the possession, custody or control of a party will generally be the year-to-date period immediately preceding the date of issuance of the SIR and the previous two full calendar years. The Bureau will also generally limit the relevant period for data requests to the year-to-date period immediately preceding the date of issuance of the SIR and the previous three full calendar years.

Where parties operate on a North American basis, and where the transaction does not raise Canada-specific concerns, the Bureau may, in appropriate cases, work with the parties to try to limit the list of custodians (to the extent possible) to a list of custodians that the US authorities have agreed to in connection with a second request under the HSR Act.

An officer or other person who has been duly authorised by the board of directors of the notifying party is required to certify on oath or solemn affirmation that, to the best of that person's knowledge and belief, all information provided in the pre-merger notification filing and in a response to a SIR (if applicable) is correct and complete in all material respects. Knowingly providing incorrect information could result in criminal prosecution for perjury in connection with swearing a false certificate.

The Act also contains an obstruction offence that applies where any person impedes or prevents or attempts to impede or prevent any inquiry or examination under the Act. Knowingly withholding or providing misleading information could be seen as impeding or attempting to impede an examination by the Commissioner.

There has also been one reported case where the Bureau advised merging parties (whose identities were 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 the Bureau receives a filing, it almost always issues a voluntary request for information. The Bureau will then contact customers and suppliers to obtain their views about the proposed transaction. If the Bureau cannot reach a conclusion about whether the proposed transaction is unlikely to prevent or lessen competition substantially, the Commissioner may inform the parties toward the end of the initial 30-day waiting period that the Commissioner intends to issue a SIR. The parties will have the opportunity to discuss the information requests in the SIR before issuance.

In some cases, the Commissioner may apply for court-ordered subpoenas to compel third parties to provide information, which can include written responses, documentary and data production, or oral testimony.

The Bureau case team and its counsel are usually receptive to meeting with the parties and their counsel during the course of the review.

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

The statutory timetable for a clearance/challenge decision is 30 calendar days from the receipt of a complete filing or, if the Commissioner issues a SIR, 30 calendar days from the date on which the last of the parties submits a complete response to the SIR.

The Bureau also tries to adhere to service standards in its review process that deviate from the statutory timelines:

- 14 days for non-complex mergers;
- 45 days for complex mergers, except where a SIR is issued; and
- 30 days after compliance with a SIR, for complex mergers where a SIR is issued (this last service-standard period is coextensive with the statutory no-close waiting period following compliance with a SIR).

The Bureau informs notifying parties of the commencement of its service standards within five business days of receiving sufficient information to assign a complexity rating, as outlined in its Fees and Service Standards Handbook for Mergers and Merger-Related Matters; however, service standards are intended to be maximums, and the Bureau may (and often does, in non-complex cases) complete cases before the full service-standard period has elapsed.

It is possible to speed up the time frame for clearance if the Bureau's substantive inquiries can be satisfied before the statutory waiting or the service-standard periods (or both) expire. 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.

In cases in which a formal filing has been made and the 30-day waiting period has expired but the Commissioner needs more time to complete the review, the Commissioner sometimes requests that the parties refrain from closing their transaction until the review is complete. There is no obligation to accommodate that request, but merging parties often do so to avoid litigating an injunction proceeding. While some parties have chosen to close their transactions once the waiting periods have expired but before the Bureau has completed its review, a pending amendment to the Act will allow the Commissioner to obtain automatic injunctive relief to prevent closing while the Commissioner prepares a detailed application for a longer injunction.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test for the Commissioner of Competition (the Commissioner) to challenge and the Competition Tribunal (the Tribunal) to issue a remedial order is whether the merger or proposed merger is 'likely to prevent or lessen competition substantially' in any relevant market (section 92(1) of the Competition Act (the Act)). The Act sets out a number

of evaluative factors that the Tribunal (and, by implication, the Commissioner during his or her investigation) is to consider in applying this substantive test:

- the availability of acceptable substitute products;
- the effectiveness of remaining competition;
- foreign competition;
- whether the merger will remove a vigorous competitor from the market;
- whether the target entity has failed or is about to fail;
- barriers to entry;
- the nature and extent of change and innovation in the market;
- network effects within the market;
- whether the merger will contribute to the entrenchment of leading market participants;
- effects on price or non-price competition, including quality, choice or consumer privacy; 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. While that provision is not yet subject to legislative change, the Commissioner has signalled an inclination towards a statutory amendment to permit the use of market share presumptions. Proposed amendments to the Act would make this change to include market share presumption.

The Act previously provided an explicit statutory efficiencies defence, but that defence was repealed in 2023.

The Commissioner's Merger Enforcement Guidelines (MEGs) elaborate on the views of the Competition Bureau (the Bureau) regarding 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 regard to the unilateral effects or coordinated effects theories of competitive harm. The Bureau has announced it intends to update the MEGs following the proposed amendments to the Act.

In respect of unilateral effects, the Commissioner generally will not challenge a merger if the combined post-merger market share of the merged entity is less than 35 per cent. For coordinated effects theories of harm, the Commissioner generally will not challenge a merger where the post-merger four-firm concentration ratio (combined market shares of the largest four firms) is below 65 per cent or the merged entity's market share would be less than 10 per cent. Transactions that involve higher market shares or industry concentration are not automatically challenged but will generally receive careful scrutiny. The proposed amendments to the Act include the implementation of rebuttable structural presumptions that are triggered where (i) the delta HHI is greater than 100, and (ii) either the HHI is greater than 1800, or the merging parties' combined shares would exceed 30 per cent.

The fact of a failing firm technically is not a defence to merger challenge; rather, 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 a factor to be considered by the Tribunal in determining whether a merger is likely to give rise to a substantial prevention or lessening of competition. The MEGs elaborate that if the imminent failure of a firm is probable and that, in the absence of the merger,

the assets of the failing firm would be likely to exit the relevant market, then the loss of the actual or future competitive influence of the failing firm will not be attributed to the merger in the Bureau's review.

In addition, the Bureau will want to be satisfied that there are no competitively preferable alternatives to the proposed transaction, such as a competitively preferable purchaser, retrenchment by or even liquidation of the failing firm.

In April 2020, the Bureau released a position statement describing its approach to failing firm arguments after its review and decision not to challenge the American Iron & Metal Company/Total Metal Recovery transaction. It confirmed and elaborated on the approach in the MEGs that financial documents and related information will be examined in detail to determine whether the firm is failing and that no competitively preferable alternatives exist. The position statement also detailed the types of information that the Bureau typically gathers from customers, competitors and other interested parties to perform this analysis.

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

Joint ventures often fall within the definition of mergers and, in such situations, are subject to the same substantive test; however, the Act specifically exempts from merger review certain unincorporated combinations in connection with one-off projects or programmes, including research and development projects, provided that a number of specified criteria are met. These relate to control of the joint venture parties, the business rationale for the formation of the joint venture, the scope and duration of the joint venture's activities, and the extent of the adverse effect of the joint venture on competition.

Part IX of the Act contains an imperfectly analogous notification exemption for combinations if they are formed with a restricted range of activities, there is an agreement in writing or intended to be put in writing imposing an obligation to contribute assets to the combination and governing a continuing relationship between the parties, there is no change in control of a party, and there are provisions for orderly termination of the combination.

In March 2010, two new provisions of the Act came into force to deal with agreements between competitors. Such agreements may be subject either to criminal prosecution under the conspiracy offence or to challenge as a reviewable practice by way of an application to the Tribunal for a prohibition order. The substantive framework for the competitor agreements reviewable practice is almost identical to the merger provisions. Once the Bureau has decided which track to pursue (merger, civil agreement among competitors or criminal conspiracy), there are double jeopardy protections that preclude it from using the other tracks.

The Bureau has indicated in its Competitor Collaboration Guidelines that the conspiracy offence will be restricted to naked restraints (cartel-like conduct) and that bona fide joint ventures that do not constitute mergers will normally be reviewed under the competitor agreements' reviewable practice provision.

Theories of harm

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

In general, the Bureau will consider whether a proposed horizontal transaction (ie, a merger involving current or potential competitors) is likely to lead to a substantial lessening or prevention of competition on either a unilateral effects basis or a coordinated effects basis. Under the unilateral theory of harm, the Bureau will consider whether the merged entity will likely be able to raise prices profitably (or lessen competition in other, non-price dimensions) as a result of the merger without relying on an accommodating response from its competitors.

Under the coordinated theory of harm, the Bureau considers whether the proposed merger is likely to reduce the level of competition in a market by, for example, removing a particularly aggressive competitor or enabling the merged entity to coordinate its behaviour with that of its competitors, so that higher post-merger prices are profitable and sustainable because other competitors in the market have accommodating responses.

Vertical mergers may raise concerns when they increase barriers to entry, raise rivals' costs or facilitate coordinated behaviour.

Mergers may also give rise to concerns about the prevention (as opposed to lessening) of competition in a market when, in the absence of the proposed merger, one of the merging parties is likely to have entered the market de novo and eroded the existing market power of the other party.

In addition to price, the Bureau may also assess the effects of a merger on other dimensions of competition, including quality, product choice, service, innovation and advertising or privacy, among other attributes.

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' (section 1.1 of the Act). Broader issues, such as employment, head office functions, national champion concerns or other industrial policy considerations, have not historically been relevant to the Commissioner's review. These factors can be relevant to an assessment under the Investment Canada Act, although the government is currently giving consideration to adding provisions to require that specific consideration be given to labour and employment issues.

Bureau reviews of proposed mergers in the federal financial services and transportation sectors on competition grounds may operate in parallel with ministerial approval processes that are based on broader public interest considerations. In both systems, the Commissioner's views on the competitive ramifications of proposed mergers inform but would not bind the relevant minister in making a decision on public interest grounds; thus, the Act specifically provides that the Tribunal shall not make an order in respect of a merger involving financial

institutions or transportation undertakings in respect of which the federal Minister of Finance or Minister of Transport, as the case may be, has certified to the Commissioner that the merger would be in the public interest.

In February 2019, the Commissioner provided a report to the Minister of Transport regarding a proposed merger of the two main airlines operating in northern Canada, Canadian North and First Air. The Bureau's report concluded that the proposed merger would give rise to significant competition concerns; however, in June 2019, the government approved this merger following a public interest assessment led by the Minister of Transport, notwithstanding the Commissioner's competition concerns. A similar result was obtained in 2022 and 2023 with respect to the merger of the Westjet and Sunwing airlines.

In March 2020, the Commissioner provided a report to the Minister of Transport regarding the proposed acquisition by Air Canada of Transat AT, concluding that this proposed acquisition would likely result in a substantial lessening or prevention of competition in the sale of air travel or vacation packages to Canadians. Specifically, the Commissioner indicated that the merger would substantially lessen competition on 83 routes originating in Canada with destinations in Europe, Mexico, Central America, the Caribbean, Florida and South America. However, in February 2021, the Canadian government approved this merger subject to a number of terms and conditions. Notwithstanding the receipt of approval in Canada, Air Canada ultimately decided to abandon the deal in April 2021 in response to the European Commission signalling to the parties that it would not approve the transaction.

Economic efficiencies

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

While the Act formerly provided a formal efficiencies defence that allowed an otherwise anti-competitive merger to be saved by efficiencies that are likely to be greater than and offset any prevention or lessening of competition, that provision was repealed in the amendments to the Act that came into force in late 2023.

Consequently, while no longer an explicit defence, one can contend that the enhanced efficiencies that arguably result from a proposed merger transaction will have the effect of a proposed transaction not leading to a substantial 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 Competition Tribunal (the Tribunal) on application by the Commissioner of Competition (the Commissioner) may order the parties to a proposed merger to refrain from implementing their merger, or doing anything the prohibition of which the Tribunal determines is necessary to ensure the merger (or a part of it) does not substantially prevent or lessen competition. If

a merger has already been completed, the Tribunal may order the dissolution of the merger or the divestiture of assets or shares.

In addition, with the consent of the Commissioner and the merging parties, the Tribunal may order any other action to be taken to remedy the anticompetitive effects of a proposed or completed merger.

Remedies and conditions

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

Divestitures are the primary remedy used in merger cases. In the *CCS/Tervita* case, the Competition Bureau (the Bureau) sought dissolution as the preferred remedy, but the Tribunal concluded that a divestiture order would be appropriate.

While it is possible (and frequently of interest to merging parties) to resolve issues through the use of behavioural remedies such as firewalls or agreements to supply, these tend to be viewed by the Bureau as less desirable than structural remedies such as divestiture and are more often seen in vertical rather than horizontal cases. Parties should expect that, in most cases, the Commissioner will seek to have any negotiated remedies recorded in a consent agreement that is filed with the Tribunal, whereupon it has the force of a Tribunal order.

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

Any divestiture or other remedy ordered by the Tribunal must restore competition to the point at which it can no longer be said to be substantially less than it was before the merger. Proposed amendments will require that any remedy restores competition to the state 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 Remedies Bulletin indicates that it prefers fix-it-first remedies, whereby an approved upfront 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, occurs frequently – the Bureau will normally require divestitures to be effected by the merging parties within three to six months. If they fail to do so, a trustee will be appointed to complete the sale in a similar time frame without any guaranteed minimum price to the seller.

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

Foreign-to-foreign mergers with competitive effects within Canada are subject to the federal Competition Act, including its remedial provisions. Consequently, divestitures of Canadian

assets have been required in many foreign-to-foreign mergers. In many of those cases, there were remedies in foreign jurisdictions as well.

In some cases, the Bureau may rely on remedies required by foreign competition authorities and not take separate remedial steps in Canada if the foreign remedies are sufficient to address anticompetitive concerns in Canada. Examples include *United Technologies/Raytheon, Harris Corporation/L3 Technologies, United Technologies/Rockwell Collins, BASF/Ciba, Dow/Rohm & Haas, GE/Instrumentarium, Procter & Gamble/Gillette, UTC/Goodrich, Thomson/Reuters and Novartis/GSK*. In those cases, the remedies required by the US or European authorities were seen as sufficient to address Canadian concerns.

Ancillary restrictions

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

The Bureau will consider ancillary restrictions as part of its consideration of the transaction as a whole; thus, its clearance of a transaction will normally also cover any ancillary restrictions that are known at the time of the review.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

The Competition Bureau (the Bureau) routinely contacts customers, and often also suppliers and competitors, for factual information and their views about a merger; however, the Competition Act (the Act) authorises the Commissioner of Competition (the Commissioner) alone to bring an application to the Competition Tribunal (the Tribunal). Consequently, a complainant has no direct ability to challenge a merger.

The Bureau is attentive to complaints from all types of private parties. The Act also provides that any six residents of Canada can compel the Commissioner to conduct an inquiry into a merger or other matters under the Act, but the Commissioner remains the sole gatekeeper who can commence a merger challenge before the Tribunal.

The Competition Tribunal Rules provide that, if the Commissioner brings an application to the Tribunal, any party affected by the merger may seek leave to intervene; thus, complainants may obtain a formal voice in the proceedings at that stage.

Publicity and confidentiality

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

All documents (including pre-merger notifications) and information provided to the Bureau are to be treated confidentially; however, the Act permits the Commissioner to share information and documents received with a Canadian law enforcement agency (which would be rare in merger cases).

In addition, the Commissioner may disclose information for the purposes of the administration or enforcement of the Act. This may occur in the Bureau's contact with customers, suppliers and competitors, although such interviews are conducted in a manner that attempts to minimise disclosure of any confidential information to the extent possible.

The Commissioner's interpretation of the confidentiality safeguards in the Act is articulated in the Bureau's 2013 Information Bulletin on the Communication of Confidential Information Under the Competition Act. The Bureau takes the position that it has the power to share confidential information with foreign antitrust agencies without receiving a waiver from the parties providing the information, pursuant to the administration and enforcement exemption. This interpretation is perceived by some as controversial and has not been tested before the courts.

As of November 2023, the Bureau has published on a weekly basis general summary information regarding merger reviews that were commenced or competed in the previous week. In exceptional circumstances, parties can make a request to delay or omit the publication of their transactions by the Bureau, which the Bureau considers on a case-by-case basis. The Bureau also publishes press releases or position statements regarding decisions in high-profile cases.

If the merger proceeds to a hearing before the Tribunal, it may be necessary, for the purposes of the administration and enforcement of the Act, for otherwise confidential information to be disclosed. Although the Bureau's position that it had a public interest privilege over all documents collected from third parties as a class as part of a Bureau investigation or inquiry was rejected by the Federal Court of Appeal in the Vancouver Airport Authority case, such a privilege may still be claimed for certain materials on a document-by-document basis. Competitively sensitive information of third parties can be protected in Tribunal proceedings through the use of confidentiality orders.

Where a challenge occurs or a remedy is embodied in a consent agreement, most of the relevant materials will be filed on the public record at the Tribunal; however, commercial or competitively sensitive material may be filed on a confidential basis if a protective order is obtained.

Cross-border regulatory cooperation

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

The Bureau routinely cooperates with other antitrust authorities on mergers that have multi-jurisdictional aspects. Specific antitrust cooperation instruments (cooperation agreements or memoranda of understanding) exist between Canada and three jurisdictions that give rise to a significant number of cross-border reviews: the United States, the European Union and the United Kingdom. There are also cooperation instruments between Canada and each of Australia, Brazil, Chile, China, Colombia, Hong Kong, India, Japan, Mexico, New Zealand, Peru, Singapore, South Korea and Taiwan.

In addition, in September 2020, the Bureau announced that it had entered a new multilateral competition enforcement framework with Australia, New Zealand, the United Kingdom and the United States.

In March 2021, the Bureau announced that it has joined its counterparts in the United States, the United Kingdom and the European Union to launch an international working group to develop an updated approach to analyse the effects of pharmaceutical mergers. This working group was initiated by the US Federal Trade Commission.

Unlike many of its sister agencies, the Bureau asserts that it does not require a waiver to share confidential information with foreign agencies, provided that such sharing of information is likely to result in assistance to the Bureau in its review of a transaction; however, it frequently requests that merging parties grant confidentiality waivers to foreign agencies to enable them to engage in two-way communications with Bureau staff.

JUDICIAL REVIEW

Available avenues

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

Although the Competition Bureau or the Commissioner investigates and determines whether to challenge a merger, the challenge is heard, and the decision is made by, the independent Competition Tribunal (the Tribunal).

The Competition Tribunal Act provides for an appeal from a decision of the Tribunal on questions of law and of mixed fact and law to the Federal Court of Appeal as of right, and on questions of fact alone by leave of the court. An appeal from a decision of the Federal Court of Appeal is only available if leave is obtained from the Supreme Court of Canada.

In its decision in *CCS/Tervita*, the Supreme Court of Canada held that Tribunal decisions on questions of law are to be reviewed on a standard of correctness, and questions of fact and mixed law and fact are to be reviewed on the basis of reasonableness.

Although it is theoretically possible to obtain judicial review of the decisions or actions of the Commissioner of Competition (the Commissioner), in practice, he or she is accorded a very

high amount of deference because the Commissioner's activities are investigative rather than adjudicative.

Time frame

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

A decision of the Tribunal is appealable to the Federal Court of Appeal, but factual findings may only be appealed with leave of the court. The typical period for such an appeal is six to 12 months. However, in the recent *Rogers/Shaw* transaction, the appeal was determined within one month of the Tribunal's decision.

An appeal from the Federal Court of Appeal to the Supreme Court of Canada is only available with leave from the Supreme Court, which is granted only infrequently. In the *CCS/Tervita* case, which is the most recent merger case reviewed by the Supreme Court, almost two years elapsed from the date of the Federal Court of Appeal decision until the Supreme Court of Canada released its decision (five months for leave to be granted, eight months for the case to be heard and 10 months under reserve).

Enforcement decisions by the Commissioner (eg, a decision not to challenge a merger) are theoretically subject to judicial review by the Federal Court of Appeal; however, such decisions are granted very substantial deference, so it is rare for complainants or other parties to bring an application for judicial review of such a decision. The time frame for such proceedings would likely be similar to that applicable to appeals of Tribunal decisions.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

Merging parties (both domestic and foreign) will typically work with the Commissioner of Competition (the Commissioner) to address any concerns he or she might have with their transaction, rather than face a lengthy and uncertain process of defending their merger through litigation before the Competition Tribunal (the Tribunal). As a result, the Commissioner has litigated very few contested proceedings before the Tribunal.

Among those cases litigated, the Commissioner obtained mixed results in the Southam newspaper case. The Commissioner failed to obtain a remedy in the *CCS/Tervita, Rogers/ Shaw, Parrish & Heimbecker/Louis Dreyfus, 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 it. More recently, the Commissioner obtained a partial injunction, and ultimately a consent resolution, in the Parkland case and recently won the *Secure/Tervita* challenge (currently under appeal).

In some cases, the Commissioner has obtained remedies in merger cases on consent following the start of litigation. For example, in August 2019, the Commissioner succeeded

in obtaining a divestiture on consent in *Thoma Bravo/Aucerna* following the Commissioner filing an application to the Tribunal challenging the transaction.

In the vast majority of cases in which the Commissioner has had concerns, the Competition Bureau (the Bureau) has been successful in negotiating consent divestitures or behavioural remedies. This has occurred in numerous foreign-to-foreign mergers, including *WESCO/Anixter, Elanco/Bayer Animal Health, Evonik/PeroxyChem, Linde/Praxair, BASF/Bayer, Bayer/Monsanto,Abbott/St Jude, Abbott/Alere, DuPont/Dow, Valspar/Sherwin-Williams, Teva/Allergan, Iron Mountain/Recall, Medtronic/Covidien, Novartis/Alcon, The Coca-Cola Company/Coca-Cola Enterprises, Teva/Ratiopharm* and *Live Nation/Ticketmaster.*

Transactions have also occasionally been abandoned in the face of opposition by the Commissioner (eg, Bell's proposed reacquisition of 50 per cent interests in two television channels from Corus in 2018, and the *LP/Ainsworth* and *Bragg/Kincardine* mergers in 2014).

The current merger review process was adopted in March 2009. In recent years, supplementary information requests (SIRs) have been issued in approximately 5 per cent of notified transactions (5.3 per cent over the Bureau's previous five fiscal years). Responding to those 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, after the parties provide the required information, has ranged from less than three months to seven-and-a-half months.

The substantive merger enforcement framework is set out in the 2011 Merger Enforcement Guidelines. The Bureau remains focused primarily on horizontal cases that could substantially lessen or prevent competition through unilateral or coordinated effects.

Reform proposals

35 | Are there current proposals to change the legislation?

On 1 May 2018, technical changes were implemented to the provisions of the Competition Act (the Act) to expand the definitions related to affiliated entities. The earlier version of the Act did not fully capture affiliates held through trusts and partnerships.

In February 2021, Canada's House of Commons Standing Committee on Industry, Science and Technology passed a resolution that called for the Committee to conduct a study on competitiveness in Canada, which would include considering potential reforms to the Act.

In autumn 2021, (at the time) Senator Howard Wetston called for submissions in respect of possible amendments to the Act. He received numerous submissions, including a proposal for some 35 amendments from the Commissioner, many related to mergers.

In its 2021 budget, the government very significantly expanded the Bureau's budget and, in its 2022 budget implementation bill, it introduced a number of amendments to the merger provisions, including adding additional factors related to the assessment of mergers, a clarification of rules surrounding unsolicited bids and the addition of an anti-avoidance provision to the merger notification rules.

In 2023, as described above, the mergers efficiencies defence was repealed. In 2023, additional amendments were proposed to the Act, including to the merger regime. As currently drafted, these amendments include:

1. the transaction-size threshold will be expanded to include sales 'into Canada' from the assets being acquired;
2. any remedy ordered by the Tribunal should restore competition to the competitive level that existed pre-merger;
3. concentration and market share presumptions being added that will presumptively make certain mergers viewed as leading to a substantial prevention or lessening of competition.

UPDATE AND TRENDS

Key developments of the past year

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

The most significant case involved the merger of Rogers and Shaw, Canada's two largest cable television providers. Their cable television services were offered in district geographic markets, so those services were not raised by the Commissioner of Competition (the Commissioner) as the concern. The market at issue in the case involved cellular telephone services, where the parties were competitors in various provinces. As a result of concerns expressed by the Commissioner, however, the parties restructured their transaction to sell Shaw's cellular telephone business to a third party prior to closing. On that basis, the Competition Tribunal (the Tribunal) – and, subsequently, the Federal Court of Appeal – rejected the Commissioner's challenge. This case is interesting for a number of reasons, including its recognition of the fact that, when transactions are restructured, the Tribunal will address the transaction before it and not necessarily the transaction originally proposed. The speed of the proceedings is also notable; the Tribunal released its decision within eight months of the Commissioner's application, and the Federal Court of Appeal ruled on the appeal within an additional one month.

Additionally, in the *Secure/Tervita* case, which involved industrial waste disposal services, although the Commissioner failed to obtain an injunction to prevent closing, the Commissioner prevailed in the merger challenge itself. In a March 2023 decision, the Tribunal found that the merger would lead to a substantial prevention or lessening of competition, and the Tribunal rejected Secure's efficiencies defence. In August 2023, the Federal Court of Appeal upheld the Competition Tribunal's ruling in favour of the Commissioner, and the Supreme Court of Canada subsequently dismissed Secure Energy's application seeking leave to appeal in February 2024.

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Notification trigger/ filing deadline	Notification is required for any transaction that constitutes a concentration of undertakings if one of the following notification triggers is met: • the combined global turnover of the undertakings concerned in the preceding financial year exceeds 12 billion yuan, and the China turnover of each of at least two of the undertakings concerned in the preceding financial year exceeds 800 million yuan; or • the combined China turnover in of the undertakings concerned in the preceding financial year exceeds 4 billion yuan, and the China turnover of each of at least two of the undertakings concerned exceeds 800 million yuan in the preceding financial year. There is no filing deadline.
Clearance deadlines (Phase I/Phase II)	The maximum statutory review period is 180 calendar days, which is divided into: • Phase I: 30 days from the notification being declared complete by the State Administration for Market Regulation (SAMR)*; and • Phase II: 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. The stop-the-clock regime may extend the review period beyond the maximum statutory review period. *References to SAMR should be understood as including the Ministry of Commerce (MOFCOM) unless otherwise noted.
Substantive test for clearance	Whether the concentration has or is likely to have the effect of eliminating or restricting competition.
Penalties	If the transaction does not have anticompetitive effects, SAMR may impose a fine of not more than 5 million yuan. If the transaction has or is likely to have anticompetitive effects, SAMR may impose a fine of up to 10 per cent of the infringing undertaking's (or undertakings') turnover in the preceding year. SAMR may also 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 the situation that existed before the implementation of the concentration. For extremely serious violations, the fines above can be multiplied by two to five times.
Remarks	Not applicable.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

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

The Anti-Monopoly Law (AML), which entered into force on 1 August 2008 and was amended in June 2022, contains a chapter entitled 'Concentrations of Undertakings'. This chapter deals with the merger control regime in China. The AML is supplemented by implementing regulations, including the Rules on Notification Thresholds for Concentrations of Undertakings published by the State Council (amended at the end of 2023 and published in early 2024, (the 2024 Notification Thresholds Rules)) and the Guidelines on the Definition of the Relevant Market published by the Anti-Monopoly Commission of the State Council, which is generally responsible for coordinating and guiding antitrust policy within China.

The State Anti-Monopoly Administration, a vice ministerial-level body under the State Administration for Market Regulation (SAMR), established in November 2021, is now responsible for the enforcement of merger control in China. Its predecessor was the Anti-Monopoly Bureau (AMB) under SAMR.

The AMB was established in March 2018 as a result of the merger of the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM*), which was formerly responsible for the enforcement of the merger control rules under the AML, and the two other former competition authorities in China, the Price Supervision and Anti-Monopoly Bureau of the National Development and Reform Commission (NDRC) and the Anti-Monopoly and Anti-Unfair Competition Bureau of the State Administration for Industry and Commerce.

In addition to the AML, other implementing rules, guidance and measures have been adopted, such as:

- the Guidance for Notification of Concentrations of Undertakings (amended in 2018 (the Notification Guidance)), which specifies factors to consider for determination of control and provides guidance on the filing procedures, such as the pre-notification consultation;
- the Guidelines on the Notification of Simple Cases (amended in 2018 (the Simple Cases Guidelines)), which provide procedural guidance on the notification of 'simple cases' that do not give rise to significant competition concerns and therefore merit a streamlined review. While there is no express deadline provided in the guidelines for the review of simple cases, in practice SAMR seeks to complete its review of simple cases in Phase I;
- the Guidance on the Notification Name of Concentrations of Undertakings (amended in 2018), which provides rules on how to name a transaction for notification purposes; and
- the Provisions on the Review of Concentrations of Undertakings (adopted in 2023 (the Merger Review Provisions)), which consolidate various rules and regulations related to key areas of China's merger control regime, including notification thresholds, filing procedures, review procedures, assessment of the competitive effects of a transaction, remedies and investigations into failure to file. In addition, the Merger Review Provisions empower SAMR to delegate its merger review function to its provincial branches. This is expected to ease SAMR's resource constraints as it faces an ever-growing caseload.

Furthermore, to facilitate undertakings' compliance with the merger control rules, a number of guidance documents have been published at central and provisional levels, providing practical and detailed but non-binding guidance to undertakings. In particular, SAMR issued the Anti-Monopoly Compliance Guide for Concentrations of Undertakings in September 2023 and the Anti-Monopoly and Anti-Unfair Competition Commission of the State Council published the Anti-Monopoly Compliance Guide for Undertakings in April 2024, which includes one chapter focusing on compliance with merger control rules.

*References to SAMR should be understood as including MOFCOM unless otherwise noted.

Scope of legislation

2 | What kinds of mergers are caught?

Mergers and acquisitions that are characterised as a 'concentration of undertakings' are caught by the AML and require notification to SAMR if they meet the relevant turnover thresholds.

A concentration of undertakings is defined in the AML as:

- a merger of undertakings;
- an undertaking acquiring control over one or more undertakings by acquiring shares or assets; or
- an undertaking acquiring control or being able to exercise decisive influence over one or more undertakings by contract or any other means.

3 | What types of joint ventures are caught?

The AML is silent on whether joint ventures are subject to notification; however, this issue was clarified in the Notification Guidance. This provides that a newly established joint venture (ie, a greenfield joint venture) constitutes a concentration of undertakings if at least two undertakings jointly control the joint venture. If, however, only one undertaking solely controls a joint venture and other shareholders have no control, the 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 varies depending on the nature and type of the transaction structure.

Remedies have been imposed in several cases involving the establishment of a joint venture, such as *Corun/Toyota China/PEVE/Sinogy/Toyota Tsusho* (2014), *Zhejiang Garden/DSM* (2019) and *Shanghai Airport/Eastern Air Logistics* (2022). Many companies have also been fined for failure to file reportable joint ventures.

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

The AML does not provide a definition of 'control'. However, the Merger Review Provisions and the Notification Guidance explain that control in the context of the Chinese merger control regime 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 structure of the undertakings concerned as reflected in transaction documents and articles of association (eg, the voting mechanism and voting history at the general meeting of shareholders, the composition, voting mechanism and voting history of decision-making or management bodies such as the board of directors, and 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 the undertakings concerned (eg, acting in concert); and
- 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 either of the following thresholds, as set out in the 2024 Notification Thresholds Rules:

- the combined global turnover of all undertakings concerned in the transaction in the previous financial year exceeded 12 billion yuan and the China turnover of each of at least two undertakings concerned in the transaction in the previous financial year exceeded 800 million yuan; or
- the combined China turnover of all undertakings concerned in the transaction in the previous financial year exceeded 4 billion yuan and the China turnover of each of at least two of the undertakings concerned to the transaction in the previous financial year exceeded 800 million yuan.

In cases where a concentration does not meet the notification thresholds, the undertakings concerned may nevertheless notify the transaction voluntarily to SAMR. Parties may choose

to file on a voluntary basis in circumstances where the transaction may give rise to competition concerns.

Further, SAMR has the discretion to review transactions that do not meet the notification thresholds if SAMR considers that the transaction is likely to result in the 'elimination or restriction of competition'. Such discretionary review may, for example, be initiated in the event of complaints from third parties, including customers, suppliers or competitors. As further explained below, failure to respond to SAMR's call-in request may be subject to penalties.

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

Filing is mandatory for any 'concentration of undertakings' that meets the notification thresholds.

The AML provides an exemption from pre-merger filing for intra-group 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 notification thresholds are met. The Notification Thresholds Rules require two parties to generate turnover in China (albeit low amounts); otherwise, there is no additional local effects or nexus test.

However, under the Merger Review Provisions, 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 as simple cases are subject to less burdensome information requirements under the Simple Cases Guidelines and a streamlined review process.

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

Yes. Foreign investment in China is subject to two regimes in general: a foreign direct investment regime and a national security review regime.

Under the foreign investment regime, foreign investment in China must be filed with or approved by MOFCOM or one of its local branches. Foreign investment is governed by the Foreign Investment Law (effective from 1 January 2020), the Implementing Regulations of the Foreign Investment Law (effective from 1 January 2020), the Catalogue of Sectors Where Foreign Investment is Encouraged (2022 (Encouraged Sector Catalogue)) and the Negative List (amended in 2021).

Foreign investment falls under four categories in China: encouraged, permitted, restricted and prohibited. The first category is provided in the Encouraged Sector Catalogue which indicates sectors where foreign investment is encouraged through preferential policies, and the last two categories are prescribed in the Negative List which indicate sectors that are closed to foreign investment or subject to foreign ownership restrictions.

The 2022 Encouraged Sector Catalogue contains 519 nationwide sectors and 955 regional sectors, representing an increase over the encouraged sectors in the former 2020 Encouraged Sector Catalogue. The 2021 Negative List has further reduced the number of restricted and prohibited sectors from 33 to 31 compared to the 2020 version. In addition, according to the government work report released in March 2024, the government plans to further reduce the negative list and to lift all foreign investment restrictions in manufacturing sectors. These developments highlight an increasing trend towards fewer restrictions on inbound investment.

Foreign investment in restricted sectors must be approved by MOFCOM or its local branches, but only a procedural filing is required for foreign investment in sectors outside the Negative List.

Under the national security review regime, a reportable foreign investment must be notified to a working mechanism office (the Office) prior to implementation. The Office is led by NDRC and MOFCOM and, institutionally, sits under NDRC.

According to the Measures on Security Review of Foreign Investment (effective from 18 January 2021), the national security review regime applies to :

- an investment made by a foreign investor in China's military or military-related industries, or an investment in a Chinese domestic business located near military or military-related facilities; or
- a foreign investor's acquisition of control over a Chinese domestic business active in critical agriculture, critical energy and resources, critical equipment manufacturing, critical infrastructure, critical transportation services, critical cultural products and services, critical IT-related or internet products and services, critical financial services, key technologies and other critical sectors.

A set of implementing rules, published by MOFCOM in August 2011, include an 'anti-circumvention' clause, prohibiting foreign investors from circumventing national security review by relying on mechanisms such as trusts, multilevel reinvestments, leasing and loan arrangements, contractual control structures or offshore transactions. This makes clear that the national security review is concerned with the substance and actual effect of a transaction rather than its form.

A national security review is conducted in three phases:

- a preliminary review phase, which lasts up to 15 working days, during which the Office determines whether a foreign investment triggers a national security review;
- a general review phase, which lasts up to 30 working days; and

- a special review phase, which lasts up to 60 working days, and will be initiated if a foreign investment has or may have an impact on national security, and can be extended in special scenarios.

During its review, the Office can 'stop the clock' while awaiting a notifying party's response to information requests.

If the Office determines that a transaction gives rise to national security concerns, the 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 Anti-Monopoly Law (AML) does not provide any deadlines for undertakings to file a reportable transaction, but it provides that notifiable transactions cannot be closed before notification and clearance by the State Administration for Market Regulation (SAMR).*

Where a transaction falls below the filing thresholds but is called in by SAMR due to potential anticompetitive effects, parties are required to submit a filing within 120 calendar days of receipt of the filing request and, in the meantime, take necessary measures to mitigate the adverse effects of the transaction on the market (if any), such as suspending implementation of the transaction.

Undertakings that fail to file a reportable transaction to SAMR or fail to respond to SAMR's call-in request may be subject to various penalties depending on the anticompetitive effects resulting from the transaction. SAMR has the power to impose a fine of up to 10 per cent of the infringing undertaking(s)' turnover in the preceding year if the transaction has or is likely to have the effect of eliminating or restricting competition. SAMR may also order the undertaking(s) to cease the implementation of the concentration, dispose of shares or assets, or transfer businesses within a given time limit and take other necessary measures to restore the pre-merger market situation. If the transaction does not have anticompetitive effects, SAMR may impose a fine of not more than 5 million yuan. The fine can be multiplied by two to five times in case of serious violations. The amended penalties under the new AML represent significant increases from the nominal fines of up to 500,000 yuan under the old AML. In addition to penalties, other serious implications for businesses include the adverse impact on relations with SAMR, potentially on a long-term basis, and the possibility of a record of an AML violation under China's social credit score system.

SAMR's published decisions for failure to file to date involve domestic transactions, Sino-foreign transactions, and foreign-to-foreign transactions. As at the date of this publication, SAMR has not published any new decisions under the amended AML.

In 2014, the Ministry of Commerce (MOFCOM) adopted its first public failure-to-notify decision. It imposed a fine of 300,000 yuan on Tsinghua Unigroup for failure to notify its

acquisition of RDA Microelectronics (both are Chinese companies). Fines were imposed notwithstanding the fact that MOFCOM found that the transaction had no adverse impact on competition in China, making it clear that 'lack of impact' on competition is not a basis for not filing in China if the transaction constitutes a concentration of undertakings and the turnover thresholds are met.

In 2017, MOFCOM adopted its first decision involving a foreign-to-foreign transaction for failure to notify. Canon was fined 300,000 yuan for failure to file its acquisition of Toshiba Medical. The case involved a multistep transaction. There have been several cases involving foreign-to-foreign transactions since then. For example, in 2017, MOFCOM announced a fine of 150,000 yuan on OCI Corporation for failure to file its acquisition of Tokuyama Malaysia, and in 2018 SAMR fined Paper Excellence BV, a company registered in the Netherlands, for failure to file its acquisition of Eldorado Brasil Celulose SA, a Brazilian company. In early 2022, Munich Re, a German insurance company, was fined for failure to file its acquisition of Covanta Europe Assets, a company registered in the United Kingdom.

In 2019, SAMR adopted its first decision involving a transaction that closed prior to clearance. As a result, the party with a duty to file, New Hope Investment, was fined 400,000 yuan for implementing the transaction before SAMR approved it.

SAMR has stepped up enforcement against failure to notify reportable transactions since late 2020, especially against companies active in the internet sector. In December 2020, SAMR fined three companies 500,000 yuan each for failing to notify reportable transactions involving variable interest entities (VIE). This was the first time that SAMR had taken action against VIE-related transactions. The decisions also marked the first time that SAMR imposed the maximum fine under the old AML.

The Antitrust Guidelines for the Platform Economy, adopted in February 2021, have reinforced SAMR's position on VIE-linked transactions, so transactions with VIE-related structures should similarly be notified if the turnover thresholds are met.

In July 2021, SAMR, for the first time, raised competition concerns and imposed remedies in relation to the unreported *Tencent/ChinaMusic Corporation* deal. In addition to imposing a fine of 500,000 yuan, SAMR ordered Tencent to take remedial measures to restore competition in the Chinese market for online music platforms where the parties horizontally overlapped. The transaction also raised vertical issues. The measures included terminating exclusivity agreements with major music copyright holders, strengthening internal compliance and a reporting duty.

As at April 2024, more than 200 decisions for failure to notify have been published. In 2022, SAMR adopted 32 failure-to-notify decisions, most of which concerned the internet sector. In 2023, SAMR reportedly adopted 32 failure-to-notify decisions, but the decisions have not been made public yet.

In addition to the focus on transactions involving major internet platforms, minority stake acquisitions and some offshore transactions with no apparent nexus to China have been subject to close scrutiny in recent years. For example, in April 2021, Shanghai Hantao Information Consultation Co Ltd was fined 500,000 yuan for failure to notify its acquisition of a 6.67 per cent stake in a target company. Similarly, in March 2022, Shanghai Huandian

Information Technology was fined 500,000 yuan for failing to notify its acquisition of a 7.32 per cent stake in a target company.

In relation to offshore transactions, since June 2020, SAMR has investigated several unreported offshore transactions. One such case concerned a joint venture between Taiwan Cement and OYAK, a Turkish cement company, which was set up in the Netherlands with no apparent nexus to China. Other cases include a joint venture between Didi and Softbank, active in the car-hailing business in Japan; a joint venture between Ping An Healthcare and SoftBank involving an online healthcare business in Japan; another joint venture between Seif and eBeauty involving an online cosmetics business in Hong Kong; and an acquisition of joint control over Covanta Europe Assets, a UK-registered company, by Munich Re, a German insurance company. These enforcement activities highlight the authority's strict stance on failure to notify reportable transactions.

In some cases, the merging parties voluntarily submitted a notification after completing their underlying transactions, and actively cooperated during the investigation with the authority; however, the merging parties were still fined despite these mitigating factors.

*References to SAMR should be understood as including the Ministry of Commerce (MOFCOM) unless otherwise noted.

Amend answer

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

According to the Provisions on the Review of Concentrations of Undertakings (the Merger Review Provisions), the Guidance for Notification of Concentrations of Undertakings (the Notification Guidance) and the Notification Form, the notification of a concentration effected by way of a merger must be made by all undertakings concerned in the merger. For a concentration effected by other means, the notification must be made by the undertaking(s) that will acquire control or will exercise decisive influence, with the assistance of other undertakings to the concentration. Undertakings involved in the concentration that serve merely as an acquisition or investment vehicle are not considered as an appropriate notifying party.

The Notification Guidance further provides that if two or more of the undertakings have the obligation to notify, the undertakings may jointly notify or appoint one of the undertakings to make the notification. Where parties agree that one of them should notify the transaction on behalf of all of them, the others are not exempt from their obligation to notify. Other undertakings participating in the transaction may submit a notification where the parties obliged to file the notification fail to do so. In addition, it is not unusual in practice for the target to be involved as a joint notifying 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 pre-acceptance period between notification and acceptance of the case normally takes up to six to eight weeks or longer depending on, among other things, the complexity of the transaction, the completeness of the notification, supplemental questions raised by SAMR and the merging parties' response to those questions.

The pre-acceptance period can be shorter (approximately up to four weeks) if the transaction is a simple case. The authority has intensified its pre-acceptance review for data completeness in recent years, which may impact the duration of the pre-acceptance period for both standard and simple cases.

At the end of the initial Phase I review period, SAMR must issue either a written decision to clear the transaction or a written notice of 'further review'. If the notifying party does not receive any written notice of further review at the end of the Phase I review period, the transaction is deemed to have been cleared, and the parties are free to implement the concentration.

If the notifying party receives a further review notice, 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. A further review notice does not necessarily indicate that SAMR has concerns about the concentration. In certain circumstances, the 90-day Phase II review period may be extended by another 60 days.

The amended AML introduces a 'stop-the-clock' mechanism that enables SAMR to suspend the statutory review period of 180 calendar days if (i) parties do not submit required information or documents on a timely basis; (ii) new facts emerge which materially impact the review process; or (iii) parties apply to suspend the review process to allow sufficient time for remedy discussions. This means that if the stop-the-clock mechanism is triggered, the total review period may exceed the maximum statutory review period of 180 days.

The 'stop-the-clock' mechanism is welcome, particularly for complex transactions where SAMR currently requires parties to pull-and-refile. In the past, in some cases, the notifying party(ies) has had to agree to withdraw and refile the notification, which restarts a further 180-day review period. Recent examples of cases where parties have withdrawn their notification and refiled include *Wanhua Chemical/Yantai Juli* (2023), *Korean Air/Asiana Airlines* (2022), *Shanghai Airport/Eastern Air Logistics* (2022), *II-VI/Coherent* (2022), *AMD/Xilinx* (2022), *GlobalWafers/Siltronic* (2022). The pull-and-refile practice is likely to gradually phase out with the introduction of the 'stop-the-clock' mechanism.

In 2023, SAMR applied the 'stop-the-clock' mechanism in three of the four transactions where remedies were imposed, namely *MaxLinear/Silicon Motion* (2023), *Simcere/Tobishi* (2023) and *Broadcom/VMware* (2023).

There is no provision under the AML or its implementing rules for expedited review; however, transactions that qualify as simple cases under the Merger Review Provisions typically benefit from a quicker review. The simple case procedure is proving effective so far in shortening the review period. In 2023, simple cases accounted for more than 90 per cent of the authority's caseload, and nearly all of them were cleared within Phase I.

Pre-clearance closing

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

The completion of a reportable concentration prior to clearance can lead to the same sanctions as failure to notify. SAMR can impose a fine of up to 10 per cent of the infringing undertaking(s)' turnover in the preceding year if the transaction has or may have the effect of eliminating or restricting competition. SAMR may also order the undertaking(s) to cease implementation of the concentration, dispose of shares or assets, or transfer businesses within a given time limit and take other necessary measures to restore the pre-merger market situation. If the transaction does not have anticompetitive effects, SAMR may impose a fine of not more than 5 million yuan. In case of serious violations, the fine can be multiplied by two to five times. Other serious implications for businesses include adverse impact on relations with SAMR, potentially on a long-term basis, and a record of an AML violation under China's social credit score system.

Fines to date have usually been imposed for failure to file, not closing before clearance. However, in 2019, SAMR imposed fines for the first time for closing before clearance. It fined New Hope Investment 400,000 yuan for implementing its transaction prior to SAMR approval.

It should be noted that for the first time SAMR has provided guidance under the Merger Review Provisions on pre-closing commercial actions which, if undertaken, can amount to closing or integrating the activities of the merging businesses before clearance. The Merger Review Provisions include a broad range of examples (eg, completing business registration, actual participation in an undertaking's business decisions, or exchange of sensitive information before closing). Parties need to consider pre-closing contractual obligations carefully. It remains to be seen whether investigation of (and fines against) pre-clearance closing activities will become an enforcement priority in the near term.

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

Yes. Sanctions also apply in cases involving closing before clearance in foreign-to-foreign mergers. However, SAMR has yet to adopt a decision involving closing before clearance of a notified foreign-to-foreign merger.

Fines related to foreign-to-foreign transactions have to date been imposed for failure to file, rather than closing before clearance. In 2017, MOFCOM published the first decision involving a foreign-to-foreign transaction for failure to file (ie, Canon's acquisition of Toshiba Medical). Shortly after that, it fined OCI Corporation 150,000 yuan for failure to file its acquisition of Tokuyama Malaysia in 2017.

In 2018, SAMR fined Paper Excellence BV, a company registered in the Netherlands, for failure to file its acquisition of Eldorado Brasil Celulose SA, a Brazilian company. Then in early 2022, Munich Re, a German insurance company, was fined for failure to notify its acquisition of Covanta Europe Assets, a UK-registered company.

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

There is no formal hold-separate or carve-out arrangement that might be acceptable to remedy local issues in a foreign-to-foreign merger.

Public takeovers

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

No. Although there is no official position on this, in practice, the review process can be expedited when a transaction is subject to public takeover bid rules.

Documentation

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

Under the AML and the merger control implementing rules, the notification materials to be submitted include:

- 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;
- an 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 on 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.

'Simple cases' are subject to less burdensome information requirements. According to the Guidelines on the Notification of Simple Cases (the Simple Cases Guidelines), SAMR will not review a notification as a simple case on its own initiative. Notifying parties that would like their transaction to be treated as a simple case must submit an application to SAMR using a simple case notification form. Some of the information and documents required to be submitted in the standard notification form are not required in the simple case notification form. This, to some extent, eases the administrative burden for notifying parties. Information and documents that do not need to be provided in a simple case notification form include:

- information on the parties' affiliates, if not active in the business relevant to the notified transaction;
- the business licences and certificates of approval of the parties' affiliates within China;
- the demand and supply structure of the relevant market and information on the parties' major suppliers and customers;
- information on market entry;
- information on horizontal or vertical cooperation agreements; and
- potential efficiencies of the transaction.

A simple case notification still requires substantial corporate and competition-related information; in particular, market definition analyses and in most cases a full set of data, including total market sizes and the market shares of the parties and their major competitors.

In addition, a public notice form must be submitted alongside the simple case notification form. The notice identifies the notifying parties and includes a summary of their activities, the transaction and the reasons for notifying the transaction as a simple case (with reference to one or more of the criteria for qualifying as a simple case). After the transaction is accepted by SAMR as a simple case, SAMR will publish the public notice form on its website for a period of 10 days for public comments.

Investigation phases and timetable

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

The AML contemplates a two-phase review process, comprising Phase I (30 calendar days) and Phase II (90 calendar days, which can be extended by another 60 calendar days). The Merger Review Provisions provide guidance on the procedures to follow when SAMR conducts its review. They also recognise a notifying party's right to be heard and to make known its views on concerns raised by SAMR.

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 must be made in writing. This is not a mandatory procedure. In complex cases, for example, where the notifying parties are uncertain as to whether a transaction is reportable or the precise scope of the relevant markets involved is difficult to delineate, it may be helpful to consult SAMR prior to filing. This may facilitate the 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?

The statutory timetable for clearance is 180 calendar days, which is divided into two phases. Phase I is 30 calendar days and Phase II is 90 calendar days, which can be further extended by up to 60 calendar days in exceptional cases.

A simplified procedure was introduced in 2014 to enable qualifying transactions to be dealt with on an expedited basis. The Simple Cases Guidelines do not set a specific timetable for reviewing simple cases. In practice, the usual time taken for clearing a transaction notified under the simplified procedure (ie, a simple case) from notification to clearance is approximately two to three months. The majority of simple cases are cleared within the initial 30-day

Phase I review period. 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 third-party stakeholders (eg, other government agencies or ministries) when reviewing simple cases as it does for standard cases. This is one of the key factors that enables SAMR to complete its review within Phase I in most simple cases.

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 the result of various 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.

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. In addition, in January 2024, SAMR announced that it had internally adopted a 'double 20-day principle' for simple case review which encourages case handlers to limit both the pre-acceptance review period and the post-acceptance review period to 20 days. Although this is an administrative policy within SAMR and is not binding on SAMR, it reflects SAMR's intention to improve the efficiency and predictability of its review of transactions notified under the simple case procedure.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Under the Anti-Monopoly Law (AML), a concentration must be prohibited if it has or is likely to have 'the effect of eliminating or restricting competition', unless the parties can show that the concentration may generate efficiencies and that its positive effects on competition significantly outweigh its negative effects on competition, or that the concentration is in the public interest.

The AML provides that the following factors shall be taken into consideration in reviewing a concentration:

- the market shares of the participating undertakings in the relevant market and their ability to control the relevant market;
- the degree of concentration in the relevant market;
- the effect of the proposed concentration on:
    - market access and technological development;
        - consumers and other relevant undertakings; and
        - the development of the national economy; and

- other factors that affect market competition considered relevant by the State Administration for Market Regulation (SAMR).*

Industrial policy and other non-competition factors also play a prominent role, and can often cause delays in the review process.

*References to SAMR should be understood as including the Ministry of Commerce (MOFCOM) unless otherwise noted.

Amend answer

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 if the notification thresholds are met.

Theories of harm

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

Under the AML, a concentration may be challenged on the ground that it has or is likely to have 'the effect of eliminating or restricting competition'. The State Administration for Market Regulation (SAMR) focuses its review on familiar theories of harm such as unilateral and coordinated effects, foreclosure effects and conglomerate effects. Recent conditional clearance decisions showing the application of these concepts include horizontal combinations such as *Danaher/GE BioPharma* (2020), *Danfoss/Eaton* (2021), *Illinois Tool Works/MTS Systems* (2021), *SK hynix/Intel NAND and SSD Business* (2021), *GlobalWafers/Siltronic* (2022), *Korean Air/Asiana Airlines* (2022), and *Wanhua Chemical/Yantai Juli* (2023) where potential unilateral and coordinated effects were identified, and vertical integrations such as *ZF/WABCO* (2020), *Cisco/Acacia* (2021), *II-VI/Coherent* (2022), *Simcere/Tobishi* (2023) and the prohibited *HUYA/DouYu* (2021) where potential foreclosure effects were identified.

In addition, there is a renewed and growing interest in leveraging and tying or bundling effects, as evidenced most recently by the conditional clearance decisions in *Infineon/Cypress* (2020), *Nvidia/Mellanox* (2020), *SK hynix/Intel NAND and SSD Business* (2021), *AMD/Xilinx* (2022) and *Broadcom/VMware* (2023). In *Nvidia/Mellanox* (2020), *AMD/Xilinx* (2022) and *Broadcom/VMware* (2023), SAMR also raised concerns over the potential misuse of third-party competitors' confidential information and the risk of undermining the interoperability of complementary products in the relevant markets.

In *Google/Motorola Mobility* (2012), *Microsoft/Nokia* (2014) and *Nokia/Alcatel Lucent* (2015), the Ministry of Commerce (MOFCOM) dealt with the complex question of the licensing of standard-essential patents in the IT sector.

Maersk/MSC/CMA CGM P3 Network shipping alliance (2014) was the second prohibition decision in the history of merger review in China and the first time that MOFCOM prohibited a global foreign-to-foreign transaction. MOFCOM considered that the alliance integrated the three major container line shipping companies' businesses (as opposed to establishing

a typical loose alliance in the shipping industry). MOFCOM analysed the horizontal overlaps between the parties on particular trades and relied on the resulting post-transaction high market shares and market concentration levels as primary grounds to oppose the transaction.

In *Maersk Line/Hamburg Süd* (2017), MOFCOM considered the potential anticompetitive effects of vessel-sharing agreements to which the merging parties were members.

In *Dow Chemical/DuPont* (2017), *Becton Dickinson/CR Bard* (2017), *Bayer/Monsanto* (2018), *UTC/Rockwell Collins* (2018), *Danaher/GE BioPharma* (2020) and *Simcere/Tobishi* (2023), MOFCOM and SAMR examined, among other things, the transaction's potential adverse impact on innovation and potential competition.

In addition, SAMR investigates factors that may affect the development of the national economy as well as the public interest.

Non-competition issues

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

Non-competition issues are relevant to both domestic consolidations, where industrial policy factors may be supportive, and to inbound investment, where industrial policy factors may create additional challenges in securing merger clearance.

The AML provides that 'undertakings may implement a concentration through fair competition and voluntary coalition in accordance with law to expand their business scale and increase their market competitiveness'. That provision is understood to reflect the state's policy of encouraging consolidation and concentrations between Chinese domestic companies and supporting successful domestic companies to compete with foreign multinational companies.

In addition, SAMR may decide not to prohibit a concentration that creates serious competition issues where there is proof that the concentration is in the public interest. The AML also provides that the state must protect the legitimate operation of industries that are vital to the national economy and national security where mainly state-owned enterprises are active. Other guidance also provides that specific explanations should be given in the notification if the concentration is related to national security, industrial policy, state-owned assets, etc. National security review is also potentially applicable under the national security review regime.

Investments by foreign companies in China and foreign-to-foreign transactions may also be reviewed in light of industrial policy considerations where it is considered that broader interests in China may be adversely affected by the concentration. Examples might include the acquisition of well-known Chinese brands or research and development 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. In both cases, although the parties did not

enjoy a significant combined market share, each transaction was subject to a lengthy review process and remedies were imposed. 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 the 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. More recently, DuPont abandoned its US$5.2 billion acquisition of Rogers in November 2022 after failing to secure timely clearance. It was also speculated that the delay was influenced by the heightened geopolitical and trade tensions between China and the United States. More recently, in August 2023, Intel terminated its planned acquisition of Israeli chipmaker Tower Semiconductor Ltd after failing to secure timely merger control approval.

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. 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 Anti-Monopoly Law (AML), a concentration cannot be implemented until clearance has been obtained from the State Administration for Market Regulation (SAMR).* SAMR can block a concentration or impose remedies as a condition for clearing the concentration. As at April 2024, three transactions have been prohibited, and remedies have been imposed in 61 cases.

*References to SAMR should be understood as including the Ministry of Commerce (MOFCOM) unless otherwise noted.

Amend answer

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 Provisions on the Review of Concentrations of Undertakings (the Merger Review Provisions), SMAR may impose divestiture remedies, behavioural remedies (eg, security of supply-type remedies, access to essential facilities such as networks or platforms, licensing key technologies and terminating exclusive agreements) or a combination of both. There are many examples of both types of remedies in China's decisional practice.

The Ministry of Commerce (MOFCOM) and SAMR have imposed a range of behavioural remedies, including commitments to ensure security of supply (with respect to, amongst other things, supply terms and conditions including price), remedies preventing bundling or tying or imposing unreasonable transaction conditions, restrictions on future acquisitions, access-related 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 regarding the volume, quality, product type and contract negotiation practices. Similarly, in *ZF/WABCO* (2020), *Wanhua Chemical/Yantai Juli* (2023) and *MaxLinear/Silicon Motion* (2023), SAMR required the parties to continue supplying the relevant product in China based on terms and conditions that were not inferior to the status quo and on a fair, reasonable and non-discriminatory (FRAND) basis. In recent cases, such as *Cisco/Acacia* (2021), *Illinois Tool Works/MTS Systems* (2021), *SK Hynix/Intel NANDand SSD Business* (2021), *AMD/Xilinx* (2022), *Wanhua Chemical/Yantai Juli* (2023), *Simcere/Tobishi* (2023) and *Broadcom/VMware* (2023), the behavioural remedies imposed included prohibitions on bundling and tying, prohibitions against imposing unreasonable terms, refusal to deal, and exclusivity arrangements – alongside security of supply commitments similar to those noted above.

In *Agrium/Potash Corporation* (2017) and *HP/Samsung* (2017), in addition to remedies related to the terms and conditions of supply of certain overlap products, MOFCOM also required the merging parties to commit not to acquire a competing business for a prescribed period of time.

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 FRAND licensing terms in connection with Motorola Mobility's significant portfolio of standard-essential patents (SEPs) in the telecommunications sector. In *Microsoft/Nokia* (2014) and *Nokia/Alcatel Lucent* (2015), MOFCOM also imposed behavioural remedies to address the licensing of SEPs.

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 East Asia and South America and not to enter into any vessel-sharing agreement with major competitors on these trades for five years. It ordered Maersk Line to reduce and maintain its refrigerated capacity shares below a certain level for three years post-closing.

In *Brocade/Broadcom* (2017), *Nvidia/Mellanox* (2020), *AMD/Xilinx* (2022), *II-VI/Coherent* (2022) and *Broadcom/VMware* (2023), the merging parties committed to take measures to protect confidential information of third parties and to maintain the interoperability level of relevant products. In *SK Hynix/Intel NAND and SSD Business* (2021), the merging parties were required to assist a third-party competitor in entering the PCIe and SATA enterprise-class solid-state drive markets.

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 some cases, upfront buyer divestiture remedies have been imposed (eg, *NXP/Freescale* (2015) in the semiconductor sector, *Dow Chemical/DuPont* (2017) in the agrichemical sector) as well as fix-it-first divestiture remedies (eg, *ABI/SABMiller* (2016) in the brewery sector, the first such case, and *Abbott/St Jude Medical* (2016) in the medical devices sector).

Often a combination of behavioural and divestment remedies is imposed. In *Glencore/Xstrata* (2013), for example, MOFCOM imposed both divestiture remedies and behavioural remedies (ie, commitment to supply the Chinese market). This approach has been adopted in a number of recent remedy cases (eg, *Danaher/GE Biopharma* (2020), *GlobalWafers/Siltronic* (2022), *Korean Air/Asiana Airlines* (2022) and *Simcere/Tobishi* (2023)).

SAMR has also imposed hold-separate remedies, although the Merger Review Provisions do not mention hold-separate remedies as 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 research and development) and prevent full integration until and unless the remedy is lifted.

Hold-separate remedies can remain in force for a relatively long time, and the remedies will be lifted automatically or upon application. For example, in *Seagate/Samsung* (2011), which concerned the global hard disk drive (HDD) market, MOFCOM required complex hold-separate remedies that essentially required Seagate to hold the Samsung HDD business separate from its own HDD business for at least a year after the decision. The hold-separate remedies were lifted in 2015 upon application, approximately four years after they were imposed.

Shortly after the *Seagate/Samsung* decision, MOFCOM imposed extensive hold-separate remedies in *Western Digital Corporation/HGST* (2012), which prohibited Western Digital Corporation from combining its operations with HGST's HDD business for at least two years after the decision. The hold-separate remedies were eventually partially lifted in 2015 upon application; the remaining elements of the hold-separate remedies expired in 2017 automatically.

Similarly, in recent cases such as *Cargotec/TTS* (2019), *II-VI/Finisar* (2019) and *Shanghai Airport/Eastern Air Logistics* (2022), SAMR required the parties to adopt specific measures

to ensure their independence and competition post-merger, including setting up firewalls, formulating firewall-related internal guidance and providing competition compliance training to employees. The hold-separate remedies in *II-VI/Finisar* (2019) and *Shanghai Airport/Eastern Air Logistics* (2022) can only be lifted upon application after at least three years and eight years, respectively, while in *Cargotec/TTS* (2019), the hold-separate remedies automatically expired after two years.

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

According to the Merger Review Provisions, remedies proposed by undertakings should 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 Merger Review Provisions also set out the procedure to be followed to implement remedies, including in relation to remedy negotiations, the selection of supervisory trustees and trustees' obligations, the implementation and monitoring of remedies, the varying and lifting of remedies, and the legal liabilities to which the undertakings and trustees are subject. Remedies can be submitted at any time during the review process, but in practice remedies are generally submitted during Phase II or the Extended Phase II period when SAMR makes known its concerns. Following the introduction of the 'stop-the-clock' mechanism, notifying party(ies) may apply to SAMR to stop the statutory review clock to allow sufficient time for remedy negotiations.

With respect to structural remedies, the Merger Review Provisions require parties to find a buyer for the divested business within the time frame specified in the conditional clearance decision or, where no time frame is specified, within six months of conditional clearance (SAMR has the discretion to extend this period by a further three months at most). If the parties are unable to find a buyer in time, SAMR can appoint a divestiture trustee to do so. The divestment must be implemented within three months after the sales agreement is executed. Upon application by the notifying parties, SAMR has the discretion to extend the implementation period. SAMR can also require the parties to complete a divestment prior to implementation of the main transaction.

Undertakings may apply to vary or lift remedies when there are material changes to the parties, the transaction, or market conditions. In January 2015, MOFCOM announced that it had agreed to lift one of the remedies imposed in *Google/Motorola Mobility* in 2012 following Google's sale of its shares in Motorola Mobility to Lenovo on the grounds that Google was no longer active in the smartphone business to which the remedy applied. In October 2015, considering the changes in the competitive dynamics of the relevant markets, MOFCOM lifted 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, it lifted entirely the hold-separate conditions imposed on Seagate in relation to its acquisition of Samsung's HDD business in 2011.

In June 2016, MOFCOM lifted all remedies imposed on Walmart following Walmart's acquisition of a 33.6 per cent stake in NewHeight in 2012. In February 2018, it lifted the respective remedies imposed in *Henkel/Tiande Chemical*, following Tiande's acquisition of sole control

over the joint venture, and *MediaTek/Mstar*, owing to changes in the market. In April 2020, SAMR lifted the remedies imposed in *Corun/Toyota China/PEVE/Sinogy/Toyota Tsusho* given substantive changes of the competition landscape in the market. In June 2023, SAMR lifted all the remedies imposed in *Marubeni/Gavilon* given that Gavilon was sold and no longer controlled by Marubeni.

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 5 million yuan where there is no anticompetitive effect, in addition to an order to correct the non-compliance. If the non-compliance has caused or is likely to cause anticompetitive effects, SAMR may impose a fine of no more than 10 per cent of the infringing party's turnover in the last year. As with the financial penalty for failure to notify, the AML has significantly increased the level of fines for non-compliance with remedies. In December 2014, MOFCOM adopted two decisions against Western Digital Corporation for two separate instances of non-compliance with the hold-separate remedies imposed by MOFCOM in 2012 in *Western Digital Corporation/HGST*. In February 2018, MOFCOM fined Thermo Fisher Scientific 150,000 yuan for its failure to comply with one of the conditions imposed for its acquisition of Life Technologies.

In addition, the Merger Review Provisions have increased the fines that can be imposed on trustees or the buyers of the divested business who fail to comply with their obligations from 30,000 yuan under the old rules to 100,000 yuan.

As at the date of publication, SAMR has not imposed fines for non-compliance with remedies nor has it imposed fines on trustees or acquirers of a divested business under its new fining powers under the Merger Review Provisions.

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

To date, the vast majority of concentrations cleared subject to remedies involve foreign-to-foreign mergers. From 2008, when the AML entered into force, to April 2024, 61 transactions have been cleared conditionally, 55 of which were foreign-to-foreign transactions.

Recent examples include *Danaher/GE BioPharma* (2020), *Infineon/Cypress* (2020), *Nvidia/Mellanox* (2020), *ZF/WABCO* (2020), *Cisco/Acacia* (2021), *Danfoss/Eaton* (2021), *Illinois Tool Works/MTS Systems* (2021), *SK hynix/Intel NAND and SSD Business* (2021), *GlobalWafers/Siltronic* (2022), *AMD/Xilinx* (2022), *II-VI/Coherent* (2022) and *Korean Air/Asiana Airlines* (2022), *MaxLinear/Silicon Motion* (2023) and *Broadcom/VMware* (2023).

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 State Administration for Market Regulation (SAMR).*

SAMR has the authority to review a concentration that does not meet the relevant notification thresholds. That discretionary review may be initiated in the event of complaints from customers or competitors.

The *Microsoft/Nokia* decision in 2014 was the first time that the Ministry of Commerce (MOFCOM) seemingly highlighted specific concerns raised by third parties in its decision. In this case, several leading Chinese technology companies reportedly submitted opinions and complaints to MOFCOM flagging concerns over the potential impact of the transaction on patent licensing.

Similarly, in the *P3 Prohibition* case in 2014, MOFCOM reportedly asked Chinese trade associations, shippers and container liner shipping companies to comment on the proposed P3 Network shipping alliance during its review, and two of China's largest container liner shipping companies and the China Shippers Association reportedly opposed the deal.

In more recent remedy decisions, SAMR notes in its decisions 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.

*References to SAMR should be understood as including the Ministry of Commerce (MOFCOM) unless otherwise noted.

Amend answer

Publicity and confidentiality

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

The Anti-Monopoly Law (AML) does not require SAMR to make public the pre-merger notifications that it has 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 disclosed is fairly limited (mainly relating to the undertakings' names and nature of the transaction). SAMR continued the same practice until April 2019, when it started to publish a list of unconditionally cleared cases on a monthly basis. Two months later, in June 2019, SAMR started to publish the case list on a weekly basis.

For simple cases, pursuant to the Guidelines on the Notification of Simple Cases and the Provisions on the Review of Concentrations of Undertakings (the Merger Review Provisions), after case acceptance, SAMR will publish a notice summarising the transaction on its website. The notice invites public comments for a period of 10 days, which gives third parties an opportunity to challenge the applicability of the simple case procedure and to raise objections about the transaction. The notice identifies the parties and includes a summary of the parties' business activities, the transaction, and the basis for simple case treatment.

Notifying parties are required to identify confidential information in the notification and in annexes to the notification if they do not wish such information to be published or disclosed to a third party. A non-confidential version of the notification and annexes must be provided along with the notification at the time of its submission. Implementing rules published by SAMR prescribe how confidential information must be redacted; for example, ranges to use when redacting market shares in the non-confidential version of the notification and annexes.

The AML provides that SAMR and its staff shall keep confidential commercial secrets obtained during an investigation. The Guidance for Notification of Concentrations of Undertakings and other implementing rules also impose confidentiality obligations on other organisations and individuals if they become aware of business secrets and other confidential information during the review process.

Cross-border regulatory cooperation

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

While China is currently not a member of the International Competition Network, it has regular bilateral or multilateral meetings with other competition authorities, covering both general issues and also, on occasion, specific cases.

SAMR has entered into more than 50 cooperation agreements with authorities in more than 30 jurisdictions, including Brazil, Canada, the European Union, Russia, Japan, South Africa, South Korea, the United Kingdom, the United States, Singapore, Pakistan and other jurisdictions that are part of the Belt and Road Initiative. These cooperation agreements take the form of, among other things, memorandums of cooperation, cooperation guidelines and joint declarations, and provide the framework and institutional arrangements for international cooperation between China and other jurisdictions.

In specific cases, SAMR may ask notifying parties to grant a waiver to enable it to discuss confidential aspects of a transaction with other competition authorities. According to the Annual Reports on Antitrust Enforcement in China for 2021 and 2022, SAMR cooperated with its counterparts in, among others, South Korea, the United States and the European

Union in multiple cases, including *Nvidia/ARM* (2021), *Danfoss/Eaton* (2021) and *Korean Air/Asiana* (2022).

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Under the Anti-Monopoly Law, a notifying party who wishes to contest the authority's decision must appeal to the State Administration for Market Regulation (SAMR)* for 'administrative reconsideration' in the first instance. If the notifying party is still not satisfied after this, it can bring an administrative action to challenge SAMR's decision before a people's court.

*References to SAMR should be understood as including the Ministry of Commerce (MOFCOM) unless otherwise noted.

Amend answer

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?

Since the entry into force of the Anti-Monopoly Law (AML) in 2008, the number of notifications reviewed annually by the State Administration for Market Regulation (SAMR)* has increased. By the end of March 2024, SAMR had concluded more than 5,500 cases – 61 cases were approved subject to remedies (55 of them concerned foreign-to-foreign transactions) and three were prohibited.

Based on public record, in 2023, SAMR unconditionally cleared nearly 800 transactions and approved four transactions subject to remedies. In addition, failure to file reportable

transactions has remained an enforcement priority. In 2023, SAMR imposed penalties in more than 30 cases for failure to notify.

The simple case procedure represents a significant improvement in the time taken to review transactions. Recent experience shows that for simple cases, it may take SAMR up to four weeks to declare the notification complete. Declaration of completeness and case acceptance starts the 10-calendar-day public consultation period during which any third party may challenge the transaction's status as a simple case and raise objections about the transaction.

Nowadays, the transaction is cleared on average within about one to two weeks of the expiry of the 10-day public consultation period. This has enabled most simple cases to be cleared within Phase I. In 2023, SAMR took an average of 17.7 days to clear a simple case from case acceptance. Since the adoption of the simple case review procedure in April 2014 to March 2024, more than 4,000 simple cases have been concluded.

SAMR continues to vigorously enforce the AML. In light of the precedents set by the *Glencore/Xstrata* (2013) and *Marubeni/Gavilon* (2013) decisions, it is expected that global transactions involving commodities that are strategically important to China are likely to be subject to close scrutiny. The *Google/Motorola* (2012), *Microsoft/Nokia* (2014), *Nokia/Alcatel Lucent* (2015), *Nvidia/Mellanox* (2020) and *Cisco/Acacia* (2021) transactions also suggest that the authority will pay close attention to transactions in the IT sector, particularly where standard-essential patents (SEPs) (and in some cases non-SEPs) are in issue.

The *MediaTek/MStar* (2013), *NXP/Freescale* (2015), *Advanced Semiconductor Engineering/Siliconware Precision Industries* (2017), *KLA-Tencor/Orbotech* (2018), *Infineon/Cypress* (2020), *GlobalWafers/Siltronic* (2022), *AMD/Xilinx* (2022), *II-VI/Coherent* (2022), and *MaxLinear/Silicon Motion* (2023) and *Broadcom/VMware* (2023) decisions indicate that the semiconductor sector has continued to draw close scrutiny from the authority.

In addition, the authority continues to pay close attention to leveraging and tying or bundling effects theories of harm in conglomerate mergers, such as *Essilor/Luxottica* (2018), *UTC/Rockwell Collins* (2018), *KLA-Tencor/Orbotech* (2018), *Infineon/Cypress* (2020), *Nvidia/Mellanox* (2020) *AMD/Xilinx* (2022), and *Broadcom/VMware* (2023), as well as a transaction's potential adverse impact on innovation, for example, in *Dow Chemical/DuPont* (2017), *Becton Dickinson/CR Bard* (2017), *Bayer/Monsanto* (2018), *Danaher/GE BioPharma* (2020), *ZF/WABCO* (2020) and *Simcere/Tobishi* (2023).

*References to SAMR should be understood as including the Ministry of Commerce (MOFCOM) unless otherwise noted.

Amend answer

Reform proposals

35 | Are there current proposals to change the legislation?

In April 2024, SAMR published an amended notification form and public notice form for simple cases for public consultation. The proposed amendments will reduce the scope of

information required. In addition, they provide guidance on the format to use when submitting the required information and clarify concepts such as conglomerate relationships, codifying SAMR's prevailing practice.

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 26 January 2024, the State Council published the amended Rules on Notification Thresholds for Concentrations of Undertakings (the 2024 Notification Thresholds Rules) with immediate effect, revising the notification thresholds in China for the first time since the inception of the Anti-Monopoly Law (AML) in 2008.

- The 2024 Notification Thresholds Rules have significantly increased the notification thresholds. A merger control filing is now triggered if one of the following two tests are met:

  1. The combined global turnover of the undertakings concerned in the preceding financial year exceeds 12 billion yuan (increased from 10 billion yuan), and the China turnover of each of at least two of the undertakings concerned in the preceding financial year exceeds 800 million yuan (increased from 400 million yuan); or
  2. The combined China turnover of the undertakings concerned in the preceding financial year exceeds 4 billion yuan (increased from 2 billion yuan), and the China turnover of each of at least two of the undertakings concerned exceeds 800 million yuan (increased from 400 million yuan) in the preceding financial year.

The introduction of the new, higher thresholds is expected to reduce the number of merger control filings in China, freeing up resources of the State Administration for Market Regulation (SAMR)* to focus on transactions that may raise competition concerns.

- The 2024 Notification Thresholds Rules reiterates SAMR's ability to call in a below-threshold transaction for review at any time if that transaction may eliminate or restrict competition in China. The new AML codified SAMR's power to call in below-threshold transactions for review.
- The 2024 Notification Thresholds Rules empowers SAMR to review and propose adjustments to the merger control thresholds based on the state of economic development in China. This will allow SAMR to propose increases (or decreases) to the turnover thresholds to the State Council.
- It is worth noting that the draft notification thresholds rules published for public comments in June 2022 sought to tackle 'killer acquisitions' by proposing a new threshold for so-called 'mega-corporations' acquiring a target with low turnover. The State Council eventually chose not to adopt this threshold possibly given the perceived challenges of applying the threshold and its potential to chill deal-making. That this threshold was not endorsed does not prevent SAMR from scrutinising 'killer acquisitions' since SAMR could

resort to its call-in power to review a below-threshold 'killer acquisition' if that transaction has or may have the effect of eliminating or restricting competition in China.

In addition to the new notification thresholds, SAMR published the Anti-Monopoly Compliance Guide for Concentrations of Undertakings (the Merger Control Compliance Guide) in September 2023. This highlights the key areas that undertakings should watch out for in their day-to-day operations including, among other things, assessment of merger filing obligations, timing for notification and gun-jumping risks, and the substantive assessment of the competitive impact of a transaction. It also encourages undertakings to establish an internal merger control compliance programme to identify, manage and address merger control compliance risks. The Merger Control Compliance Guide is not binding on undertakings, but serves as a reference guide for undertakings to develop merger control compliance programmes.

In April 2024, the Anti-Monopoly and Anti-Unfair Competition Commission of the State Council published the Anti-Monopoly Compliance Guide for Undertakings (the Antitrust Guide), which identifies the major antitrust compliance risks that undertakings face, including merger control related risks. It is worth noting that according to the Antitrust Guide, the efforts made by undertakings to establish and implement robust antitrust compliance programmes may be taken into account by SAMR as mitigating factors when investigating and assessing violations of the AML.

In addition to the new legislation and guidance, which marks a significant step in China's antitrust enforcement, SAMR has continued to scrutinise transactions that may lead to anti-competitive effects. In 2023, SAMR conditionally cleared four transactions.

Wanhua Chemical/Yantai Juli

On 7 April 2023, SAMR conditionally cleared Wanhua Chemical's acquisition of Yantai Juli, a horizontal merger in the chemical sector. SAMR raised competition concerns in connection with the Chinese market for toluene diisocyanate (TDI) due to the high combined market share of the parties, the increased concentration level in the relevant market, the lack of potential market entrants in the short term and the lack of countervailing buyer power.

To address these concerns, SAMR imposed a range of behavioural remedies focusing on ensuring security of TDI supply to China. The commitments included continuing to supply TDI to customers in China on a fair, reasonable and non-discriminatory (FRAND) basis and at prices not higher than the average price during the past 24 months; to maintain or expand the volume of TDI produced in China and to continue R&D and innovation activities; and to not engage in anticompetitive conduct such as refusal to deal, discrimination, exclusive dealing or tying. The remedies will last for five years. The remedies can be lifted on the parties' request, subject to SAMR's approval.

MaxLinear/Silicon Motion

On 26 July 2023, SAMR conditionally cleared MaxLinear's acquisition of Silicon Motion active in the semiconductor sector. It is interesting to note that the decision does not refer to horizontal, vertical or neighbouring relationships between the parties. SAMR focused its assessment on Silicon Motion's business and raised concerns in relation to the Chinese

market for third-party NAND flash controllers, a highly concentrated market, where Silicon Motion had a pre-existing dominant market position. The fact that customers are highly dependent on Silicon Motion's products and that it is difficult to switch to other alternative suppliers, as well as the significant barriers to market entry, added to SAMR's concerns about the security of the supply of third-party NAND flash controllers in China.

As a result, SAMR imposed a range of behavioural remedies to address the perceived supply chain security concerns for Chinese customers. The remedies included commitments to continue the supply of NAND flash controllers to the Chinese market on a FRAND basis; to not make any material changes to Silicon Motion's existing business model and operation; to maintain Silicon Motion's R&D activities for NAND flash controllers in Taiwan; and to retain field engineers in mainland China to provide customer support services. In addition, there was a prohibition against including any malicious code in any NAND flash controllers sold in China. The remedies will automatically expire in five years.

This case highlights the critical role of supply chain security issues in SAMR's review.

Simcere/Tobishi

On 22 September 2023, SAMR conditionally cleared Simcere's acquisition of Tobishi, a vertical concentration in the pharmaceutical sector. This was the first case where SAMR imposed remedies in connection with a transaction that did not meet the notification thresholds and was filed on a voluntary basis. The transaction concerned (i) the upstream market for the active pharmaceutical ingredient for Batroxobin (Batroxobin API) where Simcere was the only supplier in China under an exclusive supply agreement with the global supplier of Batroxobin API; and (ii) the downstream market for Batroxobin injections where Tobishi was the only manufacturer of the injections in China and Simcere was in the process of developing its own Batroxobin injections and was, therefore, a potential competitor.

SAMR was concerned that the transaction would eliminate the only potential competitor, Simcere, in the Batroxobin injection market in China, thereby further strengthening Tobishi's dominant market position. In addition, SAMR raised foreclosure concerns finding that the parties would have the ability and incentive to foreclose the supply of Batroxobin API to Batroxobin injection manufacturers, which may have a negative impact on the downstream market for Batroxobin injections.

To address the concerns related to the elimination of potential competition, SAMR required Simcere to divest its pipeline Batroxobin injection product. In addition, to address the foreclosure concerns, SAMR imposed behavioural commitments including termination of the exclusive supply agreement between Simcere and its global supplier of Batroxobin API in China, a reduction of the list price of Batroxobin injections by at least 20 per cent and continued sufficient supply of Batroxobin API to meet clinical needs in the Chinese market. SAMR further required the parties to commit that if they do not implement the divestment remedy and/or terminate the exclusive supply agreement within a prescribed timeframe, they would reduce the list price of Batroxobin injections by at least 50 per cent. The behavioural remedies will last for six years and can be lifted upon application and SAMR's approval.

Broadcom/VMware

On 21 November 2023, SAMR conditionally cleared Broadcom's acquisition of VMware, a conglomerate merger in the semiconductor sector. SAMR concluded that VMware was market leader in the market for non-public cloud virtualisation software globally and in China, while Broadcom was among the top players in the adjacent markets for fibre channel host bus adapters (FC HBA), storage adapters and Ethernet network adapters globally and in China.

SAMR was concerned that the merged entity would have the ability and incentive to leverage VMware's market power in the non-public cloud virtualisation software market to promote Broadcom's hardware products by tying Broadcom's hardware products, reducing inter-operability between VMware's software and hardware products provided by Broadcom's competitors, or misusing competitively sensitive information received from VMware's customers, ie, third-party hardware manufacturers.

To address these concerns, SAMR imposed a range of behavioural remedies to prevent the parties from engaging in tying or bundling, imposing unreasonable trading terms, or discrimination in terms of service levels, price or functionality against customers that purchase the products separately. In addition, the parties committed to ensure interoperability between VMware's virtualisation software for servers and third-party hardware products in China, as well as interoperability between Broadcom's FC HBA and relevant third-party virtualisation software. Furthermore, the parties were required to adopt ringfencing measures to protect the confidential information of third-party hardware manufacturers. In addition to the above, there were also two confidential commitments which were redacted in the decision. The remedies will automatically expire in 10 years.

Outlook

Its recent decisions are a reminder that SAMR is willing to chart its own course in relation to merger control enforcement if it identifies China-specific concerns and that it attaches great importance to supply chain security issues. In addition, it is expected that transactions in the semiconductor industry will remain subject to strict scrutiny, given the strategic importance of this sector in China.

*References to SAMR should be understood as including the Ministry of Commerce (MOFCOM) unless otherwise noted.

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Notification trigger/ filing deadline	Filing must be conducted before closing the transaction.

Clearance deadlines (Phase I/Phase II)	• Short-form notification (below 20 per cent market share): Normally 10 business days.
	• Full filing for prior approval (above 20 per cent market share):
	  • Phase I: Normally 30 business days.
	  • Phase II: Normally 15 days to submit phase II information plus three months, unless the SIC decides to, for one time only, restart the three-month period by requesting additional information.

Substantive test for clearance	The Superintendence of Industry and Commerce (SIC) follows a standard merger review substantive approach. It starts by defining the relevant markets affected by the transaction using demand and offer substitution. In some cases, the SIC uses isochrones - the area accessible from a certain point within a specified time - to determine the geographic market. Market structure is normally assessed using the Herfindahl–Hirschman Index, Kwoka Index, Stemabaka Index, cross elasticities (on some occasions), barriers to entry, buyers' bargaining power and potential competition analysis. Mergers are analysed for potential unilateral and coordinated effects, as well as any efficiencies that the parties may be able to prove. The failing-firm defence is rarely accepted, but may be a possibility if the parties meet the applicable criteria for this exception.
Penalties	Closing the transaction before clearance is an infringement of the merger control regulations. General competition law sanctions apply: • Up to 100,000 minimum legal monthly wages (approximately US$20 million) enforceable against the parties to the transaction; • Up to 2,000 minimum legal monthly wages (approximately US$500,000) enforceable against the companies' officials and collaborators, and • Reversal of the transactions if the SIC considers that it causes an undue restriction to competition.
Remarks	On 2 February 2024, the new Superintendent of Industry and Commerce, Cielo Rusinque Urrego, was sworn in before the President of Colombia.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

The Superintendence of Industry and Commerce (SIC) is Colombia's primary competition authority responsible for merger control across all sectors of the economy. However, two exceptions concerning merger control exists: mergers strictly between financial institutions, which are reviewed by the Superintendence of Finance and mergers involving airline operators, which fall under the jurisdiction of the Colombian Civil Aviation Authority (Aerocivil).

Relevant statutes for merger control
SIC

Article 4 of Law 155 of 1959, articles 9 to 12 of Law 1340 of 2009 (general proceeding, efficiencies and standard of harm), Decree 2153 of 1992 (concept of control), Resolution No. 2751 of 2021 (information burdens and further procedural regulation), Resolution No. 90523 of 2022 (jurisdictional thresholds) and Resolution No. 632 of 2023 (filing fees).

Due to certain ambiguities in the legislative text, practitioners often refer to the Guidelines for Merger Review for clarification.

Superintendence of Finance

Law 1340 of 2009, Organic Statutes of the Financial System (covered transactions and proceeding) and Circular Básica Jurídica. (proceeding).

Before issuing a decision, the Superintendence of Finance must request a non-binding opinion from the SIC.

Relevant statutes for merger control under the Aerocivil scope

Law 1340 of 2009, article 1866 Code of Commerce, and Colombian Aeronautical Regulations (RAC-3 and 5).

Unlike the Superintendence of Finance, Aerocivil is not mandated to obtain a prior opinion from the SIC.

Although mergers strictly between financial institutions are reviewed by the Superintendence of Finance and mergers involving airline operators fall under the jurisdiction of Aerocivil, SIC is the only authority in charge of investigating and sanctioning breaches of the merger review regulations (gun jumping) regardless of the industry or economic sector.

Considering that most transactions fall under SIC's scope, the subsequent sections will address the merger control regime as governed by the SIC, acknowledging the exceptions of financial institutions and airlines.

Scope of legislation

2 What kinds of mergers are caught?

Any transactions that result in the acquisition of competitive control between two independent undertakings active in the Colombian market falls under the merger control regime, provided that they meet the following cumulative criteria:

- The acquisition or consolidation of competitive control: article 45(4) of Decree 2153 of 1992 defines 'competitive control' as the mere possibility of asserting decisive influence over the strategic decisions of an enterprise, including commercial policy, the initiation, termination or variation of the business activities, or the disposition of essential assets or rights essential for market participation.
- The parties to the transaction participate in the Colombian market: direct sales through a Colombian company or subsidiary sales, exports to Colombia, sales made by third parties in Colombia, ownership of assets in Colombia, IP rights registered locally, and potential entry into the market, might be considered as a participation in the local market.
- The parties to the transaction participate in the same economic activity (horizontal overlap) or belong to the same value chain (vertical overlap). While conglomerate mergers are not covered by the merger control regime, SIC occasionally views the 'same economic activity' criterion more broadly than the concept of a relevant market. This means that companies operating within different relevant markets but in the same industry might still be viewed as horizontally overlapped.
- Economic threshold: the parties (individually or in aggregate) had assets or operational income higher than 1,641,011.99 tax value units (approximately US$17 million) for the prior fiscal year. Usually, the SIC only considers income and assets in Colombia; however, if the company does not have a direct presence in the country, assets and income would be assessed on a worldwide basis.

If the transaction does not meet all of the above criteria, the operation falls outside the merger control regime.

3 What types of joint ventures are caught?

The merger control regime catches any joint venture that meets the following cumulative criteria:

- results in the merger of a business line or market activity: the joint venture should result in the merger of distinct businesses or market activities. Mere cooperation agreements regarding specific non-market functions of the parent entities are excluded;
- lasting effects on the market: the joint venture has lasting effects and it results in the elimination of competition between the parties; and
- full functionality: the joint venture has the resources and operational ability to function in the market as an autonomous business vehicle.

If a joint venture does not meet these criteria, it is not subject to merger control.

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

Article 45(4) of Decree 2153 of 1992 defines 'competitive control' as the mere possibility of asserting decisive influence over the strategic decisions of an enterprise, including the initiation, termination or variation of the business activities, or the disposition of goods or rights essential to its participation in the market.

Acquisition of control can take place in any type of transactions regardless of its form (so that competitive control could be acquired through franchises, IP licences, or analogous agreements).

In practical terms, various scenarios exemplify the concept of 'competitive control' as follows.

- Positive control: acquisition of a majority of voting rights or the possibility to actively take most business decisions.
- Negative control: veto rights over pivotal business decisions.
- Joint control: shared decision-making authority among multiple shareholders.
- Transitions from negative control to positive control or from joint control to exclusive control: transition from a lesser form of control to a more predominant one, such as from negative control to positive control, are deemed as economic concentrations.

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 is subject to merger control if, in the previous fiscal year, the parties (individually or jointly) had assets or operational income higher than 1,641,011.99 tax value units (approximately US$17 million).

Usually, SIC only considers income and assets in Colombia. However, if the company does not have a direct presence in the country, assets and income would be calculated on a worldwide basis.

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

The filing is mandatory.

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

If more than one of the parties to the transaction participates in the Colombian market, the merger is caught by the merger control regime even if they do not have a direct presence in Colombia.

Direct sales through a Colombian company or subsidiary sales, exports to Colombia, sales made by third parties in Colombia, ownership of assets in Colombia, IP rights registered

locally and potential entry into the market, might be considered as participation in the local market.

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

As a general rule, there are not. Nevertheless, foreign investment in some specific sectors, such as private and public security, is forbidden.

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?

Filing must be conducted before closing. Closing the transaction before clearance is an infringement of the merger control regulations. In the event of such an infringement, the following general competition law sanctions are applicable:

- fines up to 100,000 minimum legal monthly wages (equivalent to approximately US$20 million) against the parties involved in the transaction;
- fines up to 2,000 minimum legal monthly wages (around US$500,000) against individuals; and
- if the Superintendence of Industry and Commerce (SIC) determines that the transaction unduly restricts competition, it can order the transaction to be reversed.

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

All the parties to the transaction are responsible for filing. Nevertheless, the filing could be submitted by one party on behalf of the others.

The SIC charges a filing fee depending on the applicable proceeding:

- Short-form notification (below 20 per cent joint market share): approximately US$782.
- Full filing for prior approval (equal to or above 20 per cent joint market share):
  - Phase I: approximately US$4,250; and
    - Phase II: between US$8,000 and US$10,200.

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

Parties must not close or implement the transaction before clearance. The waiting period depends on the applicable proceeding.

Short-form notification (10 business days)

If the market shares of the parties, individually or in aggregate, do not exceed 20 per cent in any of the relevant markets (horizontally or vertically), the parties could file a short-form notice. The SIC has 10 business days to issue an acknowledgment of receipt, in which case the parties may proceed to close the transaction.

Nevertheless, within those 10 business days, the SIC can request additional information or suggest that the parties submit a full filing for prior approval if it considers that the parties wrongly implemented the relevant market definition or the methodology for calculating market shares.

Full filing for prior approval

If the market share of the parties, individually or in aggregate, exceeds 20 per cent in any relevant markets (horizontally or vertically), the parties must submit all the information required by Resolution No. 2751 of 2021 (Annex I) and conduct a full clearance procedure.

If the SIC considers that it has all the relevant information and that the merger does not pose a significant risk to competition, it must approve the transaction within 30 business days (Phase I).

Conversely, if during the initial 30 business days, the SIC considers that the transaction may harm competition, the SIC will order the parties to submit, within 15 business days, additional information to start Phase II. Once the Phase II information is submitted, the SIC has three months to issue a decision. The SIC is allowed, for one time only, to restart the three-month period by requesting additional information.

If the SIC fails to issue a decision within three months, the merger is deemed authorised.

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?

Filing must be conducted before closing. Closing the transaction before clearance is an infringement of the merger control regulations. In the event of such an infringement, the following general competition law sanctions are applicable:

- fines up to 100,000 minimum legal monthly wages (equivalent to approximately US$20 million) against the parties involved in the transaction;
- fines up to 2,000 minimum legal monthly wages (around US$500,000) against individuals; and
- if the SIC determines that the transaction unduly restricts competition, it can mandate the reversal of the transaction.

The latest example of gun-jumping enforcement is the *Avianca /Viva* merger control case. In August 2022, two airlines, Avianca and Viva, filed for merger review before the Colombian Civil Aviation Authority (Aerocivil). This transaction had two notable characteristics:

- Avianca's parent company, by the time of the filing, had already acquired and paid 100 per cent of the economic rights of Viva. Nevertheless, according to the parties, Avianca did not acquire competitive control over Viva since they implemented a hold-separate arrangement. Under the hold-separate arrangement, all voting powers (with some exceptions), as well as the management, was conducted by independent third parties.
- The parties argued that, even though the transaction increased the concentration and dominance indexes and could produce anticompetitive effects, the operation should be approved due to the failing-firm defence.

In November 2022, Aerocivil rejected the failing-firm defence and objected to the operation. The parties challenged the decision.

In December 2022, the SIC initiated an investigation against both airlines, arguing that the hold-separate agreement was not effective and that Avianca had, in effect, taken competitive control of Viva before filing for authorisation.

The parties proposed remedies to the SIC to settle and close the investigation. The remedies included a reinforced hold-separate arrangement until Aerocivil issued a final decision on the matter. The SIC accepted the remedy proposal and closed the investigation.

Ultimately, in its final decision, Aerocivil accepted the operation subject to remedies. The remedies were primarily related to giving back slots at peak hours in the El Dorado Airport in Bogotá. The airlines considered the remedies to be excessive and desisted from the operation.

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

Yes, sanctions are applicable 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?

The SIC permits local hold-separate arrangements to enable foreign-to-foreign mergers to close before local clearance.

Parties have three options:

- Request a formal approval from SIC of the hold-separate arrangement. This procedure should take five business days, but it is rarely used due to the lack of clarity of the criteria used by SIC when assessing hold-separates.
- Inform the SIC about the hold-separate arrangement in the merger filing. This can reduce the risk of scrutiny after the transaction is cleared, but increases the risk of requests for information during the merger review process.

- Not to inform the SIC of the hold-separate arrangement and bear the risk of scrutiny after clearance.

The decision of which alternative is preferable must be determined on a case-by-case basis.

Public takeovers

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

Regarding public takeovers, if the interested party to the transaction does not have access to all the relevant information, the SIC can request the missing information from the target on behalf of the acquiring company.

Documentation

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

The documentation depends on the applicable proceeding.

- Short-form notification (below 20 per cent joint market share):
  - tax identification number;
    - certified financial statements of the previous year;
    - general description of the operation and its schedule;
    - relevant markets affected by the transaction;
    - list of market participants in the relevant market and their market share;
    - statement that indicates whether there are specific relevant sector regulations; and
    - proof of payment of the applicable fee.
- Full filing for prior approval (equal to or above 20 per cent joint market share), Phase I:
  - relevant information about the operation;
    - relevant information about the parties;
    - in-depth description of the product market;
    - in-depth description of the geographic market;
    - in-depth description of the competitors in the relevant market and their estimated participation percentage;
    - description of the distribution channels; and
    - proof of payment of the corresponding fee.
- Phase II:
  - in-depth analysis of the relevant market's structure;
    - in-depth analysis of the market entry conditions;

    - in-depth analysis of the raw materials and inputs relevant to the economic activity of the relevant market; and
    - proof of payment of the corresponding fee.

There are no sanctions for missing information, but it may cause the decision regarding the operation to be delayed. However, providing misleading information might be considered an infringement of the merger control regulations.

Investigation phases and timetable

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

The phases and steps depend on the applicable proceeding.

- Short-form notification (below 20 per cent joint market share):
  - the parties submit the relevant information; and
    - the SIC has 10 business days to issue an acknowledgment of receipt, in which case the parties may proceed to close the transaction unless the authority requests additional information or suggests the parties submit a full filing for prior approval.
- Full filing for prior approval (equal to or above 20 per cent joint market share), Phase I:
  - the parties submit all the information mandated in Resolution 2751 of 2021;
    - a summary of the filing containing only non-sensitive information that the parties provide, is made public for third parties to comment on; and
    - the SIC issues a decision within 30 business days (approve or order Phase II).
- Phase II:
  - the SIC orders the parties to submit, within 15 business days, additional information;
    - the SIC will request comments from relevant regulators (if applicable);
    - in-depth investigation, including request of information from other market participants;
    - remedies proposal (if applicable); and
    - the SIC has three months to decide. The SIC can, for one time only, restart the three-month period by requesting additional information.

The parties can request a hearing with the SIC before filing to discuss the documentation and the information that needs to be delivered. Sometimes, in such meetings, there is an opportunity to discuss substantive issues informally.

The convenience and strategic value of such a meeting must be determined on a case-by-case basis. Usually, requesting a prior meeting is only advisable in clearly challenging operations.

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

Short form notification (below 20 per cent joint market share) normally takes 10 business days.

Full filing for prior approval (equal to or above 20 per cent joint market share) for Phase II normally takes 30 business days.

Phase II

The parties have 15 days to submit Phase II information. Once all the information is submitted, the SIC has three months to decide. The SIC is allowed, for one time only, to restart the three-month period by requesting additional information. If the SIC fails to issue a decision within the three-month period, the transaction is deemed authorised.

Transactions that are clearly going to need a Phase II investigation or remedy proposals, or both, could be speeded up by submitting all Phase I and Phase II information and (if advisable) remedy proposals from the start. This must be determined on a case-by-case basis.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Superintendence of Industry and Commerce (SIC) follows a standard merger review substantive approach. It starts by defining the relevant markets affected by the transaction using demand and offer substitution. In some cases, the SIC uses isochrones - the area accessible from a certain point within a specified time - to determine the geographic market.

Market structure is normally assessed using the Herfindahl–Hirschman Index, Kwoka Index, Stemabaka Index, cross elasticities (on some occasions), barriers to entry, buyers' bargaining power and potential competition analysis.

Mergers are analysed for potential unilateral and coordinated effects, as well as any efficiencies that the parties may be able to prove. The failing-firm defence is rarely accepted, but may be a possibility if the parties meet the applicable criteria for this exception.

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 SIC will investigate market dominance, unilateral effects, coordinated effects, portfolio effects, vertical foreclosure, harm to innovation and common ownership concerns.

Any significant adverse effect on market access, consumer welfare and/or economic efficiency could be considered an undue restriction on competition.

Non-competition issues

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

Non-competition issues are not normally taken into consideration. In one recent case, the SIC assessed the impact of the transaction on data protection and privacy.

Economic efficiencies

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

According to article 12 of Law 1340 of 2009, the SIC cannot object to a merger if the parties demonstrate, based on recognised methodologies, that:

- the merger generates efficiencies;
- the efficiencies outweigh the harm to competition resulting from the merger;
- those efficiencies are transferred to consumers; and
- the efficiencies cannot be achieved by any other means.

The SIC has not explicitly authorised a merger due to efficiencies in terms of article 12 of Law 1340 of 2009. Nevertheless, in some cases, the authority has implicitly recognised the efficiency defence.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

The Superintendence of Industry and Commerce (SIC) can prohibit mergers that generate an undue restriction on competition.

Remedies and conditions

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

Yes. In fact, the SIC must offer the parties the opportunity to propose remedies.

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

The SIC has clearly stated that, as a general rule, structural remedies are preferable to behavioural remedies and that it would generally require the remedies to be implemented before closing. However, in some cases, the SIC has accepted purely behavioural remedies (mostly on vertical merger cases) or structural remedies, or both, to be implemented after closing.

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

There is no specific track record in that regard.

Ancillary restrictions

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

It is a matter of debate. Generally, ancillary restrictions are subject to ex post scrutiny in light of the prohibition on anticompetitive agreements. Whether ancillary restrictions should be subject to merger control must be determined 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?

According to the current position of the Superintendence of Industry and Commerce (SIC) (since 2018), third parties are not recognised as parties to the procedure. Third parties are therefore allowed only to access the public version of the documents and to submit comments.

Publicity and confidentiality

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

General details from the clearance process are publicly available on the authority's website. In cases where a full filing for prior approval (above 20 per cent market share) is made, the parties are requested to publish some general details in a newspaper.

Commercial information, including business secrets and other sensitive information, will remain confidential, but the parties are required to submit a summary of the documents to be included on the public record.

Cross-border regulatory cooperation

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

Yes, the SIC has several cooperation agreements with other authorities. Nevertheless, the SIC cannot disclose confidential information concerning the transaction or the parties unless authorised by the parties or ordered by a judicial authority.

JUDICIAL REVIEW

Available avenues

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

The decisions are subject to reconsideration recourse before the Superintendent of Industry and Commerce (SIC).

Appeal recourse is not possible since the decision is taken by the head of the SIC.

The decisions made by the SIC are subject to judicial review.

Time frame

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

The reconsideration recourse must be decided by the SIC within two months.

There is no opportunity for appeal.

Judicial review would normally take at least 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?

Every year, the Superintendence of Industry and Commerce analyses between 150 and 200 merger filings. Less than 1 per cent of those mergers are subject to remedies and only on very rare occasions is a transaction blocked.

Reform proposals

35 | Are there current proposals to change the legislation?

There are no relevant proposals.

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UPDATE AND TRENDS

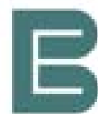
Key developments of the past year

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

During 2023, there was an increase in mergers between companies in the retail and technology industries. Nevertheless, the overall number of mergers submitted for review by the SIC has decreased.

The most relevant decision of 2023 was the closure of the gun-jumping investigation against Avianca and Viva due to the acceptance of the remedies proposed by the investigated companies.

In February 2024, Cielo Rusinque was elected as Superintendent of Industry and Commerce. Since the election of the new administration, mergers have been subject to more detailed analysis, and it has become more common for the Superintendence of Industry and Commerce to request additional information.



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Costa Rica

Claudio Antonio Donato Lopez, **Claudio Donato Monge** and
Marco López Volio
Zurcher Odio & Raven

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Voluntary or mandatory system?	Costa Rica's merger control system is mandatory.
Notification trigger/ filing deadline	Under the General Regime, The Commission for the Promotion of Competition (COPRACOM) must assess whether or not there is a change of control arising from a notified transaction. If there is, and at least two of the parties have activities within Costa Rica, then a transaction meeting the following thresholds would trigger an obligation to file: • Combined threshold: That the sum of the parties' revenues or productive assets exceeds the sum of 13,866,000,000 Costa Rican colones (approximately US$27,457,425). • Individual threshold: That at least two of the involved parties have productive assets in Costa Rica, or generated revenues in Costa Rica during the last fiscal year that exceed 693,300,000 colones (approximately US$1,372,871). Notification is mandatory for transactions that involve two or more companies in the telecommunications sector and that result in a change of control in one company, regardless of the parties' turnover or the transaction's characteristics. The filing deadline is any time before closing.
Clearance deadlines (Phase I/Phase II)	Phase 1: 30 calendar days from the moment all information is complete. Phase 2: 90 calendar days from the moment the Phase 2 RFI has been submitted and is deemed to be complete.
Substantive test for clearance	COPROCOM's substantive test for clearance involves the following criteria: • General assessment of potential anticompetitive effects. • If no anticompetitive effects are foreseen, the transaction is authorised. • If anticompetitive effects are foreseen, COPROCOM shall assess the efficiencies generated by the transaction to determine whether they offset those effects. • The parties may offer remedies and the authority may impose them.

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Quick Reference Table	

Penalties	If the parties involved in the transaction fail to notify as legally required, COPROCOM may carry a sanctioning proceeding and impose structural and/or economic sanctions.
	• Structural sanctions:
	  • Partial or total correction or divestment of the concentration. COPROCOM may also impose corrective measures to mitigate the anticompetitive effects resulting from the concentration.
	• Economic sanctions:
	  • If the parties notify the concentration after its execution, the parties may be subject to a fine equivalent to between 0.1 per cent and three per cent of each party's total turnover in the fiscal year immediately preceding that of the imposition of the sanction.
	  • If the parties fail to notify the concentration when legally required or carry out acts of execution without authorisation, and it does not carry anticompetitive effects, the fine is equivalent to between 0.1 per cent and five per cent of each party's total turnover of the in the fiscal year immediately preceding that of the imposition of the sanction.
	  • If the parties fail to notify the concentration, notify the concentration after its execution, or carry out acts of execution without authorisation, and the transaction does carry anticompetitive effects, the fine is equivalent to between 0.1 per cent and 10 per cent of each party's total turnover of the in the fiscal year immediately preceding that of the imposition of the sanction.

Remarks	Not applicable.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

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

Costa Rica's legislation on merger control is divided into three regimes: (a) the general regime, which includes any and all relevant markets except for the finance and telecommunications sector, (b) the finance sector regime, and (c) the telecommunications regime.

Both the general and the finance sector regime in Costa Rica are governed by two main bodies of law: i) The Act for the Promotion of Competition and Consumer Protection (Act No. 7472); and ii) The Act for Strengthening of Competition Authorities in Costa Rica (Act No. 9736) along with their regulations, and the guidelines issued by The Commission for the Promotion of Competition (COPROCOM), (hereinafter, the 'General Legislation').

The special telecommunications regime is regulated by the General Act on Telecommunications (Act No. 8642), Regulation No. RE-0075-JD-2023, the guidelines and protocols issued by the Superintendence of Telecommunications (SUTEL), and the General Legislation.

COPROCOM, the national competition authority in Costa Rica, enforces merger control in the general regime.

Whenever a merger includes a company that operates in the finance sector, the parties must notify the merger to COPROCOM. Once received, COPROCOM must submit the merger notification to the National Council of Supervision of the Financial System (CONASSIF) for this council to decide whether, from a reasonable point of view, the final resolution of the merger control proceeding should be issued by CONASSIF or COPROCOM.

Finally, SUTEL oversees merger control whenever it involves two or more companies that operate in a telecommunications market.

All references made to COPROCOM in this analysis shall be interpreted as applicable to SUTEL too, unless otherwise specified.

Scope of legislation

2 | What kinds of mergers are caught?

The legislation uses a very broad definition for transactions that are subject to merger control, referring to them as 'concentrations'. It defines this in very general terms as any transaction that results in an acquisition of control by one entity over another, or the formation of a new economic agent under joint control. As such, almost all mergers and acquisitions 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 meets the thresholds set forth by law may be caught by the law.

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

The Guideline on Merger Control Analysis defines economic control as the possibility, de facto or de jure, to execute a decisive influence over an economic agent or its assets, which is understood as the power to adopt or block a decision related to an 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 different thresholds that must be reached for a concentration to be subject to notification before COPROCOM under the General Regime.

1. Combined threshold: That the sum of the parties´ revenues or productive assets exceeds the sum of 30,000 base salaries during the last fiscal year. In 2024, the base salary in Costa Rica is equal to 462,000 Costa Rican colones (at the applicable exchange rate on 8 April 2024, the base salary is equivalent to US$915.24). Therefore, the first threshold is equal to approximately US$27,457,425.
2. Individual threshold: That at least two of the involved parties have productive assets in Costa Rica or generated revenues in Costa Rica of more than 1,500 base salaries during the last fiscal year. As such, this second threshold is equal to approximately US$1,372,871.

On another note, as opposed to the General Regime, the Telecommunications Regime requires that any merger conducted between two companies operating in this relevant market to be notified before SUTEL.

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

Filing is mandatory if the applicable thresholds are met in the General and Finance Regimes. The parties may request a waiver on the suspensory effect of the notification under qualified circumstances. However, the obligation to notify applies without exception if the 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 must be notified if the merger has an effect in the local market, which is understood broadly as having sold any product or service to a client based in Costa Rica, regardless of the parties' country of incorporation or the place where the merger, share purchase or joint venture agreement was entered into.

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 in which the merger control process involves some coordinated work between COPROCOM and other regulatory authorities. 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 parties must file prior to closing. Failure to file the notification can lead to fines and other sanctions, such as divestment or de-concentration. The fines range between 0.1 and 10 per cent of the parties' total revenues generated in Costa Rica during the previous fiscal year.

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

All parties are responsible for filing; however, it is sufficient for one party with a complete overview of the proposed transaction to file the notification.

The Commission for the Promotion of Competition (COPROCOM) issued the Technical Regulations for the Calculation and Collection of the Merger Control Fee in May 2023, determining a mandatory payment of 4,511,600 Costa Rican colones (approximately US$8,933).

Additionally, if COPROCOM considers that anticompetitive effects may arise in the relevant markets from the proposed transaction, this may lead to a second phase, and will require an additional payment of 9,023,201 colones (approximately US$17,867).

Nevertheless, this filing fee is not currently being enforced by COPROCOM.

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

The merger control proceeding is divided into two different phases.

Phase I consists of a general assessment of the transaction for COPROCOM to determine whether or not it may have anticompetitive effects on the market. COPROCOM must issue its resolution within 30 calendar days. However, the clock only starts running when all the required information is provided.

Phase I starts with the notification. From that point, COPROCOM has 15 business days to request additional information (RFI). If COPROCOM does not request information, the clock starts running on the date of filing. If COPROCOM does issue an RFI, the clock starts running when all the requested information has been submitted.

This phase ends with COPROCOM either authorising the transaction or concluding that the transaction may pose risks or anticompetitive effects, in which case, the merger control proceeding must be extended to Phase II.

Phase II enables COPROCOM to assess with more detail the transaction's potential anti-competitive effects, and the potential efficiencies that may be generated to determine if they offset those anticompetitive effects. The parties may offer and discuss remedies with COPROCOM. Phase II begins with an additional RFI issued by COPROCOM and it may extend up to a further 90 calendar days from the moment the parties fulfil the RFI.

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 parties must file the notification prior to closing. Failure to file the notification can lead to fines and other measures, such as divestment or de-concentration. The fines range between 0.1 and 10 per cent of the parties' total revenue generated in Costa Rica during the previous fiscal year.

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

The sanctions established in Act No. 9736 related to failure to notify a merger are applicable to foreign-to-foreign mergers. However, at the time of writing, there have been no public investigations related to this matter.

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

Act No. 9736 for the Strengthening of the Competition Authorities in Costa Rica does not expressly state applicable solutions. It only states that COPROCOM may authorise closing prior to clearance in qualified situations. However, in practice, this authorisation has never been granted.

Nevertheless, a 'hold-separate' arrangement is an applicable solution, both to reassure the parties to the transaction and to enable the transaction to become effective immediately after clearance.

Public takeovers

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

There are no special rules on 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 parties must submit a general description of the transaction, the parties thereto, the activities that each party executes globally and those executed in Costa Rica.

The parties must also provide a delimitation of the relevant market and their main competitors, and a general understanding of each market's dynamics. Parties must provide a general analysis of the potential anticompetitive effects and efficiencies generated by the transaction. In addition, parties must disclose any information related to the thresholds that triggered the obligation to notify.

Investigation phases and timetable

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

The merger control proceeding in Costa Rica is divided into two different phases.

Phase I consists of a general assessment of the transaction for COPROCOM to determine whether it may have anticompetitive effects on the relevant markets. COPROCOM must issue its resolution within a maximum of 30 calendar days. However, the clock only starts running when all the required information is provided.

From the date on which the notification is filed, COPROCOM has 15 business days to request additional information. If COPROCOM does not request any additional information, the 30-calendar-day term starts running as of the date of filing. However, if COPROCOM does issue an RFI, the deadline for the authority to reach a decision starts running when all the required information has been submitted. Phase I ends with COPROCOM either authorising the transaction or stating that, under analysis, the transaction has foreseeable anticompetitive effects and therefore it is commencing Phase II.

If Phase II is conducted, COPROCOM will fully assess the transaction's potential anticompetitive effects and any efficiencies that may be generated to determine if the latter offsets the former. The parties may offer and discuss potential remedies. Phase II begins when COPROCOM issues an additional RFI, and it may last for up to 90 additional calendar days as of the moment the parties respond to that RFI.

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

The statutory timetable for a Phase I clearance is 30 calendar days beginning on the date on which all information is deemed to be complete by COPROCOM (either the date of submission or the date on which the RFI response is submitted, and no further RFIs are received).

Phase II's statutory timetable is 90 calendar days after the parties fulfil the Phase II RFI.

In practice, COPROCOM resolves proceedings within the legal term, but not before.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test for clearance consists of an analysis of the relevant and affected markets, as well as the anticompetitive and pro-competitive effects of the transaction. If the transaction does not generate significant anticompetitive effects, or if the pro-competitive effects offset the anticompetitive effects, the transaction is approved. The Commission for the Promotion of Competition (COPROCOM) may also impose additional conditions or remedies to mitigate the anticompetitive effects.

The failing firm defence may be used as an argument to obtain authorisation for a concentration that may have anticompetitive effects; however, it has been rejected in transactions involving highly concentrated relevant markets.

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?

In its resolutions, COPROCOM has included theories of harm such as market dominance, unilateral effects, coordinated effects, conglomerate effects, vertical foreclosure, harm to innovation, and common ownership concern. However, it formally included these theories of harm until the issuance of the Guideline on Merger Control Analysis in March 2024.

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. In fact, Act No. 9736 was enacted with the purpose of granting COPROCOM more independence to address the recommendations issued by the Organisation for Economic Cooperation and Development in 2020.

Economic efficiencies

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

Economic efficiencies are considered when the transaction may result in anticompetitive effects. For example, economic efficiencies would be applicable to a transaction that generates economies of scale, which enable a company to reduce its costs and lower its final prices. If the transaction does not generate anticompetitive effects, there is no need for COPROCOM to analyse economic efficiencies.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

The Commission for the Promotion of Competition (COPROCOM) has powers to reject a transaction and has exercised these powers in the past. If the transaction is not authorised, the parties may not close the transaction and they will need to find an alternative solution.

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 parties may propose remedies and COPROCOM may also suggest remedies. Previously implemented remedies include:

3 divestments of undertakings or sale of assets;
4 restrictions or limitations related to the sale of services or goods;
5 obligations to supply certain goods or services to specific customers or competitors; and
6 the 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?

According to Act No. 9736, together with its regulations and the Guidelines on Merger Control Analysis issued in 2024, remedies are subject to compliance with the principles of proportionality, efficiency, effectiveness, transparency and consistency. Remedies may be of two types: structural, such as divestment or sale of business units, or behavioural, which facilitates rivalry and competition through access and licensing obligations, limitations on the acquisition of assets and limitations on the transfer of information between business units.

Behavioural remedies have a maximum term of 10 years. This may be extended for an additional five years if potential anticompetitive effects persist.

These remedies are subject to review at the request of the parties. Their implementation cost is borne by each party.

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

It is unusual for COPROCOM to require remedies in foreign-to-foreign mergers. In complex multijurisdictional transactions, foreign authorities tend to impose remedies that carry effects in Costa Rica. Therefore, the competition authority may consider it unnecessary to impose additional remedies.

Ancillary restrictions

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

Any ancillary restriction to a merger, acquisition or joint venture agreement must be specified in the merger control filing. If a notifying party does not state whether or not the transaction is subject to an ancillary restriction, COPROCOM will issue an request for information to the parties, which will suspend the period within which it must reach a resolution on the filing.

COPROCOM may approve an ancillary restriction if it concludes that it is reasonable and necessary. To properly determine these criteria, the authority must assess whether or not the duration, content and geographic scope of the application exceed what is reasonably required for the for the implementation of the transaction. This assessment will depend on the type of restrictions in question and the circumstances and characteristics of the transaction under analysis.

COPROCOM incorporated criteria from international best practice in its March 2024 Guidelines on Merger Control Analysis to determine the reasonableness and, consequently, the necessity and accessory nature of the duration of non-competition clauses specifically. For better reference, the authority considerers a period of up to three years is reasonable when there is transfer of loyal clientele such as goodwill and know-how, and up to two years if there is no transfer of know-how.

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 merger control proceeding requires a notice to be published in a national newspaper, which allows any interested party to appear before the Commission for the Promotion of Competition (COPROCOM) and express arguments in relation to the transaction. Evidence may be provided for or against the transaction as well as arguments as to the reasons why the concentration should be admitted or rejected. However, COPROCOM's decision is independent and it is not compelled to agree with third-party objections.

Additionally, COPROCOM may directly request information from certain economic agents (eg distributors, competitors, suppliers, main clients or consumer organisations).

Publicity and confidentiality

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

When making a merger control filing, the notifying party must submit a public version and a confidential version of the notification. Consequently, COPROCOM creates two case files:

one which is confidential and may be accessed only by the authority and the notifying parties; and another that is non-confidential, accessible to the public, and which includes the information that the notifying party has identified as public.

Cross-border regulatory cooperation

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

There are internal agreements between authorities that allow the exchange of information and advice regarding cases of similar nature. However, whenever such cooperation occurs, it is rarely disclosed.

JUDICIAL REVIEW

Available avenues

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

A ruling by the Commission for the Promotion of Competition (COPROCOM) is subject to an administrative appeal before the authority. If the appeal fails, the parties may file for a judicial review. However, at the time of writing, there have been no judicial reviews on rulings related to merger control proceedings.

Time frame

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

An administrative appeal is generally resolved within 15 business days. The judicial review does not have a clear time frame; it may 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?

Fines have been imposed for failure to notify, with the most recent occurring in 2022. These were related to transactions that posed no significant anticompetitive effects and therefore no divestment was ordered. There is no particular focus on a specific industry, sector or type of transaction.

The Commission for the Promotion of Competition (COPRACOM) has historically avoided excessive intervention in transactions that are subject to merger control. Until 2023, it had never rejected a foreign-to-foreign merger. However, in 2024 COPROCOM announced the rejection of the alliance that was filed by JetBlue Airways and Spirit Airlines in 2023.

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In this case, the authority considered that the transaction could increase the concentration of the market for passenger flights to San Jose and Costa Rica, together with their costs and the possibility of coordinated effects between competitors. Additionally, COPROCOM concluded that the approval of the transaction would worsen existing efficiencies. Although the possibility of offering commitments to reduce the potential anticompetitive effects of the transaction was granted, COPROCOM considered that they failed to counteract them.

Notwithstanding the foregoing, it should be emphasised that this is an atypical decision, since COPROCOM tends to authorise transactions with potential anticompetitive effects when the notifying parties offer effective remedies. Since its creation in 1995, COPROCOM has only blocked two transactions, including JetBlue Airways and Spirit Airlines. Therefore, this should not deter companies from entering into transactions involving companies operating directly or indirectly in Costa Rica.

Reform proposals

35 | Are there current proposals to change the legislation?

There are no current proposals to change the legislation. Costa Rica underwent significant legal reform in 2019 with the introduction of Act No. 9736, and there are no further significant reforms in sight at present. COPRACOM issued its Guideline on Merger Control Analysis in 2024, which details the aspects that the authority includes in its analysis.

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 2024, The Commission for the Promotion of Competition (COPROCOM) issued the Guideline on Merger Control Analysis, which details the general aspects that the authority considers when analysing a merger. Among other topics, this guideline defines reasonableness criteria in relation to ancillary restrictions.

Historically, as a general rule subject to certain exceptions, COPROCOM has not objected to non-compete clauses with a duration equal to or less than three years. However, prior to the issuance of this guideline there was no instrument that uniformly established the authority's reasoning. In this guideline, it was determined that a duration of up to three years is reasonable when there is a transfer of goodwill and know-how, and up to two years if there is no transfer of know-how. It was also clarified that non-compete clauses are not considered necessary when the transfer is limited to physical assets or exclusive commercial and industrial property rights. Finally, in relation to this matter, it was clarified that both the geographical scope and the proceeds related to the clauses must not exceed those of the activities that are the object of the transaction.

In relation to non-solicitation clauses, the authority established that for them to be considered reasonable, they must refer to key personnel that is strictly necessary to protect the

value of the operation and to operate the transferred assets and must not conceal no-poach agreements, which could constitute a monopolistic practice.

Another regulated category of ancillary restrictions is purchase and supply obligations to the seller, the buyer, or both, when they are necessary to enable the transfer of assets under reasonable conditions, to guarantee to either party the continuity of the supply of products required for its activities (those retained, in the case of the seller, and those acquired, in the case of the buyer). In this case, COPROCOM used the criterion of the European Commission, indicating that a duration of up to five years is justified, since it is considered as a necessary time to replace the relationship of dependence by a situation of autonomy in the market.

Also, COPROCOM stated in its guideline that for a notification of a conglomerate concentration that is governed by a favourable presumption set forth on Act No. 9736, it is not required to precisely define and analyse the relevant markets in which each company operates. Instead, this will be validated with the Classification of Economic Activities of Costa Rica (CAECR) of the National Institute of Statistics and Censuses (INEC), which is an adaptation of the most recent International Industrial Classification of all Economic Activities (ISIC) of the United Nations. This simplifies the merger control proceeding when the involved parties operate in a large number of markets, but does not preclude COPROCOM from conducting the necessary information requests to rule out any type of complementarity from the production, distribution, use or consumption.

In 2024, COPROCOM analysed merger filings regarding a large number of relevant markets, such as virtual client computing, unified endpoint management, medical device manufacturing, food ingredient manufacturing and university education.

Among the most relevant cases published by COPROCOM in 2024 is the resolution that blocked JetBlue Airways and Spirit Airlines' transaction in 2023, which constitutes the first and only foreign-to-foreign transaction that has been rejected by this authority in its history.

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Notification trigger/ filing deadline	The notification has to be submitted to the Croatian Competition Agency (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 (Phase I/Phase II)	In Phase I, the CCA has 30 days to clear the concentration. If no decision has been adopted prior to the expiry of the waiting period, the concentration is deemed to have been cleared in Phase I. Should the CCA 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 have been 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 up to 10 per cent of an undertaking's total annual turnover realised in the preceding business year, depending on the type of breach.
Remarks	Not applicable.

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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 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, No. 38/11), which provides information on the content and form of the notification as well as the assessment criteria for concentrations.

In preparation for Croatia's accession to the European Union on 1 July 2013, the Competition Act was substantially amended to comply with EU competition law. The Competition Act was most recently amended on 24 April 2021, primarily to transpose the ECN+ Directive into Croatian law, but also to introduce additional changes to the merger control regime.

Since Croatia's accession to the European Union, the EU Merger Regulation (EUMR) has been directly applicable; hence mergers falling within the scope of the EUMR are reviewed by the European Commission (one-stop-shop principle) and not by the Croatian Competition Agency (CCA), except for cases in which the European Commission decides to refer the assessment of a particular concentration to the CCA under the terms of the EUMR.

The CCA remains competent to review national merger control cases under the Competition Act. The CCA is an independent authority. The decision-making body within the CCA is the Competition Council, which consists of five members, one of whom is the president of the Competition Council.

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 direct or indirect control or decisive influence of one or more undertakings over one or more other undertakings, or over one or more parts of other undertakings, 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 Companies Act; or
- the creation of a joint venture by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity.

A concentration does not arise if:

- banks or other financial institutions, investment funds or insurance companies, in their ordinary course of business, which includes transactions and dealing with securities, for their own account or for the account of third parties, hold shares on a temporary basis with a view toward reselling them, provided that they do not exercise their voting rights in respect of those shares for the purpose of determining the competitive behaviour of that undertaking (ie, they exercise such voting rights solely with a view of 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 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 an 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 Companies Act.

3 What types of joint ventures are caught?

The creation of a joint venture by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity (full-function joint venture), constitutes a concentration.

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

In general, control may be obtained through the transfer of rights, contracts or other means, by which one or more undertakings, either separately or jointly, taking into account all legal and factual circumstances, gain the ability to exercise decisive influence over one or more undertakings on a lasting basis.

An undertaking is deemed to be controlled by another undertaking if the controlling undertaking, directly or indirectly:

- holds more than half of the share capital or half of the shares;
- may exercise more than half of the voting rights;
- has the right to appoint more than half of the members of the management board, supervisory committee or a similar administrative or managing body; or
- has the right to manage the business operations of the undertaking in another way on the basis of a special agreement on the functioning of the undertaking, through which the possibility of exercising decisive influence on a more permanent basis is acquired.

Minority interests (including board or management representation and contractual arrangements) are caught, provided 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 total worldwide business turnover of the undertakings concerned amounted to at least €132,722,808.41 and at least one of the undertakings concerned has its seat or a subsidiary in Croatia; and
- the individual total business turnover realised in Croatia by each of at least two undertakings concerned amounted to at least €13,272,280.84.

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 relevant turnover is calculated by adding together the respective turnovers of the following:

1. the undertaking concerned;
2. undertakings in which the undertaking concerned, directly or indirectly:
    - owns more than half of the shares or capital or business assets;
    - has the power to exercise more than half of the voting rights;
    - has the power to appoint more than half of the members of the supervisory board, the administrative board or bodies legally representing the undertakings; or
    - has the right to manage the undertakings' affairs;
3. undertakings that have in the undertaking concerned (acquiring or controlling undertaking) rights or powers listed in point (2);
4. undertakings in which the undertakings referred to in point (3) have the rights or powers listed in point (2); and
5. undertakings in which two or more undertakings as referred to in points (1) to (4) jointly have the rights or powers listed in point (2).

Turnover generated by sales or services between companies belonging to the same group, as well as turnover arising from taxes and parafiscal contributions, is not taken into account. In the case of an acquisition of one or more parts of an undertaking or of a group of undertakings, irrespective of whether such parts constitute independent legal entities, only the turnover pertaining to the parts subject to the concentration are taken into account for the purpose of the turnover calculation.

For the purpose of the turnover calculation of banks and other institutions that provide financial services, after the deduction of indirect taxes related to them, the sum of the following income items has to be taken into account:

- income from interest rates and similar income;

- income from securities (ie, income from shares and other variable yield securities, income from participating interests in economic entities, and income from shares in affiliated economic entities);
- commissions receivable;
- net profit on financial operations; and
- other operating income.

For insurance companies and companies that perform reinsurance activities, the value of the gross premiums, which includes amounts paid and received in relation to the insurance contracts issued by or on behalf of an insurance company, including reinsurance premiums, after the deduction of taxes and parafiscal contributions charged by reference to the amounts of individual premiums or in relation to the total premium volume, have to be taken into account.

Concentrations falling within the jurisdiction of the European Commission are, in general, not subject to Croatian merger control (one-stop-shop principle). According to article 19, paragraph 7 of the Competition Act, the European Commission may decide to refer the assessment of a concentration to the CCA, irrespective of the concentration having a Community dimension and regardless of whether the Croatian national thresholds are met (since the higher turnover thresholds stipulated by the EUMR are met). Should this be the case, the parties to the concentration must submit a respective Croatian merger notification to the CCA within 30 days of the date of receipt of the relevant decision of the European Commission.

Irrespective of whether the above-mentioned turnover thresholds are met, in specific situations in the media, postal or electronic communications sectors, a filing with the CCA or the Croatian Regulatory Authority for Network Industries (HAKOM) may be required.

Except in the situations described above, the general rule is that there is no obligation to notify a concentration to the CCA if the thresholds set forth by 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 Competition Act and if the statutory turnover threshold requirements are cumulatively met, the filing is mandatory.

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

The Competition Act requires local effects insofar that – in addition to a certain domestic minimum turnover generated by at least two of the undertakings concerned – at least one of the undertakings concerned is required to have its seat or a subsidiary in Croatia. As a result, purely foreign-to-foreign mergers usually fall outside 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 relate specifically to foreign investments. In the following sectors and others, provisions related to merger control exist.

Media sector

The CCA has sole competence to decide on concentrations involving media companies.

The Media Act (Official Gazette, No. 59/04) requires media companies to notify all concentrations to the CCA, irrespective of whether the turnover thresholds stipulated under the Competition Act are met. The Media Act also 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.

Furthermore, under the Electronic Media Act (Official Gazette, No. 111/21), change of control in an electronic media undertaking requires notification to the Competition Agency only if turnover thresholds stipulated under the Competition Act are met. However, for the purposes of preserving media pluralism and content diversity, electronic media undertakings are required to ex-post notify any change of ownership or control to the Electronic Media Agency, irrespective of the turnover thresholds and regardless of whether the CCA may be undertaking an independent assessment of the underlying concentration.

The Electronic Media Act stipulates specific market threshold requirements that denote prohibited concentrations. In those instances, 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), in addition to other statutory restrictions.

Postal and electronic communications sectors

According to article 116 of the Electronic Communications Act (Official Gazette, No. 76/22), operators with significant market power and operators who have been granted licences to use radio frequencies are obligated to notify HAKOM of any intention to merge or consolidate, or of any other type of joint or coordinated action (irrespective of whether the turnover thresholds are met). Prior to the implementation of any such operation, HAKOM must issue its approval. If the operation qualifies as a concentration exceeding the turnover thresholds, a notification must be filed with the CCA. In the course of the assessment, the CCA may invite HAKOM to comment on the case.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

There is no explicit filing deadline; however, the notification has to be submitted to the Croatian Competition Agency (CCA) prior to the intended implementation of the concentration and following the conclusion of the merger agreement, or following the publication of the invitation to tender on the basis of which control or decisive influence will be acquired by the controlling undertaking.

The parties may submit the notification even before the conclusion of the merger agreement or the publication of the invitation to tender if they are able to provide, in good faith, evidence of the proposed conclusion of the merger agreement or the announcement of the invitation to tender. In the case of a breach of the filing obligation, the CCA may impose a fine of up to 1 per cent of the undertaking's total annual turnover realised in the preceding business year.

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

There are two scenarios to consider.

In the 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.

Special filing fees for the submission of a notification, as well as for the CCA's assessment and decision, were abolished in 2021.

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). There are two waiting periods to consider.

First, following the submission of the notification, the CCA assesses the completeness of the merger notification. The Competition Act does not provide for a specific time frame; in practice, it is thus recommended to be in contact with the CCA during this stage to ensure that this period is short.

Second, once the CCA has issued the confirmation of completeness, it then assesses the intended concentration in one or two phases, depending on whether the intended concentration raises competition concerns.

In Phase I, the CCA has 30 days to clear the intended concentration. If no decision clearing the intended concentration or a procedural order on the initiation of the compatibility assessment in Phase II is adopted prior to the expiry of this waiting period, the intended concentration is presumed by law to be approved in Phase I. In that case, the CCA usually issues a letter of comfort to the notifying party, typically without any delay, confirming the compatibility of the notified concentration.

If, however, the CCA takes the view that the intended concentration gives rise to competition law concerns, it shall adopt a procedural order on the initiation of Phase II proceedings. Once the CCA has initiated Phase II proceedings, it must issue a decision within three months (which may be extended by an additional three months, if this is necessary to carry out additional market analysis). If no decision is adopted prior to the expiry of the waiting period, the intended concentration is presumed by law to have obtained clearance in Phase II.

According to article 19(6) of the Competition Act, the CCA may, in particularly justified cases and 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.

If the concentration has been closed prior to clearance and the requirements for obtaining clearance have not been met (irrespective of whether a notification has been submitted to the CCA), the CCA may impose a fine of up to 10 per cent of the undertaking's total annual worldwide turnover generated in the preceding business year. The fine is imposed where the infringement has been committed intentionally or negligently. Notions of intent and negligence should be interpreted in line with the case law of the Court of Justice of the European Union, not in line with the meaning assigned to them in criminal matters.

Where the concentration could in principle obtain clearance but has been closed prior to clearance (irrespective of whether a notification has been submitted), 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. An undertaking could also be fined up to 1 per cent of its total annual turnover generated in the preceding business year if the merger filing provides incorrect or false information about the parties and their businesses.

In addition, the CCA may order any indispensable measures aimed at restoring effective competition in the relevant market and set appropriate deadlines for their adoption. In particular, the CCA may:

- order acquired shares or share capital to be transferred or divested; or
- prohibit or restrict the exercise of voting rights attached to the shares or share capital and order the joint venture (or any other form of control by which the concentration has been put into effect) to be removed.

There are no publicly available cases in which the CCA has recently imposed such sanctions to restore competition.

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

The sanctions for closing before clearance (gun jumping) are also applicable in foreign-to-foreign mergers; however, we are not aware of these sanctions having been applied in practice to such mergers since the introduction of the Competition Act, as they usually fall outside the scope of the Croatian merger control regime (among other things, a merger filing is only required if at least one of the undertakings concerned has its seat or a subsidiary in Croatia).

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

The Competition Act does not explicitly provide for hold-separate (carve-out) solutions. Foreign-to-foreign concentrations are therefore assessed and treated in the same way as local concentrations. The Competition Act includes an additional local jurisdictional threshold requirement, according to which at least one of the undertakings concerned is required to have its seat or a subsidiary in Croatia. If this (additional) requirement is not met, a concentration does not require a notification in Croatia.

As a result, since the introduction of the Competition Act, most foreign-to-foreign mergers that could require hold-separate (carve-out) solutions fall outside the scope of the application of the Croatian merger control regime. The CCA may, in particularly justified cases and upon the request of the parties, permit the implementation of particular actions relating to the implementation of the notified concentration before the expiry of the applicable waiting period.

Public takeovers

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

The Takeover Act (Official Gazette, No. 109/07) stipulates that the deadline for requesting 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 are set out in article 20 of the Competition Act and in the Regulation on the Notification and Assessment of Concentrations (the Regulation).

Among other things, the following must be provided:

- information on the parties to the concentration (eg, names; registered seats; excerpts from the commercial register; nature of the business, ownership and control; description of the distribution and retail networks; and annual financial reports for the 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, and the 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 set forth in the Regulation is not available to the parties, this must be stated in the filing, together with information regarding where the undertakings tried to collect the data concerned, the reasons why this collection was not successful and where the CCA could obtain the missing information.

The notification and all documents attached thereto need to be submitted in the Croatian language. In addition, all documents submitted to the CCA must be in the form of an original or a certified copy bearing an apostille (depending on the jurisdiction of origin of a particular document). If a document requires translation, both the original or a certified copy and its certified Croatian translation have to be provided.

The Competition Act also envisages the possibility to submit a short-form notification in cases that – from experience – usually do not give rise to competition law concerns. The Regulation, which defines the precise content of short-form notifications, was published in the Official Gazette, No. 38/11 and came into force on 9 April 2011.

According to article 20 of the Competition Act, a short-form notification may be submitted if:

- none of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (ie, no horizontal overlaps), or in a market that is upstream or downstream of a market in which another party to the concentration is engaged (ie, no vertical relationship);
- two or more of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (horizontal relationship), provided that their combined market share is less than 20 per cent, or when one or more of the parties to the concentration are engaged in business activities in a relevant product market that is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationship), provided that none of their individual or combined market shares at either level is 30 per cent or more;
- a party to the concentration is to acquire sole control of an undertaking over which it already has joint control; or
- in cases in which two or more undertakings acquire control over a joint venture, where the joint venture has no, or negligible, actual or foreseen activities within Croatia.

However, even in those cases, the CCA may require a full notification to be made if it finds that the concentration may lead to a significant impediment of effective competition.

If the merger filing provides incorrect or false information about the parties and their businesses, the CCA may impose a fine of up to 1 per cent of the undertaking's total annual turnover generated in the preceding business year.

Investigation phases and timetable

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

Following the submission of the merger notification, the CCA first assesses its completeness. The Competition Act does not provide for a specific time frame for the review of the completeness of the notification. Once the CCA has issued the confirmation of completeness, the CCA assesses the intended concentration in one or two phases, depending on whether the intended concentration raises competition concerns.

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

In Phase I, the CCA has 30 days to clear the intended concentration. If no decision or procedural order on the initiation of the compatibility assessment decision is adopted prior to the expiry of this time period, the intended concentration is presumed to be approved in Phase I. In that case, the CCA usually issues a letter of comfort to the notifying party confirming the compatibility of the concentration concerned.

If the CCA initiates Phase II proceedings, it must issue a decision within three months. This waiting period may be further extended by an additional three months if this would be necessary to carry out additional market analyses. If no decision is adopted by the CCA prior to the expiry of the waiting period, the intended concentration is presumed by law to have obtained clearance in Phase II.

It is evident from publicly available information that the CCA usually clears concentrations in Phase I (ie, within 30 days of the day when the complete filing was submitted).

The Competition Act does not provide the possibility for the parties to obtain a waiver or to apply for expedited proceedings.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Competition Act introduced to the Croatian merger control regime the substantive test for the assessment of concentrations that is applied by the EU Merger Regulation (EUMR). According to article 16 of the Competition Act, the Croatian Competition Agency (CCA) assesses whether the intended concentration would significantly impede effective competition in the market, in particular as a result of the creation or strengthening of a dominant position.

In assessing concentrations, the CCA regularly takes into account special circumstances revolving around the specific case. For instance, in a vertical merger between a meat products manufacturer and a grocery retail chain (cleared in 2005), as well as in two other horizontal mergers between telecommunications operators (conditionally cleared in 2014 and 2017), the CCA took into consideration the failing firm defence raised by the parties to these concentrations.

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

Similar to the rules under the EUMR, if the effect or object of a full-function joint venture is the coordination of the competitive behaviour of undertakings that remain independent, such coordination will be appraised in the review process under the 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 structure of the relevant market;
- actual and potential competitors in the relevant market;
- supply and potential market supply;
- the costs, risks, and technical, economic and legal conditions necessary to enter into or withdraw from the relevant market;
- the possible effects of the intended concentration on competition in the relevant market;
- the market shares and market position, economic and financial power, and 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

- the 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, sustainability, employment or public interest issues as being relevant in the assessment process. In practice, however, the CCA may take into account non-competition issues.

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 on the condition that they are advantageous to consumers.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

Based on the assessment of the concentration under the substantive test, the Croatian Competition Agency (CCA) may, following the initiation of Phase II proceedings, issue:

- a clearance decision, by which the concentration is deemed compatible with competition rules;
- a decision declaring the concentration conditionally compatible with the Croatian competition rules, provided that within given time limits certain measures are taken and conditions are met (provisional measures); or
- a decision prohibiting the implementation of the 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 decision-making;

- any of the parties to the concentration have not fulfilled the conditions and obligations determined in the CCA's decision; 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, conditionally cleared by the CCA in 2014. In its decision, the CCA rendered a complex economic and behavioural analysis of the merger, and ordered a number of measures to counterbalance the anticompetitive effects of the concentration. In particular, these measures included the divestment of 96 retail outlets in the combined network of both undertakings (by either terminating lease agreements, or renting or selling the shops to third parties), and the imposition of an obligation on the acquirer to ensure that the three bestselling products of five of the target's largest suppliers were offered in its retail network for at least three years. The CCA appointed a monitoring trustee to ensure that the measures were duly implemented.

In 2009, in the course of the acquisition of a local Croatian oil company by a Hungarian oil company, the CCA demanded that the Croatian target company sell one of its local subsidiaries. In its clearance decision, the CCA listed certain requirements to be observed to ensure the future business integrity of the disposed subsidiary after being sold to third parties. In the same year, in a case regarding the acquisition of a local retail chain, the CCA ordered the disposal of certain retail stores. In both cases, the acquirer was ordered to nominate a monitoring trustee to monitor compliance with the remedies.

In 2014, the CCA imposed a set of remedies on the parties to a concentration in the telecommunications sector. In this case, the CCA accepted the measures proposed by the parties to the concentration, aimed at eliminating the negative effects of the concentration on competition. Among other remedies, the concentration was limited to a period of four years following the acquisition. This concentration was initially cleared by the CCA accepting a failing firm defence because control over the target was acquired in a pre-bankruptcy settlement process. In this case, in 2017, the CCA partially repealed the initial clearance from 2014, imposing a revised set of remedies on the parties to the concentration. The new remedies were requested and accepted, due to the impact of extraordinary circumstances.

Also in 2017, the CCA conditionally cleared another concentration in the telecommunications sector, imposing a combined set of structural and behavioural remedies on the parties to the concentration.

The most recent example of the CCA imposing remedies is a merger in the automotive industry, which was conditionally cleared in Phase II in 2022. To remedy the identified competition concerns, the CCA accepted a proposal from the undertakings concerned and imposed a broad set of remedies, which were primarily behavioural and included – among

other conditions – the application of equal selective distribution criteria to all members of the authorised distributors' networks, the prevention of information exchange concerns between competing multi-brand repairers, and easier access to original spare parts and technical information to independent repairers.

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.

Second, 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 a 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 that the CCA does not accept or only partly accepts the proposed remedies, it is authorised to impose other behavioural or structural measures, conditions, obligations and deadlines to ensure effective competition under article 22 of the Competition Act.

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

We are not aware of any foreign-to-foreign mergers in which the CCA has requested remedies. The CCA cleared foreign-to-foreign mergers in Phase I and without the imposition of remedies in 2019 (two mergers), 2021 (one merger), 2022 (one merger) and 2023 (two mergers).

Ancillary restrictions

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

The Competition Act does not contain explicit provisions on ancillary restrictions. However, the CCA generally takes the European Commission's decisional practice into account; therefore, in practice, ancillary restraints directly related to and necessary for the concentration are usually covered by the CCA's clearance decision.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

The Croatian Competition Agency (CCA) may gather information ex officio. It may also require from the undertakings concerned and from third parties (eg, customers and competitors) additional information that it considers necessary for the assessment of the concentration.

Further, the fact that a notification has been submitted and that Phase II proceedings have been initiated are made public on the CCA's website, inviting third parties to submit their observations and comments on the intended concentration.

Access to the CCA's case file may only be granted to the parties to the proceedings. According to the Croatian general administrative procedure rules, a 'party' may be an individual or an entity that is authorised to participate in the proceedings for the purposes of protecting its rights or legal interests. In practice, however, only the undertakings concerned are admitted as parties to the merger control proceedings and, accordingly, third parties may not be admitted as parties to the proceedings. The undertakings concerned have the right to access the case files only once they have received a statement of objections in Phase II.

In addition to the provisions of the General Administrative Procedure Act (Official Gazette, No. 47/09), the general rules stipulated in the Competition Act on third parties' rights in the proceedings apply. Although they cannot be admitted as parties to the merger control proceedings, interested third parties may submit their comments and observations on the intended concentration following the CCA's publication thereof.

Publicity and confidentiality

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

With regard to the publicity given to the process, the fact that a notification has been submitted and that Phase II proceedings have been initiated are made public on the CCA's website, inviting third parties to submit observations and comments on the intended concentration. Decisions made by the CCA are published on its website as well. Access to the case file may only be granted to the parties to the process.

The CCA may not disclose business secrets (ie, information that is defined to be a business secret by law or by the undertakings concerned). Business secrets, among other things, encompass any business information that has actual or potential economic and market value, 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 CCA's decision is based.

Against this background, it is generally advisable to explicitly mark any confidential information as such in the merger notification, and in any other comments, statements and documents sent to the CCA. Case-related information that is made public by the CCA is generally published in a non-confidential version.

Cross-border regulatory cooperation

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

The CCA has concluded cooperation agreements with several national competition authorities – for example, those of Albania, Austria, Bosnia and Herzegovina, Georgia, Hungary, Kosovo, North 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); among other things, it participates in the ECN's Merger Working Group.

Moreover, after Croatia achieved candidate status for full membership in the Organisation for Economic Co-operation and Development (OECD) in 2022, the CCA heightened its involvement with the OECD by participating in negotiations, conducting self-assessments of legal instruments in the area of competition law and by organising and participating in seminars and other activities.

Members of the CCA also regularly participate in conferences, summits and other high-level meetings organised by other competition authorities, thereby ensuring that Croatia is involved in the international competition law dialogue. As for recent developments, in 2019 the CCA carried out an EU twinning light project in Montenegro aimed at strengthening the administrative capacities of the Montenegrin competition authority through training its staff, particularly in relation to complex economic analyses, evidence collection procedures and surprise inspections (dawn raids).

Furthermore, the transposition of the ECN+ Directive into Croatian law, which was completed by the recent amendments to the Competition Act that entered into force on 24 April 2021, is expected to further facilitate and streamline cooperation between the CCA and national competition authorities in other EU member states.

JUDICIAL REVIEW

Available avenues

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

A legal action for judicial review against the decision of the Croatian Competition Agency (CCA) must be filed directly with the Croatian High Administrative Court within 30 days of the date on which the CCA decision was served. Decisions of the High Administrative Court may be further appealed, on limited grounds, before the Croatian Constitutional Court, which has recently tended to intervene in competition matters.

In the past, most of the judicial reviews brought before the then-competent Croatian Administrative Court (which decided competition law cases until mid-2013) were dismissed; the recent practice of the Croatian High Administrative Court has shown that the judges' tendency to reject these remedies in most cases has not changed. According to publicly available information, only a handful of judicial reviews have been undertaken in relation to merger control proceedings and the vast majority of follow-on administrative disputes relate to other infringements of competition law.

Time frame

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

Previously, the judicial review performed by the Croatian Administrative Court could take up to two years. Depending on the complexity of the case, it could take even longer.

Although the Croatian High Administrative Court (which took over competency in 2013) has recently performed several judicial reviews in a much shorter time (ie, within a few months of the submission of the request for judicial review), showing an improvement in the overall duration of proceedings, other recent cases have shown that the judicial review process still tends to be rather lengthy.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

Because of the relatively high domestic notification thresholds, the number of merger control cases is rather small in Croatia. According to publicly available data, the Croatian Competition Agency (CCA) cleared a total of 12 concentrations in 2023: 11 concentrations were cleared in Phase I and one concentration was cleared in Phase II. Two merger notifications were dismissed by the CCA in 2023, as neither the general turnover thresholds nor the special notification requirements applicable to the media sector had been met. In 2022, 10 concentrations were cleared by the CCA in Phase I and one was conditionally cleared in

Phase II with the imposition of behavioural remedies addressing the competition concerns arising from the concentration.

Six concentrations were cleared by the CCA in Phase I in 2021 and seven notifications were dismissed as either the turnover thresholds or the related statutory requirements had not been met.

In 2021, the CCA performed two independent reviews of concentrations that had not previously been notified upon the initiatives of interested third parties, ultimately concluding that in neither of those cases had the turnover thresholds triggering the notification requirement been met. Seven concentrations were cleared by the CCA in 2020 (six in Phase I and one in Phase II) and three merger notifications were dismissed as the statutory requirements for the CCA's assessment had not been met. Further, according to publicly available information, the CCA cleared 14 concentrations in 2019 and 11 concentrations in 2018 – all but one were cleared in Phase I.

Although there have been, according to publicly available information, no recent cases in which the CCA imposed fines for implementing concentrations prior to or without its approval, the CCA has in the past imposed a number of rather symbolic administrative fines that ranged 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 the scope of the Croatian merger control regime (among other things, a merger filing is required only if at least one of the undertakings concerned has its seat or a subsidiary in Croatia). According to information published by the CCA, two foreign-to-foreign mergers were cleared in Phase I in 2023, only one merger was cleared in each of 2022 and 2021, no foreign-to-foreign mergers were assessed by the CCA in 2020 and two such mergers were assessed and cleared in Phase I in 2019.

Reform proposals

35 | Are there current proposals to change the legislation?

The latest substantive amendment of the Competition Act entered into force on 24 April 2021. These amendments were primarily enacted to transpose the ECN+ Directive into national law; however, alongside aligning the Competition Act with the EU acquis, the amendments also encompassed changes to the local merger control regime. Although there are currently no publicly announced proposals to change the legislation, the Competition Act may be subject to a minor amendment to adjust the turnover thresholds in light of Croatia's accession to the euro area in January 2023.

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 2023, the Croatian Competition Agency (CCA) cleared a total of 12 concentrations. In particular, 11 concentrations were cleared in Phase I, five of which involved undertakings active in the grocery retail market, while others were engaged in various businesses and industries, including electric energy production and trade, network infrastructure, tourist accommodation and the wood industry. The only concentration cleared in Phase II involved two major undertakings engaged in the waste management sector. This concentration was cleared unconditionally, as the CCA assessed there is significant competition in every segment of the waste management market, indicating substantial market dispersion.

In addition, the CCA dismissed two merger filings in the media sector in 2023, as the statutory conditions had not been met.

From an economic standpoint, in 2023, a significant decrease was observed in the total value of mergers and acquisitions in Croatia. This was driven by multiple factors at both the global and national level, including the increase in interest rates, persistent high inflation rates in Croatia and ongoing global uncertainty, with outlooks for 2024 remaining divergent.

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Cyprus

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Voluntary or mandatory system?	Mandatory system for concentrations that meet the jurisdictional thresholds.
Notification trigger/ filing deadline	There is no filing deadline per se, but a notifiable concentration cannot be implemented (in part or whole) without being cleared by the Commission for the Protection of Competition (CPC). The CPC can order the partial or complete dissolution of a concentration that was implemented without clearance, in addition to imposing administrative fines.
Clearance deadlines (Phase I/Phase II)	Within one month from the date of submission of the notification and payment of the filing fee (or the date of submission of any additional information requested by the CPC) the CPC must inform the notifying undertaking(s) of its decision on whether the concentration is cleared or a Phase II investigation will be conducted. The CPC can extend this one-month period by 14 days. In the case of a full investigation (Phase II), provided the Phase II filing fee has been paid, the CPC has four months from the date of submission of the notification (or the date of submission of any additional information requested by the CPC) to inform the notifying undertaking(s) of its decision.
Substantive test for clearance	In reviewing a concentration as to its compatibility with the competitive market, the CPC takes into account a number of criteria, including: • the structure of the affected markets; • the market position of the participants; • the economic power of all the undertakings in the market; • any barriers to entry to the affected market; • the interests of the intermediate and end consumers of the products and services; and • the alternative sources of supply of the products and services that are traded in the affected markets, and of their substitutes. A concentration that creates or strengthens a dominant position in the affected markets within Cyprus will be declared incompatible with the operation of the competitive market.

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Quick Reference Table	
Penalties	Partially or completely implementing a concentration without the CPC's prior approval may result in a fine of up to 10 per cent of the total turnover of the notifying undertakings in the financial year immediately preceding the notification, in addition to a fine of up to €8,000 for each day that the infringement persists. The CPC may also order the concentration to be unwound in part or in whole. Implementing a concentration without conforming to a condition imposed by the CPC may result in a fine of up to 10 per cent of the total turnover of the notifying undertakings in the financial year immediately preceding the notification, in addition to a fine of up to €8,000 for each day that the infringement persists. A fine of up to €50,000 may be imposed for a failure to provide requested information or clarifications, or for providing misleading or inaccurate information.
Remarks	None.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

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

The Control of Concentrations Between Undertakings Law 83(I) of 2014 (the Law) is the statute regulating the control of concentrations between undertakings in Cyprus.

Enforcement of the legislation rests with the Commission for the Protection of Competition (CPC). The CPC has overall responsibility for implementing the Law and is the competent independent authority for the control of concentrations.

The CPC declares whether 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 carried out by the CPC's civil service.

Scope of legislation

2 | What kinds of mergers are caught?

The Law is applicable to transactions resulting in a change of control on a lasting basis. Such transactions are:

- mergers of two previously independent undertakings or parts thereof; and
- acquisitions by one or more persons already controlling at least one undertaking, or by one or more undertakings, directly or indirectly, whether by purchase of securities or assets, by agreement or otherwise, of control of one or more other undertakings.

Full-function joint ventures are also caught under the Law.

3 | What types of joint ventures are caught?

Joint ventures performing all functions of an autonomous economic entity in a permanent manner are caught under the Law.

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

'Control' is defined under the Law as control stemming from any rights, agreements or other means that, either severally or jointly, confer the possibility of exercising decisive influence over an undertaking through:

- ownership or enjoyment rights over the whole or part of the assets of the undertaking; or
- rights or contracts that confer the possibility of decisive influence on the composition, meetings or decisions of the bodies of an undertaking.

Thresholds, triggers and approvals

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

A concentration will meet the jurisdictional thresholds if:

- at least two of the undertakings concerned achieve, at a worldwide group level, more than €3.5 million in turnover, respectively;
- at least two of the undertakings concerned achieve a turnover in the Republic of Cyprus; and
- at least €3.5 million of the aggregate turnover of all undertakings concerned (taken together) is achieved in the Republic of Cyprus.

Where the jurisdictional thresholds are not met, the Minister of Energy, Commerce and Industry of the Republic of Cyprus may declare a concentration as being of major importance on grounds of major public interest, with reference to public security, media pluralism and the principles of sound administration.

The CPC may refer a transaction to the European Commission even where the Cypriot thresholds are not met, under Article 22 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

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

The filing of concentrations of major importance is mandatory; however, notification is not required in the following cases:

- credit institutions, financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of third parties, hold, on a temporary basis, securities which they have acquired in an undertaking with a view to reselling them, provided that:
    - they do not exercise voting rights in respect of those securities to determine the competitive behaviour of that undertaking; or
        - they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets, or the disposal of those securities, and such disposal takes place within one year of the date of acquisition (a period that the CPC may extend in certain circumstances);
- control is exercised pursuant to the applicable law on liquidation, bankruptcy or a similar procedure;
- acquisition by an investment company of direct or indirect control of the whole or parts of one or more other undertakings, provided that voting rights in respect of such a holding are exercised only to maintain the full value of those investments and not to determine, directly or indirectly, the competitive behaviour of those undertakings;
- property is transferred under a will or by intestate devolution; or

- it is a concentration between two or more undertakings, each of which is a subsidiary 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 of 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:

- at least two of the undertakings concerned achieve a turnover in the Republic of Cyprus; and
- at least €3.5 million of the aggregate turnover of all undertakings concerned (taken together) is achieved in the Republic of Cyprus.

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

Notwithstanding exceptions in relation to credit and financial institutions or insurance companies, there are no specific rules on foreign investments, special sectors or other approvals.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

Filing

There are no statutory deadlines for filing in Cyprus; however, transactions caught under the Control of Concentrations Between Undertakings Law 83(I) of 2014 (the Law) must be notified to the Commission for the Protection of Competition (CPC) and obtain clearance prior to their implementation. Clearance in Cyprus is a prerequisite for the implementation of the entire transaction at a global level.

Filing can take place following the signing of the binding transaction documentation. It may also be possible to file before signing, where the undertakings concerned can substantiate their bona fide intention to conclude an agreement.

Sanctions

On becoming aware of a failure to file a notifiable transaction, the CPC will call upon the undertakings concerned to notify the transaction to it.

If a transaction is implemented prior to the transaction being notified to and cleared by the CPC (gun jumping), the CPC may impose a fine on the notifying undertaking or undertakings. This fine may comprise up to 10 per cent of the worldwide turnover of the notifying

undertaking or undertakings. The CPC also has the power to order the partial or total dissolution of the transaction under certain conditions.

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

Concentrations of major importance must be notified to the CPC's civil service (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.

The filing fee for a Phase I assessment is €1,000. Where a concentration becomes subject to a full investigation (Phase II), a fee of €6,000 becomes payable to the CPC.

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

Within one calendar month of the date of submission of the notification and payment of the filing fee, the Service is required to inform the notifying undertaking of whether the concentration is cleared or whether it will proceed to a full investigation of the concentration (Phase II).

If, due to the volume of work or the complexity of the information contained in the notification, the Service is unable to comply with the one-month timeframe, it must inform the notifying undertaking(s) that it will extend the assessment by 14 calendar days.

If the notification is not complete or if additional information is required by the CPC, the one-month statutory period commences on the date following the submission of a complete notification or the additional information requested by the CPC.

In a Phase II investigation, the Service must prepare a report of findings to the CPC within three months of the date of submission of the notification or such additional information necessary for the notification to be considered complete, provided that the relevant filing fee is paid.

In the case of a full investigation, the Service must inform the notifying undertaking(s) of the CPC's decision no later than four months from the date of submission of the notification or such additional information necessary for the notification to be considered complete.

Implementation of the transaction must be suspended pending the CPC's assessment.

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 CPC has the power to apply administrative fines of up to 10 per cent of the aggregate turnover of the notifying undertakings for gun jumping, which may be followed by additional administrative fines of €8,000 for each day the infringement persists.

The CPC also has the power to order the partial or total dissolution of a transaction that is implemented prior to obtaining clearance by the CPC.

Over the past five years, the CPC has imposed fines for gun jumping as well as for failure to provide information required under the Law. The CPC has yet to exercise its power to dissolve a transaction for gun jumping.

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

Closing a foreign-to-foreign merger that is subject to clearance by the CPC prior to obtaining such clearance (gun jumping) may result in the following sanctions:

- an administrative fine of up to 10 per cent of the worldwide turnover of the notifying undertaking or undertakings, plus a fine of €8,000 for each day the infringement continues; and
- the CPC ordering the unwinding of the transaction.

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

Temporary approval of a concentration is only possible during a Phase II investigation, where the undertakings concerned can establish, upon a relevant application to the CPC, that they will suffer substantial damage as a result of any additional delay to the implementation of the concentration.

Temporary approval does not prejudice the CPC's final decision on the concentration and may be subject to conditions set by the CPC.

Public takeovers

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

A public takeover or the acquisition of a controlling interest that meets the jurisdictional thresholds must be notified to the CPC prior to its implementation.

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 Law prescribes the information that must be included in a notification of a concentration to the CPC.

The notification must be made in one of the official languages of Cyprus (Greek or Turkish) and must be accompanied by supporting documents, including the binding transaction documents as well as the annual reports and financial statements of the undertakings concerned. The supporting documents may be submitted in English.

The CPC has the power to impose a fine of up to €50,000 for an undertaking's failure to provide requested information, or for providing misleading or inaccurate information in the context of a merger control filing.

Investigation phases and timetable

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

Phase I

In Phase I, the Service assesses the notified concentration and submits a report to the members of the CPC with the Service's recommendation. The CPC issues a decision that may have three possible outcomes:

- the concentration does not fall within the ambit of the Law;
- the concentration falls within the ambit of the Law but does not raise any doubts in respect of its compatibility with the functioning of competition in the market, and is therefore declared compatible and cleared; or
- doubts exist in respect of the compatibility of the concentration with the functioning of competition in the market and a full investigation (Phase II) must be initiated.

The assessment period typically takes longer than the one-month statutory timeframe, because of stop-the-clock provisions being invoked when the CPC sends a request for information to the notifying undertakings. The CPC is also able to extend the one-month period for a further 14 days by giving seven days' notice to the notifying undertakings.

Phase II

The CPC invites the parties to propose remedies to address the doubts identified in Phase I regarding the compatibility of the concentration with the functioning of competition in the market. Should the merger be cross-border, the CPC may liaise with the relevant foreign authorities in respect of applicable remedies. Furthermore, any remedies have to be limited to those reasonably necessary for the protection of competition.

In the context of Phase II, the CPC may carry out negotiations and hearings with any of the parties or any other interested persons.

The notifying undertakings must be informed of the CPC's decision no later than four months from the date of filing or the date on which the information requested by the CPC was provided.

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

In a Phase I assessment, provided the filing fee has been paid, within one calendar month of the date of submission of the notification (or the date of submission of any additional information the CPC may have requested) the Service must inform the notifying undertaking(s) of whether the concentration is cleared or it will be subject to a Phase II investigation.

If, due to the volume of work or the complexity of the notification, the Service is unable to comply with the one-month time frame, it must inform the notifying undertaking(s) of a 14-calendar-day extension to the assessment period.

In a Phase II investigation, the Service prepares a report of findings to the CPC within three months of the date of submission of the notification (or the submission of additional information the CPC may have requested).

The notifying undertaking(s) must be informed of the CPC's Phase II decision no later than four months from the date of submission of the notification (or the date of submission of additional information requested by the CPC).

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

In assessing the compatibility of a concentration, the Cypriot Commission for the Protection of Competition (CPC) takes into consideration the following criteria:

- the need to maintain and develop conditions of effective competition in the relevant markets, taking into account, among other things, the structure of the affected markets, other markets upon which the concentration may have significant effects and the potential competition on behalf of undertakings;
- the position in the market of the undertakings concerned and undertakings connected to it in a manner prescribed under Annex II to the Control of Concentrations Between Undertakings Law 83(I) of 2014 (the Law);
- the financial power of the 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 to 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 the contribution being in the interest of consumers and not obstructing competition;
- the supply and demand trends for the relevant markets; and
- the contribution to the development of technical and economic progress, provided that it is to the consumer's advantage and does not form an obstacle to competition.

If a concentration significantly impedes 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, it will be declared incompatible with the functioning of competition in the market by the CPC.

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

A joint venture that is genuinely fully functional must be able to operate independently of its parents on an identifiable market. To do so, the joint venture must have management

dedicated to its day-to-day operations and access to sufficient resources, including finance, staff and assets (tangible and intangible), to conduct its business activities on a lasting basis.

Where there is a change from sole to joint control, the joint venture will only be caught under the Law if it is fully functional.

The substantive test for the assessment of a fully functional joint venture is the same as that applied to the assessment of any other concentration falling under the ambit of the Law.

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 corresponding approach of the European Commission. In addition to market shares, the assessment takes into account any anticompetitive effects that could potentially result from a concentration, such as coordinated and 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 in assessing concentrations.

Economic efficiencies

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

The CPC can take into account the transaction's contribution to 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?

The Commission for the Protection of Competition (CPC) is able to revoke its decision relating to a transaction or amend any of the terms of a past decision where:

- the initial decision was based on false or misleading information, or necessary information was withheld by the parties; or
- a commitment imposed under a Phase II decision has not been satisfied or is no longer satisfied.

Separately, in the context of gun jumping, the CPC has the power to dissolve a transaction that was implemented prior to obtaining its clearance.

Where the Minister of Energy, Commerce and Industry disagrees with a clearance decision issued by the CPC on grounds of public interest (with reference to potential effects on public security, media pluralism and due process), the Minister can refer the concentration for assessment by the Council of Ministers.

Remedies and conditions

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

The CPC can accept structural and behavioural remedies aimed at addressing the competition concerns identified by it in the context of Phase II investigations.

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

The Control of Concentrations Between Undertakings Law 83(I) of 2014 prescribes the form in which remedies should be submitted to the CPC. The CPC accepts both structural and behavioural remedies, and any remedies should be limited to those reasonably necessary for the protection of the competitive market.

Where the CPC's doubts regarding the compatibility of the concentration with the functioning of competition in the market remain, the CPC's civil service will commence negotiations with the undertakings concerned in respect of any modifications that may result in the elimination of those doubts.

Before reaching its decision, the CPC may carry out negotiations and hearings with any of the parties or other interested persons.

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

There has been no foreign-to-foreign merger to date in which the CPC requested remedies.

Ancillary restrictions

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

Related agreements will be covered by the CPC's decision if they are related to, and are necessary for, the implementation of the concentration.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

During a Phase II assessment:

- the civil service (the Service) of the Commission for the Protection of Competition (CPC) may request information from third parties for the purposes of its assessment of the concentration; and
- third parties that will be directly affected by the decision of the CPC may apply to the Service to provide their views in relation to the 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 CPC publishes a description of the notification in the Official Gazette and on its website, indicating the names of the participants, the nature of the concentration and the economic sectors involved.

The CPC publishes a non-confidential version of its decision in the Official Gazette and on its website. The redactions that will be applied to its decision will be determined following an application by the notifying undertakings to the CPC, invoking specific grounds for which any part of the decision comprises confidential information or business secrets.

The members of 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 €1,500 fine.

Cross-border regulatory cooperation

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

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 within the European Competition Network.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

The decisions of the Commission for the Protection of Competition (CPC) are administrative executive acts issued by a public authority and are subject to judicial review.

Time frame

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

The timeframe to file an administrative recourse against a decision of the CPC is 75 days from the undertaking concerned being notified of the CPC's decision or the decision's publication in the Official Gazette (whichever occurs sooner).

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

Owing to the low turnover-based thresholds, a considerable number of transactions notified in Cyprus are foreign-to-foreign.

Information exchange has been a recent focus of the Commission for the Protection of Competition (CPC), namely the ability of undertakings controlling a joint venture to acquire business secrets through the joint venture in a manner that could distort competition in the markets in which the controlling undertakings operate.

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 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 incentive 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 liquefied petroleum gas storage facilities in the area with access to the anchor and unloading pipes, to the extent that it will be under the control of the joint venture.

Reform proposals

35 | Are there current proposals to change the legislation?

The Control of Concentrations Between Undertakings Law 83(I) of 2014 (the Law) came into effect in June 2014 and replaced the previous merger control regime, which had been in place since 1999. The Law is currently under review by the CPC's civil service, which will submit a report to the CPC with its suggestions.

UPDATE AND TRENDS

Key developments of the past year

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

A number of important issues have been considered by the Commission for the Protection of Competition (CPC) over the past few years that have shed more light on its decision-making practice.

The CPC dealt with markets such as the health sector, banking, hotels, and food products, among other markets.

A major banking sector concentration that underwent a Phase II assessment was Eurobank's acquisition of control over Hellenic Bank. In the CPC's view, the concentration raised doubts as to its compatibility with the operation of competition in the market for the provision of deposit services and lending services. These doubts concerned the following issues in the said markets:

- the high market shares of the undertakings concerned, the degree of concentration in these markets, the fact that the parties concerned may be close competitors and the possibility of other banking institutions not being able to expand their services may result in non-coordinated effects on competition;
- the homogeneity of the products, the symmetry of the market shares of the largest and second-largest banks in the market, the degree of transparency in the banking sector, mainly in retail banking, as well as the potential inability of banking institutions that will not participate in possible coordination to react may lead to coordinated effects in relation to the horizontal overlap of the undertakings concerned.

In an unprecedented decision, the CPC eventually cleared the Eurobank/Hellenic Bank concentration without any remedies. While the CPC's full decision was not published at the time of writing, the CPC's announcement on clearance cited the extensive information and feedback obtained from the undertakings concerned as well as their competitors as grounds on which any doubts with respect to the compatibility of the merger with competition in the market, had been lifted.

In another Phase II investigation, the CPC cleared the acquisition of control of VLPG Hellenic Petroleum, and VLPG's merger with the LPG storage and management activities of Petrolina, Synergas Ltd and Intergaz, the latter being the founding companies of VLPG.

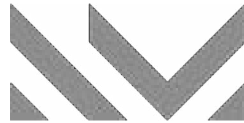
VLPG had been formed under a previous clearance decision, subject to remedies the CPC held were met by the undertakings concerned. Those remedies included:

- an amendment to the VLPG shareholders' agreement to ensure that pricing policies or terms and conditions will be at arm's length for the parent companies and third parties alike and to ensure a cost-oriented pricing policy for the provision of storage space, access to anchorage and transport pipelines;
- ensuring the possibility of renting storage space to at least two customers with a decrease in the minimum level of space necessary for onboarding a customer;
- a commitment by VLPG that in the case where 10 per cent of the total storage space is not used by a third party, then 100m^2 will be provided to the next available customer, even if the total storage space to third parties exceeds 10 per cent;
- holding VLPG board meetings during the construction of the necessary storage space facilities in the presence of an independent third party, who will ensure that no coordination takes place in the affected markets and that no sensitive information regarding VLPG is exchanged; and
- VLPG board members will not comprise board members or chief executives of the parent companies.

In addition to the above, Hellenic Petroleum undertook commitments that included:

- not to use storage space controlled by Hellenic Petroleum in the LPG-designated space for the storage or handling of LPG; and
- if five years lapse and the storage space controlled by Hellenic Petroleum is not used for the purposes declared to the CPC and there are no alternative licensing procedures in motion, Hellenic Petroleum will return this space to the State.

In light of delays experienced by the undertakings concerned in implementing the concentration, CPC recently extended the commitment that VLPG board members will not comprise board members or chief executives of the parent companies.



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Voluntary or mandatory system?	Mandatory.
Notification trigger/ filing deadline	There is no deadline for filing a notification. However, the concentration may not be implemented until and unless it has been approved by the Office for the Protection of Competition (the Office). The notifying party may file the notification as soon as the legally binding transaction documents have been signed. The notification may be submitted prior to the signing of the relevant binding transaction documents, provided that the parties have, in principle, agreed on the structure and timing of the concentration (eg, by means of documents such as a term sheet, memorandum of understanding, letter of intent, etc).
Clearance deadlines (Phase I/Phase II)	Phase I: (i) 30 calendar days for a standard procedure or (ii) 20 calendar days for a simplified procedure. Phase II: Up to five months. The above deadlines can be extended by 15 days if remedies are proposed.
Substantive test for clearance	The Office assesses notified concentrations based on a test that corresponds to the substantial impediment to effective competition test under the EU Merger Regulation. The Office will prohibit the implementation of concentrations that would significantly impede competition in the relevant market. A significant impediment to competition can be inferred particularly from the creation or threat of a dominant position. The Competition Act No. 143/2001 presumes that a concentration will not have as its result a significant impediment to competition where the aggregate combined market share of the parties to the concentration in the relevant market does not exceed 25 per cent.
Penalties	A fine of up to 10 million Czech koruna or 10 per cent of net turnover. Measures necessary to restore effective competition in the relevant market, particularly demerger obligations.
Remarks	Not applicable.

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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 Competition Act No. 143/2001 (the Act).

The merger regulation in the Act is implemented in Decree No. 294/2016, which primarily provides the form of a merger notification and specifies the documents required for a merger filing.

The Czech competition authority, the Office for the Protection of Competition (the Office), has so far published the following non-binding soft law concerning merger control:

- the Notice on Requirements of the Proposal to Approve a Concentration;
- the Notice on Pre-Notification Contacts;
- the Notice on the Calculation of Turnover;
- the Notice on the Concept of a Concentration;
- the Notice on the Concept of Parties to the Concentration;
- the Notice on the Implementation of a Concentration Prior to Approval;
- the Notice on the Competition Defence for Undertakings in Economic Difficulty; and
- the Notice on the Simplified Procedure.

The Office is responsible for enforcing merger control legislation.

Scope of legislation

2 What kinds of mergers are caught?

Pursuant to section 12 of the Act, the following types of transactions are subject to the notification obligation:

- the merger of two or more independent undertakings;
- the acquisition by one or more persons who already control at least one undertaking, or by one or more undertakings, of direct or indirect control over another undertaking or its part either by acquisition of shares or ownership interest, an agreement, a public auction, or any other means; and
- the establishment of a full-function joint venture.

The following transactions are not covered by the merger control rules:

1. a temporary acquisition of shares by a bank in an undertaking by setting off its claims against the undertaking if the acquisition is made in the context of a restructuring process for a period not exceeding one year;
2. a temporary acquisition not exceeding a period of one year by an investment undertaking of shares in another undertaking only for the purpose of their sale, provided that

the investment undertaking does not exercise its voting right to influence the competitive conduct of the controlled undertaking; and

3 a 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 one-year deadline in points (1) and (2) under certain conditions.

3 What types of joint ventures are caught?

The merger control rules apply to the formation of a joint venture that performs, 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 that regulate 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 ability 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, the meeting of which would constitute control. The Office always assesses the actual situation.

A change in the quality of control is also 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 from the Office if:

- the aggregate net turnover of all parties to the concentration in the most recently 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 most recently completed accounting period within the market of the Czech Republic exceeds 250 million koruna; or
- the aggregate net turnover of any of the below for the most recently completed accounting period within the market of the Czech Republic exceeds 1.5 billion koruna and the aggregate worldwide net turnover of the other party to the concentration for the most recently completed accounting period exceeds 1.5 billion koruna:

4 at least one undertaking party to the merger (in the case of a merger or consolidation);
5 an undertaking or its part over which control is being acquired (in the case of an acquisition of control); or
6 at least one of the undertakings that create a concentrative joint venture (in the case of the creation of a full-function joint venture).

Aggregate net turnover comprises the net turnover of:

1 all parties to the concentration;
2 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;
3 all persons controlled by the same person that will control the parties to the concentration after completion of the concentration; and
4 all persons jointly controlled by two or more persons referred to in points (1) to (3) above.

For the purpose of calculating turnover, the turnover resulting from the sale of products between the parties to the concentration and the persons listed in points (1) to (3) above shall not be taken into account.

If only part of an undertaking is subject to the concentration, only the portion of turnover achieved by this part shall be taken into account when calculating 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, net turnover is understood as the sum of the income (particularly interest income as well as income from securities, participating interest, charges and commissions, and financial operations).

For insurance undertakings, net turnover should be understood as the total sum of written premiums resulting from all concluded insurance contracts.

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

If a transaction constitutes a concentration within the meaning of the Act and exceeds the notification thresholds, filing is mandatory. No exemptions from the notification obligation apply.

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

No special rules apply to foreign-to-foreign mergers. No local effects tests nor any kind of nexus test exist; if a foreign-to-foreign transaction constitutes a concentration within the meaning of the Act and exceeds the notification thresholds stipulated therein, filing the transaction is mandatory.

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

No. There are only special rules for certain temporary transactions involving banks or investment undertakings, and liquidation and insolvency situations. According to other special legislation, transactions in sectors such as banking may require special approval from regulatory bodies other than the Office.

Since 1 May 2021, a system has been in place for the control and screening of foreign investments from non-EU countries in companies active in sectors important for the security, public order or internal order of the Czech Republic. The rules for this national screening mechanism are stipulated by Act No. 34/2021 on the Screening of Foreign Investments. The authority responsible for the screening of such foreign investments is the Ministry of Industry and Trade.

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 before it is notified to the Office for the Protection of Competition (the Office) or before an Office clearance decision 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 that 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 Competition Act No. 143/2001 (the Act) as a breach of the suspension clause.

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

A notification must be submitted by:

- the merging parties, in the case of a merger;
- the party acquiring sole control, in the case of an acquisition of sole control of an undertaking or its part;
- the parties acquiring joint control, in the case of an acquisition of joint control of an undertaking or its part; and
- all undertakings participating in the creation of a full-function joint venture jointly, in the case of 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 as of the date of opening the notification proceedings for the Office to assess a concentration within Phase I and decide:

1. that the concentration does not constitute a concentration that must be notified pursuant to the Act;
2. to clear the concentration; or
3. to open Phase II of the investigation because there are serious concerns that the concentration would significantly impede competition.

If the Office does not issue a decision in accordance with points (1) or (2), or does not open Phase II within the 30-day deadline, the concentration is deemed to be cleared.

The Phase II decision must be issued no later than five months as of the date on which the notification proceedings were opened. If the Office does not issue the decision within this deadline, the concentration is deemed to be cleared.

If the notifying party proposes remedies, the deadline for Phase I or Phase II will be extended by another 15 days.

In the simplified procedure, the Office must issue a decision within 20 days. If the Office concludes that the concentration could raise serious concerns regarding a substantial distortion of competition, it requests the parties to the proceedings to file a complete concentration notification within 20 days. The deadline for the issuance of a decision starts on the date of delivery of the complete concentration notification to the Office.

If the Office requires an 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 its 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 as of the receipt of the request to decide. The Office might also grant only partial exemption or grant the exemption subject to certain conditions.

The parties may file an application for approval of an exemption from the standstill obligation together with the complete concentration notification at any time during the proceedings. A request for exemption from the standstill obligation is subject to payment of an administrative fee of 10,000 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?

If the parties close a concentration before clearance, the Office may impose a fine of up to 10 million koruna or 10 per cent of the net turnover of the undertakings that are in breach of the standstill obligation. Furthermore, the Office may take measures that it considers necessary to restore effective competition to the relevant market (in particular, a demerger obligation).

The transaction agreement may be deemed invalid. This issue, however, is still unclear under Czech law.

In practice, the Office uses the right to impose a fine for breaching a standstill clause. When setting the fine, it considers the circumstances of the breach, if the parties knew about the breach and the duration of the breach.

In 2022, the Office adopted a gun-jumping decision in *Natland Group/Energo Příbram* (S0518/2020/KS), in which a fine of 1.435 million koruna was imposed; and in *Company New/ZOOT* (S0363/2021/KS), in which a fine of 143,000 koruna was imposed. In 2021, a gun-jumping decision was adopted in *CSG INDUSTRY/Hyundai Centrum CB, Hyundai Centrum Praha, Car Star Praha, Car Star Fleet, Car Star Immo and Whare factory* (S0491/2020/KS) and resulted in a fine of 4.505 million koruna being imposed. In 2020, a fine of 4.487 million koruna was imposed in the gun-jumping decision *CSG/Skyport* (S0269/2020).

In 2023, the Office adopted no gun-jumping decisions, but two gun-jumping cases were opened: *Auto UH/C&K* (S0544/2023/KS) and *EP Energy Trading/Gazela Energy* (S0484/2023/KS). In both cases, decisions were adopted in 2024.

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

The same rules and sanctions as those that apply to the 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 to date.

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, but the Office may grant an exception from the standstill clause.

Because the Office is obliged to assess the negative effects of mergers only on markets within the Czech Republic, merging parties could be convicted by the Office for breach of the standstill obligation only if a merger that closes before the adoption of the Office's clearance decision has an effect on markets within the Czech Republic. Therefore, a hold-separate agreement for the Czech part of a foreign transaction would probably not be seen as gun jumping.

Public takeovers

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

Standard 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, which can be downloaded from the Office's website, prescribed by Decree No. 294/2016. The notification form must be filed in Czech or Slovak.

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 analyses that 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 a Concentration.

The level of detail required in the preparation of a filing depends on the circumstances of the concentration. It is not necessary to fill in sections 6 and 7 of the notification form if:

- there is no overlap in the activities of the parties to the concentration;
- their aggregate market share is below 15 per cent in the case of a horizontal concentration; or
- the market share of any party to the concentration is below 25 per cent in the case of a vertical concentration.

The Act also foresees a simplified procedure for certain types of concentrations, which allows the parties to a concentration to provide less information and fewer supporting documents. The simplified notification of the concentration may be filed when:

- none of the undertakings involved operate in the same relevant market or their combined share in the market does not exceed 15 per cent and, at the same time, none of the undertakings concerned operate 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 koruna or 1 per cent of net turnover achieved in the previous accounting period.

Investigation phases and timetable

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

The Office recommends that the notifying party should have pre-notification contacts with it prior to filing the notification, the details of which are described in the Office's Notice on Pre-Notification Contacts.

The clearance procedure can be divided into two phases. The Office initiates Phase I after its receipt of the notification by parties to the concentration. Specifically, upon receipt of the notification, the Office publishes a short summary of the notification on its website as well as in the Commercial Gazette.

In the case of a simplified procedure, the summary is published only on the Office's website. The summary contains the names of the parties, a brief description of the type of concentration and the business sector concerned. Third parties are invited to provide their pertinent objections by a set deadline, usually five days.

The Office informs the notifying party in writing about the opening of the investigation, which constitutes Phase I. Within Phase I, the Office assesses whether the concentration falls within the scope of the Act and whether the concentration would significantly impede competition. In the event that the concentration might raise serious doubts of a significant impediment to competition, the Office opens Phase II; otherwise, the concentration is cleared.

If the Office needs clarification, further information or additional documents, it approaches the notifying party in writing. In such a case, the Office's time frame for issuing the decision is suspended.

The parties to the concentration can offer remedies to the Office either prior to the notification or at any time during the investigation, but at the latest within 15 days of obtaining the statement of objections.

If the Office intends to open Phase II, it informs the notifying party about this in writing during Phase I.

Prior to issuing the decision, the Office will invite the notifying party to acquaint itself with the information and documents contained in the administrative file, which will be the basis of its decision.

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

The Office has 30 days as of the date of opening the notification proceedings to assess a concentration within Phase I and decide:

1. that the concentration does not constitute a concentration that must be notified pursuant to the Act;
2. to clear the concentration; or
3. to open Phase II of the investigation because there are serious concerns that the concentration would significantly impede competition.

If the Office does not issue a decision in accordance with points (1) or (2), or does not open Phase II within the 30-day deadline, the concentration is deemed to be cleared.

The Phase II decision must be issued no later than five months as of the date 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 deadline for Phase I or Phase II will be extended by another 15 days.

In the simplified procedure, the Office must issue a decision within 20 days. If the Office concludes that the concentration could raise serious concerns regarding a substantial distortion of competition, it requests the parties to the proceedings to file a complete concentration notification within 20 days. The deadline for the issuance of a decision starts on the date of delivery of the complete concentration notification to the Office.

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 its decision shortly before the deadline. There is no option other than the simplified procedure available to speed up the proceedings.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Office for the Protection of Competition (the Office) assesses the notified concentrations against a test that basically corresponds to the substantial impediment to effective competition test under the EU Merger Regulation. The Office prohibits implementation of concentrations that would significantly impede competition in the relevant market. In particular, a significant impediment to competition can be caused by the creation or strengthening of a dominant position.

The Competition Act No. 143/2001 presumes that a concentration will not have as its result the significant impediment to 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 these combined factors.

A concentration that otherwise does not meet the requirements for clearance may be cleared by the Office subject to conditions and obligations.

The Office has published soft law on the failing firm defence, so it recognises this type of case and, after consideration of all relevant circumstances, it is willing to clear an affected concentration. The conditions to satisfy the failing firm defence are strict; the Office thoroughly assesses the characteristics of the market and the potential impacts that the concentration might have.

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

No. It is not only theories of harm arising from the creation or strengthening of a unilateral or collective dominant position that are the subject of the Office's investigation; the possibility of the elimination of important competitive constraints on oligopolistic markets caused by a merger is also examined by the Office within the assessment of merger effects on relevant markets.

Theories of harm

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

The test for clearance is whether the concentration significantly impedes effective competition. Within the scope of the test, the Office may rely on a number of theories of harm (eg, vertical foreclosure, conglomerate effects and collective dominance) to prove that the concentration would significantly impede effective competition; it 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, provided that it is to the consumers' advantage and does not form an obstacle to effective competition, the Office primarily assesses:

- the necessity of preservation and further development of effective competition;
- the structure of all markets affected by the concentration;
- the market shares of the parties to the concentration;
- the economic and financial power of the parties;
- the legal and other barriers faced by other undertakings to enter relevant markets;
- 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.

Economic efficiencies

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

The Office may take economic efficiencies into account in the review process. Where efficiencies are invoked in favour of a concentration, the party alleging the efficiencies bears the burden of proof.

In practice, it is advisable to document the efficiencies through the opinions of economic experts.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

The Office for the Protection of Competition (the Office) will issue a prohibition decision if it considers that a concentration would significantly impede competition in the relevant market, particularly through the creation or strengthening of a dominant position of the parties to the concentration, or some of them.

If the decision is not complied with, the Office may impose measures to restore effective competition, such as 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 net turnover if the transaction is closed despite its veto.

Remedies and conditions

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

To address the Office's competition concerns about a 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 – at the latest, 15 days as of obtaining the statement of objections.

The Competition Act No. 143/2001 (the Act) does not specify the nature of the remedies that might be proposed. Both structural and behavioural remedies are possible.

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

The Act does not specify which remedies are acceptable. Both structural and behavioural remedies can be proposed, but the Office prefers structural remedies.

Remedies may be proposed prior to the notification of the concentration or any time during the Office's investigation – at the latest, 15 days as of obtaining the statement of objections.

If remedies are proposed, the deadline for the Office's decision within Phase I or Phase II shall be extended by 15 days.

The Office shall respect remedies proposed by the parties to the concentration and only those shall be binding. In practice, it is advisable to discuss intended remedies with the Office during any pre-notification contact.

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

There has been no such record in recent years. In 2003, the Office requested commitments or remedies in a few foreign-to-foreign mergers: *General Electric Company/AGFA Geavert* (S008/2003) and *DSM/division Vitamins and Fine Chemicals Roche Group* (S029/2003).

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 restrictions to competition that the notifying party identified in the notification, and that are directly related and necessary to the concentration. The Office accepts the European Commission's Notice on Restrictions Directly Related and Necessary to Concentrations as useful guidance on this matter.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

The Office for the Protection of Competition (the Office) publishes an announcement regarding the initiation of the notification proceedings on its website and in the Commercial Gazette without delay after the receipt of the concentration notification. In the case of a simplified procedure, the summary is published only on the Office's website.

The announcement contains the names of the parties to the concentration, a brief description of the type of concentration and details of the business sector concerned. It also contains an invitation for third parties to submit any potential objections within a 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 during its investigation.

According to case law from 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 a concentration before 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 Office's clearance decision.

This case law was heavily criticised and was eventually dismissed by the Supreme Administrative Court (6 As 47/2014-82). However, at the same time, the Supreme Administrative Court suggested that third parties must have other possibilities to challenge the clearance decision. A specification of such possibilities was not given.

Publicity and confidentiality

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

During an investigation, the parties to the concentration must disclose all information and documents available, including those that might contain business secrets. To protect business secrets, the notifying party must provide two versions of the notification: one with the business secrets intact and one with the business secrets redacted.

The Office publishes an announcement regarding the initiation of the notification proceedings on its website and in the Commercial Gazette.

The Office's final decision is published on its website without the business secrets indicated by the parties to the concentration.

With regard to access by third parties, it used to be generally accepted that only the notifying party could see the file. However, according to case law from the Supreme Administrative Court (9 Afs 29/2012-53), if a third party demonstrates a strong interest in obtaining access to the file, the Office must allow the third party to have such access, but only to documents in which the business secrets have been redacted. This conclusion has been confirmed by other case law from 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 that are members of 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 a decision of the Office for the Protection of Competition (the Office) within 15 days of the date of delivery of the decision on the concentration. The appeal body is the chair of the Office.

The decision of the chair of the Office can then be challenged by bringing an administrative action to the Regional Court in Brno, but the administrative action has no suspensive effect on the Office's decision unless the Regional Court grants it at the special request of the plaintiff.

According to current case law from the Supreme Administrative Court, third parties must have other possibilities to challenge the clearance decision. A specification of those possibilities was, however, not provided and must be clarified in the next decision-making practice.

Time frame

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

An appeal of a first-instance Office decision must be lodged within 15 days of the date of delivery of the decision. Administrative action against a second-instance Office decision (ie, the decision of the chair of the Office) must be lodged within two months.

There is no deadline for the chair of the Office to decide on the appeal against the first-instance decision. There is also no deadline for a decision of the court on the administrative action against the second-instance decision. The court usually decides within approximately 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?

In 2023, the Office for the Protection of Competition (the Office) issued a total of 55 decisions concerning concentrations, 40 of which were under the simplified procedure. There were two decisions issued within the Phase II procedure.

In particular, the Office found that the concentration between CETIN and Nej.cz may have negative effects on competition in the market for the provision of retail fixed internet access. Therefore, the Office assessed it in more detail in Phase II. CETIN proposed a number of behavioural commitments to address the competition concerns. The Office found these to be sufficient and approved the concentration.

After 19 years, the Office issued its first prohibition decision in *Česká pošta/První novinová společnost* (S0467/2021). Within a five-month period, following a detailed investigation, the Office decided not to authorise the concentration. This was mainly because its implementation would lead to a significant distortion of competition, consisting of (i) the creation or strengthening of a dominant position for Česká pošta (Czech Post) in the relevant markets for the delivery of ordinary mail and addressed direct mail in the Czech Republic; (ii) a significant impediment to competition in the relevant market for the delivery of unaddressed direct mail in the Czech Republic; and (iii) restriction of potential competition in the relevant markets for the distribution of subscriptions and the delivery of print mailings in the Czech Republic. Česká pošta appealed the first-instance decision, but later withdrew its initial application for authorisation of the concentration. Therefore, the prohibition decision was annulled and the proceedings were terminated.

In 2023, the Office faced heavy criticism related to allegations of inefficient competition in the market for the production and sale of food, the prices of which were rising significantly (also due to high inflation). Therefore, the entire food supply chain was under heavy scrutiny, which might also relate to the merger control regime.

Reform proposals

35 | Are there current proposals to change the legislation?

In 2023, Act No. 226/2023, transposing the ECN+ Directive, amended the Competition Act No. 143/2001. This amendment, however, did not bring any significant changes to the Czech merger control regime. At the end of 2023, the Office published proposals for a change in the legislation aimed at further strengthening its investigative powers. As regards the merger control regime, the Office's proposals target mergers that do not meet the current turnover criteria but may nevertheless have significant effects on certain markets. The Office is proposing a call-in model that will allow it to retroactively require certain mergers that do not meet the current turnover criteria to be notified by the merging parties if the Office believes they have the potential to distort competition. However, this proposal has not yet been approved even at government level. The legislative process is therefore at an early stage and is likely to be subject to further discussions.

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 2023, the Office for the Protection of Competition (the Office) was under pressure due to the significant increase in food prices, which resulted in higher scrutiny of this industry. Under general competition law, the Office completed a record number of administrative proceedings on prohibited agreements in 2023. The total of 16 cases completed in one year was the highest in two decades. Fines amounting to 268 million Czech koruna were imposed, of which 234 million koruna have already entered into force, mainly thanks to the settlement procedure. Merger control recorded a standard number of administrative proceedings.

However, for the first time since 2005, the Office prohibited one of the mergers under review because its implementation would have resulted in a substantial distortion of competition.

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Voluntary or mandatory system?	There is a mandatory system if the mergers meet the thresholds.
Notification trigger/ filing deadline	Concentrations falling within the thresholds must be notified to the Danish Competition and Consumer Authority (DCCA) after the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest.
Clearance deadlines (Phase I/Phase II)	The time frames (Phases I and II) are inspired by article 10(1) and (3) of the EU Merger Regulation. The DCCA may approve a concentration before the expiry of the initial investigation (Phase I), which is 25 working days from the receipt of the notification. The 25 working days can be extended to 35 days if at least one of the merging parties offers remedies to the DCCA. The DCCA cannot prohibit a concentration within Phase I but may initiate an in-depth investigation (Phase II) if there are serious doubts regarding the concentration's compatibility with effective competition. The Phase II investigation lasts for 90 working days but can be extended by 20 working days if the merging parties propose commitments or revised commitments. The Phase II investigation may also be extended by 20 working days by a decision from the DCCA, provided that the merging parties either request it or consent to it.
Substantive test for clearance	The DCCA will assess whether the concentration significantly impedes effective competition. If it does not, the merger will be cleared. The test is described in the Danish Competition Act section 12 c (2): '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	For failing to notify a merger or submitting wrongful information to the DCCA, the undertakings may receive fines. The merging undertakings may also receive fines, if they implement a merger prior to the approval.
Remarks	Pre-notification consultations with the DCCA are important. Many mergers are approved following a simplified procedure.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

The main piece of legislation on Danish merger control is contained in the Consolidated Competition Act No. 360 of 4 March 2021 (the Competition Act), which is modelled on EU competition law.

In the field of merger control, the provisions of the Competition Act are accompanied by the Executive Order on the Calculation of Turnover in the Competition Act No. 1286 of 26 November 2019 and the Executive Order on the Notification of Concentrations No. 690 of 25 May 2020. The European Commission's jurisdictional notice and ancillary restraints notice provide guidance.

On 1 July 2020, an updated Danish executive order on notification of mergers entered into force, and the Danish Competition and Consumer Authority (DCCA) updated its merger guidelines accordingly. Although the new executive order has not entailed any significant changes to the current rules, the parties to a transaction must use a revised notification form when notifying a merger to the DCCA.

The revised notification form increases the level of detail required in a non-simplified notification of mergers. The additional requirements focus on the description of all plausible market segmentations, a more exhaustive list of internal documents to be submitted, and a higher standard for describing and documenting claimed efficiency gains. For non-simplified notifications, it is also a requirement to submit information on the counterfactual scenario (ie, the expected scenario if the merger is not implemented). Furthermore, the parties are now required to submit contact details of the main competitors, customers, etc, preferably in an Excel-compatible document.

The DCCA is the principal enforcer of competition law in Denmark. It is in charge of the day-to-day administration of the Competition Act and, to this end, issues decisions pursuant to the Competition Act. The DCCA is divided into units in charge of different areas of business and industry. It also has transversal units, and a management and administration secretariat. Furthermore, it functions as the secretariat and prepares the decisions of the Competition Council.

The Competition Council, which is part of the DCCA, consists of seven members appointed by the Minister for Business and Growth: a chair, a vice chair, two members with knowledge of competition law or other relevant academic backgrounds, two members with managerial backgrounds from the business world and one member with special knowledge of consumer affairs. The Competition Council has overall responsibility for the administration of the Competition Act and regulation issued pursuant thereto. It also makes decisions on matters of principle or of particular importance.

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 Tribunal forms part of the administration and its decisions can be brought before the courts.

Following an amendment to the Competition Act in 2021, appeal to the Competition Appeals Tribunal became optional, meaning that an undertaking is now able to decide if it wants to bring substantive decisions before the Tribunal or directly before the courts to obtain a full judicial review of a proposed fine or other decisions by the competition authorities.

With the recent amendment, which was adopted in May 2024 and will enter into force on 1 July 2024, a national 'call-in'-option has been adopted. Please see point 7.2.1. below.

Scope of legislation

2 | What kinds of mergers are caught?

The merger control provisions apply to concentrations. In accordance with the EU Merger Regulation (EUMR), 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 make explicit reference to the EUMR and the European Commission's notices on merger regulation. They also make explicit reference to case law from the European Commission and the Court of Justice of the European Union.

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 EUMR: 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 shareholders' 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 authorities 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.

Pursuant to the preparatory documents, case law from the Court of Justice of the European Union as well as the European Commission's practice will be followed.

Thresholds, triggers and approvals

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

The merger control provisions apply to concentrations where either:

- the combined aggregate turnover in Denmark of all the undertakings concerned is at least 900 million Danish kroner, and the aggregate turnover in Denmark of each of at least two of the undertakings concerned is at least 100 million kroner; or
- the aggregate turnover in Denmark of at least one of the undertakings concerned is at least 3.8 billion kroner, and the aggregate worldwide turnover of at least one of the other undertakings concerned is at least 3.8 billion kroner.

The preparatory documents to the Competition Act state that 'undertakings concerned' is to be interpreted in accordance with the European 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 the same concentration arising on the date of the last transaction.

Concentrations (above or below the turnover thresholds) may in exceptional circumstances be referred to the European Commission under article 22 of the EUMR. On 3 April 2020, the DCCA referred a proposed merger between Mastercard and Nets to the European Commission, since the DCCA came to the conclusion that the merger could affect markets in a number of other EU member states. This was the first time that the DCCA had requested a referral to the European Commission. The DCCA has since referred the merger between EEX and Nasdaq Power to the Commission, and joined the Spanish Competition Authority's referral of the merger between Viasat and Inmarsat. The latter two cases did not exceed national turnover thresholds.

In Denmark, a national call-in option for mergers below thresholds has been introduced. Please see point 7.2.1 below.

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 provisions 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?

In 2015, a sector-specific threshold was introduced. Within the sector of public electronic communications networks, the second part of the primary thresholds (ie, that each of at least two of the undertakings concerned is more than 100 million kroner) was 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). The Competition Act states that the Danish Business Authority – in accordance with the Act on Electronic Communications Networks and Services – can refer a merger between two or more commercial providers of electronic communications networks in Denmark to the DCCA.

Furthermore, special rules apply with regard to the calculation of the turnover of associations of companies and financial institutions. These special rules are set out in sections 5 to 7 of the Executive Order on the Calculation of Turnover in the Competition Act No. 1286 of 26 November 2019.

Special rules apply to financial undertakings (eg, banks, mortgage-credit institutions and investment management institutions); hence, such financial undertakings are not allowed to merge without permission from the Ministry of Industry, Business and Financial Affairs. This is stipulated in section 204 of the Consolidated Financial Business Act No. 406 of 29 March 2022.

The acquisition of a controlling shareholding in a public limited liability company registered on the Copenhagen Stock Exchange creates an obligation to make a general bid to purchase the remaining shares.

In May 2021, Parliament passed the Investment Screening Act No. 842 of 10 May 2021 (the Investment Screening Act). The proposal should be seen in light of the EU Foreign Direct Investment Regulation, which became effective on 11 October 2020, and the Danish government emphasising the need for a foreign direct investment (FDI) regime that secures Denmark's security and public order but does not undermine Denmark's position as an open economy or jeopardise its ability to attract foreign investments.

The goal of the Investment Screening Act is to prevent FDIs and certain economic agreements from posing a threat to national safety and public order in Denmark. The Act constitutes the framework for a Danish screening instrument that may be used to assess foreign investments and specific economic agreements, and makes it possible to take action and set out

requirements for the investment or agreement or completely prohibit it insofar as it poses a threat to national security in Denmark.

Three executive orders have been issued pursuant to the Investment Screening Act: Executive Order No. 1491 of 25 June 2021, Executive Order No. 1454 of 24 June 2021 and Executive Order No. 1455 of 24 June 2021. These executive orders deal with the scope of the act, the procedural aspects of notifications and the duty of confidentiality on the part of the authorities, respectively.

The Investment Screening Act provides for a mandatory authorisation regime for all foreign investors investing in particularly sensitive sectors and a voluntary cross-sectoral notification regime for non-EU or European Free Trade Association (EFTA) investors.

The mandatory sectoral authorisation regime requires foreign investors intending to acquire a qualifying holding in a Danish undertaking that operates in a particularly sensitive sector to apply to the Danish Business Authority for authorisation. The Act defines ‘qualifying holding’ as ‘a direct or indirect possession or control of no less than 10 per cent of the shares or voting rights or similar control by other means’.

Investors seeking to set up new businesses (greenfield investments) must also apply for authorisation if the business will be operating in a particularly sensitive sector. Pursuant to section 5 of Executive Order No. 1491 of 25 June 2021, greenfield investments are not required to apply for notification if the foreign investor’s capital injections do not exceed 75 million kroner during the first three financial years following the formation.

Finally, non-EU or EFTA investors and investors in the European Union or the EFTA that are controlled by a non-EU or EFTA owner wishing to enter into a special financial agreement (eg, a joint venture or a service and operating agreement) with a Danish business operating in a particularly sensitive sector must also apply for authorisation. The term ‘special financial agreements’ is defined in sections 12 to 17 of Executive Order No. 1491 of 25 June 2021.

Pursuant to section 6 of the Investment Screening Act, particularly sensitive sectors include businesses that:

- are in the national defence industry;
- provide IT security services or processing classified information;
- manufacture dual-use items (as defined in article 1(1) of Council Regulation (EC) No. 428/2009, as amended);
- provide critical technology other than the types mentioned above; and
- are in critical infrastructure industries.

Sections 7 to 11 of Executive Order No. 1491 of 25 June 2021 delimit the particularly sensitive sectors by specifying the activities that are to be carried out for a business to be considered as operating in one of those sectors.

Pursuant to section 6 of Executive Order No. 1491 of 25 June 2021, foreign investors have the option of pre-screening to ascertain whether a considered investment concerns itself with one of these sectors.

Authorisation must also be obtained where an existing ownership interest is increased to more than one-fifth, one-third, half, two-thirds or total ownership. Further, a new authorisation must be obtained if the ownership structure of the foreign company authorised to make the investment changes. If, for instance, a Chinese subsidiary of a Chinese group has been authorised to acquire 50 per cent of a Danish undertaking in a particularly sensitive sector and the Chinese subsidiary is later acquired by a Japanese group, then it must apply for a new authorisation in Denmark.

The voluntary cross-sectoral notification regime provides an opportunity for investors outside the European Union or the EFTA to notify the Danish Business Authority of investments in Danish undertakings, whereby they, directly or indirectly, gain 'possession or control of no less than 25 per cent of the shares or voting rights'.

Under the Investment Screening Act, non-EU or EFTA investors may also notify the Danish Business Authority of special financial agreements if the investment or agreement is likely to pose a threat to national security or public order in Denmark.

Unlike the mandatory sectoral authorisation regime, the cross-sectoral notification regime does not apply in connection with the setting up of a business (greenfield investments).

Investments that fall within the cross-sectoral notification regime will be subject to notification only if they qualify for the mandatory sectoral authorisation regime. By notifying the Danish Business Authority in any circumstance, the investor is sure to have authorisation, thus eliminating any future doubt as to whether the investment threatens national security or public order.

If no notification is made, the Danish Business Authority may, for a period of up to five years after the date of the investment, decide to make the investment subject to scrutiny to determine if the investment constitutes a threat to national security or public order. If so, the Danish Business Authority may issue an unwinding order.

The Investment Screening Act entered into force on 1 July 2021 but only applies to investments that were not closed on or after 1 September 2021.

In July 2023, the Danish government passed a revision of the Investment Screenings Act that included a broadening of the scope of the regulation and a change of the application process. After the amendment, the investment screening process will be carried out in two phases, like the merger control regime. All investments covered by the Act will have to be filed in Phase I, after which a 45-calendar-day period starts. If the Danish Business Authority finds that a more in-depth examination is required, it will initiate Phase II, within which a new 125-calendar-day period starts running when the documentation in the second phase is declared complete.

In addition to the Investment Screening Act, the Consolidated Act on War Material No. 1004 of 22 October 2012 (the Act on War Material) is the only legislative act that regulates foreign acquisitions and investments on the basis of national security interests in Denmark. It follows from the Act on War Material that special FDI screening mechanisms apply to undertakings that produce materials constructed for military purposes (eg, firearms, ammunition, gunpowder and explosives).

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The Consolidated Act on the Continental Shelf and Certain Pipeline Installations on Territorial Waters No. 1189 of 21 September 2018 is the only act other than the Act on War Material that partially takes foreign and national security interests into consideration. This Act stipulates that authorisation must be granted before placing certain pipelines in Danish waters, irrespective of whether the company is Danish or foreign, and that national security interests must be considered before granting authorisation.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

Concentrations falling within the thresholds must be notified to the Danish Competition and Consumer Authority (DCCA) after the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest, and in any event before implementation.

Fines may be imposed for failure to notify and unlawful implementation. To date, three fines in the range of 4 million to 6 million Danish 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 implemented before the DCCA or the Competition Council has approved the merger or before the time limits have expired.

This creates waiting periods of 25 working days (Phase I) or an additional 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 two scenarios:

- if the merging parties propose commitments or revised commitments; or
- following a decision from the DCCA, provided that the merging parties either request it or consent to it.

The time limits will also be suspended if the merging parties complain about the process of their ongoing case to the Competition Appeals Tribunal.

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 (ie, whether the notification contains the necessary information) within 10 working days of receiving it. 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:

- a (conditional) derogation may be granted by the DCCA; and
- 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 Council has only thrice used its powers to ask the Public Prosecutor's Office to pursue matters of unlawful implementation – two in cases of failure to notify and one in a case regarding potential pre-implementation by way of termination of a cooperation agreement. The latter decision was later overruled by the Court of Justice of the European Union.

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. In all circumstances, the fine imposed is capped at 10 per cent of the undertaking's revenue.

Substantive violations of the competition rules may trigger fines according to the following base amounts (as a rule of thumb):

- 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.

Fines for procedural infringements are likely to be significantly lower than these base amounts, probably in the magnitude of 10,000 to 500,000 kroner.

Where clearance is subsequently denied or made conditional, the transaction will have to be annulled or otherwise reopened and modified.

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

In principle, the same sanctions are applicable to notifiable foreign-to-foreign mergers as those 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 arrangements would normally not be acceptable to merit a derogation from the standstill obligation. Most often, the best way to proceed is to demonstrate the absence of any effect on Danish markets, which is likely to 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 Consolidated Competition Act No. 360 of 4 March 2021 (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 (EUMR).

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 merger cases; this involved the submission of incomplete information in one instance and failing to correct previously submitted incorrect information in another.

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Investigation phases and timetable

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

Pre-notification consultations with the DCCA may and should often 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 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 EUMR. The DCCA may approve a concentration before the expiry of the initial investigation (Phase I). It cannot prohibit a concentration within Phase I but may initiate an in-depth investigation (Phase II) if it is necessary to examine the merger further. The DCCA 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 regardless of whether the merger is filed under the simplified procedure or the full-form notification procedure. Within 10 working days of the filing, the DCCA either declares the notification complete – thereby confirming that the time began running upon notification – or specifies any missing information to be submitted. In cases of simplified notifications, the DCCA may, at its own volition, require 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 for information, which may extend the time frame.

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) of the expiry of the original 25 working days.

The time limit of 90 working days may be extended by 20 days if the undertakings propose new or revised commitments at a late stage (ie, if 70 working days or more have passed from the decision to initiate Phase II). The review period is thereby extended to 110 days irrespective of the number of days remaining of the original time frame. The deadline can also be extended by up to 20 days on request by the parties or with the parties' consent.

Similarly to the EUMR, 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. 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 results in a significant impediment to effective competition (SIEC), in particular as a result of the creation or strengthening of a dominant position. Unless this is the case, the concentration must be approved.

The substantive test for clearance of concentrations that have as their object or effect the coordination of the competitive behaviour of undertakings is similar to that set out in the EU Merger Regulation (EUMR). Such aspects of coordination shall therefore be appraised in accordance with the criteria laid down in the provisions of the Consolidated Competition Act No. 360 of 4 March 2021 (the Competition Act), which are the domestic equivalents of article 101(1) and (3) of the Treaty on the Functioning of the European Union (TFEU). This test applies in addition to the SIEC test.

The assessment of a concentration must also take account of restrictions that are directly related and necessary (ie, that are ancillary) to the concentration. The Competition Act's preparatory documents refer to the European Commission's notice on ancillary restraints in this regard.

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

In the case of full-function joint ventures, which may also have the object or effect of coordinating the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of the provisions of the Competition Act (the domestic equivalents of article 101(1) and (3) of the TFEU).

Theories of harm

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

In principle, there are no formal limitations on the applicable theories of harm. In practice, the Danish Competition and Consumer Authority (DCCA) and the Competition Council tend to follow the European Commission's practice in this respect.

Non-competition issues

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

The DCCA is expected to apply the 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'. Consequently, it can be argued that efficiency should be considered. The non-simplified merger form provides for such a defence.

In practical terms, an efficiency argument, if available, can be raised by the merging parties and it will be considered in the assessment of the case. The DCCA's assessment of efficiency gains is consistent with the practice under the EUMR; however, in raising the efficiency defence, the undertakings concerned might risk the competition authorities interpreting the argument as an indication of potential increased dominance, as the efficiency gained will make competition even more difficult for competitors that do not benefit from similar efficiencies. The efficiency defence should therefore 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 authorities to agree on suitable commitments. The commitments agreed with the competition authorities will be formulated as conditions in the approval of the concentration.

Such conditions can be appealed separately after approval of the concentration, even though they are agreed upon by the undertakings concerned during the negotiations with the competition authorities.

The Danish Competition and Consumer Authority (DCCA) 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.

As for other remedies, the administrative practice is diverse. In short, it will depend on the nature of the remedy itself and the specific conditions laid out by the competition authorities.

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.

In one foreign-to-foreign merger with the acquirer having a subsidiary and the target having sales in Denmark, the parties were required to compel 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 European 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 European Commission in its notice on restrictions directly related and necessary to concentrations, the Competition Council may assess the ancillary restrictions at the same time as it assesses the merger itself if five cumulative criteria are met:

- the merger includes restrictions for which there is no practice or that are not covered by the European Commission's notice;
- the restrictions give rise to real uncertainty;
- the merger has been notified on the basis of the full-form notification report;
- the merger cannot be assessed under the simplified procedure; and
- the parties request an assessment of the 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?

Depending on the particular circumstances, the Danish Competition and Consumer Authority (DCCA) may conduct market tests. Customers and competitors frequently submit their observations to the DCCA, most often after the DCCA has published a statement regarding the merger notification. 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 may 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 in secret. Confidential information is always omitted in public versions of decisions, etc.

Cross-border regulatory cooperation

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

Subject to reciprocity, the DCCA may exchange information with competition authorities in other countries. This right applies explicitly to information covered by the DCCA's secrecy obligations.

An agreement (dated 8 September 2017) exists between Denmark, Iceland, Norway, Sweden and Finland for the exchange of information. The DCCA also generally cooperates with the European Commission and competition authorities in other EU member states.

JUDICIAL REVIEW

Available avenues

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

The competition authorities' decisions may, generally, be appealed to the Competition Appeals Tribunal. The Tribunal's decisions may in turn be appealed to the courts by the undertakings.

Following an amendment to the Consolidated Competition Act No. 360 of 4 March 2021 (the Competition Act) in 2021, appeal to the Competition Appeals Tribunal became optional, meaning that an undertaking is now able to decide if it wants to bring substantive decisions before the Tribunal or directly before the courts to obtain a full judicial review of a decision taken by the competition authorities and proposed fines.

An example of an appeal to the Competition Appeals Tribunal regarding the cease of commitments given without any time limit 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 ultimately appealed to the Supreme Court in 2014.

The Supreme Court 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 competition authorities' decision and that it is the undertakings that bear the risk of any ambiguities.

In another example, the Western High Court adopted a judgment on the issue of whether the Danish Competition and Consumer Authority (DCCA) could demand a full-form notification of a merger instead of a simplified notification. When Salling Group acquired Wupti.com in 2015, the parties notified the DCCA of the merger using the simplified procedure; however, the DCCA found that the information in the simplified procedure was insufficient to determine the nature of the merger. The DCCA therefore ordered Salling Group to file a full-form notification, increasing the filing fee significantly.

The merger between Salling Group and Wupti.com was cleared on the basis of the full-form notification report, but Salling Group subsequently complained to the Competition Appeals Tribunal, claiming that a short-form notification under the simplified procedure would have been sufficient. The Competition Appeals Tribunal upheld the DCCA's finding.

The case was appealed to the Court of Aarhus at the first instance, which also found in favour of the DCCA. Salling Group then appealed the decision to the Western High Court, which upheld that there was no basis for setting aside the DCCA's finding, thus emphasising that the DCCA has a wide margin of discretion when determining the merger notification procedure.

Requesting submission of preliminary references before the courts occurs frequently, but in practice the Danish courts can occasionally be seen as unwilling to accede to such request; an example of this is the *EY/KPMG* case, in which Ernst & Young (Danish charter) was found by the Competition Council to have infringed the prohibition against pre-implementation. During the appeal before the Maritime and Commercial High Court, the Court submitted a preliminary reference to the Court of Justice of the European Union, which found in favour of Ernst & Young. The Competition Council subsequently withdrew the case.

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 with respect to the substantive assessment. In most antitrust cases, an appeal to the Competition Appeals Tribunal should be expected to take between three and 12 months, and 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 the merger control regime was introduced in Denmark, and until 1 October 2010 when thresholds were lowered, the Danish competition authorities approved approximately 95 mergers. Approximately four in five were cleared without commitments or other conditions, and the rest were approved after the undertakings concerned agreed to commitments.

Since 1 October 2010 (when the new thresholds were introduced), the Danish competition authorities have approved approximately 636 mergers (as at 11 April 2024). So far, only one merger has been prohibited formally (in 2008), but we are aware of approximately 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 competition authorities' enforcement concerns depend on the concentrations notified. Over the past several years, acquisitions by private equity funds have continuously been dominant on the docket of the Danish Competition and Consumer Authority (DCCA). As for industries, financial services and foodstuffs have continued to be the main focus, but industries such as energy, transport and telecommunications remain as important as always, and construction and hardware have been on the rise.

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. The Western High Court has acknowledged that the DCCA has a wide margin of discretion when determining the notification procedure (see the *Salling Group* case).

Reform proposals

35 | Are there current proposals to change the legislation?

In November 2023, the Danish Ministry of Industry, Business, and Financial Affairs introduced a bill to amend the Danish Competition Act. After receiving substantial feedback from various stakeholders, the bill underwent a few changes. The amended Competition Act was finally adopted in May 2024.

With regard to mergers, the amendment introduces a 'call-in' provision, akin to the EU's Article 22 referral mechanism. With this provision, the DCCA is now authorised to demand notification of mergers if the parties' aggregated annual turnover in Denmark exceeds 50 million Danish kroner (about €6.7 million) and if there is a risk that the merger will significantly impede effective competition; in particular due to the creation or strengthening of a dominant position. As is stated in the amendment, the call-in option applies to all sectors.

The DCCA can request a notification of a merger below the current turnover threshold no later than three months after a merger agreement has been concluded, a takeover bid has been made public, or a controlling interest has been acquired, unless special circumstances exists. If special circumstances exist, a merger below the current turnover thresholds may be subject to merger control no later than six months after a merger has been implemented.

No later than 15 working days after the merger is 'made known' to the DCCA, the DCCA must reach a swift decision to request a merger notification. The notion of 'made known' should be interpreted as implying relevant and sufficient information to make a preliminary assessment as to the existence of the two criteria for the DCCA's assessment (ie, turnover and risk of impediment to effective competition).

The call-in provision applies to transactions signed from1 July 2024 onwards.

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 recent years, Denmark's level of merger control activity has remained high, with the Danish Competition and Consumer Authority (DCCA) clearing 65 mergers in 2021, 72 mergers in 2022 and 68 in 2023. As at 20 June, the DCCA has cleared 25 mergers so far in 2024.

As in previous years, the vast majority of cases are cleared through the simplified notification procedure, which is applicable when the merger is unlikely to raise competition concerns. While only one merger has ever been formally prohibited by the competition authorities, we are aware of around five to 10 cases that have been abandoned by the notifying parties late in the process.

The DCCA has applied Article 22 of the EU Merger Regulation to refer mergers to the European Commission in a couple of instances – and also joined referrals made by competition authorities in other member states. Please refer to point 1.3.1. above.

With the recent amendment of the Danish Competition Act, a similar national call-in option for the DCCA has been adopted. The call-in option will apply to transactions signed from 1 July 2024 which is when the amendments enter into force. Please refer to point 7.2.1. for the turnover threshold under the Danish call-in option.

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Ecuador

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Voluntary or mandatory system?	Mandatory.
Notification trigger/ filing deadline	The process initiates with the notification to the antitrust authority, which must be made within eight days of the execution of the agreement, or of the date of approval of the companies' boards of directors to continue with the transaction.
Clearance deadlines (Phase I/Phase II)	Phase I: The Ecuadorian Competition Authority (SCPM) has 25 working days counted from the notification from the SCPM to the economic operator to decide if the transaction requires further analysis due to its complexity. If the SCPM considers that the operation does not have the potential to generate detrimental effects to competition and free competition, the authority will grant authorisation. Phase II: The SCPM has 60 working days to analyse the possible risks to competition generated in the relevant markets, and decide whether to approve, reject or condition the transaction.
Substantive test for clearance	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.
Penalties	Fine of 8 to 12 per cent of the breaching economic operator's total turnover in the fiscal year preceding that of the fine. If it is not possible to determine the turnover, a fine of between 50 and more than 40,000 Unified Basic Remunerations (UBR) will be applied. The current Ecuadorian UBR is US$460.
Remarks	Not applicable.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

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

The primary law regulating the control of economic concentrations in Ecuador is the Organic Law for Market Power Control (the Antitrust Law), which was enacted on 13 October 2011. The main secondary laws are:

- the Regulation of the Antitrust Law, published on 7 May 2012; and
- Resolution No. 002 by the Antitrust Regulation Entity, 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.

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 and the First-Instance Resolution Committee is in charge of approving, rejecting or subordinating approval to compliance with behavioural or structural conditions.

The Ecuadorian Competition Authority (SCPM) issued on 20 April 2020 Resolution No. SCPM-DS-2020-018, which introduces a new fast-track procedure for the competition authorisation of mergers and acquisitions in this jurisdiction.

Scope of legislation

2 | What kinds of mergers are caught?

The kinds of mergers caught include:

- transfers of an entire business;
- acquisitions of rights representing capital, shares or equity interests;
- relationships stemming from common administration; and
- any other agreement for transferring assets from one economic operator to another or granting decisive control or influence in making decisions.

Premised on Ecuadorian antitrust legislation, economic concentration is defined basically by a change of control of one or more economic operators.

To be considered an economic concentration under Ecuadorian antitrust legislation, the concentration must be between local economic operators or, if between foreign companies, must produce effects in Ecuador. The Antitrust Law establishes two thresholds that economic concentration operations must meet to determine whether the operation requires

the prior approval of the SCPM. Both 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 SCPM.

One threshold concerns the market share of the economic operators participating in the operation, while the other concerns 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.

Resolution No. SCPM-DS-2020-018 establishes that the economic concentrations operations that may be subject to the abbreviated procedure are 'those that do not have the potential to generate detrimental effects to competition and free competition', among which they must meet at least one of the following criteria:

- That the economic operator that takes control does not carry out economic activities in Ecuador directly or indirectly (through related companies that belong to the same economic group).
- In horizontal economic concentration operations, the joint participation of the economic operators involved and the companies or economic operators that belong to their economic group, must be less than 30 per cent in the relevant market; in the event that the economic concentration operation generates horizontal integration in several relevant markets, this criterion must be met in each of them.
- In horizontal economic concentration operations, prior to the operation, the Herfindahl-Hirschman Index (HHI) of the market resulting from the economic operation must be less than 2,000 points, and that as a consequence of the operation, generates a variation of less than 250 points.
- In vertical economic concentration operations, the economic operators involved and the companies or economic operators that belong to their economic group must have a participation quota of less than 30 per cent in the relevant vertically integrated markets; in the event that the economic concentration operation generates vertical integration in several relevant markets, this criterion must be met in each of them.
- In vertical economic concentration operations, the Herfindahl-Hirschman Index (HHI) of vertically integrated markets as a result of the economic concentration operation must be less than 2,000 points; in the event that the economic concentration operation generates vertical integration in several relevant markets, this criterion must be met in each of them.
- That the economic concentration operation involves economic operators that are at risk of bankruptcy.

3 | What types of joint ventures are caught?

Joint ventures that produce effects in Ecuador, surpass the thresholds established in the Antitrust Law and cause a change in the control in one of the economic operations by decisively influencing the decisions of the other 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$460 for 2024) established by the Antitrust Regulation Entity; and
- if the economic concentration involves economic operators engaged in the same economic activity and, as a consequence thereof, the acquired or increased share in the relevant market is equal to or surpasses 30 per cent.

By way of Resolution 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$1.44 billion) for economic concentrations involving the domestic financial system and securities market;
- 214,000 RBUs (US$98.44 million) for concentrations involving insurance and reinsurance companies; and
- 200,000 RBUs (US$92 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:

1. the economic operator in question;
2. 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;

3. companies or economic operators with the rights and powers listed in (2) with regard to a company or economic operator involved;
4. economic operators in which an economic operator listed in (3) has the rights listed in (2); and
5. economic operators in question in which various economic operators listed in (1) to (4) jointly have the rights listed in (2).

The Antitrust Law requires presenting the economic concentration notification within eight calendar days of the date of execution of the agreement, irrespective of the method of the economic concentration. The notification must be made in writing.

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

The economic concentration notification is mandatory when the concentration produces effects in Ecuador, so long as it exceeds the thresholds set by the antitrust regulation entity. Although the law stipulates that, if the concentration does not surpass the thresholds, no prior authorisation from the SCPM will be required, the SCPM may, directly or upon the petition of a party, request that the economic operators involved in the concentration notify the concentration for informative purposes. 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 liquidated economic operators 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 Antitrust 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 matters 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 Ecuadorian Competition Authority (SCPM) within a period of eight days from the execution of the agreement. The Organic Law for Market Power Control (the Antitrust Law) states that executing an economic operation before notifying the SCPM 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 is the recipient of the transfer; for the acquisition of rights representing capital, shares, or equity interests, the responsible party is the acquiring economic operator; for relationships because of common administration, the responsible party is 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 is the responsible party.

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.

The economic concentrations subject to the fast-track procedure will be resolved within a maximum period of 25 working days from the date on which the SCPM office becomes aware of the operation.

Pre-clearance closing

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

The Antitrust Law stipulates that executing an economic concentration operation that must be notified but has not been authorised by the SCPM is a serious offence. This kind of offence, pursuant to the Antitrust Law cited above, is sanctioned with a fine of 8 per cent to 12 per cent of the breaching economic operator's total turnover in the fiscal year preceding that of the fine. If it is not possible to determine the turnover, a fine of between 50 and more than 40,000 Unified Basic Remunerations (UBR) will be applied. The current UBR is US$460. Additional fines of up to 500 UBRs may be imposed on managers or legal representatives depending on the degree of intervention. In addition to the monetary fines, if the transaction is executed without the respective prior notification, or as long as the corresponding authorisation has not been issued, the SCPM may order the transaction to be reversed, or corrective measures implemented, or the cessation of control by one economic operator over another or others, when the case so requires.

Throughout the years, three economic operators have been sanctioned, with the fines being US$2,623,000, US$123,494 and US$17,000.

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

Certain sanctions also apply to foreign-to-foreign economic concentrations that produce effects in Ecuador. The SCPM has signed cooperation agreements with other antitrust authorities for collaborating in this type of case.

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

Premised on its legal power to subject the approval of an economic concentration to compliance with structural conditions, and as part of the conditions for approving an economic concentration in which the disinvestment of an asset package to be transferred to a third party had been ordered, in 2016 the SCPM resolved that the economic operators involved in an economic concentration had to sign a hold-separate arrangement until the ordered disinvestment was made. The reason was that the parties forming part of the economic concentration in Ecuador had to maintain their independence and competition in the market to avoid a monopoly. This took place in a stock purchase in the parent company between two subsidiaries that held the entire market share in Ecuador.

Public takeovers

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

There is only one economic concentration system in Ecuador, and there are no special rules or systems for public takeover bids. In other words, if as a consequence of a public takeover bid the thresholds and conditions set by the Antitrust Law are met, the takeover must be notified to the SCPM. Nonetheless, there are no secondary competition rules in Ecuador governing the execution of or compliance with a structural condition ordered by the SCPM that 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 in each one of the markets and the existence of barriers to entry. Together with the form, copies of the financial statements, a draft of the legal document or agreement concerning the economic concentration, a sworn statement that the information furnished is true, market analysis supporting the information supplied and confidentiality requests 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. The process is the following.

As a general overview, the process initiates with the notification to the SCPM, within eight days of the execution of the agreement or from the date of approval of the board of directors of the companies to continue with the transaction. The notification shall be accompanied by financial statements for the last fiscal year, market share, relevant markets, among others. Within the following 10 working days, if the information is not complete, the SCPM will provide 10 additional days for completion of the required documentation. If it is complete, the SCPM must notify the economic operator that the documentation is complete. Following

the date of that notification, the SCPM, by means of a reasoned resolution, must decide within a maximum of 60 working days to:

1 authorise the operation;
2 provide conditions for the approval of the transaction; or
3 deny the authorisation.

The term may be extended by up to an additional 60 calendar days. The term may be suspended for a maximum of 45 working days, when the requirements for suspension are met. Once the term provided has elapsed without the corresponding resolution having been issued, the transaction shall be deemed authorised. The authorisation by administrative silence shall produce in all cases the same legal effects as the express authorisation, without the need for any additional request by the economic operator or operators involved, who may continue with the notified concentration transaction.

The notification procedure is divided into two phases.

Phase I

The SCPM has 25 working days after notifying the economic operator that it has received the filing to decide if the transaction requires further analysis due to its complexity. If the SCPM considers that the operation does not have the potential to generate detrimental effects to competition and free competition, then the SCPM will grant the authorisation. Transactions that may be subject to this fast-track procedure, must comply with at least one of the following:

- The economic operator that takes control does not perform, directly or indirectly (through related companies that belong to the same economic group), economic activities in Ecuador.
- In horizontal economic concentration operations, the joint participation of the economic operators involved and of the companies or economic operators belonging to their economic group must have a share of less than 30 per cent of the relevant market; if the economic concentration operation generates horizontal integration in several relevant markets, this criterion must be met in each one of them. Additionally, in this type of operation, prior to the transaction, the Herfindahl-Hirschman Index (HHI) of the affected relevant market must be less than 2,000 points and the ex post variation of the same index must be less than 250 points; if the economic concentration operation generates horizontal integration in several relevant markets, this criterion must be met in each of them.
- In vertical economic concentration transactions, the economic operators involved and the companies or economic operators that belong to their economic group must have a share of less than 30 per cent in the relevant vertically integrated markets; if the economic concentration transaction generates vertical integration in several relevant markets, this criterion must be met in each of them. Additionally, in this type of operation, prior to the transaction, the Herfindahl-Hirschman Index (HHI) of the vertically integrated markets resulting from the economic concentration operation must be less than 2,000 points; if the economic concentration operation generates vertical integration in several relevant markets, this criterion must be met in each of them.

Phase II

If the authority does not grant the authorisation within the 25 first days, the procedure continues to the second phase automatically. During the second phase, the SCPM will have the remaining term of 60 working days to make a decision. During this period, the possible risks to competition in the relevant markets must be analysed. In this phase, the term may be suspended to request further documentation; this phase may be extended for an additional 60 days. The authority may approve, reject or condition the transaction. If conditions are imposed, such conditions must be implemented within a maximum of 90 working days from the date of notification. The authority may grant an extension for compliance with the conditions. If the conditions are not met in the term provided, the transaction will be denied.

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 by up to 45 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 complexity thereof.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Normally, the Ecuadorian Competition Authority (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 Stenback 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.

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.

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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 have 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 many 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 Ecuadorian Competition Authority (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 the analysis of a case in question, the authority has the power to reject a concentration operation should it find it detrimental to the market. Obviously, if the SCPM denies an economic concentration, the concentration may not be perfected in Ecuador.

If the SCPM subjects approval of the economic concentration to compliance with conditions, such conditions will be either behavioural or structural.

With these conditions, the SCPM looks to maintain the competitive pressures existing in the relevant market prior to the concentration.

Remedies and conditions

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

Yes, it is possible. In fact, the Organic Law for Market Power Control (the Antitrust Law) confers upon the SCPM the power to implement structural and behavioural remedies to stop an economic concentration from causing distortions in the market in question. 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 certain conditions.

Ancillary restrictions

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

To date, the SCPM has not had an economic concentration case where it had to analyse ancillary restrictions.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

In its analysis, the Ecuadorian Competition Authority (SCPM) reviews the information provided by the notifying party with regard to its competitors and providers, as well as the

supply and demand structure of the market in question. Furthermore, when analysing an economic concentration, the SCPM will 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 a 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 Organic Law for Market Power Control (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 Ecuadorian Competition Authority (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 that when a resolution was not the subject of an appeal, the parties were served notice thereof within 20 days.

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 13 years the Organic Law for Market Power Control (the Antitrust Law), has been in effect and that the Ecuadorian Competition Authority (SCPM) has operated for almost as long, 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 13 years, the economic concentration system in Ecuador faces many challenges, particularly with regard to educating economic operators about the rules governing this area of the law and the prior concentration notification processes. In this regard, the SCPM has focused on training and has also published a technical guide for analysing economic concentration operations. The guide is

a public document containing a clear 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 domestic mergers, as explained above.

Especially in terms of concentration indexes, the SCPM continues to anlyse the following economic sectors: food, biotechnology, clothing, footwear, energy, pharmaceuticals, transportation, construction, forest timber products, environmental services, technology, automobile and petrochemicals.

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* (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.

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Egypt

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Voluntary or mandatory system?	The system of notification of economic concentrations meeting the legal and financial requirements in Law No. 3 of 2005 on the Protection of Competition and Prohibition of Monopolistic Practices, as amended by Law No. 175 of 2022 (the Law) is mandatory, the parties to the concentration shall not implement the concentration until a clearance decision is issued from the Egyptian Competition Authority (the ECA).
Notification trigger/ filing deadline	There is no specific deadline set by the Law. What matters is that the notification is made before the concentration is implemented, as long as it is a notifiable transaction. The ECA's Guidelines provide that it is preferable to submit the notification file at any of the following phases: • The conclusion of a memorandum of understanding or letter of intent (preliminary agreement). • Conducting serious negotiations regarding the economic concentration. • The announcement of the purchase offer. • Concluding any other agreement that may lead to the acquisition of control or material influence.
Clearance deadlines (Phase I/Phase II)	In Phase I of the review, the ECA will decide whether or not to clear the concentration within 30 working days from the day following the filing of the notification, subject to an extension of up to 15 working days if the parties have submitted a commitment proposal. If the concentration was referred to Phase II investigation, the review shall last for 60 working days from the date of the committee's first phase referral decision, subject to an extension of up to 15 additional days if the parties submit a commitment proposal.
Substantive test for clearance	The Law provides that an economic concentration shall be prohibited if it limits, restricts or harms freedom of competition. The ECA will first define the relevant products and geographical markets where the concerned parties operate. Subsequently, it will assess the potential effects of the economic concentration to determine whether it would limit, restrain, or harm competition. In this evaluation, the ECA will particularly consider countervailing factors that could outweigh any anticompetitive effects. Additionally, a counterfactual assessment will be conducted, comparing market conditions with and without the implementation of the economic concentration.

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Penalties	Entities that violate the provisions on economic concentrations are criminally liable and can be subject to criminal fines as listed under Article 22 (bis-d). These sanctioned infringements include a breach of the notification obligation, failure to comply with a conditional clearance decision or a rejection to implement the economic concentration and knowingly submitting false data and documents. According to the same Article, the fine ranges from one to 10 per cent of the total annual turnover, assets or the transaction value, whichever is higher. However, in the event that the above percentage cannot be calculated, the penalties will range from 30 million Egyptian pounds to 500 million pounds.
Remarks	Pre-merger control is a major change in the Law. Prior to the amendments, merger control was ex post, which means that it took place after the transaction. The ECA's practice will be decisive on how the Law is effectively applied. In fact, the Law is written in very vague terms, which will in practice lead to a wide discretionary power for the ECA. However, since the Law has been recently adopted and modified by the Executive Regulations, there are not yet many examples to illustrate a concrete application in merger control.

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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. 3 of 2005 on the Protection of Competition and Prohibition of Monopolistic Practices, as amended by Law No. 175 of 2022 (the Law). The Law is supplemented by the Executive Regulations that were enacted by Prime Minister Decree No. 1316 of 2005, amended by Decree No. 1120 of 2024 (the Executive Regulations). The latest amendments to the Law and the Executive Regulations will enter into full force and effect as of 1 June 2024.

The Law and its Executive Regulations are enforced by the Egyptian Competition Authority (the ECA). The ECA was created by virtue of article 11 of the Law and is affiliated to the Prime Minister. The ECA is the only authority concerned with the enforcement of the Law provisions in all sectors and industries except the banking sector and public utilities managed directly by the state.

However, the recent amendments to the Law have introduced a dual-system approach to merger control. Under this new system, any economic concentrations occurring within sectors regulated by the Financial Regulatory Authority (FRA) are now exempt from oversight by the ECA. Instead, these activities fall solely under the jurisdiction of the FRA. The FRA shall consult the ECA; however, its powers are limited to issuing a non-binding opinion.

Additionally, shortly before the Law and the Executive Regulations took effect, the ECA released an explanatory infographic along with a set of questions and answers about the anticipated implementation of the ex ante merger control system (the Guidelines). These Guidelines provide insights into both the procedural and the substantive aspects of the Law and clarify several ambiguous points not addressed by the Executive Regulations.

Scope of legislation

2 | What kinds of mergers are caught?

According to Article 2 of the Law, the merger control system applies exclusively to economic concentrations as defined by the Law. In this regard, the Law defines economic concentrations as any change of control or material influence over one or more of the undertakings concerned that may result in traditional mergers, acquisitions and fully functioning joint ventures. In other words, a merger falls within the definition of economic concentration if it leads to a change in the effective influence on the economic decisions of an undertaking or a change in the ability to influence the policy of an undertaking, including its strategic decisions and commercial objectives.

Merger control applies to transactions that fall within the above definition of an economic concentration and meet the financial and jurisdictional thresholds provided in the Law. If a transaction meets these two requirements, it must be notified to the ECA prior to its consummation and will be subject to the ECA's assessment (notifiable economic concentrations).

The Law specifically exempts certain types of mergers from its scope, and therefore from the merger control regime. Pursuant to article 2 of the Law, mergers and acquisitions between parties belonging to the same entity are not considered economic concentrations. Instead, these transactions are seen as restructuring efforts that do not result in a change of control or substantial influence over the entity. Additionally, the Law excludes temporary acquisitions of securities by licensed entities, provided the securities are resold within one year of acquisition. During this period, the acquirer must not exercise any voting rights or take actions that could influence the target entity's strategic decisions or commercial objectives.

It is also worth noting that the ECA reserves the right to review any merger falling below the financial thresholds (non-notifiable economic concentrations) provided in the Law, if the ECA's board approves such intervention and if the transaction will likely give rise to competition concerns. The ECA can do so even if the transaction is consummated, with a deadline for intervention of one year from the date of consummation. In this case, the ECA can only impose behavioural remedies without blocking the transaction. This mechanism was introduced particularly to address killer acquisitions.

3 | What types of joint ventures are caught?

According to Article 2 of the Law, the establishment of a joint venture or the acquisition by two or more entities of an existing entity for the purpose of establishing a joint venture may be considered an economic concentration, if the joint venture carries out its economic activity independently and permanently. In other words, the pre-merger control law only applies to fully functioning joint ventures.

A fully functioning joint venture shall also meet certain other requirements to qualify as an economic concentration, and to be subjected to the pre-merger control. First, it should result in a change in control or material influence of one or more entities. In addition, it should meet the financial and jurisdictional thresholds set out in the Law. The Guidelines also outlined factors that should be considered for a joint venture to be notifiable. Notably, these factors are almost identical to the European Union's approach toward fully functioning joint ventures. Specifically, the joint venture must engage in an economic activity beyond performing a single function for its controlling persons, possess independent resources, and ensure that its sales and purchase operations are not limited to the controlling persons. Some non-notifiable joint ventures (ie, joint ventures below the financial thresholds) may also be subject to merger control if they are considered to have anti-competitive effects in the relevant market by virtue of the general exception provided in the Law, whereby the ECA reserves the right to review any transaction falling below the financial thresholds, if the ECA's board approves such intervention and if the transaction will likely give rise to competition concerns. In this case, ECA's intervention shall be within one year of the date of consummation.

Non-fully functioning joint ventures follow a different framework under the law.

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

The Law defines control as the ability of the controlling person or persons to exercise effective influence, directly or indirectly, by directing the economic decisions of other entities. This may be evidenced either through a majority of voting rights or through the ability of

the controlling entity to prevent the making of economic decisions of the person or persons (veto rights), or in any other manner. It includes any situation, agreement, or ownership of shares or quotas, regardless of their percentage, which leads to an actual control of management or decision-making.

Indeed, a person who has the majority of voting rights or veto rights may be able to exert a strong influence on the decision-making process and also on the management of the entity. The Guidelines also clarified that other common forms of control may include acts that lead to the ownership or the right to use and exploit all or the majority of the assets of another person, acts that lead to the acquisition of rights, which confer the ability to the controlling person to appoint the majority of the members of the board of directors or to control the decisions of the board of directors or the general assembly meetings and acts that would result in more than half of the members of the board of directors or the general assembly becoming the same persons in both the acquiring and the acquired persons.

The existence of material influence can also qualify a transaction as an economic concentration and subject it to the ECA's merger control regime. The Law defines material influence as the ability to influence, directly or indirectly, the policy of another person. It includes influencing the strategic decisions or commercial objectives of the target entity. The Executive Regulations give more precision on this definition and give a list of certain cases where material influence can effectively be detected. For instance, the ownership of more than 25 per cent of the total voting rights, shares or equity shares of another person, or ownership of less than 25 per cent if combined with other elements that are likely to result in influencing the policies of the target entity. These elements may include: the percentage of the voting rights of the acquirer compared to other voting rights, which enables the acquirer to influence the target's policies and commercial objectives, the articles of incorporation/association, the shareholders agreement or any other agreement granting the acquirer privileged voting or veto rights, or the presence of one or more representative for the acquirer on the board of directors of the target entity, or the existence of common shareholders and/or stakeholders between the acquirer and the target entity.

In all cases, the latest amendments to the Executive Regulations provided that if less than 10 per cent of the total voting rights, shares or equity shares is acquired, there is a presumption that no material influence is acquired, unless the acquirer is classified among the three largest shareholders or stakeholders of the target entity.

Consequently, it is possible to conclude that, the material influence definition and scenarios were introduced to address transactions that do not necessarily result in a change of control in one of the parties through the acquisition of the majority of the voting rights or veto rights, but still enables influence over one of the parties' policies and commercial objectives. In that case, the ECA will assess whether the transaction would fall under the definition of effective influence or material influence. Therefore, a transaction involving the transfer of a minority interest leading to material influence may also be notifiable and therefore subject to the ECA's 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?

The new Egyptian merger control regime applies to economic concentrations meeting one of the following financial thresholds provided in article 19 (bis 1) of the Law:

1. The combined aggregate local and annual turnover of the parties exceeds 900 million Egyptian pounds, and the annual turnover in Egypt of at least two of the parties concerned exceeds 200 million pounds, each of them separately (domestic notification thresholds).

2. The combined aggregate worldwide annual turnover of the parties exceeds 7.5 billion pounds, and the annual turnover realized in Egypt of at least one of the concerned parties exceeds 200 million pounds (worldwide notification thresholds).

Transactions that meet one of the above thresholds must be notified to the ECA, if they also result in a change of control or material influence as defined by the Law.

The Executive Regulations specify that achieved annual turnover of the aggregate assets value are calculated by the aggregate amount of the achieved annual turnover of the concerned parties or the asset value from the latest consolidated financial statements of the parties to the transaction, excluding sellers, unless they exit the entity targeted by the economic concentration after the consummation of the transaction. If the sellers remain part of the related parties of the entity targeted by the concentration after the consummation of the transaction, their turnover and that of their related parties shall be included in the turnover calculations of the parties to the economic concentration. The Executive Regulations further clarify that if the annual turnover achieved or the aggregate assets value are in a foreign currency, they are converted into Egyptian pounds, according to the official foreign exchange rate announced by the Central Bank of Egypt on the last day of the financial year of the parties to the economic concentration.Top of Form

Notwithstanding the above thresholds and requirements, the ECA may, following the approval of its board, examine an economic concentration that does not meet the above thresholds if there is evidence or presumptions of potential anti-competitive effects. This examination shall occur within one-year of the effective date of consummation of the economic concentration.

According to the Executive Regulations, the occurrence of any of the following cases is considered to be an indication of a harm to competition:

1. Restriction of technological development and innovation.
2. Control of markets through actions that may lead to an increase or decrease in prices.
3. Reduction of product quality.
4. Creation of barriers to entry or expansion within the relevant market.

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

Economic concentrations that result in a change of control or a material influence and which meet the financial thresholds provided in the Law require notification to the Egyptian Competition Authority (ECA). In such cases, filing is mandatory.

Failure to notify the ECA subjects concerned parties to severe penalties that range between 1 per cent and 10 per cent of their combined aggregate turnover or assets or the value of the transaction itself (whichever is higher). If the above value cannot be calculated, a fixed fine of between 30 million pounds and 500 million pounds shall apply.

However, according to article 19 bis paragraph 2 of the Law, the ECA reserves the right to review any economic concentration falling below the financial thresholds provided in the Law, if the ECA's board approves such intervention and if the transaction is likely to give rise to competition concerns. In this case, filing is not mandatory, and the ECA will have a deadline for intervention of one year from the date of consummation. Moreover, the ECA's powers in such instances are strictly limited to imposing behavioural remedies; in other words, the ECA cannot block the transaction. Parties, however, may wish to voluntary notify this category of non-notifiable transactions to avoid later intervention by the ECA.

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

In principle, the Law specifies that its provisions shall apply to acts committed abroad, if they result in the prevention, restriction or harm of the freedom of competition in Egypt and if they constitute infringements of the provisions of this Law. Therefore, a priori, foreign-to foreign mergers shall be notified if they result in any anti-competitive effects on the Egyptian markets.

However, for mergers or notifiable economic concentrations, a local nexus is required.

The Law sets out the financial thresholds that trigger the notification obligation. The two scenarios provided in the Law require that a certain turnover is realised by the parties (or at least one of them) in Egypt. Such turnover may be realised whether directly by one of the parties to the transaction, or through its related parties.

Therefore, we may conclude that a foreign-to-foreign merger is only notifiable if at least one of the concerned parties, including its related parties, realises an annual turnover in Egypt that exceeds 200 million pounds, provided that the combined turnover realised elsewhere by the parties to the transactions exceeds 7.5 billion pounds.

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

The Law does not establish any specific provisions for foreign investments or particular sectors. Instead, it shifts the jurisdiction for overseeing economic concentrations within sectors regulated by the FRA from the ECA to the FRA.

In this regard, it is worth noting that the FRA was established by Law No. 10 of 2009. This authority is responsible for the supervision of non-banking financial markets and

instruments, including capital markets, futures exchanges, insurance activities, real estate financing, financial leasing, factoring, consumer finance, securitisation and movable guarantees. Therefore, economic concentrations that fall within the FRA's jurisdiction are subject to its control, which means that entities involved in these types of concentrations are required to notify the FRA prior to closing. Finally, the FRA is obligated to consult the ECA; the latter's opinion is, however, non-binding for the FRA.

Similarly, economic concentrations within the banking sector are not subject to the ECA's merger control regime unless other requirements are satisfied.

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, a notification must be made prior to the closing of the merger if it is a notifiable transaction (ie, it meets the financial and material requirements provided in Law No. 3 of 2005 on the Protection of Competition and Prohibition of Monopolistic Practices, as amended by Law No. 175 of 2022 (the Law).

In terms of sanctions, article 22 (bis-d) of the Law provides that any person who fails to comply with the notification obligation shall be subject to a fine of not less than 1 per cent and not more than 10 per cent of the total annual turnover, assets, or transaction value of the parties to the concentration, whichever is greater. If this percentage cannot be calculated, the penalty shall be a fine of not less than 30 million Egyptian pounds and not more than 500 million pounds.

It is not possible to provide information on the application of these penalties in practice, given that the Law is relatively new and has not yet been applied due to the delayed issuance of the Executive Regulations that were enacted by Prime Minister Decree No. 1316 of 2005, amended by Decree No. 1120 of 2024 (the Executive Regulations). The Law and the Executive Regulations are expected to enter into full force and effect as of 1 June 2024.

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

Article 55 of the Executive Regulations specifies the entities that are subject to the notification requirement. In fact, the responsible entity differs depending on the nature of the transaction (ie, whether it is a merger, acquisition or joint venture). Filing is mandatory for the following legal entities:

1. The acquiring entity/entities where an acquisition leads to control (effective influence) or material influence over one or more other entities.
2. The merging entities in a merger.
3. The acquiring entities where an acquisition of another entity has the purpose of establishing a joint venture.
4. The entities establishing a joint venture.

Filing fees are provided in the Executive Regulations and vary depending on the annual turnover of the concerned parties in Egypt or worldwide, as the case may be. In all cases, the fees shall not exceed 100,000 pounds, and if one transaction falls within more than one category then the highest fee will apply. The fee scheme is as follows:

1. A fee of 80,000 pounds shall be imposed if the annual turnover or the consolidated assets in Egypt for the parties to the economic concentration collectively range between 900 million pounds and 1 billion pounds.

2. A fee of 90,000 pounds shall be imposed if the annual turnover or the consolidated assets in Egypt for the parties to the economic concentration collectively range between 1 billion pounds and 1.5 billion pounds.
3. A fee of 100,000 pounds shall be imposed if the annual turnover or the consolidated assets in Egypt for the parties to the economic concentration exceeds 1.5 billion pounds.
4. A fee of 100,000 pounds shall be imposed if the annual turnover or the consolidated assets worldwide for the parties to the economic concentration collectively exceed 7.5 billion pounds for the last year in the latest approved consolidated financial statements, provided that the annual turnover in Egypt for at least one of the concerned parties in the last approved consolidated financial statements exceeds 200 million pounds.

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

Given that notification must be made prior to the consummation of the transaction and that the Law establishes a pre-merger system, clearance must be granted for the transaction to be implemented. The Law explicitly provides for a mandatory standstill obligation, with article 19 (a) stating that ‘it is not permitted to consummate an economic concentration until an approval from the Egyptian Competition Authority (the ECA) has been granted. Once the parties have notified the ECA, everything is frozen until the ECA has examined the case.

The suspension of the transaction may last up to four months, or even longer. According to article 19 (bis-c), the ECA will examine the economic concentration in Phase I within 30 working days, starting from the day after filing. This period may be extended by 15 working days in the event commitments are submitted by the parties. Therefore, the parties may have to wait up to 45 days – and possibly more if the file is referred to Phase II examination, which may last up to 75 days, making a total of 120 days. Moreover, the ECA must await the approval of the Council of Ministers to authorise the transaction, in the event it could be saved on the grounds of economic efficiency. However, the period for the Council of Ministers to issue a decision remains undetermined.

However, the recently issued Guidelines introduced simplified procedures for some types of concentrations, that are deemed not to significantly alter the structure of the Egyptian markets. These simplified procedures aim to streamline the notification process for these concentrations, making it quicker and less burdensome either through the examination periods or the form of the notification file. The examination period for the simplified procedure notification files is 20 working days, starting from the next working day following the

date of receiving the complete simplified notification file (the information required is considered minimal compared with the traditional notification form).

The simplified procedures apply exclusively to the following cases:

1. Where the persons concerned with the economic concentration meet the domestic notification thresholds, if the annual turnover or the value of assets in Egypt of the persons concerned with the economic concentration combined do not exceed two billion Egyptian pounds for the latest year in the last audited consolidated financial statements.
2. Where the persons concerned with economic concentration meet the worldwide notification thresholds, if the annual turnover in Egypt of the target person does not exceed 500 million pounds for the latest year in the last audited consolidated financial statements.
3. Establishing or acquiring a joint venture that carries out an independent and permanent economic activity outside Egypt.
4. Establishing or acquiring a joint venture that carries out an independent and permanent economic activity in markets that are not horizontally or vertically related or otherwise related to the markets in which the parent companies operate.
5. Conglomerate economic concentrations between persons operating in markets that are not horizontally or vertically related or otherwise related to each other.
6. Acquisition of sole control over one or more persons after the acquiring person or persons exercised joint control over the same person.

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 principle, the merger cannot take place before the ECA has given its approval.

However, the consequences of violating the standstill obligations are not clear. The Law provides penalties in case of breach of the notification and filing obligations, but does not explicitly state the penalties if the transaction is closed before the clearance of the ECA has been received.

Article 22 (bis-d) of the Law, specifies that the penalties apply to persons who fail to comply with the notification obligation provided in article 19 (bis-a). While article 19 (bis-a) includes both a notification obligation and a standstill obligation, the language used by the legislator in article 22 (bis-d) appears to pertain specifically to the failure to notify. However, in its recently issued Guidelines, the ECA controversially provides that gun jumping is penalised by the fine set forth in article 22 (bis-d). The ECA's approach is particularly ambiguous because it contravenes established constitutional and criminal law principles, particularly the principle of *nullum crimen sine lege*, which may result from an extensive interpretation of the legal text. However, this dilemma can be only resolved once the law is put into effect and Egyptian courts are given the chance to apply their interpretation for these provisions. Accordingly, if ECA interpretation is to stand, gun jumping can be subject to a fine of not less than 1 per cent and not more than 10 per cent of the total annual turnover, assets, or transaction value of the parties to the concentration, whichever is greater. If this percentage

cannot be calculated, the penalty shall be a fine of not less than 30 million pounds and not more than 500 million pounds.

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

Neither the Law nor the Executive Regulations provide any exception from the standstill obligation the parties shall observe until the ECA clears the transaction. Therefore, if a foreign-to-foreign merger falls within the definition of economic concentrations notifiable to the ECA – particularly, if at least one of the parties to the transaction realises an annual turnover in Egypt that exceeds 200 million pounds, whether directly or indirectly through any of its related parties – then the transaction cannot be closed before obtaining the ECA's approval.

Controversially, the ECA's Guidelines provide that failure to adhere to the standstill obligation is subject to a fine of not less than 1 per cent and not more than 10 per cent of the total annual turnover, assets, or transaction value of the parties to the concentration, whichever is greater. If this percentage cannot be calculated, the penalty shall be a fine of not less than 30 million pounds and not more than 500 million pounds. Although this penalty is not explicitly stated in the Law, it is established in the ECA's Guidelines.

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

The Law and the Executive Regulations do not provide for any exceptions that might permit closing prior to clearance, either in the case of local mergers or in the case of foreign-to-foreign mergers. This indicates the strict approach of the ECA to pre-merger control.

Public takeovers

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

Public takeovers meeting the criteria for notifiable economic concentrations are governed by merger control regulations akin to those applied to other transactions. However, if these acquisitions fall within the purview of the FRA, then the FRA will be the designated competent authority overseeing such transactions, rather than the ECA, whose role is limited to issuing non-binding opinions.

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?

For a normal notification file, the ECA provides a form to be completed and submitted by the parties. Article 56 of the Executive Regulations adds that, for the notification file to be considered complete and ready for the review of the ECA, 12 documents and data requirements must be submitted by the parties. For instance, they must provide corporate documents, board and/or shareholders' assembly resolutions ratifying the economic concentration, financial statements, the letter of intention/memorandum of understanding, sale and purchase agreement or any other document demonstrating the change of control

or the material influence and a power of attorney. The power of attorney issued abroad must be notarised at the Egyptian embassy. It must then be legalised by the Egyptian Ministry of Foreign Affairs.

For the simplified procedure (fast-track notifications), the ECA requires significantly less data and information. It mainly requires corporate documents, financial statements and annual reports of the concerned parties, and the concentration documents (agreements, permits or approvals obtained outside or inside Egypt and the resolutions of the concerned parties' respective board or shareholders meeting approving the concentration).

It is worth noting that the Law does not clearly define the circumstances under which a transaction may be subject to a 'stop-the-clock' measure. However, as stated above, in Phase I, it is explicitly provided that the clock will start once the case file is complete. According to the ECA's Guidelines, the ECA will assess the notification file to examine its completeness within a maximum of five working days. If the file is deemed complete, these five days will be included in the examination period, meaning the examination clock will start the day following the submission of the file to the ECA.

Having said that, the notification form adopted by the ECA can provide the authority with certain leeway to extend the period of five days, meaning the deadline for the investigation can be prolonged if certain information in the notification form is not rightly addressed. As such, it is important that parties consult local counsel to reduce the uncertainties during the notification phase.

Article 22 (bis) of the Law states that the penalty for knowingly submitting incorrect data, information or documents to the ECA, is sanctioned by a fine of not less than 50,000 pounds and not more than 1 million pounds.

This is complemented by article 22 (bis-d), which provides that anyone who obtains an approval decision of an economic concentration from the ECA by knowingly submitting false data, information or documents, may be fined with the same penalty.

The same applies to any entity who obtains the approval of the FRA to implement an economic concentration, by knowingly submitting incorrect data, information or documents to this authority.

Investigation phases and timetable

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

The review process starts as soon as the notification file is complete, meaning that the documents required by the Executive Regulations have been submitted and the filing fees have been paid. There are several typical steps in the investigation. In some cases, clearance of the transaction may be granted after the initial investigation (ie, Phase I). However, in some cases, it is necessary to conduct an in-depth, Phase II investigation.

The Phase I assessment takes up to 30 days starting from the day of the filing, with a possible extension of 15 days if the parties submit an acceptable commitment offer. During this phase, a board committee is formed to decide whether to approve the transaction or to

refer the case file to a Phase II investigation, the ECA will publish a summary of the transaction to receive third parties' opinions, and it will conduct a preliminary assessment of the economic concentration and respond to the inquiries of the concerned persons.

After the completion of the Phase I assessment, the examination committee will be entitled to resort to any of the following measures: lack of jurisdiction; dismissal if the parties abandon the transaction; approving the transaction with or without conditions; or referring the transaction to a Phase II in-depth investigation if the transaction raises serious concerns that it may harm competition in the relevant market.

The examination committee must take a decision within 30 working days. If no decision is taken even after an additional 15 days, the economic concentration is considered to be approved by the ECA.

Phase II is a detailed investigation, which, according to article 19 (bis-d), lasts 60 working days starting from the date of issuance of a decision taken by one of the examination committees. It is also possible to extend this period by 15 working days. If no decision is issued within this period, the implementation of the economic transaction is deemed to be approved.

The Law is not clear on what this phase consists of and what makes it an in-depth investigation; however, the Guidelines provide that during this phase the ECA may send a request for information to the concerned persons and other market players. It will also conduct in-depth legal and economic analysis of the economic concentration and respond to the inquiries of the concerned persons.

At the end of this phase, the ECA's Board of Directors will decide whether to:

- Dismiss the application, in the event that the parties abandon the economic concentration.
- Approve the economic concentration, if it does not restrict or harm competition in the relevant market.
- Conditionally approve the economic concentration, if the undertakings submit acceptable commitments to the ECA.
- Reject the implementation of the economic concentration because of its negative impact on competition (restricts or harms freedom of competition).

In this last case, the concerned undertakings have the right to appeal the decision within 30 days of its notification to them.

Consulting the ECA before the official notification of the merger is not required by the Law, but it is advisable for undertakings to do so in order to submit a complete notification file that conforms with the ECA's requirements and considerations, and thus avoid any delays or extensions at the examination and investigation stages. The ECA welcomes such exchanges with undertakings; it explicitly provides in the Guidelines that the concerned persons with the economic concentration can discuss the economic concentration prior to its implementation with the specialists in charge at ECA before officially submitting the notification file if they have any inquiries about whether the transaction falls within the scope of application of ECL. However, it is emphasised that such discussions will not address any inquiries concerning

the impact of the economic concentration on the market (ie, the substantive assessment of the economic concentration).

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

According to article 19 (bis-c) and 19 (bis-f), the statutory timetable for clearance is 30 days from the date of filing, which may be extended by a further 15 days. In the event the file is referred to Phase II examination, the period may last up to 75 days, making a total of 120 days. In addition, the approval of a transaction on the grounds of economic efficiency depends not only on the ECA, but also on the Council of Ministers that must approve such transactions, which means that the maximum period of 120 days imposed on the ECA by the Law may be further delayed by the time taken by the Council of Ministers to review and approve the transaction. Neither the Law nor the Executive Regulations address the possibility of expediting the process. However, submitting a complete notification file will significantly decrease the chances of further delays or extensions.

During its meeting with stakeholders, the ECA indicated its commitment to completing the Phase I assessment within 20 working days. For certain industries, particularly the medical field, the ECA aims to expedite this process, potentially completing the examination of such transactions in as little as one week.

The ECA further introduced the simplified procedures (the fast-track notifications) that apply to some types of concentrations that do not that do not result in changes to the structure of the Egyptian market(s). The examination period for simplified procedure notification files is 20 working days, starting from the next working day following the date of receiving the complete simplified notification file (the information required is considered minimal compared with the traditional notification form). These simplified procedures apply exclusively to cases detailed in 2.1.3.

To conclude, the examination and clearance timetable will highly depend on the complexity of the transaction in question.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

Law No. 3 of 2005 on the Protection of Competition and Prohibition of Monopolistic Practices, as amended by Law No. 175 of 2022 (the Law) provides that an economic concentration shall be prohibited if it limits, restricts or harms freedom of competition. The Executive Regulations that were enacted by Prime Minister Decree No. 1316 of 2005, amended by Decree No. 1120 of 2024 (the Executive Regulations), further clarify that the elements that shall be considered to ascertain the impact of the concentration in the relevant market and whether it shall be approved shall be the following:

1 Market structure, along with present or potential competition levels in Egypt, and abroad provided it affects Egypt.

2 The market position of the parties including, inter alia, their economic status and solvency compared to the present and potential investments in the market.
3 The available alternatives for suppliers, customers, and consumers and their ability to access production resources or relevant markets, as well as the patterns of supply and consumption of the relevant products.
4 Barriers to entry and expansion in the relevant markets.
5 The potential impact of the economic concentration on consumers, and existing or potential investments.
6 The potential impact of the economic concentration on innovation or development.
7 The potential negative effects on freedom of competition.

The ECA will first define the relevant products and geographical markets where the concerned parties operate to identify the extent of competitive constraints that may arise after the economic concentration. Subsequently, the ECA will assess the potential effects of the economic concentration to determine whether it would limit, restrain, or harm competition. In this evaluation, the ECA will particularly consider countervailing factors that could outweigh any anticompetitive effects. Additionally, a counterfactual assessment will be conducted, comparing market conditions with and without the implementation of the economic concentration.

The Law and the Executive Regulations further provide that prohibited mergers can be saved on the grounds in three instances:

First: If not implementing the transaction would result in the exit of individuals from the market (failing firm defence), provided that the following conditions are met:

1 One of the parties concerned with the economic concentration is financially distressed to the extent that it may lead to the exit of that party and its assets from the market.
2 There is no less restrictive alternative measure than the implementation of the economic concentration.

Second: If it is proven that economic concentration will result in economic efficiencies outweighing the anti-competitive effects, provided that the following conditions are met:

1 The economic efficiency is achievable.
2 The economic efficiency is only achievable through the implementation of the economic concentration.
3 The economic efficiency benefits consumers.

Third: If the implementation of economic concentration would protect national security.

However, clearance based on economic efficiency grounds will only be granted following the approval of the Council of Ministers – which remains controversial.

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

There is no specific substantive test provided under the Law or the Executive Regulations for joint ventures. However, it can be assumed that the substantive test for joint ventures

will be the same as that for mergers, as long as the joint venture falls within the definition of economic concentration set out in article 2 of the Law, (ie, it is a fully functioning joint venture).

Theories of harm

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

The Law does not explicitly list or address specific theories of harm that the Egyptian Competition Authority (ECA) will investigate, but rather lists certain elements that the ECA will consider while assessing the possible anti-competitive effects of an economic concentration, which are the following:

1. The structure of the relevant market(s) and the actual or potential level of competition in Egypt, or outside Egypt provided it affects Egyptian markets.
2. The market position of the parties to the transaction, including their economic situation and their financial solvency with regard to current and potential investments in the market.
3. Substitutes available for suppliers, customers and consumers and their ability to access resources and enter relevant markets.
4. Barriers to entry and expansion within the relevant markets.
5. The potential impact of the economic concentration on consumers and on existing and potential investments.
6. The potential impact of the economic concentration on innovation.
7. The potential negative effects on freedom of competition.

Observing this list, is noticeable that the Executive Regulations' approach to theories of harm is distinctive. The elements of the substantive assessment are broad and generally allow the ECA to evaluate various theories of harm without constraint. This includes not only comparing the relevant markets before and after the implementation of the transaction, but also considering the effects on adjacent markets, both downstream and upstream. This versatility is valuable as it enables the ECA to adapt to different theories of harm and to address the competitive nuances and particularities of specific markets – which wouldn't be feasible if the Law prescribed specific theories of harm.

Non-competition issues

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

Non-economic considerations are illustrated under article 19 (bis-b) of the Law explicitly and they serve the Council of Ministers as a basis to clear or block a given concentration. The standard of 'protection of national security' remains vague and ambiguous; the recently enacted Executive Regulations did not elaborate on the concept or set out procedures for invoking such grounds.

Economic efficiencies

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

Economic efficiency is an important basis upon which mergers can be rescued. The Law and the Executive Regulations provide that, subject to the Council of Ministers' approval, an economic concentration may be cleared if it is proven that it will result in economic efficiency outweighing the anti-competitive effects. To assess whether the economic efficiency can rescue the concentration, the ECA will have to make sure that the efficiency fulfils the following three conditions:

1. It is achievable.
2. It is only achievable through the implementation of the economic concentration.
3. It benefits consumers.

In the absence of any application under the new Law, the following example is for illustrative purposes only: If an economic concentration were shown to result in a decrease in the price of a particular commodity, and the ECA, with approval from the Council of Ministers, determined that this price decrease could only be realised through the implementation of the concentration and would be passed on to consumers then concentration could be saved on this ground.

The problem is that the assessment of economic efficiency is not considered at the ECA level, meaning that even if the ECA can demonstrate economic efficiency, it still requires the approval of the Council of Ministers to clear the economic concentration. Therefore, if the Council of Ministers does not approve the efficiency arguments, the economic concentration cannot be approved. This can arguably prevent the authority from taking into account efficiency arguments. There are no procedures or clarity on how parties can appeal a concentration that has been blocked by the ECA or even on the entity that will assume the assessment of the efficiency argument within the Council of Ministers.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

The Egyptian Competition Authority (the ECA) has wide powers when assessing an economic concentration. During Phase I of the assessment, a board committee is formed to decide whether to approve the transaction or refer the case file to a Phase II investigation.

After completion of the Phase I assessment, the board committee is entitled to resort to any of the following measures:

- lack of jurisdiction;
- dismissal, if the concerned parties abandon the transaction;

- approving the transaction, with or without conditions; or
- referring the transaction to Phase II for an in-depth investigation, if the transaction raises substantial concerns over its potential harm to competition in the relevant market.

During Phase II, the ECA will assess the transaction within 60 days, counting from the committee's Phase I referral, which may be extended for an additional 15 days at the parties' request. The committee will then decide whether to dismiss, reject, approve, or grant conditional approval for the transaction, given the circumstances of each case.

The Law further confers the ECA the right to impose different remedies on the parties to eliminate or prevent the anti-competitive effects of the transaction, which include but are not limited to:

1 Refrain from taking any action that would lead to the exclusive distribution of a product.
2 Make basic facilities or services available to competing entities.
3 Not to discriminate in the agreements they conclude with suppliers or customers, whether this discrimination concerns prices, product quality or other trading conditions.
4 Not to condition the conclusion of a contract on the acceptance of obligations or the purchase of products that are unrelated to the product subject to the original agreement.

If the parties fail to implement the remedies imposed by the ECA, the latter will be entitled to consider their agreement null and void.

The ECA is also entitled to impose penalties in case of breach by the parties; such penalties cover the following infringements:

- Failure to notify the economic concentration to the ECA.
- Non-compliance with the conditions set forth by ECA in cases of conditional approval of the transaction.
- Failure to comply with the ECA's decision to block the transaction.
- The submission of misleading or incorrect information to the ECA.

Despite the extensive powers wielded by the ECA, its authority was notably constrained in two specific instances. First, when clearing a transaction on the grounds of economic efficiency, the ECA must obtain the approval of the Council of Ministers. This represents a significant departure from the typical merger control framework, where economic efficiencies are typically evaluated independently by the competent authority without external conditions, such as the Council of Ministers' approval.

Moreover, the powers of the ECA concerning economic concentrations within sectors regulated by the Financial Regulatory Authority (FRA) are notably restricted. In such cases, the ECA is relegated to providing a non-binding opinion to the transaction to the FRA, which retains complete autonomy to either accept or dismiss such opinion.

Remedies and conditions

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

The possibility of remedying competition issues was introduced in the amendments to Law No. 3 of 2005 on the Protection of Competition and Prohibition of Monopolistic Practices, as amended by Law No. 175 of 2022 (the Law). According to the Law, where a concentration is proven to restrict the freedom of competition, the ECA may take any necessary corrective measures, which is defined as a set of behavioural or structural measures that aim to eliminate the harmful effects on competition. The Law defines behavioural measures as measures that oblige the concerned entities to carry out certain acts, or refrain from carrying out certain acts that may be harmful to competition. However, neither the Law nor the Executive Regulations that were enacted by Prime Minister Decree No. 1316 of 2005, amended by Decree No. 1120 of 2024 (the Executive Regulations) define structural measures; nevertheless, structural measures will presumably include measures such as divestures.

Further, in cases where the ECA opts to examine concentrations below the financial thresholds (ie, non-notifiable concentrations) as per article 19 bis paragraph 2 of the Law within one year from the consummation of the transaction, the ECA is not entitled to undo the transaction. It may only impose behavioural remedies listed in the Law, which only deals with unilateral effects. The list of measures are as follows:

1. Refrain from taking any action that would lead to the exclusive distribution of a product.
2. Make basic facilities or services available to competing entities.
3. Not to discriminate in agreements concluded with suppliers or customers, whether this discrimination concerns prices, product quality or other trading conditions.
4. Not to condition the conclusion of a contract on the acceptance of obligations or the purchase of products that are unrelated to the product subject to the original agreement.

As for structural remedies, including divestment, the Law does not define or provide examples of structural remedies the ECA may impose, which leaves the ECA free to adopt whatever structural remedies or measures it deems appropriate and necessary.

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

It is explicitly provided in the Law that corrective measures imposed by the ECA must be applied immediately or within a period to be determined by the Board of Directors of the ECA. The parties shall abide by such measures within the specified timeframes and failure to do so will render their agreement null and void. So, in principle, the ECA is likely to take a case-by-case approach when imposing remedies, which is logical since some remedies can be implemented immediately, while others may require a certain timeframe.

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

The ECA's 2019 decision on the acquisition by Uber (a US company) of Careem (an Emirati company) is the latest example of the Authority's approach to economic concentrations that take place outside Egyptian territory, but which have an impact within it.

As the assessment of this economic concentration took place in 2019, ie before the introduction of the merger control system, the ECA carried out an ex ante review based on the European Court of Justice's 1973 judgment in *Continental Can*. Applying the substantive provisions of the Law, the Authority concluded that the acquisition of Careem by Uber was prohibited under Article 6, but granted a conditional approval to the parties on the basis of commitments that were sufficient to address the ECA's concerns and outweigh the potential harm of the transaction.

Subsequently, the ECA imposed commitments on the parties to prevent price-related harm, non-price related harm, harm to other markets and merger-specific barriers to entry. For instance, Uber committed to implement certain innovations in Egypt within one year of the completion date, such as rider verification methods, safety features within the rider app and anomaly detection. The purpose of these commitments was to avoid a decline in quality and incentives to innovate. All the commitments were behavioural remedies; no structural remedies were imposed.

Ancillary restrictions

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

ECA policy in this regard is still not clear.

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 indeed involved in the review process. The structure of the relevant market, including the actual or potential level of competition in the market, and the existence of substitutes available for suppliers, customers and consumers and their ability to access resources and enter relevant markets are two crucial elements in the Egyptian Competition Authority's (the ECA) substantive test. The assessment of these two aspects will require the examination of all competitors, customers, suppliers and consumers in the market to assess the impact of the transaction. During Phase I of the assessment, the ECA may issue requests for information to the concerned persons and the other market players.

In addition, the Executive Regulations that were enacted by Prime Minister Decree No. 1316 of 2005, amended by Decree No. 1120 of 2024 (the Executive Regulations) explicitly provides

that during Phase I of the assessment, the ECA shall publish a summary report on the notified economic concentration in a widely circulated daily newspaper or on the official website of the ECA upon receiving the complete notification file to enable third parties to be informed of the economic concentration so that they can submit their observations on the transaction within 15 days of the publishing date.

Notably, the ECA reserves the right to refrain from publishing the transaction for reasons of public interest.

Although the Executive Regulations have filled some of the gaps in Law No. 3 of 2005 on the Protection of Competition and Prohibition of Monopolistic Practices, as amended by Law No. 175 of 2022 (the Law), the details they provide on third-party involvement remain very general. It is still unclear to what extent the ECA will take into account the comments and observations of third parties, whether they will have a real impact on the decisions of the ECA, or whether the process will be purely informative without sufficient space for third parties to intervene.

Nevertheless, there are no provisions that regulate the parties' rights of due 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 Executive Regulations explicitly provides that the ECA shall publish a summary report on the economic concentration in a widely circulated daily newspaper or on the official website of the ECA upon receiving the complete notification file to enable third parties to be informed of the economic concentration so that they can submit their observations on the transaction within 15 days of the publishing date.

The new amendments to the Law did not, however, address the issue of confidentiality of certain information and therefore it is very likely that the ECA will be bound by the general secrecy obligation provided under article 16 of the Law, which imposes a duty of confidentiality on the chairman, the board and the employees of the ECA. They should refrain from disclosing any information, data or documents relating to the cases submitted for the ECA's review, as well as their sources. This obligation is reinforced by the fact that it pertains even after the relationship with the ECA has ended. In fact, employees of the ECA are prohibited from working with the persons who were the subject of an investigation for two years after they leave the ECA.

Cross-border regulatory cooperation

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

Egypt has not been party to a formal cooperation agreement in the area of competition law enforcement, other than within the framework of The Common Market for Eastern and Southern Africa (COMESA). Only informal cooperation initiatives are in place and are usually not disclosed.

JUDICIAL REVIEW

Available avenues

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

The Egyptian Competition Authority (the ECA) has the right to approve or reject the notified transaction. In the event of rejection, the parties may appeal the decision within 30 days in accordance with article 19 (bis-d) of Law No. 3 of 2005 on the Protection of Competition and Prohibition of Monopolistic Practices, as amended by Law No. 175 of 2022 (the Law). In such cases, the ECA will decide whether to endorse the appeal or to reject it.

The ECA's decisions are administrative in nature; therefore, after exhausting appeals before the ECA, the parties are entitled to appeal the decisions of the ECA before the competent administrative courts (ie, the Egyptian State Council) within 60 days of the publication of the decision, or its notification to the parties.

Time frame

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

Article 19 (bis-d) provides that parties may appeal against the ECA's Phase II rejection decision within 30 days of the notification date thereof. The ECA is therefore obliged to review its decision in this case. For appeals before the administrative courts, it shall be submitted within 60 days of the publication of the final decision of the ECA, or its notification to 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?

Due to the recent adoption of the Executive Regulations that were enacted by Prime Minister Decree No. 1316 of 2005, amended by Decree No. 1120 of 2024 (the Executive Regulations) in April 2024, which took effect in June, there is no record on the ECA's enforcement to date.

Reform proposals

35 | Are there current proposals to change the legislation?

The Executive Regulations were adopted on 4 April 2024 by prime ministerial decision No. 1120 of 2024 and took full effect on 1 June 2024; therefore, proposals to amend the legislation, at least in the near future, are very unlikely, although some aspects of the law are still incomplete and unclear.

UPDATE AND TRENDS

Key developments of the past year

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

Following the adoption of the amendments of Law No. 3 of 2005 on the Protection of Competition and Prohibition of Monopolistic Practices, as amended by Law No. 175 of 2022 (the Law), which introduced ex ante control of economic concentrations in December 2022, it is only in April 2024 that the Executive Regulations to these provisions were enacted by Prime Minister Decree No. 1120 of 2024. They took effect on 1 June 2024. Therefore, the past year has been marked by important legislative developments, rather than by jurisprudential evolution.

However, the Executive Regulations did not meet expectations after their long-awaited adoption. They only provided more details on the filing procedure and addressed issues to which the amendments made reference, but did not go beyond this. Although the recently issued Guidelines have clarified some ambiguities in both the Law and the Executive Regulations, their effectiveness will ultimately be demonstrated through practice.

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European Union

Rafique Bachour, **Tone Oeyen**, **Jan Jeram** and **Gozde Cevik**
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Voluntary or mandatory system?	EU Merger Control Regulation. Mandatory system. Form of notification: special form. Form CO. Detailed information on the parties (turnover, business sectors and groups), the merger proposal, the affected markets, competitors and customers in any of the official EU languages. Short Form CO can be used in certain circumstances for mergers raising no issues and Form RS is applicable for pre-notification referral requests by the notifying parties..
Notification trigger/ filing deadline	• Combined worldwide turnover over €5 billion and EU-wide turnover of at least two parties over €250 million unless each of the parties achieves more than two-thirds of the EU turnover in one and the same member state; or • Combined worldwide turnover over €2.5 billion; in each of at least three member states combined turnover over €100 million and turnover by each of at least two of the undertakings over €25 million and EU-wide turnover of at least two of the undertakings over €100 million each; unless each of the parties achieves more than two-thirds of the EU turnover in one and the same member state. Filing must be made prior to implementation. The filing can be made prior to the conclusion of a binding agreement so long as the parties intend in good faith to enter a binding agreement.
Clearance deadlines (Phase I/Phase II)	Phase I: 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. Phase II: 90 working days, plus 15 working days where commitments have been offered after the 55th day. Possibility of 20-working-day extension. Suspension effects: suspension of transaction until final decision with limited exceptions for public bids.
Substantive test for clearance	Whether a merger will significantly impede effective competition in the European Economic Area 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) of the Treaty on the Functioning of the European Union. Broadly, economic benefits must outweigh the detriment to competition.

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Quick Reference Table	
Penalties	Failure to file or implementation before clearance: fines of up to 10 per cent of parties' turnover. Failure to provide information, or supply of incorrect, incomplete or misleading information: fines of up to 1 per cent of parties' turnover (in certain circumstances). Failure to comply with a condition or obligation imposed by decision: fines of up to 10 per cent of parties' turnover. Possible revocation of clearance decision (for breach of obligation) and order for dissolution or other measures (for breach of condition). Implementation contrary to a European Commission prohibition decision: fines of up to 10 per cent of parties' turnover and possible order for dissolution of the merger or other measures. Periodic penalties of up to 5 per cent of average daily aggregate turnover payable for each day that certain infringements persist.
Remarks	Special rules for the calculation of thresholds for banks and insurance companies.

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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 rules, which apply to large-scale merger and acquisition transactions, are set out in the EU Merger Regulation (EUMR). The regime applies to the European Economic Area (EEA) and the three members of the European Free Trade Association.

The EUMR is enforced by the Directorate-General for Competition (DG Comp) of the European Commission (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 comprise a team of lawyers and economists from DG Comp, who are independent of the original case team. In addition, two hearing officers, who are independent of DG Comp and report directly to the Commissioner for Competition, organise and conduct oral hearings in Phase II cases. They also act as independent arbitrators if a dispute arises on the effective exercise of procedural rights between parties and DG Comp.

The Commission has published a series of notices and guidelines to assist in the interpretation of several 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; a revised version entered into force on 1 September 2023);
    - the Commission Implementing Regulation 2023/914 (2023); and
    - the Notice on Case Referrals (2005);
- guidelines on issues of substance, including:
  - the Guidelines on the Assessment of Horizontal Mergers (2004); and
    - the Guidelines on the Assessment of Non-Horizontal Mergers (2008);
- the Remedies Notice (2008);
- the Notice on Restrictions Directly Related and Necessary to Concentrations (2005); and
- the Notice on the Definition of Relevant Market for the Purposes of Union Competition Law (2024)

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In addition, the Commission has published a number of best practices and communications, including the Communication on the Transmission of Documents (2023), 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 available on the Commission's website.

The EUMR is based on the one-stop shop principle, whereby once a transaction triggers notification to the Commission, the national authorities of the member states are precluded from applying their own competition laws to the transaction (except in circumstances in which the Commission refers transactions to the national authorities of the member states).

On 16 March 2023, in Towercast, the EU Court of Justice (ECJ) ruled that it is possible for a national competition authority (NCA) or a national court to find that a concentration, which has no EU dimension, falls below the notification threshold under national law and has not been referred to the Commission under Article 22 EUMR, constitutes an abuse of dominance pursuant to Article 102 EUMR. NCAs have already started investigations on this basis (eg, the Belgian competition authority has used these powers to investigate (and effectively undo through a broad remedy) Proximus's acquisition of Edpnet; the French competition authority has investigated a below-thresholds transaction in the meat-cutting sector on this basis, accusing the companies of having allocated the markets through a series of cross-divestitures; the case was eventually dismissed).

The ability of national authorities to apply non-competition laws to transactions subject to the EUMR is circumscribed; however, member states have tested the ambit of those principles (eg, Hungary in *VIG/Aegon*, 2022; Spain in *E.ON/Endesa*, 2006; Italy in *Abertis/Autostrade*, 2006; and Poland in *Unicredito/HVB*, 2005).

Scope of legislation

2 | What kinds of mergers are caught?

A 'concentration' is defined in the EUMR as a merger of two or more previously independent undertakings (or parts of undertakings), or the acquisition of direct or indirect control of the whole or parts of another undertaking, which brings about a durable change in the structure of the undertakings concerned. The EUMR applies to concentrations that have an EU dimension (ie, meet certain turnover thresholds), or are referred to the Commission pursuant to Articles 4(5) or 22 EUMR.

3 | What types of joint ventures are caught?

Provided that the applicable turnover thresholds are met, the creation and change of control over full-function joint ventures are caught by the EUMR. A full-function joint venture is an autonomous economic entity resulting in a permanent structural market change, regardless of any resulting coordination of the competitive behaviour of the parents.

Non-full-function joint ventures, such as strategic alliances and cooperative joint ventures (eg, production joint ventures), are not governed by the EUMR but by the rules of the TFEU on restrictive practices, notably article 101, 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 Council Regulation (EC) No. 1/2003, article 101 of the TFEU can be enforced by the Commission or by NCAs; however, non-full-function joint ventures can trigger merger control in a number of member states (eg, Germany and, in some circumstances, Austria) even in the case of an acquisition of a minority interest.

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

'Control' means the possibility of exercising decisive influence over an undertaking on the basis of rights, contracts or other means. When outright legal control is not acquired (eg, through the acquisition of shares with the majority of the voting rights), the Commission will consider whether the acquirer can still exercise legal or de facto control over the undertaking through special rights attaching to shares or contained in shareholder agreements, board representation, ownership and use of assets, and related commercial issues.

There is no precise shareholding or other test for decisive influence and each case is decided on its own merits. For example, in News Corp/Premiere (2008), the Commission found that 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 given the specifics of the case, resulting in a notifiable concentration. Also, in Vivendi/Telecom Italia (2017), a holding of 29.94 per cent of the voting rights was deemed to amount to de facto control, because Vivendi could appoint the majority of the board of directors. .

The EU General Court has also considered the extent to which minority shareholdings come within the scope of the EUMR and confirmed that the EUMR does not empower the Commission to assess minority shareholdings where these do not lead to an acquisition of control under article 3(2) of the EUMR (see Aer Lingus Group plc v Commission, T-411/07, 2010).

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 concentrations that have an EU dimension and specific thresholds are designed to ensure that, only large-scale acquisitions, mergers and joint ventures are caught.

A concentration will be caught by the EUMR where:

- the aggregate worldwide turnover of all the parties exceeds €5 billion; and
- the aggregate EU-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 EU-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 EU, the EUMR also applies to smaller concentrations that have an impact in at least three member states if:

- the aggregate worldwide turnover of all the parties exceeds €2.5 billion;
- the aggregate EU-wide turnover of each of at least two parties exceeds €100 million;
- in each of those member states, the aggregate turnover of all the parties exceeds €100 million; and
- in each of those member states, 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 EU-wide turnover in 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.

In an acquisition, on the buyer side, the turnover of the whole group to which the relevant undertaking belongs is taken into account in accordance with detailed tests set out in the EUMR. The calculation can be complex and may involve certain adjustments to the turnover figure in the most recent audited accounts, for example to account for certain recent disposals or acquisitions. On the other hand, the turnover of the vendor is irrelevant except for that of the target business being acquired. In the case of joint ventures, the whole turnover of the parents and their groups that intend to jointly control 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 merging parties or the NCA, respectively, can request that a transaction that meets the EUMR thresholds be reviewed – in whole or in part – by the NCAs. For example, in Phoenix/McKesson (2022), the Commission partially referred a proposed acquisition to the French competition authority under article 9 of the EUMR while unconditionally approving the transaction outside France. In Triton/Caverion (2023), the Commission partially referred Triton's acquisition of Finnish tech solutions company Caverion, clearing the transaction outside Finland, whereas the Finnish competition authority conditionally approved the transaction in relation to Finland.

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 transaction that does not meet the EUMR thresholds. This can happen in cases where national jurisdictional thresholds are met (eg, Kingspan/Trimo, 2022; and Meta (formerly Facebook)/Kustomer, *2021)* as well as (subject to the ECJ's ongoing review of *Illumina/Grail*) where jurisdictional thresholds are not met (eg, Illumina/GRAIL, 2022; Qualcomm/Autotalks, 2023; EEX/Nasdaq, 2023).

On 26 March 2021, the Commission published a policy paper in which it reported on an evaluation that started in 2016 on whether the jurisdictional thresholds in the EUMR leave an

enforcement gap and whether the administrative burden on merging firms and other market participants is proportionate. The evaluation found that the current jurisdictional thresholds generally suffice to capture transactions that merit EU review; however, the Commission expressed concern that some killer acquisitions, especially in the digital and pharma sectors, might have flown under the radar in recent years.

To close this gap, the Commission published guidance on a new policy to, in certain instances, encourage and accept referral requests from member states under article 22 of the EUMR, even where transactions do not meet the national merger control thresholds of the referring member states. The first case referred to the Commission under this new policy was Illumina/GRAIL in 2021. This referral was appealed to the EU General Court (GC), which confirmed the Commission's new interpretation of article 22; the Commission has subsequently prohibited the transaction. However, on 21 March 2024, the Advocate General (AG) recommended setting aside the GC's *Illumina/Grail* judgment noting that article 22 should not be construed to permit the Commission to accept referrals from member states where national filing thresholds are not met. The AG argued that such interpretation would constitute an excessively broad understanding and a substantial expansion of the Commission's jurisdiction under the EUMR. If the ECJ follows the AG's opinion, the Commission is expected to explore how to fill the perceived 'enforcement gap' and might seek to introduce alternative thresholds to allow it to capture additional transactions.

The Commission has reviewed two other cases under this new policy. The first was the acquisition of the chipmaker company Autotalks by Qualcomm (Qualcomm/Autotalks), which would merge two suppliers of V2X semiconductors in the EEA (referred to the Commission by 15 national competition authorities). Qualcomm was requested to notify the transaction in August 2023 and subsequently abandoned the acquisition in March 2024, citing lack of timely regulatory approvals. Also in August 2023, the Commission announced that it accepted four referral requests related to the acquisition of Nasdaq's European power trading and clearing business by EEX (EEX/Nasdaq). In addition, in March 2024, the Commission accepted Luxembourg's referral request for the acquisition of Boissons Heintz by Brasserie Nationale over concerns that the deal would merge two main wholesale drinks distributors in Luxembourg (Brasserie Nationale/Boissons Heintz). The application of article 22 to this case is not controversial as Luxembourg does not have an existing merger control regime. This is an application of Article 22's original purpose as the so-called 'Dutch clause'.

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

Filing is mandatory for concentrations with an EU dimension. There are no exceptions, and the EUMR empowers the Commission to fine undertakings that fail to notify.

In certain circumstances, parties may request that a transaction that meets the EUMR thresholds be referred wholly or partly to a member state.

In light of the Commission's new policy on article 22 referrals, parties may consult with the Commission on whether a transaction is a suitable candidate for review under that provision of the EUMR (eg, in April 2023, it was reported that Pfizer briefed the Commission of its planned acquisition of Seagan).

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 an EU 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.

Certain extra-EEA joint ventures have to be notified to the Commission as a result of the parents' turnover in the EEA, but have no effect in the EEA. As of September 2023, parties will be able to notify these concentrations without any pre-notification contacts under the super-simplified procedure.

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

The EUMR applies to all transactions that meet the relevant turnover thresholds. There are no sector-specific rules.

Foreign direct investment (FDI) is governed at the member state level; however, pursuant to the EU framework regulation for the screening of FDIs that became fully applicable on 11 October 2020, the Commission has the power to issue an opinion when an investment poses a threat to the security or public policy of more than one member state. This framework enhances the cooperation between the Commission and the member states in their actions on foreign investments. In January 2024, the Commission presented a proposal for a new regulation on the screening of foreign investments, citing as the reason for the new proposal the lack of screening mechanisms across all member states, which might leave potentially critical FDIs undetected.

Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market (the Foreign Subsidies Regulation) applies to transactions signed after 12 July 2023 and closed after 12 October 2023. This new set of rules is aimed at addressing distortions caused by foreign subsidies and introduces a mandatory notification system for relevant transactions and public procurement procedures involving parties that have received foreign subsidies, as well as an ex officio review of foreign subsidies and awarded public procurement contracts. This represents an independent new ex ante notification procedure for transactions with dedicated thresholds, timelines and redressive measures.

The transaction-related regime introduced by the Foreign Subsidies Regulation requires an ex ante notification if:

- the transaction constitutes a concentration in the form of a change of control on a lasting basis, including full-function joint ventures;
- at least one of the merging undertakings, the acquired undertaking or the joint venture is established in the European Union and generates an aggregate turnover of at least €500 million in the European Union; and
- the undertakings concerned were granted combined aggregate financial contributions from third countries exceeding €50 million in the three years preceding the conclusion of the

agreement, the announcement of the public bid, or the acquisition of a controlling interest.

The Foreign Subsidies Regulation provides that even if those thresholds are not met, the Commission can call in any concentration if it suspects that the undertakings concerned may have benefitted from foreign subsidies in the previous three years. The procedural rules – including the review periods, penalties and rules on gun jumping – broadly mirror EU merger control rules.

Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (DMA) requires designated gatekeepers to inform the Commission of any intended concentration that involves core platform services or any other services in the digital sector, or enable the collection of data, irrespective of whether they are notifiable to the Commission under the EUMR or to a competent NCA under national merger rules (article 14). The Commission shares this information with member states which may use it to refer such transactions to the Commission under article 22 of the EUMR (subject to the ECJ's pending judgment in *Illumina/GRAIL*, which might remove the member states' power to refer non-notifiable transaction to the 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?

There is no deadline to submit a notification under the EU Merger Regulation (EUMR). According to article 4 of the EUMR, the concentrations that are caught 'shall be notified to the [European] 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 demonstrate to the European Commission (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.

The proposed concentration must be notified and cleared prior to implementation (the suspensory effect of the EUMR or the standstill obligation). The Commission can impose fines of up to 10 per cent of the aggregate worldwide turnover on the notifying party if it intentionally or negligently fails to notify a transaction with an EU dimension (eg, Illumina/GRAIL, 2022; Canon/Toshiba, 2019; and Altice/PT Portugal, 2018).

In EY/KPMG (C-633/16, 2018), the EU Court of Justice provided guidance on what constitutes gun jumping in response to a reference for a preliminary ruling by stating that ancillary and preparatory steps in a merger context only breach the standstill obligation if they contribute to the change of control of the target undertaking.

In May 2022, the EU General Court dismissed Canon's appeal against the Commission's 2019 decision that fined Canon €28 million for breaching the EU notification and standstill

obligations by partially implementing a transaction through a warehousing structure. The EU General Court reconfirmed that transaction steps that do not confer to the buyer early control over the target can still constitute partial implementation if they contribute to a change of control.

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

In the case of an acquisition of sole control, the acquirer alone must notify. In the case of either the acquisition of joint control or a merger, the notification must be jointly submitted by the parties to the merger or by the undertakings acquiring joint control. 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 exempted from the suspension obligation provided that the concentration is notified to the Commission and that the acquirer does not exercise the voting rights in the target until clearance.

The Commission investigates transactions that have closed without prior notification and can in certain instances order the unwinding of any notifiable transactions that have been implemented prior to clearance. Where a non-notifiable transaction has been referred to the Commission under article 22 of the EUMR, the suspension obligation applies to the extent that the concentration has not yet closed on the date on which the Commission informs the undertakings concerned that a referral request has been made. The suspension obligation ceases if the Commission subsequently decides not to examine the concentration.

The Commission has in recent years conducted several gun-jumping investigations into the early implementation of notifiable concentrations. The EUMR empowers the Commission to conduct inspections (ie, dawn raids) if it suspects that the parties have implemented the transaction prior to clearance (eg, Caterpillar/MWM, 2011).

In exceptional circumstances, the Commission may grant a derogation from the 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. The 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 to closing a transaction could have significant negative effects and has granted derogations on a limited number of occasions – mostly during the financial crisis in 2008 and 2009. Since 2020, the Commission has granted derogation decisions on eight occasions (among them, UBS/Credit Suisse, 2023; ICG/Scopelec/Setelen, 2023; Apollo/Missguided, 2022; Liberty/Ascoval/Hayange, 2020; and Jingye/Ascoval/Fri, 2020).

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 the aggregate worldwide turnover) for closing a transaction before clearance has been obtained, irrespective of whether clearance is ultimately obtained. In Marine Harvest (C-10/18 P, 2020), the EU Court of Justice (ECJ) confirmed that the EUMR allows the Commission to impose two separate fines for implementing a concentration before it has been notified and implementing a concentration before it has been authorised. The EU General Court recently applied *Marine Harvest* in Altice (T-425/18, 2021). Altice has appealed the decision but the ECJ upheld the Commission's decision to impose two separate fines in its judgment of November 2023, noting that notification and standstill obligations have different objectives, and application of separate fines was the correct approach to ensure the effective enforcement of EU merger control rules (C-746/21, 2023).

The Commission may also order interim measures to restore or maintain conditions of effective competition. For example, in October 2021 the Commission ordered Illumina to hold GRAIL separate by way of interim measure, following Illumina's decision to close the acquisition of GRAIL pending the Commission's review. In September 2022, the Commission prohibited the transaction and ordered its unwinding pursuant to article 8(4) of the EUMR. In April 2024, the Commission announced that it had approved Illumina's plan to divest GRAIL, but the interim measures will remain in force until Illumina completes the unwinding of the transaction.

The EU 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 (see Electrabel/Compagnie Nationale du Rhône, 2009). Similarly, the Court took the view that a finding that an infringement was committed negligently, rather than intentionally, does not prevent the infringement from being characterised as grave or serious.

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

The Commission has the same powers to impose sanctions in cases involving closing before clearance in foreign-to-foreign transactions as it does in transactions related to companies active in the European Economic Area (EEA).

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

A foreign-to-foreign transaction cannot be implemented outside the European Union (ie, by way of a carve-out) without breaching the EUMR notification and suspension obligations unless the Commission grants a derogation.

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 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 in cases where a controlling stake is acquired by the purchaser through the acquisition of a single package of shares from one seller only (Yara/Kemira Growhow, 2007).

In 2008, the Commission exceptionally granted such a derogation in the context of a Phase II investigation (STX/Aker Yards, 2008). In Marine Harvest (C-10/18 P, 2020), the ECJ stressed that the exception for public takeover bids must be interpreted strictly and that it cannot be used to cover a prior transaction that has already caused a change of control.

Documentation

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

Notification is made to the Directorate-General for Competition using Form CO (the official form for standard merger notifications). The parties must provide the Commission with detailed information regarding:

- the transaction;
- the undertakings involved (corporate details and structure);
- the definition of the relevant markets;
- the markets on which the activities of the parties to the transaction may overlap either horizontally or vertically, or may otherwise be related;
- the effect of the transaction on the affected markets, including information on the parties' and competitors' presence and market shares, and customers, as well as economic evidence in more complex cases; and
- possible efficiencies arising from the transaction.

Supporting documentation must be submitted along with Form CO, including:

- transaction documents;
- audited accounts; and
- relevant internal documents, such as:
    - board presentations;
        - the parties' ordinary course analyses and reports; and
        - strategic plans relating to any potentially affected market.

The filing must be complete for the review clock to start running. To ensure that the filing is complete, a draft Form CO is typically discussed with the Commission in the pre-notification phase before it is formally notified.

Since the covid-19 pandemic, the Commission has been accepting electronic rather than hard copy submissions. The Commission recently codified this practice in a revised version of the Merger Implementing Regulation. Notification can be made in any of the European Union's official languages.

Although the Commission can grant waivers from the obligation to provide information, the significant amount of detail and senior management time required to complete Form CO should not be underestimated. In complex cases, it is not uncommon for the formal review process to last for 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 but can last for several months.

Transactions that qualify for assessment under the simplified procedure (ie, when the transaction 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 Short Form CO (the official form for simplified merger notifications), which requires less detailed information from the parties.

On 20 April 2023, the Commission adopted a merger simplification package including a revised Notice on the Simplified Procedure, and a revised Merger Implementing Regulation and notification templates. The aim of the package was to streamline the notification process and to reduce the administrative burden on notifying parties, and it became applicable on 1 September 2023.

The revised Short Form CO template has been streamlined and adopts a tick-box approach for certain categories of information; however, the template now also requires notifying parties to answer additional questions, for example in relation to whether:

- the parties have significant (10 per cent or more) non-controlling shareholdings or cross-directorships in companies active in the same market as any of the other parties involved in the transaction, or in vertically related markets;
- the parties have competitors that have a significant (10 per cent or more) non-controlling shareholding in any of the undertakings concerned;
- one of the parties has plans to expand in product or geographic markets (or both) in which the other party is active or that are in a vertical relation with products in which the other party is active; and
- the parties are important innovators in the overlapping markets.

The Commission may require the submission of Form CO where it appears from the responses to these questions that the conditions for using 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 new simplification package also introduces a flexibility clause that allows the notifying parties, in certain conditions, to request simplified treatment even if the parties combined market shares exceed 20 per cent for horizontal overlaps or 30 per cent for vertical links.

The revised Notice on the Simplified Procedure also introduces the new super-simplified procedure, which allows the parties to formally notify the transaction without any pre-notification contacts. This has the potential to significantly reduce the review period of the simplest cases, such as extra-EEA joint ventures.

The Commission can impose a fine of up to 1 per cent of the aggregate worldwide turnover if incorrect or misleading information is supplied during its review. Periodic penalty payments not exceeding 5 per cent of the average daily turnover can also be imposed for each day that the infringement persists.

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 actively penalised procedural infringements by imposing sizable fines in Merck/Sigma-Aldrich, 2021; General Electric/LM Wind, 2019; and in Facebook/WhatsApp, 2017.

The Commission's Best Practices on the Conduct of Merger Proceedings (2004) (the Best Practice Guidelines) 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 contact with the Commission.

Investigation phases and timetable

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

Pre-notification

Most (if not all) proceedings begin with pre-notification contact with the Commission, with the exception of those notified under the super-simplified procedure that applies as of September 2023. This contact is not strictly mandatory but is nonetheless highly advisable and, in practice, essential even for simplified procedure cases.

Depending on the complexity of the transaction, this pre-notification stage typically involves the submission of various drafts of (Short) Form CO and may involve meetings with Commission officials. The Best Practice Guidelines also provide that the Commission may undertake informal fact-finding exercises in the pre-notification period, provided that the transaction is in the public domain and the merging parties have had the opportunity to express their views on those measures. With the parties' agreement, the Commission can also reach out to third parties for views.

Pre-notification can last anywhere from one to three weeks in the simplest cases (but can be considerably longer even for relatively straightforward cases) to more than six months in more complex cases.

Phase I

Following the formal notification, the Commission will initiate a Phase I review. It will contact relevant third parties (eg, customers, suppliers and competitors) to collect their views on the transaction and may require them to complete detailed questionnaires on the relevant markets.

During the course of the investigation, the Commission will often demand further information at short notice. Calls and meetings are also often held with the case team for transactions raising substantive issues. 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 meetings with the merging parties and interested third parties to allow points of concern to be discussed.

In complex transactions, the Commission often issues extensive and tailored requests for internal documents, which require extensive efforts to collect and review before submission.

Following the Phase I investigation, the Commission may decide to clear the transaction unconditionally, clear the transaction subject to conditions and obligations offered by the parties or initiate an in-depth Phase II investigation if it considers that the transaction raises serious doubts as to whether it may give rise to a significant impediment to effective competition. The Commission issues a decision initiating a Phase II review to which the parties have the right to respond.

Phase II

A Phase II investigation involves a large number of requests for often very detailed information, including for large volumes of ordinary course of business documents in relation to the markets where the Commission has identified serious doubts. If such doubts are confirmed during the Phase II market investigation and the parties do not propose remedies to address those concerns early in Phase II, the Commission will issue a statement of objections that describes in detail the competition concerns arising from the transaction. If a statement of objections is issued, the parties will be granted access to the Commission's file and, at the request of the parties, an oral hearing will take place (often involving complainants). The oral hearing is organised and conducted by a hearing officer.

Following the Phase II investigation, the Commission may decide to clear the transaction unconditionally, clear the transaction subject to conditions and obligations, or prohibit the transaction.

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

The Commission must reach a Phase I decision within 25 working days of the effective date of notification. This period may be increased to 35 working days if the Commission receives a referral request from a member state or the parties submit commitments (remedies) to resolve potential competition issues. The review period under the simplified procedure is also 25 working days.

Should the Commission initiate a Phase II investigation, it must take its final decision within 90 working days of the date on which the Phase II proceedings were initiated. This period may be extended to 105 working days if the parties offer commitments after the 55th day of Phase II proceedings. The investigation period may also be extended if the parties request a one-off extension of the investigation period (they must do so within 15 working days of the 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 extension cannot cumulatively exceed 20 working days.

These periods may be suspended (thereby stopping the clock) if the parties fail to respond to a formal (article 11(3) of the EUMR) information request before the deadline.

There are no formal means of accelerating the review under the EUMR; however, the Commission has shown some flexibility in certain rare cases, notably by issuing derogations from the suspension obligation, for example during the 2008–2009 financial crisis, even in cases that raised significant competition concerns and required remedies (eg, BNP Paribas/Fortis, 2008).

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The EU Merger Regulation (EUMR) prohibits concentrations that significantly impede effective competition in the European Economic Area (EEA) or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. Full-function joint ventures are appraised under the same test.

In its appraisal, the European Commission (the Commission) must formally take into account substantiated claims of efficiencies brought about by the transaction and evidence that one of the merging parties (or the acquired undertaking) is a failing firm (rescue merger).

In practice, such defences play a limited role in merger reviews. To date, the Commission has never cleared an otherwise problematic transaction only on the basis of efficiencies claimed by the parties for all markets where competition concerns were found, and it has accepted the failing firm defence in very few cases (eg, Aegean/Olympic II, 2012). The economic consequences of the covid-19 pandemic have not resulted in a softening of the Commission's stance on this issue.

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

In addition to examining whether the joint venture will significantly impede effective competition, the Commission will also assess, under article 101 of the Treaty on the Functioning of the European Union (TFEU), whether it is the object or effect of the transaction to coordinate the competitive behaviour of two or more parents to the joint venture. Such coordination can occur where two or more parents retain activities either in the same market or on an upstream, downstream or closely related neighbouring market to that of the joint venture.

The significance of this spillover effect is assessed and can be cleared with the transaction – if justified – under the criteria set out in article 101(3) of the TFEU. Full details of overlapping activities of the parents in relevant 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 Commission's guidelines on horizontal and non-horizontal mergers, the Commission will assess whether the transaction will lead to a significant impediment to effective competition (SIEC) through unilateral or coordinated anticompetitive effects.

In horizontal mergers, anticompetitive unilateral effects may occur when the merger removes relevant competitive constraints over the merging firms to the extent that it contributes:

- to the creation or strengthening of a dominant position, see for example the following merger prohibitions:
  - Hyundai Heavy Industries Holdings/Daewoo Shipbuilding & Marine Engineering (2022);
  - Tata Steel/thyssenkrupp (2019); and
  - Siemens/Alstom (2019); or
- to the weakening of competitive pressure in an oligopolistic market, for example:
  - Hutchison 3G UK/Telefónica UK (2016);
  - Orange/Jazztel (2015); and
  - Hutchison 3G Austria/Orange Austria (2012).

In *CK Telecoms UK Investments Ltd v Commission* (2020), the EU General Court (GC) ruled for the first time on the legal standard that the Commission needs to meet when establishing a SIEC under article 2(3) of the EUMR when a merger does not lead to a dominant position or coordinated effects in oligopolistic markets (ie, gap cases). While the GC has held the Commission to a higher standard in these cases, the EU Court of Justice (ECJ) set aside the GC's decision and upheld the Commission's 2016 decision prohibiting Hutchison's acquisition of Telefónica UK's O2. The ECJ concluded that '*the requirements concerning the taking of evidence, including the standard of proof, do not vary according to the type of decision adopted by the Commission in merger control*', that the '*specific requirements relating to the quality of the evidence therefore do not, in principle, affect the standard of proof required*', and that the Commission was only required to demonstrate a 'balance of probabilities' and not a higher standard of 'strong probability' (as the GC has suggested). It has also emphasised that '*the Commission is not required to comply with a higher standard of proof in relation to decisions prohibiting concentrations than in relation to decisions approving concentrations*'.

In thyssenkrupp v Commission (2022), the GC dismissed thyssenkrupp's appeal against the Commission's decision to block its proposed joint venture with Tata Steel in 2019. The GC confirmed the finding of a SIEC in the EEA markets for certain automotive steel products (where the transaction was found to eliminate an important competition constraint) and

packaging steel products (where the merged entity would achieve dominance in certain segments of the market). The Court found that the Commission had correctly concluded that the remedies offered by the parties were insufficient to eliminate the identified SIECs.

The Commission assesses the parties' ability and incentives to profitably increase prices; reduce output, choice or quality of goods and services; and diminish innovation. The impact that transactions have on the incentives of parties (and their competitors) to innovate has been increasingly investigated by the Commission (eg, Dow/DuPont, 2017; J&J/Actelion, 2017; Bayer/Monsanto, 2018; and more recently Novozymes/Chr. Hansen, 2023, in which the Commission carried out a bench-marking exercise to assess whether the transaction could negatively impact innovation beyond pipeline-to-pipeline overlaps between the parties).

In non-horizontal transactions, the Commission's main concern with regard to unilateral effects lies in the ability and incentive of the firms to engage in input or customer foreclosure owing to vertical links (eg, Wieland/Aurubis, 2019; see also Illumina/GRAIL, 2022), or to portfolio or conglomerate effects (eg, Qualcomm/NXP, 2018). In transactions in the digital space in particular, the Commission increasingly investigates whether a transaction could lead to an expansion of a multi-product ecosystem and lead to the reinforcement of a strong position in a particular market.

The Commission is also increasingly concerned with data-related theories of harm. For example, the Commission's approval of Google's acquisition of Fitbit in 2020 was conditional on compliance with a commitments package that focused on Google's use of data collected from Fitbit's devices and third-party access to such data.

In vertical cases, the Commission increasingly relies on innovation theories of harm. For example, NVIDIA/ARM (2021) involved a vertical merger where the Commission relied on the potential loss of innovation as a core theory of harm. This led to the parties offering commitments. Protection of innovation was also at the core of the Commission's prohibition decision in Illumina/GRAIL (2022).

The Commission has increasingly based its investigations on the "so-called" theories of harm that take into account the acquirer's eco-system; for example, an undertaking with significant power in its core market could, by acquiring a company in an adjacent market, strengthen its position in the core market or leverage its core market power into other markets. For example, the Commission has referred to the acquirer's ecosystem when it opened an in-depth investigation into Amazon's attempted acquisition of iRobot (Amazon later abandoned the deal) (Amazon/iRobot, 2023). This theory of harm was also the basis for the prohibition of Booking's attempted acquisition of eTraveli (Booking/eTraveli, 2023).

Coordinated effects may arise when the transaction alters the competitive conditions prevailing in the market, allowing competitors to coordinate their behaviour (eg, AB InBev/SAB Miller, 2016; and more recently in MOL/OMV Slovenija, 2023). The conditions for the Commission to demonstrate such coordinated effects are set out in the Airtours judgment of the GC (T-342/99, 2002).

Non-competition issues

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

Under the EUMR, the Commission can only prohibit concentrations that result in a SIEC in the EEA, 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. In certain cases, member states (but not the Commission) may have limited jurisdiction to intervene to protect their non-competition legitimate interests.

In Phase II cases, the full College of Commissioners, rather than just the Commissioner for Competition, is involved in the final decision, and it may consider issues other than solely competition concerns in forming its views; however, in practice, the College follows the decision proposed by the Commissioner for Competition (ie, the Directorate-General for Competition).

Although the Commission's merger decisions are based on competition considerations, the list of what the Commission considers to be relevant competition related factors has evolved over time. For example, the Commission is increasingly considering sustainability factors in various stages of merger control proceedings, such as the market definition, assessing the competitive effects of a merger and sustainability-related aspects of the proposed remedies. In September 2023, the Commission published a note specifically focusing on sustainability related aspects in EU merger control.

For example, at the end of 2019, the Commission opened a Phase II investigation into the merger between copper refiners Aurubis and Metallo, citing, among other things, concerns relating to the significant role that copper plays in electric mobility and digitisation. The Commission referred to the importance of a well-functioning circular economy in copper to ensure the sustainable usage of resources and its role in achieving objectives set out in the European Green Deal, which aims to make the European Union carbon neutral by 2050. Similarly, while assessing the acquisition of MBCC by Sika in 2023, the Commission defined the geographical scope of the chemical admixtures market as national, but considered the *global* scale of the R&D assets and innovation capabilities of the divested business to assess the proposed remedies, as it was determined that reducing carbon dioxide and meeting sustainability targets through the development of new formulations was an important factor for the ongoing innovation in the industry and the remedies needed to include the divestment of MBCC's global R&D assets regarding the chemical admixtures business.

Economic efficiencies

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

The Commission's Horizontal Guidelines state that the Commission will consider substantiated efficiency claims in its overall assessment of the merger. According to the 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.

Given these strict criteria, notifying parties need to adduce significant evidence in Form CO on the efficiencies that they anticipate will result from a transaction. In practice, efficiency considerations are highly unlikely to be accepted as outweighing the negative effects on competition of a transaction.

The Commission has accepted efficiencies claims in only very few cases (eg, FedEx/TNT Express, 2016; and UPS/TNT Express, 2013), and has never cleared an otherwise problematic transaction 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 European Commission (the Commission) is empowered to prohibit a concentration that will significantly impede effective competition in the European Economic Area (EEA) or a substantial part of it. From the entry into force of the first EU merger control regime in 1990 to May 2024, the Commission had blocked 33 transactions. This statistic does not, however, take into account transactions that were abandoned as a result of objections raised by the Commission either during pre-notification discussions or in the course of a formal review (most recently, Kingspan/Trimo, 2022).

Prohibition decisions remain relatively rare. In 2023, the Commission blocked only one transaction (Booking/eTraveli), but two others were abandoned due to regulatory scrutiny (Amazon/iRobot and Adobe/Figma). In 2022, the Commission prohibited Illumina/GRAIL and Hyundai Heavy Industries Holdings/Daewoo Shipbuilding & Marine Engineering.

If the parties implement a notifiable transaction before clearance has been obtained or after a prohibition decision has been issued, the companies concerned may not only incur fines but also be ordered to dissolve the concentration 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. In Illumina/GRAIL, the Commission prohibited the transaction after the parties had already closed it, and ordered its unwinding pursuant to article 8(4) of the European Union Merger Regulation (EUMR). In April 2024, the Commission announced that it had approved Illumina's plan to divest GRAIL; the interim measures will remain in force until Illumina completes the unwinding of the transaction.

The Commission may revoke its clearance decision if it subsequently transpires that its decision was based on incorrect information or where there has been a breach of an obligation attached to the decision. In that 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?

The parties can offer undertakings to remedy competition issues identified by the Commission during its investigation. The commitments proposed by the notifying parties need to be detailed in Form RM (the official form for remedies, introduced by the Remedies Notice (2008)), which requires information about the object of the commitments offered, and the terms and conditions for their implementation. It also requires information showing that the commitments offered remove the serious doubts as to the significant impediment to effective competition that the Commission has identified.

The Commission has a strong preference for structural rather than behavioural undertakings, but the Remedies Notice and the Best Practice Guidelines for Divestiture Commitments (2013) state that the Commission will also accept behavioural undertakings in limited circumstances; for example, where a transaction raises vertical or conglomerate concerns.

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 strong preference for structural/divestment remedies, as it believes that the most effective and clear-cut way of restoring competition (without the need for continuous monitoring) is either to create a new competitive entrant or to strengthen existing competitors through divestments.

According to the Commission's Best Practice Guidelines for Divestiture Commitments (2013), divested activities must constitute a viable business that is able to compete in 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 (eg, T-Mobile/Orange, 2010; and Hutchison 3G Austria/Orange Austria, 2012).

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 sell 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 (recently in Novozymes/Chr. Hansen). The Commission may also accept 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 (recently in MOL/OMV Slovenija).

The viability of the business to be divested was an important part of the Commission's assessment in cases such as General Electric/Alstom, 2015; ChemChina/Syngenta, 2016; and Deutsche Börse/London Stock Exchange, 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 (eg, Glencore/Xstrata, 2012). In certain (but more limited) circumstances, behavioural remedies can be accepted (eg, Meta (formerly Facebook)/Kustomer, 2021; and Google/Fitbit, 2020). In other cases (eg, Hutchison 3G Italy/Wind/JV, 2016; and Universal Music Group/EMI Music, 2012), the Commission has accepted behavioural remedies as part of a package including other divestment and structural commitments.

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 Swissport/Servisair, 2013; Teva/Ratiopharm, 2010; and Pfizer/Wyeth, 2009.

Under the Remedies Notice, the Commission can be requested to amend or lift previously imposed commitments when the parties are able to establish that a significant change in market circumstances has occurred. This review is of particular relevance for ongoing non-divestment type remedies (eg, Newscorp/Telepiu, 2010; and Hoffmann-La Roche/Boehringer Mannheim, 2011). Typically, such commitments will include a review clause, and the Commission has been willing to accept detailed review clauses specifying certain criteria of particular relevance for the future assessment of the need for the commitments (eg, T-Mobile/Orange, 2010; and SNCF/LCR/Eurostar, 2010). In Deutsche Lufthansa AG v Commission (2018), the EU General Court annulled the Commission's decision rejecting Lufthansa's request for a waiver of commitments it had given when it acquired Swiss in 2005 (the first decision of this kind).

The Commission can accept undertakings in both Phases I and II. In Phase I, the commitments must be submitted to the Commission within 20 working days of 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 (or the strengthening and finalisation of the proposed commitments) in an attempt to avoid the need for Phase II proceedings.

In Phase II, commitments must be submitted to the Commission at the latest within 65 working days of initiation of the Phase II investigation. If commitments are submitted after the 55th working day, the review period is extended by 15 working days.

The EU General Court has confirmed that remedies that are submitted beyond the deadlines may be accepted where they clearly and without the need for further investigation resolve the competition concerns previously identified, and there is sufficient time to consult the member states on those commitments (eg, EDP v Commission, T-87/05, 2005; and MyTravel v Commission, T-212/03, 2008).

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In 2023, the Commission approved nine transactions subject to remedies. Four were cleared following a Phase I investigation (Sika/MBCC Group; Advent/GfK, Hitachi Rail/Ground Transportation Systems Business of Thales and Novozymes/CHR Hansen); all four involved a divestment, with *Advent/GfK* also including a behavioural commitment. Five transactions were cleared following a Phase II investigation: two (MOL/OMV Slovenija and Vivendi/Lagardère) involved divestment commitments and three (Microsoft/Activision Blizzard; Broadcom/Vmware; and Orange/VOO/Brutele) involved behavioural commitments.

In MOL/OMV Slovenija, the Commission has also assessed the coordinated effects of the transaction by analysing the industry characteristics that could facilitate collusion; these also had to be addressed by the remedy. In Broadcom/VMware, the Commission accepted access and interoperability commitments to Broadcom's only competitor in the market, as well as to potential future competitors. Orange/VOO/Brutele involved what the Commission called 'quasistructural access-based remedies'.

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 transactions as in EEA transactions. When analysing remedies, it may liaise with other competition authorities that are examining the same transaction if the parties provide confidentiality waivers (which the parties in practice often grant in the spirit of transparency and cooperation).

For example, in Danaher/GE Biopharma (2019), the Commission cooperated with the US, Brazilian, Chinese, Israeli and Korean authorities on the proposed remedies. Other examples of EU–US cooperation include 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 (eg, 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 (2005) (the Notice on Ancillary Restraints).

The EUMR provides that any Commission decision approving a transaction will automatically cover restrictions that are directly related and necessary to the implementation of the transaction. The Commission must explicitly 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, with reference to the Notice on Ancillary Restraints, whether 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 proceedings under the EU Merger Regulation (EUMR). The European Commission (the Commission) publishes a summary of all notifications in the Official Journal of the European Union, which provides a preliminary opportunity for third parties to express their opinions on the likely impact of the transaction.

In publishing the notice, the Commission must consider the parties' legitimate interests in relation to the protection of business secrets. Third parties may also act as informants by contacting the Commission or member state authorities and bring to their attention a concentration that, in their opinion, could be a candidate for a referral under article 22 of the EUMR (without any guarantee that this would lead to a referral request).

More importantly, the Commission 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 questionnaire that provides respondents with a secure online workspace through which they can submit their replies to the Commission.

Third parties that show a sufficient interest, including worker representatives, may also apply to be heard by the Commission by giving oral or written evidence. If recognised as interested third parties, 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. They will often attend the oral hearing with the notifying parties.

Third parties can also appeal a Commission clearance decision to the EU General Court if they can show sufficient interest. Examples include Cisco Systems' appeal in 2013 against the Commission clearance decision of Microsoft/Skype (rejected by the EU General Court, T-79/12), KPN's successful appeal in 2017 (T-394/15) of the Phase II clearance decision Liberty Global/Ziggo and KPN's subsequent challenge in 2021 against the Commission's reissued clearance decision in *Liberty Global/Ziggo* (dismissed by the EU General Court, T-691/18).

Third parties will usually need to have played an active role in the Commission's proceedings to have standing to appeal. The EU General Court rejected an application by Canonical to intervene in support of the Commission in the proceedings brought by Monty Program against the Oracle/Sun Microsystems clearance decision (2010). On the other hand, in 2023, the life sciences association Biocom successfully appealed the EU General Court's refusal to grant it leave for intervention on behalf of Illumina in *Illumina/GRAIL*. The Court initially rejected Biocom's request on the grounds that it failed to demonstrate a direct and existing interest in overturning the prohibition (T-709/22, EU:T:2023:416), but the Vice President of the EU Court of Justice ultimately set aside this decision, concluding that professional associations apply for intervention not to protect individual interests but to 'defend the collective interests of their members' and Biocom represented a significant number of undertakings

in the pharmaceutical and medical devices sector who would be affected by the outcome of the appeal (T-709/22, ECLI:EU:C:2023:974).

In 2011, the EU General Court clarified that consumer associations have a right to be heard during administrative proceedings, provided that they lodge a written application to be heard by the Commission during the 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 of the European Union, inviting third-party comments. The parties to the transaction provide a draft of this notice as part of Form CO (section 1.2 of 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).

For simplified procedure cases, the Commission publishes the decision in the Official Journal. Dedicated antitrust press follows cases very closely and regularly reports on developments.

Parties to a transaction subject to review by the Commission should identify and clearly mark the information that constitutes business secrets or is otherwise confidential. The confidentiality of business secrets is protected under article 339 of the Treaty on the Functioning of the European Union (TFEU) and under article 17 of the EUMR (see also articles 18 and 19, and recital 42). These provisions require the Commission (and the member states, the European Free Trade Association (EFTA) Surveillance Authority and the EFTA states, as well as their officials and other relevant parties) not to disclose information covered by the obligation of professional secrecy that they have acquired through the application of the EUMR.

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 annexes must be included in the submission for a notification to be considered complete.

The Commission's Guidance on the Preparation of Public Versions of Commission Decisions under the Merger Regulation (2015) and the Best Practices on the Disclosure of Information in Data Rooms (2015) are also relevant.

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 decisions 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, media plurality, the prudential supervision of financial institutions (see article 21 of the EUMR) and certain defence-related matters (see article 346 of the TFEU). The list of legitimate interests in article 21 of the EUMR is not exhaustive and a member state can claim additional legitimate interests in consultation with the Commission, although the Commission has attempted to limit wider application. This provision has recently received scrutiny; for example, in February 2022, the Commission ordered Hungary to annul its veto of *VIG/Aegon* under its national foreign direct investment legislation.

The NCAs also cooperate with the Commission in the context of the referral system foreseen in the EUMR.

For other instances where a transaction does not qualify for review by the Commission but does require merger clearance at the national level in several member states, the Commission has published the 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 NCAs.

Regional cooperation agreements

In 2017, the Nordic Cooperation Agreement was signed between Denmark, Iceland, Norway and Sweden, which concerns cooperation in competition cases.

In April 2023, 10 eastern European NCAs signed an agreement on regional cooperation. The initiative is aimed at boosting their partnership in the field of competition policy to better tackle economic challenges such as inflation. The signatories are Poland, Hungary, the Czech Republic, Slovakia, Estonia, Latvia, Lithuania and Romania, as well as the agencies of EU candidate countries Moldova and Ukraine.

Cooperation with the United Kingdom

In 2020, the European Union and the United Kingdom signed the EU–UK Trade and Cooperation Agreement (TCA) to govern trade relations, including provisions regulating antitrust enforcement and cooperation. The TCA contains a shared commitment to monitor restrictive agreements, abuses of market power and anticompetitive mergers. It also encourages the EU and UK competition authorities to share information and cooperate. The TCA entered into force on 1 January 2021.

In June 2023, the Council of the European Union gave the Commission a mandate to negotiate an agreement between the Commission, the EU NCAs and the UK Competition and Markets Authority (CMA) for establishing cooperation and the competence to exchange information in competition matters. On 19 April 2024, the UK Minister of State at the Department for Business and Trade and the Minister for Europe at the Foreign, Commonwealth and Development Office wrote a letter to the UK Parliament for the official launch of the negotiations for a Competition Cooperation Agreement. The letter states that the agreement will benefit the UK by creating a formal framework to cooperate and strengthen cross-border enforcement of competition law and create a forum for dialogue between the CMA and the Commission to discuss how best to face emerging and rapidly changing markets, and how to tackle anticompetitive business conduct within them.

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
- 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 as well as communication between the reviewing agencies.

In view of this cooperation – in particular, the exchange of information between the EU and US authorities – parties to transatlantic transactions 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 or the European Union. Examples of high-profile cases in 2021 in which the EU and US agencies closely cooperated include NVIDIA/ARM and Illumina/GRAIL.

In most high-profile parallel merger reviews, the Commission and the US Department of Justice (DOJ) or the US Federal Trade Commission (FTC) have reached the same or similar conclusions (eg, Novelis/Aleris, 2019; and Danfoss/Eaton Hydraulics, 2020); however, in a number of recent high-profile parallel reviews, the Commission, the CMA and the DOJ or the FTC reached different conclusions.

In Cargotec/Konecranes (2022), the Commission accepted structural remedies proposed by the parties to achieve EU clearance, while both the DOJ and the CMA rejected the same remedies package, which resulted in the transaction ultimately being abandoned. Other examples

that illustrate the different conclusions reached by the EU, UK and US authorities include Meta/Giphy (2020), AON/Willis Towers Watson (2020) and Microsoft/Activision (2023).

Cooperation with other countries

The Commission–Canada Cooperation Agreement was signed in June 1999 and contains similar provisions to the US agreement. The Commission and Canada are in the process of negotiating a second-generation cooperation agreement.

An agreement with Japan on cooperation on anticompetitive activities entered into force in August 2003 (currently under review by the European Union and Japan), with the aim of facilitating bilateral cooperation in major merger and acquisition cases. Close cooperation with the Japan Fair Trade Commission proved successful in *Panasonic/Sanyo* (2009), which was granted a Phase I clearance subject to conditions.

For several years, the European Union and China have been increasing their cooperation on competition policy (an agreement in May 2004 on the terms of reference of a bilateral competition policy dialogue; a memorandum of understanding in September 2012 on cooperation from September 2012; and a best practices cooperation framework from October 2015). In April 2019, the European Union and China agreed on a memorandum of understanding on dialogue regarding 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 entered into a bilateral competition cooperation agreement with South Korea as well as 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 also been working in close technical cooperation with the Competition Commission of India.

Finally, on 1 December 2014, a cooperation agreement entered into force between the European Union and Switzerland.

In addition, the Commission actively participates in the working group of the International Competition Network (ICN) on multi-jurisdictional merger control, which was established in 2001 with the aim of promoting best practices and international cooperation. The Commission played a key role in the adoption in 2015 of the ICN Merger Working Group Practical Guide to International Enforcement Cooperation.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

The EU Merger Regulation (EUMR) provides for appeal to the EU General Court (GC) against decisions of the European Commission (the Commission) on both procedural and substantive grounds. A further appeal can be made to the EU Court of Justice (ECJ). 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 a normal appeal procedure.

Both the parties to the transaction and third parties who show standing can lodge an appeal before the GC to challenge the Commission's decisions. Member states can also appeal merger decisions.

The appeal process for substantive appeals is rigorous, with the GC engaging in a detailed forensic analysis of Commission decisions. Several judgments have led to clarification of the legal standard, the type of evidence that the Commission can rely on and the burden of proof that rests on the Commission:

- In Commission v Tetra Laval BV (2005), the ECJ confirmed that although the Commission has a margin of discretion with regard to economic matters, the GC must establish whether:
    - the evidence relied upon by the Commission is factually accurate, reliable and consistent;
        - the evidence contains all the information necessary to assess a complex situation; and
        - it is sufficiently capable of substantiating the Commission's conclusions.
- In UPS v Commission (2017), the GC emphasised procedural grounds, and reinforced due process and transparency standards in merger control procedures.
- In *KPN v Commission* (2017), the GC clarified the Commission's obligation to lay out complete reasoning justifying its decisions.
- In *CK Telecoms UK Investments Ltd v Commission* (2020), the GC for the first time ruled on the legal standard the Commission must meet when establishing a significant impediment to effective competition under article 2(3) of the EUMR when a merger does not lead to a dominant position or coordinated effects in oligopolistic markets (ie, gap cases). While the GC held the Commission to a higher standard, the ECJ set aside the GC's decision and held that the Commission is only required to demonstrate a 'balance of probabilities' and not a higher standard of strong probability to show a significant impediment to effective competition, and that the Commission cannot be held to a higher burden of proof for prohibiting transactions compared to approving them (C-376/20, ECLI:EU:C:2023:561).

If the ECJ annuls a Commission decision, the Commission will have to re-assess the concentration in the light of current market conditions. As such, the parties have to submit an updated notification. This was the case in *Sony/BMG*, which was approved by the Commission on 3 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 merger control decisions (Article 340 of the Treaty on the Functioning of the European Union). Most recently, UPS lodged an action for damages before the General Court against the Commission for wrongfully prohibiting its merger with TNT (following the General Court's decision to annul the prohibition on procedural grounds); however, this claim was dismissed by the General Court in February 2022 (T-834/17 and T-540/18).

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 GC is about 30 months, although in some cases the process can take longer. 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 for some that are), the delay involved will usually represent a major factor against bringing an appeal.

Appeals to the ECJ of the GC's findings generally take more than 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?

In 2023, the level of enforcement activity at the European Commission (the Commission) remained steady, with the Commission adopting 333 merger decisions (356 notifications) compared to the previous year's 371 notifications. The Commission received 25 reasoned submissions by notifying parties in the pre-notification phase, requesting a referral of a case from the Commission to a national competition authority (NCA) or vice versa. The Commission accepted the referral of three transactions pursuant to article 22 of the EU Merger Regulation (EUMR) (*Adobe/Figma*; Qualcomm/Autotalks; and EEX/Nasdaq) and referred one transaction pursuant to article 9 of the EUMR to be examined by NCAs (ACE Pharmaceuticals Belgium/Febelco/Pannoc Chemie JV).

The vast majority of mergers notified in 2023 were swiftly reviewed as they did not raise competition concerns. The simplified procedure was applied in 76 per cent of notified transactions, or 81 per cent of adopted decisions.

The Commission has intervened in 11 transactions, of which nine were approved subject to conditions. The Commission opened Phase II investigations in five cases related to wide-ranging sectors, including software publishing, consumer electronics and retail of consumer electronics, passenger and freight air transport, telecommunications, motion picture, video and television programme activities.

In 2023, the Commission prohibited one transaction (Booking/eTraveli) and ordered the unwinding of another pursuant to article 8(4) of the EUMR (Illumina/GRAIL). Two additional transactions were abandoned by the parties and the notifications were withdrawn during the in-depth investigation.

Reform proposals

35 | Are there current proposals to change the legislation?

Proposal for the screening of foreign direct investments

On 24 January 2024, the Commission presented a proposal for a new regulation on the screening of foreign investments (the Proposal), as a part of the 'Economic Security Communication' package.

The Commission explained that the reason for the Proposal was the lack of alignment between the member states' screening mechanisms and the vulnerabilities resulting from the lack of alignment in procedural and certain substantive aspects of the national mechanisms. Currently, 24 member states have enacted foreign direct investment (FDI) legislation (Bulgaria as recently as March 2024; the Irish FDI regime is being implemented in Q2 2024). The Commission proposes an ex officio review mechanism for all FDI regardless of the target sector, and a mandatory suspensory FDI screening across all member states for programmes that are within the scope of EU interests or in specific sectors that are deemed to have 'particular importance for the security or public order interests' of the EU (eg, semiconductors, artificial intelligence, quantum technologies, space and propulsion, robotics and autonomous systems, energy, etc).

The Proposal suggests a two-phase FDI review mechanism. In the first phase, the NCA determines whether it has jurisdiction and carries out an initial review. If the NCA decides that the transaction needs a more detailed assessment, it should open an in-depth review.

While the current FDI screening Regulation 2019/452 covers FDIs solely from third countries to the EU, the Proposal aims to extend the scope of the cooperation mechanism to investments made between member states, in which the investor incorporated in a member state is ultimately controlled by a foreign entity (this was the question in Xella/Janes és Társa).

The Proposal also aims to strengthen the cooperation between member states by aiming to establish a confidential database where the member states will provide basic information about the outcome of their screening decisions. In addition, in case a member state gives a comment or an opinion on a transaction, the Proposal provides that the screening member state will need to engage with the relevant member state before and after the screening decision to ensure that the comments are taken into account.

Differently from the current FDI Regulation, the Proposal provides that the FDI review should be carried out prior to closing of the transaction, and grants ex post call-in powers in all member states for at least 15 months after closing.

The Proposal is currently being discussed with the EU member states and is expected to be implemented in late 2026, following a 15-month transitional 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?

Increased reliance on non-horizontal theories of harm

Similarly to other authorities, the European Commission (Commission) has been increasingly investigating non-horizontal theories of harm, including potential conglomerate and vertical effects of notified transactions, as well as the more novel innovation and ecosystem theories of harm. It has also investigated whether transactions might lead to a loss of potential future competition where there are no existing overlaps. These recent departures from traditional theories of harm (in combination with an expanding jurisdiction) have increased the uncertainty.

Despite the common belief that digital markets and life sciences are the main targets for expansive and novel theories of harm, the Commission's most prominent recent challenges caution that no industry can ignore these new dynamics.

Booking/eTraveli**:** The Commission argued that, by acquiring a main customer acquisition channel in the online travel agencies (OTA) market, Booking would have strengthened its perceived strong position in the hotel OTA market. This would have allegedly allowed Booking to expand its ecosystem of travel services (flights, accommodation, car rentals, attractions) and make its market position in the hotel OTA market more difficult to contest. Along with 'network effects' and 'ecosystems', the Commission cited 'customer inertia' effects and the risk of increased difficulty for potential competitors to develop a customer base capable of supporting a rival hotel OTA business. The Commission relied on the newer and potentially far-reaching ecosystem theory of harm to prohibit the acquisition (its only formal prohibition in 2023). Booking's appeal of the decision is pending.

Adobe/Figma**:** The Commission launched a Phase II investigation into Adobe's acquisition of Figma, a software company offering interactive product design products. As part of its Phase II investigation, the Commission reached the preliminary conclusion that the transaction could result in a significant lessening of competition in the interactive design tools market where Figma was allegedly a market leader, and argued that it would also lead to the discontinuation of Adobe's interactive product design tool, Adobe XD, along with its potential successors, constituting a 'reverse killer acquisition'. Regarding the vector and raster editing tools market, the Commission claimed that Figma had the ability/incentive to enter into these markets and would become an effective competitor absent the transaction; approving

the transaction would mean the loss of this potential competition. The parties have ultimately abandoned the deal.

Microsoft/Activision**:** The Commission conditionally cleared Microsoft's acquisition of Activision following a Phase II investigation. The Commission was concerned that the transaction could significantly reduce competition in the distribution of console and PC video games, including multi-game subscription services and cloud game streaming services, and for PC operating systems. Among other things, the Commission considered that cloud game streaming services was a relatively small market that had potential to expand quickly, but that the acquisition could have enabled Microsoft to foreclose game distributors from this market by making Activision games exclusive to Microsoft's platforms. To address these concerns, Microsoft committed to offer, for a duration of 10 years, a free licence to consumers in the EEA enabling them to stream, via any cloud game streaming service, all current and future Activision PC and console games.

Amazon/iRobot**:** The Commission launched a Phase II investigation into Amazon's proposed acquisition of the robot vacuum cleaner (RVC) manufacturer iRobot based on the concern that Amazon could have had the incentive and ability to exclude iRobot's competitors by preventing them from selling RVCs on Amazon's website, or degrading these competitors' access to the platform through various vertical foreclosure strategies. The Commission also investigated the concern that the transaction could allow Amazon to strengthen its position in online marketplace services and related advertising services and/or 'other data-related markets'. Amazon eventually decided to abandon the transaction.

The revised market definition notice

Twenty-six years after the 1997 version, the Commission published the revised version of the Notice on the Definition of Relevant Market for the Purposes of Community Union Competition Law (Revised Notice). The revised version aims to cover the significant developments over the last three decades, mainly digitalisation, globalisation, and new ways of offering goods and services.

In line with the Commission's decisional practice, the Revised Notice emphasises that non-pricing factors such as innovation, quality, availability and sustainability should be considered when defining the relevant market, and introduces the concept of a 'small but significant and non-transitory decrease in quality'.

The notice highlights that digital ecosystems can be viewed as comprising a primary core product along with multiple secondary digital products; the Commission may employ similar principles used for after-markets when defining relevant product markets for digital ecosystems.

The Revised Notice also acknowledges the importance of frequent and significant research and development (R&D) when defining markets in innovative industries. It focuses on pipeline products as an example, suggesting that despite not being available to customers, their R&D process can indicate potential substitutability with existing or future products.

The Revised Notice dedicates a section to multi-sided platforms and notes that the presence of indirect network effects complicates the demand substitution assessment, particularly

in applying the small but significant and non-transitory increase in price (SSNIP) test. Accordingly, other evidence such as product functionalities, intended use, evidence of past or hypothetical substitution, barriers or costs of switching, interoperability with other products, data portability, and licensing features should be considered.

The Revised Notice also addresses how substantially likely future developments, particularly the structural changes that alter supply and demand dynamics, can affect market definition and advises a 'forward-looking assessment' when the case calls for it. This might be relevant in transactions involving the emergence of new products due to technological advancements or changes in regulatory frameworks affecting market scope.

Simplification of EU merger control procedures

On 20 April 2023, the Commission adopted a merger control simplification package. The aim of the package was to streamline the notification process and to reduce the administrative burden on notifying parties, and it became applicable on 1 September 2023. The package included:

- a revised Merger Implementing Regulation (including the template notification forms for Form CO, Short Form CO, Form RS and Form RM);
- a revised Notice on the Simplified Procedure; and
- a Communication from the Commission on the transmission of documents.

The revised Notice on the Simplified Procedure introduced a new super-simplified procedure to be used in the simplest of cases, which features a tick-box format throughout and does not require pre-notification. It also introduces new thresholds for vertical mergers to qualify under the simplified procedure and introduces flexibility clauses that allow for certain transactions to qualify for the simplified procedure if they are slightly above the required threshold.

A number of changes were also introduced via the revised Merger Implementing Regulation, including further simplification through the introduction of new categories of simplified cases, the streamlining of the Commission's merger procedures, and the introduction of electronic notification as the default way of notifying transactions.

Scrutiny of AI investments

With the rapid development of artificial intelligence (AI) technology, the Commission is increasingly interested in transactions relating to AI companies, particularly those involving players with existing market power or a perceived potential to dominate emerging AI markets. The Commission seems to be focusing on how transactions might affect access to and control over significant datasets, which are a crucial factor in determining market power and competitive dynamics. For example, after a January 2024 announcement that it was investigating whether Microsoft's investment in OpenAI was reviewable under the EU Merger Regulation, the Commission did not pursue a formal review under merger control rules but is said to be investigating this further under antitrust rules.

In January 2024, the Commission has also launched a call for contributions on competition in generative AI and sent requests for information to several large digital players. It has invited all interested stakeholders to share their insights on how competition law can help

ensure that this new market remains competitive. With various other competition authorities opening sector inquiries into AI, this issue is sure to remain under the microscope in the coming years.

Uncertainty around Article 22 EUMR - AGOpinion in *Illumina/GRAIL*

On 21 March 2024, Advocate General (AG) Emiliou recommended setting aside the General Court (GC) judgment in *Illumina/GRAIL*, which had previously confirmed the Commission's interpretation of article 22 as allowing referrals of transactions that are notifiable neither at the EU level nor in any member state. The AG believes that such interpretation would constitute an excessively broad understanding and a substantial expansion of the Commission's jurisdiction under the EU Merger Regulation (EUMR). Among other things, the AG concluded that:

- The word 'referral' in the title of article 22 in most official languages has a connotation that suggests that it concerns cases that are first notified to national authorities and then *referred*.
- The GC has relied on inadequate documents to establish the context and intended purpose of article 22 and failed to consider numerous other documents, including the legislature's preparatory work for the EUMR, that support a narrower interpretation of article 22.
- The GC overlooked the fact that article 22's original purpose was to allow member states without a merger control regime to request a referral, and not allowing member states 'to refer to the Commission mergers falling below the national thresholds'.

The AG also flagged that a broad interpretation of article 22 creates significant potential for conflicts with the principle of territoriality of EU law as it cannot be excluded that the EU could claim jurisdiction over mergers which have 'no foreseeable, immediate and substantial effect in the territory of the relevant Member State'.

If the ECJ follows the AG's opinion, this would mean that the Commission had no jurisdiction to review *Illumina/GRAIL* and other non-notifiable transactions. This will likely lead the Commission to explore how to fill the perceived 'enforcement gap' and potentially seek to introduce alternative thresholds, or rely on the authorities' call-in powers in some member states, to allow it to capture additional transactions.

The CK Telecoms judgment

On 13 July 2023, the EU Court of Justice (ECJ) set aside the General Court's (GC) CK Telecoms UK Investments Ltd v Commission (2020) judgment, which annulled the Commission's decision to prohibit Hutchison's acquisition of Telefónica UK's O2, and referred the case back to the GC for re-evaluation. This was the first time the EU courts delved into 'gap' cases, where transactions do not create or strengthen a dominant position but could be still considered to possibly cause significant impediment to effective competition (SIEC).

The ECJ disagreed with the GC's interpretation of the SIEC test, namely that the conditions of (i) elimination of competitive constraints between merging parties and (ii) reduction of competitive pressure on the remaining competitors should be cumulatively met for gap cases. The ECJ concluded that this approach was too restrictive and incompatible with the

objective of establishing effective control of all concentrations which could significantly impede effective competition.

The ECJ also noted that the Commission only needs to demonstrate a 'balance of probabilities' and not the higher standard of 'strong probability' (proposed by the GC) to show a SIEC, and that the Commission cannot be held to a higher burden of proof for prohibiting transactions compared to when approving them.

The ECJ upheld the Commission's appeal on the concept of 'important competitive force' and found that it is not necessary to be "particularly aggressive' in terms of price' to be recognised as an important competitive force, that an undertaking could still alter the competitive dynamic of a market without being aggressive when it comes to pricing and that it is sufficient for the Commission to show that the undertaking has 'more of an influence on the competitive process than its market share or similar measures would suggest'. The ECJ also concluded that a very high level of product substitutability is not always necessary to show closeness of competition.

While the GC held that the Commission should take into account 'standard efficiencies' when conducting an economic analysis of the likely price effects of a transaction, the ECJ concluded that there can be no presumption of 'standard efficiencies' in every transaction and that the burden of demonstrating any efficiencies lied with the companies and not the Commission.

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Faroe Islands

Morten Kofmann, Jens Munk Plum, Bart Creve, Erik Bertelsen
and Sonny Gaarslev
Kromann Reumert

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Notification trigger/ filing deadline	The notification must be made no later than one week after the agreement is concluded, the merger is publicly notified or control is acquired.
Clearance deadlines (Phase I/Phase II)	The decision on whether to approve or prohibit a merger must be reached within 90 working days after the notifier receives a declaration confirming the completion of the merger. If any participating companies introduce new or modified remedies during this process, the deadline can be extended by up to 20 working days, provided that the decision deadline is fewer than 20 days away. This extension can also occur if the Competition Authority decides so, and the involved companies agree to or request it. Should no decision be reached within the prescribed timeframes, it is automatically considered an approval of the merger.
Substantive test for clearance	Section 15 of the Competition Act No. 72 of 22 May 2023, as amended on 26 March 2024 applies the substantial impediment to effective competition test.
Penalties	Fines can be issued for failure to notify a merger or submitting wrongful information to the Competition Authority or if the merger is implemented prior to clearance.
Remarks	Not applicable.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

The main piece of legislation on Faroese merger control is contained in the Competition Act No. 72 of 22 May 2023, as amended on 26 March 2024 (the Competition Act). The law is largely based upon EU competition rules and thus also the competition rules applicable in Faroe Islands' neighbouring countries.

The Faroese Competition Council (the Council) is the principal enforcer of competition law in the Faroe Islands. It consists of a chair and four members appointed by the Minister of Trade and Industry. The Council must have comprehensive insight into public as well as private enterprise activity, including expertise in legal, economic, financial and consumer-related matters. The chair and two members of the Council must be independent of commercial and consumer interests. In practice, however, the Competition Authority, which is the secretariat of the 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 Authority are subject to appeal before the Competition Appeals Council, which is made up of four members appointed by the Minister of Trade and Industry. The chair and the vice chair of the Appeals Council must be qualified lawyers.

Scope of legislation

2 What kinds of mergers are caught?

The provisions on merger control apply to concentrations where either:

- two or more previously independent undertakings merge (amalgamate); or
- one or more persons already controlling at least one undertaking, or one or more undertakings, acquire, whether by the purchase of securities or assets, or by contract or any other means, direct or indirect control of the whole or parts of one or more other undertakings.

3 What types of joint ventures are caught?

The creation of a full-function joint venture (ie, a joint venture performing all the functions of an autonomous economic entity on a lasting basis) also constitutes a merger. Non-full-function joint ventures are not encompassed by the Competition Act. The distinction between full-function joint ventures and non-full-function joint ventures is made in accordance with EU competition law.

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

Control is constituted by rights, contracts or any other means that, either separately or jointly, confer the possibility of exercising decisive influence over the operations of an undertaking.

Minority shareholdings are caught if the possibility of exercising decisive influence over the operations of an undertaking is conferred upon a minority shareholder.

Thresholds, triggers and approvals

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

The merger control provisions apply to concentrations where:

- the participating undertakings have a total turnover of 75 million Danish kroner in the Faroe Islands, and at least two participating undertakings have a turnover of at least 15 million 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.

The Competition Authority has not referred any cases below these thresholds to the European Commission.

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

Filing a merger notification is mandatory if the turnover thresholds are met. Clearly unproblematic mergers may be notified by short-form 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-form notice.

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

There are no special merger control rules relating to foreign investment at present. In May 2021, the Danish Parliament passed the Investment Screening Act, enacting two different foreign investment screening mechanisms in Denmark; however, this Act only applies to investments in undertakings established and incorporated in Denmark proper.

The Prime Minister of Denmark has stated that the Danish government will discuss what foreign direct investment regimes will be implemented in Greenland and the Faroe Islands with their respective local governments, since business matters are devolved matters under the authority of the local governments, while Denmark's foreign policy is a matter reserved for the government of Denmark.

The fishing industry is subject to specific antitrust rules that are stricter than the merger control regime under the Competition Act. Mergers that are permissible under the specific fishing industry rules are therefore generally also permissible under the Competition Act. Such mergers may be notified by short-form notice.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

Concentrations falling within the threshold must be notified to the Faroese Competition Authority no later than one week after:

- the conclusion of the merger agreement;
- the merger is publicly notified; or
- the acquisition of control over the target company is complete.

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.

The Competition Act No. 72 of 22 May 2023, as amended on 26 March 2024, (the Competition Act) introduces a notification fee for mergers in a similar system to that in neighbouring countries. The notification fee aims to ensure that the Competition Authority, when dealing with merger cases, can also work on other supervisory tasks under the law. The notification fee under the simplified procedure is 50,000 Danish kroner, while the notification fee under the standard procedure is 0.1 per cent of the total turnover of the participating companies in the Faroe Islands – however, at most 300,000 kroner.

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 to ensure effective competition.

The waiting periods are 30 working days (Phase I) or additionally 90 working days (Phase II) after the expiry of the first waiting period. The waiting period in Phase II can be extended by up to 20 additional working days 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). The waiting period can be extended for a further 20 working days at the request of the parties or with the parties' consent.

Pre-clearance closing

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

Fines may be imposed for implementation before clearance. Where the Competition Council finds that the merger will significantly impede effective competition, it has the power to annul the merger and issue an order demanding the undertakings already merged to separate their businesses or issue other measures capable of restoring effective competition. Furthermore, the Competition Council is entitled to make approval of the merger subject to conditions.

There are no recent cases that illustrate the sanctions.

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

To date, no sanctions have been applied in foreign-to-foreign mergers.

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

So far, there has not been an opportunity to test under which circumstances a dispensation may be obtained.

Public takeovers

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

The Competition Act does not prevent the implementation of a public bid that has been notified to the Competition Authority.

Documentation

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

The level of detail depends on the filing form. For a merger that can be filed by short-form 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-form or ordinary notice are set forth in section 3 of Executive Order No. 2 of 20 July 2012.

With the permission of the Competition Authority, the participating undertakings can omit information from a notice. The Competition Authority will then assess the short-form notification and may require a full notification if the merger has an impact on the Faroese market.

The Competition Council may revoke its approval of a merger where the approval is based to a substantial extent on incorrect or misleading information for which one or more of the undertakings concerned are responsible. Further, if the Competition Council is made aware of the fact that an undertaking concerned, as a part of the assessment of a merger notified according to the simplified procedure, has submitted incorrect or misleading information, it may revoke its approval of using the simplified procedure and demand that, within two weeks, the undertakings concerned submit a full notification.

Providing incorrect or misleading information can also be punished by way of a fine.

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 often 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 Competition Authority's 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 authority has not given this notification within the 30-day time limit, it can no longer annul the merger. Merger notifications submitted by short-form 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 Competition Act No. 72 of 22 May 2023, as amended on 26 March 2024 (the Competition Act) applies the substantial impediment to 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 result in an SIEC, in particular as a result of the creation or strengthening of a dominant position, will be declared compatible with the Competition Act. The creation or strengthening of a dominant position alone is therefore not a sufficient reason to prohibit a concentration, but it is also not a requirement to do so.

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 consumers can speak in favour of approving the concentration.

In connection with the Competition Authority's assessment of the market, whether the market is open for potential international competition should be considered.

Owing to the application of the SIEC test and the intention to ensure conformity with competition law in the European Union and the European Economic Area, 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 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.

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Furthermore, the 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 or conditionally, or be prohibited.

Remedies and conditions

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

If a concentration raises competition concerns, the Competition Authority may attach conditions to its approval. Such conditions include:

- divestments of companies or parts of companies;
- dissolution 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.

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

The Competition Authority has stated that an approval of a concentration can be made subject to certain conditions, including:

- divestments of companies or parts of companies;
- dissolution 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 decisions or administrative practice from the Competition Authority can constitute the foundation for such an assessment.

Ancillary restrictions

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

The merger control provisions in the Competition Act No. 72 of 22 May 2023, as amended on 26 March 2024 do not contain any regulations on ancillary restraints; however, the Competition Authority has confirmed that reasonable and necessary ancillary restraints that do not have a harmful effect on competition can be accepted. The Competition Authority uses the rules laid down in the EU Merger Regulation and Commission Notice No. 2008/C 95/01 as guidelines.

The Competition Authority has considered several cases where competition clauses have been modified. In one particular case, the Competition Council 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 Competition Authority has not promulgated any procedures on this issue; however, it is likely that customers and competitors will be heard in connection with the authority's review of the merger.

So far, the Competition Authority has only involved customers in the review process.

Publicity and confidentiality

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

The Competition Authority (including the Competition Council) publishes all decisions with the exception of sensitive information, business secrets and the like, which are redacted. The authority can allow the merging parties to exclude other information.

The Council also makes a public statement about the fact that a merger notification has been made and invites comments from third parties.

Cross-border regulatory cooperation

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

The Competition Authority maintains close cooperation with the competition authorities in the other Nordic countries. According to the Competition Act No. 72 of 22 May 2023, as

amended on 26 March 2024, Faroe Islands can now become part of the Nordic cooperation agreement on competition matters. The cooperation agreement aims to shape cooperation between the Nordic competition authorities and ensure effective enforcement of competition legislation in these countries. Among other things, the agreement allows the competition authorities to obtain information and conduct inspections with each other.

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, the decisions of which may in turn be appealed to the ordinary courts.

There are currently no cases where this has occurred.

Time frame

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

To date, no merger decisions have been subject to judicial review.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

In 2021, three mergers were approved, followed by six mergers in 2022, and 11 mergers in 2023. This year, six mergers have been approved (as at 11 April 2024).

At this point in time, there does not seem to be a special focus on particular industries or sectors.

Reform proposals

35 | Are there current proposals to change the legislation?

Faroe Islands' new competition law, Competition Act No. 72 of 22 May 2023, as amended on 26 March 2024 entered into force in 2023, among other things allowing the Faroe Islands to join the Nordic cooperation agreement on competition matters.

We have no knowledge of any planned amendments.

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 recent years, there has been a substantial rise in the level of merger activity within the Faroe Islands. In 2021, three mergers were approved, followed by six mergers in 2022, and 11 mergers in 2023. This year, six mergers have already been approved (as at 11 April 2024).

In May 2023, a new Competition Act was adopted in the Faroe Islands.

This aim of the new legislation has been to align Faroese competition legislation more closely with the provisions of EU and Danish competition law as far as filing fees and the exchange of information among the Nordic competition authorities are concerned. Most notably, the new law introduces a notification fee for mergers in a similar system to that in neighbouring countries. The notification fee aims to ensure that the Competition Authority, when dealing with merger cases, can also work on other supervisory tasks under the law. The notification fee under the simplified procedure is 50,000 Danish kroner, while the notification fee under the standard procedure is 0.1 per cent of the total turnover of the participating companies in the Faroe Islands – however, at most 300,000 kroner.

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Voluntary or mandatory system?	Mandatory.
Notification trigger/ filing deadline	Combined turnover of the parties generated in Finland (including, for example, imports into Finland) exceeds €100 million, and the aggregate turnover of each of at least two of the parties generated in Finland exceeds €10 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 (Phase I/Phase II)	The Finnish Competition and Consumer Authority (FCCA) must either approve the concentration or initiate an in-depth investigation within 23 working days of the filing of the complete notification (Phase I). 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 (Phase II).
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 or undertakings 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.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

The relevant piece of 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 harmonised 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;
- mergers; 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 (ie, 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 (ie, the FCCA and the Market Court) interpret the concept of a ‘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 (ie, the FCCA and the Market Court) interpret the concept in accordance with the European Commission’s practice. Consequently, acquisitions of minority shareholdings and other interests less than majority control may establish joint or sole control, and therefore be caught by Finnish 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 turnover of the parties generated in Finland (including, for example, imports into Finland) exceeds €100 million, and the aggregate turnover of each of at least two of the parties generated in Finland exceeds €10 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 (EUMR).

If the target company is acquired in stages, all 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, 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. Concentrations meeting the thresholds set down in the EUMR fall under the exclusive jurisdiction of the European Commission.

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

Foreign-to-foreign transactions will be caught if the turnover thresholds are met. The Competition Act does not contain any provisions on a particular local effects test. In practice, the FCCA applies a similar substantive test to foreign-to-foreign transactions as it applies to other transactions.

Joint ventures may have to be notified in Finland even if the joint venture does not have any operations in or sales into Finland. It is sufficient that the turnovers of the parent companies of the joint venture (which are the undertakings concerned) exceed the turnover thresholds.

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

In certain insurance transactions, a notification to the FCCA is exempted if the Financial Supervisory Authority has requested a statement from the FCCA, and the FCCA has found no

objections to the concentration. If such statement has not been requested, the concentration shall be notified to the FCCA after the parties have received an approval or a non-opposition decision from the Financial Supervisory Authority.

Acquisitions of defence industry companies, companies that produce or supply critical products or services related to the statutory duties of Finnish authorities that are essential to the security of society (security sector companies), and companies that are otherwise critical for securing the vital functions of society by a foreign owner are subject to the Act on the Screening of Foreign Corporate Acquisitions in Finland (No. 172/2012). In the defence industry, monitoring covers acquisitions by all natural persons, organisations or foundations domiciled outside Finland and by Finnish organisations or foundations in which the foreign owner holds at least 10 per cent of votes or has a corresponding de facto influence.

In respect of security sector companies and companies that are otherwise critical for securing the vital functions of society, monitoring covers only acquisitions by natural persons, organisations or foundations domiciled outside the EU or European Free Trade Association (EFTA) area and by organisations or foundations domiciled in the EU or EFTA area but in which either a natural person, organisation or foundation domiciled outside the EU or EFTA area has the shareholding or de facto influence referred to above.

The Act covers acquisitions in which a foreign owner as defined above acquires at least 10 per cent, at least 33 per cent or at least 50 per cent of the votes in a limited liability company or a corresponding de facto influence in a monitored entity. The filings have to be renewed when passing a threshold and thus increasing control. For a specific reason, a filing may be required even if a threshold is not passed.

Acquisitions of defence industry companies and security sector companies are subject to mandatory prior approval by the Ministry of Economic Affairs and Employment, whereas acquisitions of companies considered critical for securing the vital functions of society are only subject to a voluntary notification; however, the Ministry may also separately require a notification to be made for acquisitions of companies that are considered critical for securing vital functions of society.

The Act on the Monitoring of Foreign Corporate Acquisitions in Finland (No. 172/2012) was amended on 11 October 2020 to meet the requirements of Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

There is no specific deadline for filing a notification. Notification must be submitted to the Finnish Competition and Consumer Authority (FCCA) following the conclusion of the acquisition agreement, the acquisition of control or the announcement of the public bid, but prior to the implementation of the concentration.

A concentration may also be notified to the FCCA as soon as the parties demonstrate with sufficient certainty their intention to conclude a concentration – for example, by a letter of intent or a memorandum of understanding signed by all parties to the concentration, or by a public announcement of the intention to make a public bid.

As there is no specific deadline for filing, sanctions are only relevant when a 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 the 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 within 23 working days of the FCCA's request unless the Market Court orders the suspension to continue. In practice, the Market Court orders the suspension to continue until it hands down its decision on the matter.

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 a 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 at 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 to safeguard competition.

Further, the Market Court may – at the request of the FCCA – prohibit the concentration or order the concentration to be dissolved or annulled – for example, by requiring the undertakings concerned or assets brought together to be separated, or by requiring the cessation of the joint control to restore the conditions of effective competition. The Market Court may, instead of prohibiting the concentration, attach conditions on its clearance. Requests from the FCCA must be notified to the parties within one year of the closing of the transaction.

There are no decisions to date where sanctions would have been imposed for closing before clearance.

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

The same rules apply to foreign-to-foreign mergers; however, there are no decisions to date where sanctions have been imposed for closing before clearance in foreign-to-foreign mergers.

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

Implementation of a merger before clearance is, under the main rule, also prohibited in foreign-to-foreign mergers; however, under the Competition Act (No. 948/2011) (the Competition Act), the FCCA has the possibility of deciding to grant permission to implement a merger before clearance.

Public takeovers

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

No; however, a party that has launched a public bid can purchase the shares offered prior to clearance, but it may not use its voting rights to determine the competitive behaviour of the target company.

Documentation

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

The notification form is broadly similar to Form CO of the EUMR. Various types of information must be given, depending on the details of each case; this may include, among other things, information 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.

The FCCA may, in individual cases, grant waivers in respect of the information to be given if certain information is deemed unnecessary for the investigation or if the transaction affects competition only to an insignificant extent.

The provision of wrong or misleading information to the FCCA is sanctioned by a fine or even imprisonment for up to six months under the Criminal Code (39/1889).

Investigation phases and timetable

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

Under the main rule, the FCCA will, after it has received a notification, send a market enquiry 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 opportunity to be heard on the planned concentration. In simple cases, the FCCA has aimed to streamline its market enquiry process by posting the market enquiry only on its website.

Should the FCCA decide to initiate a second-phase investigation, more detailed questions may be sent to competitors, customers and suppliers. The statements, as well as other issues pertinent to the case, will be discussed with the parties.

Parties are generally advised to engage in pre-notification consultations with the FCCA in all cases, and in cases where the horizontal overlap or vertical links between the parties' activities are considerable, it is recommended to approach the FCCA as early as possible – even prior to definitive signing of the transactional agreements – to ensure that the process starts as early as possible.

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

In the first phase, the concentration will be examined by the FCCA. In Phase I, the FCCA has 23 working days within which it has to clear the concentration as is or with conditions, conclude that the transaction will not be caught by the Competition Act, or decide to initiate a Phase II investigation.

If the FCCA decides to initiate a Phase II investigation, it must, within 69 working days of such a decision, either clear the concentration as is 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 69 working days 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 is 207 working days or over nine months; 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.

The median duration of Phase I investigations in 2022 was 12.5 working days and varied, depending on the complexity of the case, typically between approximately two and four weeks. In Phase II investigations, the median duration varies greatly from year to year due to the smaller number of cases. Over the past five years, the median duration of Phase II investigations has varied between 63 days in 2022 and nearly 130 days in 2020. The FCCA has not

published similar statistics for 2023, but has stated that the new notification form adopted at the beginning of 2023, together with other other measures promoting the effectiveness of merger control investigations, have led to shorter investigation periods.

The time limits set for the FCCA's decision-making will not start running until a complete notification has been filed. In recent years, the FCCA has adopted a more stringent approach to the assessment of completeness of notifications.

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 those 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 by the FCCA may be speeded up by pre-notification discussions, to which the parties are generally encouraged by the FCCA. Pre-notification discussions will in most cases de facto speed up the merger review, but they do not affect or change the time limits prescribed for the review. For the past few years, the median duration of pre-notification discussions (calculated from submission of draft notification) has varied between 10 and 12 working days in simple cases approved in Phase I, and between 28 and 30 working days in cases referred to a Phase II investigation. However, the duration of pre-notification discussions may be significantly longer depending on the complexity of the case and data and statistics available and there has been a recent trend towards even more thorough and lengthier pre-notification discussions in complex cases. The FCCA has publicly stated that in clearly unproblematic cases it aims to shorten the duration of pre-notification discussions.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

A concentration may be prohibited if it causes a significant impediment to effective competition (SIEC) in the Finnish market or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position (ie, the SIEC test). The SIEC test, also applied by the European Commission, was introduced in the 2011 reform of the Competition Act (No. 948/2011) (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 SIEC.

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 in markets that can be considered as oligopolistic, but where 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 *Kesko/Lähikauppa* case from 2016, the Finnish Competition and Consumer Authority (FCCA) took into consideration, among other factors, the failing firm defence when it allowed the acquisition of Lähikauppa by Kesko, one of Finland's major retail grocery chains, 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 (ie, the FCCA and the Market Court) will apply the SIEC test in the same way as it is applied 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 FCCA 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, among other things, on the significance of the efficiencies and the likelihood of their achievement. In general, the principles established in the European Commission's Horizontal Merger Guidelines are also applicable in Finland.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

The Finnish Competition and Consumer Authority (FCCA) investigates a concentration and either clears it, with or without conditions, or requests the Market Court to prohibit it. If the impediment to competition may be avoided by attaching conditions to the implementation of the concentration, the FCCA shall primarily order such conditions to be followed.

The FCCA can only impose conditions that the parties have approved; thus, if the FCCA and the parties cannot agree on suitable conditions, the FCCA has to make a proposal to the Market Court to prohibit the concentration.

If the Market Court finds that the concentration would significantly impede effective competition in the Finnish market or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position, the Market Court may prohibit the concentration.

If the transaction has already been implemented, the Market Court may order it to be dissolved, for example, by requiring the undertakings concerned or assets brought together to be separated or by requiring the cessation of joint control, to restore the conditions of effective competition.

Further, the Market Court may, instead of prohibiting or ordering the dissolution of the concentration, attach conditions for its clearance.

If the parties implement a transaction before clearance or without regard to a prohibition of the concentration or conditions imposed by the competition authorities, an administrative fine of up to 10 per cent of the total turnover of the relevant undertakings may be imposed.

Remedies and conditions

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

Both the FCCA and the Market Court may clear a concentration on the condition that certain undertakings are given by the parties to the concentration. Under the Competition Act (No. 948/2011) (the Competition Act), the FCCA should always endeavour to impose conditions rather than request that the Market Court prohibit a concentration.

Thus far, the FCCA has proposed that a concentration be prohibited only five times; the vast majority of cases that have entered a Phase II investigation have been resolved by commitments given by the parties. Out of the five prohibition proposals, the Market Court has prohibited only one concentration. One of the remaining four concentrations was abandoned during the Market Court process, and the remaining three were approved subject to conditions by the Market Court; however, one of those concentrations was abandoned owing to the strict conditions imposed, and one restructured and re-notified to the FCCA.

Where conditions are imposed, the competition authorities prefer structural remedies, such as divestments. Behavioural remedies are typically not considered sufficient to remedy competition concerns, but have been approved in exceptional cases.

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 to 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, although behavioural remedies are typically not considered sufficient to remedy competition concerns.

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 parties may propose remedies at any stage of the proceedings. However, as the duration of Phase I investigation cannot be extended, a conditional clearance in Phase I is generally only possible if the parties have already propose remedies during pre-notification discussions. In Phase II, the FCCA recommends the parties to propose remedies as early as possible to enable sufficient market testing of the remedies. Generally, the parties should reserve at least one to two months for commitment negotiations. If remedies are proposed closer to the end of the FCCA's investigation period, the FCCA will request an extension from the Market Court or, if a sufficiently long extension is no longer available, propose that the transaction is blocked.

Until recently, the FCCA accepted post-closing implementation of remedies within a certain period, for example, six months for a divestment; however, in 2021, in a conditional clearance of a merger between Altia Oyj and Arcus ASA, the FCCA used, for the first time, an upfront buyer obligation, which entails that the transaction cannot be implemented before the parties have entered into a binding agreement to sell the divested business to a buyer approved by the FCCA.

Subsequently, the FCCA has made it known that it will accept post-closing implementation of remedies only in exceptional circumstances. On one occasion, the FCCA applied a fix-it-first obligation, a stricter version of the upfront buyer obligation, requiring that the parties find a suitable buyer for the divestment business and enter into a binding agreement with the buyer during the FCCA’s investigation. The FCCA has, however, stated that the upfront buyer obligation will be preferred over a fix-it-first obligation in its future case practice.

The FCCA supervises the implementation of the conditions in accordance with its decision. The appointment of a trustee to monitor the implementation of the conditions and to report to the FCCA has become common practice.

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

To date, there have been no foreign-to-foreign merger cases in which the FCCA has 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 clear any restrictions ancillary to the notified concentration. Typically, accepted ancillary restrictions are limited to non-compete obligations on the seller, supply or purchase agreements and licence agreements.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

Under the main rule, competitors, customers and suppliers of the parties to the concentration will be heard in the investigation; however, the Supreme Administrative Court has held that competitors are normally not allowed to appeal against a decision to clear a concentration, as the right to appeal requires that the decision may have had a direct effect on the complainant's rights, obligations or interests.

Publicity and confidentiality

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

The Finnish Competition and Consumer Authority (FCCA) lists received notifications (the names of the parties and the notification date) and posts the market enquiries on its website; otherwise, the FCCA is reluctant to comment publicly on pending merger control procedures.

Third parties may request access to public versions of documents provided to the FCCA during or after the FCCA's investigation period. Confidential information is protected by clearly indicating business secrets in all documents submitted to the FCCA.

Cross-border regulatory cooperation

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

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 EU member states. The operation of the ECN is based on Council Regulation (EC) No. 1/2003, and facilitates the exchange of information and case allocation between the participating authorities. Although 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) forum. One of the main focuses of the ECA is the cooperation of national authorities in relation to multinational merger control processes. With regard to the allocation of and information exchange between the national authorities and the European Commission in merger cases, please refer to the chapter on the European Union.

In addition to the European cooperation networks, the FCCA cooperates closely with competition authorities in other Nordic countries and, in 2017, it 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 cooperation. In recent cases, it has been clear that in transactions notified in various Nordic countries, the countries' respective competition authorities cooperate very actively. The FCCA participates in approximately 40 different international working groups relating to competition policy.

JUDICIAL REVIEW

Available avenues

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

A decision of the Finnish Competition and Consumer Authority (FCCA) on whether it will initiate a second-phase investigation may not be appealed. Further, in the 2011 reform of the Competition Act (No. 948/2011) (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 parties whose rights, obligations or interests have been directly affected by the FCCA's decision. 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 FCCA decisions 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 time limit of 69 working days on the Market Court to rule on the case.

The Market Court has not issued any substantive decisions in merger control cases since 2020, when it handed down two decisions. One was the first prohibition decision in Finland (*Kesko Oyj/Heinon Tukku Oy*, MAO:50/20). Another proposal by the FCCA to prohibit a concentration was deemed to have been dismissed after the parties abandoned the transaction (*Mehiläinen yhtiöt Oy/Pihlajalinna Oyj*, MAO:581/20). Both of these decisions were delivered within three months owing to the time limit set in the Competition Act for such decisions (the statutory time limit has since been amended to 69 working days).

Between 2021 and 2023, the Market Court has issued procedural decisions to extend the FCCA's Phase II investigation period in one case each year. Such decisions are typically delivered within a few days owing to their urgent nature.

In other types of cases, handling times in the Market Court vary greatly depending on the nature and complexity of the case.

The Market Court's decisions (eg, decisions to prohibit a transaction) can be appealed to the Supreme Administrative Court. The handling times of the Supreme Administrative Court vary significantly depending on the nature and complexity of the case from a few months to several years. The Supreme Administrative Court has not ruled on any merger control cases for over a decade.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

At the time of writing, the Finnish Competition and Consumer Authority (FCCA) has in 2024 issued 15 unconditional clearance decisions in Phase I. In addition, one case taken to a Phase II investigation in late 2023 was abandoned by the parties in early 2024.

In 2023, the FCCA issued a total of 51 decisions in merger cases. The vast majority of the decisions were unconditional Phase I clearance decisions. Only one case was approved subject to conditions after a Phase II investigation (Crayfish BidCo Oy/Caverion Oyj) and two cases were abandoned during a Phase II investigation (*Enersense International Oyj/Voimetel Oy* and *OptiGroup FSF AB/Pamark Business Oy*).

The FCCA has not officially identified any particular sectors or issues as its current enforcement concerns; however, on the basis of recent decisions by the FCCA and statements given by FCCA officials in the national media, it appears that the FCCA has a particular interest in social and health services, grocery and other consumer goods markets, transportation, telecommunications, intellectual property rights, digital goods and services, energy, construction, primary production, and competition neutrality of public sector services.

Reform proposals

35 | Are there current proposals to change the legislation?

There are no current legislative 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?

Amendments to the merger notification thresholds in Finland entered into force on 1 January 2023. The new notification thresholds are significantly lower than the previous thresholds and the number of concentrations notified to the FCCA were expected to double under the new thresholds. However, during the first year in which the new notification thresholds were applied, the number of concentrations notified to the FCCA, only increased by approximately 40 percentage points.The current economic climate may be the main factor behind the lower-than-expected increase in the number of notified concentrations.

On the case front, an exceptional number of notified transactions have been withdrawn over the past couple of years. Since late 2022, five notified transactions have been withdrawn during the FCCA's Phase II investigation due to the significant competition concerns identified by the FCCA. Until recently, withdrawals of merger notifications were extremely rare in Finland. In all cases, the FCCA identified potential competition concerns in clearly narrower market segments than those considered relevant by the parties. The merger notifications were withdrawn after it became evident that the parties would not be able to close the deals in an acceptable form and/or time frame.

In 2023, the FCCA also made its first proposal to the Market Court for the imposition of a fine for breach of conditions imposed on a merger clearance. In December 2023, the FCCA found that Valio Oy (Valio), a food manufacturer, had breached the behavioural remedies imposed on the clearance of its acquisition of Heinon Tukku Oy (Heinon Tukku), a foodservice wholesaler, and proposed that a fine of €900,000 be imposed on Valio. Heinon Tukku purchases products from Valio's competitors and, therefore, to secure clearance of the acquisition, Valio undertook to protect its competitors' pricing information by preventing its staff responsible for the pricing of Valio's products from accessing this information. Protection of the information was implemented through information system boundaries, and an independent trustee was appointed to monitor compliance with the commitments. However, due to an error in the information system firewall, the staff responsible for the pricing of Valio's products had

access to the pricing information of Valio's competitors for several months. Valio noticed the error while preparing for the monitoring trustee's inspection and notified the issue to the FCCA. The FCCA took into account Valio's initiative in reporting the breach. However, the importance of Valio's initiative was reduced because it waited two weeks after discovering the error before reporting it, and that the breach would in any event have been discovered in the monitoring trustee's inspection. The case is still pending before the Market Court.

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Voluntary or mandatory system?	Mandatory. Form of notification: no special form. Similar type of information but less detailed than EU Form CO. In French.
Notification trigger/ filing deadline	Main thresholds: • worldwide combined pre-tax turnover of over €150 million; • at least two of the undertakings concerned each achieved a pre-tax turnover in France exceeding €50 million; and • the concentration does not have an EU dimension. Thresholds specific to the retail sector: • worldwide combined pre-tax turnover of over €75 million; • at least two of the undertakings concerned each achieved in the retail trade sector in France a pre-tax turnover exceeding €15 million; and • the concentration does not have an EU dimension. Thresholds specific to the French overseas territories: • worldwide combined pre-tax turnover of over €75 million; • at least two of the undertakings concerned each achieved a pre-tax turnover exceeding €15 million (or lowered to €5 million in the retail trade sector) in at least one (but not necessarily the same) French overseas department or community; and • the concentration does not have an EU dimension. Filing: no time limit for notification; but in any event sufficiently in advance of completion, as French merger control has a suspensive effect.
Clearance deadlines (Phase I/Phase II)	The first stage will normally last between 25 and 60 working days; the second stage will normally last between 65 and 130 working days, and even longer with no time limit in the event of failure to provide information. Suspension effect: suspension until clearance (possibility of a derogation upon request).
Substantive test for clearance	Substantial lessening of competition with particular emphasis on the creation or reinforcement of a dominant position. The authorities also examine whether the operation creates or reinforces purchasing power, placing suppliers in a state of economic dependency.
Penalties	Failure to file or implementation before clearance: for corporate entities, 5 per cent of their turnover in France; for individuals, €1.5 million.

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Remarks	Special rules for press and audiovisual sectors, banks and insurance companies. Foreign investments are generally unrestricted but some investments in strategic sectors are subject to declaration or prior authorisation. Foreign-to-foreign mergers are subject to notification if the relevant French turnover thresholds are met.

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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 Commercial Code (the Code).

An independent administrative authority, the Competition Authority (the Authority), has competence over merger control cases in France; however, the Minister for the Economy holds residual powers in two circumstances:

- even if the concentration is cleared by the Authority at the end of Phase I, the Minister can ask the Authority to open an in-depth Phase II review of the concentration (although the Authority has discretion on whether to act on this request); and
- whatever the final decision of the Authority at the end of Phase II, the Minister can substitute his or her own decision based on public interest grounds.

In 2020, the Authority published its updated Merger Control Guidelines (the Guidelines), replacing the 2013 version. Although non-binding, these are generally followed by the Authority.

Scope of legislation

2 | What kinds of mergers are caught?

The French definition of ‘merger’ 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?

Under French law, joint ventures are treated in the same way as under the EUMR. It follows that the creation of a joint venture performing, on a lasting basis, all the functions of an autonomous economic entity constitutes a concentration. A concentration also occurs when a joint venture that was not initially full function becomes fully fledged (*DCNS/Priou*, 2016) and in the case of a transition from exclusive control to joint control.

In *Cosson/Ensis Group/Terzeo* (2019), the Authority applied, for the first time, the *AustriaAsphalt* case law of the EU Court of Justice in which the Court clarified how the concept of concentration should be analysed in the context of the transition from exclusive control to joint control with the maintenance of the historical shareholder (7 September 2017, C-248/16).

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 a 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 (eg, the 2018 *AG2R La Mondiale/Matmut* case concerning a de facto merger). As is the case 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 threshold for negative sole control or joint control are not subject to merger control provisions. However, in the 2022 *Inovie group/Bio Pôle Antilles* case, the Authority took into account the effects of a non-controlling minority stake concomitant with an exclusive takeover, considering that the acquisition of exclusive control of Bio Pôle Antilles by the Inovie Group – associated with the concomitant project to acquire a non-controlling minority stake in the capital of Synergibio (the sole private competitor of Bio Pôle Antilles) – was likely to affect competition in the market for routine medical biology examinations in Guadeloupe and Saint Martin. Furthermore, in the 2024 *CMA CGM/Altice Media* decision, the Authority paid particular attention to the buyer's pre-existing, non-controlling minority stakes in the capital that allow it to be represented in the governing body of Metropole Télévision.

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 sets of turnover-based thresholds currently exist in France.

Turnover calculations under French law are very similar to those set out in the EUMR, and the Code expressly refers to article 5 of the EUMR in this regard. The turnover of an undertaking is thus calculated by taking into account the whole group to which the undertaking belongs, and the seller is not taken into account.

First, French merger control applies where the following cumulative thresholds are met:

- all the undertakings that are party to the concentration achieved, during the previous financial year, a worldwide combined pre-tax turnover of over €150 million;
- at least two of the undertakings concerned each achieved, during the previous financial year, a pre-tax turnover in France exceeding €50 million; and
- the transaction is not caught by the EUMR.

Second, lower thresholds apply to concentrations involving undertakings in the retail trade (ie, where two or more parties to a concentration operate retail premises). French merger control is thus applicable where the following cumulative thresholds are met:

- all the undertakings that are party to the concentration achieved, during the previous financial year, a worldwide combined pre-tax turnover of over €75 million;
- at least two of the undertakings concerned each achieved, during the previous financial year, a pre-tax turnover in the retail trade sector in France exceeding €15 million; and
- the transaction is not caught by the EUMR.

Third, lower thresholds apply to concentrations involving undertakings operating in French overseas departments and French overseas communities (ie, where at least one party to a concentration is active in one or more French overseas departments, in the Mayotte department, in the Wallis and Futuna islands or in the French overseas communities of Saint Pierre and 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 (reduced to €5 million in the retail trade sector) in at least one French overseas department or French overseas community concerned – these 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.

The term '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, among other things, 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 those premises (of which at least one must be located in France) is generated through such activities. According to the Guidelines, if this 50 per cent threshold is met, 100 per cent of the turnover achieved in the premises, both retail and non-retail, 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 no need to conduct a local effects test as such; whether the parties are incorporated under French law or have subsidiaries in France is irrelevant.

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

Foreign investments

Foreign investments in France are unrestricted; however, certain foreign investments must be declared, for administrative and statistical purposes, to the Minister for the Economy and the Banque de France.

Where the foreign investment concerns a strategic French sector (eg, a sector that might affect public policy), prior authorisation may be necessary. Prior authorisation is required in a number of strategic sectors (eg, defence, security, cryptology and information systems security), which were further expanded by the Decree of 28 December 2023. All foreign investments in those sectors must be formally approved by the Minister for the Economy prior to implementation. For this purpose, 'foreign investment' means the acquisition of control in a French entity or a branch registered in France pursuant to article L233-3 of the Code or the acquisition of all or part of a branch of activity of a French entity.

Non-European investments fall under stricter requirements than European investments since prior approval of the Minister is also required for them when 25 per cent of the voting rights in a French entity are exceeded (directly or indirectly) or when 10 per cent of the voting rights in a French listed company are exceeded. To identify the ultimate controlling entity of an investor, the Decree of 31 December 2019 provides that where no control can be established on the basis of French corporate law concepts, control will be assessed under French merger control rules.

Following notification, the Minister for the Economy has 30 business days to indicate whether the notified foreign investment falls outside the scope of control, is cleared unconditionally or requires further analysis. If further analysis is required, the Minister has 45 additional business days to clear the foreign investment (with or without conditions) or to prohibit it. Such review entails a standstill obligation. Where an investment is deemed to threaten national interests, approval may be conditional on the parties' implementation of specific remedies, including divestments, set in proportion to the importance of the national interest at stake.

Failure to comply with the notification requirement entails very significant risks (in particular, a significant fine, nullity of the relevant agreements and an injunction to restore the status quo ante). The Law of 22 May 2019 strengthened and expanded the powers of the Minister

for the Economy. In particular, it strengthened the power of injunction of the Minister and 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).

The Law of 22 May 2019 also expands the Minister's powers to fine investors in the cases of acquisition without prior approval, approval obtained by fraud, non-compliance with remedies or breach of an injunction. In those cases, the Minister may impose a fine capped at the highest of the following: 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 September 2022, the Treasury published guidelines on the control of foreign investments in France. These guidelines aim to clarify the administrative control doctrine and to provide guidance on the procedure.

Specific merger rules

In addition, specific merger rules apply in a certain number of sectors, such as:

1. The audiovisual sector – 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.
2. The press sector – 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 in point (1) applies.
3. Investment services and insurance – specific authorisation from the relevant French authorities is required.
4. The banking sector – a non-binding opinion is requested from the Credit Institutions Committee during the Authority's Phase II 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; and
- the Competition Authority (the Authority) may fine the concerned party as follows (maximum fines):
    - corporate entities: 5 per cent of pre-tax turnover in France from the previous financial year (plus, where applicable, the turnover in France of the acquired party over the same period); and
        - individuals: €1.5 million.

There have been several fines for failure to notify reportable mergers. In 2022, a €7 million fine was imposed on Cofepp for both acquiring control of Marie Brizard Wine & Spirits (MBWS) before notifying the transaction and not waiting for its clearance decision once notification was submitted.

In 2012, a €392,000 fine was imposed on Colruyt France for failure to notify the acquisition of UGCA Unifrais.

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 a joint notification obligation.

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 and a concentration that requires notification must not be completed before approval has been obtained from the Authority. In addition, the powers of the Minister for the Economy to intervene within a certain period may extend the suspension period.

If the Authority clears the transaction expressly in Phase I, 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 an in-depth Phase II review. If the period for the Authority to authorise the transaction in Phase I 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 Phase II, regardless of whether the Minister intervenes, 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 a 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, 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. Several derogations were granted in such a context over the past few years.

The Law of 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 2018, in *GPG/Tati Group*, the Authority granted the derogation and subsequently required structural and behavioural remedies to approve the concentration. In *Financière Cofigeo/groupe Agripole* (2018), the Authority granted the derogation and then imposed divestment injunctions after a Phase II investigation.

In 2020, in *Chaussea/La Halle*, *Fijace/Maxi Toys* and *Carrefour/Bio c'Bon* (all concerning the retail sector), the Authority granted derogations on the ground that the targets were subject to insolvency proceedings. In 2021, the Authority cleared those three concentrations subject to divestiture commitments.

In July 2020, the Authority granted Mobilux a derogation to acquire Conforama in light of its serious financial difficulties. In 2022, having concluded its substantive analysis, the Authority subsequently considered that the transaction would give rise to risks to competition but nonetheless cleared it without commitments, applying – for the very first time – the failing firm exception.

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 not filing and triggers the same sanctions.

On 8 November 2016, the Authority jointly fined Altice Luxembourg and SFR Group €80 million for having prematurely implemented two mergers that had each been notified and cleared in 2014 (ie, the acquisition of SFR by Numericable (an Altice subsidiary) and the acquisition of OTL Group by Numericable). This decision, which followed complaints from competitors and dawn raids, was the Authority's first decision dealing with gun-jumping practices and was, then, unprecedented internationally in terms of the scale of the practices concerned and the amount of the fine imposed.

This heavy fine reflected the accumulation of various gun-jumping practices, namely:

- intervention by Altice in SFR and OTL's operational management before clearance;
- exchange of confidential information;
- far-reaching closing preparation and premature anticipation of commercial opportunities;
- anticipated assignment of managers;
- 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 that the Authority found that the behaviour was deliberate.

On 12 April 2022, the Authority fined Cofepp €7 million for both failure to notify its acquisition of MBWS and completion of the merger prior to the Authority's approval. This decision, which followed dawn raids, was the first Authority decision to simultaneously sanction two different types of gun-jumping breaches, in line with the European Commission's decisional practice and EU case law (*Marine Harvest*). Although the Authority imposed a single fine, it considered the obligation to notify a transaction and the standstill obligation as two distinct requirements that pursue separate objectives. They could therefore each lead to a fine of up to 5 per cent of the notifying party's turnover in France, which could potentially be increased to take the target's revenue into account.

The gun-jumping practices sanctioned by the Authority comprised the acquisition of control of MBWS before notification to the Authority and the fact that, after notification, Cofepp pursued its concentration with MBWS before the Authority had issued its decision (eg, by exchanging confidential information). The Authority considered that the build-up of Cofepp's interference in MBWS's business reflected a deliberate willingness to carry out the transaction in defiance of competition rules. Cofepp did not contest the facts and obtained the benefit of a settlement procedure.

The 2020 Merger Control Guidelines (the Guidelines) introduced some clarification on the action which the parties to a concentration are allowed — or not allowed — to take prior to the Authority's clearance. In particular, they stress that the prohibition of gun jumping prevents the parties from ceasing, prior to the clearance, to behave like competitors and prevents the acquirer from prematurely exercising control over the target (in law or in fact).

The Authority will assess whether the parties to the transaction behaved prematurely as a single entity already sharing a single objective, focusing in particular on the exchange of information between them, the acquirer's interference in the internal management of the target, the reduction in the target's autonomy and the adoption by the parties of any commercial behaviour that they would not have adopted before the transaction.

The Guidelines also highlight that the agreements that may be adopted between the acquirer and the target to protect the value of the acquirer's investment must not go beyond the protection of the interests of the acquirer (ie, the acquirer must not exercise a decisive influence on the target as a result of those agreements).

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

The fact that the transaction is foreign-to-foreign is irrelevant, and sanctions would apply in cases of closing before clearance.

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

No specific solutions permitting closing before clearance are provided for under French law in foreign-to-foreign transactions, other than the general possibility available in any transaction to seek from the Authority a derogation from the suspension requirement.

Public takeovers

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

Public bids may fall within the scope of French merger control if they involve stocks or shares that confer sole or joint control over an undertaking listed on the French Stock Exchange and otherwise meet the applicable jurisdictional thresholds. As a derogation to the suspensive effect of the merger control process, the stocks or shares in question may be purchased and transferred, provided that 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. Consequently, 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, 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.

A provision making the offer conditional upon clearance of the transaction by the competition authorities (the European Commission, the competition authorities of European Economic Area 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 Phase I of the review process can be inserted into the offer documents. In that case, the offer lapses and becomes void if any of the relevant competition authorities opens a Phase II review. For those purposes, the offer period is extended until the end of Phase I.

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 documents required for the purpose of a filling are listed in annexe 4-3 of the Commercial Code. Filings must include:

- a copy of the merger agreement or draft agreement and a memorandum giving details of the legal and financial aspects of the transaction and its likely impact, in particular on competition;
- the identity of the parties concerned, including the entities economically linked to them;

- a definition of the relevant product and geographic markets, as well as the criteria used to identify any substitutable products or services; and
- a description of the position in the relevant market of the parties involved in the transaction.

Filing most often involves the provision of detailed information about the parties and their business. The time necessary to prepare a non-complex filing will, in general, range from 15 days to a month, depending on the size of the transaction, the markets concerned and the cooperation of the parties to the transaction. Filings must also include a declaration certifying that the data provided is complete and accurate.

A distinction must be drawn between the markets concerned by the concentration and those that are affected by the transaction:

- Markets 'concerned' are relevant markets on which the concentration will have an influence, either directly or indirectly.
- An 'affected' market is a market on which:
    - at least two undertakings that are party to the merger are active and hold a combined market share of 25 per cent or more; or
        - at least one undertaking that is party to the merger is active, and another is active on an upstream, downstream or related market, where, on either of those markets, the combined market share of all the undertakings is 30 per cent or more.

The information required for notification is more detailed if the concentration involves affected markets.

The Guidelines provide that transactions that should not, prima facie, raise competition 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 parties to obtain clearance within a shorter period (15 to 20 working days on average) in cases where no competition issues are anticipated. The simplified procedure applies to transactions:

- where there is no horizontal or vertical overlap and where the parties are not active in neighbouring markets;
- with horizontal overlap where the combined market share is below 25 per cent or where the combined market share is below 50 per cent and the increment is less than two percentage points;
- with vertical overlap where the combined market share is below 30 per cent;
- involving activities on neighbouring markets with a market share below 30 per cent on the neighbouring markets;
- comprising a change from joint to sole control;
- comprising the creation of a full-function joint venture exclusively active outside French territory; and

- comprising acquisition of joint control of a real estate asset for sale in the future state of completion.

However, even in those situations, the Authority may still ask for a full filing if justified by the case specificities.

In 2019, the Authority launched an online notification form (including both a pre-notification form and a formal notification form) for mergers that benefit from the simplified procedure, which concerns the following notifiable transactions:

- transactions where the purchaser operates neither on the same market as the target nor on upstream, downstream or related markets (which covers most of the transactions carried out by investment funds);
- transactions relating to food distribution and that do not involve a change of trading name of the retail stores concerned; and
- transactions relating to motor vehicle distribution.

Since the entry into force of the Decree of 18 April 2019, parties only have to submit one copy of the filing (annexes included) to the Authority. The Decree also simplifies the financial data that the parties have to provide to the Authority.

Providing inaccurate information or omitting information may result in fines of up to 5 per cent of the undertaking’s turnover. In addition, the clearance decision may be withdrawn, meaning that the parties must notify the transaction again within one month of the withdrawal (otherwise, a fine may be imposed for gun jumping).

Investigation phases and timetable

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

The Mergers Unit of the Authority examines concentrations notified to the Authority.

Before the pre-notification phase, the parties can ask for the appointment of a case handler, and the Authority has to reply within five days. If the parties do not request the appointment of a case handler, the case handler will be designated within five days of pre-notification.

Informal pre-notification contacts are often necessary and highly recommended in the Guidelines to identify (and possibly resolve) potential issues. The Authority invites the parties to get in touch with its services at the earliest opportunity to anticipate any possible competition concerns. Although not compulsory under the Commercial Code, pre-notification has now become systematic in practice.

Formal notification triggers the Phase I review. The Guidelines provide that the case handlers will indicate whether the file is complete or incomplete generally within 10 working days of the filing. The Authority may request information not only from the parties but also from other market players, including the parties’ suppliers, customers and competitors. This is done notably through market tests performed by the Authority. There is also a notice posted on the Authority’s website to allow for spontaneous comments by third parties.

In addition, the Authority has the power to conduct on-site investigations, although the use of those powers remains exceptional. In cases raising competition concerns, the parties may propose remedies to avoid a Phase II review.

Should the Authority consider that a case raises major competition difficulties or should the Minister decide to request a Phase II review of a case despite clearance being granted by the Authority at the end of Phase I (and should the Authority accept such a 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 on-site 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 Phase II, during which third parties (customers, experts, etc) may be heard in the absence of the notifying parties. At the beginning of the in-depth investigation, a provisional (although not binding) timetable outlining the main steps of the forthcoming procedure is expected to be provided by the case handlers.

In its final decision, the Authority can authorise the concentration with or without commitments proposed by the parties, or it can prohibit the transaction.

In *Leclerc/Casino* (2020), the Authority prohibited a transaction for the first time, considering that the transaction would have created a local duopoly, tacit collusion and a reduction in consumers' choice. Although the parties proposed to reduce the acquired supermarket's commercial surface, the Authority ultimately blocked the acquisition.

In *Ardian/SPMR* (2021), the Authority blocked the transaction after a Phase II investigation. It raised several competition concerns, including that the target's SPMR pipeline infrastructure was an essential facility, Ardian would obtain the exclusive power to decide the pipeline's commercial policy and the French state would not have enough control over Ardian market's power. Ardian proposed commitments but these were deemed insufficient, leading the Authority to prohibit the concentration.

In 2022, in the *TF1/M6* case, Bouygues withdrew its planned acquisition of the Métropole Télévision group after the plenary session held before the Authority's board to hear the parties and various major players in the markets concerned. This hearing focused on the competition issues identified during the investigation and the commitments proposed by the notifying party; during the investigation, the Bouygues group had offered commitments relating to television and radio advertising markets, the market for the acquisition of broadcasting rights for original French-language films and the markets for distribution. Likewise, in 2023, the agricultural cooperatives Euralis and Maïsadour announced the withdrawal of their plan to create a joint venture that would have brought together the Maïsadour Group's fat palmipeds smoked fish and food retail distribution activities, Delpeyrat and Comtesse du Barry and their subsidiaries, and the fat palmipeds and food retail distribution activities of the Euralis Group, carried out by Euralis Gastronomie and its subsidiaries. The Phase II investigation opened by the Authority highlighted that the transaction could have presented high competitive risks, particularly in the downstream markets for the marketing of fattened duck products to mass retail distribution and out-of-home catering.

The Authority may also, if need be, impose by injunction conditions that were not proposed by the notifying parties. For example, in *FinancièreCofigeo/groupe Agripole* (2018), in the absence of suitable commitments from the parties, the Authority granted clearance subject to appropriate remedies it imposed to protect competition.

The Minister for the Economy has the power, after a Phase II decision of the Authority, to review the case and to take a final decision on public interest grounds, which the Minister did for the first time in *FinancièreCofigeo/groupe Agripole* (2018).

Finally, to comply with French labour law, the labour or employees' organisation (works council) of a French company involved in a merger must be informed and consulted before the signing of a transaction, and a meeting of the works council is required following the publication of the notification release on the Authority's website.

In March 2021, the Administrative Supreme Court ruled that the works council of a target company can be considered as an interested party and thus has standing to bring an action against a merger clearance decision by the Authority.

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. The clearance timetable is as follows.

Phase I

Phase I is common to all concentrations and lasts a maximum of 60 working days unless the clock is stopped by the Authority.

The Authority may authorise the concentration within 25 working days of the date on 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 up to 15 working days to finalise commitments, among other things. In this case, Phase I can last up to 60 working days, including the five working days granted to the Minister for the Economy under his or her intervention powers.
- The Authority may suspend the review period if the notifying parties fail to promptly inform the Authority of a new relevant fact or fail to provide the requested information within the allocated deadline, or third parties fail to provide the requested information for reasons pertaining to the notifying parties. The suspension lasts for as long as its cause exists.

Where no competition issues are anticipated, the simplified procedure allows the parties to obtain clearance within a shorter period (on average after 15 to 20 working days following the filing of a complete notification).

The Authority may also shorten its Phase I review when one of the undertakings is facing financial difficulties or is subject to legal proceedings.

At the end of Phase I, the parties must still comply with the waiting period granted to the Minister (five working days) if the Authority does not issue any decision by the end of Phase I (ie, grants tacit approval).

Phase II

Phase II lasts a maximum of 130 working days from its opening unless the clock is stopped by the Authority.

After Phase I review, if the concentration raises serious doubts regarding its compatibility with competition in 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 also be considered.

The Authority will issue its decision within 65 working days of the opening of Phase II. The parties may submit commitments. The 65-working-day period is maintained if the commitments are submitted within 45 working days of the beginning of the review period.

If the commitments are submitted less than 20 working days before the expiry of the 65-working-day deadline, the review period is extended by 20 working days from the receipt of the commitments. This extension is also applicable in the case of a modification of already submitted commitments proposed less than 20 working days before the expiry of the 65-working-day deadline. In any case, the review cannot be extended beyond 85 working days.

Two stop-the-clock procedures exist:

- The parties may ask for suspension of the review for up to 20 working days to finalise commitments, among other things.
- The Authority may suspend the review period if the parties fail to promptly inform it of a new fact or fail to provide the requested information within the allocated deadline, or third parties fail to provide the requested information for reasons pertaining to the notifying parties. The review period recommences as soon as the issue giving rise to the suspension is resolved.

At the end of Phase II, the parties must still comply with the waiting period granted to the Minister (25 working days).

Powers of the Minister for the Economy

The Minister for the Economy no longer has jurisdiction over merger control; however, the following must be noted:

- After Phase I, within five working days of the notification of the Authority's clearance decision to the Minister, the Minister can ask the Authority for an in-depth examination of the case; however, the Authority has discretion to decide whether to allow this request and has indicated that it will decide such request within five working days of receiving it.
- After Phase II, within 25 working days of the notification of the decision of the Authority to the Minister, the Minister has the power to review the case and take a final decision on the concentration on public interest grounds (eg, industrial and technological progress, companies' competitiveness in an international context and social welfare) but not competition grounds. The Law of 6 August 2015 provides that, where the parties have failed to comply in a timely manner with the commitments provided for in the Minister's decision, the Minister may:
  - withdraw his or her decision, thus obliging the parties to re-notify the transaction within one month;
    - enjoin the parties to comply with the relevant commitments subject to periodic penalties; 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 his or her power to review a merger on public interest grounds only once.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test for clearance is whether the transaction significantly lessens competition, especially by creating or strengthening an individual or collective dominant position. Unilateral effects, even in the absence of dominance, are taken into account.

In addition, at the end of Phase II, the Minister is entitled to call the case and take into account the economic and social effects (ie, effects other than the impact on competition) of the concentration to prohibit or authorise it.

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

No, there is no special test for joint ventures. A joint venture performing, on a lasting basis, all the functions of an autonomous economic entity is treated like any other type of merger; however, possible coordination issues between parent companies will be examined.

Theories of harm

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

The Competition Authority (the Authority) broadly uses the same analytical framework as the European Commission. In addition to the level of market shares, it may take into consideration a wide variety of elements in its assessment of unilateral and coordinated effects in horizontal, vertical and conglomerate mergers.

In the *Castel/Groupe Patriarche* (2012) Phase II case, the Authority used the upward pricing pressure test to analyse the incentives of the new entity to increase the prices of wines. The 2020 Merger Control Guidelines stress the increasing importance of such tests in the competitive assessment of transactions.

The Authority used the gross upward pricing pressure index (GUPPI) test in *Casino Guichard-Perrachon/Monoprix* (2013) as part of its analysis to impose divestments. Conversely, in *Orlait/Terra Lacta* (2014), it also used the GUPPI test to conclude that a price increase was unlikely to result from the merger, in view of the highly competitive market structure and the strong countervailing buyer power.

To quantify online competition in local markets, the Authority used for the first time a scoring method in *Fnac/Darty* (2017), in addition to the market shares and GUPPI methods. Based on diverse evidence, each competitor was given a weighting reflecting the different levels of competitive constraint they imposed on the merging parties.

In *Elsan/MediPôle-Partenaires* (2017), the Authority for the first time took account of the impact of the concentration on the quality of medical treatment offered and required corresponding divestiture commitments; however, the assessment of non-price effects of mergers is not unprecedented. For instance, the Authority had previously taken into account media pluralism issues in merger assessments and did so again in *Mondadori France/Reworld Media* (2019).

In *Carrefour/Bio c'Bon* (2021), the Authority set the threshold for the risk of economic dependence of suppliers at 22 per cent, a threshold beyond which it was considered that a producer cannot replace the loss of a customer without suffering considerable financial losses. In this case, after a market test, the Authority did not identify any situations in which the transaction would create or reinforce a state of economic dependence.

In the in-depth Phase II investigation in *Axel Springer Group (SeLoger.com)/Concept Multimédia (Logic-Immo.com)* (2018), 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 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.

The Authority also implemented this approach in *Luderix International (Picwic)/Jellej Jouets (Toys'R'Us)/undivided ownership Mulliez* (2019) and *Fnac Darty/Nature & Découvertes* (2019); however, such conclusion regarding online and physical sales channels is not systematic (eg, *Sarenza/Monoprix* (2018), *André/Spartoo* (2018) and *Dimeco/Cafom Group* (2018)).

Other recent decisions offer examples of innovative market definitions and of corresponding competitive assessments. The following decisions all involve first-time events in the Authority's assessment:

- In *Storengy/DMSE* (2021), the Authority examined the hydrogen production and distribution markets and the market for the development, construction and installation of hydrogen stations.
- In *Carrefour/Bio c'Bon* (2021), the Authority examined the markets for organic food products, recognising that organic and non-organic food products were not substitutable.
- In the *GMOB* (2021) joint venture case, the Authority examined the upstream market for the supply of electric vehicle charging points and the downstream market for the installation and operation of electric vehicle charging points.
- In *Mobilux/Conforama* (2022), the Authority applied the failing company exception (ie, unconditional clearance of an acquisition by a competitor of an undertaking that would disappear in the short term in the absence of such transaction, even if the latter is detrimental to competition).
- In *ECG Group/Vacanceselect* (2023), the Authority examined two new relevant markets: first, a market for the activity of tour operators, which consists of a campsite making some of its pitches available to a third-party campsite (known as a tour operator) so that this third-party operator can operate them on its own behalf; and second, a market for online travel agency services specialising in camping. The transaction was cleared subject to commitments.
- In *Aéroport de Paris (ADP)/Select Service Partner/Extime Food & Beverage Paris* (2023), the Authority distinguished, for the first time, the upstream market for granting concessions from the downstream concession catering market and concluded that the transaction is not likely to raise competition concerns on any of these markets. In particular, based on a counterfactual scenario, the Authority took into account the fact that the transaction would not cause the transition from an oligopolistic to a monopolistic situation, since even in the absence of the transaction the most likely scenario would be for ADP alone to take over the management of almost all catering outlets, via Extime. Therefore, the catering outlets at Paris-CDG and Paris-Orly airports would in any case be operated by a single operator and the transaction has no impact on the structure of competition on the downstream airport catering market.

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 Phase II, the Minister for the Economy may decide to examine the case.

Although the Minister cannot challenge the findings of the Authority on a competition basis, she or he can make a decision based on the grounds of public interest justifications other

than maintenance of competition. The Minister's decision may be based on factors such as industrial development, maintenance of employment or the competitiveness of the undertakings in international competition. The decision of the Minister will then supersede that of the Authority.

In 2018, the Minister used this power for the first time in *Financière Cofigeo/groupe Agripole*. In this case, the Authority had cleared, following an in-depth investigation, the acquisition by Financière Cofigeo of certain securities and assets of the Agripole group (carrying a ready-made meal business), subject to divestment injunctions. On the day of the clearance, the Minister announced that the transaction needed to be assessed on public interest grounds, in particular the maintenance of employment and industrial development.

The Minister cleared the transaction without divestment but subject to the maintenance of employment within the group for two years as he considered the divestment to have an implied material risk to employment. Further, he 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 Commercial Code requires the Authority, during Phase II, 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.

In *Ardian/SPMR* (2021), the Authority considered that Ardian had not demonstrated that the notified transaction would generate efficiency gains offsetting the anticompetitive effects of the transaction and therefore blocked the transaction.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

The Competition Authority (the Authority) has already issued two prohibition decisions (*Leclerc/Casino* (2020) and *Ardian/SPMR* (2021)) following a Phase 2 merger control investigation.

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 time frame, 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.

In this respect, in January 2020, the Authority rejected a complaint lodged by Towercast challenging TDF's takeover of Itas, claiming that this merger, which fell below the notification thresholds, strengthened TDF's dominant position. The Authority rejected the complaint, considering that the merger could not constitute an abuse of dominant position.

However, with the announcement in 2020 of the European Commission's new policy on accepting referrals by national competition authorities of concentrations that do not have a European dimension, pursuant to article 22 of the EU Merger Regulation, the Authority now has a tool to capture transactions after their implementation even when the mergers do not exceed the national notification thresholds of the referring member state.

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);
- execute a contract (eg, a trademark or patent licence);
- amend conditions of sale;
- keep the Authority informed of any change in the structure of the relevant market (eg, an increase in the parties' market share); or
- even sometimes freeze their market share.

Remedies can be submitted either in Phase I or Phase II; however, not all Phase II investigations end with remedies (eg, *Axel Springer/Concept Multimedia* (2018), *Mobilux/Conforama France* (2022) and *ADP/Select Service Partner/Extime* (2023) were 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) if the initial divestment turns out to be either unlikely or impossible.

The 2020 Merger Control Guidelines (the Guidelines) introduced a standard form of divesture commitments and a standard form of trustee mandate to habilitate a trustee to monitor and audit fulfilment of the commitments.

In the Guidelines, the Authority reaffirmed its preference for structural remedies and said that behavioural remedies shall, in principle, have at least a five-year duration. Nevertheless, there is a large possible scope for remedies:

- *Bernard Hayot/Vindémia* (2020): fix-it-first divestment commitments and unprecedented behavioural remedies were taken to protect overseas local suppliers, including maintaining current levels of supplies from local producers, setting up an internal procedure to support local suppliers in a state of economic dependency and including in contracts with suppliers a provision to protect them from negative effects relating to their economically dependent state on Bernard Hayot.
- *SAFO/NDIS* (2019): the Authority required, for the first time, an upfront buyer commitment. SAFO also agreed to a behavioural commitment not to operate the acquired hypermarket under one of Carrefour's brands and to run the hypermarket autonomously from its master franchisor to prevent the removal of an independent retail operator from the market.
- *SALTO/TF1/France Télévisions/M6* (2019): TF1, M6 and France Télévisions made several commitments aimed at preventing coordination risks between them, and to address risks concerning various markets.
- *Coopérative Dauphinoise/Terre d'Alliances* (2020): the parties committed not only to divest four platforms and a silo but also, pursuant to the principle of the sunrise clause, to submit to the prior approval of the Authority certain strategic decisions (eg, changing the name of shops) relating to the stores in areas in which the transaction gave rise to an overlap of activities between the parties.
- *Inovie/Bio Pôle Antilles* (2022): to obtain clearance, Inovie committed to abandoning its plan to acquire a minority stake in the capital of Synergibio for a period of 10 years.
- *Phoenix Group/OCP Répartition* and *La Française des jeux/Aleda* (2022): in these cases, the Authority accepted legally binding behavioural remedies. In the first case, to remedy the risk of deterioration of commercial conditions for pharmacies located in the Saint Étienne area, the parties agreed to allow termination of contracts in force without cost or penalty by 31 December 2022, and that future contracts could be withdrawn at any time without charge or penalty. In the second case, the Authority identified competition issues due to conglomerate effects in the distribution of games and bets. La Française des jeux notably undertook not to make the granting, modification or withdrawal of its authorisation conditional on the use of an Aleda global cash solution and not to offer bundles.
- *La Française des jeux (FDJ)/ZEturf* (2023) and *GCP/OCS/Orange Studio* (2024): the Authority cleared both transactions subject to behavioural remedies to ensure, respectively, the dissociation of the FDJ's monopoly gaming activities (online and point-of-sale lottery games and point-of-sale sports betting) and the competitive gaming activities (online horse race and sports betting) on the one hand; and the diversity of French cinema on the other hand.

From April 2023 to May 2024, the Authority was fairly active in the field of commitments, with four clearances subject to remedies.

Finally, regarding behavioural remedies, the Authority issued in January 2020 a comprehensive report on its decision-making practice in this field, notably revealing that one-third of the commitments taken in French merger cases are behavioural ones (among the highest rates in Europe).

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

Undertakings can be submitted to the Authority at any time from the notification of the case, during the first 25 working days in Phase I and 65 working days in Phase II.

Where the parties submit undertakings in Phase I, the review period of 25 working days is extended by 15 additional working days. The parties may also ask to stop the clock for up to 15 working days to finalise undertakings.

During Phase II, where undertakings are submitted or modified more than 45 working days after the opening of Phase II, such in-depth review period is extended by 20 working days from the date when the remedies are proposed. On several occasions (eg, *Ronsard/LDC Group* in 2021), the Authority has required fix-it-first commitments requiring the notifying party to identify, prior to the adoption of the decision, a suitable acquirer to take on the asset that it has committed to divest.

In 2019, the Authority authorised for the first time a merger with an upfront buyer commitment, whereby the transaction could not be implemented until the buyer had been approved by the Authority (*Super NKT/SAFO*).

Undertakings imposed on the parties by the Authority (ie, injunctions) aim at remedying anti-competitive effects of the operation. Moreover, remedies can be imposed by the Minister for the Economy to deal with other negative consequences.

Failure to implement a remedy can result in the following 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.

The Authority may also:

- withdraw the decision authorising the operation, in which 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.

Examples of cases in which sanctions have been imposed include the following:

- Regarding *VivendiUniversal/CanalSat/TPS*, the Authority fined Canal Plus €30 million for breaching several remedies and withdrew its authorisation in 2011. Vivendi and Canal Plus re-notified in 2012, and the Authority cleared the operation subject to several injunctions that could be renewed for five additional years (2017 to 2022).

- Regarding *Numericable/SFR*, the Authority imposed a fine in 2016 of €15 million in *Altice/Numericable* for breach of remedies. It also fined Altice and SFR Group €40 million, together with several injunctions, in 2017 for breach of other remedies regarding the same case. Although the penalty payments were cleared by the Authority in 2022, the Authority again fined Altice €75 million for not having properly complied with the Authority's injunction before the deadline.
- In 2018, the authority 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. This was the first time that the Authority fined a company for non-compliance with structural commitments comprising divesting assets within a given deadline.

It is also possible for the Authority to review remedies adopted for clearance of an operation in view of changes in circumstances. The Authority used this possibility for the first time in *Bigard/Socopa* (2011) where it authorised the enforcement of a review clause included in the clearance decision, changing a trademark licence remedy into a trademark sale remedy. Other examples include the remedies in the acquisition by Vivendi and Groupe Canal Plus of Direct 8 and Direct Star, and the acquisition of Mediaserv (now Canal Plus Telecom) by Canal Plus Overseas (now Canal Plus International).

The Authority is clearly minded to exercise a more systematic ex post control of the implementation of undertakings and insists on using trustees to monitor commitments; however, this enforcement policy does not systematically lead to findings of infringements.

Further to ex officio proceedings initiated by the Authority in 2018 to verify compliance with the commitments taken by Altice France in *Numericable/SFR* (2014) and consisting in the disposal of Completel's DSL network, the Authority considered there to be no evidence establishing that Altice had not complied with its commitment. The Authority highlighted that, when reviewing compliance with a commitment, its level of control is limited to the framework set by its previous decision that made the commitment binding (rather than a broad competitive analysis power it holds in the context of the notification of mergers).

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

Foreign-to-foreign mergers do not prevent the Authority from reviewing the merger and, if necessary, requiring remedies (eg, the behavioural injunctions imposed in *Boeing/Jeppesen* (2001) and the divestment undertaking in *GE/InVision Technologies* (2004)).

For 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.

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Ancillary restrictions

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

The French decisional practice is not as developed as that of the European Commission on the issue of ancillary restraints; however, it has been considered on a number of occasions that restrictions that are both necessary and directly related to a merger are covered by the clearance decision.

Regarding 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 now dedicate 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 that their scope and duration are not excessive), licence agreements, and purchase and supply contracts (provided that they are of limited duration and are not exclusive).

The Authority has used these provisions and examined ancillary restraints in several cases (eg, *GFI-Bus/Thales 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 Competition Authority (the Authority) may interview any third parties during the review of the concentration, and it may also seek comments from any person who may be considered relevant for the review process. The Authority may hear third parties in the absence of the notifying parties. Moreover, the works council (the 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 Phases I and II (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 (eg, *Wienerberger* (2014) in respect of the 2013 *Bouyer-Leroux/Imerys* clearance decision).

In 2018, the Authority opened an in-depth examination in *Axel Springer Group (SeLoger.com)/Concept Multimédia (Logic-Immo.com)*. 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.

In *TF1/M6* (2022), the services conducted a very large-scale investigation, including notably the analysis of thousands of pages of responses to questionnaires sent to the parties as well as to their suppliers, competitors and customers in the various markets affected by the transaction. There were also more than 20 hearings, several economic studies and exchanges with several regulatory agencies. The investigation led to the parties abandoning their planned acquisition.

In *GCP/OCS/Orange Studio* (2024), the Authority conducted an extensive market investigation, sending out questionnaires to dozens of operators in the sector and holding a number of hearings as well as consulting the French Regulatory Authority for Audiovisual and Digital Communication (*Autorité de régulation de la communication audiovisuelle et numérique* – ARCOM) and the French Directorate General for Media and Cultural Industries. Following this consultation, the Authority cleared the transaction subject to commitments.

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 Authority decisions is publicly available on the Authority's website. When a transaction is notified, a brief press 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.

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 the confidentiality of business secrets.

Decisions issued by the Minister for the Economy are published in the official ministerial publication, the electronic 'Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes' on the Minister's website.

Press releases from both the Authority and the Minister, if any, may also be found online. For important decisions, the press release is also published in English.

Cross-border regulatory cooperation

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

Within the framework of the European Competition Network, the competition authorities of EU member states inform each other of merger cases pending before them, in particular to

be able to jointly request referrals of cases to the European Commission under article 22 of the EU Merger Regulation.

On 11 September 2020, the European Commission announced that its policy on article 22 is now to encourage such requests in certain circumstances, even when the transaction does not meet the national notification thresholds of the referring member state if they may have a 'significant impact on competition in the internal market'. The Authority became the first agency to make use of this new policy when it referred *Illumina/Grail* (2021) to the European Commission.

The Authority also cooperates with non-EU antitrust agencies.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Decisions of the Competition Authority (the Authority) and the Minister may be challenged before the Supreme Administrative Court (the Council of State) on the grounds of abuse of power or for breach of a procedural rule.

In 2016, the Council of State partially annulled the decision of the Authority clearing the acquisition of Totalgaz by UGI (2015) in the liquefied petroleum gas sector.

In 2017 and 2018, the Council of State reviewed a number of appeals relating to the *Fnac/Darty* merger and rejected all such appeals.

In 2019, the Council of State rejected the request for suspensive interim measure lodged by Mondadori's works council, which sought to suspend the Authority's conditional clearance in the *Mondadori France/Reworld Media* case.

In *Illumina/Grail* (2021), the Council of State dismissed the appeal against the Authority's decision to refer the case to the European Commission. It considered the Authority's referral to be inseparable from the review of the concentration by the European Commission and that the whole procedure could only be reviewed by the EU Court of Justice, so the Council of State had no jurisdiction over such an appeal.

In a judgment of 13 July 2022, the EU General Court confirmed the possibility for a national competition authority to refer a transaction that falls below the notification thresholds to the European Commission (an appeal to the EU Court of Justice is pending and the Advocate General issued its opinion on 21 March 2024 advising the EU Court of Justice to set aside the General Court's judgement).

Time frame

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

Appeals against decisions of the Authority and of the Minister can be brought by the parties within two months of the date when the decision is notified and by third parties within two months of publication of the decision on the Authority's website.

In principle, appeals do not result in the suspension of the decisions; however, an action to suspend a decision issued by the Authority can be lodged before the Council of State through a request for a suspensive interim measure. The 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 *Cegid/CCMX* (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. The merger was eventually cleared by the Council of State in 2006.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

Merger control activity remained intense over the past year, with approximately 265 clearance decisions rendered from April 2023 to April 2024. Four of those were conditional clearances, mainly in the sectors of distribution and retail, services and media.

In the past few years, several concentrations in French overseas territories were examined. This kind of merger is often resolved with commitments, given the specificity of the overseas markets and local vertical integration issues (eg, *Biolab Martinique/Cerba* (2022)).

One merger case was referred by the European Commission to the Competition Authority (the Authority) in the past year, upon request of the parties.

To address the question of retailers' buying power, parties to joint purchasing agreements in upstream retail must inform the Authority of any contemplated buying alliance, even if the arrangements do not fall within the scope of merger control (eg, because it is a non-full-function joint venture). This obligation applies where the following cumulative thresholds are met:

- all the undertakings that are party to the contemplated arrangement achieved, during the previous financial year, a worldwide combined pre-tax turnover exceeding €10 billion; and
- all the undertakings that are party to the contemplated arrangement achieved in France, during the previous financial year, a combined pre-tax purchase turnover of over €3 billion.

In 2018, the Authority opened two market investigations in relation to notified purchasing alliances (one between Auchan, Casino, Metro and Schiever, and another between Carrefour and Tesco). In October and December 2020, it issued two decisions making legally binding commitments proposed by those undertakings, which were made for five years and will be verified by a trustee approved by the Authority.

Reform proposals

35 | Are there current proposals to change the legislation?

With regard to the introduction of ex post (ie, post-closing) merger control review, the Authority announced in 2020 that it would try to review more closely operations that currently fall below the thresholds but that impact the competitive dynamics of markets.

In that respect, the Authority indicated that it welcomed the decision of the European Commission to accept referrals by national competition authorities pursuant to article 22 of the EUMR for concentrations that do not have a European dimension, even when they do not meet the national notification thresholds. In particular, it mentioned that it had, on several occasions, called for such a change to the application of article 22 to better address predatory or consolidating acquisitions that fall below the thresholds that have been observed, in particular, in the digital economy, in the pharmaceutical and biotechnologies sectors, and in a number of highly concentrated industrial sectors.

This new referral possibility was used by the Authority in early 2021 in *Illumina/Grail* and in 2023 in *Qualcomm/Autotalks*.

Finally, in its roadmap for 2024-2025, the Authority indicated that it will continue to consider the use of the new merger control possibilities now provided by article 22.

QUPDATE 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 revised Merger Control Guidelines (the Guidelines), issued in 2020, continue a trend of alleviating the burden on companies that trigger merger control procedures. The Guidelines aim to provide a new and more informative framework that enables companies to better anticipate the approach of the Competition Authority (the Authority).

The Authority indicated that it welcomed the decision of the European Commission to accept referrals by national competition authorities pursuant to article 22 of the EU Merger Regulation for concentrations that do not have a European dimension, even when they do not meet the national notification thresholds.

This new referral possibility was used for the first time by the Authority in early 2021 and confirmed by the EU General Court in 2022 in respect of the acquisition of Grail, an innovative

biotech company, by Illumina (an appeal is pending before the EU Court of Justice) and again in 2023 in respect of the acquisition of Autotalks by Qualcomm, both world leaders in long- and short-range communication technologies, which are increasingly used in the automotive and road infrastructure industries. These referrals are the first and second time the European Commission has accepted referral requests under Article 22, demonstrating the Authority's support for use of this framework and its focus on problematic concentrations that do not meet the French notification thresholds.

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Notification trigger/ filing deadline	Notification trigger:
	• the concentration does not have an EU dimension;
	• combined worldwide turnover of all parties is over €500 million; and
	• either:
	  • at least one party has a turnover of over €50 million in Germany; and
	  • another party has a turnover of over €17.5 million in Germany;
	• or:
	  • one party has a turnover of over €50 million in Germany, but neither the target nor any further participating undertaking has a turnover in Germany exceeding €17.5 million;
	  • the value of consideration for the transaction is over €400 million; and
	  • the target is active in Germany to a significant extent.

Clearance deadlines (Phase I/Phase II)	Phase I: one month from notification. Phase II: five months from notification (extension possible if merging parties consent). Extension by one month, if merging parties submit remedies proposals. Suspension effects: suspension until clearance (possibility of a derogation upon request for important reasons).
Substantive test for clearance	Whether a merger will significantly impede competition; in particular, if it will create or strengthen a dominant market position (statutory rebuttable presumption 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, for credit and other financial institutions, and for insurance companies.

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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 Federal Cartel Office (FCO) in Bonn. The current legislation can be found in Part 1, Chapter 7 of the Act against Restraints of Competition of 1958 (GWB).

The FCO is a federal authority that is responsible to the Federal Ministry for Economic Affairs and Climate Action (the Ministry) but is independent in its decision-making and does not receive binding instructions.

The FCO is subdivided into 13 decision divisions. The first to ninth decision divisions have jurisdiction for the full range of competition law enforcement areas in specific economic sectors, including merger control. The 10th to 12th decision divisions specialise in prosecuting hardcore cartels. The final decision division (known as the V division) is in charge of consumer protection and is also responsible for the full range of competition law enforcement areas (including merger control) in specific economic sectors (not covered by the first to ninth decision divisions).

The FCO is supported by its Chief Economist Team, which is part of a division responsible for general competition law questions. Andreas Mundt has been the president of the FCO since 2009.

Scope of legislation

2 What kinds of mergers are caught?

The GWB sets out a comprehensive list of events that constitute 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 that constitute 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).

A concentration shall also be deemed to exist if the undertakings concerned have previously triggered a concentration, unless the new concentration does not result in a substantial strengthening of the existing affiliation between the undertakings. This may even apply to transactions only strengthening a pre-existing concentration type (for example, a concentration may exist where an existing material competitive influence is strengthened, but without

it becoming control). The FCO confirmed this very recently when it analysed the notifiability of additional investments by Microsoft in OpenAI.

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).

Not only is the acquisition of a share of 25 per cent or more a concentration between the acquirer and the joint venture, but it 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.

It is not entirely clear in practice whether the concentration between the newly acquiring shareholder and the other parent companies (with a pre-existing shareholding of over 25 per cent) should be viewed as a stand-alone concentration independent from the concentration between the newly acquiring over-25 per cent shareholder, or whether both concentrations should be viewed as one single concentration (with, therefore, at least three undertakings concerned for the purposes of turnover thresholds calculation).

The GWB does not differentiate between full-function and non-full-function joint ventures, so 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.

Joint ventures are not only subject to merger control but may also fall under the provisions on restrictive practices (section 1 of the GWB and article 101 of the Treaty on the Functioning of the European Union). This means that they require merger control clearance by the FCO 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 acquiring control under the European merger control regime has largely been adopted in Germany. Although there is no definition of 'acquisition of control' in the GWB, its 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.

The German merger control regime also catches acquisitions of interests below the level of control. An acquisition resulting in an interest (shares or voting rights) of 25 per cent or more constitutes a concentration. In addition, the acquisition by one or several enterprises of a material competitive influence over another enterprise constitutes a concentration. This covers situations where:

- a shareholding of below 25 per cent is acquired, provided additional factors that make the situation comparable to an acquisition of 25 per cent are present; and
- at the same time, the acquired influence is relevant for competition (ie, the acquirer obtains an influence that can have an effect on the way the target company competes on the market or its potential to compete).

Such factors can include any that may give the acquirer the possibility of influencing the target (eg, the right to appoint members of the supervisory board, information rights as a shareholder and specific rights agreed in the shareholders' agreement, 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 FCO 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, and sector-specific knowledge of the minority acquirer) than to purely quantitative indicators (percentage of the shares acquired and 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 FCO cleared in May 2017. The two companies planned to hive off Budnikowsky's procurement, IT, e-commerce, administrative and logistic activities into the joint venture in which EDEKA would hold 25.1 per cent. However, while EDEKA did not acquire any shares in Budnikowsky or vice versa, the FCO still considered that EDEKA's shareholding in the joint venture allowed it to exert material competitive influence over Budnikowsky. The FCO's decision 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.

Recently, the FCO also considered that investments made by Microsoft in OpenAI conferred material competitive influence; however, there was no notification obligation as none of the sets of thresholds were reached.

Consequently, for legal certainty, it may be advisable to notify cooperation agreements like this to the FCO in the future. Some commentators have also described this case as a way of using the merger control regime to obtain an individual exemption for cooperation agreements.

A more recent case illustrating the test for material competitive influence relates to the Kühne Group's acquisition of additional shares in Lufthansa, leading to a minority participation of 15.01 per cent. The acquisition was subject to merger control as the FCO found that Kühne would be able to exercise a material competitive influence on Lufthansa due to continuously low attendance at Lufthansa shareholder meetings over the previous few years. According to the FCO, Kühne would assume the role of a minority shareholder with de facto blocking 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?

There are two sets of thresholds.

According to the first set of thresholds, a concentration must be notified prior to its completion if in the preceding financial year:

- the combined worldwide turnover of all participating enterprises exceeded €500 million;
- one participating undertaking had a turnover exceeding €50 million within Germany; and
- at least one further undertaking had a turnover in Germany exceeding €17.5 million.

The second set of thresholds catch concentrations that do not meet the thresholds in the first set in an attempt to give the FCO the power to review certain transactions in, among other sectors, the fast-moving digital sector. According to the second set of thresholds, a concentration must be notified prior to its completion if in the preceding financial year:

- the combined worldwide turnover of all participating enterprises exceeded €500 million;
- one participating undertaking had a turnover exceeding €50 million within Germany, but neither the target nor any other participating undertaking had a turnover in Germany exceeding €17.5 million;
- the value of consideration for the transaction exceeds €400 million; and
- the target is active in Germany to a significant extent (local nexus).

If the parties to a concentration fulfil the first set of thresholds, they will be exempted from the notification obligation if the concentration relates to the combination of public undertakings as a consequence of a reform of communal territory. This exemption does not apply if the parties to a concentration fulfil the second set of thresholds.

Other exceptions exist in relation to members of a banking association and the hospital sector.

Turnover figures must be calculated by reference to an undertaking's most recently completed financial year, on a worldwide consolidated group basis, excluding intra-group sales and value added tax. In specific sectors, the calculation of turnover is a two-step process – for example, in the case of traded goods (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, building societies, companies that are active in the broadcasting sector, and producers and distributors of newspapers or magazines.

Transactions that meet the above thresholds but have no appreciable domestic effects within the territory of Germany are exempt from the notification requirement.

The question of whether the target is active in Germany to a significant extent (which is relevant for the application of the second set of thresholds) is different from the question of whether the transaction can have an appreciable effect in Germany and should, therefore, be dealt with separately. In 2018, the FCO published a joint guidance paper with the Austrian competition authority on the first question, which has recently been slightly updated. Although the new transaction value thresholds available under the GWB have to date only triggered jurisdiction in a very small minority of cases reviewed by the FCO, the FCO will carefully analyse whether the conditions for jurisdiction are met. When disputable or disputed, the FCO will take the time necessary to analyse this (see, for example, *Meta/Kustomer* and *Microsoft/OpenAI*).

German merger control is not applicable to any transaction that falls within the scope of the EU Merger Regulation (EUMR) (with exceptions provided for in the EUMR, such as the EUMR referral process). Similarly, merger control under the GWB is not applicable to any transaction that falls below the German turnover or transaction value thresholds, and the FCO cannot investigate such cases.

However, a recent reform of the GWB gave the FCO new powers to impose an obligation on selected companies to notify all future concentrations in one or several economic sectors if certain cumulative criteria are met:

- the company must have had revenues in Germany above €50 million;
- there must be objective elements that indicate that competition in Germany, in the relevant sectors, could be significantly impeded; and
- the target company must have achieved revenues in Germany of more than €1 million in its preceding business year.

The FCO can impose such an order only if it has previously conducted a sector inquiry in at least one of the economic sectors concerned. The order is valid for three years (renewable).

The FCO is contemplating making the first application of this possibility in the waste management sector, specifically with regard to *Rethmann Group/Remondis*. It completed an inquiry in the sector in 2023.

Following the announcement by the European Commission that it had modified its policy practice so as to accept, under article 22 of the EUMR, referrals from national competition authorities even if they themselves originally had no jurisdiction over the case because the national merger control thresholds were not met, Germany has been vocal that it would not refer such cases to the European Commission (or join such a referral). Other EU member states have chosen an alternative approach.

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

Filing is mandatory if the jurisdictional thresholds are met and if the requirements of the appreciable (domestic) effects clause are met.

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

Foreign-to-foreign mergers are subject to the German merger control regime only if they have an appreciable effect within German territory, the concept of which the FCO has always applied 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 German territory, 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 those 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 FCO updated its guidance in 2014 to relieve concentrations that do not affect Germany of unnecessary bureaucracy. The guidance provides concrete examples as well as a flowchart to illustrate how to apply the concept of appreciable effects. The German-language version of this guidance has, however, been removed from the FCO's website since it is currently being updated, but can still be referred to for guidance.

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

Yes, under the applicable Foreign Trade and Payments Ordinance (AWV), there are two different tests under which the Ministry assesses foreign investments: the cross-sectoral examination and the sector-specific examination.

Both regimes have been frequently amended in recent years, leading to tighter control over acquisitions of domestic companies. Some of the recent changes were adopted to implement Regulation (EU) 2019/452 (the EU Screening Regulation); however, the German government has chosen to define many of the sectors and activities that are described by the EU Screening Regulation in more detail.

Cross-sectoral examination

The cross-sectoral examination regime is applicable in all cases where investors from outside the European Union or the European Free Trade Association (EFTA) – directly or indirectly – acquire 25 per cent or more of the voting rights in a German enterprise. It allows the Ministry to initiate a review of the investment and applies to all sectors and enterprises.

It also applies in cases where non-EU or non-EFTA investors acquire at least 10 per cent (or in some cases at least 20 per cent) of the voting rights in a German enterprise engaged in a number of defined activities that are considered to be particularly sensitive (eg, the operation of critical infrastructure, or the development or manufacturing of certain critical technologies). In these cases, a mandatory filing obligation and a standstill obligation apply.

For all other acquisitions, filings are voluntary but may be advisable if the acquirer concludes that there is a risk of a call-in of the acquisition for review by the Ministry.

If no filing is made, the Ministry has up to five years from signing to open an investigation (and, in the worst-case scenario, unwind the transaction).

The cross-sectoral examination also applies to acquisitions by acquirers from within the European Union or the EFTA if one of their (indirect) shareholders comes from a non-EU or non-EFTA member state and holds 25 per cent or more (or, if the lower thresholds are applicable, 10 per cent or 20 per cent, or more) of the voting rights in the acquirer. Since 2021, the review right also applies to acquisitions below the applicable voting rights thresholds if atypical control is acquired, such as by means of a certain number of seats on the board or management, or in the form of certain veto rights.

Critical infrastructure that is subject to the mandatory regime includes certain facilities and systems in the following sectors: energy, information technology and telecommunications, transport and traffic, health, water supply, food, finance and insurance and municipal waste management. These are described in more detail, by type and threshold, in one of the applicable regulations (BSI-KritisV).

Critical technologies are defined in detail in the AWV and include, among other things, automated or autonomous vehicles, unmanned drones, semiconductors and certain types of industrial robots. Most of those categories are defined in more detail either in the AWV or in industry-specific regulations.

In addition to critical infrastructure and critical technologies, the mandatory regime applies to a range of other activities, such as software for the operation of critical infrastructure, cloud computing services, the media, the extraction and processing of certain raw materials, and a very broad range of activities in the health sector. In light of the covid-19 pandemic, the mandatory filing obligation was extended to include companies that develop, manufacture or distribute (components for) personal protective equipment, certain pharmaceuticals or certain medical products.

In its review, the Ministry assesses whether the acquisition is likely to pose a threat to public order or the security of Germany, of another EU member state or in relation to projects or programmes of EU interest within the wording of article 8 of the EU Screening Regulation.

The Ministry may either restrict the acquisition (eg, through commitments or by limiting the scope of an investment) or prohibit it altogether. The review period is two months (with potential extensions subject to agreement by the parties) starting from the day of the submission of the complete filing. If an in-depth investigation procedure is opened and the parties have sufficiently addressed all questions raised in the opening decision, the Ministry has four months to clear the case (unconditionally or with conditions), enter into negotiations with the purchaser (which stops the clock) or prohibit the transaction. This review period can be extended by another three months in factually or legally complex cases and is suspended in the case of information requests from the Ministry.

Germany has implemented the EU cooperation mechanism that allows the European Commission and other member states to provide comments in relation to foreign investments undergoing screening in Germany.

Sector-specific examination

The sector-specific test applies to all non-German purchasers, including from within the European Union or the EFTA. It focuses on acquisitions falling within certain strategic sectors, ie, acquisitions of 10 per cent or more of the voting rights in domestic companies that produce, develop or possess goods listed in Part I, section A of the German export control list (war weapons, ammunition and defence goods) or domestic companies that are active in relation to certain cryptographic systems and certain other defence-related goods/activities must be notified to the Ministry.

The Ministry may prohibit or restrict the acquisition to safeguard Germany's essential security interests. The transaction may not be closed without the approval of the Ministry, which must issue a written statement of clearance if there are no objections to the notified investment.

Like in the cross-sectoral examination, the in-depth review that follows the initial two-month period can take up to four months (subject to extensions) and negotiations of remedies and requests for information stop the clock. The review period can be extended by another four months in legally and factually complex cases.

Sanctions

Where the suspensory regime applies, failure to notify may lead to the transaction being invalid until clearance. In addition, criminal sanctions (prison terms of up to five years or financial penalties, or both) for closing without obtaining prior clearance and certain other activities that are considered to be gun jumping (eg, the exchange of sensitive information) apply. The same applies to violations of enforceable orders by the Ministry prohibiting or restricting an acquisition. Negligent violations may give rise to administrative fines.

For transactions that do not trigger a mandatory filing, the Ministry may still open a review procedure ex officio and, in the worst-case scenario, the transaction may have to be unwound. In the case of a review, the Ministry may issue enforceable orders prohibiting or restricting an acquisition, and violations may give rise to administrative or criminal sanctions.

Special sectors

Besides the general foreign investment regime, there are some other sector-specific rules, such as in relation to radio and television broadcasting.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

There are no legal deadlines for notification of a concentration; however, 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 if the concentration project is sufficiently well defined.

Fines can be imposed for closing before clearance as well as for submission of incorrect or incomplete filing. Such sanctions are regularly applied in practice.

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

In principle, all parties involved in a merger (ie, typically the purchaser and the target company) are responsible for filing. In the case of an acquisition of shares or assets, the vendor must also notify. In practice, the filing is often done by the acquiring firm on behalf of all parties involved.

Filing fees payable to the Federal Cartel Office (FCO) can amount to up to €50,000 (in cases of minor importance or with an 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 FCO 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 FCO 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 must not be completed before either the FCO has cleared the transaction or the relevant waiting periods of one month (Phase I), or five months (Phases I and II together) after submission of a complete notification have expired without the FCO having prohibited the transaction.

Case law from 2008 clarified that the suspension obligation also applies to transactions that are notified to the FCO, even where there is no formal notification obligation; therefore, the decision to submit a precautionary notification of a transaction where the question of the notification requirement is not entirely clear (eg, in possible cases involving the acquisition of

material competitive influence) must be carefully made as the notification, once submitted, triggers the waiting periods until a final decision of the FCO is rendered.

The FCO 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 FCO and the courts interpret this exemption restrictively. Stock market developments, staff loss or competitiveness risks would usually not suffice – exemption tends to be limited to situations of imminent insolvency.

Recently, the FCO granted this exemption for a notifiable transaction involving the appropriation of shares that had been pledged to secure claims. The exemption was necessary to ensure that the transaction was not made public before its implementation as this could have influenced stock market prices and thus jeopardised the full satisfaction of the claims secured. One condition of this exemption was that the voting rights acquired could not be exercised until formal clearance was granted by the FCO. A second condition was to notify the transaction immediately (within 14 days at the latest) after effective transfer of the shares.

The parties have the right to withdraw their notification at any time unless the FCO has delivered a decision ending the procedure (eg, an explicit or implicit clearance decision or a prohibition decision). 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 FCO regularly imposes fines for closing notifiable transactions prior to clearance. Since the end of 2007, the FCO has imposed five fines (up to €4.5 million) for closing before clearance.

In *EDEKA/Kaiser's Tengelmann*, the Higher Regional Court of Düsseldorf decided that 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 was confirmed by the German Federal Court of Justice (BGH) in November 2017, which decided that measures or behaviour that themselves cannot constitute a concentration per se, but that 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 *EDEKA/Kaiser's Tengelmann II*, the BGH confirmed that the FCO can formally issue interim measures against existing or merely imminent gun-jumping acts (according to the FCO, this approach also holds in the context of the EU Court of Justice's *Ernst & Young* judgment).

In cases of negligent disregard of the notification obligation, the FCO usually informs the parties 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 FCO will usually impose a fine. Fines are much more likely to be imposed if there is already a negative track record.

The FCO 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 FCO 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 Phase I cases does not apply.

Should the FCO 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 FCO to undo a consummated merger that fulfils the prohibition conditions in the Act against Restraints of Competition of 1958 (GWB) quickly, as there is no longer a need to issue a formal decision prohibiting the merger before opening a merger dissolution procedure.

Further, any transaction implementing a merger in violation of the clearance requirement is regarded as invalid under civil law (at least in German law) until final clearance is given.

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

Sanctions for closing before clearance are applied to any notifiable concentration. Whether the concentration involves national undertakings or foreign undertakings is irrelevant.

The largest fine ever imposed by the FCO for closing before clearance related to a foreign-to-foreign merger (the fine imposed on Mars in 2008 for having closed the non-German parts of the acquisition of Nutro Products).

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

Hold-separate arrangements that are entered into between the parties for the purpose of closing a foreign-to-foreign transaction prior to clearance without breaching the suspension obligation may be possible if they ensure that the closing will not have an impact on the market in Germany; however, because they are unusual under German merger control rules, they require analysis in each individual case.

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 FCO's fining of Mars in 2008 for having closed its acquisition of Nutro before clearance. Mars had notified its intention to acquire all shares in Nutro. Nutro had no assets in Germany, and all sales

of Nutro products into Germany were made through an independent third-party distributor located outside Germany. Following clearance by the Federal Trade Commission in the United States, Mars acquired the majority of the shares in Nutro prior to the FCO'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 FCO found that this was not sufficient as, in the FCO's view, the German business could not be separated from the remaining Nutro business. It 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 carve-out or hold-separate solutions with the FCO beforehand to avoid fines. In cases that do not raise competition issues, asking the FCO 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) of the EU Merger Regulation, 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 FCO, 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 FCO.

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:

- the name;
- the place of incorporation;
- the type of business;
- the turnover of the parties involved (worldwide, in the European Union and in Germany);
- the 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.

If the transaction is notified because the second set of thresholds is met, the value of consideration for the transaction and the principles dictating its computation are also required pieces of information. It is advisable, and it 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 letter setting out the necessary information. Very often, a standard, non-issues-case German merger notification consists of approximately 10 pages in a letter format, which must however contain all information necessary for the FCO to confirm the absence of competition concerns. The notification must be submitted in German, and the relevant waiting period begins after a complete notification has been received by the FCO.

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 (eg, as internal reports or annual reports and accounts) to the FCO; however, the FCO sometimes requests those documents. Similarly, the FCO does not usually require the submission of powers of attorney.

Fines for the following administrative offences can be imposed. If a filing is made with incorrect or incomplete information, a fine of up to €100,000 can be imposed. A fine of €90,000 was imposed in *Clemens Tönnies/Tummel* (January 2013) as one notifying party did not disclose a majority participation in a company, despite this participation being relevant for the substantive assessment of the notified concentration with another company.

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 FCO to refrain from issuing a prohibition decision or from opening a Phase II investigation.

External lawyers advising the notifying parties can also be fined if they intentionally submit incorrect information. Several external lawyers have already been subject to such an infringement procedure.

Fines for incomplete filings have, to date, been rare in practice. Early in 2016, the FCO 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 FCO is likely to impose significant fines (eg, a fine of €250,000 was 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 FCO has sufficient data on the relevant markets, a decision is likely to be issued after internal discussions within the FCO 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, the division often contacts other market participants (eg, competitors, customers, suppliers or business associations) to seek their views and information on their activities and the relevant markets, and it often requires the notifying parties to provide further information.

In most cases, the FCO can ascertain during the Phase I investigation that the case does not raise substantive competition problems in Germany. In those cases, it will issue an

informal clearance letter. The clearance letter is not reasoned and is not subject to appeal by third parties.

If competition concerns are identified during the Phase I investigation, the FCO must inform the parties (usually, but not necessarily, in writing) within one month that a Phase II investigation will be initiated. This notification in almost all cases does not contain preliminary views on the substance.

If the initial concerns are not confirmed during Phase II, the FCO will either clear the concentration directly or, especially if there are intervening third parties, issue a draft clearance decision. If the Phase II investigation confirms the competition concerns, the FCO will set out the identified issues in a written statement of objections (or a draft prohibition decision).

Both the statement of objections (or draft prohibition decision) and the draft clearance decision provide an opportunity to submit comments. In addition, upon request of the notifying or the intervening third parties, the FCO will also allow them to present their comments in a meeting with the case team (such meetings can happen before or after sending a draft statement of objections or draft decision).

Merging parties can submit proposals for commitments at any time of the procedure, provided that the FCO still has sufficient time to review and market test the proposal. Submissions of commitments do not require prior receipt from the FCO of a written statement of objections or draft decision. Discussions on possible commitments can be launched via the submission by the parties of commitment or remedy outlines to be discussed with the FCO before more formal proposals are put on the table.

At the end of Phase II, the FCO 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.

Clearance decisions with commitments can only be issued at the end of the Phase II procedure (by contrast to the EU merger control regime, for example). A recent case in the waste disposal sector (*K+S/Remex/JV,* December 2021) could be cleared by the FCO in Phase I only after the parties agreed, during the review procedure, not only to take some measures remedying competition concerns, but also implement them before clearance was granted in Phase I.

Although some commentators have presented this case as being a conditional clearance in Phase I, this is not correct – it is in effect an unconditional Phase I clearance decision based on changes implemented by the parties modifying the facts for review (eg, effective divestment by one of the parties of its share in a competitor during the ongoing review and contractual arrangements with a positive effect on the structure of competition). Although not strictly speaking a conditional decision, the role played by the FCO in encouraging the parties to implement fix-it-first measures is notable as it enabled an unconditional Phase I clearance.

The FCO 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 and are welcomed, as they

will identify the areas in which the FCO would like to receive more information, among other things.

The FCO has often mentioned in press releases that Phase I clearances are regularly granted, owing to intensive analysis having been conducted in agreement with the parties, even before the parties have formally submitted their notification. By contrast, in simple cases, pre-filing consultations with the FCO seem to be unnecessary.

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

The FCO 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 Phase II investigation.

Decisions in Phase II proceedings must be issued within five months of the notification date. The five-month period may be further extended, provided that the notifying parties consent. This is applied in many cases, particularly (but not only) after commitments have been proposed by the parties to allow the FCO to properly market test the commitments, and there is an automatic one-month extension of Phase II if the parties submit commitments.

There is no mechanism in Germany through which the parties and the FCO can agree to pause the review or give more time for review; this is achieved through jointly agreed review period extensions (ie, deadlines subject to prorogation). However, there is a stop-the-clock mechanism in Phase II proceedings, should the notifying parties not fully respond to an information request of the FCO.

In practice, decisions are usually issued within the initial investigation (Phase I) 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 Federal Cartel Office (FCO) if it would significantly impede effective competition, in particular if it leads to the creation or strengthening of a dominant market position. The dominance test was replaced by the European significant impediment of effective competition (SIEC) test in 2013; 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 on Substantive Merger Control' document on the dominance test continue to be relevant. The FCO applies the analytical framework of the SIEC test in a similar way as the European Commission. In a recent judgment of the German Federal Court of Justice, it was clarified that a strengthening of a dominant position does not need to be significant to justify a prohibition decision (judgment of 12 January 2021 relating to the FCO's prohibition

decision in *CTS Eventim/Four Artists*). Any strengthening of a dominant position can therefore constitute an SIEC (leading to a prohibition decision).

According to the definition of dominance under the Act against Restraints of Competition of 1958 (GWB), a dominant position exists if one or more enterprises have no competitors, 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 regarding 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 FCO and the German courts. In contrast to the presumption of single-firm dominance, the parties must rebut the presumption of collective dominance (by showing, among other things, that there would be no implicit collusion between the presumed jointly dominant companies). Because the FCO 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 FCO often considers complex economic arguments. Besides market share levels, the factors it takes into account include:

- the competitive structure of the market, including overcapacities on the market;
- barriers to entry and potential competition;
- the closeness of competition;
- switching costs;
- access to customers (eg, the importance of distribution networks and brands);
- access to suppliers or purchasing patterns of customers;
- vertical integration;
- structural links to competitors;
- suppliers and customers; and
- if relevant, the parties' financial resources.

From 2020 to 2021, numerous retail mergers, or specialist retail, such as book retail or furniture retail, confirm that the FCO will look in depth at both the customer-facing and the procurement sides of retail businesses, with many of those cases having been looked at in Phase II, ultimately leading to conditional clearances. The 'Guidance on Substantive Merger Control' document sets out the analytical framework for review.

There are three situations in which a concentration cannot be prohibited by the FCO even if it would significantly impede effective competition:

- 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. This exception is rarely applied in practice.
- The SIEC concerns exclusively relevant markets that have been in existence for at least five years and that had – added together – a total annual value of less than €20 million in the preceding calendar year (de minimis market clause). This rule does not apply where a concentration is notifiable pursuant to the second set of thresholds provided by the GWB. It also does not apply in relation to markets in which the service is provided free of charge to users. In the assessment of the €20 million threshold, only the value of the German part of the market has to be taken into account, even if the geographical market is wider than the national market. If the relevant geographical market is narrower than the national market, the relevant geographical market must be taken as the reference point for the calculation.
- The third exception is a specific rule for the failing firm defence in the press (newspaper and magazine) sector. Dominant publishers will be allowed to acquire a small or medium-sized competitor, even if this leads to the strengthening of a dominant market position, provided that the acquired publisher meets specific financial underperformance criteria (which are clearly defined by the GWB 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 must pass the SIEC test under the merger control rules.

In addition to the SIEC test under the merger control regime, all cooperative aspects of the joint venture are reviewed under the restrictive practices provisions of the GWB (this is in contrast to the EU Merger Regulation, 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 recent judgment of the Higher Regional Court of Düsseldorf dated 22 September 2021 related to the FCO's clearance decision in *Telekom Deutschland/EWE*. It clarified that any commitments entered into by the undertakings as the result of this parallel review under the restrictive practices provisions can also be considered in the assessment of the competitive dynamics as part of the merger control review (in that case, they were considered as insufficient to allay competition concerns).

A joint venture will raise competition issues if it leads to coordination between the parent companies. Coordination will be more likely in cases where the parent companies continue to be active on the same market as the joint venture.

Spillover effects on neighbouring or other markets are less likely but can also occur (eg, if the joint venture carries substantial weight compared to the parent companies' other activities); however, a joint venture is unlikely to violate the restrictive practices provision if:

- 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 FCO 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 FCO will typically approach the analysis can be found in its 'Guidance on Substantive Merger Control' document.

In *Remondis/DSD* (July 2019), the FCO prohibited the concentration for reasons of both vertical foreclosure risks (customer and input foreclosure – raising rivals' costs) and horizontal overlaps leading to dominance on the other.

With regard to unilateral effects, key aspects of the FCO's analysis relate to market shares, concentration ratios, capacity restrictions, customer preferences and switching costs, intellectual property 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 FCO focuses its assessment on input and customer foreclosure effects.

With regard to coordinated effects, the FCO's assessment focuses on whether coordination becomes more stable – for example, because a significant outside competitor is acquired or the companies participating in coordination become more symmetrical.

The identification of competition issues in conglomerate mergers is, by contrast, rather rare.

The protection of companies' incentives and ability to compete have played an increasing role in the FCO's substantive assessment, and the degree of innovation capabilities is a factor that is taken into account by the FCO in its substantive assessment. Although the FCO has had no prominent recent case, there is no reason to believe that the FCO's approach would differ from the recent approach of the European Commission in innovation. In *Novartis/MorphoSys*, the FCO reviewed in detail the impact that the acquisition by a large pharmaceutical company of a German biotechnology company may have on the research and development of new products.

Non-competition issues

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

Non-competition considerations are not relevant and must not be taken into account by the FCO. The FCO regularly reiterates that its prerogative is the control of concentrations purely from a competition perspective. 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.

The FCO's decision to prohibit a merger can be overruled by the Federal Minister for Economic Affairs and Climate Action (the Minister) 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 rules in 1973, a ministerial authorisation has only been granted without conditions in three cases and with conditions in seven cases (most recently, in *EDEKA/Kaiser's Tengelmann* (2016) and *Miba/Zollern* (2019)). In total, there have been only 23 applications (according to the number communicated by the Federal Ministry for Economic Affairs and Climate Action in the context of its recent consultation on a new reform of the law).

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 Minister to issue guidelines about details of the procedure. The Minister is supposed to authorise a merger within four months of receiving the application; if a decision is not reached after six months, the application will be deemed to have been 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 a right are quite high, it remains to be seen whether 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/Kaiser's Tengelmann*, in which a merger was initially authorised by the Minister but then later blocked by the Higher Regional Court of Düsseldorf following appeals from competitors.

Economic efficiencies

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

Efficiency arguments have to date not played a major role in the FCO'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 those cases, clearance can still be granted if the parties can demonstrate that the merger will also result in an improvement of market conditions that outweighs the disadvantages of market dominance.

Efficiencies can only be considered as an improvement of market conditions if the efficiency gains would be passed on to consumers (balancing clause). In this respect, the FCO will require a high level of proof that the parties will pass on the efficiencies.

As the FCO works on the understanding that a dominant company will often have little or no incentive to pass efficiency gains on, it is difficult to succeed with efficiency arguments in cases involving the creation or strengthening of a dominant position; however, efficiencies will be thoroughly investigated by the FCO (for a positive outcome, see Charité/Deutsches Herzzentrum Berlin).

Whether efficiencies will be accepted as a defence in SIEC cases that do not create or strengthen a dominant position is an open question. Efficiency arguments can play a role in proceedings regarding ministerial authorisation.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

If the statutory conditions for prohibition are fulfilled, the Federal Cartel Office (FCO) will prohibit the merger. The FCO also has the power to order the divestment or the disposal of certain assets where a merger has already been completed.

The FCO has used the power to order the dissolution of a concentration and ordered two Swiss-based companies to undo their merger (*Sulzer/Kelmix,* 2007). This was the first-ever divestment order from the FCO in relation to a foreign-to-foreign merger (the decision was successfully appealed by the parties on other grounds).

According to the Higher Regional Court of Düsseldorf, public international law does not 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 FCO would in practice be able to enforce the 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 Phase II clearance decisions. In addition, remedies (eg, 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 FCO are explicitly prohibited by the Act against Restraints of Competition of 1958 (GWB).

This was confirmed by the FCO in *Remondis/DSD* (2019); however, albeit rare in practice, behavioural remedies are possible under German law if they are effective and do not lead to permanent control of the undertaking's behaviour by the FCO.

The FCO has published guidance on acceptable remedies, explaining which conditions must be met to enable the FCO to clear a transaction with conditions and obligations.

The FCO 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 are considerably shorter.

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

The FCO can accept remedies if they effectively solve the competition problem and provided that they do not involve a permanent monitoring of the parties' behaviour by the FCO. Consequently, a broad range of undertakings is possible if the undertaking effectively remedies the competition concerns raised.

In general, all kinds of structural undertakings are accepted by the FCO, although in practice most are divestment undertakings. Divestitures can only be made to a suitable purchaser approved by the FCO.

Non-structural remedies have also been accepted in some cases (see, for example, the 2011 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).

When remedies are offered and accepted, they can be made binding as conditions or obligations in clearance decisions in three ways. Those are illustrated as follows using the example of a structural divestiture remedy.

Conditions precedent or suspensive conditions

The first type is a condition precedent or suspensive condition. The conditional clearance decision includes a condition precedent (eg, a divestment sale must be made); in other words, it is only after that condition is fulfilled that the clearance decision becomes valid or effective (ie, the parties can close the main transaction only after the condition is fulfilled). The clearance decision provides a deadline (ie, implementation period) for the condition to be fulfilled; if it is not fulfilled in time, the clearance decision for the main deal lapses.

When the condition relates to the divestiture by the parties of a business to a third party, the FCO can either impose that the condition precedent will be met when the divestiture transaction has been completed (this is chosen in the majority of cases) or that it will be met already when the divestiture transaction has (only) been signed.

According to FCO guidance, the FCO will generally give the parties a period of six months after service of the clearance decision to identify a suitable purchaser, conclude binding agreements and get them approved by the FCO (and, if the conditions precedent includes

such a requirement, to complete the divestiture transaction). This is because the FCO will generally require the parties to obtain approval from the FCO on the identity of the purchaser and the terms of the divestiture sale and purchase agreement (SPA).

The divestiture transaction is then signed (and, if applicable, closed) within the implementation period. The parties then provide to the FCO evidence that the condition precedent is fulfilled. The conditional clearance decision for the main deal then becomes valid or effective, and the main transaction can then be closed.

Such process has now become relatively standard. In (still) very rare cases, the FCO, in parallel to reviewing the main transaction, can also demand from the parties a concrete divestment plan, which would include not only the FCO validating the potential purchaser and the divestiture SPA but also the FCO requiring parties to complete the divestiture transaction even before the clearance decision for the main transaction is issued (this is known as a fix-it-first requirement (ie, the FCO asking for completion of the divestiture remedy before issuing its clearance decision for the main transaction)).

The most common process, however, is the condition precedent with the implementation period. It should be noted that such process is generally referred to by the FCO as the upfront buyer requirement. This is slightly different from what is commonly referred to using the same term under European merger control rules, where it generally only means that the main deal's clearance decision is issued but contains a clause that imposes that the parties can only close the main transaction after they have presented to the European Commission a buyer of the divestment business and a binding agreement with the divestiture purchaser, and both have been approved by the European Commission; however the divestiture transaction does not necessarily need to be completed for the condition precedent to be fulfilled, which is the case for most conditions precedents in German merger control practice.

Conditions subsequent or resolutory conditions

The second type (conditions subsequent or resolutory conditions) is now generally reserved for exceptional circumstances. Here, the clearance for the main transaction is immediately valid when it is issued (and the parties can, therefore, validly close the main transaction) but it includes a condition subsequent providing that if a divestment is not completed within a certain period, then the validity of the clearance for the main transaction lapses, so the parties have to dissolve the main transaction if it has already closed.

Obligation

The third type is a simple obligation. One or several obligations are attached to the main transaction's clearance decision (which is immediately valid); if the obligations are not met, there is, however, no direct immediate effect on the clearance decision's validity.

Any divestment remedy must be accompanied by a proposal to safeguard the business in the interim. Normally, the parties need to appoint a monitoring trustee to oversee compliance with the preservation measures. A divestiture trustee will be required to handle the disposal of the business if the parent companies do not find an acceptable purchaser within the disposal deadline.

Unlike the EU Merger Regulation, the GWB does not provide for the possibility of commitments in Phase I, nor is there a deadline in Phase II for the submission of commitments. However, it is advisable to discuss commitments with the FCO as soon as the FCO's competition concerns become clear.

There has been a recent case (*K+S/Remex/JV,* 2021) in which the parties, during the ongoing Phase I review of the case, proceeded to implement substantial, material changes (eg, divestment of a stake in a competitor) to successfully modify the market structure in such a way that those measures (strictly speaking, no conditions and obligations) enabled the FCO to unconditionally clear the case in Phase I.

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

Regarding all mergers that it reviews, the FCO 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 FCO liaises closely with other competition authorities when investigating a merger, in particular with regard to remedies, provided that the parties supply a waiver allowing the FCO to exchange the necessary confidential information with other competition authorities.

Ancillary restrictions

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

A clearance decision of the FCO does not automatically cover arrangements that are related and necessary to the implementation of the concentration insofar as the arrangements may restrict competition between the parties. They may, however, be reviewed outside the merger control process under the restrictive practices provisions of the GWB or article 101 of the Treaty on the Functioning of the European Union.

This does not mean that such arrangements are automatically unlawful and void. As a basic rule, ancillary arrangements are exempted from the restrictive practices provisions if they are necessary and indispensable to the successful implementation of the concentration, and EU law and practice are taken into account. In particular, ancillary restrictions in the context of newly formed joint ventures and moderate non-compete obligations on the seller may be accepted. There is no Germany-specific guidance that has been published on this topic.

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 one-month investigation period, but even more so during the in-depth Phase II investigation, the Federal Cartel Office (FCO) often contacts customers, competitors or other market participants for market information, and their reactions have a substantial influence; however, it 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 FCO 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 Phase II proceedings as interveners. No private action may be brought parallel to the merger control proceedings of the FCO 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 Phase II decisions to the extent they are affected by the decision. Phase I clearance decisions are not subject to appeal (reiterated by the Higher Regional Court of Düsseldorf in a judgment dated 4 November 2020).

Publicity and confidentiality

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

The FCO publishes a list of notified transactions with very limited case information on its website. If the parties want to keep the transaction confidential during an initial period, they usually have to limit themselves to informal pre-notification discussions with the FCO 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 FCO in very exceptional cases upon request. If such a request is made and the FCO needs to undertake further investigations, it usually does not accept the notification as triggering the waiting periods; however, it will only postpone publication in extremely rare cases.

The FCO also publishes a list of all ongoing Phase II 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 FCO. A non-confidential version of all Phase II decisions is also available on the FCO's website, along with summary reports of selected cases (some of which are also available in English).

The FCO is under a statutory obligation to guarantee confidentiality, and the disclosure of any business secrets by staff of the FCO constitutes a criminal offence. Consequently, business secrets contained in a merger notification or in a response to an information request issued by the FCO will be kept confidential by the FCO if they are identified as such by the notifying party and amount to business secrets.

Cross-border regulatory cooperation

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

The FCO 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 consent, if the information is used for the same subject matter for which it was collected and if the receiving authority protects the confidentiality of the information. Regular cooperation exists in particular with the European Commission on jurisdictional issues.

The FCO has also a track record of cooperating with the US Federal Trade Commission and, on policy matters, with the International Competition Network and the Organisation for Economic Co-operation and Development. There is also a merger working group within the European Union with members from the European Commission as well as all EU national competition authorities and observers from countries of the European Free Trade Association.

The European Commission and the national competition authorities of the EU member states exchange basic case information about notified transactions. Notification of a transaction in one member state can, therefore, trigger questions from other national competition authorities.

It is to be expected that worldwide regulatory cooperation may increase even further in the coming years, particularly with regard to digital markets.

JUDICIAL REVIEW

Available avenues

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

All Phase II decisions of the Federal Cartel Office (FCO), irrespective of whether they are clearances, conditional clearances or prohibitions, 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 (BGH) only on a point of law.

There are, however, admissibility criteria for such an appeal, as recalled by the Higher Regional Court of Düsseldorf in its judgment declaring inadmissible an appeal against the prohibition decision *Miba/Zollern* (judgment of 26 August 2020): the appeal was declared

inadmissible as the concentration (prohibited by the FCO) had in the meantime been authorised by the Federal Ministry for Economic Affairs and Climate Action.

In its decision of 25 September 2007 regarding *Springer/ProSiebenSat.1*, the BGH acknowledged the right to a declaratory judgment on the FCO'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 a review, either to clarify the factual basis of the FCO's decision or to obtain legal certainty on a point of law (eg, if a similar acquisition may be attempted in the future). The Higher Regional Court of Düsseldorf, in the aforementioned *Miba/Zollern* judgment, reiterated the strict conditions on when such a request for a declaratory judgment is admissible.

The most recent review of a Phase II decision of the FCO by the Higher Regional Court of Düsseldorf relates to the conditional clearance by the FCO of the 2020 furniture retail merger *XXXLutz/Tessner*. Although that transaction was cleared subject to remedies, the parties had sought judicial review before the Higher Regional Court of Düsseldorf, which ultimately annulled some of them.

Judicial review of Phase II clearance decisions is also available to third parties admitted, at the FCO'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 competition interests are directly and individually affected by the decision. Third parties admitted as intervening parties in the initial merger control procedure do not automatically have the right to appeal FCO decisions; they still have to demonstrate how the decision directly and individually affects their competition interests.

A recent example of a successful appeal by a third party against a clearance decision by the FCO is Vodafone's appeal against the *Telekom Deutschland/EWE* clearance decision (2021).

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. It will do so if, based on a preliminary assessment, it has serious doubts as to the legality of the appealed clearance decision. In contrast to the normal court proceedings, the appellant further has to show that its rights are infringed by the clearance decision; thus, the requirements for getting an interim order are more demanding than for lodging an appeal.

Ministerial authorisation decisions overruling a prohibition order of the FCO are also subject to full judicial review by the Higher Regional Court of Düsseldorf.

For the first time in the FCO's existence, one regional court (the Regional Court of Cologne) 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 FCO. It 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 an FCO decision must be filed with the FCO within one month of service of the decision. In the case 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 Climate Action.

Proceedings before the Higher Regional Court of Düsseldorf will typically last for 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 BGH 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 Federal Cartel Office (FCO) has continued to be very active in merger control over the past year. Out of around 800 notifications made to the FCO in 2023 (same number as in 2022), seven (as at the end of 2023) led to in-depth Phase II investigations. At the end of 2023, no transaction had been prohibited by the FCO (one transaction (in the surface drainage sector) was prohibited by the FCO in 2022), but two had been cleared subject to conditions.

In recent years, in contrast to earlier periods, there have not been any particular sectoral trends, with Phase II cases, notification withdrawals or prohibitions in a diverse array of sectors. It can be noted, however, that several cases in the press and advertising sector were reviewed by the FCO. It is to be expected, however, that cases in the following sectors, which are well known to the FCO and often characterised by a high level of concentration, will be candidates for in-depth merger control scrutiny:

- petrol stations;
- hospitals;
- local newspapers;
- packaging and waste disposal, and recycling;
- retail and food retail;
- wholesale sanitary equipment;
- airlines; and
- telecommunications and mobile communications.

It is also to be expected that merger control enforcement regarding platforms and digital businesses will increase in sophistication as the FCO continues to consolidate its thought-leading expertise via cases in the dominance or quasi-dominance area. Sectors subject to sector inquiries, involving companies with paramount significance for competition across

markets or potentially subject to the new notification obligation, will logically also be a future focus of the FCO's merger control efforts.

Reform proposals

35 | Are there current proposals to change the legislation?

The 10th reform of the Act against Restraints of Competition of 1958 entered into force on 19 January 2021. The 11th reform entered into force on 7 November 2023, with only a secondary degree of impact on merger control (covered in this chapter). The government is already consulting intensively on changes necessary in a 12th reform (see Update & Trends below).

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 new reform of the Act against Restraints of Competition of 1958 (GWB) is already in the works. The German Federal Ministry for Economic Affairs and Climate Action is currently in the process of evaluating numerous comments received between November and December 2023 following its launch of a wide-ranging public consultation on changes necessary to the law. The questions asked by the German Federal Ministry go significantly beyond merger control; the new reform could well be one of the most important reforms in the history of the GWB.

In the area of German merger control, the questions already preview the Ministry's willingness to consider reforms that would bring significant changes to both German merger control procedure and substance. Although the Ministry has not yet communicated its views on the various ideas submitted during the consultation (and any draft bills would need to pass a potentially lengthy legislative process in the coming years), the open and diversified character of its questions is evidence that the scope and functioning of German merger control may potentially be significantly expanded and moderniesd.

For example, questions were asked with regard to:

- ways of reducing the number of reviewable transactions with a view to only focusing on those transactions that can have a material impact on competition, for better prioritisation of both companies' and the FCO's resources;
- better targeting of merger control review thresholds, in particular the second set of thresholds (consideration value);
- whether the SIEC test continues to be the most appropriate standard for merger control substantive review;
- ways to increase the efficiency of merger control procedures; and
- the relevance of the ministerial authorisation procedures.

It appears that – unexpectedly – views received by the Ministry on all of these topics are very different and that no consensus exists between the various stakeholders.

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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 (Phase I/Phase II)	Phase I: one month from notification. Phase II: two additional months. Implementation is prohibited until issuance of the Competition Commission's decision.
Substantive test for clearance	A concentration must not substantially restrict competition in the Greek market, especially by way of creating or reinforcing a dominant position.
Penalties	Pre-merger filing: in the case of failure to file, fines ranging from €30,000 and up to 10 per cent of the aggregate turnover may be imposed by the Competition Commission. In the 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 (eg, banking, insurance, media and telecommunications).

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

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

The relevant piece of legislation is Law No. 3959/2011 on the Protection of Free Competition, as amended (the Competition Law). The substantial amendments introduced by Law No. 4886/2022 (the New Law) became effective on 24 January 2022 (with the exception of the new article 1A, which is not related to merger control and became effective on 1 July 2022). In addition to modernising the substantive and procedural provisions of the Competition Law, the New Law transposed the ECN+ Directive into the Greek legal order.

The Competition Law is enforced by a 10-member Competition Commission (the Commission), an independent authority with administrative and economic autonomy. Its administrative and economic affairs are monitored by the Minister of Development, and are subject to parliamentary control. It has a five-year term of office. It consists of the President, the Vice-President, six rapporteurs, two regular members and two substitute members.

The Directorate General of Competition is headed by a general director appointed by the Commission for a four-year term of office. It has approximately 80 members.

The National Telecommunications and Post Committee enforces the law regarding concentrations and antitrust cases in the electronic communications sector, according to Law No. 4727/2020.

Concentrations and antitrust cases in the media sector (TV, radio, newspapers and periodicals) are governed in principle by Law No. 3592/2007 on the media and the Competition Law, which are enforced by the Commission.

The Commission has been appointed as the competent national authority for the enforcement of the EU Digital Markets Act.

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.

In a 2021 decision in the electricity generation and supply markets, the Commission held that two or more transactions can be treated as a single concentration if they are interdependent. This occurs if one of the transactions would not have been carried out without the other and control is ultimately acquired by the same undertakings.

Conditionality is normally demonstrated if the transactions are linked de jure (on the basis of a contractual term) or de facto. An indication of de facto conditionality may be the statement of the parties themselves or the simultaneous conclusion of the relevant agreements. In the case at hand, the notified concentration referred to two agreements for the acquisition of sole control over two target companies by the same ultimate undertaking, which were signed on the same day. From the spirit of the agreements and their simultaneous conclusion, the transactions were considered interdependent and were thus treated as a single concentration.

3 What types of joint ventures are caught?

All full-function joint ventures shall constitute concentrations 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 takes into account:

- whether the parent undertakings will 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 will eliminate competition in a substantial part of the relevant market.

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

According to the Competition Law, control shall be constituted by:

- rights, contracts or other means that, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on the activities of an undertaking, in particular by ownership or usufruct over all or part of the assets of an undertaking; and
- rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

Control is acquired by the person or persons who (or undertakings that) are holders of the rights or entitled to rights under the contracts concerned, or, while not being holders of such rights or entitled to such rights under such contracts, have the power to exercise the rights deriving therefrom.

In a 2019 decision, the Commission stated that control may be acquired by natural persons if those natural persons carry out further economic activities on their own account or if they control at least one other undertaking. In that case, the natural person who acquired the shares of the target company (the son) did not fulfil these requirements, so the Commission examined whether the requirements were met by the other notifying natural person (the father) on the grounds that the formal holder of a controlling interest may differ from the person or undertaking, having, in fact, the real power to exercise the rights resulting from this interest. The Commission concluded that control over the target would be, in essence, exercised by the father and that the undertakings concerned were the target undertaking and the father, with the turnover of the undertakings controlled by him being included in the calculation of his turnover.

The acquisition of control may be in the form of sole or joint control. Sole control can be acquired on a de jure or a de facto basis. In the former case, sole control is normally acquired where an undertaking acquires a majority of the voting rights of a company. In the case of a minority shareholding, sole control may occur in situations where specific rights are attached to this shareholding.

Sole control on a de facto basis may exist, among other cases, 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 an 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 (ie, when this minority shareholder can block actions that determine the strategic commercial behaviour of the undertaking).

As such, the Commission takes into consideration decisions on investments, business plans, determination of budget or the appointment of management. Such veto rights may be included in a shareholders' agreement or in the company's statutes.

Finally, joint control exists, according to the Commission, when the minority shareholdings together provide the means for controlling the target undertaking. This can be the result of either an agreement by which they undertake to act in the same way or can occur on a de facto basis, when, for example, strong interests exist between the minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the joint venture.

In a 2016 decision, the Commission dealt with the acquisition of exclusive control over 14 regional airports in Greece. This was achieved through the conclusion of concession agreements between Fraport AG and the Hellenic Republic Asset Development Fund, whereby Fraport was assigned with the financing, upgrade, maintenance, management and operation of the airports for a period of 40 years. This period was considered sufficiently long to lead to a lasting change in control of the undertaking concerned.

Regarding the acquisition of control of a part of an undertaking, the Commission looks separately at each category of assets acquired and examines whether, despite the fact that they may have been acquired by different legal acts, they constitute a single unitary transaction. Furthermore, it considers the acquisition of control over assets as a concentration if those assets constitute a business to which a turnover can be attributed. It has found that this occurs in cases where the assets include, for example, installations, stocks, goodwill, operation licences and intangible assets, and are combined with a transfer of personnel.

In the same context, in a 2013 decision, the Commission considered – 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 to be part of an acquired business.

In a 2018 case in the media sector, the Commission 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 relaunched 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 an acquisition was a concentration and should have suspended implementation until the Commission had issued its decision.

In a 2020 decision, the Commission dealt with a concentration as a result of which the notifying parties claimed that a joint control on a de facto basis would be established between the three minority shareholders and original founders of the undertaking on the one hand and the entering investor shareholder who had the higher minority stake on the other. The Commission held that, in the absence of strong common interests and economic or family links among the original founders, the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control. Where there is no stable majority in the decision-making procedure and a majority can be reached on each occasion by any of the various combinations possible among the minority shareholders, it cannot be assumed that the minority shareholders or a certain group thereof will jointly control the undertaking. In the case at hand, the entering investor shareholder was the only one that could veto the strategic decisions of the undertaking and none of the other shareholders had such a decisive influence; therefore, it would acquire negative sole control.

In a 2021 decision that dealt with a notified transaction in the TV sector, joint control was to be acquired over the existing target company, which would become a full-function joint venture. The Commission examined whether the two notifying parties constituted a single economic entity, in which case the control exercised over the target company could be attributed to the single entity. The Commission held that the pre-existing family ties between the persons exercising control over the notifying parties were not decisive factors in establishing the existence of a single economic entity, but it should be examined whether there also existed other structural links on the basis of which central management could be established between the notifying parties. Such links were not found to exist in this case.

On the same topic, in another 2021 decision concerning the car market, the acquiring company was part of a de facto group of companies where the central person was a natural person. In that case, the Commission again held that the family ties between the persons exercising control over the legal entities were not sufficient to establish the existence of a single economic entity, but other economic links should be identified. Such links were found to exist in this case as the legal entities demonstrated a high degree of consolidation in that their share capital was controlled by members of the same family, there was a significant overlap among the members of the board of directors of the legal entities and they all had the same registered offices. All these factors indicated that there existed a central management of the affairs of these entities, which thus formed a single economic entity.

The turnover of all these entities was attributed to the central person who indirectly acquired control over the acquiring company.

In a 2021 decision on a concentration in the gaming market involving the change of the quality of control over the target company from joint control to sole control, the Commission held that if a concentration comprising the acquisition of joint control has already been thoroughly examined regarding its effects on competition, any subsequent change of joint to sole control is not likely to raise issues for further analysis.

In a 2022 decision, the Commission treated three linked transactions as a single concentration. More specifically, it cleared an acquisition of sole control over the target companies that occurred in three phases (ie, by virtue of three consecutive transfers of shares within a 12-month time frame of one another). According to the terms and conditions of the total transaction, concluded by virtue of a single framework agreement that described each phase in detail, the change in the quality of control over the targets would occur in the second phase when the acquiring company would own 60 per cent of the shares of each target company. The triggering event for notification was held to be the date of the framework agreement.

In a 2023 decision, the Commission held that a de facto joint control of an undertaking does not exist when there are no common interests between minority shareholders that would deter them from acting against each other during the exercise of their rights, the undertaking in question is a holding company without commercial activity meaning that there can be no contribution by the shareholders which is vital for its operation, and the interest shared by the shareholders/investors is only one of receiving a return on their investment.

In another 2023 decision, the Commission approved the acquisition of sole control by a big supermarket chain of 10 stores of a smaller supermarket chain that were located in six prefectures in northern Greece. It examined whether the transaction could lead to the creation or strengthening of a dominant position where the share of the unified entity post-concentration would exceed 35-40 per cent and the market share increment of the acquiring undertaking would exceed 5 per cent. For that purpose, it compared the total share of the parties to that of competing supermarkets located within a 10-minute drive of each target store in urban areas and 30 minutes in semi-urban areas.

Minorities and other interests less than control are not caught by the Competition Law.

Thresholds, triggers and approvals

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

A concentration is subject to a pre-merger notification if the parties have a combined aggregate worldwide turnover of at least €150 million and each of at least two participating undertakings has an aggregate turnover exceeding €15 million in Greece. In concentrations in the media sector, the thresholds are €50 million and €5 million, respectively.

The New Law provides that the preceding minimum thresholds and criteria may be subject to amendments by way of a joint ministerial decision of the Minister of Finance and the

Minister of Development. This decision may also introduce different minimum thresholds and criteria for different sectors of the economy.

In a 2020 decision involving the acquisition of joint control in a pre-existing undertaking by an undertaking and a natural person, each one to hold 45 per cent in the joint venture, the Commission held that the undertakings concerned were each of the undertakings acquiring joint control and the pre-existing acquired undertaking. In that case, the natural person was participating in other joint ventures with third parties. For the allocation of the turnover of these joint ventures to the natural person, the Commission allocated to it the turnover of the joint venture on a per capita basis according to the number of undertakings exercising joint control.

In the case of an acquisition of parts of one or more undertakings, irrespective of whether these parts have a legal personality or not, only the turnover related to the target assets shall be taken into account with regard to the seller.

Regarding credit institutions and other financial institutions and insurance undertakings, article 10(3) of the Competition Law includes specific provisions regarding calculations of turnover.

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

The filing is mandatory without exception.

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

Yes, if the thresholds are met, according to article 6 of the Competition Law. 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 sectors of the economy under the umbrella of a specific 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 and refer others to the applicable regulatory authority. This was demonstrated in a 2018 decision that approved the acquisition of sole control by Vodafone Hellas over Cyta Hellas regarding the market 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 internet access, pay TV and mobile telephony was referred to the NTPC.

Legislation relating to special sectors (eg, banking, insurance, investment services, telecommunications, media and energy) provides 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 on 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 Law No. 4608/2019 on the Development Bank, Law No. 4399/2016 on Development and Law No. 4146/2013 on Strategic and Private Investments. Tax incentives for the transformation of companies are provided by a number of laws, such as Law No. 4601/2019, Law No. 4172/2013, Law No. 2166/1993 and Law No. 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?

The Competition Commission (the Commission) encourages pre-notification consultation with the notifying parties as it is useful when determining the information that should be submitted with the filing.

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 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 late notification do not exceed double the minimum fine amount, although there have been some exceptions.

In a decision published in 2022 involving a gun-jumping case, the Commission imposed a €500,000 fine for a delay of 214 days in submitting a notification. The Commission and the notifying party had different approaches to the event triggering the notification.

The Commission noted that the acquirer was a very large company with a significant economic standing and a high level of market power in most of the markets in which it operated, which included gaming activities and the operation of video lottery terminals, state lotteries and horse races, among other things.

In imposing the fine, the Commission took into account that the late notification was not intentional, it did not appear that it had as its object or effect to circumvent the effective control of the merger by the Commission and the acquirer fully cooperated with the Commission by responding promptly to every request for information.

In a 2023 decision, the Commission imposed a fine of €30,000 for a 33-day delay in notifying the transaction. It held that a binding agreement is one that cannot be unilaterally revoked and aims at creating a legal relation on which each contracting party can count on.

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. 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 that acquire the joint control.

The filing fee for a pre-merger filing amounts to €1,100. Law No. 4886/2022 (the New Law) provides that if a Phase II procedure is initiated, the filing fee will be increased to €3,000.

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

For 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) of Law No. 3959/2011 on the Protection of Free Competition, as amended (the Competition Law) within 30 days of the notification of the transaction (Phase I decision);
    - after an in-depth investigation (with or without conditions) within 90 days of the initiation of Phase II proceedings, according to article 8(4), (5), (6) and (8) of the Competition Law (Phase II decision); or
    - before a 90-day term following the initiation of Phase II proceedings has expired without the issuance of a prohibitive decision (deemed clearance), according to article 8(6) of the Competition Law; or
- prohibiting the transaction within 90 days of the initiation of Phase II proceedings, according to article 8(6) of the Competition Law.

In a 2014 case, the Commission dealt with an acquisition of joint control that had been approved 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 when 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 elected a new board of directors comprising 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. A month after its election, the shareholders' meeting of the target company revoked its decision to elect such a board with retroactive effects

since its election. The Commission thus concluded that joint control had not been actually implemented and refrained from imposing 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 become effective. So, until that day, the target was still being managed by the previous shareholder (ie, the seller). On the basis of those facts, the Commission found that the transaction had not been implemented early, 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, which included 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 incurs a fine of at least €30,000 and up to 10 per cent of the aggregate turnover of the undertaking under obligation to notify, according to article 9 of the Competition Law. 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 issuance of 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 closed 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 Competition 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.

In 2019, the Commission granted a derogation to a major Greek bank that intended to take over all customer current account contracts from a bank under liquidation. 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.

In 2022, the Commission issued a derogation decision regarding a concentration involving a change of control. The target company was under the joint control of the acquiring company and Gazprom Export LLC. The main relevant product markets were the markets for the primary and retail supplies of natural gas. The acquiring company had requested permission to implement the concentration prior to its notification to the Commission, invoking the economic and business uncertainty caused by the war in Ukraine. In fact, shortly after the beginning of the war, the target company began facing difficulties in its operations due to the participation of Gazprom in its share capital, such as the refusal of banks to renew letters of guarantee and the refusal of providers to provide services to the target company. These would have a negative impact on the normal supply of the target's customers (eg, producers of electric power) and wider consequences for the normal operations of the Greek energy market. The fact that the United States, the United Kingdom and the European Union had imposed economic sanctions on entities connected with Russia increased the uncertainty of the target while Gazprom remained a 50 per cent shareholder. The Commission permitted the implementation of the transfer of Gazprom's participation to the acquiring undertaking, subject to terms and conditions.

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

The Commission may 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 of implementing 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 that 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 that the board would not proceed to acts of management 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 European Union's 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), 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 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 principal provisions of 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 an attorney for service.

Read this article on Lexology

If wrong or missing information is provided, the Competition Law provides for a fine of €15,000, with a maximum level of 1 per cent of the turnover.

Investigation phases and timetable

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

Upon receipt of notification, a rapporteur is appointed from the members of the Commission who shall be assisted by a team of employees of the Directorate General of Competition. An investigation shall commence involving contacting third parties, such as competitors or customers, with the purpose of defining the relevant and affected markets, and the competitive conditions therein. Letters may also be addressed to notifying parties with additional requests for information. While in principle the recommendation is detailed, in the absence of horizontal overlaps or vertical relations between the acquiring undertaking and the target, the rapporteur may issue a recommendation through a simplified procedure.

The rapporteur should issue his or her recommendation to the Commission. Regarding Phase II decisions, the recommendation should also be made available to the notifying parties, regardless of whether it suggests clearing the transaction. The parties, following the issuance of the recommendation, have access to the non-confidential information of the Commission's file on the case. Third parties do not have access to the file.

A summons is addressed by the secretariat to the parties for a hearing before the Commission. At the hearing, the parties may present their arguments and examine witnesses. Thereafter, they may also submit written pleadings.

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

There is a two-stage procedure for pre-merger filings.

If the concentration does not raise serious doubts concerning potential restrictive effects on competition, the Commission should issue a clearance decision within one month of notification (Phase I decision).

If the concentration raises serious doubts, the president of the Commission must issue a decision within one month of notification initiating a full investigation of the notified transaction. The participating undertakings should be immediately informed about this decision.

The case is introduced before the Commission within 45 days. From that date, the undertakings may, within 20 days at the latest, propose commitments. In exceptional cases, the Commission may accept commitments even after the expiry of the 20-day term, in which case the term for the issuance of a decision under article 8(6) of the Competition Law 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) of the Competition Law are not fulfilled, it shall issue a decision prohibiting the concentration. Such a decision must be issued within 90 days of the initiation of Phase II.

If the Commission finds that the concentration does not substantially restrict competition or if it approves the same with conditions, it shall issue an approving decision. If the 90-day term expires without the issuance of a prohibitive decision, the concentration is deemed as approved, with the Commission thereafter issuing a merely confirmatory decision (Phase II decision).

This timetable cannot be speeded up. It can be extended when, among other cases, the notifying undertakings consent, according to article 8(11) of the Competition Law.

If the participating undertakings do not furnish any required information before the set deadline, the term for the issuance of the decision is suspended and recommences as soon as the information is furnished. In its decisions, the Commission mentions the date of the notification, the date of its request for information and the date of submission thereof by the notifying party.

The Commission issues its decisions within the above terms.

The New Law introduced an important change according to which the parties may propose commitments during Phase I. Such commitments should be proposed within 20 days of the notification of the concentration. If these are accepted, the Commission may approve the concentration with conditions within the term of Phase I (ie, within one month of notification).

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The test for clearance is that a concentration must not significantly restrict competition in the Greek market, in particular by way of creating or reinforcing a dominant position. Criteria taken into account include actual and potential competition, barriers to entry, the economic strength of participating undertakings, the supply and demand trends relating to the products or services involved, the structure of the market and the bargaining power of suppliers or customers.

In a 2017 decision, the Competition Commission (the Commission) dealt with a conglomerate merger where an undertaking active in cold meat and cheese products was acquired by an undertaking producing sweet and salted snacks, and chocolate products. The Commission cleared the merger on the grounds that it was unlikely that the acquiring company, although it had a significant share in its market, would proceed to combined sales because:

- these were not complementary products;
- supermarkets had alternative sources of supply for 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 strategies to react to any attempt at foreclosure; and
- private label products played an important role in that market.

In a 2021 decision relating to the car market, the Commission confirmed that, if concentrations result in duopolies with a 50 to 60 per cent market share, the possibility of creating collective dominance will be assessed; however, this does not in itself indicate the existence of a specific presumption.

The Commission has consistently assessed to what extent horizontal mergers might significantly impede effective competition, in particular by creating or strengthening a dominant position, in one of two ways:

- by eliminating important competitive constraints on one or more firms, which consequently would have increased market power, without resorting to coordinated behaviour (non-coordinated effects); or
- by changing the nature of competition in such a way that firms that previously were not coordinating their behaviour would significantly coordinate and raise prices or otherwise harm effective competition (coordinated effects).

In Law No. 3592/2007 on the media market, the term '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 forms of media of the same type or of different types. The wider the spread across various forms of media, the lower the market share conferring dominance. These shares vary from 25 to 35 per cent.

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

In addition to examining whether a joint venture will significantly restrict competition, the Commission will assess possible cooperative effects.

Theories of harm

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

Single or joint market dominance is the basic concern of the authorities during their investigation of a concentration. They have also examined unilateral, coordinated, vertical and conglomerate effects.

Non-competition issues

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

The Commission has shown that it takes into account the effects on the national economy when examining a merger. To be efficient in this respect, it also uses mapping, which is a new tool that was afforded to the Commission by Law No. 4886/2022 that allows it to study competition conditions in any market or sector of the economy for the effective exercise of its powers. In this context, in June 2022, the Commission announced the conduct of the first mapping study on the conditions of competition in the petroleum industry. According to the Commission, the study will selectively focus on 95 octane unleaded petrol, diesel and heating oil, and will examine price pass-through in the oil production and distribution chain in the Greek market.

Sustainability has come under the Commission's spotlight. In June 2022, the Commission presented the Sandbox for Sustainable Development and Competition, an innovative initiative aimed at strengthening competition and sustainable development. According to the Commission, the Sandbox is a supervised environment wherein companies can undertake initiatives that contribute significantly to the goals of sustainable development for a specific period of time under the guidance of, and in direct collaboration with, the Commission to ensure that these initiatives do not significantly impede competition. The Sandbox involves various sectors, such as technology, environment, energy, recycling, waste management and healthcare, but also other areas that aim primarily at promoting the environmental goals of sustainable development.

Economic efficiencies

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

Economic efficiencies are taken into account by the Commission to the extent that they enhance the degree of competition in the market in favour of consumers.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

If the authorities find that a concentration significantly restricts competition, then a prohibitive decision shall be issued.

If a concentration has been implemented in breach of Law No. 3959/2011 on the Protection of Free Competition, as amended (the Competition Law) or in breach of a prohibitive decision, the Competition Commission (the Commission) may require the undertakings concerned to dissolve the concentration – in particular, through the dissolution of the merger or disposal of all the shares or assets acquired – 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 measures for the dissolution of a 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 to render the concentration compatible with the substantive test for clearance or to ensure compliance by the parties with the amendments to the terms of 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 the non-coordinated and coordinated effects of the transaction in great depth and cleared it following an undertaking by the acquiring company 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 applicable 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 the divestiture.

In a 2017 decision, the Commission, following Phase II proceedings, cleared an acquisition by the second-largest supermarket chain in Greece of another supermarket chain (in a stage of pre-bankruptcy proceedings) with an equal share. This made the acquiring undertaking the largest chain in Greece, moving the previous number one chain to 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, the sales of which 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, there were issues of safety and consumer protection resulting in the interruption of the cooperation, the quality of the product deteriorated or there was an unreasonable increase in its price.
- The acquiring company and the new entity undertook to sell 22 shops in defined locations to address the concerns that a high number of shares would emerge for the new entity post-merger in these geographic areas. Such a sale should have been effected within a term of nine months.

In that same transaction, the Commission issued a new decision in 2018 to accept a request by the acquiring party to modify the commitments on the grounds that 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 in 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 have exceeded 50 per cent, this was no longer the case as new undertakings had entered the market and competition had increased. The Commission thus decided to lift the commitment of sale regarding 12 stores and imposed a commitment on the undertaking not to operate the remaining two stores as supermarkets for a term of three years.

In a 2019 decision, the Commission cleared a transaction subject to three years of behavioural remedies. In that case, the vertical dimension of the notified concentration posed competition concerns owing to the dominant, if not monopolistic, position of the acquired

company in the market of aluminium waste recycling. The acquiring undertaking was a big producer and processor of primary cast aluminium.

According to the Commission, there was a risk that access to the recycling service would be offered by the new entity as a tied service with the purchase of primary cast aluminium from the acquiring company. The agreed remedies provided that:

- the offer of recycling services to the customers of the acquired company would not be dependent on the purchase of primary cast aluminium from the acquiring company and, vice versa, that the acquired company would continue to offer its recycling services to its existing and creditworthy customers; and
- the customers of both the acquiring and acquired companies would not be bound by an obligation to exclusively obtain primary cast aluminium and recycling services from them.

In a 2022 Phase II decision, the Commission approved the acquisition by an online delivery platform through which consumers connected with restaurants, supermarkets, convenience stores and other local stores of four target undertakings, among which one provided online intermediation services for reservations in restaurants, subject to commitments offered by the acquiring undertaking.

In examining the transaction, the Commission concluded that the combination of the parties' activities in the market for online intermediation for restaurant reservations through the target's platform and in the online intermediation market for food ordering through the acquiring party's online platform would give rise to conglomerate effects, given that both platforms had significant market power in the respective markets in Greece. As a result of the transaction, the merged entity would have the ability to bundle the two services for their business users, thereby reducing the ability of competitors in the market of online intermediation services for restaurants to compete effectively.

The acquiring undertaking undertook not to tie the online intermediation services for food ordering with the online reservation services in restaurants when offered to business users (namely, restaurants) so that such users would be free to purchase each of the services separately. It also undertook not to provide special discounts to business users or charge reduced fees when these users bought online intermediation services and food ordering restaurant reservations services. The monitoring of the implementation of the commitments, the duration of which was set to two years, was assigned to an appointed trustee.

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

To date, only one decision imposing divestment as a condition for clearance has been issued. In that case, to entirely remove the horizontal overlap between the parties to the concentration and enable access by competitors to the chocolate milk market and given that it was not possible to separate the business activity related to chocolate milk from that of plain milk, the Commission concluded that the acquiring party should sell a leading chocolate milk trademark 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 access to its distribution network for chocolate milk to the buyer 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 to and necessary for the implementation of the concentration. The Commission usually examines these restrictions separately and clears them on the basis of principles similar to those of the European Commission's notice on ancillary restrictions.

In a 2020 decision, the Commission dealt with a concentration involving the acquisition of a part of an undertaking, following which the undertaking that sold part of its business would become a shareholder in the acquiring company. The non-compete clause prevented the shareholder from competing for as long as it remained a shareholder and for two years after it had ceased being a shareholder.

The Commission held that non-compete clauses are only justified by the legitimate objective of implementing the concentration when their duration, their geographical field of application, their subject matter and the persons subject to them do not exceed what is reasonably necessary to achieve that end. Based on this, it held that a clause aimed to eliminate any competitive pressures that the shareholder could exercise on the acquiring company for a term that was unreasonably long was not viable. It also found that an obligation to impose a non-compete clause to a third party was equally not necessary. Therefore, both restrictions were found not to be ancillary restraints directly related to and necessary for the concentration.

In a 2021 decision relating to the merchant-acquiring services and card-acquiring processing markets, the Commission held that restrictions agreed between the parties to a transaction involving a transfer of business could be to the benefit of the buyer or the seller. In principle, protection is required for the buyer, not the seller, as it is the buyer who has to ensure the full benefit from the acquired business.

As a general rule, either the restrictions on the benefit of the seller are not at all necessary for the implementation of the transaction nor are directly related to it or their scope and duration should be more limited than those on the buyer. In the case at hand, the Commission found that the ancillary restrictions to the benefit of the seller could not be considered directly related to and necessary for the concentration, and should therefore be assessed under

articles 1 and 2 of the Competition Law, as well as articles 101 and 102 of the Treaty on the Functioning of the European Union.

The Commission came to the same conclusion in a 2022 decision involving a restriction on the benefit of the seller in the form of an obligation on the buyer to purchase undefined quantities of the services involved exclusively from the seller.

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 Law No. 3959/2011 on the Protection of Free Competition, as amended (the Competition Law) to play an important role in the application of Greek merger control rules. The Directorate General of Competition may address questions to third parties, such as competitors or customers. These should be replied to within five days, and the Competition Law provides for fines for those who do not comply.

The Competition Commission (the Commission) may invite any third party to the hearing before it if it decides that such a third party's 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 fixes the form and content of the public announcement of concentrations subject to pre-merger control by the notifying party in the daily press. This announcement should take place immediately after notification and is also uploaded to the Commission's website, so that any interested party may submit observations or information on the notified concentration.

Commission decisions are published in the Government Gazette. Commercial information, including business secrets, is protected from disclosure under article 28 of the Regulation of Operation and Administration of the Competition Commission.

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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 EU 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 European Competition Authorities network and cooperates with such authorities regarding merger control.

JUDICIAL REVIEW

Available avenues

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

Decisions of the Competition Commission (the Commission) are subject to appeal before the Administrative Appeal Court of Athens. This appeal does not automatically suspend the enforcement of the contested decision, but a petition to this effect may be submitted to the Administrative Appeal Court, which may grant a suspension of the whole or part of the appealed decision if serious reasons exist. If the appealed decision imposes a fine, the Administrative Appeal Court may suspend only up to 80 per cent of the fine.

A recourse for judicial review of the Administrative 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 to approve a concentration if this decision was based on inaccurate or misleading information. In such a case, the Commission may issue a new decision; however, this possibility is only available if the applicant can invoke 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 Administrative Appeal Court of Athens 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 Administrative Appeal Court's decision being served. It may take more than a year for the Administrative Appeal Court to deliver its decision and even longer for the Council of State to do 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?

The Competition Commission (the Commission) has, to date, never prohibited a foreign-to-foreign merger, but has imposed fines for failure to notify and for early closing.

In 2023, the Commission cleared 18 transactions.

Reform proposals

35 Are there current proposals to change the legislation?

Yes.

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 2023 there were changes in the composition of the Competition Commission (the Commission). Currently, the President is Irene Sharp, who was previously a judge in the Council of State; the Vice President is Hara Nikolopoulou and the rapporteurs are: Panagiotis Fotis, Ioannis Stefatos, Harikleia Vlahou, Anna Gatziou and Pantelis Borovas. The regular members are Michail Polemis and Vasiliki Milliou and the substitute members are Angeliki Kanellopoulou and Ioannis Michail.

In a 2023 Phase II decision, in the *Attica/Anek* case the Commission accepted the failing-firm defence and approved the merger by absorption of Anek by Attica. The case concerned the market for provision of sea transportation for passengers and vehicles in Crete and the Adriatic. The Commission held that, due to its financial difficulties, Anek would have to exit the market in the near future, that there had not been any other offer for its acquisition less harmful for competition and that no credible interest had been demonstrated by other parties for the purchase of Anek assets which would, therefore, have to exit the market.

Notifications of concentrations continue with increasing speed in 2024. According to the Commission's press releases, during the first four and a half months of 2024, the Commission approved eight notified transactions.

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Greenland

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Notification trigger/ filing deadline	A merger must be filed after the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest.
Clearance deadlines (Phase I/Phase II)	The Competition Tribunal must make its decision on the substance within 40 working days (Phase I) of 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 by 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 time frame). The deadline is only extended by as many days as are required to provide 20 days for the assessment of the new or revised commitments. The deadline can also be extended by up to 20 days at the request of the parties or with the parties' consent.
Substantive test for clearance	The substantive test for clearance is to assess whether the concentration significantly impedes effective competition. If it does not, the merger will be cleared.
Penalties	For failing to notify a merger or submitting wrongful information to the competition authorities, the undertakings can receive fines. The merging undertakings can also receive fines if they implement a merger prior to the approval.
Remarks	Not applicable.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

The main legislation on Greenlandic merger control is contained in Act No. 1 of 15 May 2014 of the Greenlandic Parliament (the Competition Act), which is modelled on Danish competition law (and thereby EU competition law) and entered into force on 1 July 2014. The main differences from the Danish Competition Act are the notification thresholds, which are significantly lower, and the situated-in requirement. The situated-in requirement entered into force on 1 January 2021 through Act No. 8 of 19 November 2020 of the Greenlandic Parliament.

For merger control, the provisions of the Competition Act are accompanied by Executive Order No. 3 of 10 March 2016 on the notification of mergers and Executive Order No. 13 of 23 July 2015 on the calculation of turnover.

The legislation can be accessed in Danish or Greenlandic using the Greenlandic government's legislation website.

The Competition Tribunal is the principal enforcer of competition law in Greenland. It consists of a chair and six members appointed by Parliament with diverse knowledge of public and private commercial activities. The chair and three of the members must be independent of commercial and consumer interests, while of the remaining three members, one is nominated by a commercial interest organisation, one by a consumer organisation and one by the joint committee, which represents the interests of the municipalities in Greenland.

The day-to-day administration of the Competition Act is handled by the Consumer and Competition Authority, which serves as the secretariat of the Competition Tribunal.

Scope of legislation

2 What kinds of mergers are caught?

The provisions of merger control apply to concentrations. A concentration will be deemed to arise where either:

- two or more previously independent undertakings merge; or
- one or more persons already controlling at least one undertaking, or one or more undertakings, acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

3 What types of joint ventures are caught?

The creation of a full-function joint venture (ie, a joint venture performing all the functions of an autonomous economic entity on a lasting basis) also constitutes a concentration.

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

Greenlandic regulation resembles Danish legislation (which is consistent with EU law), entailing that 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 an 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 global aggregate turnover of all the undertakings concerned is more than 100 million Danish kroner;
- the global aggregate turnover of each of at least two of the undertakings concerned is more than 50 million kroner; and
- at least one of the participating undertakings is situated in Greenland.

Executive Order No. 13 of 23 July 2015 lays down detailed rules on the calculation of turnover.

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 Greenlandic market can be shown, provided that one of the participating enterprises is situated in Greenland.

The preparatory documents of the Competition Act do not define exactly what is required for an enterprise to be situated in Greenland, and the Competition Authority has not prepared any guidelines on this matter; however, the Consumer and Competition Authority has stated that this requirement would be fulfilled in circumstances where one of the merging companies

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has a business registration number in Greenland and is thus registered there or when it has a branch, etc, located in Greenland.

We are aware of at least one case, which concerned a company in the buyer group being registered in Greenland, in which the Consumer and Competition Authority did not find the requirement to be fulfilled. Nevertheless, the reach of this practice is uncertain.

The Consumer and Competition Authority has also stated that other scenarios may fulfil the requirement. By way of example, the generation of local turnover might under certain circumstances be indicative, although this remains to be seen in practice.

Furthermore, the preparatory documents state that the Competition Act is intended to ensure the control of mergers between undertakings 'sourcing commodities in Greenland for export'. It is further stated that the effect of those mergers may be significant, especially for the development of markets 'for sourcing of fish and seafood in Greenland, including the price that fishermen receive for their catches'.

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

Not at present. However, Greenland has recently announced an upcoming international trade policy, which will entail the implementation of a Greenlandic investment screening 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?

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 was expected to be set in an executive order, although this has yet to be issued.

Fines may be imposed for failure to notify (and unlawful implementation); however, to date, there have not been any cases before the Consumer and Competition Authority where such fines have been imposed.

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

In principle, all the parties involved in a concentration are responsible for filing. In practice, however, the filing of acquisitions can be expected to be made by the acquiring party.

The fee amounts to 50,000 Danish kroner for simplified notifications and 0.015 per cent of the parties' turnover for non-simplified notifications. The filing fee is capped at a maximum of 1.5 million kroner.

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Fees must be paid at the same time as the notification is filed.

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 Competition Council's time limits have expired.

The waiting periods are 40 working days (Phase I) or an additional 90 working days (Phase II) after the expiry of the first waiting period. The waiting period in Phase II can be extended by up to 20 additional working days 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). The waiting period can be extended for a further 20 working days at the request of the parties or with the parties' consent.

The Consumer and Competition Authority must declare whether a notification is complete (ie, whether the notification contains the necessary information) within 10 working days of receiving 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?

Fines may be imposed for failure to notify and unlawful implementation. Fines are calculated on the basis of the severity of the unlawful action, the duration thereof and the undertaking's turnover.

Moreover, where clearance is subsequently denied or made conditional, the transaction will have to be annulled or otherwise reopened and modified. The Competition Tribunal has not yet issued decisions in this regard.

On 1 January 2021, the Competition Tribunal was given the authority to impose administrative fine notices; however, it has not yet imposed any administrative fine notices in a merger case.

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 those applicable to other mergers.

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

No decisions or administrative practice from the competition authorities can constitute the foundation for such an assessment.

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 Act No. 1 of 15 May 2014 of the Greenlandic Parliament, as amended (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 slightly less detailed than Form CO, which is 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 often take place.

After receiving a non-simplified notification, the Competition Tribunal must declare whether the notification is complete. When the notification is complete, the Competition Tribunal may approve a concentration before the expiry of the initial investigation (Phase I). The Competition Tribunal cannot prohibit a concentration within Phase I but may initiate an in-depth investigation (Phase II) if there are serious doubts regarding the concentration's compatibility with the Competition Act.

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

The timetable for clearance is the same regardless of whether the merger is filed under the simplified notification procedure or the full notification procedure.

The Competition Tribunal must make its decision on the substance within 40 working days (Phase I) of 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) of the expiry of the original 40 working days.

These time limits may be extended by up to 20 days if the undertakings propose new or revised commitments at a later stage (ie, less than 20 days remaining of the original deadline). The deadline is only extended by as many days required to provide 20 days for the assessment of the new or revised commitments. The deadline can also be extended by 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 results in a significant impediment to effective competition (SIEC), in particular as a result of the creation or strengthening of a dominant position. Unless this is the case, the concentration must be approved.

The substantive test for clearance of concentrations that have as their object or effect the coordination of the competitive behaviour of undertakings is similar to that set out in the EU Merger Regulation (EUMR). Such aspects of coordination shall therefore be appraised in accordance with the criteria laid down in the provisions of Act No. 1 of 15 May 2014 of the Greenlandic Parliament, as amended (the Competition Act), which are the domestic equivalents of article 101(1) and (3) of the Treaty on the Functioning of the European Union (TFEU). This test applies in addition to the SIEC test.

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

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 EUMR. Such aspects of coordination shall therefore be appraised in accordance with the criteria laid down in the provisions of the Competition Act, which are the domestic equivalents of article 101(1) and (3) of the TFEU. This test applies in addition to the SIEC test.

In the case of full-function joint ventures, which may also have the object or effect of coordinating the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria laid down in the provisions of the Competition Act, which are the domestic equivalents of article 101(1) and (3) of the TFEU.

Theories of harm

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

In principle, there are no formal limitations on the applicable theories of harm; however, from the very limited practice, the Competition Council would appear to follow the European Commission's practice in this respect.

Reference can be made to a decision from 2020 involving a horizontal merger between Arctic Retail Group and Pisiffik in the market for grocery stores, in which the Competition Tribunal

made multiple references to the European Commission's decisional practice. Considering the few actors on the market and the substantial barriers to entry, the Competition Tribunal was apprehensive about approving the merger, but the parties involved proposed commitments that eliminated the Tribunal's concerns.

Non-competition issues

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

Non-competition issues are not relevant in the review process.

Economic efficiencies

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

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'. Consequently, it can be argued that efficiency should be considered.

In practical terms, an efficiency argument can be raised if available, and it will be considered in the assessment of the case. According to the Competition Tribunal's decision in *Arctic Retail Group/Pisiffik*, there are three criteria that need to be fulfilled for an efficiency argument to be taken into account. The efficiencies must be:

- for the benefit of consumers;
- specific to the merger; and
- verifiable.

However, in raising the efficiency defence, the undertakings concerned may 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 be in the position of deciding whether to proceed with the transaction on the basis of remedies accepted by the Competition Tribunal.

Remedies and conditions

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

If the competition authorities assess that the concentration cannot be approved without conditions, the undertakings concerned will enter into a dialogue or negotiation with the competition authorities to agree on suitable commitments. The commitments agreed with the competition authorities will be formulated as conditions in the approval of the concentration.

Such conditions can be appealed separately after approval of the concentration, even though they are agreed upon during the negotiations with the competition authorities. The Competition Tribunal may attach conditions, including divestment orders or behavioural remedies, for clearance of a concentration and may also issue orders to ensure that the parties fulfil such conditions.

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

No decisions or administrative practice from the Competition Tribunal can constitute the foundation for such an assessment.

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

No decisions or administrative practice from the Competition Tribunal can constitute the foundation for such an assessment.

Ancillary restrictions

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

Notifying parties are not required to identify ancillary restrictions. It is therefore up to the parties to assess whether there are ancillary restrictions that need to be evaluated by the Consumer and Competition Authority.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

The Consumer and Competition Authority can be expected to conduct market tests.

Publicity and confidentiality

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

The Consumer and Competition Authority makes a public statement about the fact that a merger notification has been made and invites comments from third parties. Decisions are published on the Authority's website, although commercially sensitive information, which can include the commitments proposed by the parties, will be redacted.

Act No. 9 of 13 June 1994 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 Act No. 1 of 15 May 2014 of the Greenlandic Parliament, as amended, 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 competition authorities in Denmark, the Faroe Islands, Iceland, Finland, 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 courts in Greenland.

Time frame

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

The time frame for an appeal before the courts 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?

No decisions or administrative practice from the competition authorities can constitute the foundation for such an assessment.

Reform proposals

35 Are there current proposals to change the legislation?

Act No. 1 of 15 May 2014 of the Greenlandic Parliament, as amended (the Competition Act) was amended to change the thresholds and provide for a situated-in requirement, which resulted in a revised Competition Act entering into force on 1 January 2021.

Most recently, the implementation of an FDI screening regime has been announced.

UPDATE AND TRENDS

Key developments of the past year

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

Since 22 June 2023, the Consumer and Competition Authority has received two merger notifications. One has been approved in phase I, after the simplified case proceedings, and one is currently being processed.

The Consumer and Competition Authority has received two inquiries regarding the notification obligation for mergers. Both of these should not be reported in Greenland.

The Consumer and Competition Authority has published a merger case on its website from 13 April 2023. The delay in publication of decisions is due to the translation of the decisions from Danish into Greenlandic.

As at 11 April, two mergers have been notified, but not yet approved, in 2024. Three mergers were notified in 2023, and so far one of them has been approved. No decisions were published by the Consumer and Competition Authority in 2022. In 2021, the authority approved one merger in Phase I, even though there was a partial horizontal overlap between the parties involved. The merger was cleared as it did not give rise to any competition law concerns.

In relation to foreign direct investment, the adoption of an act regarding the screening of investments that targets foreign investments in Greenland has been announced.

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Voluntary or mandatory system?	Voluntary apart from the mandatory requirement under the Code on Takeovers and Mergers and Share Buy-backs (the Takeovers Code), which requires that an offeror of a potential mandatory general offer seeks the prior consent of the Communications Authority 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 (Phase I/Phase II)	There is no formal timeline for clearance. The Competition Ordinance focuses on two key behavioural prohibitions on business conduct concerning anticompetitive agreements and abuse of a substantial degree of market power, and incorporates a limited merger control regime that applies to mergers involving a telecommunications licence carrier (the Merger Rule). The Competition Ordinance only stipulates that the Competition Commission and the Communications Authority (the competition authority) may only commence an investigation of a merger within 30 days of the day on which the competition authority first became aware, or ought to have become aware, that a merger has taken place; if the competition authority reasonably believes that a merger contravenes the Merger Rule, it must apply to the Competition Tribunal for an order within six months of the day on which the merger was completed or the competition authority became aware of the merger (whichever is later).
Substantive test for clearance	The substantive test to be applied is whether the merger has, or is likely to have, the effect of substantially lessening competition in Hong Kong.
Penalties	There are no specified sanctions for not filing because the merger control regime is voluntary in general. However, the competition authority may apply to the Competition Tribunal for an order to unwind a completed merger or to prohibit a proposed merger if it has reasonable cause to believe that the merger will likely contravene the Merger Rule. In the case of a mandatory general offer involving the change of a carrier licensee, failure to obtain the Communications Authority'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.

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Remarks	The merger control regime at present only applies to transactions where an undertaking that directly or indirectly holds a telecommunications carrier licence is involved. The regime may be extended to other or all sectors of the economy in the future.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

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

Hong Kong is administratively and legally separate from the People's Republic of China. As such, Hong Kong has its own system of law.

The Competition Ordinance (Cap 619), which came into full force on 14 December 2015, is the first-ever economy-wide, cross-sector competition law in Hong Kong. It focuses on two key behavioural prohibitions on business conduct concerning anticompetitive agreements and abuse of a substantial degree of market power, and 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 and the Communications Authority (the competition authority) have concurrent jurisdiction in enforcing the Merger Rule. The competition authority has issued a guideline setting out how it intends to interpret and give effect to the Merger Rule (the Guideline). A dedicated Competition Tribunal has jurisdiction to hear and determine applications made by the Competition Commission or the Communications Authority to unwind a completed merger or to prohibit a proposed merger.

In practice, and as stipulated under the terms of a memorandum of understanding between the Competition Commission and the Communications Authority, the Communications Authority will typically take the lead in relation to matters relating to the Merger Rule, given that the merger control regime in Hong Kong only applies to the telecommunications sector.

Scope of legislation

2 | What kinds of mergers are caught?

The merger control regime only applies to mergers involving a carrier licence within the meaning of the Telecommunications Ordinance (Cap 106). The carrier licence essentially relates to network operators that establish and maintain wired or wireless transmission facilities 'for carrying communications' between locations that are separated by public streets or unleased land. This includes the local and external fixed, and mobile, 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 part of the assets (including goodwill) 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.

The 'lasting basis' element requires a joint venture to be intended to operate for a sufficiently long period. Accordingly, a joint venture established for a specific project without any ongoing operational activities is unlikely to constitute a merger within the meaning of the Merger Rule.

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.

The term 'decisive influence' refers to the power to determine or veto decisions relating to the strategic commercial behaviour of an undertaking.

Control may, therefore, be established on a legal or de facto basis such that minority and other interests that amount to less than legal control may be caught; however, no specific percentage threshold for control is stated in either the Competition Ordinance or the related guidelines.

Thresholds, triggers and approvals

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

There are no financial thresholds under the Competition Ordinance; instead, the question is whether a merger has taken or is to take place.

The competition authority has nevertheless identified two indicative safe harbours according to which mergers are unlikely to substantially lessen competition:

- four-firm concentration ratio:
    - where the post-merger combined market share of the four (or fewer) largest firms (CR4) in the relevant market is less than 75 per cent, and the merged firm has a market share of less than 40 per cent; or
        - where the CR4 is 75 per cent or more, and the combined market share of the merged entity is less than 15 per cent of the relevant market; and
- Herfindahl-Hirschman Index (HHI):
    - where the post-merger HHI is less than 1,000 in the relevant market;
        - 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.

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' (paragraph 5.6 of the Guideline).

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 Code on Takeovers and Mergers and Share Buy-backs (the Takeovers Code) that would result in a change in relation to a carrier licensee, the Takeovers Code requires that the MGO offeror obtain prior formal consent from the Communications Authority in relation to the change to the carrier licensee before it triggers an obligation to make an MGO.

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

The Merger Rule applies to foreign mergers if the transaction (indirectly) involves a telecommunications carrier licence under the Telecommunications Ordinance.

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

Generally speaking, there are no economy-wide restrictions relating to foreign investment in Hong Kong. Sector-specific limits on foreign investment apply in the television and sound broadcasting sectors.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

There are no deadlines for filing as the merger control regime is generally voluntary. As a result, there are no specified sanctions for not filing except where prior formal consent from the Communications Authority is required for a change to the carrier licensee. In those circumstances, failure to obtain consent may result in disciplinary action under the Code on Takeovers and Mergers and Share Buy-backs (the Takeovers Code). Sanctions include the issuance of a public apology, and public censure and requirements imposed on the company involved, licensed representatives and registered institutions not to act on or implement the merger or acquisition.

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

Merging parties can submit a voluntary notification to the Competition Commission and the Communications Authority (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.

The Competition Ordinance focuses on two key behavioural prohibitions on business conduct concerning anticompetitive agreements and abuse of a substantial degree of market power, and incorporates a limited merger control regime that applies to mergers involving a telecommunications licence carrier (the Merger Rule). Parties to a merger may also apply to the competition authority for a formal decision as to whether the proposed 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). The 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 formal decision. In the case of the Communications Authority, the amount of the fee will be equal to the costs and expenses incurred by the Communications Authority (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.

No indicative timetable for clearance 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 ultimately depend on the complexities of the case and the resources available to the competition authority. In practice, from submission of all required information, cases without issues 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 it first became aware, or ought to have become aware, that a merger has taken place. If the competition authority reasonably believes that a merger contravenes the Merger Rule, it must apply to the Competition Tribunal for an order within six months (this can be extended if the Competition Tribunal considers it reasonable) of the day on which the merger was completed or the competition authority became aware of the merger (whichever is 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?

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 a mandatory general offer (MGO) pursuant to the Takeovers Code, it is a requirement that the offeror obtain prior formal consent from the Communications Authority for a change to the carrier licensee. Failure to do so may result in disciplinary action under the Takeovers Code.

Sanctions include issuance of a public apology, public censure, and requirements imposed on the company involved, licensed representatives and registered institutions not to act on or implement the merger or acquisition.

In addition, the competition authority may commence an investigation of an anticipated or completed merger and can seek various orders from the Competition Tribunal, including orders to unwind the transaction or orders to divest certain assets. In certain circumstances, the competition authority can also apply to the Competition Tribunal for interim measures for the purpose of 'preventing pre-emptive action' (paragraph 5.30 of the guideline issued by the competition authority setting out how it intends to interpret and give effect to the Merger Rule (the Guideline)), which may prejudice the hearing of the application by the Competition 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, except where prior formal consent from the Communications Authority is required for a change to the carrier licensee or the implementation of the merger or acquisition.

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

Not applicable. The Hong Kong merger control regime is voluntary and non-suspensory.

Public takeovers

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

Yes. Where a party is required to make an MGO under the Takeovers Code that would result in a change in relation to a carrier licensee, the Takeovers Code requires that the MGO offeror obtain prior formal consent from the Communications Authority in relation to the change to the carrier licensee before it triggers an obligation to make an MGO. Failure to do so may result in disciplinary action under the Takeovers Code.

Sanctions include the issuance of a public apology, public censure, and requirements imposed on the company involved, licensed representatives and registered institutions not to act on or implement the merger or acquisition.

Documentation

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

A prescribed form (Form M) sets out the information required for an application for a decision to exclude a merger or proposed merger from the application of the Merger Rule. The information to be provided includes the parties' general corporate information, business activities and ownership structure, a description of the transaction, proposed market definition, market shares, a detailed competition analysis and grounds for exclusion. The application should also include supporting documents such as a declaration of completeness and accuracy, and 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.

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 ultimately depend on the complexities of the case and the resources available to the competition authority. In practice, from submission of all required information, cases without issues have been approved within one month and complex cases have taken up to six months to be approved.

In addition, the competition authority may commence an investigation of a merger within 30 days of the day on which the competition authority first became aware, or ought to have become aware, that a merger has taken place. If the competition authority reasonably believes that a merger contravenes the Merger Rule, it must apply to the Competition Tribunal for an order within six months (this can be extended if the Competition Tribunal considers it reasonable) of the day on which the merger was completed or the competition authority became aware of the merger (whichever is later).

Generally, the competition authority will have the power to obtain relevant documents and information, and to require any person by written notice to attend an interview before the competition authority during an investigation. The competition authority may also conduct market inquiries that could include consulting with interested third parties. If, following its investigation, the competition authority considers that there is no reasonable cause to believe that the merger or anticipated merger contravenes the Merger Rule, the competition authority will take no further action. In the alternative, the competition authority can apply to the Competition Tribunal for an order.

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

No indicative timetable is provided by the competition authority in relation to the Informal Advice Route or the Decision Route. The competition authority has stated that it will endeavour to process applications in an efficient and timely manner, but that timing will ultimately depend on the complexities of the case and the resources available to the competition authority. In practice, from submission of all required information, cases without issues have been approved within one month and complex cases have taken up to six months to be approved.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Competition Ordinance focuses on two key behavioural prohibitions on business conduct concerning anticompetitive agreements and abuse of a substantial degree of market power, and incorporates a limited merger control regime that applies to mergers involving a telecommunications licence carrier (the Merger Rule). The substantive test to be applied for the Merger Rule is whether the merger has, or is likely to have, the effect of substantially lessening competition in Hong Kong. A guideline jointly issued by the Competition Commission and the Communications Authority (the competition authority) setting out how they intend to interpret and give effect to the Merger Rule (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 are likely to be available in the market;
- the existence and height of any barriers to entry into the market;
- whether the merger would result in the removal of an effective and vigorous competitor;
- the degree of countervailing power in the market; and
- the nature and extent of change and innovation in the market.

The Guideline further sets out additional factors that the competition authority may consider when assessing a vertical merger. These include whether:

- there is market power at one or more of the functional levels involved in the merger;

- there are incentives to leverage that market power into the upstream or downstream market with the purpose of lessening or foreclosing competition in that market (ie, where the merged firm operates in a competitive upstream or downstream market);
- the market power is likely to be leveraged (eg, where raising rivals' costs in downstream markets through discriminatory access pricing would be profitable and would lessen competition); and
- the effect is likely to substantially lessen competition in the market.

The competition authority will usually employ a with-and-without test when assessing the transaction, which involves assessing the level of competition that is likely to exist in a market both with and without the merger.

Non-competition issues

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

The Chief Executive in Council may, by order published in the Gazette, exempt a specified merger or proposed merger from the application of the Merger Rule if he or she is satisfied that there are exceptional and compelling reasons of public policy to do so. There is little guidance on what constitutes exceptional and compelling reasons of public policy.

Economic efficiencies

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

The Merger Rule does not apply to a merger if the economic efficiencies that arise or may arise from the merger outweigh the adverse effects caused by any lessening of competition in Hong Kong. The undertaking claiming the benefit of such an 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 for decision

The Competition Ordinance focuses on two key behavioural prohibitions on business conduct concerning anticompetitive agreements and abuse of a substantial degree of market power, and incorporates a limited merger control regime that applies to mergers involving a telecommunications licence carrier (the Merger Rule). Parties to a merger may apply to the Competition Commission and the Communications Authority (the competition authority) for a formal decision as to whether the proposed 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).

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 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

Where the competition authority, after conducting an investigation, has concluded that the merger will not contravene the Merger Rule, the investigation will be closed and the competition authority will take no further action. If, however, the competition authority has reasonable cause to believe that anticipated mergers will likely contravene the Merger Rule if carried into effect, it may initiate proceedings at the Competition Tribunal.

If the Competition Tribunal considers that the merger is likely to contravene the Merger Rule, it may make an order to ensure that there will be no such contravention, including ordering the person against whom the order is directed not to proceed with the merger or a part of the merger, or prohibiting the person against whom the order is directed from doing anything that will result in a merger. If the Competition Tribunal is not satisfied that a merger would likely contravene the Merger Rule, it may make a declaration to that effect.

If an application is made to the Competition Tribunal but it has not yet been finally determined, the Competition Tribunal may make interim orders for the purpose of ‘preventing pre-emptive action’ (paragraph 5.30 of the Guideline).

Review of completed mergers

Similar to anticipated mergers, the competition authority may apply to the Competition Tribunal for an order if it has reasonable cause to believe that a merger will likely contravene the Merger Rule. Insofar as the Competition Tribunal is satisfied that a merger contravenes the Merger Rule, it may make any order it considers appropriate for the purpose of bringing the contravention to an end, which may include an order providing for divestiture of any business or any undertaking or association of undertakings, or an order prohibiting or restricting the acquisition by any person of the whole or part of another person's business or doing anything that will or may result in a merger.

In each of the above scenarios, it is possible for the parties to propose suitable remedies to close down any competition authority investigation or Competition Tribunal proceedings.

Remedies and conditions

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

Yes, it is possible for the parties to the merger to propose suitable remedies to meet the concerns of the competition authority in return for the competition authority's agreement not to commence an investigation, not to bring proceedings in the Competition Tribunal, or to terminate any investigation or proceedings that have commenced.

As a general rule, the competition authority prefers structural remedies, as such remedies do not generally require ongoing monitoring activity.

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

The procedural requirements for the acceptance, withdrawal of acceptance, variation and release of commitments are provided in Schedule 2 of the Competition Ordinance. Before accepting a commitment, the competition authority must give at least 15 days' notice of the proposed commitment to those that are considered likely to be affected by the merger and the proposed commitment, and consider any representations that are made to the competition authority. Any commitment accepted by the competition authority will be made public in the register of commitments.

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

The competition authority does not distinguish between domestic mergers and foreign-to-foreign mergers.

Under the (now repealed) regime under the Telecommunications Ordinance, the Communications Authority approved, in 2014, HKT Limited's acquisition of CSL New World Mobility Limited subject to remedies.

The remedies to address concerns in the downstream retail mobile telecommunications service market were for 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 to make known any plan of closure of any base station sites for a period of five years.

The remedies to address concerns in the upstream wholesale access service market were for 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 for 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 that 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 Competition Ordinance's behavioural provisions relating to the prohibitions on entering into anticompetitive agreements and abusing 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?

The Competition Ordinance focuses on two key behavioural prohibitions on business conduct concerning anticompetitive agreements and abuse of a substantial degree of market power, and incorporates a limited merger control regime that applies to mergers involving a telecommunications licence carrier (the Merger Rule). Parties to a merger may apply to the Competition Commission and the Communications Authority (the competition authority) for a formal decision as to whether the proposed 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).

Under the Decision Route, whereby an application is made to the competition authority for a formal approval decision, the competition authority must publish a notice and allow 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 considering their views insofar as they are relevant; and
- carry out independent research – for example, to help assess the degree of competition in the relevant market.

Before accepting a commitment, the competition authority must give at least 15 days' notice to those likely to be affected by the merger and the proposed commitment, and consider any representations that are made to the competition authority.

Publicity and confidentiality

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

The competition authority is under a duty to establish and maintain adequate procedural safeguards to prevent the unauthorised disclosure of confidential information (which is a broadly defined term in the Competition Ordinance and encompasses commercial information and business secrets). It is an offence when a specified person (which is a defined term in the Competition Ordinance and includes the competition authority and its members, employees or agents) is in breach of his or her duty to preserve the confidentiality of any confidential information.

Disclosure is only allowed with lawful authority – for instance, when the required consent is sought or if the information has already been lawfully disclosed to the public on an earlier occasion. In the case of disclosure with lawful authority, a specified person must, before disclosing any such information, give notice to the person who provided the information and to any person who is likely to be affected by the disclosure, and consider any representations that are made about the proposed disclosure. The Competition Ordinance also imposes an obligation on third parties (not being specified persons) not to disclose confidential information.

Where a person or applicant provides information to the competition authority and is seeking confidential treatment, the information must be specifically identified and the reason for confidentiality must be provided. Parties are also asked to submit both confidential and non-confidential versions of documents when appropriate.

Specifically in relation to complaints, the competition authority will generally investigate in private to protect the interests of those involved and will not make disclosures except where appropriate (eg, to carry out the investigation).

Cross-border regulatory cooperation

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

There is no express provision in the Competition Ordinance providing for cooperation with antitrust authorities in other jurisdictions. The Competition Commission did, however, become a member of the International Competition Network (ICN) in 2013. It has since been an active member of the ICN and is engaged in the work of various ICN Working Groups. In 2018, it was appointed co-chair of the Advocacy Working Group with a view to promoting a culture of competition through non-enforcement means.

The Competition Commission has also formally entered into memorandums of understanding with antitrust authorities in other jurisdictions. For example, in 2016, it signed a memorandum of understanding with the Canadian Competition Commission with the purpose of enhancing cooperation, coordination and information sharing between the two agencies, in December 2020, it signed a memorandum of understanding with the Philippine Competition Commission to strengthen cooperation between the two agencies, and in 2023, it signed a memorandum of understanding with the Guangdong Administration for Market Regulation (one of the provincial agencies of the State Administration for Market Regulation of China) to strengthen cooperation in the advancement of competition policy and law in the Guangdong-Hong Kong-Macao Greater Bay Area.

JUDICIAL REVIEW

Available avenues

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

An application may be made by any person or undertaking concerned to the Competition Tribunal for a review of a decision of the Competition Commission and the Communications Authority (the competition authority). An application can only be made with the leave of the Competition Tribunal. Leave can only be granted if the Competition Tribunal is satisfied that either the review has a reasonable prospect of success or it is in the interests of justice to hear the review.

Before or after the determination of an application for review, the Competition Tribunal may, either of its own motion or on application, refer any question of law arising from the review to the Court of Appeal for determination by way of case stated.

An appeal lies as of right to the Court of Appeal against any decision, determination or order of the Competition Tribunal made under the Competition Ordinance, with a few exceptions. The Court of Appeal has jurisdiction to hear and determine an appeal and may:

- confirm, set aside or vary the decision, determination or order of the Competition Tribunal;
- where the decision, determination or order is set aside, substitute any other decision, determination or order it considers appropriate; or
- remit the matter in question to the Competition Tribunal for reconsideration in light of the decision of the Court of Appeal.

An appeal does not lie to the Court of Appeal against any interlocutory decision, determination or order of the Competition Tribunal unless leave to appeal has been granted by the Court of Appeal or the Competition Tribunal.

Time frame

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

An application for the review of a decision of the competition authority must be made within 30 days of the day on which the determination was made. The Competition Tribunal may extend the time if it is satisfied that there is a good reason for doing so and no injustice would be caused as a result of the extension.

An application for a judicial review must be made within three months of the day on which the determination was made.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

Since the entry into force of the Competition Ordinance on 14 December 2015, the Communications Authority 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 Communications Authority decided not to commence formal investigations into any of these acquisitions.

More recently, the Communications Authority reviewed Hong Kong Broadband Network's proposed acquisition of WTT. Following a public consultation on the original commitments offered by the parties, the Communications Authority conditionally cleared the transaction subject to revised commitments. The transaction reduced the major operators in the relevant market from four to three.

The Communications Authority 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. Although there is no expiry date for this commitment, the parties may request for the commitment to be varied or terminated.

The Communications Authority 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 telecommunications services on existing or no less favourable terms to wholesale customers for a period of three years after the effective date of the acquisition. The parties have agreed to submit written reports on compliance with these revised commitments to the Communications Authority every six months until the expiry of the revised commitments.

Between 1 April 2022 and 31 March 2023, the competition authority reviewed one transaction under the Merger Rule but no further action was considered necessary in respect of the transaction.

Reform proposals

35 | Are there current proposals to change the legislation?

It is 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 undertook to review the Competition Ordinance a few years after it came into effect. The Competition Ordinance focuses on two key behavioural prohibitions on business conduct concerning anticompetitive agreements and abuse of a substantial degree of market power, and incorporates a limited merger control regime that applies to mergers involving a telecommunications licence carrier (the Merger Rule).

In this context, the Competition Commission has indicated that it would advocate for certain aspects of the Competition Ordinance to be revised, including the introduction of a cross-sector merger control regime. The acquisition of Hong Kong Express by Cathay Pacific, which was completed in July 2019 and was not reviewable under the Merger Rule, triggered a fresh wave of concerns over the lack of a cross-sector merger control regime; however, it remains to be seen whether the Merger Rule will be broadened in the future and in what time frame.

UPDATE AND TRENDS

Key developments of the past year

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

No updates at this time.

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Voluntary or mandatory system?	Mandatory.
Notification trigger/ filing deadline	A combination would be required to be notified to the Competition Commission of India (CCI) and receive approval from the CCI prior to closing.
Clearance deadlines (Phase I/Phase II)	Phase I: 30 working days from receipt of notification, excluding clock stoppages 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 deadline may be extended by 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 that the CCI believes the transaction will have, or is likely to have, an appreciable adverse effect on competition (AAEC) in India, the transaction will be treated as void and all actions taken in pursuance of the transaction shall also be void. In such a case, the CCI also has the power to unwind the transaction, although this has not happened to date.
Remarks	Not applicable.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

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

Competition law in India is governed by the Competition Act, 2002 (the Competition Act), and regulations and guidance notes issued thereunder. Sections 5 and 6 of the Competition Act require the pre-notification to the Competition Commission of India (CCI) of all acquisitions, mergers and amalgamations, where the turnover or assets of the parties and groups cross specified thresholds (combinations). The CCI is responsible for merger review and applies the standard of appreciable adverse effect on competition (AAEC).

On 11 April 2023, the Competition (Amendment) Act, 2023 (the Amendment Act) received the assent of the President of India. Some of the provisions of the Amendment Act have been notified (and have come into force). The merger control related provisions have yet to come into force and will do so through government notifications.

Scope of legislation

2 | What kinds of mergers are caught?

Section 5 of the Competition Act covers three broad categories of combinations: acquisitions, mergers and amalgamations. For a transaction to qualify as a combination under the Competition Act, it must meet the jurisdictional thresholds. The Amendment Act also provides for deal value thresholds (provisions relating to which are yet to be notified) to assess whether an acquisition, merger or amalgamation qualifies as a combination and requires notification to the CCI. To prevent the merger control regime from becoming unduly onerous, Schedule I to the CCI (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 (Combination Regulations) lists categories of transactions that are ordinarily not likely to cause an AAEC in any relevant market in India and, therefore, are not normally required to be notified to the CCI. Some of these transactions are the following:

- 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. Further, an acquisition of less than 10 per cent of total shares or voting rights will be deemed to be solely for investment purposes if the acquirer:
    - is able to exercise only the rights of ordinary shareholders exercisable to the extent of their respective shareholding;
    - does not have a right to or intend to have a seat on the board of the target enterprise; and
    - does not intend to participate in the management or affairs of the target enterprise.
- An acquisition of additional shares or voting rights of an enterprise by the acquirer or its group, where the acquirer or its group, prior to the acquisition, already holds 25 per cent

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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 an enterprise by the acquirer or its group.

- An acquisition of shares or voting rights where the acquirer already holds 50 per cent or more of the shares or voting rights in the target enterprise, except where the transaction results in a transfer from joint control to sole control.
- An acquisition of assets not directly related to the business of the acquirer, or made solely as an investment or in the ordinary course of business, not leading to control of the target enterprise, except where the assets represent substantial business operations of the target enterprise in a particular location or for a particular product or service, irrespective of whether such assets are organised as a separate legal entity or not.
- Intra-group reorganisations, which 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 of the shares or voting rights of the other enterprise, or a merger or amalgamation of enterprises in which more than 50 per cent of the shares or voting rights in each of such enterprises are held by enterprises within the same group (this exemption is not available if the transaction results in transfer from joint control to sole control).
- Acquisitions of stock-in-trade, raw materials, stores and spares, trade receivables, and other similar current assets in the ordinary course of business.
- An acquisition of shares or voting rights pursuant to a buy-back, bonus issue, stock split, consolidation of face value of shares or subscription to rights issue not leading to an acquisition of control. Note that care will need to be taken in the case of an acquisition of control through a renunciation of rights.
- An amended or renewed tender offer where a notice has been filed by the party making the offer.
- An acquisition of shares, control, voting rights or assets by a purchaser approved by the CCI (for instance, in case of a divestiture).
- An acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stockbroker on behalf of its clients in the ordinary course of its business and in the process of underwriting or stockbroking.

On 11 March 2024, the government of India released the Draft CCI (Exempted Combination) Rules, 2024 (Draft Exemption Rules) for public comments, which propose to replace the existing Schedule I to the Combination Regulations (see section 7.2.1, below).

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.

The term 'enterprise', as defined by 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 fall within the scope of section 5 of the Competition Act. In any event, in the majority of cases, a truly greenfield joint venture is unlikely to involve assets (which are being acquired, taken control of, merged or amalgamated) exceeding 4.5 billion rupees or turnover exceeding 12.5 billion rupees, in India. Accordingly, the de minimis threshold is likely to be met and greenfield joint ventures would not require filing a notification with the CCI. 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.

There is presently limited guidance from the CCI in relation to the treatment of joint ventures or the criteria it would apply in determining whether a transaction is greenfield or brownfield, or, for that matter, whether it would treat full-function joint ventures differently from non-full-function joint ventures.

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

The acquisition of control is only one of the events that may trigger a notification. As a starting point, the definition of 'control' under section 5(a) of the Competition Act includes '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'.

Previously, a substantial amount of the CCI's decisional practice had interpreted 'control' to mean the ability to exercise decisive influence over the management, affairs and strategic commercial decisions of a target enterprise, whether such decisive influence was capable of being exercised by way of a majority shareholding, veto rights (attached to a minority shareholding) or contractual covenants. However, the CCI expanded the scope of control in two of its orders, penalising Telenor (C-2012/10/87) for failing to notify its acquisitions of shareholdings in two companies and penalising UltraTech Cement (C-2015/02/246) for failing to provide information on the shareholding or control of the promoter family over two companies.

In *UltraTech Cement* (C-2015/02/246), the CCI stated that regard had to be given to different levels of control when defining it – in ascending order, material influence, de facto control and controlling interest (de jure control) – and not just to special rights. In *Telenor* (C-2012/10/87), the CCI held that Telenor could not have sole control over the two target companies and as such, was required to seek a prior approval from the CCI. In the first target, another shareholder held a 51 per cent shareholding, conferring a controlling interest; in the second target, even though Telenor held a 67.25 per cent shareholding, other shareholders held more than 26 per cent, giving them the ability to block special resolutions (which was considered negative control even under India's foreign direct investment policy).

Such an interpretation includes negative control by minority shareholders. In contrast to investor protection rights, having the ability to veto (or cause a deadlock in respect of) strategic commercial decisions could be sufficient to confer at least joint control, the acquisition

of which would require notification to the CCI. As such, strategic commercial decisions on matters such as annual business plans, budgets, recruitment and remuneration of senior management, and opening of new lines of business are sufficient to confer control.

The Amendment Act codifies the lowest standard of control (material influence). It defines 'control' as the ability to exercise material influence, in any manner whatsoever, over the management, affairs or strategic commercial decisions by:

- one or more enterprises, either jointly or singly, over another enterprise or group; or
- one or more groups, either jointly or singly, over another group or 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?

The jurisdictional thresholds under the Competition Act, as revised by the government of India in a notification dated 7 March 2024, are as follows:

- Under the parties test:
  - the parties have combined assets in India of 25 billion rupees or combined turnover in India of 75 billion rupees; or
  - the parties have combined worldwide assets of US$1.25 billion, including combined assets in India of 12.5 billion rupees or a combined worldwide turnover of US$3.75 billion, including a combined turnover in India of 37.5 billion rupees.
- Under the group test:
  - the group has assets in India of 100 billion rupees or a turnover in India of 300 billion rupees; or
  - the group has worldwide assets of US$5 billion, including assets in India of 12.5 billion rupees or a worldwide turnover of US$15 billion, including a turnover in India of 37.5 billion rupees.

The Amendment Act also provides for deal value thresholds, which cover transactions: (a) with a deal value in excess of 20 billion rupees; and (b) where the target enterprise has substantial business operations in India. Such transactions will require notification in India (assuming no exemption is available). The provisions on deal value thresholds are yet to be notified.

The Amendment Act provides that the value of the transaction should be understood to include every valuable consideration, whether direct, indirect or deferred for any acquisition, merger or amalgamation. The Amendment Act further provides that the CCI shall issue regulations to prescribe the criteria to assess whether an enterprise has substantial business operations in India. In September 2023, the CCI released the Draft CCI (Combinations) Regulations, 2023 (Draft Combination Regulations). The Draft Combination Regulations set

out the methodology for calculating the deal value and ascertaining if an enterprise has substantial business operations in India.

A transaction that does not satisfy the jurisdictional thresholds does not amount to a combination and, as such, cannot be investigated by the CCI. That said, the CCI has the power to seek information on any transaction, including information on why the transaction was not notified to the CCI.

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

Filing under the Indian merger control regime is mandatory. If the jurisdictional thresholds are met and no exemptions are available, the combination must be notified to the CCI.

On 7 March 2024, the government of India issued a notification revising the de minimis thresholds, which is valid till 6 March 2026. It increased the asset threshold from 3.5 billion rupees to 4.5 billion rupees and the turnover threshold from 10 billion rupees to 12.5 billion rupees. On 11 March 2024, the government also released the draft CCI (De Minimis) Rules, 2024 (Draft De Minimis Rules) which, when they come into effect, will codify the above revised de minimis thresholds into rules.

In addition to the exemptions under Schedule I of the Combination Regulations and the de minimis target-based filing exemption, the government 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 exempted nationalised banks from the application of the provisions of sections 5 and 6 of the Competition Act for a period of 10 years. In July 2023, the government extended the exemption granted to regional rural banks from the application of the provisions of sections 5 and 6 of the Competition Act for a period of five years.

Section 6(4) of the Competition Act provides that acquisitions, share subscriptions or financing facilities entered into by public financial institutions, registered foreign institutional investors, banks or registered venture capital funds pursuant to any covenant of a loan agreement or an investment agreement do not need to be pre-notified to the CCI. In such cases, the body concerned will need to notify the CCI of the acquisition within seven calendar days of completion of the transaction.

However, the corresponding provision in section 6(9) of the Amendment Act provides that acquisitions, share subscriptions or financing facilities entered into by public financial institutions, foreign portfolio investors, banks or Category I alternative investment funds do not need to be notified to the CCI, thereby removing the need for a post-facto filing altogether. This has not yet been notified.

In August 2019, the CCI introduced a green channel route that is applicable to combinations where the parties, their respective group entities and/or affiliates have no horizontal overlap, no vertical relationship and no complementary activities. Such combinations are, subject to certain conditions and safeguards, deemed to be approved by the CCI upon filing. The Amendment Act codifies this mechanism in the Competition Act and further empowers the CCI to bring additional types of transactions within the ambit of the green channel route.

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

Yes, foreign-to-foreign transactions satisfying the standard assets and turnover thresholds under the Competition Act and not covered by any exemptions will have to be notified even if there is no local nexus or effects on markets in India.

In this regard, in its decision in proceedings against SABIC International Holdings BV (15 July 2022) under section 43A of the Competition Act, the CCI noted that, once the thresholds prescribed under section 5 of the Competition Act are met, the CCI can inquire under section 32 into combinations taking place outside India that cause or are likely to cause an AAEC in India. The residential status of the parties to the transaction is immaterial.

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 telecommunications, electricity, pharmaceuticals, media, oil and natural gas.

There are non-competition regulatory approvals that may be required depending on the sector in which the investment is being made. Notably, following an amendment to the Insolvency and Bankruptcy Code 2016, it has been made clear that where a transaction covered by the corporate insolvency resolution process has to be notified to the CCI, approval by the CCI is required before a resolution plan is approved by the committee of creditors. However, a judgment by the National Company Law Appellate Tribunal (NCLAT) has indicated that this amendment is instructional rather than mandatory. The corporate insolvency resolution process 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 is 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?

A notifiable transaction requires a notification to (and approval from) the Competition Commission of India (CCI) before consummation. The filing can be made at any time before closing of the proposed transaction.

In practice, parties may have pre-filing consultations (PFC) with CCI staff or case team members, on substantive and procedural matters, which frequently help parties to decide whether they need to notify and, if so, how they should proceed. The CCI has published a PFC guidance note setting out the framework for such consultations.

If the parties to the proposed combination fail to notify a notifiable transaction, the CCI can impose a penalty of up to 1 per cent of the parties' total turnover or value of assets (whichever is higher). The Amendment Act introduces another method for the calculation of penalties, ie, 1 per cent of the value of the transaction (this provision is yet to be notified).

The CCI has exercised its power to impose a penalty for non-notification of either whole or part of a transaction in several cases, with the penalties imposed ranging from nil to 50 million rupees (with the outlier exception of the 2.02 billion rupees penalty imposed on Amazon (C-2019/09/688) for its failure to notify an interconnected transaction – see section 2.2.1, below). For instance:

1 The CCI imposed a penalty of 50 million rupees on Piramal Enterprises (C-2015/02/249) for failing to notify previously the interconnected steps of a closed transaction. The Competition Appellate Tribunal upheld the imposed penalty.
2 The CCI imposed a penalty of 4 million rupees on Axis Bank (9 August 2023) for failing to notify its acquisition of 9.91 per cent stake in CSC e-Governance Services India Limited (CSC). Axis Bank did not notify the transaction to the CCI as: (i) it erroneously believed that the transaction benefitted from the earlier de minimis target-based filing exemption; and (ii) the transaction involved a minority acquisition with no intention to participate in the affairs or management of CSC and therefore benefitted from the exemption provided under item 1 of Schedule I to the Combinations Regulations. The CCI observed that: (i) both the assets and turnover of CSC were higher than the thresholds for the earlier de minimis exemption; (ii) the transaction was neither made solely as an investment nor in the ordinary course of business; and (iii) Axis Bank had the intention to have representation on the board of directors of CSC and to participate in its management or affairs. Considering these facts, the CCI held that the transaction did not benefit from the earlier de minimis exemption and item 1 of Schedule I to the Combinations Regulations.
3 The CCI imposed a nominal penalty of 500,000 rupees on each of a number of telecommunication companies for failing to notify acquisitions of spectrum (Bharti Airtel/Videocon, C-2017/05/509; Bharti Airtel and Bharti Hexagon, C-2017/05/510; and Reliance Jio Infocomm/Reliance Communications, C-2017/06/516). Notably, the CCI held that guidelines issued by the sectoral regulators did not replace the competition mandate of the CCI. Spectrum constituted an asset, the acquisition of which was a combination under the Competition Act as the exemption for the acquisition of assets (made solely as an investment or in the ordinary course of business) did not apply.

Parties are increasingly using the PFC process before formally filing or deciding not to file. Further, parties need to be cautious of all statements made internally and before the regulator.

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

In an acquisition, the acquirer is responsible for filing. In a merger or an amalgamation, both the parties are jointly responsible for filing.

Generally, the notice is filed in the (short) Form I. However, where there is a horizontal overlap of more than a 15 per cent combined market share or a vertical linkage of more than a 25 per cent market share, the CCI recommends the notice to be filed in the (long) Form II. A green channel filing is required to be made in a Form I (with an additional declaration).

The filing fees are 2 million rupees for a Form I (including filings made through the green channel route), and 6.5 million rupees for a Form II. The acquirer or the parties to a merger or amalgamation, as applicable, shall pay the filing fees. In the case of a joint notification, filing fees are payable jointly or severally. The Draft Combination Regulations propose to increase the filing fees for Form I and filings made under the green channel route to 3 million rupees and for Form II to 9 million rupees.

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. 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 Amendment Act shortens this period to 150 calendar days.

Further, the Amendment Act provides that, if the CCI does not form its prima facie opinion within 30 calendar days of the receipt of the notice the combination is deemed to have been approved. The above changes are yet to be notified.

The suspensory effect extends both to exempt steps of interconnected transactions and 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 to the proposed combination fail to notify a notifiable transaction or they implement the transaction without approval, the CCI can impose a penalty of up to 1 per cent of the parties' total turnover or value of assets (whichever is higher). The Amendment Act introduces another metric for the calculation of penalties, ie, 1 per cent of the value of the transaction (this provision is yet to be notified).

In the past, the CCI imposed nominal penalties in cases of delayed, voluntary filings. In cases where parties had consummated part of the combination prior to approval by way of a pre-payment of the consideration, the CCI imposed a penalty of 500,000 rupees (*Hindustan Colas/Shell India*, C-2015/08/299) and a penalty of 1 million rupees (*Chhatwal Group Trust/Dilip Buildcon Limited*, C-2018/01/544). In another case, where a loan had been advanced to the seller and the loan could be adjusted against the consideration payable for the proposed acquisition before CCI approval, a penalty of 1 million rupees was imposed (*Adani Transmission/Reliance Electric*, C-2015/01/547).

In *Trian Fund/Invesco* (C-2021/01/810), the CCI took issue with Trian Fund's partial consummation of the transaction and subsequent filing of a notification, even though Trian Fund argued that it could benefit from the exemption under item 1 of Schedule I to the Combinations Regulations. In rejecting Trian Fund's arguments, the CCI imposed a nominal penalty of 2 million rupees.

A penalty of 500,000 rupees was imposed in *Cairnhill CIPF/Mankind Pharma* (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 the dissolution of a joint venture, the CCI decided not to impose any penalty for a belated filing. This was due to the unique structure of the combination and the lack of finality in key terms, which were to be determined by third parties.

The CCI found that even a contractual clause in the acquisition agreement amounted to the consummation of a part of the acquisition (*Bharti Airtel/Tata Teleservices*, C-2017/10/531). It is not clear what the offending clause covered because material parts of the order were redacted. However, the CCI considered that the arrangement disincentivised the target from competing with the acquirer, affected the business activities in the ordinary course of the target, and could not be considered inherent in and proportionate to the objective of preserving the business valuation. In proceedings against Veolia under section 43A of the Competition Act (*Veolia/Suez*, 17 May 2022), Veolia believed that the assets being acquired, taken control of, merged or amalgamated were not more than 3.5 billion rupees in India or the turnover was not more than 10 billion rupees in India and was not notifiable to the CCI (the earlier de minimis target-based filing exemption) based on the publicly available records of Suez SA (ie, the target). The CCI held that it was immaterial whether Veolia acted in a bona fide manner and the de minimis target-based filing exemption did not apply. The CCI decided to take a somewhat strict view and imposed a penalty of 10 million rupees.

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, aligning their commercial behaviour or completing any leg of a notified transaction until approval for the entire transaction has been received. In *LT Foods/Hindustan Unilever* (C-2016/04/387), the CCI made it clear that any coordination between parties before approval – such as handing over inventory, making introductions to suppliers and setting restrictions on promotional selling – is prohibited and imposed a nominal penalty of 500,000 rupees.

In January 2020, the CCI penalised CPPIB (C-2017/11/536) in relation to its failure to disclose an interconnected transaction as part of the transaction notified to the CCI. Even though the transaction documents did not capture any such interconnectedness between the two transactions, the CCI relied on press releases of the parties to establish that CPPIB was aware of the interconnected transaction and should have disclosed or notified it. CPPIB was required to pay 5 million rupees for gun jumping and non-disclosure.

In March 2022, the CCI imposed a nominal penalty on Adani Green Energy (C-2021/05/837) for exchanging information during the standstill period. The relevant clause under consideration allowed the parties to discuss ongoing business and operations of the target and its subsidiaries, with the acquirer providing input on the business of the target and the target taking such input into account in its best interests. The CCI considered the facts that there was a clean team protocol in place and the input from Adani was not binding on the target were insufficient to prevent the exchange of information (even if these protocols were followed).

In other gun-jumping cases in March 2022 involving Tata Power (C-2021/03/824, C-2021/03/825 and C-2021/03/826), the CCI clarified that approval from the relevant state electricity commission did not exempt the acquirer from a CCI notification and approval requirement, and the CCI approval should have been received prior to accepting the letter of intent issued by the regulator to the acquirer. However, given the specific circumstances of the case (ambiguity due to an overlapping provision in sector-specific regulations, conditions of the tender imposed on the acquirer and voluntary filing and cooperation of the acquirer), only a nominal penalty of 500,000 rupees was imposed on Tata Power.

Although nominal penalties are the norm, in December 2021 the CCI imposed a significant penalty of 2.02 billion rupees on Amazon (C-2019/09/688) for failure to notify under section 43A of the Competition Act, as well as a penalty under sections 44 and 45 of the Competition Act of 20 million rupees in respect of 'the deliberate design on the part of Amazon to suppress the actual scope and purpose of the Combination'. In the case, although Amazon had filed a notification with the CCI, it was held that it had deliberately failed to notify parts of the transaction. The CCI required Amazon to make a new notification using Form II within 60 days of receipt of its order, with the earlier approval remaining in abeyance (a first-of-its-kind decision in India). On appeal, the NCLAT confirmed its complete agreement with the CCI's views that Amazon had intentionally not made known the real ambit and purpose of the combination and found that Amazon was in breach of sections 43A, 44 and 45 of the Competition Act. The NCLAT upheld the CCI's decision to impose a penalty under section 43A of the Competition Act, but reduced the penalty imposed under sections 44 and 45 of the Competition Act to 10 million rupees. The NCLAT upheld the CCI's direction requiring Amazon to furnish a fresh notification for the combination, keeping the CCI's earlier approval order in abeyance. Amazon has filed an appeal against this order in the Supreme Court of India.

In ADIA/UPL (C-2022/12/995), the CCI for the first time declared a notification void ab initio, which was deemed approved when applied through the green channel route. The CCI held the parties had incorrectly filed under the green channel route as the parties (through their portfolio companies) were engaged in overlapping activities. The CCI imposed a penalty of 500,000 rupees under section 43A of the Competition Act on the acquirers for consummating the transaction and 5 million rupees under section 44 of the Competition Act for making statements which were false. As a result, parties will have to exercise greater caution while conducting the assessment on horizontal overlaps, vertical relationships and complementary activities as the satisfaction of the criteria to benefit from the green channel route will be carefully assessed by the CCI.

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 to 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, 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* (C-2013/05/122), the CCI imposed a penalty of 10 million rupees on Etihad Airways for completing one limb of the notified transaction before receiving clearance. Further, 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 a clearance in India.

In proceedings against SABIC International Holdings BV (15 July 2022) under section 43A of the Competition Act, the CCI noted that, once the thresholds prescribed under section 5 of the Competition Act are met, it can under section 32 of the Competition Act inquire into combinations taking place outside India that will, or are likely to, cause an appreciable adverse effect on competition (AAEC) in India. The residential status of the parties to the transaction is immaterial. The CCI imposed a minimal penalty of 4 million rupees on SABIC.

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

There is currently no precedent in India in relation to this issue and the CCI has not given any guidance. However, the Competition Act is worded in a manner such that 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 a time that clearance from the relevant 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 enter into effect until CCI approval is received. In *Baxter/Baxalta* (C-2015/07/297), 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 enter into effect (even if, in practice, the transfer of the local entities required separate agreements).

Public takeovers

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

At present, there are no special merger control rules under the Competition Act applicable to public takeover bids.

However, the Amendment Act provides for a derogation from the standstill obligations under the Competition Act for open offer or open market purchases and other transactions undertaken on stock exchanges, subject to:

- the parties filing a notification form after undertaking the purchase within such time as prescribed by the CCI through regulations; and

- the acquirer not exercising ownership or beneficial rights or interest in such securities, including exercising voting rights and receipt of dividends (unless otherwise prescribed by the CCI through regulations) until the CCI approves the transaction.

This provision has not yet been notified.

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. In the case of the green channel route, a Form I is filed and the requisite information is relatively minimal.

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 includes:

- the trigger document;
- recent financial statements of the parties;
- shareholdings with details of rights in other entities present in relevant and related markets;
- market data (market share, market size to the extent possible and based on independent third-party data sources and sales); and
- a competition assessment of the relevant market.

Sections 44 and 45 of the Competition Act empower the CCI to impose penalties for furnishing false or incomplete information on a transaction. In the Amazon case (C-2019/09/688), a penalty was imposed under sections 44 and 45 of the Competition Act for 'the deliberate design on the part of Amazon to suppress the actual scope and purpose of the Combination'. In *ADIA/UPL* (C-2022/12/995), the CCI declared the deemed approval obtained by ADIA and TPG as void ab initio as it observed that the parties (through their portfolio companies) horizontally overlapped and had wrongly filed the notification under the green channel route.

The Amendment Act provides that the CCI may also impose penalties under section 43A of the Competition Act over and above sections 44 and 45 of the Competition Act in cases where parties fail to provide the information requested by the CCI while examining if a non-notified transaction was, in fact, reportable. This penalty can be up to 1 per cent of the value of the total turnover or assets, or the value of the transaction, whichever is higher. This change is yet to be notified.

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 period may be extended by up to 15 working days. Further, where modifications are offered in Phase I itself, the period is further extended by 15 calendar days.

The clock will stop if a formal request for information is made and will 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. Most transactions are approved by the CCI in Phase I.

Phase II

If the CCI forms a prima facie opinion at the first stage 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 CCI may approve the combination if the parties' reply is found to be satisfactory and dispels any AAEC concerns. If the reply is not found to be satisfactory, the CCI moves to an in-depth investigation of the combination. At this second stage, the CCI must form another prima facie opinion on whether the combination causes or is likely to cause an AAEC, after considering the parties' reply (*UP Glass Manufacturers Syndicate and Others v CCI*, Competition Appeal (AT) Nos. 07, 08, 09 and 10 of 2023).

In such cases, the CCI may either direct the Director General to conduct a detailed investigation or do so on its own, which 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 (section 29(2) of the Competition Act). To date, 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 comments are received by the CCI, it may request further information or seek clarification from the parties. At this stage, the CCI may invite any person or member of the public who was affected or likely to be affected by the combination to file their written objections before the CCI within 15 working days of the date on which the details of the combination were published. The right of third parties to submit objections arises only when the CCI issues the direction for publication of the proposed combination under Section 29(2) of the Competition Act, and not at any stage prior to that (*UP Glass Manufacturers Syndicate and Others v CCI*, Competition Appeal (AT) Nos. 07, 08, 09 and 10 of 2023).

Thereafter, within 15 working days of the expiry of this period, 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 if it is of the view that the transaction will cause or is likely to cause an AAEC.

After receipt of all the information, the CCI will pass orders either approving, prohibiting or suggesting modifications to the combination.

Changesin timeline under the Amendment Act

The introduction of the Amendment Act will lead to significant changes to the overall timelines for merger approval (including modification). Not only has the Amendment Act reduced timelines, but references to 'days' are also specifically to calendar days – previously, the same timelines were in working days. The Amendment Act codifies the Phase I and Phase II procedure and, if the CCI does not form a prima facie opinion at the end of the 30-calendar day Phase I review period, the transaction is deemed approved.

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

The CCI presently has up to 210 calendar days from the date of notification to approve or prohibit a notified combination. If the CCI does not expressly approve or prohibit the transaction, the transaction is deemed to have been approved after the expiry of the 210-calendar-day period. The 30-working-day period for the parties to submit amendments to proposed modifications, and for them to accept the CCI's original modifications if the modifications are not accepted, are excluded from this 210-calendar-day 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-calendar-day period, although the Competition Act and the Combinations Regulations are silent on this aspect.

The Amendment Act provides that the CCI has up to 150 calendar days from the date of notification to approve or prohibit a notified combination; otherwise, the combination is deemed to have been approved. Similarly, it provides that the CCI has up to 30 calendar days from the receipt of the notice for its prima facie opinion on whether the combination is likely to cause or has caused an AAEC within the relevant market in India; otherwise, the combination is deemed to have been approved. These provisions are yet to be notified.

There are no provisions to speed up the review timetable; parties who wish to gain early clearance should comply with all information requests expeditiously. In practice, CCI clearance can take between 60 and 90 days even for no-issues transactions. Transactions with substantial overlaps can take significantly longer. For example, in *Agrium/PotashCorp* (C-2016/10/443) and *Holcim/Lafarge* (C-2014/07/190), conditional clearance decisions were adopted at almost the end of the entire 210-calendar-day review period. In *Dow/Dupont* (C-2016/05/400) and *Bayer/Monsanto* (C-2017/08/523), the CCI took over 500 days (including the time taken by the parties to respond to the RFIs) to clear and approve the transactions 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 causes or is likely to cause an AAEC within the relevant market in India. To determine whether a combination causes or is likely to cause an appreciable adverse effect on competition (AAEC), the Competition Commission of India (CCI) must have due regard to all or any of the following factors stated in section 20(4) of the Competition Act:

- the actual and potential level of competition through imports in the market;
- the extent of barriers to entry in the market;
- the level of combination in the market;
- the degree of countervailing power in the market;
- the likelihood that the combination will result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- the extent of effective competition likely to sustain in a market;
- the extent to which substitutes are available or are likely to be available in the market;
- the market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- the likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- the nature and extent of vertical integration in the market;
- the possibility of a failing business;
- the nature and extent of innovation;
- the 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.

The Competition (Amendment) Act 2023 (Amendment Act) proposes a minor change in the third factor under section 20(4) of the Competition Act, amending the level of 'combination' in the market to the level of 'concentration' in the market.

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

There is no special substantive test for joint ventures, and nothing has, to date, emerged from decided cases.

Theories of harm

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

Based on the CCI's jurisprudence, the CCI has considered both unilateral effects and coordinated effects as appropriate theories of harm in a number of cases. More recently, the CCI has also started assessing portfolio effects in detail as a theory of harm.

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* (C-2016/10/443), 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.

In relation to the issue of common ownership, in a first for a remedy in a private equity deal, the CCI accepted modifications where the investor had an existing investment in an entity competing with the target in the market (*Canary and Link/Intas*, C-2020/04/741). The remedies related to the investor removing their director on the board of the competing portfolio investment, restrictions on use of information relating to the portfolio entities and the investor exercising limited veto rights in the competing portfolio investment. Recently, the CCI also accepted voluntary modifications by an investor which had an investment in an entity competing with an affiliate of the target. The investor agreed to not participate, associate with, receive non-public information of or exert influence on any matter or affair related to the target's affiliate (*General Atlantic/Acko Tech,* C-2023/04/1017).

The CCI's decisional practice indicates that its competition assessment has become much more detailed and granular over the years. The CCI no longer focuses only on unilateral effects; it also focuses on vertical and portfolio effects, as seen in *Siemens/Varian* (C-2020/12/798); *Bayer/Monsanto* (C-2017/08/523) and *Schneider/L&T* (C-2018/07/586). The CCI has also considered the ability and incentive of parties to cause foreclosure in transactions exhibiting vertical and complementary linkages (*MacRitchie Investments/API*, C-2023/12/1084; *Sun Pharmaceutical/Ranbaxy Laboratories,* C-2014/05/170; and *Google International/Bharti Airtel,* C-2022/03/913).

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.

In approving a transaction involving *Kirloskar/ISMT Limited* (C-2021/12/886), the CCI received a third-party application urging the regulator not to approve the transaction. The CCI noted that the transaction had been considered against factors under the Competition Act and was not likely to raise any competition concerns; therefore, the CCI did not place any reliance on the application.

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, which include:

- the 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 caused or was likely to cause an AAEC, solely on the grounds that efficiencies outweighed competition concerns. At the time of writing, remedies were offered/required on 29 occasions (excluding cases where parties voluntarily amended non-compete clauses). However, such transactions were cleared on account of modifications and divestments, not on account of efficiencies. Some guidance can be drawn from the CCI's clearance decisions adopted in *Etihad Airways/Jet Airways* (C-2013/05/122), *Holcim/Lafarge* (C-2014/07/190) and *PVR/DT* (C-2015/07/288), where the CCI indicated that the efficiencies (where claimed by the parties) should be merger-specific, verifiable and quantifiable, and outweigh competition concerns.

In December 2021, while clearing Tata Sons' acquisition of the solely government-owned carrier Air India (C-2021/11/883), the CCI noted that there were certain domestic and international markets where market concentration would increase as an outcome of the transaction. However, it noted that the transaction was supported by various mitigating factors in the form of market forces (including supply-side substitutability, the existence of a strong competitor and a likelihood of expansion in the capacity of airports) as well as factors specific to the target such as a likelihood of improving operational efficiencies, addressing sub-optimal asset utilisation and optimising the route network, and the possibility of deriving efficiencies from synergies when the target was operated by a private entity. Based on these factors and the fact that, without the transaction, the target would have exited the market, the CCI noted that, although any of the above factors alone might not have been sufficient to alleviate the likely harm to competition, it appeared that the likely benefits outweighed the likely harm when all the factors were considered in unison.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

If the Competition Commission of India (CCI) believes that a transaction will cause or is likely to cause an appreciable adverse effect on competition (AAEC) in India, the transaction will be treated as void and all actions taken in pursuit of the void transaction will also be void. No transaction has yet been blocked by the CCI, despite the CCI having the express powers to do so. The CCI also has the power to unwind a transaction, although this has not happened to date.

In Amazon (C-2019/09/688), the CCI directed the parties to file a fresh notification and kept the previous approval in abeyance, which was upheld by the National Company law Appellate Tribunal (NCLAT) on appeal. An appeal against the decision of NCLAT is pending before the Supreme Court of India.

The CCI also has the power to reduce the scope of ancillary restrictions such as non-compete provisions and can also order the divestiture of assets. There is no express limitation on the types of remedies that the CCI can accept to address AAEC concerns.

Remedies and conditions

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

Yes, it is possible to remedy competition issues. Initially, the remedies considered by the CCI were largely in the context of non-compete obligations in the pharmaceutical sector (eg, in 2012, *Orchid Chemicals & Pharmaceuticals/Hospira Healthcare*, C-2012/09/79). Since then, the CCI has considered far more significant remedies, both behavioural and structural, when clearing transactions. In a number of cases, the CCI has accepted or proposed structural remedies where a proposed combination would result in high combined market shares and unacceptable increases in levels of concentration. In all these cases, the CCI has not followed a one-size-fits-all approach, but has tailored the remedies to the specific circumstances of each case. Divestiture may be of products, businesses or shareholdings. Structural remedies akin to divestitures include commitments to exit a business or to not re-enter a market.

In *Outotec OYJ/Metso OYJ* (C-2020/03/735), the CCI's concerns were addressed by the adoption of voluntary remedies under which Metso OYJ would effectively transfer its India business through an exclusive and irrevocable licence of the technology for use in India only. This was the first time that the CCI accepted a transfer of rights for a technology (for a specified duration) as a remedy to address competition concerns.

Separately, in a first for a remedy in a private equity deal, the CCI accepted modifications where an investor had an existing investment in an entity competing with the target in the market (*Canary and Link/Intas*, C-2020/04/741). The remedies related to the investor removing their director on the board of the competing portfolio investment, a restriction on the use of information relating to the portfolio entities and the investor exercising limited veto rights in the competing portfolio investment.

In a separate transaction, the CCI accepted voluntary modifications by an investor which had an investment in an entity competing with an affiliate of the target (*General Atlantic/Acko Tech*, C- 2023/04/1017). The modifications included the non-participation of the investor in any matter and a commitment to not receive any non-public information pertaining to the affiliate of the target.

In *PVR/DT* (C-2015/07/288), the CCI relied on structural remedies and required the freezing of divestitures and expansion as a precondition to clearing transactions in the field of cinema multiplexes. The CCI did not accept behavioural remedies in the form of price caps, as it considered such remedies to be ineffective to address the identified AAEC concerns and difficult to monitor.

The CCI has also gone as far as requiring divestment of minority shareholdings in companies in India (*Bayer/Monsanto,* C-2017/08/523; and *ZF/WABCO*, C-2019/11/703) and outside India (*Agrium/PotashCorp,* C-2016/10/443).

In *CME/ZEEL/BEPL* (C-2022/04/923), which involved an amalgamation of Zee Entertainment Enterprises Limited (ZEEL) and Bangla Entertainment Private Limited with and into Culver Max Entertainment Private Limited (trading as Sony in India), the CCI approved the transaction based on the voluntary structural remedies offered by the parties in relation to the market for the operation and wholesale supply of television channels in India. The parties agreed to divest ZEEL's ownership in three Hindi-language channels.

Recently, the CCI granted a conditional approval to the 100 per cent acquisition of Hindustan National Glass & Industries Limited (HNG) by AGI Greenpac Limited (AGI Greenpac). This was subject to a structural remedy which involved AGI divesting a manufacturing plant of HNG (*HNG/AGI Greenpac*, C-2022/11/983).

In terms of behavioural remedies, in *Bayer/Monsanto* (C-2017/08/523), the CCI accepted a broad package of behavioural remedies to address a variety of concerns about horizontal overlaps, vertical foreclosure, innovation and portfolio effects. The CCI cleared *Schneider/L&T* (C-2018/07/586) in Phase II on the basis of a bouquet of innovative and transaction-specific behavioural remedies (including white labelling, expansion freezes, export commitments and capacity allocation).

In *Hyundai/Kia* (C-2019/09/682), the CCI accepted remedies in relation to the acquisition by these automobile manufacturers of small shareholdings in the ride-sharing company, Ola. The parties agreed that a strategic collaboration with Ola would be on a non-exclusive basis and that the algorithm or programming of the Ola marketplace would not give preference to Hyundai or Kia cars or discriminate against drivers of other cars.

In *Ipca/Unichem* (C-2023/05/1028), the CCI accepted Unichem's voluntary undertaking that it would not re-enter the Indian formulations market for at least 36 months from the date of closing of the transaction.

In September 2023, the CCI conditionally approved the merger of Tata SIA Airlines into Air India (C-2023/04/1022), subject to voluntary behavioural commitments of maintaining minimum capacities on certain identified routes offered by the parties.

The CCI has also accepted firewalls and information exchange protocols as remedies (for example, in *Northern TK/Fortis,* C-2018/09/601, *Tata/GMR,* C-2019/07/676) and *General Atlantic/Acko Tech*, C- 2023/04/1017).

In Nippon Yusen Kabushiki (C-2016/11/459), which concerned the creation of a joint venture to continue container line shipping and terminal services, the CCI expressed concerns about the possible spillover effects in the parties' retained businesses. These were addressed by a voluntary behavioural commitment to introduce a rule of information control, prohibiting exchanges of information on the non-integrated businesses and for disciplinary action in cases of breach.

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

In many of the divestiture cases, the CCI set out in some detail the elements of the required divestiture. A detailed examination of these elements is outside the scope of this chapter, but they may be briefly set out as follows:

- Identifying the divestment business: the necessary components of the business, including, in some cases, key personnel, are set out in the order.
- First divestiture period: the divestiture is, in principle, to take place with requisite CCI approvals in the first divestiture period. Typically, this period is six months from the date of clearance decision, although it was 18 months in *Agrium/Potash Corp* (C-2016/10/443). The period is often treated as confidential in the order. The CCI may also extend this period based on the merits of each case. In *ZF Friedrichshafen/WABCO* (C-2019/11/703), the CCI extended the first divestiture period, in which the high court had directed the CCI to reconsider its initial decision not to grant an extension request.
- Preservation of economic viability, marketability and competitiveness: measures are to be taken to ensure that the business to be divested is run as a viable business and that assets are not degraded, among other things.
- Hold-separate obligations: if the business to be divested is part of a broader business, the former is to be kept separate with the appointment of a separate manager. In the case of divestment of shares, the divesting shareholders are not to exercise voting rights or be involved in the business as of the date of the CCI's decision.
- Ring-fencing: confidential information is not to be shared between the parties and the divested business.
- Purchaser requirements: various purchaser requirements are set out to ensure that the purchaser will be an independent and viable player in the market.
- Approval of the sale and purchase agreement, and of the purchaser: the CCI is to give approval to the purchaser and to the terms of the sale and purchase agreement. In all cases other than *Sun Pharmaceutical/Ranbaxy Laboratories* (C-2014/05/170), the CCI has permitted the closing of the main transaction pending closing of the divestment.
- Monitoring agency: the CCI generally appoints an independent agency as a monitoring agency to supervise the carrying out of the modification.
- Second divestiture period: if the parties fail to divest in the first divestiture period, the CCI may direct the parties to divest alternative divestment products in a second divestiture period. This will be overseen by a divestment agency, which will have the sole authority to sell at no minimum price.

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

The CCI has yet to require remedies in foreign-to-foreign transactions and none have been offered to date.

It should be noted that, in *Abbott Laboratories/St Jude Medical* (C-2016/08/418), the CCI noted that the remedy offered by the parties on a worldwide basis would address its AAEC concerns.

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 also covers the ancillary restrictions.

Specifically, in relation to non-compete arrangements, the CCI had issued a Guidance Note on Non-Compete Restrictions (the Guidance Note) that set out what the CCI believed to be the acceptable scope of non-compete arrangements (including in relation to duration, geographic scope and product scope). Non-compete clauses to which the Guidance Note did not apply were not deemed to be anticompetitive, and parties were required to self-assess such clauses to ensure compliance with sections 3 and 4 of the Competition Act (addressing anticompetitive agreements and abuse of dominant position, respectively).

In November 2020, the CCI removed the requirement to provide information on non-compete obligations in the short Form I (used for notifying a majority of notifiable combinations) and, on 31 December 2020, the CCI withdrew the Guidance Note. The CCI stated that its removal would provide parties with greater flexibility in determining non-compete restrictions and reduce the information burden in notifications. However, the withdrawal of the Guidance Note has reduced certainty and increased the self-assessment burden on parties who are filing a notification with the CCI.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

Third parties do not have a right to be involved in Phase I proceedings; however, the Competition Commission of India (CCI) can reach out to third parties and those third parties may make representations to the CCI during Phase I. If the CCI forms a prima facie opinion that the combination has, or is likely to have an appreciable adverse effect on competition (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. The CCI may then ask any person or member of the public affected or likely to be affected by the combination to file objections in writing within 15 working days of the date on which the details of the combination were published.

The Amendment Act proposes to reduce this period from 15 working days to 10 calendar days. The person filing objections is required to substantiate their claim that they are adversely affected or are likely to be affected by the combination by producing supporting documents. Third parties can only present their opinions in writing to the CCI and there is no provision for an oral hearing before the CCI.

The CCI is empowered 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 horizontal overlaps, vertical relationships and complementary activities, the CCI is increasingly relying on these powers; it has reached out to competitors, customers and sectoral experts to gather information as well as to verify the information and claims made by the notifying parties. The CCI has also increased international cooperation, especially in its review of global, multi-jurisdictional transactions.

In August 2018, in *Walmart/Flipkart* (C-2018/05/571), the CCI approved the acquisition of a majority stake in Flipkart by Walmart. Notably, a number of market players and pressure groups voiced criticisms of Flipkart's business practices. The CCI found that a majority of these concerns were unconnected to the transaction and many had nothing to do with competition law. The CCI took note of concerns of deep discounting and preferential treatment to select retailers in online marketplaces, but held that these were not specific to the notified transaction. As the purpose of merger review was to consider the effects of combinations, such conduct was not subject to the merger review process.

Publicity and confidentiality

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

Parties are required to submit a maximum 1,000-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 confidentiality regime was overhauled through the publication of the CCI (General) AmendmentRegulations 2022 (the General Regulations Amendment) to amend Regulation 35 of the CCI (General) Regulations, 2009, which is the primary provision that governs the CCI's confidentiality regime. The General Regulations Amendment introduced a self-certification requirement through which parties certify that confidentiality claims over information or documents being filed with the CCI are consistent with the requirements set out by the regime.

This places the burden, which previously had rested on the CCI, on the parties to undertake an itemised assessment of each confidentiality claim. The factors for seeking confidentiality include disclosure of trade secrets; destruction or appreciable diminution of the commercial value of information; or reasonable expectation of causing serious injury. The General Regulations Amendment also provide that certain information shall, by default, be marked as confidential, including email dumps, call detail records and any other document or material of a personal information nature. False claims by parties attract a penalty, which represents an additional burden.

Cross-border regulatory cooperation

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

To enhance cooperation between authorities, the CCI has signed memorandums of understanding (MOUs) with various competition authorities, including:

- the Federal Antimonopoly Service of Russia;
- the Administrative Council for Economic Defence in Brazil;
- the competition authorities of China and South Africa as part of the BRICS group;
- the US Federal Trade Commission and the Department of Justice;
- the Canadian Competition Bureau;
- the European Commission;
- the Australian Competition and Consumer Commission;
- the Japan Fair Trade Commission;
- the Competition Commission of Mauritius; and
- the Egyptian Competition Authority.

The MOUs, which are very general in nature, are intended to increase cooperation and communication between international competition authorities. The CCI has stated that it has reached out to other competition authorities during the review process in a number of cases. It regularly seeks waivers from parties to share information with other authorities in large global transactions.

JUDICIAL REVIEW

Available avenues

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

Any person aggrieved by an order of the Competition Commission of India (CCI) may appeal to the National Company Law Appellate Tribunal (NCLAT) within 60 days. The NCLAT took over this responsibility from the Competition Appellate Tribunal (COMPAT) after the latter's dissolution in May 2017. NCLAT orders can be further appealed to the Supreme Court of India.

In 2013, a concerned citizen appealed the *Etihad Airways/Jet Airways* (C-2013/05/122) decision before the COMPAT in *Jitender Bhargava v Competition Commission of India & Others* (Appeal No. 44 of 2013). The appeal was dismissed as the appellant did not have *locus standi* to appeal the CCI's decision as he was not an aggrieved person, as required by the Competition Act.

In 2014, Thomas Cook appealed the CCI's decision in *Thomas Cook/Sterling Holidays* (Appeal No. 48 of 2014), and the COMPAT set aside the penalty of 10 million rupees imposed by the CCI for a delayed filing. The CCI appealed this decision to the Supreme Court of India, which upheld the CCI's decision and restored the penalty on Thomas Cook. The penalty of 20 million rupees imposed on the acquirer in *SCM Soilfert/Deepak Fertilizers* (C-2014/05/175) for consummating strategic open market purchases in the target enterprise without

prior approval from the CCI was upheld in appeal both at the COMPAT and the Supreme Court of India.

In *Agrium/PotashCorp* (C-2016/10/443), upon rejection of the counterproposal made by the parties to divest shareholdings in two entities as opposed to three entities that were proposed by the CCI to remedy coordinated effects in the market, the parties filed an appeal before the NCLAT. In the first-ever appeal against a CCI modification proposal, the NCLAT provided a time frame of six weeks to the parties and the CCI to arrive at a consensus and resolve the matter. Subsequently, the parties submitted a new proposal, which was accepted by the CCI and approved by the NCLAT.

In August 2018, the Confederation of All India Traders, a traders' collective, filed an appeal before the NCLAT challenging the approval order passed by the CCI in *Walmart/Flipkart* (C-2018/05/571) on the grounds that the CCI failed to look into the anticompetitive effects arising out of the combination. The NCLAT dismissed the appeal, stating that the appellant could not make any prima facie case.

Further, for the first time, the NCLAT set aside a CCI decision to impose a penalty on Eli Lily in March 2020 (TA (AT) (Competition) No. 03 of 2017) for not notifying a transaction that was covered under the earlier de minimis target-based filing exemption). The CCI had wrongly held that the thresholds of the de minimis target-based filing exemption did not apply to the business being acquired, but rather to the target's parent.

In June 2022, the NCLAT upheld a CCI order under sections 43A, 44, and 45 of the Competition Act (with some modifications) to find Amazon guilty and impose a penalty (C-2019/09/688), dismissing the appeal filed by it against the CCI's order.

In July 2023, the NCLAT dismissed an appeal filed by a third party against the CCI's approval in *HNG/AGI Greenpac* (C-2022/11/983). The transaction involved the 100 per cent acquisition of HNG by AGI Greenpac, which was approved by the CCI subject to the divestiture of a manufacturing plant of HNG. The appellants submitted that the CCI did not follow the procedure set out under the Competition Act and the Combination Regulations in approving the acquisition. The NCLAT reviewed the process followed by the CCI and held that it had followed due procedure in accordance with the Competition Act and the Combinations Regulations, and accordingly dismissed the appeals (see section 36, below). An appeal against the NCLAT's decision is pending before the Supreme Court of India.

The Amendment Act introduces a requirement on a person against whom a penalty is imposed to pay at least 25 per cent of the amount in the manner directed by the NCLAT.

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 of the date of receipt of the appeal. Appeals to merger decisions have generally been completed within this period. Further, the decision of NCLAT can be appealed before the Supreme Court of India within 60 days of the date of communication of the NCLAT'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?

Since the merger control provisions came into force in June 2011, the Competition Commission of India (CCI) has cleared almost all notifications in the Phase I review period. Only a handful of cases were cleared after a Phase II review. Show-cause notices were issued in *Mumbai International Airport and Bharat Petroleum Corporation* (C-2014/0/164), *Nippon Yusen Kabushiki and Mitsui OSK Lines* (C-2016/11/459), *ChemChina/Syngenta* (C-2020/09/776), *ZF/WABCO* (C-2019/11/703), *Outotec OYJ/Metso OYJ* (C-2020/03/735), *BillDesk/PayU* (C-2022/04/920), *Tata SIA Airlines/Air India*, C-2023/04/1022), *HNG/AGI Greenpac* (C-2022/11/983); however, these transactions were cleared before Phase II was initiated.

To date, there have been no prohibition decisions.

Recently, the CCI appears to have paid particular attention to the digital and technology, pharma, energy, retail and ecommerce sectors in its merger review process.

Although the Competition (Amendment) Act 2023 (Amendment Act) compresses the various timelines for approval and makes major changes to the merger control regime under the Competition Act 2002, it remains to be seen how this will impact the CCI's enforcement record once the relevant provisions are notified by the government.

Reform proposals

35 Are there current proposals to change the legislation?

On 11 April 2023, the Amendment Act received assent of the President of India. Some of the provisions of the Amendment Act were notified (and came into force). The merger control related provisions have yet to come into force and will do so through government notifications.

Amendments such as the introduction of deal value thresholds (which is yet to be notified) may result in more transactions being subject to CCI review. The Draft Combination Regulations sets out the methodology of calculating deal values and determining substantial business operations in India.

March 2024 was a busy period in the Indian competition law space, with a slew of notifications / draft legislations being published by the government of India, as listed below:

1. A notification was issued, which increased the jurisdictional thresholds (parties as well as group level tests) by 150 per cent of the original values.
2. A notification was issued, which increased the asset and turnover thresholds of the de minimis target-based filing exemption from 3.5 billion rupees to 4.5 billion rupees and 10 billion rupees to 12.5 billion rupees, respectively, for a period of two years.

3 The Draft De Minimis Rules, which mirror the revised de minimis thresholds and effectively codifies the notification into rules.
4 The Draft CCI (Green Channel) Rules, 2024, which will consolidate the criteria for availing the green channel route. Notably, these will revise the test for determining an affiliate based on 'access to commercially sensitive information' of an enterprise.
5 The Draft Exemption Rules, which exempt certain categories of transactions from the requirement of a prior approval of the CCI. Some of the key changes that are proposed to be made by the Draft Exemption Rules are set out below:

  - An acquisition of shares in the ordinary course of business. The criteria for an acquisition to qualify as ordinary course of business has been expressly provided and this exemption has been limited to acquisition of shares or voting rights by underwriters, stockbrokers, and mutual funds up to specified thresholds.
  - Acquisition made solely as an investment. This exemption is available if: (i) the acquirer holds less than 25 per cent of shares or voting rights of the target; (ii) the transaction does not lead to the acquisition of control of the target; and (iii) the transaction qualifies as 'solely as an investment'. A transaction is considered solely as an investment if:
  - the acquirer does not acquire a right or ability, in any entity, to (a) nominate a director / observer to the board; and / or (b) access commercially sensitive information; and
  - the acquirer group does not have any horizontal overlaps, vertical relationships and complementary activities with the target group. In case of overlapping activities, the transaction will still be considered solely as an investment if post-transaction, the acquirer holds less than a 10 per cent shareholding / voting rights in the target.

- Acquisition of incremental shareholding by an existing shareholder. Any incremental acquisition of shares/voting rights by an existing shareholder in the target is exempt, provided it meets the following conditions:

  - no horizontal overlaps, vertical relationships and/or complementary activities between the acquirer group and the target group;
  - pre- and post-transaction, the acquirer or its group entities hold less than 25 per cent shareholding/voting rights in the target; and
  - there is no acquisition of control of the target by the acquirer or its group.
  - If there are horizontal overlaps, vertical relationships and/or complementary activities between the acquirer group and the target group, an incremental shareholding acquired (through single/series of acquisition) not exceeding 5 per cent is exempt. However, this exemption is not available where (in case of overlapping activities) the pre-transaction shareholding of the acquirer is less than 10 per cent, and the post-transaction shareholding of the acquirer is more than 10 per cent.

- Intra-group transactions, such as:

  - An increase in shareholding / voting rights in the target where:

    - prior to the proposed transaction the acquirer group holds 25 per cent or more but less than 50 per cent shareholding/voting rights;
    - post the proposed transaction the acquirer holds less than 50 per cent shareholding/voting rights;

  - there is no change in control of the target.
  - Intra group acquisition of assets, if there is no change in control over assets being acquired.
  - Intra group merger or amalgamation not leading to change in control.

- Exemption for demergers. An issuance of shares by the resulting company as consideration for the demerger to the demerged company or to its shareholders (in the proportion of their shareholding in the demerged company) is exempt from notification.

A key feature of the changes proposed by the Draft Exemption Rules is the concept of 'change in control' from the current threshold of 'change from joint to sole control'. This signifies that, if there is any change in the nature or degree of control exercised by an acquirer, certain exemptions may not apply.

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 July 2023, the National Company Law Appellate Tribunal (NCLAT) dismissed an appeal filed by a third party against the Competition Commission of India's (CCI's) approval in *HNG/AGI Greenpac* (C-2022/11/983). The transaction involved a 100 per cent acquisition of HNG by AGI Greenpac, which was approved by the CCI subject to the divestiture of a manufacturing plant of HNG. Following this, certain third parties filed an appeal against the approval before the NCLAT. Through its landmark judgment, the NCLAT explained the procedure under Section 29 of the Competition Act and dealt with the interplay between Phase I and Phase II investigations:

1. An appeal against an order of the CCI could be filed by 'an aggrieved person'. While determining the locus standi of the appellants, the NCLAT observed that the expression 'an aggrieved person' must be understood widely and not construed narrowly. Since the CCI performed inquisitorial functions (as opposed to adjudicatory functions), a wide range of interested parties must be allowed to approach the CCI/NCLAT, in the public interest.
2. While forming its opinion that a transaction was likely to cause an appreciable adverse effect on competition (AAEC), the CCI must issue the show-cause notice to both parties to the combination, ie, the acquirer and the target. The NCLAT further held that non-issuance of the show-cause notice to the target did not vitiate the approval order of the CCI.
3. Once a show-cause notice was issued, the CCI was required to consider the replies of the parties. In the event a remedial proposal/modification was found to be adequate to address the competition concerns at that stage, the CCI could approve the transaction without proceeding further under section 29(2) of the Competition Act.
4. If, after considering the replies to the show-cause notice, the CCI was of the view that a transaction was likely to cause an AAEC, then the CCI could proceed to direct the publication of details of the combination under section 29(2) of the Competition Act.

Publication of details of the combination was not required if the CCI did not form any prima facie opinion of AAEC after considering the replies.

5 The right of third parties to submit objections arose only when the CCI issued directions to the parties to publish details of the proposed combination under Section 29(2) of the Competition Act. The scheme of the Competition Act did not entitle any person to participate in the proceedings, other than those who had given the notice to the CCI.

An appeal against the NCLAT's decision is pending before the Supreme Court of India.

Further, in August 2023, the CCI set aside a deemed approval obtained under the green channel route. It observed that the parties had incorrectly made a filing under the green channel route as the parties (through their portfolio companies) were engaged in overlapping activities. The CCI imposed a penalty of 500,000 rupees under section 43A of the Competition Act on the acquirers for consummating the transaction without its prior approval and 5 million rupees under section 44 for making statements which were false in material particulars (*ADIA/UPL* (C-2022/12/995)).

In September 2023, the CCI conditionally approved the merger of Tata SIA Airlines into Air India, subject to voluntary behavioural commitments offered by the parties. The parties agreed to ensure a certain level of scheduled passenger transport capacity on India-Singapore and other specific international routes and specific domestic routes (*Tata SIA Airlines/Air India*, C-2023/04/1022).

Ravneet Kaur was appointed as the CCI chair on 16 May 2023. Three members – Anil Agrawal, Sweta Kakkad and Deepak Anurag – were also appointed as members to the CCI in 2023, as a result of which the CCI is now fully quorate.

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Notification trigger/ filing deadline	Notification must be filed if the transaction: • constitutes a merger, consolidation or acquisition (of shares or assets) resulting in a concentration/change of control; • meets the jurisdictional thresholds; and • is between non-affiliated entities. Foreign-to-foreign mergers may have to be notified if they have a nexus with the Indonesian market. The transaction must be notified to the Indonesian Competition Commission (KPPU) within 30 business days of the transaction becoming legally effective.
Clearance deadlines (Phase I/Phase II)	In Phase I, the KPPU has three business days to check the completeness of the notification documents and if the transaction is notifiable. In Phase II, after the Phase I period has ended and if notification is deemed to be required, the KPPU has a further 90 business days to carry out its assessment and issue its opinion. Simplified assessment is available for transactions that are not expected to create competition issues.
Substantive test for clearance	The KPPU carries out a comprehensive assessment if the Herfindahl-Hirschman Index (HHI) is between 1,500 and 2,500, and the change in HHI is above 250; or the HHI is above 2,500 and the change is above 150. If the market concentration test is positive, the KPPU will consider entry barriers.
Penalties	A late notification penalty of 1 billion rupiahs per day up to a maximum of 25 billion rupiahs applies.
Remarks	Not applicable.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

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

Merger control in Indonesia, enforced by the Indonesian Competition Commission (KPPU), is governed by:

- Law No. 6 of 2023 on the Ratification of Government Regulation No. 2 of 2022 (in lieu of Law No. 11 of 2020 on Job Creation) into Law (the Competition Law);
- Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, as amended by the Competition Law;
- Government Regulation No. 57 of 2010 on Mergers, Consolidation and Acquisition of Shares that may result in Monopolistic or Unfair Business Competition Practices;
- Government Regulation No. 44 of 2021 on the Implementation of the Prohibition of Monopolistic Practices and Unfair Business Competition;
- Government Regulation No. 20 of 2023 on the Type and Rates of Non-Tax State Revenues at the KPPU;
- KPPU Regulation No. 3 of 2023 on the Assessment of Mergers or Consolidations of Undertakings or Acquisition of Shares in a Company that May Result in Monopolistic Practices or Unfair Competition;
- KPPU Guidelines for the Assessment of Mergers, Consolidations or Acquisitions issued on 6 October 2020, to the extent that they do not conflict with KPPU Regulation No. 3 of 2023; and
- Supreme Court Circular Letter No. 1 of 2021 on the Transfer of Examination of Objections to KPPU Decisions to the Commercial Court.

The following KPPU regulations are also relevant:

- KPPU Chair Regulation No. 4 of 2022 on the Definition of Relevant Markets; and
- KPPU Regulation No. 2 of 2023 on the Case Handling Procedure.

Scope of legislation

2 | What kinds of mergers are caught?

Mergers, consolidations and acquisitions are caught.

A merger is the legal act of one or more undertakings merging with another undertaking, resulting in assets and liabilities being transferred by operation of law to one undertaking and the legal status of the other to cease by operation of law.

A consolidation is the legal act of two or more undertakings consolidating by establishing a new undertaking that obtains the assets and liabilities of the consolidating undertaking by operation of law, with the legal status of the consolidating undertakings ceasing by operation of law.

An acquisition is the legal act of an undertaking acquiring shares or assets of another undertaking, resulting in a change of control of the undertaking or the assets of the undertaking. A change of control could also involve a change from sole to joint control or vice versa.

The concepts of mergers, consolidations and acquisitions should be interpreted broadly to mean any type of concentration of control over undertakings that were previously independent into one undertaking or group of undertakings, or a change of control from one undertaking to another undertaking that results in a concentration of control or market concentration.

A share acquisition may be carried out through a direct purchase from the existing shareholder or the capital market, or through subscription of new shares by capital injection. The definition of shares goes beyond the conventional understanding of the term by encompassing legal instruments that are conceptually similar to shares, which enable their owners to control and receive benefit from such ownership (eg, a participating interest, which is commonly acquired in the oil and gas industry). An acquisition of shares with no or limited voting rights (preferred stock) is exempt from notification as it does not result in a change of control.

A transfer of assets (tangible or intangible) is tantamount to an acquisition of shares and, accordingly, should be notified to the KPPU if there is:

- a transfer of their management control or physical control; or
- an increase in the ability of the acquirer to control a relevant market.

The following asset transfers are exempt:

1 a non-bank asset transfer transaction valued at less than 250 billion rupiahs;
2 a bank asset transfer transaction valued at less than 2.5 trillion rupiahs;
3 a transfer of assets that is carried out in the ordinary course of business (this depends on the business profile of the acquiring party and the purpose of the acquisition) – transactions in the ordinary course of business are:

    - transfers of assets that are finished goods from one undertaking to another for resale to consumers by an undertaking that is active in the retail sector (ie, the sale of consumer goods by retailers); and
    - transfers of assets that are supplies to be used within three months in the production process (ie, the purchase by an undertaking of raw materials and basic components from various sources for production).

The assets described under point (3) above have no relationship with the business activities of the undertaking acquiring the assets.

The transferred asset value in points (1) and (2) above is as cited in the latest financial statements, or as calculated at the sale, purchase or other legal asset transfer. The highest of these should be the basis for calculation of the threshold. If the transferred assets are privately owned, the asset value would be based on the value as referred to in the seller's tax filing.

An undertaking is any individual or business legal or non-legal entity that is established and domiciled, or is carrying out activities within, Indonesia either individually or jointly by virtue of an agreement, while carrying out various business activities in the economic field.

If the transaction is carried out between affiliates, the transaction is exempt. A company is an affiliate of another if:

- it either directly or indirectly controls, or is controlled by, that company;
- both it and the other company, directly or indirectly, are controlled by the same parent company; or
- there is a main principal shareholder relationship with the counterparty.

The principal shareholder should be a controlling shareholder. 'Affiliation' means a relationship of control.

3 What types of joint ventures are caught?

Joint ventures are, in principle, caught by Indonesian merger control legislation unless they are greenfield joint ventures. To avoid doubt, mergers, consolidations or acquisitions carried out by a joint venture after its establishment are still caught, provided that other criteria are met.

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

A change of control occurs if the controlling undertaking changes from an undertaking:

- carrying out a merger (merging entity) into one that accepts the merger (surviving undertaking);
- carrying out a consolidation into one that is the result of the consolidation;
- whose shares are acquired into one that carries out the acquisition of shares; or
- whose assets are acquired into one that carries out the acquisition of assets.

In the event of an acquisition of shares, control exists if the acquiring party holds:

- more than 50 per cent of the shares or voting rights; or
- 50 per cent (or less) of the shares or voting rights but has the ability to influence or direct the company's policy or management, or both.

Whether the acquiring party has the ability to influence or direct the undertaking's policy or management is determined case by case. Case law shows that an acquiring party may, for instance, have control because it has certain veto rights and a right to nominate the majority of directors, including the president director, or if it has more expertise than the other shareholder in the business in which the target is engaged.

In case of a share acquisition involving a foreign target, the matter of control is determined based on the law applicable to the target. However, we see that in determining whether a change of control has occurred, the KPPU will also consider whether the acquiring party (i) will consolidate the financial statements of the target, (ii) has the right to appoint the

majority of directors, in particular the finance director, and (iii) is registered as the controlling shareholder in the trade register (or local equivalent).

Thresholds, triggers and approvals

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

The jurisdictional thresholds for notification are:

- the combined value of assets in Indonesia exceeds 2.5 trillion rupiahs or, if all undertakings involved in the transaction are active in the banking sector, 20 trillion rupiahs; or
- combined turnover in Indonesia exceeds 5 trillion rupiahs.

Of relevance to the calculation are assets or sales in Indonesia of the acquirer and all undertakings (ie, including the target) that follow the merger, consolidation or acquisition directly or indirectly control, or are controlled by, the undertaking that carries out a merger, consolidation or acquisition of shares or assets. This includes the ultimate beneficial owner, which is the highest controller of a group of undertakings that is not controlled by any other undertaking.

The jurisdictional thresholds are also met if only one party involved in the transaction meets the threshold.

The definition of 'target' includes the target and its subsidiaries and the seller is not taken into account; however, if the transaction results in a change from single to joint control, the assets or turnover in Indonesia, or both, of the existing shareholder and its affiliates are also relevant (unless the transaction is carried out by a joint venture within the meaning discussed below).

The asset value and turnover are calculated based on the consolidated audited financial report of the ultimate beneficial owner – or, if no consolidated financial report is available, the financial reports of the ultimate beneficial owner and each of its subsidiaries – in all cases that occurred during the year before the one in which the transaction takes place. Turnover includes sales of products produced domestically and imported products. Exported products should be excluded from the calculation.

If the asset or sales value of a party involved in the merger, consolidation or acquisition has decreased by 30 per cent or more in an accounting year as compared with the year before, the value is calculated on the basis of the average of the past three years or, if the decrease occurred in under three years, the average of the past two years.

If the transaction is carried out by a joint venture, the ultimate controlling entity for the calculation of the asset and sales value is the joint venture itself, so the calculation should be based on the financial statements of the joint venture and its subsidiaries (if any), as well as of the target and its subsidiaries (if any). The asset and sales value of other affiliates of the joint venture (eg, controlling entities and sister companies) may be ignored for the calculation of the threshold.

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According to the KPPU, the joint venture should form a business unit that is independent from each of the shareholders that have formed the joint venture. The joint venture should have its own financial statements, separated from each of the undertakings that have formed it.

The KPPU does not seem to require that the shareholding of parent companies in the joint venture is equal (ie, 50/50) or that they have exactly the same rights over the governance of the joint venture, but rather that both parent companies are given rights over strategic decisions (including veto rights) that would confer on them joint control over the joint venture.

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

A post-merger filing is mandatory if all criteria are met. Parties involved in the transaction may carry out a voluntary pre-merger filing; however, even if parties carry out a voluntary pre-merger filing, the post-merger filing will still be mandatory. No exceptions exist other than when the transaction is carried out between affiliates, in which case the transaction is exempt. A company is an affiliate of another if:

- it either directly or indirectly controls, or is controlled by, that company;
- both it and the other company, directly or indirectly, are controlled by the same parent company; or
- there is a main principal shareholder relationship with the counterparty.

The principal shareholder should be a controlling shareholder.

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

Foreign-to-foreign mergers may have to be notified if they have a dual nexus in the Indonesian market. A transaction has a nexus if at least (i) the acquiring party or one of its affiliates (eg its ultimate parent entity, a sister company or subsidiary), and (ii) the target or one of its subsidiaries carry out business activities in or sales to Indonesia.

The term 'business activities in Indonesia' can be broadly interpreted and includes:

- direct and indirect (portfolio) equity investment in Indonesian limited liability companies;
- investment in financial instruments other than shares, such as loans or assets;
- contractual rights;
- participation in a unit or trust, no matter whether directly or indirectly; or
- opening a representative office.

Whether a company has sales in Indonesia is not always easy to determine. Parallel sales could also trigger a notification requirement.

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

Indonesia has a general foreign investment regime, which is set out in Law No. 25 of 2007 on Investment, as amended by the Competition Law, and implementing legislation, including

Presidential Regulation No. 10 of 2021 on Investment Sectors, as amended by Presidential Regulation No. 49 of 2021.

Under Law No. 25 of 2007, as amended, all business fields are open to foreign investment unless declared otherwise. Foreign investment must be carried out through a foreign investment company in the form of a limited liability company under Indonesian law (PT PMA) and domiciled within the territory of Indonesia, unless provided otherwise by law. Foreign investors who make investments through a PT PMA should:

- subscribe to shares at the time the PT PMA is established;
- purchase shares; or
- invest through another method in accordance with applicable laws and regulations.

Presidential Regulation No. 10 of 2021, as amended, indicates:

- 37 business fields are subject to specific requirements, which may be classified as:
    - open to foreign direct investment (FDI) but subject to a maximum foreign shareholding limit;
    - open to FDI but subject to special approval from the relevant ministry;
    - 100 per cent reserved for domestic investors; and
    - certain business fields that are limited, supervised or regulated by a separate regulation on the supervision and control of alcohol beverages;
- six business fields that are completely prohibited from FDI under the Competition Law (narcotics, gambling or casinos, harvesting of fish listed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora, utilisation or harvesting of coral, chemical weapons and chemicals that may damage the ozone layer);
- 60 business fields that are reserved for cooperatives and small and medium-sized enterprises; and
- 46 business fields that are open to FDI if in partnership with cooperatives and small and medium-sized enterprises.

Several sectoral laws (eg, in banking, non-banking financial services (venture capital, multi-finance and securities companies), insurance, mining, oil and gas, and shipping) introduce foreign investment rules and restrictions.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

A transaction that meets the relevant criteria should in principle be notified to the Indonesian Competition Commission (KPPU) within 30 business days of the date that the transaction becomes legally effective. Notifications must be submitted through the KPPU's online portal.

The portal is only accessible between 9am and 2pm on business days, which excludes Saturdays and Sundays, official national holidays and joint leave.

If the target is an Indonesian limited liability company, a transaction becomes legally effective on:

- for a merger, the date of approval by the Minister of Law and Human Rights (MoLHR) of the amendment of the articles of association;
- for a consolidation, the date of approval by the MoLHR of the deed of establishment;
- for an acquisition of shares, the date of notification to the MoLHR; and
- for an acquisition of assets, the date of the asset transfer.

A transaction involving a target that is a public company becomes legally effective on:

- the date on which the public disclosure letter for the transaction is submitted to the Financial Services Authority; or
- the final date of payment of shares or other equity securities in the exercise of a rights issuance, merger, consolidation or acquisition carried out by a public company in connection with a public company, or a private company in connection with a public company.

The legal effectiveness of foreign-to-foreign transactions is determined based on the closing date in the agreement between the parties or approval from the authorities in the jurisdiction in which the transaction is taking place.

If a transaction has more than one date on which the transaction will become legally effective, the final date will apply.

For late notification, the KPPU can impose a penalty of 1 billion rupiahs per day up to a maximum of 25 billion rupiahs.

The KPPU has to date imposed penalties for late notification in at least 57 cases, 41 of which occurred in the past five years, showing an increase in enforcement activity. To the best of our knowledge, five cases were related to foreign-to-foreign transactions.

The penalties imposed recently ranged between 1 billion and 10.33 billion rupiahs per transaction, and 20.66 billion rupiahs in total for a single company that acquired three different entities owing to a delay of 1,220 days. The highest penalty for a single transaction (12.6 billion rupiahs) was imposed in October 2019 for a delay of 240 days.

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

The following parties are responsible for a notification filing:

- for a merger, the surviving undertaking of the merger;
- for a consolidation, the undertaking resulting from the consolidation;
- for an acquisition of shares, the undertaking that acquires the shares; and
- for an acquisition of assets, the undertaking that acquires the assets.

As of May 2023, filing fees are required. They are calculated by multiplying the value of assets or sales in excess of the notification threshold, whichever is lower, by 0.004 per cent.

The value of assets or sales is based on the total asset or sales value of:

- the surviving entity, the consolidating undertaking, or the acquiring undertaking and the acquired undertaking; and
- the undertakings that are directly or indirectly controlled by the surviving undertaking resulting from the merger, the consolidating undertaking, or the acquiring undertaking and the acquired undertaking.

If both the asset and sales value meet the threshold, the filing fee will be calculated using whichever value is lower and will only be payable if the KPPU finds that the transaction is notifiable. The maximum fee is 150 million rupiahs.

The notification fee can be reduced to zero per cent or fully waived based on one or more of the following considerations:

- the transaction supports the development of micro, small and medium-sized enterprises;
- inability to pay or force majeure; or
- pursuant to a specific government policy.

These considerations were further elaborated in KPPU Regulation No. 3 of 2023 on the Assessment of Mergers or Consolidations of Undertakings or Acquisition of Shares in a Company that May Result in Monopolistic Practices or Unfair Competition, which was issued on 30 March 2023 and became effective on 31 March 2023.

The notification fee has its legal basis in Government Regulation No. 20 of 2023 on the Type and Rates of Non-Tax State Revenues at the KPPU, which was issued on 5 April 2023 and came into effect on 5 May 2023.

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

As Indonesia has a post-merger system, there are no waiting periods and the implementation of a transaction does not have to be suspended prior to clearance.

Pre-clearance closing

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

As Indonesia has a post-merger system, there are no possible sanctions involved for closing or integrating the activities of the merging businesses before clearance.

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

Not applicable.

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

Not applicable.

Public takeovers

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

No.

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 documents comprise a notification form and supporting documentation. A high level of detail is required. Even if the parties to a transaction have no overlapping market share, the KPPU still expects the notifying party to provide information on the products, competitors, customers and suppliers of the parties involved in the transaction. The KPPU also, in principle, expects to see relevant corporate documents and audited financial reports of the parties and their affiliates.

The notifying party will need to grant power of attorney (notarised and consularised if signed abroad) to the legal representatives preparing the filing for the KPPU.

The notifying party will also need to submit a business plan containing an industry analysis, the management strategy for the next three to five years, an impact analysis (of transactions, market share, markets affected or the benefits of the transaction) and a summary of the transaction. The business plan, particularly the transaction impact analysis, should be prepared by an economist.

The KPPU can ask the parties to submit supplementary documents in addition to the above.

Any foreign-language documents, in principle, must be translated into Bahasa Indonesia. A translated summary of each submitted document is permissible.

Incomplete notifications will not be accepted and the KPPU will not issue a receipt of submission. If the submission is late, the KPPU may initiate a formal investigation and may impose penalties for the delay.

Further, if submitted information or documents prove to be false, the KPPU may cancel the registration of the notification or the findings of its review, or both. Cancellation may be

treated as late notification and be subject to penalties of 1 billion rupiahs per day up to a maximum of 25 billion rupiahs.

Investigation phases and timetable

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

Informal and anonymised consultations are common and may be advisable before notifying a merger, but they will not be binding on the KPPU.

A party may choose to engage in voluntary pre-merger consultation. This procedure is similar to the notification procedure. The KPPU's assessment carried out in the framework of a consultation will be valid for two years if there are no substantial changes to the provided transaction information. A consultation will not exempt the party from the obligation to submit a notification after the transaction has become effective.

Notification comprises two phases: a check on the completeness of notification documents and a review, consisting of initial and comprehensive review sub-phases, with the latter only being applicable to transactions that appear to be problematic from an Indonesian competition perspective. The first phase, which is applicable to all notified transactions, also consists of a check regarding if the transaction is notifiable. This check should be completed within three business days of the notification being submitted. If the notification documents are complete, the KPPU will issue a notification registration number and official confirmation on whether the transaction is notifiable. If the transaction is notifiable, the notification will continue to the review phase. If the notification documents are not complete, the KPPU will request the undertaking to provide additional documents or information as deemed necessary.

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

The KPPU has three plus 90 business days to check the completeness of documents, confirm the notifiability of the transaction and review the notification.

Under the KPPU Guidelines for the Assessment of Mergers, Consolidations or Acquisitions, the procedure can be speeded up if the KPPU concludes that a notification is suitable for a simplified assessment as the transaction is not expected to create competition issues.

The simplified assessment takes into account the following characteristics of the transaction:

- no involvement of the parties in overlapping business activities;
- no engagement in vertically integrated business activities;
- should overlapping business activities exist, a limited joint market share of those activities;
- should vertically integrated business activities exist, a Herfindahl-Hirschman Index below the required threshold for each of those activities;
- the transaction not having the potential for tying or bundling, or a network effect;
- the notification was submitted within 30 business days of commencement of the transaction; or

- the transaction involves an acquisition resulting in an undertaking that gains sole control (from joint control with another undertaking hitherto).

A simplified assessment may be carried out either by the KPPU or at the request of the notifying party. If the KPPU approves a simplified assessment request, it should issue its opinion on the transaction within 14 business days.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Indonesian Competition Commission (KPPU) applies the Herfindahl-Hirschman Index (HHI) or concentration ratio. The KPPU carries out a comprehensive assessment and looks at other aspects if:

- the HHI is between 1,500 and 2,500, and the change in the HHI is above 250; or
- the HHI is above 2,500 and the change in the HHI is above 150.

If the market concentration test is positive, the KPPU will consider entry barriers. In doing so it will, for instance, look at the level of ease for new players to enter the market, the strength of new players, the time needed to enter the market, switching costs, homogeneity of products and brand loyalty.

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

No.

Theories of harm

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

Theories of harm that the KPPU will investigate are market foreclosure and potential unilateral or coordinated effects.

If a transaction results in a conglomerate, the KPPU will also assess the potential of tying or bundling effects, or both.

Non-competition issues

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

The KPPU will assess a transaction more positively if it may prevent a party from bankruptcy. A decrease in market players through bankruptcy would be viewed as more harmful than one of market players becoming dominant as a result of the transaction.

The KPPU may also take into account other non-competition issues when carrying out a review, such as:

- policy to augment the competitiveness and strength of national industry;
- technology and innovation development;
- protection of small and medium-sized enterprises;
- impact on the labour force; and
- implementation of relevant laws or regulations.

Economic efficiencies

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

The KPPU will assess a transaction more positively if it has potential efficiency effects that benefit customers. Efficiency gains are balanced against the anticompetitive effects of a transaction. The KPPU will prioritise healthy competition over efficiency.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

The Indonesian Competition Commission (KPPU) cannot prohibit or otherwise interfere with a transaction within the framework of merger control. However, it may initiate a formal investigation into a violation of cartel or abuse of dominance rules under Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, as amended by Law No. 6 of 2023 on the Ratification of Government Regulation No. 2 of 2022 (in lieu of Law No. 11 of 2020 on Job Creation) into Law.

Remedies and conditions

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

When the KPPU has concerns about a transaction, the parties are able to negotiate structural remedies (ie, divestiture) or behavioural remedies, for example:

- access to intellectual property rights related to essential facilities; or
- elimination of competition barriers, such as exclusive contracts, consumer switching costs, tying or bundling, or supply or purchase barriers.

The KPPU may require an undertaking to provide information on the price, production, costs and other data to ensure that the undertaking applies a justifiable price strategy.

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

As Indonesia has a post-merger notification regime, a transaction will be legally effective by the time remedies are imposed. The KPPU will state the timing for remedy compliance. If the KPPU imposes behavioural remedies, compliance is required for three years.

If the undertaking does not respond or refuses to accept a conditional approval that imposes remedies, the KPPU can initiate an investigation into violation of Law No. 6 of 2023 on the Ratification of Government Regulation No. 2 of 2022 (in lieu of Law No. 11 of 2020 on Job Creation) into Law, which may lead to the imposition of penalties.

To the best of our knowledge, the KPPU has never imposed penalties or sanctions as a result of a party's failure to comply with its remedies.

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

To the best of our knowledge, the KPPU has to date only agreed to or imposed behavioural, not structural, remedies. The KPPU has imposed behavioural remedies, usually consisting of reporting requirements, in at least five cases.

The KPPU has never imposed behavioural or structural remedies in a foreign-to-foreign merger.

Ancillary restrictions

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

KPPU Regulation No. 3 of 2023 on the Assessment of Mergers or Consolidations of Undertakings or Acquisition of Shares in a Company that May Result in Monopolistic Practices or Unfair Competition is silent on the circumstances under which the clearance decision will cover related arrangements (ancillary restrictions). We are also not aware of any case in which the KPPU has addressed related arrangements.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

Suppliers, competitors, industry associations and government agencies may be involved in the review process.

The notifying party is requested to provide contact details of third parties, and the Indonesian Competition Commission (KPPU) may invite such parties to be interviewed and hear their opinion about the impact of the transaction.

There is no formal procedure for third parties to submit a complaint about the transaction as part of the merger review process. However, any party may file a complaint to the KPPU based on an alleged violation of article 28 or other relevant provisions of Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, as amended by Law No. 6 of 2023 on the Ratification of Government Regulation No. 2 of 2022 (in lieu of Law No. 11 of 2020 on Job Creation) into Law, if they suffer losses as a result of the transaction. The case will be examined and adjudicated separately by the KPPU in the framework of a formal investigation.

Publicity and confidentiality

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

The notification and a brief description of the transaction between parties are publicised by the KPPU on its website.

Before 2019, the KPPU publicised its opinion on certain notifications. Since 2019, the information published by the KPPU is limited to the registration number, the date of the notification, the identity of the acquirer and the target, and the status of the notification.

Cross-border regulatory cooperation

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

The KPPU cooperates with competition authorities in other jurisdictions on general policy matters and the sharing of generic information. The KPPU is under a legal obligation to respect the confidentiality of information.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Parties cannot file an objection against the opinion of the Indonesian Competition Commission (KPPU) on merger control. There is also no other access to judicial review. It is possible, but rare, for parties that have been subject to a penalty for late notification to file an objection to the KPPU's decision.

Time frame

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

The authority to review competition law cases was recently transferred from the District Court to the Commercial Court. The time frame for the objection phase is between three and 12 months.

Upon receipt of the Commercial Court's decision, the parties may file for cassation to the Supreme Court. Law No. 6 of 2023 on the Ratification of Government Regulation No. 2 of 2022 (in lieu of Law No. 11 of 2020 on Job Creation) into Law (the Competition Law) revoked the Supreme Court's obligation under the Competition Law to render its decision within 30 days of receipt of the application. Therefore, it could take up to 250 days to obtain a Supreme Court decision at cassation level.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

Unlike in other jurisdictions, a merger notification in Indonesia does not result in the Indonesian Competition Commission (KPPU) issuing a formal decision to permit or prohibit a transaction between the parties; instead, the KPPU will render a non-binding opinion, which can be:

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

In most cases, the KPPU issues the first opinion described above.

If the KPPU issues a conditional approval, the undertaking must accept behavioural or structural remedies. The KPPU has imposed behavioural remedies, usually consisting of reporting requirements, in at least five cases.

The KPPU has never imposed behavioural or structural remedies in a foreign-to-foreign merger.

Reform proposals

35 Are there current proposals to change the legislation?

The Indonesian legislature plans to enact a new competition bill that will replace Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, but it will not be enacted in 2024 as it is not part of the 2024 national legislation programme.

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 current Indonesian merger control regime is based on a streamlined merger control regulation, Indonesian Competition Commission (KPPU) Regulation No. 3 of 2023 on the Assessment of Mergers or Consolidations of Undertakings or Acquisition of Shares in a Company that May Result in Monopolistic Practices or Unfair Competition, which was issued on 30 March 2023 and became effective on 31 March 2023. The Regulation makes fewer mergers, consolidations and acquisitions subject to a notification requirement (particularly in foreign-to-foreign cases), sets new rules on the notification process and reduces the length of review periods.

Separately, the Indonesian government issued Government Regulation No. 20 of 2023 on the Type and Rates of Non-Tax State Revenues at the KPPU on 5 April 2023, which became effective on 5 May 2023 and makes merger notifications to the KPPU subject to a notification fee.

Other than the above, there have been no significant developments in the field of merger control in the past year. However, as mentioned before, the KPPU continues to be active in imposing penalties for late notification. In fact, of the five cases in 2023 in which it issued a decision, three concerned penalties for late notification. The KPPU is also active in ensuring that penalties are paid, inter alia by cooperating with the Attorney General's Office.

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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 €567 million in Italy and turnover of each of at least two of the undertakings involved in Italy over €35 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 Italian Antitrust Authority (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 (Phase I/Phase II)	Phase I: 30 calendar days (15 calendar days for public bids) from notification. Phase II: 90 additional calendar days (extendible by a further 30 calendar days where the information provided is materially incomplete). As a general rule, the transaction can be implemented after notification (not suspensory), save in cases where a specific standstill order is issued when initiating a Phase II.
Substantive test for clearance	Whether the merger significantly impedes effective competition in the Italian market or in a substantial part thereof, in particular through the creation or strengthening of a dominant position; thus, the same test as that under the EU Merger Regulation applies.
Penalties	Failure to file: fines of up to 1 per cent of the notifying parties' worldwide turnover in the previous fiscal year (also in the case of the IAA requesting a notification pursuant to its call-in powers for below-threshold transactions). Implementation before clearance: no penalties. If parties implement the transaction notwithstanding a prohibition decision or non-compliance with conditions imposed in a Phase II clearance decision, the IAA may impose fines of between 1 and 10 per cent of the turnover of the businesses concerned.
Remarks	Special provisions in the electricity and gas, defence, broadcasting and telecommunications sectors, and for banks and insurance companies. In addition, special foreign direct investment powers granted to the government (so-called 'golden powers') applicable to merger and acquisition transactions relating to assets in key industries, such as (but not limited to) defence and national security, energy, communications and transportation.

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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 over concentrations and joint ventures. Presidential Decree No. 217 of 30 April 1998 contains procedural and enforcement rules.

The Law was amended recently by Legislative Decree No. 185 of 8 November 2021, which implemented the ECN+ Directive, with a further supplement introduced by Law No. 118 of 5 August 2022 (the 2022 Annual Competition Act) and Law No. 214 of 30 December 2023 (the 2023 Annual Competition Act). The Law is enforced by an independent body, the Italian Antitrust Authority (IAA), in Rome. There are also specific merger control regimes for utilities and other sectors.

Scope of legislation

2 | What kinds of mergers are caught?

The Law applies to concentrations. A concentration occurs where:

- two or more undertakings merge;
- an undertaking or a person already controlling an undertaking acquires sole or joint control over the whole or parts of another undertaking; or
- two or more undertakings form a full-function joint venture through the establishment of a new company.

3 | What types of joint ventures are caught?

The Italian merger control regime now applies to full-function joint ventures, following the criteria provided for in the EU Merger Regulation (EUMR) and the related Consolidated Jurisdictional Notice (please refer to the chapter on the European Union).

The 2022 Annual Competition Act finally removed the distinction between 'concentrative' and 'cooperative' joint ventures, which derived from Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings (the original EU merger control regulation) but had been removed in 1997. Before the introduction of the 2022 Annual Competition Act, only concentrative joint ventures qualified as concentrations for the purposes of Italian merger law. Cooperative joint ventures were subject to the rules on restrictive practices as set out in article 101 TFEU or article 2 of the Law (ie, the Italian version of article 101 of the Treaty on the Functioning of the European Union), which 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.

The 2022 Annual Competition Act thus aligned national rules with EU merger law, with the consequence that cooperative but full-function joint ventures now benefit from a higher degree of legal certainty conferred by the ex ante merger control review process.

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 Civil Code, namely:

- companies in which another company has the ability to control, directly or indirectly and including through fiduciary companies, the majority of votes at the shareholders' meeting;
- companies in which another company has, directly or indirectly and 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 that 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) and full-function 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 in light of 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 when assessing whether this minority shareholder holds joint or even sole control, 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, which provides two cumulative turnover thresholds, was modified in August 2017. The thresholds are updated each year to reflect adjustments in the GDP deflator index, and the new figures are published in the IAA's Bulletin and on its website. The most recent change was on 11 March 2024. The current test requires that:

- the Italian turnover of all undertakings involved is higher than €567 million; and
- the Italian turnover of each of at least two undertakings involved is higher than €35 million.

Turnover is calculated as the amount derived from the sale of products or the provision of services (excluding turnover taxes) in the preceding financial year.

Specific rules apply to credit and other financial institutions, as well as to insurance companies. In particular, following the introduction of the 2022 Annual Competition Act, the calculation of credit and financial institutions' turnover for the purposes of computing the relevant filing thresholds is now in line with EU merger control rules as it is based on the sum (excluding value added tax and other direct taxes) of:

- interest and similar income;
- income from shares and securities of any kind;
- fees;
- profits from financial operations; and
- other operating income.

In the case of insurance companies, the value of premiums collected is considered.

The 2022 Annual Competition Act also introduced call-in powers with reference to below-threshold transactions. As specified in the IAA's 2024 notice on the procedural aspects of these powers, which replaced the previous 2022 notice and included IAA experience with its first applications of these brand new powers, the IAA may now request the acquirer of control over an undertaking – within a maximum period of six months of the date of closing – to file a notification concerning the related below-threshold transaction if, cumulatively:

- either one of the two merger filing thresholds described above is exceeded or the aggregate worldwide turnover of the parties exceeds €5 billion; and
- the IAA, on the basis of the evidence at its disposal, considers that there are actual competition concerns in the national market (or in a substantial part thereof), also taking into account the detrimental effects on the development and diffusion of smaller undertakings characterised by innovative strategies.

Upon receipt of the IAA's request, the parties have 30 days to submit their notification.

To avoid the uncertainty brought about by these new powers, the parties may consider initiating a voluntary pre-notification in relation to a below-threshold transaction, provided that they have already reached an agreement on the essential elements of the transaction.

The Law will naturally not apply to any transaction caught by the provisions of the EUMR, with the exception of downstream referrals, as provided for in the EUMR (as set out in the chapter on the European Union).

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, provided that 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;
    - have any direct or indirect control over another undertaking; or
    - hold licences, permits, concessions or any other rights that would allow them to engage in business activities, or have direct or indirect control over another undertaking holding any of those rights.

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

Concentrations between foreign companies must be notified to the IAA whenever, by virtue of their sales in Italy, the parties satisfy the cumulative turnover thresholds. The presence of assets or subsidiaries in Italy is not a relevant factor for the purpose of determining the existence of a notification obligation. The rules of the Law therefore also apply to foreign-to-foreign mergers.

The cumulative nature of the two turnover thresholds means that the jurisdictional nexus between a foreign-to-foreign deal and Italy is satisfied every time the merger turnover thresholds are met. A 2017 change to the Law further reinforced the local nexus factor, requiring that at least two of the undertakings concerned generate material turnover in Italy for a transaction to be reportable.

The situation is now different in relation to the new call-in powers, as the IAA may now request notification of a transaction between undertakings that do not have any turnover in Italy. In such cases, the IAA should request a notification of a below-the-threshold merger only if it can demonstrate that the transaction does have a material nexus with Italy at least in terms of effects on Italian companies and/or consumers.

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

Special foreign direct investments (FDIs) powers apply to a wide range of M&A transactions relating to assets in specific industries. These 'golden powers' (so called as they replace the former golden share provisions) impose mandatory filing obligations on the parties involved in any deal where key strategic assets and undertakings are being transferred and grant the government – not the IAA – far-reaching powers to impose vetoes and restrictions on such deals.

Failure to comply with the new rules gives rise to heavy sanctions (eg, the approximately €74 million fine issued by the Office of the Prime Minister against Telecom Italia for failing to file its acquisition of control by Vivendi; this fine is currently suspended).

In 2019, 2020, 2021, 2022, and 2023 the government amended the golden power rules, materially broadening the scope of review to include, in addition to the original national defence and security sectors:

- energy, communications and transportation;
- 5G networks;
- critical infrastructures, whether physical or virtual, including water, health, media, data processing or storage, aerospace, electoral or financial infrastructure and sensitive facilities;
- critical technologies, including artificial intelligence and robotics;
- the supply of critical inputs, including energy or raw materials;
- food security;
- access to sensitive information; and
- the freedom and pluralism of the media.

To provide clearer guidance to notifying parties on the scope of the transactions caught, Decree-Law No. 21 of 21 March 2022 introduced a pre-notification mechanism.

In addition, there are specific provisions that are applicable to special sectors:

- In the case of mergers involving banks, the IAA must take a decision within 60 days of the submission date. It will assess whether the concentration gives rise to any antitrust concerns, and the Bank of Italy, in line with its financial supervisory role, will in parallel assess the transaction under prudential rules in proceedings also lasting 60 days. In 2007, the Bank of Italy and the IAA signed a protocol agreement setting up procedural guidelines for the exchange of information in relation to concentrations with effects on banking markets.
- Mergers in the insurance sector are subject to the Law; however, the Institute for the Supervision of Insurance – the relevant authority for insurance companies that, 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 those 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). Moreover, mergers and agreements (as well as the analysis of dominant positions on the market) in this sector trigger a notification obligation to the AGCOM:

- for all entities operating in the Integrated Communications System (SIC), which is a regulatory concept aimed at including all type of communication activity which is substantially financed through different types of advertisement services;
- in cases where one entity operates in the SIC and the other is among those that should be registered in the Communication Operators Register (ROC) that exceed the same turnover thresholds set for the merger control played by the IAA; or
- in cases where the party operating in the SIC exceeds the following thresholds:
    - revenues higher than 20 per cent of the total revenues generated by the whole SIC or revenues higher than 50 per cent in one or more of its markets;
    - revenues higher than 20 per cent of the total revenues generated in the markets for the retail supply of electronic communications services and, at the same time, revenues higher than 10 per cent of the total revenues generated by the whole SIC and revenues higher than 25 per cent of the revenues in one or more of its markets;
    - revenues higher than 8 per cent of the total revenues generated by the whole SIC and, at the same time, shareholdings in companies that publish daily newspapers (with the exception of those exclusively spread via telecommunication); and
    - holding authorisations to broadcast more than 20 per cent of all television programmes or more than 20 per cent of the radio programmes broadcast on digital terrestrial frequencies at the national level.

These filing obligations are aimed at guaranteeing media pluralism and are in addition to the possible parallel filing to the European Commission or the IAA for merger control purposes (ie, they do not exclude the other). The deadline to notify – which does not entail standstill obligations – is seven days prior to the completion of the transaction; penalties for not notifying may amount to up to 1 per cent of the turnover of the interested companies.

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 those new companies or the acquisition of a controlling interest in existing companies operating in new markets is subject to a prior filing to the IAA, irrespective of any associated turnover, and there are penalties of up to €51,645 for failure to notify.

On 27 February 2024, the IAA published a new notice on the applicable filing formalities, accompanied by a new filing form, which replaced the 1996 notice and form. 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 it more than 25 times, with fines ranging between €1,000 and €50,000, despite the maximum fine possible being up to 1 per cent of the parties' turnover.

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 (ie, before the purchaser has acquired the ability to exercise decisive influence over the behaviour of the target undertaking). The earliest that a notification can be submitted is as soon as the parties have agreed on the essential terms of the transaction, which would allow the Italian Antitrust Authority (IAA) to conduct a thorough appraisal.

In general, the IAA prefers to be notified of a binding agreement; however, in exceptional cases, a filing has been accepted even before signing the final agreement, provided that the parties can assure the IAA that the main terms and conditions of the transaction – and, in particular, the aspects that are relevant for an antitrust analysis – will not change. While the IAA has generally adopted a strict approach to this issue by rejecting filings not supported by a binding agreement and its practice varies from one sectoral unit of the IAA to another, it is advisable to discuss this with officials from the competent unit if necessary.

Fines for failure to notify, and for when the IAA requests notification pursuant to its new call-in powers for below-threshold transactions, may amount to up to 1 per cent of the worldwide turnover of the notifying party or parties in the previous fiscal year. The IAA has informally indicated that it will adopt a zero-tolerance approach towards 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 failure to notify their acquisition of sole control over Banca Padovana Credito Cooperativo in Liquidazione Coatta Amministrativa and Banca Romagna Cooperativa, respectively. The IAA closed both proceedings, imposing on the two banking institutions a €5,000 fine.

In February 2021, the IAA initiated proceedings for failure to notify against Doreca SpA and Abruzzo Distribuzione Srl. The transaction concerned the establishment of AD Beverage SpA, a full-function joint venture, by the contribution by the parent companies of two businesses under 10-year lease agreements with effect from June 2020. In May 2021, the IAA issued a modest fine to the parties, stressing in particular that the transaction did not generate any competitive concerns and that only 10 months had passed.

In 2022, the IAA dealt with two cases for failure to notify a transaction. The first involved the shift from joint to sole control over Calvi Holding SpA in favour of DeA Capital Alternative Funds SGR SpA following some relevant triggering events according to the shareholders'

agreement. These events placed DeA Capital Alternative Funds in the position to exercise its voting right in the shareholders' assembly in full autonomy and without any constraints, as well as to appoint all the directors of the board. In this case, the IAA imposed a modest fine of €6,460.33. A significant fine of €285,000 has been imposed (jointly and severally) on Project Informatica srl and HIG Capital LLC instead (respectively, the subsidiary and its ultimate controlling entity) for failure to notify the former's acquisition of sole control over Centro Computer SpA.

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

In the case of an 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, although, as a matter of practice, in most cases the parties to a transaction make clearance by the IAA a contractual condition of closing.

The IAA, when opening Phase II proceedings, may order, with a formal decision in that 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 and that completion of the transaction would lead these concerns to crystallise. Since 1990, this has occurred only four times (the most recent case is the C 12265 *Sammontana/Forno D'Asolo* case, still pending in May 2024).

In any event, even if this order is issued, a public takeover offer may be completed during the 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 Law No. 287 of 10 October 1990 (the Law), 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.

Although the absence of a standstill obligation attenuates the risk of gun jumping in the pre-clearance phase in this regard, undertakings must remain wary that any interactions between them prior to clearance and completion of the deal remain subject to review by the IAA under article 2 of the Law, the Italian equivalent of article 101 of the Treaty on the Functioning of the European Union, as well as under the latter.

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

There are no sanctions for closing before clearance, provided that 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?

A transaction, including a foreign-to-foreign deal, may be closed before clearance; thus, implementation of a foreign-to-foreign concentration, as well as concentrations involving national undertakings, can occur after filing (and even before clearance) except where the IAA has issued a specific suspension order to the contrary when opening Phase II proceedings.

In cases where the IAA has issued a specific suspension order in respect of a foreign-to-foreign deal or otherwise, although it is, 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 the 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 as the relevant prospectus is filed with the Italian financial regulator. In the case of a national public bid (ie, public takeover subject to Italian capital market regulations), the term relating to the Phase I assessment period is reduced to 15 days.

Where the IAA, having opened a Phase II 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 that must be submitted to the IAA along with the relevant attachments through certified email.

Completing the form can be time-consuming. The information required includes details of the parties, a 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, as provided in the new 2024 filing form and accompanying notice:

- more than one party is active in a relevant market and, after the concentration, they will hold a combined market share of not less than 20 per cent with an Herfindahl-Hirschman Index delta higher than 150, or a combined market share higher than 50 per cent; or
- after the transaction, one party will hold a market share of not less than 30 per cent when at least one other party is present in an upstream or downstream market; or
- a party to the concentration has a market share of not less than 20 per cent and any other party to the concentration is either a potential competitor (an operator may be considered a potential competitor if it has planned to enter a market or has developed or pursued such a goal within the last three years) or is a new entrant (which entered the market within the last five years); or
- a party to the concentration holds a market share of not less than 30 per cent and any other party holds assets (such as raw materials, infrastructure, data or intellectual property rights) that are important to that market or a closely related neighbouring market; or
- a party to the concentration is present in a product market that is a neighbouring market and closely related to a product market in which another party to the concentration is active, and the individual or combined market share of the parties in either market is not less than 30 per cent; or
- a target company is an important innovator or is conducting potentially important research; or
- a target company is a start-up or new entrant with significant competitive potential that has yet to develop or adopt a business model that generates significant revenues (or is still in the early stages of implementing such a model).

As a matter of practice, the IAA tends to require full filings even where the applicable market share thresholds 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; as a matter of practice, the IAA

accepts attached documents (ie, transaction documents) in the original language (if in English, French or Spanish, but a translation may be required in relation to other languages).

The notifying party should indicate in its notification which pieces of information constitute business secrets that are to be treated as strictly confidential, as well as the reasons for their 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 an unlikely 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 the possible competitive effects of the transaction and the scope of the information to be provided in the actual filing.

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 entitled to submit their observations within five days of publication.

Investigation phases and timetable

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

The IAA has wide-ranging powers; however, they only apply if Phase II proceedings are opened. It can gather all relevant information, order the production of documents, order inspections and make copies of corporate documents.

Even during Phase I, it cannot be ruled out that the IAA may want to informally contact competitors, clients or suppliers to ask for comments or to verify whether the information submitted is true. In some cases, the officials may contact the parties directly to ask for clarifications or explanations of the transaction. The parties may make submissions in writing and may apply to be heard at hearings.

Fines of up to €25,823 for failure or refusal to provide information and up to €51,645 for supplying false information may be imposed, but only in the case of Phase II proceedings.

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

A first-stage investigation takes 30 calendar days (15 for national public bids), after which the IAA may:

- clear the transaction if it does not raise serious doubts in respect of its compatibility with the Law; or
- open Phase II proceedings if serious doubts concerning the compatibility of the transaction with the Law arise.

The IAA does not usually issue a Phase I decision earlier than 30 days following receipt of notification. This is because of various factors, such as the amount of information that the officials must consider, the internal procedural rules of the IAA and its considerable workload; however, in the least problematic cases, the issuance 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, which interrupts the running of the 30-day period. The term will run afresh from the moment the IAA considers the information to be 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, IAA officials will usually seek to obtain the relevant information from the parties in an informal way (ie, over the phone), although this is typically done by setting very tight deadlines (normally, two to three days, sometimes even tighter). In principle, only when those deadlines are not complied with does the IAA issue a formal letter interrupting the 30-day Phase I period.

A new procedure entailing an informal pre-notification meeting operated by the IAA has been introduced, in part, to avoid these interruptions. During the 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.

In December 2023, the Italian legislator extended the original deadline of 45 calendar days for the conclusion of Phase II. Currently, Phase II proceedings must be closed within 90 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. This extension can be made just once.

Accordingly, provided that the 30-day Phase I period is not interrupted, the overall duration of proceedings can run for up to 150 calendar days.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

A concentration is prohibited whenever it presents a significant impediment of effective competition (SIEC) in the Italian market or in a substantial part thereof, in particular through the creation or strengthening of a dominant position (the SIEC test). The SIEC test is a result of the recent amendment to Law No. 287 of 10 October 1990 (the Law) by the Legislative Decree No. 185 of 8 November 2021, which implemented the ECN+ Directive, with a further supplement introduced by Law No. 118 of 5 August 2022 (the 2022 Annual Competition Act). Through the 2022 Annual Competition Act, Italian merger control definitively abandoned the substantive test of Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings and fully aligned it with the test set forth by the EU Merger Regulation (EUMR). However, de facto, this amendment does not

revolutionise the Italian merger control system since the Italian Antitrust Authority (IAA) interpreted the former test broadly, thus effectively applying a test that was similar to the current one.

The criteria for evaluating a merger are largely in line with the EUMR and include considering:

- the structure of all the relevant markets, and actual and potential competition therein;
- the market shares as well as the economic and financial power of the relevant undertakings;
- the choice that suppliers and users have;
- access to sources of supply and market outlets;
- the existence of any barriers to entry;
- supply and demand trends;
- the interests of intermediate and final customers; and
- technical and economic progress, provided that it is to the consumers' advantage and it does not constitute an obstacle to competition.

The Law now directly tackles below-threshold transactions, addressing in particular the situation in which the turnover of the target is not an appropriate indicator of its relevance as a competitive constraint. In such cases, the IAA should additionally assess whether the undertaking, among other things:

- is a start-up or new entrant with significant competitive potential that has yet to develop or adopt a business model that generates significant revenues (or is still in the early stages of implementing such a model);
- is an important innovator or is approaching a potentially important research activity;
- is an important actual or potential competitive force;
- has access to assets that are significant to competition (such as raw materials, infrastructure, data or intellectual property rights); or
- provides products or services that are key components for other industries.

In these regards, the IAA may also take into account the possible imbalance between the consideration paid and the target's turnover.

The IAA's approach has not been affected by the global economic crisis and it does not appear that this has been a key element in its merger assessment; however, in some cases, the IAA has considered current trends and companies' corporate restructuring in some markets as background elements of the transaction, as in:

- *Stato Federale della Baviera/BayernLB Holding* (2016), a concentration related to a bank nationalisation in Germany;
- *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.

The IAA has, however, been prepared to accelerate the procedure in those cases. The IAA has not used the failing firm defence or any similar failing firm theory in the past few years. Notably, in *Emmelibri/Effe 2005 Gruppo Feltrinelli/NewCo* (2014), the notifying parties – while

putting forward defensive arguments highlighting that, absent the merger, Effe 2005 would have ceased its distribution activities – explicitly excluded any failing firm defence.

In 2012, the IAA issued a temporary suspension order to prevent the implementation of the proposed acquisition of Fondiaria Sai, the second-largest insurer in Italy, by Unipol, also one of the key players in the Italian insurance market, despite the rationale of the transaction being rescuing the target company's group from financial difficulties. The transaction was eventually cleared subject to structural remedies.

The IAA has delivered on its stated goal of bringing its enforcement more in line with European best practice by grounding its decisions increasingly on sophisticated substantive economic analysis. In recent cases, it made use of various economic tools, such as the diversion ratio and the gross upwards pricing pressure indicator in *Fratelli Arena/Rami di Azienda di SMA* (2019), *BDC Italia-CONAD/Auchan* (2020), *Diperdì/Rami di azienda di SMA e Società Generale di Distribuzione* (2020), *Tamoil Italia/Repsol Italia* (2021), *Cinven Capital Management-Fressnapf Beteiligungs/Agrifarma-Maxi Zoo Italia* (2022), *Bubbles Bidco/Quattro* (2022) and *IP Italiana Petroli/Esso Italiana* (2023).

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

There is no special substantive test for full-function joint ventures, which are exclusively appraised under the SIEC test that applies to other concentrations.

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 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 *Granarolo/Centrale del Latte di Vicenza* (2002) case). The IAA has to date never applied the purely unilateral effects theory of harm that is now possible under the EUMR when the transaction does not involve or lead to a situation of dominance. Some believe that this would not be possible under the Law.

The transaction in *Ardagh Glass/FiPar Finanziaria di partecipazioni Industriali* (2011) involved horizontal effects in the glass and metal packaging sector. Although, 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 and took 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 is *Enel/ERG Power* (2022), which also represents the first veto of a concentration assessed under the recently introduced SIEC test. In particular, the IAA blocked the proposed change of control of ERG Power srl, a branch of ERG Power Generation SpA operating a gas combined cycle plant for the production of electricity in Sicily. This was not only because the post-merger entity's market shares would have been

higher than 35 per cent and 60 per cent in the two relevant markets, but also because of the further effects produced by the shift in control of a particularly efficient plant to Enel that would have led to a significant increase of Enel's pivotal role (ie, the percentage of operating hours in which the operator's production capacity is indispensable to meet the electricity demand in a given time slot – in other words, an increase in the amount of time in which the operator can act as a monopolist for residual demand) in relation to Sicily.

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-market contacts of the undertakings concerned.

Unilateral effects were considered a serious concern in *Arnoldo Mondadori Editore/RCS Libri* (March 2016), which involved 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 segments could have resulted in barriers to entry to the market for the acquisition of authors' rights. Further, the concentration would have likely resulted in the systematic refusal by the merged entity to provide book catalogues to other distributors, thus having an anticompetitive impact on both the upstream and downstream markets. Ultimately, the IAA cleared with conditions the acquisition of RCS Libri by Mondadori.

On the other hand, in *Edenred Italia/Ristochef* (2011), the IAA initiated a Phase II investigation as it was initially concerned by significant horizontal aspects as the concentration could have strengthened the dominant position of the leading player in the luncheon vouchers market. The IAA eventually authorised the transaction without imposing conditions as it concluded that, despite the large market share imputable to the combined entity post-merger, the operation did not produce significant anticompetitive effects on any of the relevant markets in light of factors such as the bidding nature of the relevant market and the absence of barriers to entry.

By contrast, in March 2017, the IAA closed with commitments the *Gruppo Editoriale l'Espresso/Italiana Editrice* case, concerning a transaction in the book publishing sector. According to the IAA, the transaction was likely to create or strengthen a dominant position in the advertising market for daily newspapers in metropolitan cities of Turin and Genoa. The IAA noted that, in area local to Turin, the estimated combined market share post-merger would have been 90 to 95 per cent; in area local to Genoa, the transaction would have led to a de facto monopoly.

In this context, the IAA was concerned that third parties would not have 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 of granting licence agreements for advertising activities to third parties in the *Repubblica* newspaper for both the Turin and Genoa local editions. In particular, the IAA considered the duration of those agreements (five years) sufficient to allow third parties enter the relevant market and exercise effective competition.

The IAA took into account both horizontal and conglomerate effects in *Reti Televisive Italiane/Gruppo Finelco* (2016), which concerned 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.

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. It also required video and radio advertising to be managed by two separate undertakings. Finally, 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 European Commission has recently been paying attention. With regard to the former, when the IAA authorised the *Luxottica Group/Barberini* merger in November 2018 with commitments (ie, the merged entity would enter into supply agreements with all interested market operators), the imposed remedies were, among other things, based on the IAA's concerns surrounding a reduction of ability to innovate by competitors.

Finally, in its recent big data sector inquiry, the IAA has displayed an interest in exploring the relationship between competitive harm and harm to consumer welfare.

Non-competition issues

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

In principle, as a matter of law, a prohibited concentration may, exceptionally, be authorised by the IAA for reasons connected with the general interests of the national economy; however, the applicability of this general interest exception requires prior issuance by the Italian government of the necessary guidance criteria, which 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 and notwithstanding clearance by the IAA, the President of the Council of Ministers may prohibit, for essential reasons related to the 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 has never been used to date.

That said, 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 it leads to the creation or strengthening of a dominant position, on financial stability grounds. Although this power was not used, in the *Cassa Centrale Raiffeisen*

dell'Alto Adige/Gruppo Bancario Cooperativo delle Casse Raiffeisen merger, the 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) and commitments having originally been deemed necessary. Clearance was given taking into consideration the functional and structural peculiarities of the banks as well as the fact that these were cooperative banks that also supported local economies, which had to change their corporate nature pursuant to new sectoral legislation.

Economic efficiencies

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

To date, 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 over 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 this trajectory, an efficiency claims section has been recently introduced in the new form CO.

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. In *SEL – Società Elettrica Altoatesina/Azienda Energetica* (2015), which concerned 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 those 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 merger specific.

Most recently, the expected efficiencies deriving from the concentration (avoidance of certain organisational duplications) were deemed suitable to have a positive impact on consumers, which helped with the unconditional clearance in May 2018 of the *Cassa Centrale Raiffeisen dell'Alto Adige/Gruppo Bancario Cooperativo delle Casse Raiffeisen* banks merger.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

The Italian Antitrust Authority (IAA) may block a transaction or clear it subject to conditions (offered by the notifying party) or measures (imposed by the IAA), or both. If a prohibited

transaction has already been implemented, the IAA may order all measures, including divestment, that are necessary to restore the parties to their pre-merger positions.

Should the parties implement the transaction despite a negative decision or fail to comply with the relevant conditions, the IAA may also impose fines of between 1 per cent and 10 per cent of the turnover of the businesses party to the transaction. This principle has been confirmed by the Supreme Administrative Court, which specified that the sanction for failure to comply with an IAA decision shall apply not only where the transaction was subject to an outright prohibition but also when the transaction was cleared subject to conditions and those conditions have not been complied with (*Edizione Holding/Autostrade* (2000, 2002 and 2004)).

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.

In April 2016, the IAA sanctioned Moby with a fine of €374,000 as it did not respect clearance conditions for the merger with Toremar, which had been authorised in 2011.

In the past three years, the IAA opened three proceedings (C12231B – *BPER Banca/Unipol Banca*, C12247C – *BDC Italia-Conad/Auchan* and C12246B – *Fratelli Arena/Rami di azienda di SMA-Distribuzione Cambria-Roberto Abate*) to verify alleged failures to comply with conditions imposed in its 2019 clearance decisions. However, all three cases were closed without finding any non-compliance.

In light of market changes and of corporate and legislative changes, in July 2016 the IAA resolved to remove certain measures previously imposed in *Unicredit/Capitalia* (2007) concerning the banking and insurance sectors, as the measures (consisting, among other things, of eliminating certain commissions for cash withdrawals and avoiding entering any partnership with Generali insurance group) were no longer justified.

In July 2016 and in January 2017, the IAA resolved to amend the measures imposed in *Enrico Preziosi-Artsana/NewCo-Bimbo Store* (2015) concerning the manufacture 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 the 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 the 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 (eg, 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; 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, meaning that Phase I commitments have been very rare and must be clear-cut for the IAA to take them into consideration.

Across a vast range of cases, commitments have involved the adoption of structural remedies proposed by the merging parties; however, recent decisions also show a significant degree of flexibility (particularly if compared to the European Commission) towards behavioural (rather than structural) remedies (at least, as far as vertical or foreclosure issues are concerned), with the IAA accepting partly or solely behavioural remedies (eg, *Mondadori Media-Artoni Group-SRH/Press-Di Distribuzione Stampa e Multimedia* (2022), *Emmeeffe Libri/Centro Libri* (2020) and *F2I SGR/Persidera* (2019)) or at the very least pairing behavioural remedies with structural ones (eg, *2i Rete Gas/Infrastrutture Distribuzione Gas* (2021)).

In *Mondadori Media-Artoni Group-SRH/Press-Di Distribuzione Stampa e Multimedia*, the IAA cleared the transaction, which led to an acquisition of joint control over the national distributor Press-Di Distribuzione Stampa e Multimedia by Artoni, SHR and Mondadori on the condition that the parties implement a wide set of only behavioural remedies to exclude foreclosure effects on the national and local markets for the distribution of newspapers and magazines. Indeed, Artoni and SHR – which are local distributors – could have had an incentive to use their shareholding in Press-Di to the detriment of their competitors. The remedies, which have a duration of five years, included limitations on Press-Di's ability to terminate contracts with local distributors as well as measures to block any undue exchange of information by Artoni and SHR with their competitors through the target, among others.

In the *Emmeeffe Libri/Centro Libri* concentration, the IAA authorised the acquisition of sole control over independent book wholesaler Centro Libri by part of Emmeeffe, a book wholesaler and marketing and commercial services provider jointly controlled by editorial groups Messaggerie and Feltrinelli, on the condition that Emmeeffe implement a number of behavioural remedies, including not worsening both existing and future contractual conditions established with independent bookstores and editors for a certain time.

Likewise, in *F2i SGR/Persidera*, investment management company F2i sought control of Persidera, which was active in the construction, maintenance and management of TV broadcasting facilities. At the time, F2i also held 40 per cent of TV, radio, mobile services and facilities management company EI Towers. The IAA authorised the acquisition but imposed obligations to provide access to EI Towers' services and infrastructures under equitable and fair conditions, as well as measures related to the independence between the original and the acquired business units.

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In the *Ascopiave/Rami di Azienda di ACEGASAPSAMGA* (2019) operation, whereby multi-utility company Ascopiave acquired gas distribution business units of incumbent concessionaire ACEGASAPSAMGA, the IAA used a number of behavioural remedies to safeguard the ability of a potential future entrant on the market to challenge Ascopiave's incumbent position, including the commitment to allow a potential future entrant to pay in instalments – as opposed to a lump sum – the fees due to the exiting incumbent (ie, residual industrial value), as well as the obligation for Ascopiave, when eventually releasing the concession, to retain workers exceeding the potential future entrant's requirements, so that the latter should not have to shoulder the financial burden thereof.

In *2i Rete Gas/Infrastrutture Distribuzione Gas*, the transaction consisted of the acquisition by 2i Rete Gas of all the share capital of Infrastrutture Gas. As a condition of clearance, the IAA requested the divestment of part of the gas redelivery points of one of the parties at an established price. Only in the event of failure to obtain such a price would a series of behavioural measures need to be implemented.

In *IP Italiana Petroli/Esso Italiana* (2023), due to the IAA's concerns over possible obstacles to competition in the petroleum products market that would have resulted from the concentration, IP proposed behavioural commitments, including sharing storage and transit capacity and reviewing contracts with retailers.

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

Regarding substantive conditions, the IAA relies on the principles laid down by the European Commission in its 2008 Commitments Notice. Remedies may be offered in both stages of the proceedings. There are no particular rules regarding their timing; however, although usually not expressly mentioned in the official merger clearance decisions or subsequent decisions, the 2008 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 or the current restructuring that most banking groups are going through, or both.

The IAA has indicated that behavioural remedies are the exception, in consideration of the difficulties associated with monitoring compliance (particularly in relation to the 2000, 2002 and 2004 *Edizione Holding/Autostrade* cases). Nonetheless, along with structural measures, the IAA has also continued to accept behavioural remedies.

While there is no specific timing for proposing remedies, it is advisable to discuss them at least at the early stages of Phase II, with a strong recommendation whenever possible to start this dialogue at the pre-notification stage.

In relation to certain sectors (insurance and telecommunications), an additional 30-day period will have to be added to allow for the mandatory, but non-binding, opinion of the relevant regulatory agency.

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

In *Solvay Sodi* (1997), 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 and the principles set out in the 2005 EU Notice on Ancillary Restrictions.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

In Phase I, the Italian Antitrust Authority (IAA) informs the public of the filing of a transaction through a notice on its website. Any interested party, including customers and competitors, may then submit observations on the notified concentration within five business days of the publication of the notice on the website. Since the introduction of the notice of merger, the disclosure that a notification has been submitted has had the effect of further increasing the number of third-party interventions during Phase I.

Decisions whereby the IAA opens Phase II proceedings are published in the IAA's Bulletin and posted on its website for, among other things, 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 instances of contact can influence the IAA's final decision 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 the laws relating to the transparency of conduct that apply to public bodies. As recently stated by the Council of State (which is the Supreme Administrative Court that decides on second and last instance appeals against IAA decisions), 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's Bulletin and posted on its website. Normally, there are three weeks between a decision being taken and its actual publication. This period is reduced to approximately one week or less in relation to decisions in which the IAA opens a Phase II merger investigation.

The legal framework for disclosure and access to the file is contained in Presidential Decree No. 217 of 30 April 1998. All parties that have 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. 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 (NCAs) 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 EU Merger Regulation (EUMR) applies, there is a substantial impact in Italy.

One of the units within the IAA is specifically dedicated to the IAA's relationship with the European Commission and the other NCAs in the context of the European Competition Network. Finally, the IAA is an active member of the International Competition Network, one of the goals of which is to promote international cooperation between NCAs.

In 2010, the record shows only one referral under article 22 of the EUMR, which eventually became Case No. COMP/5959 *SCJ/Sara Lee*, and one request for referral made by the IAA under article 9 (the European Commission concluded, however, that there was no need for the matter to be examined by the IAA – Case No. 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. However, the IAA joined Austria's request for referral in *Meta/Kostumer* in 2021, and more recently requested the referral of Qualcomm/Autotalks in 2023.

Moreover, there have been six voluntary referrals back to the IAA under article 4(4) of the EUMR: (*Lottomatica/Admiral Entertainment/NewCo* (2016), *Holcim Calcestruzzi-Colabeton/Conferimenti di impianti in Cava diCusago* (2017), *Sonepar Italia/Sacchi* (2017), *CVC/La Gardenia/Limoni* (2017), *Cinven/Arcaplanet-Maxizoo* (2022) and *Sammontana/Forno D'Asolo* (2024).

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Interested parties may appeal against a decision of the Italian Antitrust Authority (IAA) to the Regional Administrative Court of Lazio (the TAR Lazio), which has exclusive jurisdiction in these matters. The TAR Lazio may annul an IAA decision only on the grounds of lack of jurisdiction or competence, violation of the law, or abuse or misuse of powers. The IAA's discretionary judgment is not subject to judicial review except in limited circumstances. Decisions of the TAR Lazio are subject to appeal before the Supreme Administrative Court (ie, the Council of State).

Time frame

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

Usually, each judicial step takes between one and two years. It is, therefore, possible to have judicial review completed in three to four years; however, the Supreme Administrative Court may transfer the case back to the IAA.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

The Italian Antitrust Authority (IAA) reviewed approximately 77 cases in 2023, 96 in 2022, 74 in 2021 and 69 in 2020.

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) of Law No. 287 of 10 October 1990 (the Law), 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 of 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 any costs savings generated to consumers, it was eventually deemed necessary to divest a number of stores to avoid overlaps in excess of 45 per cent in any of the 14 identified micro-markets.

In *2i Rete Gas/Nedgia*, regarding the distribution of gas in some regions in the south of Italy, the IAA was concerned that the concentration might lead to a strengthening of a dominant position in tenders for the awarding of the natural gas distribution service, which would have discouraged participation of competitors.

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In the *Cassa Centrale Raiffeisen dell'Alto Adige/Gruppo Bancario Cooperativo delle Casse Raiffeisen* case, the IAA's main concerns (which were ultimately abandoned) were the horizontal overlaps in the bank funding market as the merged entity would have had a 45 to 50 per cent market share in the area local to Bolzano.

In the *Noah 2/Mondial Pet Distribution* case, concerning the distribution of pet products, the IAA found a potential significant impediment of effective competition as the merged entity would have a market share well above 45 per cent in some local areas. Two divestitures were accordingly required.

In November 2018 the *Luxottica Group/Barberini* merger was authorised by the IAA with commitments, which were mostly grounded on foreclosure concerns because of the integration of the parties' respective frames and lens capabilities.

In March 2019, a Phase II investigation was opened into the acquisition by Sky Italia of R2, the technical platform for the provision of terrestrial digital television services of Mediaset Premium. Although this transaction was abandoned – as anticipated – because of the concerns raised by the IAA, the case was opened following a cooperation agreement between Sky and Mediaset. The agreement had already been in place for several months and, among other things, resulted in the parties providing each other access to, and hosting in, their respective satellite and terrestrial digital platforms and channels, particularly after Mediaset's exit from the market of the pay-TV content of Serie A and Champions League football games (somewhat anticipating the consequences of the deal).

To encourage competition in the pay-TV market by seeking to enhance the value of internet TV services, the IAA imposed on Sky several measures, such as a prohibition against using information and assets held by R2 for the purpose of proposing its own commercial pay-TV offers. The most important remedy was represented by prohibiting Sky from entering into any exclusive deal in relation to audiovisual rights on the internet for a three-year period. This led to important changes to the supply-side structure of the Italian pay-TV market as it facilitated the entry and expansion of the over-the-top media service players – the only ones that, according to the IAA, could have exercised some competitive pressure over the incumbent operator. In 2022, the IAA acknowledged a pro-competitive shift in the TV services market owing to the entrance of streaming platform operators and withdrew the measures just weeks before their natural expiration.

Over the past few years, the IAA, while dealing with a wide range of sectors and especially towards the tail end of the supply chain (eg, retail banking and retail commerce), seems to have overall focused its attention on access to key contributions as well as facilities and barriers to entry. It has also paid close attention to the capacity of transacting parties to catch consumers' business through geographical proximity.

With regard to the main sectors under scrutiny, the energy sector seems to have attracted the IAA's attention – for example, after having blocked the *Italgas-Acegas/Isontina Reti Gas* merger in 2013, the IAA blocked the *Enel/ERG Power* merger in September 2022. In the latter case, the IAA determined that, as a result of the concentration, Enel would have had a market share of between 35 and 40 per cent in the market for the production and supply of electricity and a market share of about 60 per cent in the market for the dispatching of electricity in Sicily. Moreover, the IAA deemed that the anticompetitive effects of the merger

were intensified by the particular pro-competitive role played by the specific gas combined cycle technology of the plant owned by ERG, which made the plant the most efficient in the relevant markets.

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 Aosta Valley region. The merged entity would have achieved a nearly 100 per cent share in terms of the number of points served in the domestic market and a more than 90 per cent share in the non-domestic market for low-voltage connections. A good portion of the IAA's analysis focused on the negative impact of the regional regulations that provided a barrier to entry. During the investigation, the IAA rejected the merging parties' price commitment (ie, to freeze prices in the free market at particularly affordable levels for two years, with a possible extension to four) as the IAA deemed this insufficient to achieve the long-term elimination of the competition issues.

In 2015, the IAA cleared with conditions a concentration in the electricity energy sector between Società Elettrica Altoatesina and Azienda Energetica. The IAA was concerned that the merged entity could restrict competition in the future market for a tender for the distribution of natural gas in the area local to Bolzano given 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 a 30 per cent share held in the market for the supply of natural gas to small-sized customers.

The IAA has also confirmed its interest in the publishing and advertising sector: in recent years it has cleared with conditions many concentrations in this field, including *Reti Televisive Italiane/Gruppo Finelco*, *Arnoldo Mondadori Editore/RCS Libri, Gruppo Editoriale l'Espresso/Italiana Editrice* and the very recent *Mondadori Media-Artoni Group-SRH/Press-Di Distribuzione Stampa e Multimedia*.

The IAA has also confirmed its increasing focus on market dynamics at the local level, particularly on identifying micro-markets through isochronal analysis, and requesting parties' and market data at such a geographical level, even for non-problematic concentrations. Local catchment areas determined through isochrons were also considered for the banking sector in the *BPER Banca/Unipol Banca* (2019) mergers (ultimately cleared in Phase II), in the supermarket sector in the *Fratelli Arena/Rami di Azienda di SMA* (2019) and the *BDC Italia-CONAD/Auchan* (2020) acquisitions, and also in *Cinven Capital Management-Fressnapf Beteiligungs/Agrifarma-Maxi Zoo Italia* (2022).

More specifically, all those cases entailed the transfer of a number of bank branches (*BPER Banca/Unipol Banca*) or retail sales points (*Fratelli Arena/Rami di Azienda di SMA, BDC Italia-CONAD/Auchan* and *Cinven Capital Management-Fressnapf Beteiligungs/Agrifarma-Maxi Zoo Italia*). The IAA evaluated the competitive pressure exerted by those retail activities in light of their catchment area for consumers or driving time (through isochrons) required to reach them and, therefore, imposed remedies of divestment of the overlapping branches or sales points presumably on this basis.

In the most recent examples in 2022, the IAA followed the same approach when issuing two clearances with conditions. The first relates to the acquisition of joint control by Cinven and Fressnapf over the pet food retail chains Agrifarma and Maxi Zoo Italia. Having adopted

a 20-minute drive isochron to determine the geographic extension of local markets, the IAA concluded that the transaction was likely to create or strengthen a dominant position in 78 local markets and consequently imposed the adoption of structural measures. The second relates to the acquisition of sole control by HIG Capital (through its subsidiary Bubbles BidCo) over Quattro srl, a company active in the sale of home care and personal care products through 62 outlets in the Sardinia region. As a result of a market test, the IAA identified the relevant geographic markets in 15-minute drive isochrons. As in the concentration mentioned above, the IAA deemed that competition concerns arose in about 22 local markets and imposed structural measures.

Local catchment areas were also deemed relevant in several 2022 Phase I clearances (eg, *IN's Mercato/Ramo di azienda Dico* (2022) and *Fratelli Arena/Due rami di azienda di Superisola* (2022)) where the IAA performed its review on geographic markets identified by 15-minute drive isochrons (for supermarkets and hypermarkets) and 10-minute drive isochrons (for mini-markets).

The relevance of local catchment areas in the IAA's merger control assessment was further confirmed in 2023 and 2024 in a few Phase I clearance decisions, such as *Enilive/Rami di azienda di Sirtam-New Green Fuel* (2024), concerning retail distribution of motor fuels on the ordinary road network; and *FSI Ligantia/Sogaer* (2024), which involved the market for airport management.

In *IP Italiana Petroli/Esso Italiana* (2023), the IAA approved with conditions a concentration in the markets for the wholesale and retail sales of off-network petroleum products as well as the distribution of motor fuels on the road and motorway network, taking into account catchment areas in its assessment.

In 2023 and the first months of 2024, the IAA reviewed or is reviewing at least seven below-thresholds transactions. Several of these transactions were notified upon the request of the IAA, exercising its new call-in powers. In at least three of these cases, the IAA opened Phase II, namely *Alpacem Cementi Italia/Ramo di Azienda di Buzzi Unicem* (2024), concerning production and marketing of cement and concrete, *Servizi Italia/Ramo d'azienda di Steris* (2024), regarding sterilisation services for medical devices, instruments and surgical equipment used by healthcare facilities, and *Ignazio Messina & C/Terminal San Giorgio* (2024), concerning an acquisition by Ignazio Messina & C, a company active in the maritime transport of goods by container and rolling stock, of a company active in the same sector.

Reform proposals

35 | Are there current proposals to change the legislation?

Legislative Decree No. 185 of 8 November 2021, which implemented the ECN+ Directive, with a further supplement introduced by Law No. 118 of 5 August 2022, recently amended the Italian merger control system. It was further amended by Law no. 214 of 30 December 2023, which extended the time limit for the conclusion of Phase II to 90 days. Currently, there are no significant 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?

Over 2023 and the first months of 2024, the Italian Antitrust Authority (IAA) reviewed or is reviewing at least seven below-thresholds transactions. Several of these transactions were notified upon request of the IAA, exercising its new call-in powers. In at least three of these cases, the IAA opened Phase II, namely *Alpacem Cementi Italia/Ramo di Azienda di Buzzi Unicem* (2024), concerning the production and marketing of cement and concrete, *Servizi Italia/Ramo d'azienda di Steris* (2024), regarding the market for sterilisation services for medical devices, instruments and surgical equipment used by healthcare facilities, and *Ignazio Messina & C/Terminal San Giorgio* (2024), concerning an acquisition by Ignazio Messina & C, a company active in the maritime transport of goods by container and rolling stock, of a company active in the same sector.

Law No. 214 of 30 December 2023 (2023 Annual Competition Act) extended the deadline for the conclusion of Phase II, which was previously set at 45 calendar days, to 90 calendar days.

By contrast, more significant changes took place on the IAA enforcement policy side.

First of all, following the implementation of new powers for the IAA to request filings for below-threshold transactions within six months of closing through the 2022 Annual Competition Act, the IAA published a new communication at the beginning of 2024 setting out the principles under which it commits to exercise its call-in powers. This communication replaces the previous one issued in 2022 and takes into account the experience gained by the IAA in the first year of application of the new powers, providing some important practical clarifications. For example, the 2024 communication sets a maximum deadline for voluntary notification to the IAA by the companies involved in the below-threshold transaction, which should be received by the IAA before the transaction is finalised, and in any case no later than the second month after its finalisation. Secondly, the 2024 communication also formally opens up the possibility for the undertakings to which the IAA requests notification of a below-threshold transaction to access the pre-notification procedure.

Secondly, in February 2024, the IAA issued a new notice on how to notify a concentration, with a new form that will apply from May 2024. Among the novelties introduced in the new form, the market shares of the merging companies used to identify the 'affected markets' of the transaction (and, therefore, subject to penetrating disclosure requirements) have been increased. For example, while the former form considered an 'affected market' to be one in which two or more merging parties operate at the same time and, post-merger, would hold a share of no less than 15 per cent, under the new form, the market is 'affected' if the share of the post-merger firms is no less than 20 per cent (where the difference in the degree of concentration in the market, measured by the delta of the Herfindahl-Hirschman Index, is greater than 150), or greater than 50 per cent. In addition, the new form reflects the increasing focus of the IAA on elements beyond the market shares of the merging parties. For instance, section VI.I.2.1 of the new form, on the characteristics of the offer in the 'affected markets', is significantly more developed than the previous version, and places significantly

more emphasis on research and development activities concretely, or even only potentially, carried out by the merging parties.

Thirdly, in March 2024, the IAA raised the turnover thresholds that make the notification of a merger mandatory to €567 million for turnover achieved within the Italian territory by all of the undertakings concerned, and to €35 million for the total turnover achieved individually at national level by at least two of the undertakings concerned.

Finally, the past year saw some changes at an institutional level. On 1 January 2023, the IAA adopted a new organisational structure based on nine departments – two of which are specifically dedicated to antitrust law (the first for cartels and digital platforms, the second for all other economic sectors) – and 25 directorates. Among the latter, the Legal Affairs, Procedural Guarantees and Litigation Directorates are worth mentioning, through which the IAA intends to strengthen its focus on procedural guarantees (procedural guarantees have recently proven to be of particular interest to the Regional Administrative Court of Lazio and the Council of State).

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Voluntary or mandatory system?	Mandatory.
Notification trigger/ filing deadline	Different thresholds apply depending on the transaction structure. For example, for share acquisitions exceeding the threshold of either a 20 or a 50 per cent stake, the acquiring group must have Japanese turnover of over ¥20 billion and the target group (excluding the seller) of over ¥5 billion. No filing deadline, apart from the suspensory obligation until clearance. In addition, when the transaction falls below the thresholds but meets certain criteria (eg, the transaction value is above ¥40 billion, the target group (excluding the seller) turnover exceeds ¥100 million and the transaction is expected to affect the Japanese market), it is recommended to voluntarily consult the JFTC to identify whether a filing is required.
Clearance deadlines (Phase I/Phase II)	For Phase I, 30 calendar days from formal submission of filing. Once Phase II is triggered, the later of 120 days from the date of acceptance by the Japan Fair Trade Commission (JFTC) of the notification or 90 days from the date of submission of the additional materials or information.
Substantive test for clearance	The 2004 Guidelines on the Application of the Antimonopoly Act for Reviewing Business Combinations, as amended in December 2019, elaborate on the items considered by the JFTC but are generally consistent with other major jurisdictions.
Penalties	Gun jumping is subject to a criminal fine of up to ¥2 million.
Remarks	Not applicable.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

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

Chapter 4 of Law No. 54 of 1947, as amended (the Antimonopoly Act), along with the relevant provisions of its Cabinet Ordinance and Regulations, prohibit certain forms of transactions, including mergers and acquisitions, and set out a filing requirement for certain transactions. The thresholds and detailed filing requirements are provided in the Antimonopoly Act, together with its Cabinet 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 December 2019 (the Merger Guidelines).

The Antimonopoly Act is enforced by the Japan Fair Trade Commission (JFTC). The JFTC is an external agency of the Cabinet Office (which is, in principle, equated with other government ministries positioned under the Cabinet), but the Antimonopoly Act declares its independence from any external pressure in respect of its operation. The JFTC is the empowered authority under the Antimonopoly Act, but almost all the implementation procedures are delegated to the General Secretariat, except for ultimate high-level decision-making.

Scope of legislation

2 | What kinds of mergers are caught?

Share acquisitions, statutory mergers, statutory demergers, business transfers (ie, transfer of all or a significant part of the business of another company, transfer of all or significant business-related fixed assets of another company, leases of all or significant businesses of another company, delegation of management regarding all or significant businesses of another company, and contractual arrangements to share business profits and losses of another company) and the appointment of interlocking directorships are the categories of transaction regulated by the Antimonopoly Act. Those transactions (or personnel arrangements) are prohibited if they cause a substantial restraint of competition.

The Antimonopoly Act sets out special rules for companies engaged in banking and insurance. Those companies are prohibited from acquiring more than 5 per cent (for companies engaged in insurance businesses, 10 per cent) of voting rights in another Japanese company except for in certain special cases, including when an approval by the JFTC is obtained.

If certain thresholds are met, share acquisitions, statutory mergers, statutory demergers and business transfers (transfers of businesses or business-related fixed assets only) are subject to a prior notification requirement. No filing requirement is imposed in respect of the creation of interlocking directorships.

3 | What types of joint ventures are caught?

There are no specific, separate rules for joint ventures. Typically, the establishment of a joint venture is caught by the filing requirement, as are the acquisitions of shares in the joint venture company by the investors exceeding either the 20 or 50 per cent threshold. In contrast with 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 JFTC's substantive review if it takes place.

The JFTC 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 JFTC's examination is primarily limited to the unilateral anticompetitive impact of the joint venture itself. In other cases, the JFTC also examines the risk that the parents of the joint venture are colluding with each other via the joint venture.

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

In terms of the thresholds for the formal filing requirements, the present Japanese rules take a relatively simple approach. For share acquisitions, the Antimonopoly Act provides thresholds defined by percentages (share acquisition to exceed 20 or 50 per cent), without using the concept of control as is used in some other jurisdictions.

The concept of control is, however, used to define the scope of a group company. Given that the filing thresholds rely on the Japanese turnover on a group company basis, the concept of control plays a significant role. It is provided by the relevant regulation that a parent–subsidiary relationship is recognised when a company has control over another company's business or financial decision-making, taking into account various factors, such as a minimum voting stake of over 40 per cent, board representation and loans.

The concept of control is also relevant for the purposes of substantive reviews. The Merger Guidelines provide detailed criteria to decide whether a share acquisition should fall under the scope of the JFTC's examinations in respect of the impact on competition and the criteria are primarily based on the concept of control, although the word 'control' itself is not used. For example, when the share acquisition results in a stake of over 50 per cent in the target company or when the share acquisition results in an over 20 per cent stake in the target company and the acquirer alone becomes the largest shareholder therein, the share acquisition qualifies for JFTC review (subject to certain exceptions) regardless of whether a formal filing obligation exists.

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 JFTC's substantive review should take place, such as the percentage of the resulting shareholding, the distribution of the stake between shareholders, mutual

shareholding between the acquirer and the target, and interlocking directorships between them and their business relationships.

There is no concept of joint control, unlike in EU-style jurisdictions. As a result, if a joint venture is owned by two parent companies that each hold 50 per cent and have equal rights in terms of the number of board members or decision-making powers in key strategic issues (ie, deadlock relationship), neither of the parents is regarded as having control over the joint venture; therefore, it is understood that the joint venture does not belong to either of the parents' groups for the purpose of merger control reportability. There is some room for case-by-case analysis, which 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 structure, as illustrated below. The categorisation is based on structures used in the Companies Act and, as a result, it is often difficult to decide which category a foreign transaction would fall under. Generally speaking, the JFTC tends to take an analytical approach, looking at the exact contractual formats rather than the big picture. For example, a foreign transaction that would be perceived as a transfer of business could be interpreted under Japanese law as a combination of multiple share acquisitions. When the reportability is unclear, it is safest to consult the JFTC.

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 JFTC prior to the transaction when all the following thresholds are met:

- the ratio of voting rights held by an acquiring company in an issuing company exceeds either the 20 or 50 per cent threshold;
- the acquiring party as a group has a Japanese turnover of more than ¥20 billion; and
- the target as a group (the target entities and subsidiaries, not including the entities staying with the seller) has a Japanese turnover of more than ¥5 billion.

When calculating the Japanese turnover, in principle, both direct and indirect sales within and into Japan made by the company group during the most recent financial year should be included except intra-group captured sales.

There are separate rules for collective share transfers, which are a form of transaction available under Japanese corporate law that allows more than two companies to create a common holding company. For this form of transaction, when one of the parties as a group has a Japanese turnover of more than ¥20 billion and the other or another party has a Japanese turnover of more than ¥5 billion, the JFTC filing obligation is triggered.

Statutory merger or demerger

In respect of statutory mergers, a filing must be made with the JFTC when both the following thresholds are met:

- one of the parties as a group has a Japanese turnover of more than ¥20 billion; and
- the other party as a group has a Japanese turnover of more than ¥5 billion.

There are more detailed rules for statutory demergers.

Business asset transfer

Regarding business or business-related fixed-asset transfers, a filing must be made with the JFTC when the transferee company as a group has a Japanese turnover of more than ¥20 billion and the target business or business-related assets satisfies any of the following:

- whole business of another company with a Japanese turnover of more than ¥3 billion;
- key business of another company with a corresponding Japanese turnover of more than ¥3 billion; or
- whole or key part of another company's business-related fixed assets with a corresponding Japanese turnover of more than ¥3 billion.

Substantive test

Even if a transaction does not meet this threshold, it is technically still subject to the JFTC's substantive test. When the application of the substantive test is expected, parties can go through voluntary consultation with the JFTC to avoid uncertainty. This is not a legally binding rule and the Antimonopoly Act does not stipulate any threshold for parties to consider voluntary consultation. The Procedural Merger Guidelines, however, provide useful points of reference in this respect.

The substantive test catches non-notifiable transactions if the anticompetitive effect is material, in which case the parties are advised to engage in voluntary consultation. In particular, when a transaction is subject to merger control in other jurisdictions (especially the United States and the European Union) and the anticompetitive impact in Japan is expected to be substantial, the JFTC tends to obtain the information via intergovernmental channels and sometimes contacts the parties, even in the absence of a filing obligation.

Voluntary filing for large transactions with an impact on the Japanese market

The JFTC amended the Procedural Merger Guidelines in December 2019 to encourage parties to a large non-reportable transaction to make a voluntary filing where an impact on the Japanese market is expected. This amendment is designed to capture large technology mergers, but the rule itself is not sector-specific and applies across all industries if the conditions are met.

The amended Procedural Merger Guidelines state that, for merger proposals that do not require notification, parties are advised to consult the JFTC if the total amount of consideration

for the acquisition is expected to exceed ¥40 billion and the merger proposal is likely to have an impact on domestic consumers by satisfying any of the following conditions:

- the target company's business sites and research and development centres are located in Japan;
- the target company conducts sales activities aimed at domestic consumers, such as operating Japanese-language websites or using pamphlets in Japanese; and
- the domestic turnover of the target company exceeds ¥100 million.

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

Filing is mandatory if the relevant conditions are met. Transactions within the same company group are exempted from the filing requirement.

After the amendment to the Procedural Merger Guidelines, the JFTC has been active in reviewing non-reportable cases, where the JFTC tends to ask for a formal filing.

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 target company satisfies the threshold based on Japanese turnover. The same criteria apply to foreign-to-foreign transactions.

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

Yes. In respect of foreign shareholdings in Japanese companies, there are some regulated industries where foreign ownership levels are limited by specific sectoral legislation. For example, NTT, a holding company of the dominant national telephone carrier, must be less than 33.3 per cent foreign-owned. In addition, foreign shareholdings must be less than 20 per cent for terrestrial and radio broadcasters and less than 33.3 per cent for domestic airlines.

The Foreign Exchange and Foreign Trade Law applies to foreign direct inward investments to Japan, requiring a party that has made an investment in Japan to make a post-fact filing with the Ministry of Finance through the Bank of Japan within 15 days of the investment in most cases. For certain industries (eg, 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 notification within a certain period following a particular transactional event (signing or board resolution, etc), although a notification must be made with the Japan Fair Trade Commission (JFTC) 30 days prior to the closing of the transaction.

When a notification is submitted, the JFTC issues an acceptance notice to confirm the filing date and the parties are subject to a 30-day waiting period following that date.

If the parties fail to make the required filing or close in breach of the waiting period, a fine of up to ¥2 million may be imposed; however, to our knowledge, no such criminal sanctions have ever been imposed, although parties that have failed to file are often requested to file a delayed report with a brief explanatory note setting out the reason for the delay and the measures to be taken to avoid future negligence.

The JFTC can also apply to the relevant court for annulment of any statutory merger or demerger for which the parties failed to file, but it has never done so.

In 2016, the JFTC 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 JFTC filing. This two-step structure was also investigated by overseas authorities and included a financial penalty. This case demonstrated the JFTC'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 a business-related fixed-asset transfer and share acquisition, the acquiring company is responsible. The JFTC 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 JFTC is required, the parties cannot close the transaction for 30 days following the filing. When a notification is submitted, the JFTC issues an acceptance notice to confirm the filing date.

It is possible for the JFTC not to accept an initial submission as a sufficient notification, in which case the parties should revise the notification to ensure that all the required information is provided in the notification. To avoid uncertainty, as a practice recommended by the JFTC, companies normally submit a draft notification informally to the JFTC in advance for the JFTC 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 JFTC before submitting the notification formally. If several rounds of questions and market testing are conducted, it can take several months before the JFTC grants an informal green light to submit formally.

As a rule of Japanese law that is different from many other jurisdictions, once the 30-day waiting period lapses, the parties can close the transaction legally even if the JFTC has not completed its substantive review, although the JFTC can reserve the right to take action for a certain period by requesting additional material or information before the expiry of the 30-day waiting period.

If the JFTC asks one or more of the companies during the waiting period to submit additional material or information, the JFTC may still take action even after the expiry of the waiting period, subject to the 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 acceptance of the submission of the additional material.

The JFTC has the discretion to shorten the 30-day waiting period. In the regime in force prior to the amendments in 2011, the JFTC was reluctant to shorten the waiting period, except in very rare cases; however, in the current regime, the JFTC is likely to be more generous in agreeing to shorten the 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?

There has been no precedent of the JFTC challenging gun jumping with a penalty. It is, however, possible under Law No. 54 of 1947, as amended (the Antimonopoly Act) for the JFTC to take measures against transaction parties who have actually or effectively closed the transaction before the required clearance.

In 2016, the JFTC 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 JFTC filing. Considering the increasing global trend to regulate gun jumping, a similar level of caution as that used in the most aggressive jurisdictions, such as the United States and the European Union, is also prudent with regard to the JFTC.

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 JFTC has to date not imposed such sanctions.

Remedies

Apart from criminal sanctions, the JFTC 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

The JFTC may petition the court for annulment of a merger or demerger on the grounds that a transaction requiring notification has been closed during the 30-day period and the court may invalidate the transaction. The JFTC has, however, never done so.

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

There have been no cases in which a sanction has been imposed against any company, either Japanese or foreign, for closing before clearance; however, the rules allow the JFTC to challenge foreign-to-foreign mergers if an impact exists and affects the Japanese market.

In 2008, the JFTC proactively investigated BHP Billiton, as it was then known, at the time of its merger discussions with Rio Tinto, which is indicative of the JFTC'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 Japanese rules, if the 30-day waiting period has lapsed, the parties can technically close a transaction legally without waiting for the JFTC's substantive clearance (completion of substantive review); however, even after the expiry of the 30-day period, the parties remain exposed to the risk of receiving an JFTC remedy order in a case where substantial antitrust concerns are raised by the JFTC.

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 against closing does not extend beyond the 30-day period; however, the JFTC may petition a court for an interim suspension of the deal.

Theoretically, the parties are not precluded from trying to agree a hold-separate arrangement with the JFTC but, to our knowledge, there is no precedent for such an attempt.

Public takeovers

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

There are no competition law rules specifically applicable to public takeover bids. There is no clear rule in respect of when a notification can be filed with the JFTC 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 JFTC.

It is generally understood that, when a takeover bid requires JFTC notification, the registration statement for a takeover bid to be filed with the Financial Services Agency must disclose the merger filing requirements under the Antimonopoly Act 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 JFTC, a company must comply with the format prescribed by the JFTC (different forms are set out for each transaction category), which can be downloaded from the JFTC's website. The filing, including parts of the additional documents to be attached to the form, must be in the Japanese language. As a result, when a foreign company prepares for a notification, sufficient time should be allowed for translation.

Unlike Form CO in the European Union, which has to be prepared in flowing text, the Japanese form simply sets out tables into which the reporting parties insert the relevant information and data. An applicant is not expected to provide its own economic analysis of the market or detailed market data (except for very high-level data) in the filing. The JFTC format on its own does not require notifying parties to fully express its own argument to justify the transaction.

The following are the details, among other things, that should be included in the form:

- descriptions of the companies involved, including their affiliated entities and economic importance measured by assets or sales;
- the purpose and background of the transaction;
- information regarding shareholding relationships between the companies involved; and
- high-level market information, including the types of products or services subject to horizontal overlap or vertical relationship between the parties, the geographical coverage of those businesses, and the rankings and market shares of key players.

Additional documents must be provided (different requirements apply depending on the transactional category of share acquisitions, statutory mergers, demergers and business transfers), including the most recent annual report, the 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 JFTC. The Procedural Merger Guidelines clarified in their implementation regulations that parties can submit those supplementary documents.

During the review, the JFTC requests additional information and, sometimes, these requests are more demanding than those of other authorities, particularly around supporting evidence in respect of market definitions. In recent years, the JFTC has also requested internal documents, although usually on a voluntary basis. It has been reported that the JFTC's Merger Section has recently issued orders for document submission and the JFTC's focus on internal documents is likely to intensify in the coming years.

Submission of false information is subject to a criminal penalty of up to ¥2 million, but we are not aware of any cases where the penalty has been imposed.

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Investigation phases and timetable

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

Parties can discuss issues with the JFTC 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 JFTC finds that the filing raises any issues under the Antimonopoly Act in Phase I, it is likely to contact the parties informally first. The JFTC can also formally request more information by a written request (report request), although such a request triggers Phase II review. If the parties fail to respond properly to the JFTC's request for information or the JFTC otherwise considers that more proactive investigation is necessary, it may commence a formal investigation, and has the power to interview relevant parties (eg, suppliers, competitors, employees, executives and customers) and examine related documents.

The JFTC often interviews customers of the parties in addition to carrying out document-based assessments. If the parties are manufacturers with substantial production facilities, the JFTC may visit those facilities. 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 JFTC issues a notice that confirms the date when the JFTC officially accepted the notification. The parties are subject to a 30-day waiting period starting from that date (Phase I). If the JFTC 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 Antimonopoly Act, the parties can still complete the transaction upon the expiry of the 30-day period, even if the JFTC has not completed its substantive review; however, once Phase II is triggered, the JFTC 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 JFTC's acceptance of the notification or 90 days from the date of acceptance of the submission of the additional materials or information. The parties are therefore subject to de facto prohibition from closing until clearance is given.

The JFTC issues a written confirmation of its clearance at the end of both Phase I and Phase II.

The JFTC often shortens the waiting period in response to the parties' specific request. When Phase II review is triggered, the case is disclosed on the JFTC's website for third-party comments and a summary of the JFTC's analysis also appears on its website after the completion of the review.

Before the formal timeline starts, and particularly in difficult cases, there are usually informal pre-notification discussions, as in the European Union. This process can take several months, especially if the JFTC conducts market testing and there are several rounds of questions.

There have been recent cases in which the JFTC has requested, on a voluntary basis, parties' internal documents. The requests were not as formal as those seen in the United States and the European Union, but this may become a more common practice.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Japan Fair Trade Commission (JFTC) reviews individual mergers and acquisitions in light of whether competition in the defined market will be substantially restrained.

Safe harbour

For horizontal transactions, the criteria suggested by the 2004 Guidelines on the Application of the Antimonopoly Act for Reviewing Business Combinations, as amended in December 2019 (the Merger Guidelines) are:

- the Herfindahl-Hirschman Index (HHI) after the business combination (post-HHI) is not more than 1,500;
- the post-HHI is over 1,500 and not more than 2,500, and the increase in HHI is not more than 250; or
- the post-HHI is more than 2,500, and the increase of HHI is not more than 150.

For vertical and conglomerate transactions, the suggested criteria are:

- the combined market share is not more than 10 per cent in any of the related markets; and
- the post-HHI is not more than 2,500 and the combined market share is not more than 25 per cent in any related market.

These numerical thresholds are not absolute but merely for indicative purposes and the actual review process is conducted in 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, given past cases.

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 positions of the parties and the competitors, and the state of competition;
- imports;
- entry;
- competitive pressure from related or neighbouring markets;
- competitive pressure from users;

- overall business capabilities;
- efficiency;
- the financial strength of the company parties; and
- the scale of the markets.

The failing firm defence is not something that is regularly used and acknowledged, but while the hurdle is not low, it is worth exploring where the claim is relevant.

Amendments to Merger Guidelines

In 2011, more detailed rules were included in the Merger Guidelines for the analysis of import pressure and the option to define the term 'global market' beyond the national market. This was to more accurately reflect the existing review practice of the JFTC and no significant change to its review policy in substance has been observed to date.

In 2019, the JFTC amended the Merger Guidelines to reflect the already existing review practice, including various key considerations for digital mergers, overlaps in research and development activities, and foreclosure using big data.

Green Guidelines

In 2023, the JFTC published new Green Guidelines covering a broad range of topics, including horizontal cooperation, unilateral conduct and abuse of superior bargaining position, in addition to merger control. The Green Guidelines clarify that clean products could be treated as separate markets from conventional products. For example, electric vehicles could be a separate market from petrol and diesel cars, and renewable electricity could be separate market from electricity generated by conventional methods. In this regard, in 2024, the JFTC revised the Green Guidelines, clarifying that clean and conventional products, as neighbouring markets to each other, can be counted as a pro-competition factor.

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

There are no specific criteria for joint ventures and, in principle, the JFTC's substantive test also applies to joint ventures. The Merger Guidelines, however, include a few general statements regarding anticompetitive behaviour that may arise in joint ventures.

For example, it is stated that, in assessing the effect of a joint venture on competition, the commercial relationship between the investors in the joint venture should be examined because the investors could, without having any direct capital tie-up between them, indirectly create an anticompetitive business combination.

In this respect, whether the investors have transferred the business in a given sector to the joint venture entirely or partially is also taken into account. In the case of a partial transfer of business where the investors still retain some interest or activities in the same business sector, the risk of an anticompetitive effect is likely to be higher than in a 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, Law No. 54 of 1947, as amended (the Antimonopoly Act) 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 Japanese 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.

The Merger Guidelines have chapters on horizontal business combinations as well as vertical or conglomerate business combinations. They also differentiate between the anticompetitive impact of unilateral conduct and that of coordinated conduct. In recent technology cases, the JFTC has analysed conglomerate aspects closely, which seems to be an increasingly common trend.

The JFTC 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 in other jurisdictions, 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 JFTC appears to be interested in hearing about new technologies and, more generally, innovation aspects; it is worth exploring this argument where it is relevant.

The concept of common ownership could be captured by the JFTC, considering that the Merger Guidelines indicate that a mere 10 per cent shareholding could be considered as having a potential impact on competition; however, we are not aware of any specific initiative by the JFTC 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 and Communications. Likewise, with regard to air transport, approval from the Ministry of Land, Infrastructure, Transport and Tourism is mandatory with a view to transferring business licences following a merger or acquisition.

The Antimonopoly Act includes special rules for share acquisitions in the banking and insurance sector, and in examining applications for approvals, the JFTC must consult with the Financial Services Agency (FSA). In addition to the Antimonopoly Act, 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 JFTC review process, but especially in the context of regulatory assessment in a specific industry, it appears to us that public interest is sometimes taken into account. This was debated in some expert communities in the context of a recent series of JFTC merger reviews involving local banks, where the JFTC expressed concerns regarding a 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 JFTC does not openly acknowledge public interest as a factor in its review.

De minimis market exemption

The 2019 amendment introduced a new paragraph that provides for effective exemption to two-to-one mergers where the relevant market is too small to support multiple players, however efficient they may be. This addition to the Merger Guidelines appears to be intended to address specific situations, such as a merger between regional banks within the same small region; however, as the wording itself does not limit the application of the paragraph, its actual scope of application is uncertain.

Economic efficiencies

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

Economic efficiency is listed in the Merger Guidelines as a factor to be considered in the review process; however, the extent to which the improvement of economic efficiency offsets the anticompetitive impact is restricted by the following conditions:

- the efficiency improvement must be specific to the business combination and not capable of being achieved by other available means;
- the efficiency improvement must be practically possible; and
- the efficiency improvement 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 a monopoly.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

The Japan Fair Trade Commission (JFTC) can either issue remedy orders to rectify a breach of Law No. 54 of 1947, as amended (the Antimonopoly Act) or petition a court for annulment of the transaction, although no precedents exist for the latter. For the purposes of the former, the JFTC must give prior notice and provide the parties concerned with an opportunity to make submissions. If the JFTC issues such an order and the parties are dissatisfied, they may request the JFTC to hold a hearing.

Remedies and conditions

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

Yes. The 2004 Guidelines on the Application of the Antimonopoly Act for Reviewing Business Combinations, as amended in December 2019 (the Merger Guidelines) clearly state that remedies can relate to the behaviour of the parties, although, in principle, a structural measure, such as divestment, is preferable.

The Merger Guidelines list possible remedies, including divestment, such as a partial transfer of business in a given sector, or the termination of a business or capital relationship with other entities, or alternatively long-term supply agreements regarding the product concerned if the former is difficult to achieve.

When those primary measures are not viable, the parties are advised to take, as secondary remedies, measures to promote imports or new entry into the relevant market, or to increase the independence of each undertaking (eg, by setting up an information firewall or prohibiting the purchase of raw materials from a communal seller).

Types of remedy that have been adopted 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 the United States, to clearly prefer divestitures, it appears that the JFTC may be more open to behavioural remedy options. When a behavioural remedy is adopted, the JFTC tends to do the monitoring itself rather than requiring an external monitoring trustee.

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

In terms of procedures to finalise the contents of remedies, the JFTC introduced the Commitment System at the end of 2018 and the Policies Concerning Commitment

Procedures clearly state that, in the context of finalising merger remedies, the timeline and procedural requirements under the Commitment System will apply.

Although it is not entirely clear from the Merger Guidelines, the general understanding is that the traditional procedures for merger remedies (ie, with no timeline or specific documents required except that the parties must give details of the remedy in the final section of a formal filing once the remedy is decided) would technically continue to apply. As at the time of writing, this new mechanism has not been seen in operation in merger contexts and, as a result, it is unclear how it operates and what relationship exists between the old rules and the Commitment System.

The following describes the current system.

Conditions

The basic condition applicable to a divestment order or other remedy is that the remedy is able to restore the competition that is likely to be undermined by limiting the freedom of the merging parties to set market prices and other market conditions. Upon request by the parties, the JFTC 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 JFTC during the review, in either Phase I or Phase II, after the submission of notification, the parties are requested to submit an amendment of the original notification to reflect the agreed remedy.

Timing

In principle, remedy measures should be implemented before a transaction comes into effect; however, when a remedy is to be implemented only after the transaction enters into force, the deadline to implement the remedy must be specified clearly and appropriately.

In particular, in the case of a partial business transfer, ideally, the purchaser should be decided and approval should be obtained from the JFTC 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 JFTC'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?

If a substantial restraint to competition in the Japanese market is expected, remedies are required even for foreign-to-foreign transactions. Foreign companies have agreed and implemented remedies in a number of previous transactions reviewed by the JFTC.

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 JFTC is reluctant to order remedies regarding foreign-to-foreign transactions; it is simply because of the common

practice, up until now, of arranging remedies on a voluntary basis before a cease-and-desist order is issued. If remedies cannot be agreed by the end of Phase II, a cease-and-desist order may be possible.

Ancillary restrictions

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

There is no express guidance in this respect in either the Antimonopoly Act or the Merger Guidelines. In general, however, even if it does not request or order remedies or bring court action for annulment regarding a transaction, the JFTC can still challenge certain ancillary restrictions between the parties.

In that sense, a merger clearance does not protect ancillary restrictions; therefore, ancillary restrictions are still subject to challenges on the basis of other competition rules. It is very likely, however, that the JFTC would order the parties to exclude or amend anticompetitive ancillary provisions if those arrangements are obvious at the time of merger control review.

To that extent, it is worth considering putting any ancillary arrangements before the JFTC 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 Japan Fair Trade Commission (JFTC) often interviews customers of the parties as well as competitors.

Law No. 54 of 1947, as amended (the Antimonopoly Act) also stipulates as a general right that anyone (including customers and competitors) who perceives there to be an infringement of the Antimonopoly Act may report to the JFTC 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 JFTC in respect of certain transactions during the course of the review process. In this event, the JFTC must then investigate and, even if it decides not to take any measures, it must inform the complainant of its decision.

There has been a precedent where the JFTC 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 JFTC 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 JFTC issues a remedy order, detailed information will be fully disclosed.

In 2017, the JFTC started to disclose information on all filed cases to include parties' identities, the industry, the structure of the transaction, the clearance date and whether it was short-track.

Website disclosure of Phase II cases

When Phase II is triggered, this fact is published on the JFTC website for third-party comments. In the past, this website notice to attract third-party comments was used only for Phase II review, but in some technology cases, even under a voluntary procedure, the JFTC has already started to do the same during the pre-notification stage.

Further, in the case of a Phase II review, the final analysis and observations are made public.

The JFTC sometimes publishes a case summary upon clearance if it considers it as a significant review case, even where the review was completed in Phase I. The JFTC contacts the parties prior to the publication to ensure that the public disclosure does not include trade secrets or any other commercial information that the parties would not wish to be made public. The parties can request the JFTC to limit the information disclosed on the website to omit certain sensitive information. Some cases are disclosed on the website without disclosing the names of the parties involved.

Cross-border regulatory cooperation

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

The JFTC cooperates very actively with other major jurisdictions on specific cases. It is, therefore, very important that submissions to the JFTC are consistent with those made in other jurisdictions, particularly the United States, the European Union and Korea.

Cooperation in individual cases

In 1999, the governments of Japan and the United States concluded an agreement concerning cooperation on anticompetitive activities. Similar agreements were signed in 2003 with the European Union and in 2005 with Canada. The primary purpose of these bilateral frameworks is to promote collaboration between the competition authorities of both parties in terms of information gathering and implementation of each party's antitrust legislation.

Japan has also signed economic partnership agreements with Brunei, Chile, India, Indonesia, Malaysia, Mexico, Peru, the Philippines, Singapore, Thailand and Vietnam, and these contain a chapter on collaboration on antitrust issues.

The actual status and development in the implementation of these bilateral instruments is not clear, particularly given the less active enforcement of merger regulations in some countries, but it seems that, in respect of large-scale multi-jurisdictional transactions (especially when involving US, EU and Korean authorities), the JFTC has extensive exchange of detailed information practices with other authorities in the course of its merger control review.

Other policy discussions

The JFTC has been active in various international forums (the International Competition Network, the Organisation for Economic Co-operation and Development, the Asia-Pacific Economic Cooperation, etc), including general policy discussions and capacity building for developing countries in connection with antitrust legislation.

JUDICIAL REVIEW

Available avenues

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

Under the previous rules, when the Japan Fair Trade Commission (JFTC) issued a cease-and-desist order and the parties to the transaction were dissatisfied, they could request the JFTC to initiate the procedure for a hearing and file a court challenge if they were dissatisfied with the JFTC's decision.

In April 2015, JFTC hearing proceedings were abolished and, instead, the first-stage appeal of a JFTC cease-and-desist order is now made to the Tokyo District Court. There are various ongoing discussions among practitioners in respect of how this system should be used in practice.

Time frame

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

A legal action to challenge the decision of the JFTC must be filed within six months of the date on which the parties acknowledge the decision.

The time limit for filing an appeal with the Tokyo District Court is subject to the general rules, under which the plaintiff must file an appeal within six months.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

The latest publicly available data is for fiscal year 2023 (1 April 2023 to 31 March 2024). In this period, a total of 345 filings were made.

The number of notified transactions increased by 13 per cent compared with fiscal year 2021.

Of the 345 cases filed during fiscal year 2023, 335 were cleared in Phase I, and there were no cases where a clearance was given on condition of remedies. There were no cases reviewed in Phase II and 10 were withdrawn during Phase I.

Reform proposals

35 Are there current proposals to change the legislation?

No.

UPDATE AND TRENDS

Key developments of the past year

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

In April 2024, the Japan Fair Trade Commission (JFTC) published its revised Green Guidelines, which were first published in March 2023.

The guidelines specifically cover business combinations seeking environmental sustainability and outlines the JFTC's approach in terms of market definition, substantive review (eg, on competitive pressure from adjacent markets in transitioning markets) and remedies, recognising that behavioral measures may be more suitable in certain circumstances.

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Kenya

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TripleOKlaw Advocates

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Voluntary or mandatory system?	The system is mandatory for notifiable mergers. The Consolidated Merger Guidelines provide for mergers that are notifiable as the following: a merger which involves the acquisition of direct control; a merger which involves the acquisition of indirect control; and a 'full-function' joint venture.
Notification trigger/ filing deadline	There is no deadline with regards to notification filing.
Clearance deadlines (Phase I/Phase II)	The Competition Authority of Kenya (the Authority) makes a determination in relation to a proposed merger of which it has received notification within 60 days of the date on which the Authority receives that notification.
Substantive test for clearance	The Authority subjects mergers to two main review assessments: a) whether it is likely to lead to a substantial lessening of competition; and b) whether the merger will conflict with certain government policies, eg employment stability and the protection and encouragement of the growth of small businesses.
Penalties	• Failure to notify the Authority: imprisonment for a term not exceeding five years or a fine not exceeding 10 million Kenyan shillings, or both. The Authority can 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. • Offences under the Act for which no penalties have been specified: a fine not exceeding 500,000 shillings, or imprisonment for a term not exceeding three years, or both.
Remarks	The notification process is an integral part of merger controls as it delineates the types of mergers in the market that are subject to mandatory control procedures by the Authority. The control mechanisms are necessary for balanced and fair competition among businesses in the market. The provision for a general penalty is equally a good measure since it puts new markets and trends that may circumvent the regulations in check.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

Merger control falls under the ambit of the Competition Act 2010 (the Act). The Act seeks to safeguard competition in the national economy, and this includes the regulation of mergers. The Act establishes the Competition Authority of Kenya (the Authority) as the enforcing body.

Scope of legislation

2 What kinds of mergers are caught?

The Act in section 41 defines a merger as what occurs when one or more entities, directly or indirectly, acquire or establish direct or indirect control over the whole or part of the business of another entity. This means that mergers can occur when one entity either directly or indirectly, acquires or establishes control over all or part of the business of another entity. This can happen in ways such as:

- the purchase or lease of shares, acquisition of an interest or purchase of assets of the other undertaking in question;
- the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;
- the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;
- acquiring by whatever means the controlling interest in a foreign undertaking that has a controlling interest in a subsidiary in Kenya;
- in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;
- vertical integration;
- exchange of shares between or among undertakings that result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or
- amalgamation, takeover or any other combination with the other undertaking.

3 What types of joint ventures are caught?

This is provided for in the Competition (General) Rules 2019 (the Rules), and more specifically, the Merger Threshold Guidelines. For a joint venture to get caught, it has to be considered a full-function joint venture. Full-function joint ventures are defined in the Rules as a joint venture that must perform for a period of 10 years or more and carries on all the functions of an autonomous economic entity.

These types of joint ventures are considered as mergers and can arise from any of the provisions highlighted under section 41 of the Act.

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

Control is defined in the Act in relation to the creation of mergers, and section 41(3) states that a person controls an undertaking if it:

- beneficially owns more than one-half of the issued share capital or business or assets of the undertaking;
- is entitled to vote 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;
- 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 above-mentioned paragraphs.

As previously stated, a merger can occur when one entity either directly or indirectly, acquires or establishes control over all or part of the business of another entity. The control can be determined to exist in the ways listed.

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?

Notification threshold

In Kenya, there are notifiable mergers and excluded transactions that need not be notified to the Authority. A notifiable merger is one that meets the requirements stipulated in the Merger Threshold Guidelines of 2019. Notification arises in situations where:

- the undertakings have a minimum combined turnover or assets of one billion shillings and the turnover or assets of the target undertaking is above 500 million shillings;
- the turnover or assets of the acquiring undertaking is above 10 billion shillings and the merging parties are in the same market or capable of vertical integration; and
- in the carbon-based mineral sector, if the value of the reserves, rights and associated assets to be held as a result of the merger exceeds 10 billion shillings.

Excluded transactions

Mergers that do not meet the requirements for notification listed above may apply to the Authority to be excluded from the mandatory notification process. The application is considered by the Authority, who first satisfies itself on whether:

- the combined turnover or assets (whichever is higher) of the merging parties does not exceed 500 million shillings; or
- the merger meets the Common Market for Eastern and Southern Africa (COMESA) Competition Commission Merger Notification threshold and at least two-thirds of the turnover or assets (whichever is higher) is not generated or located in Kenya.

Once an application is made to the Authority by the merging entities, and the same is considered with regards to the abovementioned grounds, the authority may either accept the application and exclude the transaction from notification requirements, or reject the application.

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

Yes, it is a mandatory provision of law. Section 42 (2) of the Act prohibits the implementation of proposed mergers without approval of the Authority. Even for a transaction to be excluded, an application for the same must still be made to the Authority.

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

The Rules provide that a merger shall not be subject to notification if it is taking place wholly or entirely outside of Kenya and has no local connection. Furthermore, when it comes to extraterritorial mergers, the parties shall notify the COMESA Competition Commission where the merger meets the threshold prescribed under the COMESA Competition Regulations and Rules.

However, the extraterritorial application of the Act will be in relation 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 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.

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

No specific provision relating to the restricting of foreign investments in Kenya. However, Kenya has sector-specific regulations that provide for restrictions on foreign investments in the aviation, maritime, insurance, telecommunications, mining and banking 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?

The provisions on notification and filing are provided for under Part IV of the Competition Act (the Act). First, where a merger is proposed, each of the undertakings involved shall notify the Competition Authority of Kenya (the Authority) of the proposal in writing or in the prescribed manner. Following this, the Authority may, within 30 days of the date of receipt of the notification, request such further information in writing from any one or more of the undertakings concerned. There exist no specific deadlines for filing in this respect.

Regarding sanctions for not filing, the Authority, in its determination in the matter regarding the acquisition of shareholding in Asante Capital EPZ Limited by Moringa Entities, issued a financial penalty for implementing the merger without seeking approval as stipulated in the Act. Furthermore, the merger was also cancelled until both parties took steps to regularise the transaction. This is the position provided for in both the Act and the Competition (General) Rules 2019 (the Rules).

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

The Act does not expressly provide the party that is responsible for the payment of filling fees. Therefore, this is normally negotiated between the acquiring undertaking and the target undertaking.

The charges under the Merger Threshold Guidelines are:

Threshold (kshs)	***Fees per proposed merger (kshs)***
0–500 million	Zero (excluded from notification)
500,000,001–1 billion	Zero (excluded transaction)
1,000,000,001–10 billion	1 million
10,000,000,001–50 billion	2 million
Above 50 billion (>)	4 million

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

Under the Act, the Authority is required to acknowledge the receipt of a merger application within three days of its receipt, following which it is required to make a determination:

- within 60 days of the date it receives the merger application;
- if the Authority requests further information, within 60 days of the date of the receipt of such further information; or
- if the Authority has convened a hearing conference, within 30 days of the date of the conclusion of the conference.

If the Authority is of the view that a transaction is more complex, it can extend the determination period by an additional 60 days prior to the expiry of the original determination time frame, with written notice to the entities involved.

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?

Engaging in the implementation of a merger transaction, which involves integrating the activities of the merging businesses before obtaining clearance from the Authority, is considered an offence under the Act. According to the Act, the full payment of the purchase price is construed as 'implementation', but the payment of a deposit, not exceeding 20 per cent of the purchase price, is allowed. Any merger that is implemented without adhering to the notification and approval requirements outlined in Part IV of the Act is legally ineffective in Kenya. Consequently, parties cannot enforce any related agreements in legal proceedings.

Furthermore, failure to comply with the notification and approval requirements constitutes an offence. Upon conviction, the individual is subject to imprisonment for a maximum term of five years, a fine not exceeding 10 million Kenyan shillings, or both. The Authority also has the authority to impose a financial penalty, which may amount to a maximum of 10 per cent of the preceding year's annual gross turnover in Kenya for the undertakings involved in the offence.

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

Certainly, if the Act's provisions apply to the foreign-to-foreign merger.

Sanctions may be applied to the foreign-to-foreign merger if it falls within the ambit of the Act.

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

The Act and the Consolidated Guidelines do not include provisions for establishing hold-separate or ring-fencing arrangements to facilitate the implementation of foreign-to-foreign mergers outside Kenya. Hold-separate or ring-fencing arrangements in mergers involve measures to keep certain aspects of merged entities separate and distinct during a specified period, addressing regulatory concerns, and preventing potential anticompetitive effects.

Public takeovers

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

There are no distinct merger control regulations. In cases where a public takeover is subject to the Act's provisions, these provisions must be applied in conjunction with the stipulations of the Capital Markets Act CAP 485A, the Capital Markets (Takeover and Mergers) Regulations 2002, and any other pertinent sector-specific legislation.

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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 regulatory authority has published a specific merger notification form for both the acquiring and target entities to complete individually. The required level of detail varies based on the characteristics of the merger. Different schedules within the form dictate the information to be provided, depending on factors such as the type of merger and the relationship between the involved parties.

The merger notification form provides that the following documents should be filed:

- Schedule I – 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;
- 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 – 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 past three years; and pricing schedules including terms of discounts and rebates offered.

The authority is not confined to the provided form questions and may request further information within 30 days if the initial submission is deemed insufficient.

Providing materially incorrect or misleading information is considered an offence under the Act. Those convicted may face a fine of five million Kenyan shillings or imprisonment for up to five years, or both.

Investigation phases and timetable

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

Upon receipt of a merger notification form at the Authority's offices, the Authority typically acknowledges the submission in writing, assigning a case officer for the analysis of the proposed merger. In the initial assessment, the submission is scrutinised to ascertain its completeness. If necessary, the Authority may request additional information or seek clarifications. The evaluation includes determining:

- whether the proposed merger qualifies as a ‘merger’ as per the Act;
- establishing the Authority's extraterritorial jurisdiction over the merger;
- assessing whether the merger meets the thresholds outlined in the Merger Threshold Guidelines; and

- deciding if an application for exclusion from Part IV of the Act is appropriate. Additionally, any requests for confidentiality are considered, and if deemed acceptable, confidentiality is granted through a letter issued early in the evaluation process.

The case officer, in collaboration with the Authority's mergers and acquisition division, conducts a comprehensive merger assessment. This phase may involve interviews with the merging parties or the convening of a hearing conference. Subsequently, the mergers and acquisition division presents its recommendations to the Authority's board for a determination. The board, within the stipulated time frames, makes a decision, and this decision is communicated to the parties who submitted the merger notification.

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

Typically, the Authority acknowledges the receipt of a merger application within three days. The Authority is obligated to reach a determination within specific time frames:

- within 60 days of receiving a merger filing;
- within 60 days of receiving additional information, if requested; or
- within 30 days after concluding a hearing conference, if applicable.

In instances where the Authority perceives a transaction as complex, it has the discretion to extend the determination period by an additional 60 days before the expiration of any of the aforementioned determination periods. This extension is communicated to the involved undertakings through a written notice.

Regarding exclusions from the provisions of Part IV of the Act, the Authority typically communicates its determination within 14 days of receiving the merger notification form. If the Authority determines that the proposed transaction does not qualify as a 'merger' or when an advisory opinion on a proposed transaction is sought, the decision is communicated in writing to the inquiring party within 10 days.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Competition Authority of Kenya (the Authority) utilises the competitive effects test and the public interest test to any proposed merger transaction. The Authority considers the extent to which the proposed merger transaction affects competition or create a dominant position. The Authority further assesses the compliance of the proposed merger with government policies.

While considering the above-mentioned tests, the Authority will consider whether the proposed merger is likely to:

- affect employment;
- benefit the public;

- 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;
- prevent or lessen competition or restrict trade or the provision of any service or endanger the continuity of supplies or services;
- affect the ability of national industries to compete in international markets;
- affect a particular industrial sector or region; and
- results in any undertaking acquiring or strengthening a dominant position in the market.

Further, the following considerations are made when the failing firm defence is used:

- in the absence of a proposed merger, the assets of the failing undertaking would inevitably exit the market;
- the failing undertaking would be forced to exit the market because of financial problems if not taken over by another undertaking; and
- there isn't a less anticompetitive alternative acquisition other than the proposed merger.

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 Consolidated Guidelines specify that the Authority will examine all plausible theories of harm applicable to each merger on a case-by-case basis. In the process, the Authority will scrutinise market dominance, and delineate and identify the market for goods and services produced by the entities involved in the proposed merger. The Authority's primary focus will be to ensure that the merger's impact does not lead to the prevention or reduction of competition, either by enabling the creation or augmentation of market power or by facilitating its exercise.

Non-competition issues

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

The Competition Act mandates the Authority to factor in the well-being of the public during the evaluation of a proposed merger. The Consolidated Guidelines explicitly state that the public interest assessment is conducted independently of the competition test outcome.

When examining public interests, the Authority appraises the impact of the proposed merger on employment, the accessibility and competitiveness of small and medium-sized enterprises in any market, and the ability of national industries to compete internationally and within a specific industrial sector.

With respect to employment-related assessment, the Authority scrutinises the merging entities' historical performance concerning labour-related matters. If the Authority concludes that the merger might lead to job losses, it necessitates the merging entities to provide a

justification. This justification is then evaluated against the countervailing public interest that supports the job losses. The Authority may conditionally approve the merger and demand written commitments from the merging parties to refrain from layoffs for a specified period.

Additionally, the Authority is likely to consider the post-merger impact of foreign direct investment. A significant concern is the potential for a foreign entity to shift its procurement activities from local markets to foreign ones, adversely affecting the ability of local suppliers to compete and sustain jobs.

Economic efficiencies

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

The Consolidated Guidelines highlight economic efficiencies as a crucial component of the competition test employed by the Authority in the assessment of a proposed merger. The evaluation of the degree to which the adverse effects of a proposed merger can be offset by economic efficiency is conducted on a case-by-case basis. Acceptance of such efficiencies seems to be permissible only in cases where there is no public interest concern.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

The Competition Authority of Kenya (the Authority) has the sole discretion (statutorily) to determine the validity of a merger transaction.

Remedies and conditions

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

Yes, addressing competition concerns is feasible, as the Authority possesses the authority to impose conditions on a proposed merger that it identifies as anticompetitive or raising public interest-related issues.

Structural remedies may be mandated by the Authority in response to the proposed merger. These remedies encompass, among others:

- the divestment of an entire undertaking or a portion of its business;
- the immediate transfer of contractual rights; and/or
- alterations to the intellectual property rights of the undertaking.

In cases where structural remedies are not commercially viable, the Authority may opt for behavioural remedies. These remedies may include:

- periodic reporting of information to the Authority;
- an order compelling the merged entity to provide goods and services to a specific customer segment or geographical region;
- commitments to price caps;
- restrictions on expansion;
- commitments regarding access to critical technology; and
- prohibitions on the merged entity approaching any customers of the divested or sold business.

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

Remedial measures imposed on a proposed merger, which may involve requirements such as divestiture, are designed to reinstate or sustain competition while facilitating the realisation of merger-specific efficiencies and benefits.

In cases where the remedial package involves divestment, the Authority reserves the right to mandate the appointment of divestment trustees to midwife the divestiture process.

The time frame for implementing each remedial package is determined by the Authority on a case-by-case basis. Under the Consolidated Guidelines, every remedial package sanctioned by the Authority, whether structural or behavioural, must incorporate the following elements:

- address the major areas of competition concern;
- pose a low risk of not achieving success;
- be practically implementable and monitorable within the Kenyan context; and
- be capable of resolving the identified areas of concern within a specified, preferably short, time frame.

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

The Authority makes no distinction between local mergers and foreign-to-foreign mergers. Consequently, the Authority has granted approval to certain foreign-to-foreign mergers, subject to conditions aimed at rectifying the anticompetitive impacts of the merger and ensuring adherence to the provisions of the Competition Act 2010.

Ancillary restrictions

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

The Authority conducts a comprehensive evaluation of a proposed merger, and in cases where behavioural remedies are deemed necessary, it may enforce ancillary restrictions. These restrictions might encompass various measures, such as prohibiting the merged entity from soliciting customers from the business that has been sold or divested, implementing a temporary moratorium on job losses for a specified duration, placing constraints on output, restricting expansion and prohibiting the altered business entity from changing existing business models, including distribution chains, for a designated period.

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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 2010 (the Act) allows any individual, including customers or competitors not involved in a proposed merger, to voluntarily provide information related to that merger to Competition Authority of Kenya (the Authority) during the application stage. However, once the Authority reaches a determination on the proposed merger, only a party involved in the merger or any individual against whom the Authority issues an order can 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?

Under the Act, any individual submitting information or documentation to the Authority is allowed to assert a claim for confidentiality regarding that information or documentation. The Authority has established a designated form for this purpose. After receiving such a claim, the Authority evaluates the request and communicates its decision to the claimant. In instances where the Authority denies the request for confidentiality, any submitted information will be treated as confidential for a period of 14 days.

The submitting party has the option to retract any information provided to the Authority within the 14-day period if a request for confidentiality on that information has been declined.

Cross-border regulatory cooperation

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

The Authority is mandated to collaborate with other regulatory and public bodies in all affairs pertaining to competition and consumer welfare. In practice, the Authority actively engages in cooperation and information-sharing with antitrust authorities in different jurisdictions. Furthermore, the designated merger notification forms necessitate merging parties to disclose to the Authority if a proposed merger will also be reported to other antitrust authorities.

In line with fostering international collaboration, the Authority has established a cooperation agreement with the Common Market for Eastern and Southern Africa (COMESA) Competition Commission. This agreement formally requires each party to notify the other about any enforcement activities it becomes aware of that may impact the interests of the other party.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

The law has provided various remedies available to the parties in a merger and acquisition arrangements where they can access a second opinion in respect to the decision made by the Competition Authority of Kenya (the Authority). The Competition Tribunal is established under section 71 of The Competition Act of 2010. Parties aggrieved to the decision of the Authority may appeal the decision to the Competition Tribunal (the Tribunal) that is established under The Competition Tribunal (Procedure) Rules 2017, which will hear and determine their grievance.

While determining the matter before them, the Authority as well as the Tribunal provide the justifications of the decision they have made. Section 40(2) of the Competition Act is to the effect that upon the determination of the matter by the Tribunal, any party aggrieved by the decision has a recourse to seek the intervention of the High Court of Kenya, as a second appeal institution, whose decision serves to bring the matter to a finality.

Time frame

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

The time frame is provided for under The Competition Tribunal (Procedure) Rules 2017. Upon determination of the matter before it, the Authority provides the parties with the decision and publishes the same in the Kenyan Gazette. Upon receipt of the decision of the Authority and upon determination that a party is going to appeal the decision, the Notice of intention to appeal to the Tribunal for review of the decision is served upon the Authority within 14 days.

Additionally, the appellant is required to file a substantive appeal at the Tribunal within 14 days from the date of serving the intention to appeal.

Within 30 days of receipt of the substantive appeal, the Tribunal publishes a notice of application for review in the Kenyan Gazette. The purposes of gazettement to inform any interested parties of the application for review as well as requiring any of the interested parties to submit on the application.

At times, subject to some requirements such as a matter of public importance, the Tribunal can direct that the same be subject to a fast-track procedure, whose effect is that the same has to be substantively heard within six months of the date the decision to subject the matter to fast-track procedure was made.

Where a party is dissatisfied with the decision of the Tribunal, it may appeal to the High Court within 30 days against the decision made by the Tribunal.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

When deciding whether to approve some mergers, the Competition Authority of Kenya (the Authority) takes into consideration various factors, especially the effect a particular merger will have on competition and employment, and how the market will be affected.

For example, The Competition Tribunal (the Tribunal) recently upheld a fine of 7.2 million Kenyan shillings imposed on Makini School after it acquired a campus in 2019 without seeking approval from the Authority. In a judgment dated 10 August 2023, the Tribunal held that Makini School should have sought the approval of the Authority when it took over Bhayani nursery and primary school in Kisumu municipality. The Tribunal held that the failure to seek approval of the regulator was in violation of section 42(2) of the Competition Act 2010 (the Act). The school challenged the penalty, which was equivalent to 1 per cent of its turnover in 2018, arguing that there was no evidence or legal foundation to support the conclusions and orders made.

Reform proposals

35 Are there current proposals to change the legislation?

There aren't any current proposals to change the legislation on mergers and acquisitions.

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 East African Community (EAC) aims to have common rules regulating competition between companies and protecting the market from infringements by the end of 2024. These efforts emanate from a memorandum of understanding entered into between the EAC and the Competition Authority of Kenya. By the end of December 2024, the two agencies have committed to, among other things, review and streamline merger notification guidelines, and develop and implement an information-sharing framework for cross-border laws.

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Malta

Ron Galea Cavallazzi and **Lisa Abela**
Camilleri Preziosi

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Voluntary or mandatory system?	Mandatory.
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 (Phase I/Phase II)	Phase I: six weeks, but can be increased to two months if after notification and not later than the end of the fifth week after the undertakings concerned submitted commitments. Also, until the end of the fifth week, the undertakings concerned may request a three-week suspension period to discuss a new commitment proposed, which would be granted at the discretion of the Director General (DG). Under the simplified procedure, the duration of Phase I is four weeks instead of six. Phase II: 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 generally be acceded to. Concentrations are suspended only during Phase I.
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 the relevant market.
Penalties	The penalty for failure to file a notification before implementation is a fine of between €1,000 and €10,000. The penalty for breaching the mandatory waiting period is up to 10 per cent of the turnover of the undertaking that benefits from the transaction.
Remarks	There are no bills or amendments to Chapter 379 of the Laws of Malta (the Competition Act) in the pipeline, although one may envisage an amendment to the Control of Concentrations Regulations and the 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.

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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 Regulations (CCRs) constitute the principal legislation governing mergers. The CCRs were issued as subsidiary legislation (SL 379.08) under Chapter 379 of the Laws of Malta (the Competition Act). The Competition Act is the main piece of legislation regulating competition in Malta.

The relevant regulator is the Director General (DG), who heads the Office for Competition (the Office) within the Malta Competition and Consumer Affairs Authority. Concentrations must be notified to the DG, who then has the obligation to conduct the prescribed assessment within the established time frames.

The undertakings concerned and interested third parties may file an application before the Civil Court (Commercial Section) on points of law or fact, requesting an appeal from the merger decision of the DG.

Scope of legislation

2 What kinds of mergers are caught?

The CCRs apply to concentrations. The term 'concentrations' is defined as the merging of two or more previously independent undertakings, or the acquisition by one or more undertakings (or one or more persons or undertakings already controlling at least one undertaking), whether through the 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, occurring within or outside Malta, that meets the turnover thresholds.

3 What types of joint ventures are caught?

The CCRs specifically provide that the creation of a joint venture (JV) performing on a lasting basis all the functions of an autonomous economic entity (ie, a full-function JV) is considered to be a concentration. Accordingly, such JVs, or the acquisition of control of JVs, are also caught by the CCRs and the CA.

In recent years the Office has not, on the basis of its revised interpretation of the wording of the CCRs, applied the turnover test for a JV to be notified under the CCRs. As a consequence, according to the Office, it appears that all joint ventures must be notified, irrespective of whether the turnover thresholds in the CCRs are met.

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

'Control' is defined in the CCRs 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
- rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

Minority and other interests are not specifically mentioned in the CCRs, but the acquisition of a minority interest can be considered a concentration if the minority shareholder will be able to exercise decisive influence, for example, by vetoing strategic decisions in an undertaking.

The acquisition of a minority interest that does not lead to an acquisition of control is not caught by 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 thresholds of the CCRs are based on turnover, calculated on the basis of the ordinary activities of each of the undertakings concerned in the previous financial year.

There are two turnover thresholds (the Malta Turnover Thresholds), which are cumulative:

- the aggregate turnover in Malta of the undertakings concerned must have exceeded €2.3 million; and
- each of the undertakings concerned must have had a turnover in Malta equivalent to at least 10 per cent of the combined turnover in Malta of the undertakings concerned.

The Office has always interpreted the aggregate turnover threshold to relate solely to turnover in Malta.

There are special rules for calculating the turnover of credit institutions, other financial institutions and insurance undertakings in the CCRs.

To the best of our knowledge, the DG has not referred any cases below the Malta Turnover Thresholds to the European Commission. The Office only publishes merger decisions assessed under the CCRs.

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 transactions that qualify as a concentration, as defined in the CCRs. The CCRs contain a concentration notification form (Form CN) that must be submitted in all cases.

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

According to the CCRs, the definition of 'concentration' includes mergers and takeovers 'whether these occur within or outside Malta'. It therefore includes foreign-to-foreign mergers, provided that each of the undertakings concerned satisfy the Malta Turnover Thresholds.

The CCRs adopt a local effects test in prohibiting concentrations that might lead to a substantial lessening of competition in the Maltese market or a part thereof.

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

The CCRs do not deal with rules on foreign investment or other relevant approvals, and they are not sector-specific. Outside the CCRs, there are tax rules, money laundering rules, legislation on collective investment schemes and rules on 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 must be notified to the Director General (DG) within a 15-working-day period prior to their implementation and following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest.

For a concentration to be considered as complete, the notification must be carried out in accordance with the information requirements set out in the concentration notification form (Form CN) contained in the Control of Concentrations Regulations (CCRs), and the notification fee must be paid on notification.

Where undertakings intentionally or negligently fail to notify a concentration in accordance with the CCRs, a penalty ranging between €1,000 and €10,000 may be imposed by the Civil Court (Commercial Section) (the Court) following a request to that effect by the DG.

Prior to the revision of the enforcement of competition law regime, where the DG could directly impose penalties as established under the CCRs, the DG imposed a fine of €2,000 on undertakings involved in the food sector for failure to notify a concentration in terms of regulation 5 of the CCRs. To date, under the new enforcement regime, the Court has not been requested by the DG to impose any fines for failure to notify a concentration.

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.

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.

In cases concerning a merger or the acquisition of joint control, the notification must be made jointly by the parties to the merger or joint venture (JV), as the case may be. Each

party completing the notification form is responsible for the accuracy of the information that it provides.

Notification is subject to the payment of a fee of €163.06, which must be paid by the notifying party or parties upon submission of the duly completed notification form.

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

Following complete notification, the DG may either issue an authorisation decision or initiate a Phase II investigation. A Phase I decision must be issued within six weeks of the date following notification. The period for a Phase I review can be increased to two months 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. It is up to the DG to decide whether to accede to such a request.

If, following modifications, the DG finds that the concentration does not infringe the CCRs, it must issue a decision declaring the concentration to be lawful. The decision will cover restrictions that are directly related to and necessary for the concentration's implementation. The DG may 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 regarding its lawfulness in terms of the CCRs and decides to launch a Phase II investigation, the DG must, except in the case of modifications, issue a decision declaring that the concentration is unlawful within four months at the latest; however, when the undertakings concerned submit commitments with a view to rendering the concentration lawful in terms of the CCRs, following the DG's decision to initiate Phase II and within three months of the date on which the proceedings were initiated, they may request that this four-month period be suspended for up to a month for proper consideration of the commitments.

The CCRs also provide for a simplified procedure, whereby the DG will issue a short-form decision within four weeks of notification in respect of concentrations that do not raise serious doubts regarding their legality, 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.

A concentration cannot be put into effect either before its notification or until it has been declared lawful, with a limited exception in the case of public bids. Furthermore, in all cases, the DG may, upon a reasonable request and after having taken into account the effect of a suspension (eg, major financial risks) and the threat of competition, grant a derogation from the obligation to suspend transactions prior to clearance. This derogation may be subject to conditions and obligations to safeguard effective competition.

Pre-clearance closing

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

A penalty of up to 10 per cent of the total worldwide turnover of the undertaking concerned in the preceding financial year can be imposed on the persons or undertakings concerned where the concentration is implemented intentionally or negligently before it has been notified. To the best of our knowledge, no such sanctions have been applied in practice.

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

No specific reference is made on sanctions with regard to foreign-to-foreign mergers under the CCRs. If a foreign-to-foreign merger falls under the CCRs, the sanctions applicable to closing before clearance with respect to non-foreign-to-foreign mergers should apply equally.

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

The CCRs do not prescribe any powers to impose hold-separate orders in this respect. 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; however, 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. In those cases, Form CN 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 Form CN contained in a schedule to the CCRs, where applicants are required to supply details about, among other things:

- the notifying party and all parties to the concentration, including the extent of their involvement;
- the nature and economic and financial structure of the concentration;
- ownership and control;
- personal and financial links and previous acquisitions;
- market definitions;
- information on affected markets;
- general conditions in affected markets;
- general market information;
- cooperative effects of a JV; and
- general matters.

The CCRs provide that the following types of documents must be submitted:

- copies of the final or most recent versions of all documents bringing about the concentration;
- copies of the latest annual reports and accounts of all the parties to the concentration;
- the proposed structure of ownership and control pre- and post-transaction; 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 in respect of competition conditions, competitors (actual and potential) and market conditions.

No time frames shall commence until all the necessary information and details are supplied for the notification to be complete. Where a party supplies incorrect or misleading information, 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 Court, upon the request of the DG.

In addition, the DG may 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 upon notification and lasts until a Phase I decision is issued, whereby the Office

for Competition (the Office) issues an authorisation decision or decides to start Phase II proceedings.

Where the Office finds that a concentration raises serious doubts regarding its lawfulness in terms of the CCRs, it initiates Phase II proceedings to further investigate and, if need be, induces modification by the notifying parties to bring it within the parameters of the CCRs. Commitments can be offered by the parties during both Phase I and Phase II for the purposes of securing clearance.

At the end of Phase II, the Office declares the concentration to be lawful; finds it to be permitted subject to the imposition of certain conditions, restrictions or modifications; or finds it to be in breach of the CCRs and prohibits it, issuing a Phase II decision to that effect.

The CCRs do not require that a pre-notification draft be submitted with the Office; however, it is advisable to consult the Office before submitting the notification for the purpose of expediency. The Office encourages pre-notification meetings as it considers them to be extremely valuable to both the notifying parties and the Office itself.

Pre-notification meetings are often useful because they enable open discussion on issues, such as:

- determining the precise amount of information required in a notification;
- understanding the undertakings' products or services, competitors and customers;
- whether the concentration may be notified under the simplified procedure;
- identifying key issues and possible competition concerns;
- ascertaining deadlines; and
- understanding the Office's procedure.

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

The Office takes six weeks to communicate a decision with respect to Phase I, and four months to communicate a decision with respect to Phase II. Although there are no specific exemptions to speed up the process, in practice meetings and consultation with the Office prior to notification usually enables the Office to process Form CN within a shorter time frame.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

To determine whether a concentration is deemed to be lawful, the Control of Concentrations Regulations (CCRs) require the Director General (DG) to take into account, among other things, 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, among other things, 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 a 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?

In addition to a general substantive test applicable to concentrations, in the case of a joint venture (JV) that is subject to the CCRs, the DG would also have particular regard to:

- whether two or more parent companies retain significant activities in the same market as the JV, or in a market that is downstream, upstream or neighbouring that of the JV; and
- whether the coordination resulting from the JV enables the undertakings concerned to eliminate 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?

In general, the DG relies on the relevant decisions of the European Commission, and interpretative notices and guidelines of the European Commission on the relevant provisions of the Treaty on the Functioning of the European Union and secondary legislation relating to competition, including the Guidelines on the Assessment of Horizontal Mergers under the EU Merger Regulation.

The Office for Competition (the Office) will carry out a more thorough analysis where mergers have horizontal and vertical effects.

Horizontal effects occur 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.

Vertical effects occur 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 their individual or combined market share is 25 per cent or more, regardless of whether there is an existing supplier or customer relationship between the parties to the concentration.

Mergers with vertical effects are likely to create barriers to entry in the market or increase the likelihood of parties colluding in the market.

The Office 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 affected 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 that show a sufficient interest in the concentration; therefore, apart from representatives of the administrative or managerial bodies of the undertaking concerned, any third parties that show a sufficient interest in the concentration may apply in writing to the DG to make their views known in writing or orally.

The CCRs are clear on the relevant assessment to be made, and non-competition issues are not relevant to the review process.

Economic efficiencies

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

In making this appraisal, the DG must consider the need to maintain and develop effective competition in the Maltese market in view of, among other things:

- the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside Malta;
- whether the business, or part of the business, of a party to the concentration has failed or is likely to fail;
- the nature and extent of development and innovation in a relevant market;
- 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; and

- the development of technical and economic progress, provided that it is to consumers' advantage and does not form an obstacle to competition.

The DG will also consider whether the benefits derived from the concentration outweigh the effects on competition in Malta; however, the undertakings concerned must prove that these efficiencies cannot otherwise be attained, are verifiable and are likely to be passed on to consumers in the form of lower prices or greater innovation, choice or quality of products or services.

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 Director General (DG) to perform the following:

- the imposition of conditions and restrictions upon the applicants when granting clearance, thereby regulating the transactions to be performed;
- in specific circumstances, the revocation of clearance; and
- a declaration of invalidity of concentrations.

The DG may also revoke a merger decision where:

- the decision is based on false, misleading or incomplete information for which one of the undertakings is responsible; or
- the undertakings concerned commit a breach of a commitment attached to the decision.

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 in respect of its lawfulness under the Control of Concentrations Regulations may, within the prescribed time frames, enter into negotiations with the DG and effect modifications or otherwise submit commitments and restrictions to which the concentration will be subjected in case of clearance.

There are no restrictions as such regarding the method to be proposed by the notifying parties and the undertakings concerned are given adequate opportunities to rectify the situation by proposing a remedy, which can be structural as well as behavioural, including divestments. Clearance will only be given, however, if the remedies have been agreed to by the DG and the concentration will not lessen effective competition.

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

No specific conditions for such remedies are established by law. These would generally be stipulated by the DG and may include a time frame within which divestments or other remedies must be implemented.

The DG normally adopts an approach that is similar to that adopted by the European Commission and the European courts.

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

Although there are foreign-to-foreign mergers that, from time to time, are notified to the DG, to date, no occasions have arisen where such mergers were objected to in Malta. Generally, where the DG may have had cause to object to any such merger, this may have been stopped or objected to by authorities within the European Competition Network.

Ancillary restrictions

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

If the parties to a concentration 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 and will be covered by the 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 Control of Concentrations Regulations (CCRs) place considerable emphasis on customers and the preservation of their rights. The concentration notification form contained in the CCRs requires the details of the five largest independent customers of the parties to the concentration in each affected market. Within this framework, the Director General (DG) will consult those customers to determine the effect that the proposed concentration will have upon them.

The notification must be published and, upon publication, any interested third party, including competitors, may come forward and present objections to the DG.

Before taking any Phase II decision, the DG may, should this be deemed necessary, request information from or hear other persons or undertakings that show sufficient interest in the concentration.

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, with details concerning the actual notification, the names of the parties, the nature of the concentration and the economic sectors involved, inviting third parties to make submissions.

The CCRs, 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 is used only for the purposes of that hearing, and information requested may not be disclosed.

The parties may submit any information that they believe should be kept confidential separately, giving reasons regarding how they would be harmed if such information is divulged or published.

Finally, decisions taken by the DG are published on the website of the Office for Competition (the Office), but the CCRs oblige the DG to have regard to the legitimate interests of undertakings in the protection of their business secrets.

Cross-border regulatory cooperation

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

The Office is the designated competition authority under article 35 of Council Regulation (EC) No. 1/2003 and, as such, must cooperate with the European Commission. The Office 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 other authorities.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Persons, undertakings or associations of undertakings concerned, or any third party entitled to a hearing in accordance with the Control of Concentrations Regulations, may, within 20 days of notification or publication of the decision, request an appeal from the decision of the Director General (DG) on points of law or fact, before the Civil Court (Commercial Section) (the Court), which replaced the Consumer and Competition Appeals Tribunal. Unless the Court orders otherwise, this will not suspend the decision.

The Court has the power to substitute its discretion for that of the DG, including the power to confirm, modify or quash, in whole or in part, the DG's decision. In the latter case, it may refer the matter back to the DG to take a new decision.

There is a further right of appeal available to the DG and any party to the proceedings to the Court of Appeal from any judgment delivered by the Court on points of law or of fact.

Time frame

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

An appeal before the Court must be made within 20 days of the date of notification or, in the case of third parties, within 20 days of its publication of the merger decision. An appeal before the Court of Appeal must be made within 20 days of the Court's judgment being issued.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

Following the 2011 amendments to Chapter 379 of the Laws of Malta (the Competition Act), the enforcement regime was changed so that the Director General (DG) assumed the power to investigate and sanction behaviour deemed to restrict competition and, if necessary, impose an administrative fine of 10 per cent of the turnover from the undertaking.

However, in May 2016, the Constitutional Court adopted its judgment in *Federation of Estate Agents v Director General (Competition)* (3 May 2016), which held that certain provisions of the Competition Act breached the right to a fair hearing enshrined in the Constitution and, therefore, legislative amendments were required for the Office for Competition (the Office) to be able to adopt any decisions finding infringements or to impose penalties. Accordingly, until the Competition Act was amended, the DG was unable to impose administrative fines if there was a breach of the substantive provisions of the Competition Act.

On 31 May 2019, Act XVI of 2019 entered into force, amending the Competition Act so that the imposition of penalties could resume but subject to a new enforcement regime. Under the revised Competition Act, if the Office, following an investigation, considers that a breach of competition law has occurred, the DG can no longer issue a decision itself; rather, it must file a sworn application (ie, a statement of claim confirmed on oath) before the Civil Court (Commercial Section) (the Court) against the suspected undertaking or undertakings concerned.

The sworn application must contain, among other things, a summary of the facts that led the DG to find a suspected infringement of competition law and a demand the imposition of a fine or other remedy on the undertaking or undertakings concerned for that breach.

Consequently, although it is still up to the DG to carry out investigations and issue a decision on a notified concentration in terms of the Control of Concentrations Regulations (CCRs), the penalties contemplated by the CCRs are, following the 2019 amendments, to be imposed by the Court.

Reform proposals

35 Are there current proposals to change the legislation?

There are currently no proposals for reform concerning merger control.

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 2023, the Office for Competition (the Office) issued 14 decisions. There was a focus on concentrations in the gaming sector, health products and medical equipment, and the grocery and retail sector.

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Mexico

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Voluntary or mandatory system?	Filings are mandatory in cases where at least one of the monetary thresholds under the Federal Economic Competition Law is met. Voluntary filings are advisable in cases where the transaction is close to such thresholds or if it could raise competition concerns.
Notification trigger/ filing deadline	A filing must be submitted before the transaction is implemented or closed. The merger review process is suspensive in all cases, meaning that the parties are only permitted to close the transaction after receiving clearance from the Federal Economic Competition Commission and the Federal Telecommunications Institute (the Antitrust Authorities) or once the corresponding review period elapses without the issuance of a resolution by the Antitrust Authorities (in which case, constructive assent applies).
Clearance deadlines (Phase I/Phase II)	Under the standard review process, the Antitrust Authorities have, in principle, 60 business days within which to review the notification and issue its resolution as of the date on which they receive a complete file. Non-complex cases can be resolved within approximately one to two months. Complex cases may take up to one year.

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<table>
<tr><th colspan="2">Quick Reference Table</th></tr>
<tr><td>Substantive test for clearance</td><td>The Antitrust Authorities must consider the relevant market, the main economic agents participating in the relevant market, the degree of concentration in the relevant market, the effects of the concentration on other competitors or consumers and potential efficiencies caused by the transaction.
Note that another relevant consideration by Antitrust Authorities is in connection to Non-Competition Clauses.
COFECE’s guidelines state that when the parties justify the need to incorporate a non-compete clause, COFECE assesses that this would be likely to have little effect on competition and free market access, based on the following parameters:
• Obliged subjects: When the obliged subjects are the seller and the companies that are part of the economic interest group to which it belongs, as well as their respective successors and assignees. Additionally, it may include, as an obliged subject, an economic agent that has been created as a vehicle to carry out the notified transaction and that remains part of the economic interest group of the seller.
• Product service or coverage: When (i) it is limited to the products and/or services offered through the business object of the transaction; (ii) products and services are included that are in an advanced phase of development by the business object of the transaction at the time of the notification and/or (iii) products or services are included that are fully developed, but have not yet been commercialised by the business object of the transaction at the time of the notification. Also, operations carried out at an international level could include non-competes negotiated on a global level, with the products and services offered worldwide, even when in Mexico the seller’s activities are limited to only some of them. Also, COFECE generally considers that products/services not produced, distributed or commercialised by the target cannot be included.
• Duration: When the validity is up to three years after the conclusion of the transaction and this duration is justified.
• Geographic coverage: COFECE may only pronounce itself on the effects that the non-compete clause may have on the process of competition and free market access within the national territory. In Mexico, it has been considered that such a clause would be unlikely to affect competition and free market access (i) when it covers the territory served by the company or the assets object of the transaction prior to the transaction; and (ii) when it includes regions in which the business object of the transaction is in an advanced phase of expansion, investments have been made or any other action has been taken tending to the expansion of the territory.</td></tr>
<tr><td>Penalties</td><td>The fine that can be imposed for failure to notify can range from 542,850 Mexican pesos up to 5 per cent of the annual local revenues of each economic agent, separately.</td></tr>
<tr><td>Remarks</td><td>Not applicable.</td></tr>
</table>

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

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

In Mexico, merger control is governed by:

- article 28 of the Constitution;
- the Federal Economic Competition Law (the Competition Law); and
- the Regulations to the Competition Law and the Regulations to the Competition Law for the Telecommunications and Broadcasting Sectors.

There are other specific provisions addressing antitrust matters in the legislation that applies to certain sectors, such as financial services and energy. Furthermore, the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (IFT) (the Antitrust Authorities) have published guidelines for the notification of concentrations (the Antitrust Authorities' Guidelines). Although not binding, the Antitrust Authorities' Guidelines provide further information and explanations on the notification procedures for concentrations.

Scope of legislation

2 | What kinds of mergers are caught?

Article 61 of the Competition Law employs a very broad interpretation of 'concentrations', a term that includes mergers, acquisitions of control, and any acts by which shares, trusts, equity, partnerships and assets of any kind are concentrated. Straightforward business vehicles that could meet monetary thresholds should be informally referred to COFECE before filing. In any case, any merger that meets the monetary thresholds defined in article 86 of the Competition Law must be notified to COFECE or the IFT, regardless of the vehicle used for the merger.

3 | What types of joint ventures are caught?

Joint ventures fall within the definition of 'concentrations' under the Competition Law. Therefore, joint ventures that trigger any of the monetary thresholds provided in the Competition Law are subject to review by the Antitrust Authorities.

Likewise, collaboration agreements may also fall within the definition of 'concentration' and trigger a filing obligation. The Antitrust Authorities' Guidelines provide parameters to determine if such agreements could be subject to analysis as concentrations, which include the duration, independence and scope of the agreement. In this sense, according to the Antitrust Authorities' Guidelines, a collaboration agreement could be considered a concentration if:

- its term is permanent or long;
- it involves the creation or incorporation of a new entity with functional and operational autonomy or the entities involved lose a certain degree of independence;

- the scope of the agreement does not reduce the competitive pressure between parties in other markets or activities outside the scope of the agreement; and
- competition between the economic agents involved disappears in certain markets.

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

Neither the Competition Law, the Regulations to the Competition Law nor the Regulations to the Competition Law for the Telecommunications and Broadcasting Sectors provide for a definition of 'control', so there is no test to determine whether a pre-merger filing is required. Nevertheless, having pre-existing control may qualify for an exemption from notifying or applying for an expedited review process.

Due to the lack of a definition of 'control' in the Competition Law, the Antitrust Authorities' Guidelines include some references to the definition of 'control' established in the Securities Market Law, pursuant to which control shall be understood as the power of a person or a group of persons to:

- impose, directly or indirectly, decisions in general shareholders' meetings (or an equivalent decisive body) to appoint or dismiss the majority of the board members (or an equivalent decisive body) of a company;
- exercise the majority of the voting rights of a company; or
- determine, directly or indirectly, the management, strategy or main policies of a company through stock ownership, agreements or otherwise.

Likewise, the Antitrust Authorities' Guidelines incorporate the precedents issued by Mexican courts, which establish that there are two types of control:

- real control, where there is effective direction from a holding company over its subsidiaries; or
- underlying control, where there is a potential exercise of control through persuasive means (even if there is no legal centralised and hierarchical relationship, but there is real power).

There is no exemption in the Competition Law that applies to the acquisition of minority, non-controlling shareholdings. Acquisitions by such minority participations shall be considered when analysing pre-merger filing thresholds.

Regarding notification exemptions in cases concerning minority interests, acquisitions of shares in publicly listed companies are exempted if two cumulative conditions are met:

- the acquisition does not exceed 10 per cent of the capital stock of the issuer; and
- the acquirer is not entitled, as a result of the transaction, to:
    - appoint or revoke board members, managers or directors;
    - impose decisions in shareholders' meetings or equivalent bodies;
    - maintain any interest that would allow it to exercise 10 per cent or more of the voting rights; and

    - influence, directly or indirectly, the administration, operations, strategy or key policies of the target.

There is another exemption for private equity funds with speculation purposes, which applies when the fund acquires, on behalf of its passive investors, interests in other economic agents with the sole purpose of generating a return to its investors on the understanding that the fund shall not have the possibility (de jure or de facto) nor the intention to participate in, manage or influence (directly or indirectly) the management, operation or commercial policies of the target. There are no clear guidelines on what is understood as 'speculation purposes' or to which specific funds this exemption may apply, so it is rarely used.

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?

All concentrations that occur in Mexico or have effects in Mexico (in the case of foreign-to-foreign transactions) are subject to the Competition Law and may be investigated. However, the Competition Law sets forth certain monetary thresholds that trigger the obligation to notify concentrations before they are consummated. The monetary thresholds are calculated based on measure and adjustment units (the Measure Units). The thresholds for 2024 are the following:

- if the transaction, or series of transactions, that gives rise to the concentration, notwithstanding the place of execution, directly or indirectly represents within Mexico a value greater than 1,954,260,000 Mexican pesos (equivalent to 18 million Measure Units) – in this case, this threshold refers to the price allocated to Mexico in the relevant agreement between the parties (for this threshold, if the markets in which the target is active are within the telecommunications sector and are under the jurisdiction of the IFT, the commercial value of the Mexican portion of the transaction as a percentage of the overall purchase price will need to be estimated);
- if the transaction, or series of transactions, that gives rise to the concentration results in the acquisition of 35 per cent or more of the assets or shares of an economic agent, with total assets or annual sales located or originating in Mexico that are worth more than 1,954,260,000 pesos (equivalent to 18 million Measure Units); or
- if the transaction results in:
    - an accumulation within Mexico of assets or capital stock worth in excess of 911,988,000 pesos (equivalent to 8.4 million Measure Units); and
    - the assets located in Mexico or the annual volume of sales originating in Mexico of the economic agents involved in the concentration, jointly or separately, are worth more than 5,211,360,000 pesos (equivalent to 48 million Measure Units).

Specifically in connection with the final threshold mentioned above, to determine the value of the assets accumulated in Mexico, the parties shall consider whichever is the higher of:

- the value of the assets as shown in the financial statements of the target (ie, book value); or

- the price allocated to the assets (ie, market value).

The Antitrust Authorities can investigate concentrations that do not meet any of the thresholds described above and that are not required to be notified within one year of their consummation if they believe that the concentrations had anticompetitive effects.

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

Filing is mandatory if at least one of the monetary thresholds is met. A voluntary filing is advised in cases where the transaction:

- comes too close to triggering the monetary thresholds, even if they are not effectively met;
- is below the thresholds but the parties are not willing to assume the risk of a potential investigation where there is a high degree of market share concentration; or
- is a product of horizontal cooperation agreements between competitors that may include provisions that can give rise to monopolistic practices.

This approach is advised for parties to be able to conduct a transaction on a risk-free basis once the Antitrust Authorities have authorised it. Pursuant to the Competition Law, transactions that have been approved by the Antitrust Authorities cannot be subject to further investigation unless the approval was issued based on false information or the conditions imposed on the transaction were not implemented on time.

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

Foreign-to-foreign transactions that have effects in Mexico need to be notified if they meet any of the monetary thresholds. Local effects are the direct or indirect ownership of assets, capital stock or revenues in Mexico by the economic agents involved in the merger.

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

The Foreign Investment Law sets some limits on the participation of foreign investors in specific activities that are:

- reserved for the Mexican state (eg, electricity transmission);
- reserved for Mexican nationals (eg, transportation of freight and passengers within Mexico); and
- considered to be of strategic importance.

Additionally, the Hydrocarbons Law provides that transactions that entail cross-participation require a favourable opinion from COFECE followed by approval from the Energy Regulatory Commission. Cross-participation is deemed to occur when a person or entity directly or indirectly holds equity interests that constitute direct or indirect control in two types of entities:

- end users, producers or marketers of hydrocarbons, oil products and petrochemicals that use pipeline transportation or storage services subject to open access obligations; and

- holders of open access hydrocarbons, oil products and petrochemicals transportation and storage permits.

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 has to be submitted to the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (the Antitrust Authorities) before:

- the closing of the transaction in accordance with the applicable legislation or, if applicable, satisfaction or waiver of the conditions precedent to which such a transaction is subject;
- the acquisition (or the direct or indirect exercise) of control over the target business;
- the acquisition of assets, participation (in trusts), partnership interests or shares of other economic agents;
- the execution of a merger agreement; or
- in the event of a series of transactions, completion of the last act and the subsequent reaching of the monetary thresholds as a result thereof.

Concentrations derived from transactions carried out abroad should be notified before they produce legal or material effects in Mexico.

The merger review process is suspensive in all cases, meaning that the parties are only permitted to close the transaction after receiving clearance from the Antitrust Authorities or once the corresponding review period elapses without the issuance of a resolution by the Antitrust Authorities (in which case, constructive assent will apply).

The Federal Economic Competition Law (the Competition Law) provides that, when economic agents fail to notify a transaction, a fine ranging from 518,700 Mexican pesos to up to 5 per cent of their annual local revenues can be imposed on each economic agent involved or, in the absence of Mexican revenues belonging to any of the involved economic agents, up to 41.49 million pesos. These fines are imposed on each of the parties involved in the transaction, considering their revenues separately (as opposed to considering their combined turnover). Recently, and based on the available precedents (approximately 18 investigations over the past five years), COFECE has been increasing the number of investigations for failure to notify and the amount of the fines imposed.

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

All parties directly involved in the transaction are responsible for the filing and shall jointly make the filing.

The Regulations to the Competition Law and the Regulations to the Competition Law for the Telecommunications and Broadcasting Sectors provide that, when the transaction involves

more than one entity belonging to the same economic group, the controlling entity or entities may notify the transaction.

For 2024, the fee that must be paid to file a notification of concentration is 237,058 Mexican pesos. The filing fee is updated annually.

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

The Antitrust Authorities have, in principle, 60 business days in which to review the notification and issue a resolution. This term is counted as of the date on which they receive a complete file with the information required for analysis. If the Antitrust Authorities do not issue a resolution within this term, constructive assent applies. The merger review process is suspensive in all cases; the parties cannot close a transaction prior to receiving 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 Competition Law establishes that transactions shall not be registered in the corporate books or be registered in the Public Commerce Registry before obtaining approval from the Antitrust Authorities. The Competition Law imposes a fine of up to 5 per cent of the revenues of companies that close an operation before receiving the Commission's approval, as well as fines of up to 19,566,000 Mexican pesos on the Mexican notary public who formalises a transaction without securing prior approval.

COFECE has dismissed filings related to the partial closing of a transaction or closed the merger review process and opened an ancillary proceeding to investigate the transaction, enabling COFECE to impose a fine for not filing a notification. In a very recent case, the merging parties decided to carve out the Mexican part of their business to be able to close the global transaction. COFECE considered that the transaction has been modified substantially. For this reason, it dismissed the filing, opened a verification procedure and imposed a fine for failure to notify. This decision is being challenged in court and a resolution is pending.

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

In foreign-to-foreign mergers, COFECE has imposed fines for failure to notify when a global transaction closed and the Mexican part of the business had not been fully carved out.

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

In general, the Mexican merger review process is suspensive in all cases; the parties cannot close a transaction prior to receiving clearance.

However, if the parties' timetable for a transaction does not provide sufficient time for obtaining approval in Mexico before closing, there are alternatives available (at least where the Mexican component is not an essential element of the transaction). For example, the parties may explore carving out the Mexican portion of the transaction so that the closing is not legally effective in Mexico until approval is granted.

The Antitrust Authorities are reluctant to accept the execution of hold-separate or similar arrangements to enable closing while approval is pending.

If the parties are willing to implement a carve out, they may approach COFECE's Directorate-General of Merger Analysis to discuss this approach and avoid potential fines.

Public takeovers

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

Acquisitions of shares in listed companies are exempted only if two cumulative conditions are met:

- the acquisition does not exceed 10 per cent of the capital stock of the issuer; and
- the acquirer is not entitled, as a result of the transaction, to:
    - appoint or revoke board members, managers or directors;
    - impose decisions in shareholders' meetings or equivalent bodies;
    - maintain any interest that would allow it to exercise 10 per cent or more of the voting rights; and
    - influence, directly or indirectly, the administration, operations, strategy or key policies of the target.

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 a general basis, the documents and information required from each of the notifying parties in a merger review process are the following:

- original power of attorney granted by each of the notifying parties (ie, the parties directly involved in the transaction), which must be ratified before a notary public. If power of attorney is granted outside Mexico, it must also be legalised through the inclusion of a Hague apostille (if the other country is a party to the Apostille Convention) or formalised and legalised before the Mexican consulate of the country in which it is granted. If there are several parties belonging to the same corporate group, the ultimate parent company may file the notification on their behalf;
- a receipt of the payment of the corresponding filing fees;
- a copy of the transaction documents;
- a copy of the documents internally produced or exchanged between the parties, or both, that were or will be used to negotiate and implement the transaction (eg, offer memos,

PowerPoint presentations, business plans, strategic plans, marketing plans, reports and studies);

- a copy of the articles of incorporation and current by-laws of the parties involved in the transaction (eg, formation documents and operating or limited partnership agreement and articles of association);
- audited financial statements for the previous year of the parties involved in the transaction. If relevant financial events have taken place between the most recent audited financial statements available and the pre-merger filing, the latest interim reports (balance sheet and income statement) are also required;
- in the case of corporations, information on their capital stock structure, including the name and specific ownership or interest of each share or interest holder up to the level of individuals holding 5 per cent or more of the controlling entity;
- in the case of funds, the identity of the general and limited partners that hold 20 per cent or more of the interests before and after the transaction. Once a concentration is admitted for processing, the economic agents involved therewith cannot substantially modify the structure of the notified transaction;
- a description of the activities carried out by the parties and their corporate groups;
- a description of the products or services, substitute products or services, manufacturing capacity, market share information, clients' and suppliers' data, and efficiencies that are to be achieved as a consequence of the transaction;
- confirmation as to whether the parties (as corporate groups) and their main shareholders participate, directly or indirectly, in overlapping or related (ie, upstream or downstream) activities in Mexico to those of the other party or parties;
- if applicable, detailed information on overlapping or related activities in Mexico by the applicable party's corporate group (depending on the case and the market or markets involved, this information may also be required at a Mexican, North American Free Trade Agreement or global level);
- the market share information of the parties and their competitors (depending on the case and the market or markets involved, this information may also be required at a Mexican, North American Free Trade Agreement or global level; and
- a list of the parties' offices, properties and facilities in Mexico (specifying their addresses).

The Antitrust Authorities may request additional information and documentation on the parties or the transaction – including the information listed above if not submitted in the initial submission – that should be submitted within the period specified in the request.

Approval of a transaction based on false information may be challenged and eventually revoked.

Investigation phases and timetable

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

The typical steps in the review process of a concentration will depend on the type of procedure chosen by the parties (ie, standard or expedited review process). Below is a description of the phases provided in the Competition Law.

Standard review process

Once the filing is submitted, the Antitrust Authorities can request additional information (to complete the file) within the following terms:

- within 10 business days of the date of filing, the Antitrust Authorities can request basic information that should have been included in the initial filing – the applicants will have 10 business days in which to satisfy the request (this term can be extended in justified cases);
- within 15 business days of the date of filing or the date on which the request for information mentioned in the point above is satisfied, the Antitrust Authorities can request additional information that they consider necessary for the analysis of the transaction – the applicants will have 15 business days in which to satisfy the request (this term can be extended in justified cases); and
- the Antitrust Authorities may request further information that they deem relevant for their analysis from any person, including the notifying parties, authorities or other economic agents that may be related to the relevant market or the transaction – the applicants will have 10 business days to satisfy the request (this can be extended in justified cases) and such requests will not stop the clock.

If the Antitrust Authorities issue a request for additional information pursuant to the points above, the 60 business days for review and resolution will start running on the date on which they receive all the requested information.

In transactions where the Antitrust Authorities raise competition concerns, they shall inform those concerns to the parties at least 10 business days prior to the date on which the case is to be listed in the agenda of matters to be resolved by the Antitrust Authorities' plenum of commissioners. This is to ensure that the parties have an opportunity to offer remedies or conditions that may address the concerns. The 60 business days that the Antitrust Authorities have to issue a resolution will be restarted on the date on which the remedies or conditions are offered.

In particularly complex cases, the Competition Law allows the Antitrust Authorities to extend the term during which they can request additional information or issue a resolution by up to 40 business days.

Expedited review process

In accordance with the Competition Law, if the parties to a transaction provide evidence to the Antitrust Authorities that the transaction will not have any anticompetitive effect in the market (ie, absence of overlapping or related activities), the parties may ask the Antitrust Authorities to analyse the transaction in an expedited review process. In this scenario, the Competition Law provides that, within five business days of the date of receipt of the notification, the Antitrust Authorities will issue an official communication accepting the expedited review process. Within 15 business days of the issuance of that communication, the Antitrust Authorities must reach a resolution on the transaction. If they do not issue a resolution within this term, constructive assent applies.

In cases where the Antitrust Authorities determine that a transaction submitted under this process does not meet the requirement of having no overlapping or related activities, or if the filing is not submitted with all the required information, an official communication denying the expedited review process and initiating a standard review process will be issued.

Although the Competition Law allows parties to request an expedited review process if they clearly evidence that the transaction will not have anticompetitive effects on the market, applying for this type of filing is more problematic than applying for a standard one as the Antitrust Authorities devote more time to discussing form (ie, applicability of the expedited procedure) over substance and do not have an opportunity to issue any requests for information if any piece of information is missing. Furthermore, under the Competition Law, the information that the parties must submit to the Antitrust Authorities is almost the same under both the standard and the expedited review processes. The Antitrust Authorities generally disincentivise the use of the expedited process.

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

Under a standard review process, the Antitrust Authorities have, in principle, 60 business days to review the notification and issue their resolution. This term is counted from the date on which the Antitrust Authorities have a complete file with the information that they require for the analysis (if requests for information are issued, the clock will start running on the date on which they are satisfied). If the Antitrust Authorities do not issue a resolution within this term, constructive assent applies.

In practice, in non-complex cases, a resolution is issued within one to two months. More complex cases usually take approximately six months but can take up to one year. Although there is no pre-notification stage in Mexico, when the economic agents' timetable is tight, discussing the case with the Antitrust Authorities prior to submitting the filing helps to make them aware of timing and speed up their review to the extent possible.

In 2023, the average time to resolve simple cases was 25 days, from the moment the filing is completed until the case is resolved. COFECE considers the filing complete after submission of the notification, the response to the first request for information and the second request for information (if issued).

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Pursuant to the Federal Economic Competition Law (the Competition Law), during the review process, the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (IFT) (the Antitrust Authorities) must analyse whether a proposed transaction must be authorised, opposed or conditioned based on the potential effects it may have on the relevant market and other related markets.

For these purposes, the Antitrust Authorities must consider the relevant market, the main economic agents participating in the relevant market, the degree of concentration in the relevant market, the effects of the concentration on other competitors or consumers and the potential efficiencies caused by the transaction.

Although there is no specific market share threshold in Mexico applied by the Antitrust Authorities when approving or investigating a transaction, the most relevant factors considered in their assessment are resulting market shares and the Herfindahl–Hirschman Index (HHI). The HHI helps to determine if a market is highly concentrated (ie, when the results are close to 10,000 points) or highly atomised (ie, when the results are close to zero points).

Both of the Antitrust Authorities have established their own interpretations of the HHI, which comprise three independent tests. For COFECE, each of the tests is considered to have been satisfied when:

- the increase from the HHI prior to the transaction to the HHI after the transaction is less than 100 points;
- the total value of the HHI after the transaction is less than 2,000 points; or
- the total value of the HHI after the transaction is more than 2,000 and less than 2,500 points, the increase from the HHI prior to the transaction to the HHI after the transaction is more than 100 points and less than 150 points, and the economic agent resulting from the transaction will not be one of the four economic agents with the largest market share participation in the relevant market.

For the IFT, each of the tests is considered to have been satisfied when:

- the total value of the HHI after the transaction is less than 2,000 points;
- the HHI after the transaction remains between 2,000 and 2,500 points, and the increase from the HHI prior to the transaction to the HHI after the transaction is no more than 150 points; and
- the total value of the HHI after the transaction is more than 2,500 and the increase from the HHI prior to the transaction to the HHI after the transaction is no more than 100 points.

By meeting any of these tests, the Antitrust Authorities may preliminarily consider that a transaction has minimal potential to result in adverse effects on a relevant market.

The Competition Law does not provide a different procedure or analysis for failing firms, but the guidelines for the notification of concentrations published by the Antitrust Authorities recommend demonstrating the imminent risk of exit from the market, the absence of other plausible solutions, the ability of the acquirer to mitigate the problem and the permanence of the financial situation.

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

No. The standard analysis for concentrations applies to joint ventures.

Theories of harm

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

When investigating the potential effects of a concentration, the Antitrust Authorities usually analyse:

- horizontal overlaps, as well as if those overlaps could grant the acquirer or the economic agents resulting from the transaction power in the relevant market and the effects of the transaction on consumers and other participants in the market;
- any actual or potential vertical relationships between the economic agents involved that may give raise to any foreclosures, either upstream or downstream; and
- conglomerate effects.

Also, Article 64 of the law considers the following to be indications of unlawful mergers:

- if it confers, or may confer, the surviving entity, the acquirer or the economic agent resulting from the concentration, substantial market power in terms of this law, or if it increases or could increase said substantial market power, by which free market access and economic competition may be hindered, diminished, harmed or impeded;
- if it has, or may have, the purpose or effect of imposing barriers to entry, impeding third parties' access to the relevant market, to related markets or to essential facilities or of displacing other economic agents; or
- if its purpose or effect is to substantially facilitate the concentrating parties to engage in practices prohibited under this law, particularly monopolistic practices.

Non-competition issues

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

Pursuant to the rule of law principle established in the Constitution, the Antitrust Authorities may only consider competition factors when analysing a particular case. Particularly, only market-related factors are considered when the Antitrust Authorities carry out their analysis. The Antitrust Authorities have, to date, been disciplined in not formally or informally incorporating other factors such as public interest, industrial policy, sustainability or employment in their analyses.

Economic efficiencies

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

Only efficiencies directly derived from the transaction that outweigh any potential anticompetitive effects and result in an increase in consumer well-being can be considered by the Antitrust Authorities in the review process. Such efficiencies may include, among other things:

- savings of resources that will allow the production or provision of the same amount of goods or services at a lesser cost, or a greater amount of goods or services at the same cost, without reducing the quality of the goods or services;

- cost reductions;
- transfers or developments to technology that result in an improvement to the production or provision of goods or services; or
- production or commercialisation cost reductions derived from the expansion of infrastructure or distribution networks.

In practice, it is very difficult to prove such efficiencies to the Antitrust Authorities.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

The Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (the Antitrust Authorities) can unconditionally authorise, reject or block a transaction or authorise a transaction subject to remedies.

Remedies and conditions

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

Remedies can be offered to address competition concerns identified by the Antitrust Authorities during their analysis.

Although both structural and behavioural remedies can be offered to the Antitrust Authorities, in practice, there is a strong preference for structural remedies. However, please note that recently (2024) COFECE authorised a concentration subject to behavioural remedies, which had not happened in a very long time. This was within the electricity generation market. These remedies may be required to be complied with pre- or post-closing; in complex cases, COFECE usually requests pre-closing remedies.

Structural remedies usually comprise divesting certain assets, rights, partnership interests or shares to third parties that are viable competitors.

Regarding behavioural remedies, parties may offer remedies comprising, among other things:

- ceasing or refraining from carrying out specific actions or types of conduct;
- carrying out certain acts to enhance participation of competitors, or provide access or sell goods or services to competitors; and
- amending or deleting certain terms and conditions contained in the transaction documents.

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

Under the Federal Economic Competition Law, remedies may be offered by the economic agents and further accepted by the Antitrust Authorities or imposed by the latter.

In the first scenario, the economic agents may submit their proposals on any day as of the submission of the initial notification writ until one day after the case is listed in the agenda of matters to be resolved by the Antitrust Authorities' plenum of commissioners. If, after the submission of the pre-merger filing, the parties offer remedies or conditions to assuage any possible concerns, the Antitrust Authorities will have 60 business days in which to issue a decision as of the date on which the remedies are offered.

Regarding a transaction concerning which the Antitrust Authorities have a competition concern, they shall inform the parties of the concern at least 10 business days before the date on which the case is to be listed in the agenda of matters to be resolved by the Antitrust Authorities' plenum of commissioners. This is to ensure that the parties have an opportunity to offer remedies or conditions that may address the concern. The time limit within which the Antitrust Authorities must issue a resolution will restart on the date on which remedies or conditions are offered. The parties may only modify the terms of the remedies offered once (in which case, the time limit will also restart).

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

In foreign-to-foreign mergers and based on market definition, if competition concerns are identified in Mexico, the Antitrust Authorities will request remedies to mitigate the identified concerns. The Antitrust Authorities can waive their demands for remedies or conditions if such measures have already been agreed upon in other jurisdictions and mitigate the competition concerns that they initially had.

Ancillary restrictions

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

Decisions by the Antitrust Authorities do not cover any related arrangements apart from remedies that they can impose if the transaction raises competition concerns and can be linked to a prior authorisation of economic agents also subject to remedies, unless those related arrangements were included in the merger review process.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

The Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (the Antitrust Authorities) may contact customers, suppliers and competitors to request specific information related to transactions that raise competition concerns to gain a better understating of the applicable market dynamics.

Under the Federal Economic Competition Law, any third party may file a claim for the Antitrust Authorities to investigate an illegal concentration. The claim, however, shall be dismissed if:

- it is evident that the involved economic agent does not have market power in the relevant market; or
- the facts claimed are those contained in a notification of concentration currently being analysed by the Antitrust Authorities, in which case the claim shall be dismissed but the claimant will be allowed to offer information to aid the Antitrust Authorities' analysis.

Publicity and confidentiality

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

The Antitrust Authorities publish the names of the parties submitting pre-merger filings and abstracts of certain stages of the review process (unless the parties request that this information not be published and submit evidence that the disclosure of the information could result in an adverse effect on the parties) on their websites. These notices are published on a daily basis, but there is no specific time frame within which the Antitrust Authorities should publish a specific file's information. For COFECE, as all proceedings before it are conducted electronically, generally only the names of the parties submitting pre-merger filings and a notification once the case is published for discussion are published on COFECE's website. If COFECE issues a third-party request during the filing process, it publishes an abstract with the economic agent from whom they required information and the status of the request.

Furthermore, a non-confidential version of Antitrust Authorities' decisions shall be published within 20 business days of the date on which the decision is formally notified to the parties. Subject to a prior request by the parties to a transaction, the publication of a non-confidential version of the Antitrust Authorities' decision may be postponed until five business days after the consummation of the transaction. The pre-merger filing writ, its supporting documents and any other submissions made by the parties are not publicly available.

The parties can request that certain parts of the filing be treated as reserved or confidential information. Reserved information will only be available to the parties to the transaction and the Antitrust Authorities' officers, whereas confidential information will only be available to the party that requested such treatment and the Antitrust Authorities' officers.

Cross-border regulatory cooperation

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

The Antitrust Authorities have entered into several collaboration agreements with competition authorities in other jurisdictions. Through these agreements, it is possible for the Antitrust Authorities' officers to hold conversations with their peers in other jurisdictions regarding certain transactions, which typically happens in transactions that involve several jurisdictions. In any case, the information and documents provided to the Antitrust Authorities shall not be exchanged with other competition authorities unless applicants to a pre-merger filing provide a waiver in connection thereto.

JUDICIAL REVIEW

Available avenues

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

According to article 28 of the Constitution, only the final decisions of the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (IFT) (the Antitrust Authorities) can be challenged by means of a constitutional trial before a specialised federal court with no injunctive relief available to them. This does not apply in cases where COFECE imposes fines or orders a divestiture, following which the constitutional trial will suspend the application of COFECE's determination until a definitive ruling is issued by the courts. This suspension does not apply to decisions issued by the IFT.

Parties to the merger control process will be able to file a constitutional claim because their interest in the matter is automatically proven by the decision. In practice, it is not common for a constitutional claim to be filed due to the time the judicial review takes, which is usually incompatible with the timeline for closing the transaction.

Constitutional claims have been made and the rulings have been followed by the Antitrust Authorities in cases where remedies were imposed on the parties in the merger control process, but this option is rarely used.

There are no definitive guidelines as to whether third parties are entitled to access a constitutional trial to challenge a merger notification process or its decision before the specialised courts. There is currently one proceeding that is pending a resolution.

Time frame

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

According to the Constitutional Appeal Law, if a decision by COFECE or the IFT is challenged, the appeal must be submitted to the specialised courts within 15 calendar days of the date on which the decision became effective (ie, the day after it was duly notified to the parties). In practice, rulings on such appeals take between one 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?

The Federal Economic Competition Commission and the Federal Telecommunications Institute have been very focused on initiating investigations for failure to notify transactions by actively monitoring press releases, trade publications and prior transactions when analysing pre-merger filings to discover transactions for which a filing – when required – has not been made. This has led to several fines over the past five years, which have become more common in the past year.

Reform proposals

35 Are there current proposals to change the legislation?

No.

UPDATE AND TRENDS

Key developments of the past year

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

- COFECE has continued with its policies and deepened its analysis with respect to the acquirer. In this regard, COFECE currently requests information on the parties' capital stock structure including the name(s) and specific ownership/interest of each share/interest holder holding 5 per cent or more of the controlling entity (including at the individual level). Likewise, in notifications in which a private equity firm is involved, COFECE has asked the parties to provide information of the general partner and limited partnerships involved in the fund, such as their corporate rights and shareholding structure up to the level of individuals holding an interest of 5 per cent or more in such entity for general partners, and 20 per cent or more in the case of limited partners, as long as they are passive investors.
- Contrary to its past common practices, COFECE has started requesting more substantial information through the first information request, such as market share and/or data to obtain market share (eg, volume sales). Likewise, COFECE´s second requests have recently resembled second requests from the US Department of Justice, with requests for items such as organisational charts from the parties with contact information, and exhaustive searches on their systems for strategic terms such as 'compete', 'rival' and 'competition', among others.
- COFECE has been more cautious on reviewing and requesting information to evidence the closing of the transaction, aiming to confirm that the transaction was closed in the exact terms in which it was notified. In cases where closing differed from COFECE's

clearance decision, it has made inquiries and, in some instances, opened a verification procedure.

- COFECE has improved the review periods for transactions where there are no overlaps or vertical links.
- COFECE has been very active investigating and sanctioning transactions that were not notified and triggered a mandatory filing.
- COFECE and IFT have been closely collaborating to avoid jurisdictional conflicts when studying markets that could potentially be reviewed by both authorities. This has led to faster resolutions, since jurisdictional conflicts are resolved by the Federal Administrative Courts, which takes at least a couple of months.

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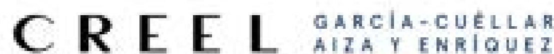

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Netherlands

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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 (Phase I/Phase II)	Phase I: four weeks. Phase II: 13 weeks (subject to suspension should the Authority for Consumers and Markets require additional information).
Substantive test for clearance	Whether the concentration significantly impedes effective competition in the Dutch market or any part thereof, in particular as a result of the creation or strengthening of a dominant position.
Penalties	Failure to file or implementation before clearance: transaction voided plus fines of up to €900,000 or 10 per cent of worldwide turnover (whichever is higher). Incorrect or incomplete information: fines of up to €900,000 or 1 per cent of worldwide turnover (whichever is higher).
Remarks	Not applicable.

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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 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 its predecessor in competition enforcement, the NMa, had been 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 of three members. Martijn Snoep has been chair of the board since 1 September 2018.

Scope of legislation

2 | What kinds of mergers are caught?

The Act applies when any of the following operations occur:

- two or more previously independent undertakings merge;
- one or more undertakings acquire direct or indirect control of the whole or parts of one or more other undertakings; or
- a joint venture (whether concentrative or coordinative) is established that performs, on a lasting basis, all the functions of an autonomous economic entity.

3 | What types of joint ventures are caught?

Full-function joint ventures (ie, joint ventures that perform, on a lasting basis, all the functions of an autonomous economic entity) are caught by Dutch merger control provisions. Cooperative aspects of joint ventures are not caught but are 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 and 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 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, from 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 value added tax 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 Pension Act, alternative thresholds apply: €500 million combined gross written premium, of which at least two undertakings concerned received €100 million from Dutch residents.

Previously, separate thresholds applied in relation to the healthcare sector, but these were abolished on 1 January 2023.

Concentrations that fall below those 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.

In recent years, the ACM has supported requests for referrals of cases to the European Commission on the basis of article 22 of the EUMR, even when it did not itself have jurisdiction over the matter (eg, *Illumina/Grail* and *Cochlear/Oticon*). This shows that the ACM may also ask for a referral of a non-notifiable concentration that may have a significant impact on competition in the Netherlands.

If there is any doubt about the necessity of 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 chapter on the European Union) fall under the Act.

A prior mandatory notification to the Dutch Healthcare Authority (NZa) needs to be made if a merger involves a healthcare provider that employs 50 or more persons. The NZa will primarily apply a procedural test to see whether the parties have taken due account of the interests and opinions of stakeholders. If an NZa notification is required, the transaction cannot be implemented until the NZa has provided clearance (and cannot be implemented until the ACM has also provided clearance if a subsequent ACM notification is needed).

In 2017, the NZa, for the first time, imposed a fine of €70,000, for the failure to notify a healthcare merger. The ACM will only accept a notification if the NZa has provided prior clearance. These rules are expected to change. The additional test applied by the NZa will be performed by the ACM after legislative changes have been implemented.

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

Filing is mandatory. The Act prohibits the implementation of concentrations that fall within the scope of the Act before they have been notified to the ACM and a period of four weeks has passed. With regard to the acquisition of shares, the ACM is of the opinion that concentrations are implemented when the shares in question are transferred. The ACM may, at the request of the notifying party, grant a (conditional) exemption to the prohibition to implement the transaction before clearance.

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

With respect to the geographical allocation of turnover, the ACM follows the guidance as provided by the European Commission's Consolidated Jurisdictional Notice in attributing turnover to the Netherlands.

If the turnover thresholds are met, foreign-to-foreign mergers must be notified, even if the companies concerned do not have a physical presence in the Netherlands. Joint ventures may also need to be notified if the parent companies meet the notification thresholds, even if

the joint venture is not active in the Netherlands. The substantive test only applies to impediments to competition on the Dutch market or parts thereof.

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

On 1 June 2023, the Foreign Investment Review act (the FIR Act) entered into force.

Under the FIR Act, foreign investments in Dutch businesses or undertakings that could potentially result in a threat to national security or serious social disruption will be subject to ex ante screening. The regime covers investments into several sectors and activities: vital processes; sensitive technologies; corporate campuses; and dual-use and military goods (considered as types of sensitive technologies).

The Minister of Economic Affairs has indicated that all investments made after 8 September 2020 will be retroactively reviewable ex officio.

In addition, there are specific rules pertaining to certain sectors in the Netherlands.

Banking and insurance sectors

Concentrations involving companies in the banking and insurance sectors are subject to the merger control provisions of the Act. A protocol has been drawn up between the ACM and the Dutch Central Bank, setting out rules for the exercise of supervisory powers in those 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 in 2012. Friesland Bank was in financial difficulty and could not continue independently. The NMa and the Dutch Central Bank granted Rabobank permission to acquire Friesland Bank without going through the normal notification process.

Healthcare sector

Under the Healthcare Market Regulation Act, the NZa evaluates concentrations involving healthcare providers with a view to protecting the quality, accessibility and availability of healthcare services and the interests of clients and employees. This requires a separate filing prior to (a potentially required) notification under the Act to the ACM.

A merger control cooperation protocol between the ACM and the NZa specifies that they will keep each other informed in merger cases, and it also specifies how information is exchanged between them and how they can consult each other on, for example, market definition issues. The ACM has also entered into a number of cooperation agreements with other authorities and government departments, including the financial markets supervisor, the authority for personal data and the gambling authority.

A pending legislative proposal would transfer the test currently performed by the NZa to the ACM (in addition to the standard merger control test that the ACM already performs). For now, mergers should be reported to the NZa and then to the ACM.

Energy

The Electricity Act and the Gas Act prescribe a mandatory notification to the Minister of Economic Affairs for concentrations involving a change of control of generation facilities producing over 250 megawatts of electricity or liquefied natural gas, respectively. When triggered, notifications must be submitted at least four months before closing; however, the notification requirement does not have suspensory effect. The public interest concerns involved are public safety, and the continuity and reliability of the generation and supply of energy.

Telecommunications

Under the Telecommunications Act, the Minister of Economic Affairs is able to review acquisitions of 'predominant control' of a 'telecommunications party' that has a 'relevant influence in the telecommunications sector'.

'Telecommunications party' is broadly defined and includes providers of mobile and fixed telecommunications networks and services, as well as hosting services and data centres. Such transactions should be notified to the Minister of Economic Affairs no less than eight weeks before closing or no later than the launch of a public offer.

The Minister of Economic Affairs has eight weeks (or six months in the case of an in-depth review) to decide whether the acquisition should be prohibited subject to a clock stoppage, if further information is needed. The regime does not have a suspensory effect.

The Minister may prohibit the acquisition where it can reasonably be expected that the acquirer would abuse or cause deliberate outage of the network, or the acquirer has such a record that the level of risk of a negative impact in the quality, quantity, continuity and confidentiality of telecommunications services will occur would increase significantly.

Defence

The Minister of Economic Affairs previously announced that a separate legislative proposal introducing a sector-specific ex ante investment screening mechanism for military and dual-use goods would be proposed in 2022. As yet no further details have been made public.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

Like the EU rules, the Competition Act of 22 May 1997 (the Act) provides for a two-phase filing procedure: the notification (first phase) and the licence (second phase). The Act does not require that an agreement be signed or that a controlling interest be acquired before notification is possible. A concrete intention to engage in a transaction is sufficient.

The Authority for Consumers and Markets (ACM) decides whether a licence authorising the transaction is required within four weeks, starting from the day after receipt of the notification. If a licence is required, a second-phase examination will be necessary. To initiate the second phase, the parties (or party) concerned must submit a separate application. The ACM must decide on the licence application within 13 weeks.

The implementation of a concentration before the ACM has provided clearance can lead to administrative penalties. If the parties provide incorrect or incomplete information in their notification, the ACM can impose a fine of €900,000 or 1 per cent of the annual worldwide turnover of the company (whichever is higher).

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

In the case of a merger, the acquiring companies have to notify the transaction. Where a company acquires control of another company, the obligation to notify applies to the acquiring company. With regard to public bids, the bidder has to notify the transaction. The filing fees are €17,450 for the notification and €34,900 for the licence application.

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

The implementation of a concentration pending the statutory waiting period of four weeks following notification of the proposed concentration is prohibited. There are two exceptions to this rule. The implementation of a public bid is not prohibited if the ACM is notified immediately and the acquirer does not exercise its voting rights. Further, the ACM may in exceptional circumstances (such as risk of irreparable harm) grant a derogation from the prohibition at the request of one of the notifying parties.

The ACM quite regularly grants exemptions to the standstill obligation in cases involving a target company in financial distress. If the parties go ahead with the 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 Netherlands Competition Authority (NMa), prior to its merging with other Dutch authorities to become the ACM in 2013, imposed fines for implementing a concentration without having notified and received clearance in several cases, indicating that it was fully prepared to impose tough sanctions for gun-jumping violations. One 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 NMa therefore imposed a fine of €1.366 million 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 NMa was not entitled to impose sanctions on the seller.

In 2013, the District Court of 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 ACM imposed the fine during the year that the concentration was implemented, the Fortis turnover would have been excluded, resulting in a much lower fine.

In March 2022, the ACM imposed a fine of €350,000 on Verenigde Nederlandse Apotheken (VNA) for failure to notify an acquisition of four pharmacies. In July 2019, the VNA had acquired four pharmacies but intended to divest part of those pharmacies within the same year, which would have brought the total combined turnover of the target pharmacies below the applicable turnover threshold; however, that subsequent sale did not take place, so the combined turnover exceeded the notification threshold and a notification had to be made at the time. VNA proactively approached the ACM and fully cooperated with the ACM's investigation, which resulted in a 35 per cent reduction of the fine.

Similarly, in May 2022, the ACM imposed a fine of €1.85 million on Modulaire (comprising Algeco Holdings BV, Modulaire Investments BV and Modulaire Investments Sàrl) for failure to notify the acquisition of BUKO HV Holding BV. The parties had inadvertently failed to take into account the group turnover of Modulaire. After discovering this error, they notified the transaction in May 2021. The ACM unconditionally cleared it in June 2021 and commenced infringement proceedings for violation of the standstill obligation. As a result of the extensive cooperation and proactive approach of the parties, the ACM applied a 35 per cent reduction to the fine (the base fine having been €2,846,190).

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

The ACM is prepared to impose sanctions for gun-jumping violations. Its predecessor, the NMa, had also shown its willingness to impose sanctions in foreign-to-foreign mergers that had not been notified before implementation.

One 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 Advent's turnover 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 NMa. The NMa found that the parties had violated the Act and imposed sanctions on Advent and the sellers.

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

Specific solutions are not available, but a divestment or other measure before closing, so that the notification thresholds are no longer met, means that clearance is no longer required. In addition, the parties also have the opportunity to request a derogation from the prohibition on implementing an intended concentration before clearance from the ACM.

Public takeovers

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

The implementation of a public bid is exempt from the prohibition on implementing an intended concentration before clearance, provided that the ACM is notified immediately and the acquiring party does not exercise its voting rights.

Documentation

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

Standard forms (in Dutch) must be used for both the notification and the licence application (an unofficial English language version is available on the ACM's website). The notification form requests information on the undertakings concerned, such as a description of their business activities, a description of the sectors in which they are active, information on the group (if applicable), and a financial outline of the preceding year showing the total turnover and the turnover in the Netherlands.

Further, the notification form requests a description of the transaction and supporting documentation (the supporting documents can be submitted in another language, although 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.

Parties must indicate whether there are any ancillary restraints and if they wish the ACM to declare whether they fall within article 10 of the Act. If there are markets to be investigated, parties should provide both value- and volume-based market share figures. Parties are also asked to indicate whether the concentration has been or will be filed with any other competition authority in the European Union 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.

One 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. The possibility 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 make 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 on 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 period resulting from requests for additional information and replies to these.

If the ACM considers that it cannot clear the concentration within the first phase, it will determine that a licence is required. Following receipt of the application for a licence, an in-depth second-phase investigation will commence. The ACM must make a decision within 13 weeks of receiving the application for a 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 or propose remedies, or 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 the Dutch merger control regime is applicable, the concentration does not raise any competition concerns and 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. Cases that do not present substantive competition concerns are usually cleared in three to four weeks following 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 (which 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.

In 2022, the ACM opened three second-phase investigations and had one second-phase investigation in progress that had been pending since the end of 2021 (*RTL/Talpa*) but did not issue a decision in any of these cases in 2022. In 2023, three of the four second-phase investigations that were initially notified in 2021 and 2022 were brought to a conclusion. The ACM prohibited *RTL/Talpa* and *AVR/AEB* and granted conditional clearance for *Roompot/Landal*. This illustrates that complex second-phase cases can take more than a year.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

A licence application will be required where the Authority for Consumers and Markets (ACM) considers that a concentration may cause a significant impediment of effective competition (SIEC) in the Dutch market or any part thereof, in particular as a result of the creation or strengthening of a dominant position. A licence will be granted if the ACM concludes after its second-phase investigation that this will not occur. As this test mirrors the SIEC test in the EU Merger Regulation (EUMR), it will cover all competition issues raised by mergers, including unilateral effects cases.

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

Joint ventures performing on a lasting basis all the functions of an autonomous economic entity are dealt with under Dutch merger control rules 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 Competition Act of 22 May 1997 (the Act), the test applied is whether a proposed transaction causes an SIEC in the Dutch market or any part thereof, in particular as a result of the creation or strengthening of a dominant position. In applying the test, the ACM generally applies the same criteria and theories of harm as used by the European Commission, including the criteria set out in the horizontal and non-horizontal guidelines, and by the European courts.

Non-competition issues

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

Only competition issues are relevant in the ACM's review process.

If the ACM refuses to issue a licence authorising an envisaged concentration, the Minister of Economic Affairs may, in response to a request to that effect, decide that a licence will be granted if this is desirable for general interest reasons – either economic or non-economic

– that outweigh the expected detriment to competition. This is a separate power of the Minister, not a right to give instructions to the ACM in specific cases.

In 2019, the ACM prohibited the acquisition by PostNL of Sandd as it considered that it would result in a postal delivery monopolist that would be able to increase prices for business mail by 30 to 40 per cent. For the first time, the Minister made use of the power to grant a licence for general interest reasons. The Minister concluded that the benefits of the acquisition to the public would outweigh the detriment to competition as envisaged by the ACM and granted a licence subject to certain conditions (to prevent the price increases that could result from the transaction).

In 2020, that decision by the Minister was overturned by the District Court of Rotterdam. That judgment was appealed to the Court of Appeal for Trade and Industry, which in June 2022 upheld the District Court of Rotterdam's judgment that the Minister should not have used her power to grant a licence for general interest reasons, because she relied on facts and circumstances already investigated by the ACM in the context of its prohibition decision. Meanwhile, the appeal of the ACM's prohibition decision was dismissed by the District Court of Rotterdam and an appeal against that judgment is currently pending before the Court of Appeal for Trade and Industry in The Hague.

Economic efficiencies

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

The Netherlands Competition Authority (NMa), prior to its merging with other Dutch authorities to become the ACM in 2013, generally did not pay specific attention to economic efficiencies in the review process, in particular because notifying parties did not frequently submit efficiency claims. Since the alignment of the test under the Act with the EUMR in 2007, there is more room for taking efficiencies into account.

In 2009, the NMa 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 NMa 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 NMa stated that the Act (in its concurrent form) left room for the NMa to take such efficiencies into account. Subsequently, the NMa 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 NMa. The transaction was ultimately cleared.

It is believed that the ACM will be as reluctant as the European Commission in accepting efficiencies as a justification for clearing a concentration that would otherwise fall foul of competition law. The ACM will especially focus on whether it is credible that efficiency gains will be passed on to consumers.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

If a concentration is implemented despite the standstill obligation, it is null and void, and the Authority for Consumers and Markets (ACM) may order it to be reversed within a specified time limit. Contravention of the standstill obligation as well as of several other merger control provisions (eg, supply of incorrect information) may be sanctioned with fines or an order to remedy the infringement, subject to periodic penalty payments on non-compliance with such order, or by a combination of these sanctions.

The administrative fine for refusal to cooperate amounts to €900,000 or a maximum of 1 per cent of the relevant turnover of the undertaking concerned (whichever is higher).

Remedies and conditions

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

Since 1 October 2007, the Competition Act of 22 May 1997 (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.

Until 1 January 2023, the Act provided that if the ACM imposed conditions at the notification stage, the suspension obligation stayed in place until the conditions were fulfilled, which reduced the practicality of this possibility. Parties often, if possible, amended the original notification to alleviate the ACM's concerns to circumvent this requirement. If the original notification was amended, the transaction (as notified in the amended notification) could be closed after the decision was adopted. On 1 January 2023, the Act was amended to align it more closely with the EU process, to allow for commitments to be offered during a first-phase investigation and to allow closing to take place prior to the commitments being put into effect.

The ACM may attach conditions to the granting of a licence in the second phase, such as that changes must be made to the intended transaction or certain aspects of it.

The 2007 Guidelines on Remedies (the Guidelines) set out both the 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, although 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 *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. It therefore seems unlikely that the ACM will accept a behavioural remedy in the form of a price cap in relation to hospitals in the future, similar to its position with respect to other sectors; the ACM will only accept an amendment of the original notification if a structural remedy is used.

In 2019, the ACM accepted behavioural remedies in relation to the acquisition by Sanoma Learning of Iddink Holding, relating to the distribution of school books and materials via digital learning platforms. Following an appeal by a third party, the District Court of Rotterdam annulled the decision, due to inadequate reasoning in relation to a theory of harm with respect to bundling, and ordered the ACM to further investigate and substantiate its decision. The ACM took a new decision in August 2021, again allowing the merger with the same remedies. Meanwhile, the Court of Appeal for Trade and Industry in The Hague dismissed the appeal and confirmed that the ACM rightly granted conditional clearance to the deal.

In 2023, the ACM granted conditional clearance following a lengthy second-phase investigation to Roompot for acquiring Landal, both operators of holiday parks. Clearance was subject to the divestment of 30 holiday parks to a third-party buyer, Dormio Group.

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

The 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 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 ACM's competition concerns. 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).

Regarding timing, the Guidelines clearly favour discussing remedies in pre-notification meetings and strongly recommend submission of remedies at least one week prior to the end of the four-week time limit. With remedies in the licence phase, the Guidelines state that, as a general practice, the ACM will inform the parties of the competition problems it perceives in its preliminary assessment, typically after eight weeks. This gives parties the opportunity to submit remedies should they not have done so at an earlier stage. At this stage, remedies in the licence phase should be proposed at least three weeks prior to the deadline for the decision.

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

To date, we are not aware of any remedy decision that involved foreign-to-foreign mergers; however, parties have amended their filing in response to competition concerns in at least one concentration involving two foreign-owned undertakings, which sought to take joint control over two Dutch undertakings.

Ancillary restrictions

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

When submitting a notification, parties can indicate whether there are any ancillary restraints. Parties may ask the ACM to declare that the related arrangements fall within article 10 of the Act, meaning that they are directly related to and necessary for the implementation of the concentration as a result of which the cartel prohibition contained in article 6 of the Act would not apply to the restraint.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

The Authority for Consumers and Markets (ACM) may request information from customers, suppliers and competitors on the envisaged transaction or relevant markets. Third parties whose interests are directly involved may submit their comments on the proposed transaction to the ACM and are invited to express their view on the preliminary assessment issued by the ACM eight weeks after the application for a licence is made. 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 to invite interested parties to submit their views on the proposed transaction. Decisions by the ACM, including decisions 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 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 collaboration group and the International Competition Network, and with the European 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 those authorities. The notification form also requests parties to indicate whether the transaction has been, or will be, notified to other antitrust authorities.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Appeals against decisions by the Authority for Consumers and Markets (ACM) must be lodged with the District Court of Rotterdam (Chamber of Administrative Law). The judgment of the District Court may be further appealed to the Court of Appeal for Trade and Industry in The Hague. Any person whose interests are directly affected may appeal against a decision. The Minister of Economic Affairs may, in response to a request, grant a licence for an envisaged concentration even though the ACM has refused to grant one. Decisions of the Minister are also subject to judicial review.

In 2016, the Court of Appeal for Trade and Industry annulled the ACM's 2012 prohibition decision involving biscuit producers AA ter Beek and Continental Bakeries. Continental Bakers produces private label biscuits, while AA ter Beek produces private label biscuits in addition to branded biscuits. According to the ACM, the upstream market for the production of biscuits comprises both private label and branded products, meaning that the combined market share of the parties would be very high. The market definition was based on reasoning by the ACM that, when purchasing biscuits, retailers will take into account pricing for both private label and branded biscuits. The Court of Appeal annulled the decision on the basis that the ACM had not investigated or 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 District Court of Rotterdam upheld, on appeal by Vodafone, a 2014 ACM clearance decision in relation to the acquisition of sole control by Dutch incumbent telecom operator KPN of Reggefiber, a fibre-optic cable operator. KPN already had joint control of Reggefiber, the acquisition of 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, allayed any competition concerns. The sector-specific regulation, among other things, requires KPN to put in place information walls and 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, and accepted that the sector-specific regulation was sufficient to prevent concerns.

In 2017, the District Court of Rotterdam dismissed two appeals against ACM clearance decisions. One case related to the ACM's decision to clear the acquisition by Lotto of the Staatsloterij, which was appealed by Stichting Speel Verantwoord and Lottovate (both third parties). The District Court dismissed the appeal. One of the third parties appealed to the Court of Appeal for Trade and Industry, which dismissed the appeal. The other case that the District Court of Rotterdam dismissed related to the clearance of the acquisition by Brocacef of Mediq, which was appealed by Mosadex. Mosadex had appealed this judgment to the Court of Appeal for Trade and Industry, which in 2019 dismissed Mosadex's appeal.

In 2020, the District Court of Rotterdam annulled the Ministerial decision to grant a licence to the PostNL/Sandd concentration. After the ACM had prohibited the concentration, the Minister of Economic Affairs made use of her power to grant a licence for compelling reasons of general interest. The District Court of Rotterdam upheld appeals submitted by several interested third parties and annulled the decision for both procedural (interested third parties not having been sufficiently heard) and substantive grounds (predominantly relating to insufficient motivation of the decision). The judgment was appealed to the Court of Appeal for Trade and Industry, which in June 2022 upheld the District Court of Rotterdam's judgment that the Minister should not have used her power to grant a licence for general interest reasons. Meanwhile, the District Court of Rotterdam dismissed the appeal against against the initial prohibition decision confirming the ACM's decision. An appeal is currently pending before the Court of Appeal for Trade and Industry in The Hague.

In 2021, the District Court of Rotterdam annulled a clearance decision regarding the acquisition by Sanoma Learning of Iddink Holding and ordered the ACM to revisit its investigation in relation to a theory of harm with respect to bundling. The ACM adopted a new decision in August 2021. Appeals were lodged against the District Court of Rotterdam's judgment and

the new decision. In 2022, the Court of Appeal for Trade and Industry annulled the District Court's judgment and dismissed Noordhoff's appeal.

In 2022, the District Court of Rotterdam dismissed an appeal lodged by T-Mobile against the ACM's unconditional clearance decision in the *KPN/APG/Glaspoort* case. The ACM had decided that KPN and APG did not need a licence to establish a joint-venture (Glaspoort), focused on the development and roll-out of fibre optics in the Netherlands.

In 2023, quite exceptionally, the District Court of Rotterdam annulled two ACM prohibition decisions: (i) the *Mediq/Eurocept* case; and (ii) the *Bergman Clinics/Mauritskliniek* case. In both cases, the court concluded that the ACM had insufficiently substantiated its decisions and failed to demonstrate the theories of harm that underpinned the prohibition decisions.

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 2022, the Authority for Consumers and Markets (ACM) imposed fines in two cases relating to gun-jumping (see section 2 above). In both instances, the parties had proactively approached the ACM regarding the violation of the standstill obligation and fully cooperated with the ACM's investigation. The two respective concentrations were also notified and subsequently unconditionally cleared by the ACM. As a result, in both cases, the fines imposed were reduced by 35 per cent.

At the beginning of 2024, the ACM published its agenda, which focuses on three main topics: the digital economy, energy markets in transition, and sustainability. All three themes were already on the agenda in recent years, and sustainability more generally has been a key area of focus for the ACM. As part of its focus on the digital economy, the ACM also made reference to curtailing the market power of tech companies and the monitoring of online platforms.

Reform proposals

35 Are there current proposals to change the legislation?

It is expected that new legislation will enter into effect by which the ACM will take over the test currently performed by the healthcare regulator, the Dutch Healthcare Authority (NZa), in relation to concentrations involving healthcare providers. This test, which will apply in addition to ACM's merger control assessment, consists primarily of a procedural test to see whether the parties have taken due account of the interests and opinions of stakeholders. However, the legislative proposal was amended at the beginning of 2020, following input from the NZa and the ACM, but has not been further debated or adopted since then.

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 2022, 113 merger notifications and one licence notification were submitted to the Authority for Consumers and Markets (ACM). Of the 113 merger notifications, seven related to the healthcare sector. The only licence notification related to the telecoms sector. The ACM issued 115 first-phase clearance decisions, referred one case to the second phase, issued one licence subject to conditions and prohibited two concentrations. The vast majority were short-form decisions.

In 2023, three second-phase cases that were pending since 2021 and 2022, were brought to a conclusion. The ACM prohibited the concentrations *RTL/Talpa* and *AVR/AEB*, and granted conditional approval to the *Roompot/Landal* deal (subject to the divestment of 30 holiday parks).

In 2023, quite exceptionally, the District Court of Rotterdam annulled two ACM prohibition decisions: (i) the *Mediq/Eurocept* case; and (ii) the *Bergman Clinics/Mauritskliniek* case. In both cases, the court concluded that the ACM had insufficiently substantiated its decisions and failed to demonstrate the theories of harm that underpinned the prohibition decisions.

In March 2022, the ACM imposed a fine of €350,000 on Verenigde Nederlandse Apotheken (VNA) for failure to notify an acquisition of four pharmacies. In July 2019, the VNA had acquired four pharmacies but intended to divest part of those pharmacies within the same year. That would bring the total combined turnover of the target pharmacies below the applicable turnover threshold. However, that subsequent sale ultimately did not take place and so the combined turnover of the target pharmacies exceeded the notification threshold and a notification had to be made at the time. VNA proactively approached the ACM and fully cooperated with the ACM's investigation, which resulted in a reduction of the fine by 35 per cent.

Similarly, in May 2022, the ACM imposed a fine of €1,850,000 on Modulaire (Algeco Holdings BV, Modulaire Investments BV and Modulaire Investments Sàrl) for failure to notify the acquisition of BUKO HV Holding BV. The parties had inadvertently failed to take into account the

group turnover of Modulaire. After discovering this error, the parties decided to notify the transaction to the ACM in May 2021. The ACM unconditionally cleared the transaction in June 2021 and commenced an infringement proceeding with respect to the violation of the standstill obligation, resulting in a decision in 2022. As a result of the extensive cooperation and proactive approach by the parties, the ACM applied a 35 per cent reduction to the fine (the base fine being €2,846,190, reduced to €1,850,000).

In 2019, the ACM prohibited the acquisition by PostNL of Sandd as it considered that the acquisition would result in a monopolist in relation to postal delivery which would be able to increase prices for business mail by 30-40 per cent. For the first time, the Minister of Economic Affairs made use of her power to grant a licence for general interest reasons. In short, the Minister considered that the benefits of the acquisition to the public would outweigh the detriment to competition as envisaged by the ACM, and granted a licence subject to certain conditions (to prevent the envisaged price increases). In 2020, that decision by the Minister was overturned by the District Court of Rotterdam. That judgment was appealed to the Court of Appeal for Trade and Industry, which in June 2022 upheld the District Court of Rotterdam's judgment that the Minister should not have used her power to grant a licence for general interest reasons. In 2023, the District Court of Rotterdam dismissed the appeal against the ACM's prohibition decision. An appeal before the Court of Appeal for Trade and Industry is currently pending.

In 2021, the District Court annulled a clearance decision regarding the acquisition by Sanoma Learning of Iddink Holding and ordered the ACM to revisit its investigation in relation to a theory of harm with respect to bundling. The ACM adopted a new decision in August 2021. Appeals were lodged against the District Court of Rotterdam's judgment and the new decision. In 2022, the Court of Appeal annulled the District Court's judgment and the new decision (addressing the lack of substantiation identified by the District Court at first instance) and dismissed Noordhoff's appeal.

At the beginning of 2024, the ACM published its agenda, which focuses on three main topics: the digital economy, energy markets in transition, and sustainability. All three themes were already on the agenda in recent years, and sustainability more generally has been a key area of focus for the ACM. As part of its focus on the digital economy, the ACM also made reference to curtailing the market power of tech companies and the monitoring of online platforms.

In addition, in recent years, we have seen an increasing focus by the ACM on sustainability, both in merger control and behavioural cases, as well as in relation to consumer law cases.

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Voluntary or mandatory system?	Voluntary; however, one of the enforcement priorities of New Zealand's Commerce Commission (NZCC) is non-notified mergers that may substantially lessen competition.
Notification trigger/ filing deadline	Filing and clearance must be undertaken pre-closing. The NZCC has defined concentration indicators that it uses to identify mergers that are less likely to cause competition concerns, but stresses that these are initial guides only and that a merger not exceeding such indicators may still substantially lessen competition.
Clearance deadlines (Phase I/Phase II)	Target time frame is 40 working days from filing, but the NZCC can request extensions. Over the past three financial years, the average time taken for the NZCC to reach a decision for clearances is 74 working days, but this will depend on complexity and opposition.
Substantive test for clearance	The NZCC must be satisfied that the merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market.
Penalties	Up to NZ$500,000 for individuals and up to the higher of NZ$10 million, three times the commercial gain of the contravention or (if that cannot be ascertained) 10 per cent of group turnover for companies.
Remarks	Not applicable.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

New Zealand's merger control legislation is contained in Part 3 of the Commerce Act 1986 (the Act). New Zealand's competition law regulator is the Commerce Commission (NZCC). The NZCC adjudicates on applications for clearance, or authorisation, of mergers and can take enforcement action in the courts. Interested third parties can also enforce the Act directly.

Scope of legislation

2 What kinds of mergers are caught?

The Act prohibits any person (including bodies corporate) from acquiring assets of a business or shares if that would, or would be likely to, substantially lessen competition in a market in New Zealand.

The phrase 'assets of a business' is not defined and, therefore, could include any asset owned by a business; however, this has historically been interpreted to refer to a collection of assets sufficient to run a business or business division.

The term 'acquire' includes both legal and beneficial acquisition, including entry into an agreement to acquire assets or shares that is not conditional on clearance or authorisation.

Partial acquisitions of shares can be caught, and there is no de minimis transaction, asset or turnover value threshold.

3 What types of joint ventures are caught?

Joint ventures involving an acquisition of assets or shares can be caught by the merger control provisions. Joint ventures that do not involve the acquisition of assets or shares can be caught by the restrictive trade practices prohibitions contained in Part 2 of the Act.

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

There is no definition of 'control' in the Act's general merger control regime. Acquisitions of assets of a business or shares, including minority or partial acquisitions, may breach the Act where:

- the acquirer will be able to 'directly or indirectly . . . exert a substantial degree of influence over the activities of the other' (interpreted as being able to bring real pressure to bear on the decision-making process of the target); and
- that influence is likely to substantially lessen competition in the market.

The NZCC considers that the ability to exert a substantial degree of influence can arise at any level of shareholding. The NZCC does not provide indicative thresholds in its Mergers and Acquisitions Guidelines (the M&A Guidelines) given that other factors, such as the spread of shareholding, will be relevant to determining whether an individual shareholder has the necessary degree of influence. Other case-specific factors will also impact this assessment, including an individual shareholder's influence on management or policy.

The NZCC previously investigated the acquisition of 19.99 per cent of the shares in a listed company and blocked the proposed acquisition of 22.5 per cent of the shares in a listed company (where there was also a cooperation agreement between the parties).

There is an additional process that may be triggered where an overseas person acquires a controlling interest in a New Zealand company.

Thresholds, triggers and approvals

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

There are no asset or turnover thresholds. The test is simply whether the acquisition of assets or shares will or would be likely to substantially lessen competition in a market in New Zealand.

The M&A Guidelines include post-merger market share concentration indicators that are used to 'identify those mergers that are less likely to raise competition concerns'. These are:

- where the merged firm's post-merger market share is less than 40 per cent in a non-concentrated market (where the three largest firms post-transaction have a combined market share of less than 70 per cent); and
- where the merged firm's post-merger market share is less than 20 per cent in a concentrated market (where the three largest firms post-transaction have a combined market share of 70 per cent or more).

The NZCC stresses these are 'only initial guides' and that a 'merger not exceeding these indicators may still substantially lessen competition'. For this reason, the NZCC no longer refers to these indicators as 'safe harbours' as it considered that the term indicated a 'degree of safety that did not exist'. Accordingly, market share measures remain insufficient in and of themselves to establish whether a merger is likely to have the effect of substantially lessening competition.

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

Merger filings in New Zealand are voluntary. Parties can (but are not obliged to) seek clearance or authorisation of a proposed merger but there is no statutory obligation to do so; however, if:

- a merger has been implemented or is no longer conditional on NZCC approval, it cannot then be cleared or authorised retrospectively; and

- parties reach that point without obtaining NZCC approval, the NZCC may choose to open an investigation, and it has a range of enforcement options at its disposal.

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

The merger control prohibitions in the Act extend to acquisitions outside New Zealand 'to the extent that [the acquisition] affects a market in New Zealand'.

Accordingly, an offshore merger involving two or more major suppliers of a product or service to New Zealand may be caught by the Act irrespective of whether either party has a physical presence or subsidiary in New Zealand.

However, the practical ability of the New Zealand authorities to enforce orders made against offshore companies may limit the recoverability of penalties from foreign firms.

To address such limits regarding acquisitions by Australian businesses, New Zealand has legislation (the Trans-Tasman Proceedings Act 2010) and a mutual enforcement treaty with Australia that effectively removes the bar on the NZCC enforcing penalties against Australian companies and directors.

In respect of acquisitions by businesses from other countries, the NZCC may seek remedies where an 'overseas person' acquires a controlling interest in a New Zealand company through an acquisition outside New Zealand ('controlling interest' is defined as control of the board or the ability to control more than 20 per cent of the voting rights, issued shares or dividend entitlements). The NZCC can apply to the High Court within 12 months of the acquisition for a declaration that the acquisition will substantially lessen competition in a market in New Zealand.

If the High Court makes such a declaration, it may make an order requiring that the New Zealand company cease carrying on business in New Zealand, or dispose of shares or assets. Contravention of any such declaration is subject to the same penalties as a breach of the merger control provision (the difference being that the penalties are enforceable against the New Zealand company rather than the overseas acquirer).

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

Foreign investment in New Zealand is governed by the Overseas Investment Act 2005, under which consent is required if an overseas person proposes to directly or indirectly:

- acquire a qualifying interest (being a freehold interest or a leasehold (or equivalent) interest for a term of 10 years or more) in sensitive land (ie, non-urban land greater than five hectares, residential land and other parcels of land that are classified as sensitive owing to their special characteristics), including through acquiring a more than 25 per cent indirect interest in the securities of an entity that directly or indirectly has a qualifying interest in sensitive land;
- acquire a more than 25 per cent interest in significant business assets, being a New Zealand business or business assets, where the consideration provided for the New

Zealand business, or the gross value of the assets of the New Zealand business, exceeds NZ$100 million; or
- establish a business in New Zealand where the business is carried on for more than 90 days in any year and the total expenditure expected to be incurred, before commencing the business, in establishing the business, exceeds NZ$100 million.

In respect of investments in significant business assets, the Overseas Investment Office (OIO) will grant consent if it is satisfied that the investor meets the investor test, which involves considering certain character and capability criteria to determine whether the relevant entities and persons are suitable to own or control those New Zealand assets.

For investments in sensitive land, in addition to meeting the investor test, the investor must usually also satisfy the benefit test, meaning that the transaction must be likely to result in a net benefit to New Zealand when taking specific economic, environmental and other benefit factors into account.

Investments in residential land, forestry, farmland and fishing quotas have differential treatment under the consent regime.

In addition, all applications for consent may also be subject to the national interest test, which empowers the OIO and the relevant minister to consider whether the investment is contrary to New Zealand's national interest. The test mandatorily applies to investments in certain strategically important businesses and to investments by non-New Zealand government investors.

Even in cases where OIO consent is not required under the significant business assets or sensitive land pathways, investors still need to consider whether the transaction involves New Zealand land or assets that are used in a strategically important business. If so, the transaction may be subject to mandatory or voluntary notification to the OIO for review to determine whether it is likely to pose significant risks to New Zealand's national security or public order. Any transaction involving a qualifying investment in a strategically important business that is not mandatorily or voluntarily notified by the investor can be called in for review by the OIO in conjunction with the relevant minister.

If a transaction is deemed to present risks to New Zealand's national interest, national security or public order under either of the above tests, the investment may be blocked, unwound or have conditions imposed.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

As notification is voluntary, no sanctions apply for failing to file. However, mergers cannot be cleared or authorised retrospectively, and the Commerce Commission (NZCC) may

investigate non-notified mergers that it considers could negatively impact competition in New Zealand.

In the past few years, the NZCC has continued to investigate and take enforcement proceedings against non-notified mergers. In 2019, the NZCC challenged First Gas Limited's acquisition of certain gas distribution assets in the High Court and, in 2020, the NZCC agreed to settle High Court proceedings against Wilson Parking for acquiring certain car park leases (with Wilson Parking agreeing to divest some car park leases as part of that settlement). In July 2022, the High Court ordered software company Objective Corporation Limited to pay a NZ$1.54 million penalty in relation to its non-notified acquisition of Master Business Systems Limited. In December 2023, the NZCC filed proceedings relating to Alderson Logistics Limited's non-notified acquisitions of Supa Shavings and Mooreys. These procedures are ongoing.

Over the past three financial years, the average time taken for the NZCC to reach a decision for clearances is 74 working days. There have not been any completed authorisations in the past three years, but the last three authorisations have taken between 66 and 252 working days.

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

Applications for clearance or authorisation of a merger are made by the acquirer. The fee is NZ$3,680 to seek clearance or NZ$36,800 to seek authorisation (including goods and services tax).

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

The Commerce Act 1986 (the Act) provides the NZCC with 40 working days to decide on clearance applications and 60 working days for authorisation applications, but in practice the NZCC can, and frequently does, seek extensions. If applicants do not agree to such an extension, the application is deemed to have been declined if the NZCC has not made a decision by the deadline. This means that, in practice, merging parties always agree to extensions sought by the NZCC.

For cases determined during the NZCC's financial year ending June 2023, the NZCC took on average 94 days to make a clearance determination. There is more variability with respect to how long the NZCC takes to reach an authorisation application decision. The past five merger authorisation applications decided by the NZCC have taken between 45 and 252 working days.

As the NZCC cannot grant clearance or authorisation retrospectively, any proposed merger that might give rise to competition issues should be made conditional on NZCC approval and should not complete until approval is obtained.

Pre-clearance closing

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

Mergers cannot be cleared or authorised retrospectively, so a transaction agreement must remain conditional on regulatory approval until clearance or authorisation is obtained.

If the NZCC believes a merger (that is no longer conditional) may breach the Act, it can investigate and, if necessary, initiate proceedings. On 5 May 2022, the maximum penalty for mergers that breach the Act increased from NZ$5 million to the greater of NZ$10 million, three times the commercial gain of the contravention or (if that cannot be ascertained) 10 per cent of group turnover (or NZ$500,000 for individuals). The High Court can also impose injunctions and make divestiture (and other) orders. If the NZCC was considering a clearance or authorisation application at the time of completion, it would close that clearance investigation and open an investigation into a potential breach.

In 2008, the Court of Appeal upheld penalties for breach of the merger provisions of the Act (*New Zealand Bus Ltd v Commerce Commission* [2008] 3 NZLR 433). The acquirer had filed for clearance, but subsequently withdrew its application and completed the acquisition. The NZCC brought proceedings, alleging that the acquisition was likely to substantially lessen competition, and the High Court ordered the acquirer to pay a penalty of NZ$500,000. Two directors of the vendor were found liable as accessories for agreeing to waive the clearance condition.

Accordingly, both acquirers and vendors need to be aware that, while merger clearance remains voluntary:

- seeking clearance may be the safest option for potentially problematic mergers; and
- withdrawing a clearance application and completing a transaction is likely to be high risk.

Until closing, merger parties are treated as separate businesses for the purposes of the Act's restrictive trade practices prohibitions. Therefore, any integration between parties prior to closing gives rise to gun-jumping risks under the restrictive trade practices prohibitions. In 2010, the NZCC successfully prosecuted two pathology businesses for agreeing not to compete pending a proposed merger (*Commerce Commission v New Zealand Diagnostic Group Ltd and Ors* HC Auckland CIV 2008-404-4321, 19 July 2010). The High Court imposed penalties of NZ$65,000 and NZ$35,000, respectively. Those fines would likely be significantly higher in today's context (and intentional cartel conduct is now a criminal offence as of April 2021).

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

Foreign-to-foreign mergers that close before obtaining clearance are subject to the same potential sanctions as domestic mergers. However, in practice, there are limits on the ability of New Zealand authorities to enforce orders made against offshore companies; therefore,

there is an additional process for the NZCC to seek remedies in respect of acquisitions by overseas persons.

Although the NZCC has not, to date, used these powers, it has opened investigations into foreign-to-foreign mergers since their introduction in 2017.

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

The NZCC does not have jurisdiction to clear any merger after closing. Accordingly, the New Zealand aspect of the merger would need to remain conditional until clearance is obtained if clearance is advisable.

Public takeovers

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

No; however, in practice, the NZCC applies lower thresholds for finding a 'substantial degree of influence' for public companies than for private companies (for a public company, the NZCC normally examines shareholdings of 15 per cent or more but concerns could also potentially arise regarding lower shareholdings, depending on other factors).

The Takeovers Code (the Code) also applies to listed companies. The Code is administered by the Takeovers Panel, which is separate from the NZCC. The Code is far-reaching and should be considered carefully in relation to public company acquisitions.

Documentation

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

There are prescribed application forms for both clearances and authorisations. The forms require information concerning the transaction, the parties, the rationale, the markets, etc. Economic evidence is often advisable for more complex clearance cases. For authorisation applications, economic analysis of public benefits and detriments is invariably required.

The applicant must also provide the documents bringing about the merger and ancillary agreements, and documentation prepared for or considered by senior management and directors that sets out the rationale for the merger, analyses the merger or competitive conditions, and includes the business plans, annual reports and management accounts.

Although there are no sanctions for not providing all required information, until the NZCC is satisfied it has received all required information, it will not register the application.

There are sanctions for deliberately providing incorrect information, including deliberately misleading the NZCC about the existence of requested information as it is an offence under the Act to deceive or knowingly mislead the NZCC. Companies found in breach can be fined up to NZ$300,000, and individuals up to NZ$100,000.

Investigation phases and timetable

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

There are no formal phases to a clearance process mandated by statute. However, the NZCC has published guidance setting out its expected process and timelines for clearance applications.

Prior to formal filing, merger parties are encouraged to contact the NZCC as early as possible to inform it of potential applications and engage in pre-notification consultation. This typically enables the NZCC to plan ahead, which can help expedite the process. The NZCC generally expects a substantially developed draft alongside supporting documents at least a week prior to pre-notification consultations. The NZCC will generally advise whether parties need to supplement their application with further information before it would be willing to register a formal filing.

Once the NZCC registers a formal filing, a media release is published on its website to announce that it has received the application. Subsequently, the NZCC's indicative time frames are as follows, although these can vary depending on complexity and opposition:

- By working day five, the NZCC aims to publish a draft investigation timeline on its website, alongside a statement of preliminary issues. This sets out the issues that the NZCC intends to explore and invites submissions from third parties, which are typically due by working day 15.
- The NZCC aims to complete initial interviews and information gathering by working day 30.
- By working day 40, the NZCC is required to either reach a determination or obtain an extension. If the NZCC has not granted clearance by working day 40, it will seek an extension and publish a statement of issues setting out the issues it is continuing to investigate by working day 50. Both the merger parties and third parties are able to submit responses, which are typically due by working day 65.
- If the NZCC has not granted clearance by working day 90, it will likely issue a statement of unresolved issues, setting out the issues that it considers as not having been satisfactorily addressed. Merging parties and third parties will then have until approximately working day 110 to make submissions.
- Following submissions on the statement of unresolved issues (working day 130 or beyond), the NZCC will decide to either grant or decline clearance.

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

The Act provides the NZCC with 40 working days to decide clearances and 60 working days to decide authorisations; in practice, the NZCC often seeks extensions. If applicants do not agree to an extension, it is open to the NZCC to simply fail to make a determination in the prescribed time frame, in which case the application is declined. This means that merging parties, in practice, always agree to extensions sought by the NZCC.

Over the past three financial years, the average time taken for the NZCC to reach a decision for clearances is 74 working days. There have not been any completed authorisations in the past three years, but the last three authorisations have taken between 66 and 252 working days.

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The best ways to expedite the NZCC's process are to:

- contact the NZCC as early as possible about potential applications and engage in a pre-notification consultation;
- have all required information ready to submit to the NZCC at least one week prior to the targeted formal filing date; and
- respond expeditiously to all NZCC information and interview requests.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

To grant clearance, New Zealand's Commerce Commission (NZCC) must be satisfied that the merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market. If it is not so satisfied, it must decline to give clearance.

Analytically, this test requires the NZCC to compare the situation if the transaction does not proceed (the counterfactual) against the situation if the transaction does proceed (the factual). In assessing the counterfactual, the NZCC must consider any possible hypothetical that has a real chance of eventuating. New Zealand courts have stated a hypothetical can have a real chance of occurring despite it being less likely than not. This means the NZCC can consider multiple counterfactual outcomes and will compare the factual against the most competitive of these (effectively a worst-case scenario analysis).

There is no separate failing-firm defence in the Commerce Act 1986 (the Act); however, as the NZCC's analysis is forward-looking, parties may argue that at least one of their businesses will leave the market if the transaction does not proceed. The NZCC has accepted such arguments, provided that this can be demonstrated to a satisfactory level of probability. The NZCC's Mergers and Acquisitions Guidelines include an appendix setting out its approach to assessing failing-firm arguments.

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

No. If a formation of a joint venture involves the acquisition of business assets or shares, it will be analysed in the same manner as any other merger.

However, other aspects of a joint venture relationship, such as any ongoing collaboration, are analysed pursuant to the restrictive trade practices regime in Part 2 of the Act, which prohibits:

- cartel arrangements between actual or potential competitors (such as price fixing, output restriction or market allocation arrangements) (section 30); and
- arrangements that have the purpose, effect or likely effect of substantially lessening competition in a market in New Zealand (section 27).

There is a collaborative activities exception to the section 30 cartel prohibition. The NZCC issued its Competitor Collaboration Guidelines on the application of this exception, which does not provide protection from the section 27 or section 47 prohibition. In November 2023, the NZCC released its Collaboration and Sustainability Guidelines which provide guidance on the situations in which the NZCC considers businesses can collaborate to pursue sustainability goals without breaching competition laws.

Theories of harm

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

Broadly speaking, the NZCC will consider the extent to which an acquisition will increase the risk of:

- unilateral effects, where an acquisition removes a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that the combined firm can profitably increase prices (often said to be by 5 per cent or more) without the profitability of that increase being thwarted by rival firms' competitive responses;
- coordinated effects – that is, the scope for an acquisition to increase the potential for the combined firm, along with some of or all the remaining competitors, to (implicitly) coordinate their behaviour so that prices increase in the market; this typically occurs in highly concentrated markets (four or fewer competitors) where the remaining competitors are of a similar size or market share to each other;
- conglomerate effects, where the acquirer's and target's products are complementary or adjacent to one another, such that the acquisition could result in the acquirer having an unmatched portfolio of products it can use to lessen competition in the market by bundling or tying products together across that portfolio;
- vertical input foreclosure, where the acquirer is acquiring a supplier/customer and could cut off access to inputs from its competitors and lessen competition; and
- vertical customer foreclosure, where the acquirer is acquiring a supplier/customer and could lessen competition by cutting off access to customers from its competitors.

Non-competition issues

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

The NZCC is an independent Crown entity and is not subject to direction from the government; however, section 26 of the Act provides that when exercising its powers and functions, the NZCC must 'have regard to the economic policies of the [g]overnment' where such policies are provided to the NZCC in writing by the Minister of Commerce and Consumer Affairs and laid before Parliament.

This is a highly transparent process and such statements are rarely issued; however, they have been issued in relation to specific applications before the NZCC. Nevertheless, the ultimate decision remains with the NZCC and, although it must consider such a statement, the statement does not change the competition, or public benefits and detriments, assessment that the NZCC must make.

Besides the potential for a section 26 statement, non-competition issues are not relevant in the clearance context (which focuses on whether there is a substantial lessening of competition).

Parties may also apply for authorisation for a merger where the NZCC can approve a transaction that would otherwise substantially lessen competition where that transaction would be likely to result in public benefits that outweigh the detriments arising from the lessening of competition. Public benefits and detriments have historically been predominantly economic efficiencies.

However, in its 2017 decision to decline the merger of two media organisations, Fairfax New Zealand Limited and NZME Limited, the NZCC took a loss of media plurality into account as a public detriment in its analysis. This consideration was upheld on appeal, so the NZCC's Authorisation Guidelines now set out that 'benefits or detriments can relate to matters such as the environment, health, media or social welfare'.

Non-competition factors might also arise through the operation of the Treaty of Waitangi, given the NZCC's stated commitment to support future-focused Māori–Crown relationships through taking a good-faith, collaborative approach to engagement with Māori.

Economic efficiencies

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

When considering a clearance application, the only question is whether the merger has the effect of substantially lessening competition in a market. The test implies some consideration of efficiencies within the affected market or markets, as it is a net effects test.

However, the NZCC considers it to be rare that efficiencies would be sufficient to outweigh what would otherwise be a substantial lessening of competition. Accordingly, a merger that relies on efficiencies is better dealt with under the authorisation regime.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

New Zealand's Commerce Commission (NZCC) cannot unilaterally prohibit a transaction, declare the Commerce Act 1986 (the Act) has been breached or impose penalties. It can, however, bring an action in the High Court seeking remedies such as:

- an injunction preventing a proposed merger;
- a declaration that a merger breaches (or would breach) the Act;
- an order for divestiture of assets or shares; or

- penalties in the amount of up to the higher of NZ$10 million, three times the commercial gain of the contravention or (if that cannot be ascertained) 10 per cent of the group turnover per offence for bodies corporate and NZ$500,000 per offence for individuals.

The Act also gives the NZCC broad powers of investigation, and failure to comply with any compulsory NZCC request can give rise to penalties of up to NZ$300,000 for a company and NZ$100,000 for an individual.

Remedies and conditions

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

The NZCC can accept undertakings to divest assets or shares in the context of either a formal clearance or authorisation application, or an investigation of a merger (where the parties have not sought clearance or authorisation). The NZCC cannot accept behavioural undertakings in relation to mergers.

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

If given in the context of a formal clearance or authorisation process, a divestment undertaking may be proposed as part of the initial application or as an amendment, but must be offered prior to the NZCC's final determination. If an undertaking is accepted by the NZCC, it is deemed to form part of the application. Typically, merging parties will then have six months (or sometimes up to 12 months) to fulfil the undertaking. Potential acquirers of assets or shares do not have to be identified at the time the undertaking is given, but must ultimately be approved by the NZCC.

If an acquirer of assets or shares does not fulfil a divestment undertaking by the specified date (which is negotiated with the NZCC), the parties lose the benefit of the clearance. If the NZCC is satisfied that there is a contravention of an undertaking, it can apply to the High Court for a divestment order or pecuniary penalties.

Outside of a formal clearance or authorisation process, the NZCC also has a separate power to accept a written undertaking to dispose of assets or shares. Again, if the NZCC considers that a person has breached such an undertaking, it may apply to the High Court for orders directing the person to comply with the undertaking, or pay to the Crown an amount reasonably attributable to the breach or any consequential relief that the High Court considers appropriate.

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

The NZCC can apply to the High Court for a declaration if an overseas person acquires a controlling interest, either directly or indirectly, in a New Zealand body corporate through an acquisition outside New Zealand. The NZCC has not yet used these powers (introduced in 2017), although it has investigated foreign-to-foreign mergers since then, including one where it is understood that a divestment remedy was provided to the NZCC to resolve its concerns.

Ancillary restrictions

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

The NZCC can only give clearance for the acquisition itself. Ancillary restraints will be governed by the restrictive trade practices provisions of Part 2 of the Act, which prohibit cartel provisions or arrangements that have the purpose, effect or likely effect of substantially lessening competition in any market.

There is an exception to these restrictive trade practices prohibitions for covenants in business acquisition agreements that are 'solely for the protection of the purchaser in respect of the goodwill of the business'. This provides an exception for restraints imposed on vendors that are reasonable in both scope and duration to protect the goodwill being acquired.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

New Zealand's Commerce Commission (NZCC) seeks information from competitors, suppliers and customers to test the information provided by the applicant. It publishes a public version of the application on its website to enable third parties to make submissions.

In addition, during its clearance process, the NZCC publishes statements on its website outlining the issues under consideration to allow interested parties the opportunity to submit. It will typically upload a non-confidential version of any third-party submission to its website to allow the merger parties to respond.

If an acquisition occurs in the absence of a clearance or authorisation, both the NZCC and interested parties have the ability to apply to the High Court for relief. At that stage, the usual Court rules relating to disclosure and documents apply.

Publicity and confidentiality

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

Once an application is received by the NZCC, it will issue a media release announcing the fact of the application, the parties' identities and a link to the public version of the application document (confidential or commercially sensitive information, including the parties' estimates of market share, is excluded from the public version).

Subsequently, the NZCC will publish on its website any statement of preliminary issues, statement of issues, statement of unresolved issues and final decision, and public versions of any further submissions (from the parties or third parties).

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As a public body, the NZCC is subject to the Official Information Act 1982, meaning any person can request information held by the NZCC, which includes any information submitted as part of a merger process. Under the Official Information Act's principle of availability, such information should be disclosed unless there is a good reason not to do so (such as where disclosure would disclose a trade secret or unreasonably prejudice the commercial position of the provider or subject of the information). The NZCC will consider requests for information in line with its obligations under the Official Information Act. The NZCC has a good track record of protecting genuinely confidential or commercially sensitive information.

Additionally, as of May 2022, the NZCC is able to share any information it holds, including information acquired in the merger approval process, with other government agencies or statutory entities, subject to appropriate confidentiality obligations.

Cross-border regulatory cooperation

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

The NZCC regularly cooperates with overseas regulators regarding merger applications and has a particularly close relationship with the Australian Competition and Consumer Commission (ACCC). The two regulators coordinate through the formal cross-appointment of commissioners, including by having the NZCC cross-appointee appointed to the panel deciding ACCC decisions that involve both Australia and New Zealand (and vice versa).

Additionally, the NZCC has statutory powers to enter into cooperation agreements with its overseas counterparts to enable it to share compulsorily acquired information and perform searches for the purposes of assisting an overseas regulator. Unless such a cooperation agreement has been entered into, confidential information provided to the NZCC cannot be shared with another regulator without a waiver from the provider of the information, as New Zealand's domestic confidentiality and privacy laws will continue to apply. To date, the NZCC has entered into formal cooperation agreements with the ACCC and the Canadian Competition Bureau.

The NZCC is also a member of the International Competition Network and maintains contact with overseas regulators through that network. In 2020, the NZCC signed a multilateral mutual assistance and cooperation framework with authorities in Australia, Canada, the United Kingdom and the United States to enhance international cooperation on competition enforcement. This allows for the sharing of public information and investigative information to the extent permitted by law or by waiver of confidentiality and the coordination of investigative activities.

In 2023, the NZCC entered into a new initiative, the Pacific Island Network of Competition Consumer and Economic Regulators. This initiative includes regulators from New Zealand, Australia, the Cook Islands, Fiji, French Polynesia, Kiribati, New Caledonia, Papua New Guinea, Samoa, Solomon Islands, Tonga and Vanuatu. Through the initiative, regulators will be able to share information and intelligence.

JUDICIAL REVIEW

Available avenues

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

Appeals of clearance or authorisation decisions made by New Zealand's Commerce Commission (NZCC) may be made to the High Court by giving notice of appeal within 20 working days of the date of the NZCC's decision or within such further time as the Court allows. Appeals proceed by way of rehearing. Persons entitled to bring an appeal are:

- the applicant;
- the target; and
- for authorisations, any person who has a direct and significant interest in the application (provided that they participated in the NZCC's process prior to its decision).

Third parties cannot appeal an NZCC clearance decision but can judicially review the clearance process.

The High Court, on appeal, can confirm, modify or reverse the NZCC's determination, or exercise any powers that could have been exercised by the NZCC. The Court can also direct the NZCC to reconsider, either generally or in respect of specified matters, the matter to which the appeal relates. Parties can subsequently appeal a High Court decision to the Court of Appeal and, if leave to appeal is granted, to the Supreme Court.

Time frame

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

Appeals may be made to the High Court by giving notice of appeal within 20 working days of the date of the NZCC's decision.

It is difficult to assess the usual time frame for appeals against the NZCC's merger determinations as there have been very few. The most recent appeals to be heard in both the High Court and Court of Appeal were those of media organisations Fairfax New Zealand Limited and NZME Limited against the NZCC's decision to decline their application for clearance or authorisation to merge:

- The NZCC declined the application on 3 May 2017.
- The parties filed a notice of appeal on 26 May 2017, and the High Court hearing was held from 16 to 27 October 2017.
- On 18 December 2017, the High Court issued its judgment, in which it upheld the NZCC's decision.
- On 22 February 2018, the High Court granted leave to appeal its decision to the Court of Appeal.
- The hearing was held from 5 to 8 June 2018.
- On 26 September 2018, the Court of Appeal issued its judgment, upholding the NZCC's decision.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

The identification and investigation of non-notified mergers have become a publicly stated priority of New Zealand's Commerce Commission (NZCC) ever since it identified an increase in such mergers in 2018. Consequently, there have been several non-notified mergers across all industries and sectors that have been investigated, resulting in enforcement action or requiring commitments from merger parties to resolve NZCC concerns. As at April 2024, the NZCC has one investigation into a non-notified acquisition open.

Approximately every four years, the NZCC publishes a statement of intent, which provides insight into its overall direction and strategic objectives for the forthcoming period. In the NZCC's previous statement of intention and media releases, the NZCC has indicated that an enduring priority for the NZCC is identifying and investigating non-notified mergers. Reflecting this, since 2020, the NZCC has:

- obtained a divestment undertaking from Wilson Parking, following its non-notified acquisition of an additional car park lease in Wellington – Wilson Parking also agreed to pay NZ$500,000 towards the NZCC's costs;
- opened an investigation into Beijer Ref AB's non-notified acquisition of Heatcraft New Zealand Limited, being an acquisition in the refrigeration and air conditioning equipment industry – the investigation was closed without further action in December 2020;
- opened an investigation into the non-notified acquisition of Wallace Group GP Limited by interests associated with Glenninburg Holdings Limited, both involved in the animal rendering industry – this investigation was closed without further action in May 2022;
- filed proceedings in relation to Objective Corporation Limited's non-notified acquisition of Master Business Systems Limited, alleging that the acquisition substantially lessened competition in certain building software markets – the High Court imposed a NZ$1.54 million penalty in relation to the acquisition in July 2022; and
- filed proceedings in relation to Alderson Logistics Limited's acquisitions of Supa Shavings and Mooreys, alleging that the transactions substantially lessened competition in the chicken and goat bedding market in the Waikato. These proceedings are ongoing.

Reform proposals

35 Are there current proposals to change the legislation?

The Commerce Act 1986 underwent major reforms through the Commerce Amendment Act 2022. A number of the key amendments came into force on 5 April 2023. There are no other 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?

After opening an investigation in January 2023, the New Zealand Commerce Commission (NZCC) filed proceedings in December 2023 in relation to Alderson Logistics Limited's acquisitions of Supa Shavings and Mooreys, alleging that the acquisition substantially lessened competition for the supply of chicken and goat bedding in the Waikato region. The outcome of this case is yet to be determined.

In March 2024, the NZCC published its review of, and learnings from, previous merger applications which the NZCC had either cleared, authorised or declined between 2014 and 2019. The NZCC found that market participants tend to overstate the likelihood of entry and expansion, and overestimate the ability and likelihood of third parties to exercise countervailing buyer power. The NZCC also found that dynamic markets may require alternative analytical frameworks for defining relevant markets and assessing likely competitive effects. The NZCC has announced that, going forward, it will undertake ex post reviews of its merger decisions every two years.

In April 2024, the NZCC received its first authorisation application since 2018. Evergreen NZ Holdings has sought clearance, or in the alternative, authorisation, to acquire ACM Holdings (NZ) limited, its competitor in cash distribution services. The NZCC has not yet reached a decision on this application.

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Voluntary or mandatory system?	Mandatory for notifiable mergers (section 93(1) of the Federal Competition and Consumer Protection Act (FCCP Act); paragraph 1 of the Notice of Threshold for Merger Notification 2019). Mandatory for large mergers (section 96(1) of the FCCP Act) and voluntary for small mergers (section 95(1) of the FCCP Act).
Notification trigger/ filing deadline	Notification trigger: • the combined annual turnover of the acquiring undertaking and the target undertaking (combined figure) in, into or from Nigeria equals or exceeds 1 billion naira; or • the annual turnover of the target undertaking in, into or from Nigeria equals or exceeds 500 million naira. No deadline for filing, provided that it is done prior to implementation of the merger (section 96(4) of the FCCP Act and paragraph 13(1) of the Merger Review Regulations 2020).
Clearance deadlines (Phase I/Phase II)	Phase I: 20 business days (small merger) and 60 business days (large merger) (sections 95(6) and 97(1) of the FCCP Act, respectively). Phase II: 40 business days (small merger) and 60 business days (large merger) (sections 95(6) and 97(1)(a) of the FCCP Act, respectively).
Substantive test for clearance	Contained in section 94 of the FCCP Act.
Penalties	Contained in section 96(7) of the FCCP Act.
Remarks	Not applicable.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

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

The Federal Competition and Consumer Protection Act 2018 (the FCCP Act) is the main merger control legislation applicable in Nigeria. Where the merger involves a public company, the Investments and Securities Act 2007 (ISA) will also apply.

In addition, there is sector-specific legislation that regulates merger transactions in certain industry sectors. This legislation complements the ISA, rather than supplanting it. The legislation includes:

- the Banks and other Financial Institutions Act 2020 (for banks);
- the Nigerian Communications Commission Act 2003 (for telecommunications companies);
- the Insurance Act 2003 (for insurers and re-insurers);
- the Pension Reform Act 2014 (for pension fund administrators);
- the Petroleum Industry Act 2021 (for operators in the upstream petroleum industry); and
- the Electricity Act 2023 (for operators in the electricity sector).

The Federal Competition and Consumer Protection Commission (FCCPC) is responsible for administering and enforcing the FCCP Act and regulations and guidelines made thereunder. The Securities and Exchange Commission (SEC) administers and enforces the ISA. Similarly, sector-specific legislation allows regulatory authorities to administer the respective sector-specific legislation.

Scope of legislation

2 | What kinds of mergers are caught?

Transactions that fall within the definition of a 'merger' and that meet the prescribed monetary threshold for notification will require prior notification to, and the approval of, the FCCPC. Under the FCCP Act, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking. A merger may be achieved through:

- a purchase or lease of shares, an interest in or assets of the other undertaking in question;
- the amalgamation or other combination with the other undertaking in question; or
- a joint venture.

The prescribed monetary threshold determines whether a merger will be categorised as small or large. A merger falling below the prescribed monetary threshold for notification is deemed a small merger and need not be brought to the attention of the FCCPC unless the FCCPC requires the parties to do so. Any merger whose value exceeds the prescribed threshold is a large merger and will require notification to and the prior approval of the FCCPC. A party to a small merger can, however, voluntarily notify the FCCPC at any time. The parties to a large

merger can only implement the merger if it is approved by the FCCPC. In the absence of such approval, any action taken by parties to a large merger is deemed void.

3 What types of joint ventures are caught?

Joint ventures that satisfy the requirement of control under the FCCP Act will be caught. It also catches joint ventures that operate on a regular or lasting basis with all the functions of an autonomous economic entity. This type of joint venture, the assets or turnover value of which is above the notification threshold, requires notification to and the approval of the FCCPC.

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

The FCCP Act defines 'control' to include a situation where an undertaking (the Acquirer) has control over the business of another undertaking (the Target) if the Acquirer:

- beneficially owns more than one-half of the issued share capital or assets of the Target;
- is entitled to cast a majority of the votes that may be cast at a general meeting of the Target;
- can appoint or veto the appointment of a majority of the directors of the Target;
- is a holding company and the Target is its subsidiary as contemplated under the Companies and Allied Matters Act 2020 (as amended);
- can materially influence the business or commercial policy of the Target in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control; and
- in the case of a Target that is a trust: (1) is entitled to control the majority of the votes of the trustees; or (2) entitled to appoint the majority of the trustees or change the majority of the beneficiaries of the trust.

The FCCP Act does not define 'material influence', and the term is also not defined by case law. The FCCPC carries out an assessment as to whether a party has material influence on another on a case-by-case basis, examining, among other things, the overall relationship between the acquirer and target and the acquirer's ability to materially influence policy relevant to the target's behaviour in the market. Some factors that raise a presumption of material influence include:

- acquisition of more than 25 per cent equity;
- existence of any special or preferential voting or veto rights associated with the shareholding under consideration;
- convertible loan arrangement or shareholder loan arrangement conferring influence over certain decisions;
- pre-emption rights on sale of shares or assets;
- board composition;
- status and expertise of acquirer and corresponding influence with other shareholders;
- provisions in the target's articles granting such influence over policy; and
- commercial agreement or arrangement between the parties granting influence over policy.

Internal arrangements, management representation or other interests that do not confer control do not come under the purview of transactions that require FCCPC approval. However, in practice, parties are advised to apply and obtain a negative clearance from the FCCPC before consummating transactions when they are in doubt as to whether the nature of the internal arrangement will require FCCPC approval.

'Control' as defined under the FCCP Act does not include control acquired by an office holder (such as a receiver and manager or a liquidator) and credit institutions or other financial institutions or insurance companies that in the ordinary course of business may hold (on a temporary basis) security that they have acquired in an undertaking with a view to reselling them.

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 prescribed threshold for merger notification contained in the Notice of Threshold for Merger Notification requires that the FCCPC be notified of a merger if in the financial year preceding the merger:

- the combined annual turnover of the acquiring undertaking and the target undertaking (combined figure) in, into or from Nigeria equals or exceeds 1 billion naira; or
- the annual turnover of the target undertaking in, into or from Nigeria equals or exceeds 500 million naira.

Transactions falling below the thresholds can be investigated by the FCCPC if the merger is likely to lessen competition in the market, or if the transaction is illegal or fraudulent. The FCCPC has the power, within six months of a small merger being implemented, to require the parties to that merger to notify it of the merger. Within 20 business days (or extended period) of being notified, the FCCPC shall issue a report:

- approving the merger;
- approving the merger subject to conditions;
- prohibiting implementation of the merger, if it has not been implemented; or
- declaring the merger void.

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

Notification to the FCCPC and the FCCPC's prior approval is mandatory for mergers that meet or exceed the prescribed monetary threshold (large mergers). Such mergers cannot be consummated without prior notification to and approval of the FCCPC. Any action taken in respect of a large merger that either has not been previously approved by the FCCPC or is contrary to the provisions of the FCCPC is void.

Prior notification to the FCCPC is not mandatory for small mergers. The merger parties may, however, voluntarily notify the FCCPC of the merger. Also, the FCCPC may require parties

to a small merger to notify it of the merger if it is likely that the merger may substantially prevent or lessen competition.

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

Parties to a foreign-to-foreign merger must notify the FCCPC where the foreign entity has a local nexus, such as a Nigerian subsidiary, and the foreign merger has met the turnover requirements for large mergers in Nigeria.

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

The Nigerian Investment Promotion Commission Act 1995 (the NIPC Act) mandates the registration of foreign ownership of shares in a Nigerian company with the Nigerian Investment Promotion Commission (the NIPC). The NIPC is established by the NIPC Act. The Foreign Exchange (Miscellaneous Provisions) Act 1995 regulates dealings in foreign exchange, and the importation and repatriation of foreign capital invested in Nigerian businesses.

Where an undertaking in Nigeria is acquired by or comes under the control of a foreign undertaking, the acquisition will be subject to FCCPC review if it meets the notification thresholds and is likely to prevent or lessen competition in Nigeria.

If the merger relates to an entity or entities within a regulated industry, such as insurance, banking, telecommunications, or electricity, additional approvals may be required from the relevant sector regulator.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

There is no deadline for filing and obtaining the approval of the Federal Competition and Consumer Protection Commission (FCCPC) in respect of a notifiable merger, provided that it is done prior to implementation of the merger. Failure to notify the FCCPC of a large merger is an offence and attracts a fine of up to 10 per cent of the turnover of the undertaking in the previous year. The FCCPC also has the power to impose an administrative penalty for non-compliance with the provisions of the Federal Competition and Consumer Protection Act 2018 (the FCCP Act).

The FCCP Act is a relatively new piece of legislation. To our knowledge, the FCCPC has not publicly disclosed any sanctions it has imposed on merging parties for defaulting in notifying and obtaining FCCPC approval before consummating a large merger.

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

The FCCP Act requires each party to a merger to file a FCCPC Form 1 (Notice of Merger); however, in practice, parties will file a joint application for FCCPC approval. In fact, the Notice of Merger requires parties to a proposed merger to jointly complete the Form 1. The filing fees payable are calculated based on the assessment and turnover of the parties or the purchase consideration (whichever is higher), and include an application fee of 50,000 naira that is payable per merging entity.

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

The FCCPC has 60 business days to consider and approve a proposed merger. It may extend the waiting period to 120 business days by issuing an extension notice to the parties. If the FCCPC fails to communicate a decision on the proposed merger after 60 business days or after the extended period, the merger will be deemed to have been approved.

Any approval obtained is still subject to the power of the FCCPC to revoke its own decision to approve a merger. For large mergers, parties are prohibited from consummating the merger or taking any action in respect of the merger pending approval or following a refusal of the merger by the FCCPC.

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?

Regarding mergers that require prior notification to the FCCPC, the parties are prohibited from consummating or implementing the merger (even partly) without the prior approval of the FCCPC. The same sanctions for implementing a merger without approval are equally applied for not notifying the merger to the FCCPC. The FCCPC has the power to invalidate mergers that have been partly or wholly consummated without its prior approval. The FCCPC may also impose administrative fines. Consummating a merger without approval is an offence and attracts a fine of up to 10 per cent of the turnover of the undertaking in the previous year. There is no publicly available information illustrating the types of sanctions imposed by the FCCPC.

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

The FCCPC does not have the power to impose sanctions on foreign-to-foreign mergers where:

1. the foreign entities do not have a local entity or subsidiary in Nigeria;
2. the turnover threshold requirements for prior notification and approval in Nigeria have not been met; and
3. the foreign merger does not affect the market by preventing or lessening competition in Nigeria.

Regarding point (2), to determine whether the threshold requirement is met, the foreign entity's turnover in foreign currency will be converted to naira at the prevailing official exchange rate as determined by the Central Bank of Nigeria for the corresponding period when the year ended.

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

Parties to a notifiable foreign merger are not permitted to take any steps to implement the merger prior to receiving FCCPC approval.

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 in Nigeria. The definition of 'merger' in the FCCP Act is, however, wide enough to catch takeover bids. These mergers will require FCCPC approval if they meet or exceed the prescribed threshold.

The Securities and Exchange Commission (SEC) has rules applicable to mandatory takeover bids involving public companies. Where a mandatory takeover bid is triggered, parties are required to file with SEC to obtain authorisation to proceed with the takeover as well as for the approval of the bid document and its registration.

There are no special rules governing a voluntary takeover bid. Where one is made, the rules applicable to mandatory takeover bids should be followed.

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 party to a merger must provide information in the application form (FCCPC Form 1 (Notice of Merger)) alongside all relevant supporting documents. The FCCPC requires full disclosure of all relevant information so that it can make an informed decision. Some of the information required in Form 1 includes:

- a non-confidential executive summary of the merger;
- details of the merging parties;
- the nature of the merger;
- the areas of activity of the merging parties;
- the markets on which the merger will have an impact;
- the strategic and economic rationale for the merger;
- a detailed description of the merger, ownership and control; and
- the annual turnover of the merging parties.

The supporting documents that must be filed alongside Form 1 include:

- copies of the final or most recent version of the merger documents;

- minutes of board of directors' and shareholders' meetings where the merger was discussed and approved;
- analysis, reports, studies, surveys, presentations and any comparable documents for the purpose of assessing the merger with respect to its rationale, market shares, competitive conditions, competitors, potential for sales growth or expansion into other product or geographic markets, and general market conditions; and
- analysis, reports, studies, surveys and any comparable documents from the past two years for the purpose of assessing any of the affected markets with respect to market shares, competitive conditions, competitors, or potential for sales growth or expansion into other product or geographic markets.

The FCCPC can revoke its decision to approve or may conditionally approve a merger where the application was based on incorrect information supplied by the merging parties. The FCCPC can also prohibit a merger in its entirety.

Investigation phases and timetable

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

The approval procedure for a large merger has two phases. A Phase I review is conducted within 60 business days of the date of satisfactory notification. This review timeline can be extended by a further 30 business days where the merger raises initial competition concerns and parties propose acceptable remedies. Where this is the case, a Phase II review may not be required. For a Phase II review, the Phase I review period can be further extended by 60 business days where the undertakings propose acceptable remedies to the FCCPC.

It is advisable for merging parties to obtain informal guidance from the FCCPC prior to notification. In fact, the FCCPC advises merging parties to seek pre-merger consultation before filing the formal notification to the FCCPC. The pre-notification consultation may take place in person, by telephone, by video or by other digital means. Pre-merger consultation can be used in resolving matters such as, among others:

- whether a merger is required to be notified;
- the calculation of the annual turnover, value of assets and market share; and
- the merger notification filing fees.

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

For small mergers, the Phase I review is usually concluded within 20 business days of the date of a satisfactory notification. The timeline may be extended by 15 business days where initial competition concerns are raised.

The FCCPC has 60 business days to consider and approve a large merger, and it may extend the waiting period to 120 business days by issuing an extension notice to the parties. If the FCCPC fails to communicate a decision on the merger after 60 business days or after the extended period, the merger will be deemed to have been approved, subject to the powers of the FCCPC to revoke it.

Merging parties may apply to the FCCPC for an expedited process that reduces the merger review period by up to 40 per cent. This process attracts an additional fee of 10 million naira.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test for clearance in Nigeria has two limbs: lessening or preventing competition and protecting public interest. In approving a merger, the Federal Competition and Consumer Protection Commission (FCCPC) will consider if the merger has the potential to substantially lessen or prevent competition and, if so, the FCCPC will determine whether the merger has an overriding public interest. Where the first limb applies, the FCCPC also considers whether the merger is likely to result in any technological efficiency or other pro-competitive gain that would not be obtained if the merger is prevented; in such cases, the FCCPC may on the basis of public interest approve a merger.

In determining whether a merger or a proposed merger is likely to substantially prevent or lessen competition, the FCCPC typically assesses the strength of competition in the relevant market. It also considers the probability that the undertakings in the market, after the merger, will behave competitively by taking into account a number of factors, including:

- the actual and potential level of import competition in the market;
- the level of ease of entry into the market, including tariff and regulatory barriers;
- the level and trends of concentration, and history of collusion on the market;
- the degree of countervailing power in the market;
- the dynamic characteristics of the market, including growth, innovation and product differentiation; and
- whether the business, or part of the business, of a party to the merger or proposed merger has failed or is likely to fail.

If the FCCPC cannot justify a merger on grounds of public interest, it will consider the effect that the proposed merger will have on:

- a particular industrial sector or region;
- employment;
- the ability of national industries to compete in international markets; and
- the ability of small and medium-sized enterprises (SMEs) to become competitive.

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

No. Where a joint venture results in a merger, the substantive test for clearance is the same as for any other merger.

Theories of harm

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

Theories of harm are competition concerns that may arise as a result of a merger. The FCCPC analyses these theories based on the three types of mergers (horizontal, vertical and conglomerate mergers) and adopts a tailored approach to the particular nature of the merger. The basic theories of harm investigated by the FCCPC are divided into the following categories:

- Unilateral effects: these may arise in horizontal mergers, removing the competition between the firms and allowing the merged firm to raise prices profitably.
- Coordinated effects: these may arise in both horizontal and non-horizontal mergers. Here, the merger increases the ability for several firms within the market (including the merged firm) to jointly increase prices because it creates or strengthens the conditions under which they can coordinate.
- Vertical or conglomerate effects: these may arise in both horizontal and non-horizontal mergers. The merger creates or strengthens the ability of the merged firm to use its market power in at least one of the markets, thus reducing rivalry.

Non-competition issues

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

In determining whether a merger is likely to substantially prevent or lessen competition, non-competition issues are relevant in the merger review process. The FCCPC will consider certain public interest issues on four grounds:

- particular industrial sector or region (eg, the FCCPC will consider the security of supply and stable provision of energy);
- the effect of the merger on employment;
- the ability of national industries to compete in the international market; and
- whether the merger affects certain factors that may have an impact on the ability of SMEs to compete.

In determining whether employment is a substantial public interest ground, the FCCPC will consider the overall nature of the transaction (among other things), including:

- the extent of overlap and duplication in the merging parties' activities;
- the rationale of the transaction;
- the intention of the parties relating to employment and the target business;
- any plans to create further employment opportunities within the merged entity; and
- whether there is any planned retrenchment.

Where the ability of national industries to compete in international markets will result in significant economic benefits that flow back to the domestic economy (such as further investment in the domestic economy, job creation opportunities, the introduction of improved technologies and higher-quality products or services), the FCCPC is likely to consider these to be substantial public interest grounds.

Economic efficiencies

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

In cases where the FCCPC finds that a merger will substantially lessen or prevent competition, it may still approve the merger on the basis of economic efficiency gains, other pro-competitive advantages or public interest factors. The FCCPC will investigate the following three categories of efficiencies in its review process:

- allocative efficiency: the degree to which goods and services within the economy are distributed according to consumer preferences;
- technical (productive) efficiency: the state where the optimal combination of inputs results in the maximum amount of output at minimal costs; and
- dynamic efficiency: the optimal introduction of new products and production processes over time.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

The Federal Competition and Consumer Protection Commission (FCCPC) is empowered to approve (with or without conditions) or prohibit a merger pursuant to the Federal Competition and Consumer Protection Act 2018 (FCCP Act). The FCCPC is also empowered to revoke its decision approving or conditionally approving a merger where the approval was based on incorrect information provided by the merging parties.

Remedies and conditions

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

Merging parties may propose remedies to the FCCPC at any time during the review process, including during the pre-notification consultation.

The following remedies are available to merging parties in the resolution of competition issues:

- structural remedies that involve a change in the market structure (commitment to divest assets);
- behavioural or non-structural remedies that are ongoing measures designed to modify, regulate or constrain the future conduct of merging parties (commitment with respect to certain contractual clauses) – examples of behavioural remedies would be granting access to intellectual property rights (such as upgrades of technology or data), granting licences for data or brands, or granting access to the merger parties' customers; and

- a hybrid of both structural and behavioural remedies.

An example is the notice published by the FCCPC on 4 March 2023, requesting stakeholders' comments on the behavioural and structural remedies proposed by the merging parties in the proposed acquisition of a 21.61 per cent stake in Central Securities Clearing System Plc by FMDQ Holdings Plc.

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

The FCCPC must determine the most appropriate remedies offered by the merging parties within the prescribed time frames. Merging parties are encouraged to engage with the FCCPC at the earliest opportunity by submitting a remedies proposal to the FCCPC. This can be done as early as during the pre-merger consultation. During Phase I, the FCCPC and the merging parties have an additional 15 business days for small mergers and 30 business days for large mergers for the merging parties to offer and the FCCPC to accept remedies.

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

The FCCPC takes the same approach to remedies for foreign-to-foreign mergers as it does for domestic mergers.

Ancillary restrictions

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

Generally, agreements among undertakings that have the likely effect of preventing, restricting or distorting competition in any market are unlawful, void and have no legal effect. The FCCPC may grant an exemption where the market share held by each of the merging parties does not exceed the stipulated limit in the relevant market affected by such agreements. The FCCPC may also impose certain ancillary restrictions, such as the limitation of the scope of any restraint of trade by the merger parties.

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 typically contacted as part of the review process. During Phase I of the review process, the Federal Competition and Consumer Protection Commission (FCCPC) typically sends out information requests to the merger parties' key suppliers, competitors and customers to seek their views on the merger and request that they provide information, such as estimated market shares, capacity, switching costs and potential entry or expansion. Where a Phase II review becomes necessary, the FCCPC will

conduct an in-depth review and investigation with respect to the effects of the merger on competition by organising hearings with third parties, including issuing detailed questionnaires to market participants, such as key customers or competitors of the merging entities, or industry experts such as regulators and relevant public authorities.

Complainants may appear before the FCCPC to make submissions during an oral hearing, with or without the merging entities in attendance, to give their opinion on whether the merger is likely to substantially prevent or lessen competition.

Publicity and confidentiality

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

The FCCPC must publish a non-confidential summary of key information about the transaction within five business days of receipt of an application to notify, and within two business days of a complete and satisfactory notification.

The publication of the notice will include an invitation to interested third parties to provide comments on the merger by providing a written submission to the FCCPC within three business days of the publication, in the case of small mergers, and seven business days of the publication, in the case of large mergers.

Merging parties may protect commercial information, including business secrets, from disclosure at the point of notifying the FCCPC of the intended merger. Where a merging party is of the opinion that its interest could be harmed by publication or disclosure of any information, it can submit a separate document clearly marked as 'business secrets' with an explanation as to why it considers such information to be confidential.

Cross-border regulatory cooperation

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

The FCCPC cooperates, to some degree, with antitrust authorities in other jurisdictions. On 31 January 2023, the FCCPC executed a memorandum of understanding with the Egyptian Competition Authority to strengthen both the Nigerian and Egyptian economies, and to promote shared prosperity. The memorandum seeks to address crucial issues for the progress of both agencies' engagement through joint investigation, capacity development, and sharing of information and experiences to ensure that consumers and businesses derive the protection and benefits inherent to the economic expansion that the memorandum enhances.

Further, it is expected that merging parties will notify the FCCPC at the onset if the merger is being notified in any other jurisdictions and, if so, whether the merging parties are willing to offer a waiver to support coordination between the FCCPC and the competition authorities in those other jurisdictions.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

If the merging parties are dissatisfied with the decision of the Federal Competition and Consumer Protection Commission (FCCPC), they may appeal to the Competition and Consumer Protection Tribunal (the Tribunal) to review the decision of the FCCPC. Any merging party dissatisfied with the ruling, award or judgment of the Tribunal may appeal to the Court of Appeal.

Time frame

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

An aggrieved merging party may appeal to the Tribunal within 30 business days of being notified of the FCCPC's decision.

A dissatisfied merging party can further appeal the Tribunal's decision to the Court of Appeal by notice to the Tribunal's Registrar within 30 days of the date of the Tribunal's decision. Appeals can be made to the Supreme Court of Nigeria from the decision of the Court of 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 the first quarter of 2022, the Federal Competition and Consumer Protection Commission (FCCPC) investigated the anticompetitive activities of shipping companies over the high cost of services provided by shippers. These investigations yielded results as significant declines in shipping costs were noticed by the end of the first quarter.

In the second quarter of 2022, the FCCPC investigated Nigerian electricity distribution companies over arbitrary billing and mass disconnection of electricity consumers.

Further, in March 2024, the FCCPC, pursuant to a court order issued by the Federal High Court, Abuja on 16 December 2022, investigated multiple electric power generators, manufacturers and distributors and filed criminal charges against Mikano International Limited for actions that the FCCPC considered obstruction of justice and a lawful investigation.

The FCCPC also investigated complaints of violations of consumer rights by certain digital money lenders with a view to ensuring that operators comply with applicable principles of fairness and ethics within the industry. Pursuant to the investigations into the digital money lending industry, the FCCPC released the Limited Interim Regulatory/Registration Framework

and Guidelines for Digital Lending 2022 to regulate the digital lending space, and to make provisions for the requirements for approval and registration to carry out digital lending in Nigeria. Following the increased risk of default in connection with increased demand for loans through digital money lending platforms, the FCCPC issued a public notice in the first quarter of 2024, reiterating its commitment to the enforcement of the provisions of the Limited Interim Regulatory/Registration Framework and Guidelines for Digital Lending 2022.

Further, in February 2024, the FCCPC investigated a fast-moving consumer goods store in Abuja following reports of anti-competitive activities in relation to misleading pricing practices. This investigation resulted in the temporary closure of the store as a result of its continued violations of the Federal Competition and Consumer Protection Act 2018 (FCCP Act), and its misleading pricing practices.

Reform proposals

35 | Are there current proposals to change the legislation?

At the time of writing, there is no pending proposal before the National Assembly to amend the FCCP Act or repeal 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?

The competition regime and the Federal Competition and Consumer Protection Commission (FCCPC) are still fairly new in Nigeria; thus, there has not been significant case law on merger control. Nonetheless, the FCCPC has reiterated its commitment through various press releases to help curb price gouging and possible violations of consumer rights. Further to this, on 24 July 2023, the FCCPC issued a notice on potential anti-competitive conduct by the Lagos chapter of the Association of Mobile Money and Bank Agents in Nigeria's (ie, point of sale operators) statement of price fixing for its services. The FCCPC directed the association to desist from such illegal price fixing or cartel behaviour and reminded association members of the penalty for non-compliance. In addition, there have been recent concerns about allegations of 'predatory pricing' by foreign airlines in Nigeria against Air Peace, a Nigerian airline. We expect that the FCCPC will address these concerns appropriately in the near future.

While there have been no regulatory enactments or competition cases in the past year, the regulations set out below continue to be relevant.

The FCCPC introduced regulations in 2022, including the Abuse of Dominance Regulations 2022, to provide a regulatory framework for the implementation of Part IX of the Federal Competition and Consumer Protection Act 2018 (the FCCP Act) relating to abuse of dominance and other related matters. Another development is the release by the FCCPC of the Notice of Market Definition 2022, which establishes the framework within which competition

policy is applied by the FCCPC. Defining the term 'market' helps to identify the actual competitive constraints that a relevant undertaking is faced with.

Further, the FCCPC released the Restrictive Agreement and Trade Practices Regulation 2022 for the provision of a regulatory framework for the implementation of the FCCP Act in relation to restrictive agreements and related matters aimed at restricting, preventing or distorting competition, or that have a similar effect.

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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 an annual turnover of 1 billion Norwegian kroner in Norway. Individual threshold is an annual turnover of 100 million kroner in Norway.
Notification trigger/ filing deadline	No deadline for filing. Provided that 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 if the content requirements can be fulfilled and as soon as the parties are ready to go public.
Clearance deadlines (Phase I/Phase II)	After receipt of a notification, the Norwegian Competition Authority (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, and 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 Competition Tribunal handles the appeals against decisions of the NCA made after the implementation date. Some amendments to the Competition Act also apply as of 1 July 2016, including the change of the substantive test for clearance of mergers to that of the EU Merger Regulation.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

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

Merger control in Norway is regulated by Chapter 4 of the Norwegian Competition Act and the Regulation on Notification of Concentrations (the Notification Regulation). Both the Competition Act and the Notification Regulation were amended in 2016 and are to a large extent harmonised with the EU Merger Regulation (EUMR).

The primary enforcer of merger control in Norway is the Norwegian Competition Authority (NCA). All appeals are handled by the Norwegian Competition Tribunal, an independent and court-like administrative body for competition cases, which was established in 2017. Decisions of the Competition Tribunal are appealed to the Gulating Court of Appeal, with a possibility of further appeal to the Norwegian Supreme Court.

Scope of legislation

2 | What kinds of mergers are caught?

Merger control in Norway applies to concentrations.

According to section 17 of the Competition Act, a concentration is deemed to arise where:

- two or more previously independent undertakings or parts of undertakings merge; or
- one or more persons already controlling at least one undertaking, or one or more undertakings, acquire direct or indirect control on a lasting basis of the whole or parts of one or more other undertakings.

The concept of 'concentrations' under the Competition Act is harmonised with the EUMR and encompasses lasting changes to the structure of the market.

Case law from the Court of Justice of the European Union, as well as the European Commission's jurisdictional notice and decisional practice, are relevant to the assessment of the concept of concentrations pursuant to the Competition Act.

3 | What types of joint ventures are caught?

The creation of a full-function joint venture (ie, 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 regime.

The concept of a full-function joint venture in Norway is the same as that under the EUMR.

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

As stipulated in section 17 of the Competition Act, 'control' is defined as the possibility in law or fact to exercise decisive influence over an undertaking. As such, the concept of control in Norway is the same as that under the EUMR.

Minority shareholdings that do not confer control are not subject to a mandatory filing requirement; however, it follows from section 16(a) of the Competition Act that the NCA has the power to intervene against acquisitions of non-controlling stakes where such acquisitions will significantly impede effective competition. Pursuant to section 18(5) of the Competition Act, the NCA may in such cases order the acquirer of a non-controlling stake to submit a notification. The NCA must issue such an order within three months of the date on which the final agreement regarding the acquisition is concluded.

In addition – pursuant to section 16(a) of the Competition Act – if an anticompetitive, non-controlling stake in another undertaking has been achieved through successive purchases, the NCA can intervene against all of the transactions that have taken place within two years of the date of the most recent acquisition.

Under the current Competition Act, the NCA first intervened against an acquisition of a minority shareholding that did not confer control in March 2019, when Sector Alarm sought to acquire 49.99 per cent of the shares in its competitor Nokas.

Another example occurred in 2021 when the NCA ordered Bonnier Books Holding AB to submit a notification of its acquisition of 45 per cent of the shares in Strawberry Publishing AS. The decision to order notification was based on the fact that Bonnier Books had joint control with Egmont Holding AS in Cappelen Damm Holding AS, a competitor of Strawberry Publishing; however, as a result of Egmont's acquisition of Bonnier Books' shares in Cappelen Damm, Bonnier Books was found to no longer have any ownership interests in Cappelen Damm. Following this, the NCA withdrew its order for notification.

Pursuant to section 24 of the Competition Act, the NCA may also require specific market players to provide information on individual markets where, among other things, the degree of local competition is particularly central. This duty to provide information entails that the relevant market actors must provide information on all business combinations – irrespective of whether they entail the acquisition of control – in which the company group in question is involved, and that are below the notification thresholds. As such, some actors may also have a duty to provide information on minority interests. As of May 2024, the NCA has imposed such an obligation on specific market actors in various sectors including, but not limited to, suppliers of concrete, accounting systems, home security systems and electric car charging. The NCA is continuously evaluating whether there is a need to introduce disclosure requirements for additional market players or within other markets.

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 Norwegian 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 those under the EUMR.

Pursuant to section 18(2) of the Competition Act, the NCA can choose to investigate concentrations falling below the thresholds and require a notification if there are reasonable grounds to assume that competition will be affected by the concentration. An order to submit a notification in such cases must be given within three months of the conclusion of the final agreement regarding the concentration or the acquisition of control, whichever comes first.

The NCA has issued a number of orders for notification since the current jurisdictional thresholds were introduced in 2014.

In a 2019 case concerning Sector Alarm's acquisition of 49.99 per cent of the shares in its competitor Nokas, the NCA ordered Sector Alarm to submit a notification about its acquisition of sole control over Nokas' security alarm portfolio, which had revenue that fell below the thresholds. On appeal, the Competition Tribunal upheld the NCA's decision to require a notification.

In 2020, the NCA ordered parties to submit a notification of concentration with competitors below the thresholds on two separate occasions:

- in February 2020, the media group Amedia was ordered to submit a notification about the acquisition of the local newspaper company Nu Publishing, although the latter only had a marginal turnover; and
- in March 2020, the media group Schibsted ASA was ordered to submit a notification about its acquisition of Nettbil AS, which is a start-up that offers a digital marketplace for auction-based car sales to dealers in Norway.

The aforementioned cases underline that the NCA is not afraid to intervene in cases below the notification thresholds, especially in concentrated sectors.

If the turnover thresholds of the EUMR are met, the NCA will not be competent to review the transaction, and no notification will be required in Norway, except for transactions involving markets for products that fall outside the scope of the Agreement on the European Economic Area. The rules of the EUMR on the referral of cases between the European Commission and national competition authorities are largely applicable in Norway through Protocol 24 of the Agreement.

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

Notifications of concentrations that meet the turnover thresholds are mandatory. There are no exceptions from the mandatory notification obligation.

Concentrations that fall below the thresholds and acquisitions of minority shareholdings can be notified voluntarily.

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 Norwegian merger control if they satisfy the turnover thresholds and are liable to have an effect on competition in the Norwegian market or in wider markets that include Norway.

Where the relevant turnover thresholds are met, a transaction is presumed to have local effects on competition in Norway.

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

There is no general legislation in Norway applicable to all foreign investments. However, important amendments of the Security Act of 2019 were proposed in 2023. The object of the proposed amendments is to protect national security interests in relation to foreign direct investments in Norwegian enterprises. The proposed changes can be seen as an overhaul of the current Norwegian investment control system, which is described as too narrow and fragmented, meaning that relevant investments are not detected systematically or to a sufficient extent. As at May 2024, some of the proposed amendments have not yet come into force.

In some sectors, there is special legislation on concessions, limitations on ownership, etc, particularly in the finance, aquaculture, telecommunications and energy sectors.

The Norwegian Media Authority's control over media ownership was abolished on 1 July 2016, rendering a review of changes in media ownership the exclusive responsibility of the NCA.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

There is no deadline for filing pursuant to the Competition Act. However, the Norwegian Competition Authority (NCA) may impose fines for failure to notify a transaction that is subject to notification. Fines for not filing may amount to up to 10 per cent of the notifying party's aggregate group turnover.

However, it should be noted that, in light of the fact that there is no deadline for filing, the practical implication of not filing is a risk of fines being imposed for breaching the standstill obligation.

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

The party or parties responsible for filing will vary.

In the case of mergers, the obligation to file rests with the merging parties jointly.

If two or more undertakings acquire joint control over one or more other undertakings, the obligation to file rests with the acquiring undertakings jointly.

If a single undertaking acquires control over one or more other undertakings, the obligation to notify rests with the acquiring undertaking alone.

No filing fees are required.

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

An automatic standstill obligation applies to all transactions that are subject to notification to the NCA. As such, transactions cannot be implemented until clearance is obtained from the NCA or an express exemption from the standstill obligation has been granted.

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 was in financial difficulties and where the value of the target business could be significantly diminished if the parties could not begin implementation prior to the NCA's clearance. A recent example is from February 2020 when the ultimate owners of the sports retailer Sport1 were given a partial exemption from the standstill obligation to implement the proposed takeover of Sport1's bankrupt competitor, Gresvig.

Pre-clearance closing

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

Infringement of the standstill obligation can lead to significant fines. Fines may be imposed both in case of full and partial integration of the parties' businesses before the standstill obligation has expired.

Pursuant to the Competition Act, the NCA may issue a fine of up to 10 per cent of the undertaking's aggregate group turnover for infringements of the standstill obligation.

In February 2015, the NCA issued a record fine of 25 million Norwegian kroner for failing to notify a concentration. Another, more recent example was provided in August 2020 when the NCA imposed a fine of 20 million kroner on NorgesGruppen for failing to notify its acquisition

of retail space in Sædalssvingene 3 in Bergen; however, this decision was later revoked by the NCA.

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 transactions as those that are applicable to other notifiable transactions; however, there are no examples from the NCA's decisional practice of sanctions having been applied for closing before clearance in foreign-to-foreign transactions.

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

The Competition Act allows for an exemption from the standstill obligation on a case-by-case basis. To obtain an exemption, the parties to a foreign-to-foreign merger would normally be required to demonstrate that neither the Norwegian market nor wider markets that include Norway are affected. An exemption on this basis has so far only been granted in one case.

Public takeovers

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

A specific regulation provides for an exemption from the automatic standstill obligation for public takeover bids. The regulation corresponds to article 7(2) of the EU Merger Regulation (EUMR).

Documentation

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

The level of detail required in the preparation of a filing primarily depends on the existence of affected markets (ie, an overlap between the businesses of the undertakings concerned) and the position of the undertakings in those markets. The requirements are relatively extensive if the undertakings have a combined market share of more than 20 per cent in any relevant market or more than 30 per cent in markets that are vertically connected. These market share thresholds correspond to Form CO of the Implementing Regulation under the EUMR.

Notifications must include the following categories of information:

- contact information;
- description of the transaction;
- descriptions of the undertakings concerned;
- descriptions of affected markets, including as a minimum a description of the market structure, lists of the most important competitors, customers and suppliers, and a description of barriers to entry;
- account of any efficiencies;

- information on whether the concentration is subject to notification to other competition authorities;
- the latest version of the agreement giving rise to the concentration, including any attachments; and
- annual reports and financial statements of the undertakings concerned.

Notifications must be submitted in Norwegian if there are affected markets.

Any business secrets must be clearly marked in the notification, and all confidentiality claims must be substantiated for the notification to be regarded as complete by the NCA. Furthermore, a proposal for a public version of the notification is to be included with the notification. The NCA is required to publish some basic information about every notification on its website.

The Regulation on Notification of Concentrations includes a system for simplified notifications. On conditions similar to those of the simplified procedure under the EUMR, the notifying parties may submit a simplified notification. Such notifications can be submitted in Norwegian, Swedish, Danish or English.

If the parties do not provide the required level of detail in the notification, the deadlines for the NCA's handling of the case will not start running until all required information is provided. Sections 29 and 32 of the Competition Act provide a legal basis to impose administrative fines against undertakings or, in the most severe cases, criminal sanctions against natural persons if the parties provide the NCA with incomplete, incorrect or misleading information.

Similar to other national and supranational competition authorities, the NCA has recently strengthened its focus on misleading or incorrect information. In March 2020, the NCA fined the Norwegian state-owned train operator Vygruppen 7.5 million Norwegian kroner for providing incorrect information when notifying a joint venture. From the NCA's decision, it follows that there is a fairly low threshold for such sanctions if the NCA first finds that incorrect or misleading information has been provided regarding relevant topics.

This fine was later repealed in February 2021, as the Competition Tribunal found that the NCA had not fulfilled its duty to investigate whether the substantive condition set out in section 29(1)(d) of the Competition Act had been met, as required by section 17 of the Public Administration Act.

Investigation phases and timetable

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

The typical steps and phases of the investigation mirror those set out in the EUMR, and primarily consist of an initial investigative phase (Phase I) with the possibility for a further in-depth investigative phase (Phase II). However, while pre-notification in practice is required in cases before the European Commission, pre-notification is optional in Norway.

Although parties are under no obligation to consult with the NCA before notifying a merger, it is often advisable to approach the NCA at an early stage to present the main issues and the

available data, and to enter into pre-notification discussions – in particular in cases that may be considered complex or that may raise concerns.

Confidentiality is respected so that discussions with the NCA may take place before the deal is public.

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

Phase I

Counted from the date a complete notification is submitted, the NCA has 25 working days to either approve the transaction or notify the parties that it may intervene against the transaction. In its notice, the NCA must briefly state its reasons for possibly intervening. If no notice of possible intervention is given, the transaction is cleared. In non-problematic cases, the NCA's practice is to clear the transaction before the Phase I deadline by way of an informal notice.

If the notifying parties propose remedies within 20 working days of their submission of the notification, the initial NCA deadline is extended by 10 working days. In such cases, the NCA may accept and make binding the proposed remedies before the extended deadline.

Phase II

If the NCA gives notice of possible intervention, it has 70 working days (ie, 45 additional working days) from receipt of the notification to either accept and make binding any remedies presented by the notifying parties or to issue a reasoned statement of objections. If the notifying parties present remedies later than 55 working days after their submission of the notification, the deadline is extended accordingly.

The parties have 15 working days to submit their comments to the statement of objections. After the parties submit their comments, the NCA has 15 working days to issue its final decision. If remedies are presented to the NCA after it has issued its reasoned statement of objections, the final deadline can be extended by 15 working days. The NCA can also, if requested by the parties, extend its final deadline to issue a decision with 15 additional working days. In such cases, the maximum timetable for clearance is 145 working days.

In light of the foregoing, the NCA's deadlines are primarily extended owing to incomplete notifications and the presentation of remedies by the parties.

If the NCA considers intervention in Phase II and 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?

Under the Competition Act, the Norwegian Competition Authority (NCA) shall intervene against concentrations that would result in a significant impediment to effective competition (SIEC), in particular as a result of the creation or strengthening of a dominant position. This substantive test is harmonised with that of the EU Merger Regulation (EUMR).

In applying the SIEC test, the NCA must also take into account whether the transaction generates efficiencies that outweigh any anticompetitive effects, as well as arguments related to a potential failing-firm defence. The NCA's practice indicates a very high threshold for clearing a concentration owing to efficiencies or the failing-firm defence, but there are examples of both.

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

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 section 10 of the Competition Act (which corresponds to article 101 of the Treaty on the Functioning of the European Union).

Theories of harm

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

The NCA will typically consider possible unilateral, coordinated, vertical and conglomerate effects of a concentration when evaluating whether it would cause a SIEC; however, we note that conglomerate effects do not seem to be a focus of the NCA.

Non-competition issues

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

Non-competition issues cannot be taken into account by either the NCA or the Competition Tribunal when reviewing merger cases.

Economic efficiencies

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

The NCA's practice indicates a very high threshold for clearing concentrations based on efficiencies.

In an anomalous decision from April 2017, the NCA cleared Telia's acquisition of the mobile service provider Phonero based on efficiencies, although it found that the concentration

would cause a SIEC. This outcome was most likely owed to service providers having considerable and easily verifiable marginal costs compared with mobile network operators.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

If the substantive test is met, the Norwegian Competition Authority (NCA) can either prohibit the transaction or accept and make binding appropriate commitments by the notifying party or parties to remedy the concerns identified.

Remedies and conditions

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

Both structural and behavioural remedies can be offered to remedy competition issues. Divestitures are in general considered more likely to succeed than behavioural remedies. Proposed remedies are, however, assessed on a case-by-case basis, and the NCA has recently approved both categories of remedies.

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

For a remedy to be approved, it must be considered by the NCA as being sufficient to alleviate the competition concerns raised by the transaction.

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

Since the Competition Act entered into force in 2004, the NCA has required remedies in four transactions in which both parties were headquartered outside Norway:

- First, the NCA required the divestiture of the Norwegian subsidiaries of one of the parties to a case regarding oil drilling services. The concentration was, however, cleared on appeal.
- Second, the NCA accepted behavioural remedies in a case regarding ticket services. On appeal, the behavioural remedy was replaced by a structural remedy – namely, the divestment of the acquirer's Norwegian subsidiary.
- Third, the NCA imposed a structural remedy in a case regarding laboratory services. The acquirer was required to divest its Norwegian subsidiary.
- Fourth, the NCA accepted behavioural commitments in a case regarding two Sweden-based suppliers of spare car parts.

Ancillary restrictions

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

A decision by the NCA to clear a transaction also covers restrictions directly related to and necessary to the implementation of the notified concentration, provided that there is no significant impediment to effective competition. Ancillary restrictions in Norway are treated in the same way as those under the European Commission's notice on 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?

Third parties, and in particular customers and competitors, are regularly involved in the merger procedures before the Norwegian Competition Authority (NCA), primarily as sources of market information. Third parties also have the possibility to bring arguments before the NCA on their own initiative.

The NCA will normally conduct relatively extensive investigations into proposed concentrations, including by sending written requests for information to third parties. This is particularly the case with regard to transactions that go to Phase II. Furthermore, the NCA will usually turn to third parties if in doubt regarding:

- whether to close a case in Phase I;
- whether to carry out market test; and
- in connection with its assessment of any proposed remedies from the merging parties.

The formal rights of third parties and complainants are limited to a right to see non-confidential versions of the documents in the case file. Additionally, if requested, affected third parties will normally be allowed a meeting with the NCA to express their views on a concentration.

Publicity and confidentiality

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

Although the general rule pursuant to the Public Administration Act is that all documents are public, the NCA is obliged by law not to disclose business secrets and other confidential information. As such, information regarding market shares, strategies and other competitively sensitive information is kept confidential.

Any business secrets must be clearly marked both in the notification and in all other documents submitted during the merger procedure, and any secrecy claim must be substantiated.

Furthermore, a proposal for public versions of the submitted documents must be submitted alongside the notification.

The NCA is required to publish some basic information about every notification on its website. It is also required to publish non-confidential versions of any adopted commitments or prohibition decisions. It will, in practice, also make public the main reasons for closing cases in which a Phase II investigation has been initiated.

Cross-border regulatory cooperation

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

The NCA is part of the European Competition Network and exchanges basic information about notified concentrations within the network on a regular basis.

The NCA has close contact with the other Nordic competition authorities, both on a general basis and in individual merger cases where such contact is advantageous to the NCA's case handling. In 2018, a new cooperation agreement between the Nordic authorities entered into force, expanding the level of cooperation. The Nordic competition authorities may now, to a greater extent, exchange confidential information with each other, and get access to information submitted by companies located in another Nordic country.

The NCA is also a member of the European Free Trade Association (EFTA) Network of Competition Authorities. The members are the EFTA Surveillance Authority and the national competition authorities of the EFTA states party to the Agreement on the European Economic Area. The NCA is also regularly invited to participate in meetings and working groups of the European Competition Network; however, these networks are not primarily established to be forums for discussions about individual merger cases.

Finally, the NCA is a member of the International Competition Network, and regularly participates in meetings and discussions within the Organisation for Economic Co-operation and Development involving competition issues.

JUDICIAL REVIEW

Available avenues

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

All decisions from the Norwegian Competition Authority (NCA) can be appealed to the Competition Tribunal. Only decisions from the Competition Tribunal may be subject to judicial review.

Time frame

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

Decisions from the NCA to intervene against concentrations may be appealed to the Competition Tribunal within 15 working days. Appeals are sent to the NCA, which has 15 working days from the date of receipt to amend its decision or forward it to the Competition Tribunal.

The Competition Tribunal must provide its decision no later than 60 working days after its receipt of the appeal.

Decisions from the Competition Tribunal may be appealed to the Gulating Court of Appeal. The appeal must be submitted within three months of the parties' receipt of the Competition Tribunal's decision. In a case before the Gulating Court of Appeal, there are no fixed deadlines; the case will follow the normal procedure for civil cases.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

Since the Competition Act entered into force in 2004, the Norwegian Competition Authority (NCA) has intervened in a total of 50 merger cases (as at May 2024). Of the intervention decisions, 33 cases were approved subject to remedies and the remaining 17 were blocked. Only a small minority of those cases have been appealed, and only three cases have been appealed to the Competition Tribunal after it was established as the appellate body in 2017.

In February 2021, an appeal was lodged to the Gulating Court of Appeal concerning the NCA's prohibition of the proposed acquisition of Nettbil AS by Schibsted ASA. The NCA later appealed the decision of the Gulating Court of Appeal to the Norwegian Supreme Court. In February 2023, the Supreme Court upheld the Gulating Court of Appeal's decision, thereby overturning the NCA's prohibition decision.

Of the NCA's 50 intervention decisions, four concerned transactions in which both parties were headquartered outside Norway.

The NCA has recently paid particular attention to the grocery market, the dairy products market, retail banking, books, broadband, mobile telephony, taxis, security services, local and regional newspapers, and recycling.

Finally, the NCA has continued its focus on the effect on competition in local markets and its use of quantitative methods (eg, diversion ratios and gross upward pricing pressure index analyses).

Reform proposals

35 | Are there current proposals to change the legislation?

Proposal for a new market investigation tool for the NCA

In March 2023, The Norwegian Government launched a public consultation regarding a proposal for a new market investigation tool for the NCA. The proposal consists of the following steps:

1. Information gathering: The proposal empowers the NCA with wide powers for information gathering. Any person, natural or legal, must comply with any request for information. Non-compliance risk being sanctioned with fines.
2. Opening market investigation: Based on the gathered information, the NCA can decide to open an investigation if the NCA considers that there is a risk that competition is restricted. The NCA is obligated to conduct a public consultation on the draft decision to open a market investigation, but the final decision to open an investigation cannot be contested through an appeal.
3. Market investigation: The NCA will assess if there are circumstances which "*significantly restricts or are capable of significantly restricting competition*". During the market investigation, the NCA will rely on its general competence to order any legal or natural person to provide such information as is required by the NCA to perform it's tasks under the Norwegian Competition Act.
4. Procompetitive remedies or commitments: The NCA can impose both structural and behavioural remedies if necessary to reduce or eliminate the restriction of competition. The NCA may impose interim measures during the market investigation. Also, if an undertaking under investigation offers commitments, the NCA may issue a decision making the commitments binding for the undertaking.

Most respondents to the public consultation were negative to the proposal, while the NCA had a positive view on the proposal. In particular, many respondents were concerned that potential remedies could be too invasive, considering that the affected undertakings have not yet violated the law. Respondents were also concerned with a perceived lack of legal safeguards and legal certainty.

The proposed amendment is still in an initial phase. After the public consultation deadline expired in June 2023, the Government has not provided any updates on the advancement of the proposal.

Proposal for new competence to the NCA in regards to public procurement regulations

There is currently a proposal to amend the Competition Act, in connection with an overhaul of the public procurement regulations. The proposal concerns a new competence for the NCA to handle complaints regarding breaches of the public procurement regulation's provision on illegal direct procurement, and to give the NCA the competence to impose sanctions if an illegal direct procurement has taken place. The proposed amendment is in an initial phase, and is still under review as at May 2024.

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 Norwegian Competition Authority (NCA) only intervened in one transaction in 2023, out of a total of 113 filings. The prohibition decision issued by the NCA was not appealed. Although this number of interventions is not quite on par with its practice in previous years, the small variation in the number of interventions is probably a matter of coincidence based on case-specific circumstances.

ØB Group/Betongvarer

The proposed acquisition of Betongvarer by ØB Group was the only prohibition decision adopted by the authority in 2023. ØB Group is a national supplier of ready-mix concrete. The target, AS Betongvarer, is also a supplier of ready-mix concrete but only a local player. Specifically, the target had only one site producing ready-mix concrete, with revenues of under €2 million.

ØB Group is one of the entities that is subject to a special notification regime in Norway. This entails an obligation for ØB Group to always notify the NCA about the deal even if it falls under the standard jurisdictional thresholds, when entering into concentrations within specific markets. Therefore the parties submitted a voluntary notification in December 2022.

In its assessment, the NCA took a relatively simplistic approach to their assessment on geographic market definition. It assessed where possible customers were located, and their distance from the nearby ready-mix concrete producers, and compared this to where the revenues from these producers were in fact achieved. This showed that only the acquirer and the target were active within the same geographic market. The NCA essentially reviewed this as a 2-1 merger, and therefore prohibited the transaction in May 2023.

Norwegian/Widerøe

The acquisition of Widerøe by Norwegian was one transaction that at first seemed likely to be prohibited by the NCA. The transaction involved Norwegian, a low cost airline that operates domestic routes in Norway and also international routes. Widerøe is a regional airline headquartered in Bodø. Widerøe operates mainly on domestic routes in Norway with a relatively small number of passengers.

Norwegian submitted a filing to the NCA in June 2023. On 17 November, the parties were notified that the NCA might prohibit the acquisition. The NCA was concerned that the acquisition would significantly weaken competition in the market for air travel. Following the responses from the parties and further analysis, the NCA concluded that there were not sufficient grounds for prohibiting the acquisition, and therefore approved the acquisition in late December 2023.

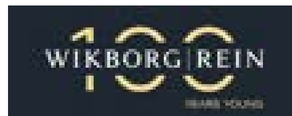
Nordea/DanskeBank

In October 2023, Nordea submitted a filing to the NCA of its intended acquisition of Danske Bank's personal banking customer portfolio. Both parties are active in the market for banking services, which is considered a significant market for Norwegian consumers.

In November 2023, the NCA announced that it needed to further analyse the transaction in phase II. One of the bigger concerns was that the acquisition would create a significant impediment to effective competition in the market for mortgages. However, after a closer assessment of the transaction, the NCA finally approved the acquisition in December 2023.

Legislative developments

Previously, only the private party involved in an infringement had the right to appeal decisions from the Competition Tribunal to the Gulating Court of Appeal. In July 2023, new legislation was passed which gave the NCA a right to appeal decisions from the Competition Tribunal. An important point to underline in this context, is that the NCA's right to appeal is limited to cases involving potential breaches of the prohibitions rules, meaning that NCA's right to appeal does not apply to merger control cases.



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Peru

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Notification trigger/ filing deadline	Transactions that involve a transfer or change of control over a company or part of it and fulfil concurrently the following thresholds: • The total sum of the value of annual sales or gross income or value of assets in Peru of the companies involved in the concentration operation has reached, during the fiscal year prior to that in which the operation is notified, a value equal to or more than 118,000 Peruvian tax units (UITs) (584.1 million soles). • The value of annual sales or gross income or value of assets in Peru of at least two of the companies involved in the concentration operation, during the fiscal year prior to that in which the operation is notified, is individually equal to or greater than 18,000 UITs (89.1 million soles). There is no filing deadline. Reportable concentration acts must be notified to the Competition Commission (the Commission) at the National Institute for the Defence of Competition and Protection of Intellectual Property (INDECOPI) and cannot be implemented unless and until INDECOPI grants clearance.
Clearance deadlines (Phase I/Phase II)	The first-phase review period is 30 business days, which commences only after a notification is deemed complete. The Commission has up to 25 business days to determine the completeness of the notification. If the Commission has serious concerns that the transaction may generate restrictive effects upon competition, it can initiate a second-phase review that may last for up to 120 business days.
Substantive test for clearance	The substantive test for clearance requires the evaluation of the effects of the transaction to identify whether it produces a significant restriction of competition in the markets involved. This evaluation includes different economic factors.
Penalties	Depending on the seriousness of the infringement, fines of up to 12 per cent of the gross revenue of the offender or its economic group on all their economic activities in the year prior to the issuance of the decision by INDECOPI.
Remarks	INDECOPI may act ex officio in cases where reasonable indications of a concentration operation that may generate a dominant position or affect competition in the market are identified. This power allows a review by the authority regardless of whether the concentration exceeds the thresholds.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

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

The legislation relevant to merger control comprises Law No. 31112 (the Merger Act), which establishes the prior control of corporate mergers, and its regulation approved by Supreme Decree No. 039-2021-PCM (the Regulation). The Merger Act and the Regulation were approved in January and March 2021 and entered into force on 14 June 2021.

Through this legislation, the government enforces a mandatory merger control regime that is applicable to all fields of economic activities and derogates from Law No. 26876, which only imposes mandatory pre-notification and clearance requirements for vertical or horizontal concentrations in the fields of electricity generation, transmission and distribution.

The National Institute for the Defence of Competition and Protection of Intellectual Property (INDECOPI), Peru's multipurpose market overseer, consolidates all merger review responsibilities. The Competition Commission at INDECOPI (the Commission), which investigates and sanctions anticompetitive practices, is in charge of conducting the initial phases of review and issuing clearance decisions.

The National Directorate of Investigation and the Promotion of Competition (formerly the Technical Secretariat of the Commission) will provide administrative support, issue guidelines and conduct non-compliance investigations. The Tribunal for the Defence of Competition at INDECOPI will act as an appellate body.

In the case of operations involving economic agents from the financial system that collect deposits from the public or are insurance companies, the economic agents must submit an authorisation request to the Superintendency of Banking, Insurance and Private Pension Fund Administrators (SBS). The SBS determines whether the operation involves economic agents that present relevant and imminent risks that compromise the stability of the economic agents or of the systems they comprise.

If the SBS determines that the operation does not present a relevant and imminent risk, it informs the requesting economic agents that they must present an authorisation request to INDECOPI; otherwise, only the SBS's authorisation is necessary. The concentration operation proceeds if authorisation by the SBS and INDECOPI is obtained, provided that the latter is required and if the relevant thresholds are fulfilled.

The economic agents who have been granted authorisation to operate by the Superintendency of the Securities Market (SMV) and participate in concentration operations must obtain from the SMV the authorisations that are required in accordance with the special regulations on the matter. The request must be submitted to the SMV prior to or simultaneously with the request for authorisation from INDECOPI. The concentration operation proceeds if the authorisation of the SMV and INDECOPI is obtained.

Scope of legislation

2 What kinds of mergers are caught?

The Merger Act defines 'concentrations subject to clearance' as transactions that involve a transfer or change of control over a company or part of it, including:

- the merger of two or more previously independent economic agents into any form of company or entity;
- the acquisition of rights by one or more economic agents that, directly or indirectly, allow the holder to, individually or in association, exercise control over another economic agent;
- the incorporation of two or more independent economic agents of a joint company, a joint venture or any other form of association agreement in which the former share control over a new autonomous entity that performs an economic activity; and
- the acquisition by an economic agent, by any means, of direct or indirect control over productive operating assets of another economic agent.

3 What types of joint ventures are caught?

The Merger Act and the Regulation apply to operations in which two or more independent economic agents incorporate a joint company, a joint venture or any other form of association agreement in which the independent economic agents share control over a new autonomous entity that performs an economic activity.

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

The Merger Act defines 'control' as the power to exercise lasting and decisive influence over the composition, deliberations or decisions of an undertaking's decision-making bodies, allowing it to determine the latter's competition strategy. Such influence may be exercised through ownership or rights of use over all or part of the assets of a company, or rights or agreements that may allow to control the undertaking's decision-making bodies.

Minority acquisitions do not require notification unless they confer control.

Thresholds, triggers and approvals

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

The Merger Act has two concurrent financial thresholds that are determined by the value of a Peruvian tax unit (UIT). According to the Threshold Guidelines, the UIT applicable for the analysis of the thresholds is the one in force the year prior to the notification; hence, if a concentration is filed in 2024, the applicable UIT will be the one for 2023.

In 2023, the value of one UIT is 4,950 soles. The value of the UIT is updated each year.

A concentration is subject to the prior control procedure when the following is fulfilled:

- the total sum of the value of annual sales or gross income or the value of assets in Peru of the companies involved in the concentration during the fiscal year prior to that in which the operation is notified is equal to or more than 118,000 UITs. If a concentration is filed in 2024, the applicable UIT will be the one for 2023; hence, this threshold is equivalent to 584.1 million soles; or
- the value of annual sales or gross income or the value of assets in Peru of at least two of the companies involved in the concentration operation, during the fiscal year prior to that in which the operation is notified, is individually equal to or greater than 18,000 UITs. If a concentration is filed in 2024, the applicable UIT will be the one for 2023; hence, this threshold is equivalent to 89.1 million soles.

To calculate the sales, gross income or value of the assets in Peru obtained by the companies involved, the following rules are considered, depending on the type of operation:

- For mergers of two or more independent economic agents, under any form of corporate organisation of the merging entities or of the entity resulting from the merger or the constitution by two or more independent economic agents of a joint company, joint venture or other similar modality that implies the acquisition of joint control over one or more economic agents that perform functions of an autonomous economic entity, the annual sales, gross income or the book value of the assets of the economic agents participating in the operation and their respective economic groups are considered.
- For acquisitions by one or more economic agents, direct or indirectly, of the rights that provide control over the whole or part or other economic agent, the annual sales, gross income or the book value of the assets of the acquiring agent and the economic group of the latter, and the annual sales, gross income or the book value of the assets of the target and the companies that are controlled by the latter are considered.
- For acquisitions by an economic agent, by any means, which has direct or indirect control over the productive operating assets of other economic agents, the annual sales, gross income or the book value of the assets of the acquiring agent and its economic group, and the sales or gross income that have been generated by the acquired operating productive assets or the book value of such assets are considered.

When determining the value for both the individual and combined threshold, only one of the two parameters must be used (ie, only sales or gross income, or the book value of assets). Likewise, if there is another currency besides the sol in the financial statements or documents to be provided, the exchange rate that will be used is the average exchange rate of the 12 months prior to the notification issued by the Peruvian Central Bank.

The authority will consider as a single concentration operation the set of acts or operations carried out between the same economic agents within a period of two years. The concentration must be notified before the last transaction or act that would exceed the thresholds indicated above is carried out.

INDECOPI may act ex officio where reasonable indications of a concentration that may generate a dominant position or affect competition in the market are identified. This allows the authority to conduct a review regardless of whether the concentration exceeds the thresholds.

The Regulation identifies the special circumstances that would motivate action by INDECOPI, including:

- horizontal concentrations carried out in concentrated markets;
- horizontal concentrations that involve the acquisition of an economic agent with a small market share, but with growth potential, or of an innovative economic agent that has recently entered the market;
- horizontal concentrations in which the acquiring economic agent or its economic group has previously carried out concentrations that involved the acquisition of a competitor; or
- other concentrations that have the potential to generate possible significant restrictive effects on competition.

INDECOPI may exercise this power in respect of concentrations that have an impact on the Peruvian market (ie, those that involve economic agents who have carried out economic activities or generated income, sales or cash flows in the country in the 12 months prior to the formal closing of the operation). INDECOPI may only ex officio review any act of concentration within one year of its formal closing.

INDECOPI cannot review ex officio operations that completed the closing acts necessary to make the transfer or change of control that were effective before the Merger Act came into force.

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

The filing system is mandatory for operations that produce effects in Peru, qualify as concentrations under the Merger Act and meet the relevant thresholds. Concentrations that do not fulfil these requirements may be notified voluntarily. In either case (mandatory or voluntary filing), the concentration cannot be implemented until INDECOPI grants clearance.

Economic agents may also consult INDECOPI to determine whether the operation must be notified. The opinion issued by INDECOPI in this consultation is not binding.

To date, no exceptions to notification have been developed by the Merger Act or the Regulation.

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

The Merger Act is applicable to any operation that produce effects in Peru (ie, local effects test); hence, any operations carried out abroad must be notified if they:

- qualify as a concentration under the Merger Act;
- fulfil the relevant thresholds; and
- directly or indirectly link economic agents who carry out economic activities in the country or include economic agents that offer or demand goods or services in the market and carry out acts of concentration that produce or may produce effects in all or part of Peru.

The Merger Act does not contain explicit provisions on carve-outs that set specific legal requirements allowing parties to close a transaction outside Peru before clearance has been issued by INDECOPI.

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

No special regulations have been developed that describe additional rules for foreign investment.

In the case of operations involving economic agents from the financial system that collect deposits from the public or are insurance companies, the economic agents must submit the authorisation to the SBS to determine whether the operation only requires an authorisation from the latter (if it involves economic agents that present relevant and imminent risks that compromise the stability of the economic agents or of the systems they comprise) or also from INDECOPI (provided that the latter is required and if the relevant thresholds are fulfilled).

Economic agents who have been granted authorisation to operate by the SMV and participate in a concentration must obtain authorisation from the SMV and INDECOPI.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

There is no specific deadline. Reportable concentration acts must be notified to the Competition Commission (the Commission) at the National Institute for the Defence of Competition and Protection of Intellectual Property (INDECOPI) and cannot be implemented unless and until INDECOPI grants clearance.

The authority will consider as a single concentration operation the set of acts or operations carried out between the same economic agents (including their economic groups) within a period of two years. The concentration operation must be notified before the final transaction or act that would exceed the relevant thresholds is carried out.

Failing to file a reportable operation may be subject to a fine of up 500 Peruvian tax units (UITs), which is equivalent to 2.58 million soles for 2024 (for fining purposes, the current UIT equivalent to 5,150 soles should be considered), provided that the amount does not exceed 8 per cent of the gross revenue of the offender or its economic group of all their economic activities in the year prior to the issuance of the decision by INDECOPI. INDECOPI may also seek to void and break up the unauthorised concentration.

No infringement cases have been analysed at the time of writing; however, in 1999, INDECOPI imposed sanctions (150 UITs) for not filing under Law No. 26876.

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

In mergers or concentrations that involve the acquisition of joint control, the application must be filed by the economic agents involved in the transaction. For all other cases, the application must be filed by the economic agent acquiring control over the other economic agents.

A fee will be required for filing. The value of the fee is 91,629.40 soles.

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

The first-phase review period is 30 business days. This period commences only after a notification is deemed complete. The Commission has up to 25 business days to determine the completeness of the notification.

If the Commission has serious concerns that the transaction may generate restrictive effects upon competition, it can initiate a second phase review that may last for up to 120 business days (90 business days that may be extended for another 30 business days).

If a decision has not been issued upon the expiration of the review periods, the transaction will be deemed to have obtained clearance.

Decisions issued by the Commission may be appealed to the Tribunal for the Defence of Competition at INDECOPI (the Tribunal). The Tribunal must issue its determination within 90 business days.

Reportable concentration acts cannot be implemented unless and until INDECOPI grants clearance.

Pre-clearance closing

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

Closing or integrating the activities of the merging businesses before clearance is subject to fines up to 1,000 UIT, equivalent to 5.15 million soles for 2024, provided that the amount does not exceed 10 per cent of the gross revenue of the offender or its economic group of all their economic activities in the year prior to the issuance of the decision by INDECOPI, if executing a concentration operation before:

- it has been submitted to the prior control procedure;
- the decision of the Commission has been issued; or
- the transaction is deemed to have obtained clearance because a decision has not been issued upon the expiration of the review periods.

INDECOPI may also seek to void and break up the unauthorised concentration.

No infringement cases have been analysed at the time of writing; however, in 2009, INDECOPI imposed sanctions (100 UITs) for gun-jumping practices under Law No. 26876 (the concentration itself was approved).

Concentrations that have been closed before clearance will not have any legal effects in Peru.

Finally, the implementation of a concentration denied by INDECOPI is subject to fines of up to 12 per cent of the gross revenue of the offender or its economic group from all their economic activities in the year prior to the issuance of the sanctioning decision by INDECOPI.

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

Foreign-to-foreign mergers that produce effects in Peru may be subject to sanctions if they are closed before clearance.

No infringement cases have been analysed at the time of writing.

However, in 2009, INDECOPI imposed a sanction (100 UITs) for gun-jumping practices under Law No. 26876 for a cross-border operation that had local effects. In that case, the sanctioned party was a Peruvian company controlled by a European group that acquired control over another European company with a controlling share over another company in Peru.

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

Law No. 31112 (the Merger Act) and Supreme Decree No. 039-2021-PCM (the Regulation) do not contain explicit provisions on carve-outs that set specific legal requirements allowing parties to close a transaction outside Peru before clearance has been issued by INDECOPI.

Economic agents may consult INDECOPI to determine whether the proposed solution might be acceptable to permit closing before clearance. The opinion issued by INDECOPI in this consultation is not binding.

Public takeovers

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

No specific rules have been issued for public takeover bids in the Merger Act or the Regulation; hence transactions that involve a transfer or change of control and fulfil the thresholds shall be notified to INDECOPI.

Takeover bids have specific regulations issued by the Superintendency of the Securities Market in the relevant field.

Documentation

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

The Regulation and the notification forms detail the documents required for the concentration application. The request for authorisation of the concentration operation submitted to the Commission must include (in addition to the date and number of the payment receipt), among other things, documents that support the following information:

1. Identification data of the notifying economic agent.
2. Identification data of the legal representative of the notifying economic agent, as well as the indication of their powers. If the powers granted abroad are not registered, they must be endorsed by the Peruvian consul and the Ministry of Foreign Affairs of Peru, or apostilled, as appropriate.
3. Description and objective of the concentration operation and identification of the economic agents involved in it. For these purposes, the following must be included:
   - a copy of the final or most recent version of the agreement or contract signed on the concentration operation or, if an agreement or contract on the concentration operation has not yet been signed, documents that evidence the real and serious intention of the economic agents to execute the operation (eg, a memorandum of understanding or letter of intent);
   - a copy of the minutes of the meetings of the management and administration bodies of the companies involved at which the concentration operation, the reasons for its execution and its effects have been discussed; and
   - a copy of the reports, studies, presentations or internal or external reports that have been prepared or commissioned to evaluate or analyse the concentration operation, the reasons for its execution and its effects.
4. Description of the ownership and control structure of each of the economic agents involved in the operation, and their respective economic groups.
5. Identification of the kinship, property or management ties existing between each of the economic agents described in point (4) with respect to other companies operating in the country.
6. Identification and description of the markets involved in the concentration operation. For such purposes, 'markets involved' are understood to be the markets in which the economic agents that directly intervene in the concentration operation and their respective economic groups participate. A copy of studies, reports, analyses, surveys and any comparable document corresponding to the identification and definition of the markets involved, the structure of supply and demand, differentiation of goods or services and intensity of competition, entry barriers and exit from the market, and the existence of cooperative agreements must be provided.
7. When applicable, a detailed description of the efficiencies related to the concentration operation and how these are transferred to consumers, as well as the opportunity to transfer such efficiencies.
8. Identification of the countries in which the concentration operation has been or will be notified and, if applicable, its processing status. When appropriate, the pronouncements

of the authorities must be provided. This may be reported after the application is submitted.

9 The financial statements of the economic agents involved for the fiscal year prior to the date of the notification.

Failure to provide information within the period determined by the authority may be subject to a fine of up 500 UITs, which is equivalent to 2.58 million soles for 2024, provided that the amount does not exceed 8 per cent of the gross revenue of the offender or its economic group on all their economic activities in the year prior the issuance of the decision by INDECOPI.

Failure or denial to provide information or supplying wrong or missing information may be subject to a fine of up 1000 UIT, which is equivalent to 5.15 million soles for 2024, provided that the amount does not exceed 12 per cent of the gross revenue of the offender or its economic group on all their economic activities in the year prior the issuance of the decision by INDECOPI.

Investigation phases and timetable

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

For notification, the Merger Act establishes that, prior to the initiation of the control procedure, economic agents may consult the National Directorate of Investigation and the Promotion of Competition (formerly the Technical Secretariat of the Commission) for guidance purposes to determine whether the transaction is within the scope of the law or what information is required for prior control, among other aspects. The opinions of the National Directorate are not binding.

If there is no certainty about the potential effects of the concentrations or if there is a potential risk that the authority may analyse the concentration ex officio (eg, the concentration involves a sensitive or high exposure market), regardless of whether the concentration act exceeds the thresholds, it would be advisable to file a voluntary notification.

Prior approval proceedings are organised in phases. The first-phase review period is 30 business days, which commences only after a notification is deemed complete. The Commission has up to 25 business days to determine the completeness of the notification.

If the Commission has serious concerns that the transaction may generate restrictive effects upon competition, it can initiate a second-phase review that may last for up to 120 business days. In the latter case, the Commission will issue a publication announcing the beginning of the second phase to allow third parties to file relevant information.

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

The first-phase review period is 30 business days. This period commences only after a notification is deemed complete. The Commission has up to 25 business days to determine the completeness of the notification.

If the Commission has serious concerns that the transaction may generate restrictive effects upon competition, it can initiate a second-phase review that may last for up to 120 business days. It is not possible to speed up a request.

To date, the authorisations filed before INDECOPI have been granted without conditions, during the first phase, within two and a half months of the date of filing. In second phase cases, authorizations have been granted, with conditions, within 10 months of the date of filing.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test requires the evaluation of the effects of the transaction to identify whether it produces a significant restriction on competition in the markets involved.

This test should include, among other things:

- the structure of the involved market;
- the actual or potential competition of the economic agents in the market;
- the evolution of the supply and demand of the products and services in market in question;
- the distribution and commercialisation sources;
- legal or other barriers (technological, investment, horizontal or vertical restrictions) that impede access to the market;
- the economic and financial power of the companies involved;
- the creation or strengthening of a dominant position; and
- the generation of economic efficiencies.

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

No.

Theories of harm

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

There are no specific theories of harm contained in Law No. 31112 or Supreme Decree No. 039-2021-PCM. However, under Law No. 26876, the National Institute for the Defence of Competition and Protection of Intellectual Property has usually analysed the market concentration, unilateral effects, vertical foreclosure, common ownership effects and conglomerated effects, among other things.

Non-competition issues

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

To date, no cases have been decided on explicit non-competition issues.

Economic efficiencies

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

One of the factors that the authority considers in the substantive test is the generation of economic efficiencies through the transaction.

In the case of economic efficiencies, the parties shall evidence that the efficiencies:

- are a part of concentration;
- compensate for the identified restrictions on competition and focus on increasing the wellness of the consumers;
- can be transferred to the consumers; and
- are verifiable by the authority.

If successful, the transaction will be cleared.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

The National Institute for the Defence of Competition and Protection of Intellectual Property (INDECOPI) is entitled to void and break up an unauthorised concentration (ie, by ordering the dissolution of the operation that involved the merger or the acquisition of assets or shares) to undo the anticompetitive effects of the operation.

Law No. 31112 (the Merger Act) establishes that concentrations that have been closed before clearance will not have any legal effects in Peru.

Remedies and conditions

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

The Merger Act authorises parties to offer commitments to remedy competition concerns that arise owing to the concentration. Neither the Merger Act nor Supreme Decree No. 039-2021-PCM describe any of the remedies that could be offered.

INDECOPI may authorise a concentration subject to the fulfilment of a condition of conduct.

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

In the first phase, parties may offer commitments to remedy competition concerns that arise during the evaluation within 15 business days of the date the authorisation request is deemed complete. Commitments can be modified within 10 business days of the submission, if applicable.

The first phase will be suspended by up to 15 business days, which may be extended by 15 additional business days. After this period, the Competition Commission at INDECOPI (the Commission) may deny or authorise the commitments.

In the latter case, the Commission will consult private sector agents and public entities for their opinion regarding the proposed commitments. Those parties will submit their comments within five business days, after which the Commission will issue its final decision.

In the second phase, commitments may be submitted within 40 business days of the beginning of the phase and can be modified within 10 business days after that period. The second phase will be suspended by up to 15 business days (this period may be extended by 30 additional business days). After this period, the Commission may deny or authorise the commitments.

In the latter case, the Commission will consult private sector agents and public entities for their opinion regarding the proposed commitments. Those parties shall submit their comments within 10 business days, after which the Commission will issue its final decision.

Regarding the conditions imposed by INDECOPI, the authority establishes a period for its review. The Commission determines whether upon expiration the condition is maintained, overturned or modified, and the decision may be appealable. During the procedure, the Commission may request information from other public entities or private sector agents. If the condition of conduct is modified, it cannot be more burdensome for the authorised economic agent than the one previously imposed. During the review, the condition remains in force.

On the other hand, if the Commission or an economic agent considers that there is a change in the conditions of competition in the market during the review period established, it may request the Tribunal for the Defence of Competition at INDECOPI (the Tribunal) (second instance) to reverse or modify the referred condition.

In that procedure, the Tribunal may request information from other public entities or private sector agents. If the condition of conduct is modified, it cannot be more burdensome for the authorised economic agent than the one previously imposed. If the Tribunal does not issue its final resolution within the legal term, positive administrative silence will be applied (for which the order made at the request of a party would proceed).

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

No foreign-to-foreign mergers in which the authority has required remedies have been observed at the time of writing.

The Merger Act is applicable to any operation that produces effects in Peru (ie, local effects test); however, under Law No. 26876, there are no cases involving foreign-to-foreign mergers with no effects in Peru (or with no corporate vehicles in the country).

Ancillary restrictions

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

No cases regarding ancillary restrictions have been analysed at the time of writing.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

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

Third parties with a legitimate interest may access the file and present relevant information to the Competition Commission (the Commission) at the National Institute for the Defence of Competition and Protection of Intellectual Property (INDECOPI). This must be done within 10 business days of the day after the publication of the resolution to initiate the second phase of an application, or the publication of the resolution to initiate the ex officio review of concentrations on the INDECOPI website.

The Commission may consult private sector agents and public entities for their opinion regarding the commitments offered by the parties.

Private sector agents who have not requested to be part of the procedure and public entities can only send an opinion on the concentration operation when the authority requires it or when they wish to formulate one.

Publicity and confidentiality

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

The final resolutions of merger control operations will be published on INDECOPI's website, which is publicly accessible.

Until the procedure is completed at the administrative level, only the parties involved in the concentration and third parties with legitimate interests may know the status of the file;

however, if a transaction qualifies for the second phase, the authority will issue a summary of that decision.

The involved parties may request that the information provided is kept confidential. This must be approved by the Commission. If so, only a non-confidential version will be made public.

Cross-border regulatory cooperation

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

Within the framework of an international agreement or an arrangement with a foreign competition authority, INDECOPI may investigate anticompetitive conduct in the national territory of Peru and may exchange information, including confidential information, with the competent authorities of countries that are part of the agreements or conventions.

INDECOPI has cooperated with many international authorities and jurisdictions to uncover anticompetitive practices in Peru and abroad.

JUDICIAL REVIEW

Available avenues

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

The final decision issued by the Competition Commission (the Commission) at the National Institute for the Defence of Competition and Protection of Intellectual Property (INDECOPI) may be appealed within 15 business days of its issuance. The Tribunal for the Defence of Competition (the Tribunal) at INDECOPI will act as an appellate body. The final resolution issued by the Tribunal will end the administrative procedure.

A decision issued by the Tribunal may be questioned or appealed via judicial review within three months of its notification.

Time frame

33 | What is the usual time frame for appeal or judicial review?

At the time of writing, since Law No. 31112 (the Merger Act) and Supreme Decree No. 039-2021-PCM came into force on 14 June 2021, no cases have been appealed; however, the Merger Act establishes that the Tribunal shall issue its final decision within 90 business days of the date the appeal was filed.

Judicial review does not have a clear time frame.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

At the time of writing, 40 cases have been approved in the first phase without conditions and two in second phase with conditions. There are presently two first-phase cases and three second-phase cases pending. No cases have been rejected to date.

To date, there have been no cases in which sanctions have been issued, or ex officio investigations carried out.

Reform proposals

35 Are there current proposals to change the legislation?

No.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

No updates at this time.

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Poland

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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 to implement the concentration, which means that the notification has to be filed before implementation. There is a bar on closing.
Clearance deadlines (Phase I/Phase II)	The Office for Competition and Consumer Protection (OCCP) has one month to issue its decision for a simple case in Phase I. Complex cases may enter into the second stage, which gives the OCCP an additional four months to complete its review.
Substantive test for clearance	The OCCP clears a concentration that does not result in a significant impediment to effective competition (SIEC) in the market, in particular, by the creation or strengthening of a dominant position in the market (in practice, the SIEC test applies).
Penalties	If an undertaking has implemented a concentration without regulatory clearance, the general principle is that the OCCP may fine the undertaking by way of a decision, with the fine not to exceed 10 per cent of the revenue earned in the accounting year preceding the year within which the fine is imposed. In addition to that, the OCCP may fine a notifying party with a fine not exceeding 3 per cent of the revenue earned in the accounting year preceding the year within which the fine is imposed for: a) providing false information in the notification; b) not submitting the information requested by the president of the OCCP or submitting false or misleading information; c) preventing or obstructing the initiation or proceeding of a search or not adhering to the rules of the search specified in the the Act of 16 February 2007 on competition and consumer protection.
Remarks	Not applicable.

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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, among other things, 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: the Guidelines on the Criteria and Procedure of Notifying the Intention of Concentration to the Office for Competition and Consumer Protection (the Guidelines), 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 the procedural aspects of the Act.

Additionally, the OCCP also published the Clarifications Concerning the Assessment by the OCCP of the Notified Concentrations on its website. The Guidelines provide a discussion and explanation of the substantive aspects that are taken into account in the framework of the assessment of concentrations carried out by the OCCP.

In Poland, the OCCP is the sole authority responsible for the enforcement of competition rules, including the merger control regime.

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 take direct or indirect control over one or more undertakings, whether by acquisition of stocks, shares or other securities, or otherwise;
- several undertakings create one joint undertaking; and
- an acquisition by an 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 regarding 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.

There is no such certainty with regard to the treatment of situations where a company exists on the market for some time and then a new shareholder acquires a minority interest (which does not give control over the company). The Guidelines seem to suggest that such a situation also needs to be notified; however, it is difficult to agree with this approach (the acquisition of a non-controlling minority interest was removed from the list of concentration types several years ago).

It may be thus assumed that a situation where one undertaking creates a joint venture and then transfers it to another party shall be notifiable when this is a functionally linked process of creation of a new undertaking, albeit divided into stages and not a situation in which 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 that, whether individually or jointly and taking into account all legal or factual circumstances, allow it to exercise a decisive influence upon another undertaking or other undertakings; in particular, such powers are created by:

- holding directly or indirectly a majority of votes at the shareholders' meeting or general meeting of shareholders, also in the capacity of a pledgee or user, or on the management board of another undertaking, also under agreements with other persons;
- the right to appoint or dismiss a majority of members of the management board or supervisory board of another undertaking, also under agreements with other persons;
- appointing members of one undertaking's management board or supervisory board to form more than half of the members of another undertaking's management board;
- holding directly or indirectly a majority of votes in a dependent partnership or at the general meeting of a dependent cooperative, also under agreements with other persons;
- the ownership of all or some of the assets of another undertaking; or
- an agreement for the management of another undertaking or transfer of profit by such undertaking.

The above is not an exhaustive 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, an acquisition of control may also take place in the 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 a capital group in proportion to its interest in the jointly controlled undertaking.

In the case of an 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 an acquisition of property of another undertaking, the turnover mentioned above relates to the turnover generated by the buyer's group as well as to the turnover generated by the acquired property.

In the case of separate concentrations occurring between the same groups of undertakings taking place within a period of two years, the turnover figures of the acquired targets have to be added together. This is meant to prevent undertakings from circumventing the obligation to notify by splitting a larger transaction into smaller parts that would not qualify for 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 transactions that have de minimis impact on competition in the relevant markets are caught by the merger control regime if only one of the thresholds is met. There are, however, exemptions from this general rule.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Under the Act, filing is mandatory when the jurisdictional thresholds are met and no exemptions from the notification obligation apply. The obligation to notify an intention of concentration does not apply in the following cases:

- the turnover generated by the undertaking over which the control is to be taken (the target undertaking and its subsidiaries) in the territory of Poland did not exceed the equivalent of €10 million in each of the two financial years preceding the notification;
- the turnover of none of the undertakings taking part in a merger or founding a joint venture exceeded in the territory of Poland €10 million in each of the two financial years preceding the transaction;

- where control is taken over an undertaking or a group of undertakings belonging to the same capital group and simultaneously a part of the assets of the undertaking or the group of undertakings belonging 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, on its own account or on 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 of the date of the acquisition or takeover and that:
    - this institution does not exercise the rights arising from these stocks or shares, except the right to dividend; or
    - this institution exercises these rights solely to prepare the resale of the entirety or part of the undertaking or 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 the undertaking does not exercise the rights arising from these stocks or shares, except the right to sell;
- the concentration arises as an effect of insolvency proceedings, excluding cases where control is to be taken over or the assets are to be acquired by a competitor or a participant of the capital group to which the competitors of the undertaking to be taken over or whose assets are to be acquired belong; and
- the concentration applies to undertakings participating in the same capital group.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

There may be situations where foreign-to-foreign transactions will have to be notified to the OCCP. Under the Act, the notification obligation (even with respect to a transaction to be finalised outside the territory of Poland) exists where a concentration causes or may cause effects in the territory of Poland.

The Act is silent on what criteria are to be taken into account when assessing the effect. According to the Guidelines, it can be presumed that if at least one of the participants of the concentration (in practice, any member of the capital group to which the buyer, the seller or the party to the joint venture 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 OCCP may mean that, particularly in the case of the formation of joint ventures, many foreign-to-foreign concentrations will formally be caught by the Polish merger control rules. For example, if Company A and Company B intend to form a joint venture in the United States, and Company A and Company B have joint worldwide turnover in excess of €1 billion, it will be sufficient for the obligation to notify to arise if Company A or Company B, or any entity from the capital group of Company A or Company B, has any (even insignificant) turnover in Poland.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no special rules with respect to foreign investment; however, there are special rules for financial institutions when it comes to the calculation of turnover for threshold purposes. Moreover, according to other special legislation, transactions in sectors such as banking may require special approval from regulatory bodies other than the OCCP.

On 30 September 2015, the Act on Control of Certain Investments (ACCI) entered into force. According to the ACCI, the Minister of Energy and the prime minister become 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 must notify the Control Body and get the required approval. The obligation to inform the Control Body applies 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 scope of application of the ACCI also covers transactions undertaken by firms operating in the production of rhenium; the extraction and processing of metal ores used in the manufacture of explosives, weapons and ammunition; and 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 and 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 to object.

A decision is preceded by a non-binding recommendation presented to the Control Body by the Consultative Committee, which is 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 the right to sell such shares) and in declaring the invalidity of resolutions adopted by the decision-making bodies of companies.

In 2020, Poland adopted an amendment to the ACCI as part of the Anti-Crisis Shield 4.0, which expands the state's control over M&A transactions in some strategic sectors of the economy. These provisions came into force on 24 July 2020, and there is a risk that they will be deemed to also apply to ongoing transactions (those not closed before that date).

The new provisions were prepared to protect Polish industry against hostile takeovers performed by investors from outside the European Union, the European Economic Area

(EEA) and the Organisation for Economic Co-operation and Development (OECD). The carve-out for investors from the OECD was added at the very last stage of the parliamentary works, and it significantly softened the impact of the new law as not only investors from the European Union but also those from Australia, Canada, Israel, the United States, Japan and South Korea will benefit from the carve-out.

The new law will have a significant impact on M&A transactions as it:

- concerns enterprises active in numerous sectors of the economy;
- establishes a low materiality threshold for transactions (transactions regarding enterprises with an annual Polish turnover exceeding €10 million are subject to notification);
- grants the competent authority (ie, the OCCP) far-reaching powers (one of the conditions triggering their objection is the mere potential of a threat to the public policy, public security or public health in Poland); and
- provides for strict financial penalties, as well as imprisonment for natural persons, in the event of a violation of the duties resulting from the draft law.

The list of entities covered by the new provisions (protected entities) is relatively long and includes, among others:

- public companies;
- entities that hold assets listed as being ‘critical infrastructure’; and
- entities doing business in certain sectors of the economy, namely:
    - IT (software developers dedicated to certain specified sectors);
    - entities involved in electricity generation (both conventional and renewables);
    - entities involved in the transmission and storage of fuel and gas;
    - telecommunication companies;
    - entities in the medical and pharmaceutical industry (the manufacture of medical devices and instruments, as well as medicines and other pharmaceutical products, etc);
    - entities involved in the generation, transmission and distribution of heat; and
    - entities involved in the processing of meat, dairy, grain, fruits and vegetables.

Only transactions undertaken by entities from outside the European Union, EEA and OECD are subject to control.

The Act concerns actions that may lead to the acquisition of dominant control or ‘significant participation’ (meaning acquiring or crossing the 20 per cent or 40 per cent shareholding thresholds). The new law covers not only the direct acquisition of shares but also indirect acquisitions through subsidiaries, asset deals and all types of indirect means of taking control or gaining influence over another entity (eg, mergers, demergers, amendments to articles of association and redemptions of shares, as well as all other transactions or acts resulting in the indirect acquisition of significant participation or control, including those performed on the basis of foreign transactions under foreign law).

The new law will only apply to cases where the target enterprise has achieved a turnover in excess of €10 million in Poland in at least one of the previous two financial years.

The OCCP is intended to undertake the control of foreign investments; therefore, it is possible that certain transactions may, in practice, require two approvals from the same government body, issued on the basis of different conditions.

In principle, a transaction must be notified prior to its consummation. Unfortunately, the amended ACCI is imprecise in this regard; in some sections, it imposes an obligation to notify prior to the conclusion of ‘any agreement creating an obligation to acquire’ and, in relation to public companies, requires notification prior to the announcement of a public tender offer (which may indicate that it is impermissible to announce a public tender offer conditional on approval – in practice, this may create certain difficulties, including, for example, the leak of the intention to announce a tender offer prior to it being announced). The transaction should not be completed prior to clearance being granted or the lapse of the statutory time period for the issue of the clearance decision.

Approval of a transaction that does not raise any issues, or confirmation that the transaction is not subject to control, will be given within 30 business days. Cases requiring review from a public security or public policy perspective will be completed within 120 calendar days (where the clock stops any time the OCCP seeks additional information).

Any acquisition made without the required notification shall be invalid. Moreover, the draft provides for both very strict financial (fines up to the maximum amount of 50 million zlotys) and penal (up to five years’ imprisonment) responsibility for non-compliance with the new provisions. These penalties may be imposed both on the entity acquiring an interest without notification and natural persons acting on its behalf.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Act of 16 February 2007 on competition and consumer protection (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, meaning 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 Office for Competition and Consumer Protection (OCCP) making its decision (the guillotine effect). Clearance by the mere passage of time is rather unlikely to occur.

The Act provides for a worldwide bar on closing.

If an undertaking has implemented a concentration, even if unintentionally, without clearance from the OCCP, 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 the cases described above, the concentration has already been implemented and restoration of competition in the market is otherwise impossible, 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. In 2012, the OCCP issued two decisions and, in 2013, it issued only one decision imposing fines for non-compliance with the obligation to notify the concentration.

Among more recent cases, note two decisions from 2017:

- In Decision No. DKK-86/2017 of 5 June, the grocery wholesaler Bać-Pol SA was fined 527,000 zlotys for failure to notify the takeover of a portion of assets of another company, Klementynka. The OCCP initiated proceedings against Bać-Pol after receiving information that one of its subsidiaries implemented a concentration without prior authorisation from the OCCP.
- In Decision No. DKK-145/2017 of 19 September, a consumer eggs producer had to pay 339,000 zlotys for failure to notify its takeover of a portion of the assets of another company operating in the same relevant market.

No penalties on individuals (management board members) were imposed.

The highest imposed fine by the OCCP was the fine of 29 billion zlotys imposed on Gazprom in 2020. In addition, fines of over 234 million zlotys were also imposed on the five other participants of the joint venture concerning the Nord Stream 2 pipeline, which was not properly notified to the OCCP. Establishment of the planned joint venture company was earlier notified to the OCCP as a concentration, but the filing was withdrawn after receiving objections from the OCCP. The OCCP subsequently accused the participants of the joint venture of implementing the concentration without receiving the required consent. The fine, however, was quashed by the Polish court of first instance. The Court of Appeals upheld the judgment of the court of first instance.

The only cases that have been made public are cases where the concentration was consumed (ie, the transaction was closed or the joint venture was formed and registered) prior to clearance. Moreover, such fines were imposed on undertakings that had already notified a merger, but their actions were 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 control;
- all undertakings participating in the creation of a joint undertaking jointly; 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.

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 within which it must issue its decision lapses.

Pre-clearance closing

12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Under the Polish merger control regime's sanctions, closing before clearance is treated similarly to failure to notify. As a result, the consequences for both types of infringements are the same. In practice, the OCCP rarely imposes fines for such infringements.

13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

In the case of closing a 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 the undertakings can be fined. The same rule applies equally to Polish and foreign-to-foreign mergers.

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 decision issued by the OCCP (Decision No. DOK-37/2007 of 6 April 2007, *Olympus Capital Holdings Asia/Arysta Life Science*), the OCCP seemed to hold that a concentration may be completed before clearance if the parties refrain from implementing the Polish aspect that has local effects in Poland.

In this decision, the OCCP did not question the rationale for completing the transaction before clearance; it only pointed out that no relevant evidence was offered to show that the parties refrained from implementing the aspect of the transaction that had local effects in Poland.

Because there is only one such decision and the Guidelines on the Criteria and Procedure of Notifying the Intention of Concentration to the OCCP (the Guidelines) suggest that this scenario is unlikely, such solutions will always be associated with risk and require 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 to have been 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 the Regulation of the Council of Ministers of 23 December 2014 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 (eg, data identifying undertakings involved, the authorities authorised to represent them and the subject of the actual activity as well as a 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. The application usually runs to around 35 to 40 pages, plus attachments.

The LID has to be submitted together with certain documents, such as excerpts from relevant commercial registers for the applicants, executed versions of the most relevant transaction documents, the most recent financial statements of the parties concerned and structure charts of the parties concerned. Documents prepared in a foreign language must have a sworn Polish translation.

In terms of possible sanctions, under the Act, providing untrue data in a transaction notification may result in a financial sanction of up to €50 million. Such fines are rather uncommon in practice.

In 2012, the OCCP imposed on UPC Polska a fine of 775,000 zlotys for providing false information regarding possessing document materials for an assessment of the pending merger proceedings (Decision No. DKK-6/2012 of 30 January 2012, *UPC Polska/Aster*). In short, UPC applied to the OCCP for consent to acquire Aster. The OCCP requested the undertaking to complete the notification, among other things, by providing information on whether the company and the to-be-acquired entity possessed any reports, analyses or marketing enquiries concerning the access market to pay TV in Poland.

During the proceedings, it transpired that UPC had concealed the market analysis containing significant information for the examined transaction. The document not revealed by the company confirmed, among other things, the OCCP's opinion, stating that the concentration would have a significant impact on local markets of particular cities. This was contrary to UPC's stance, which claimed during the pending proceedings that the market of pay TV was to be defined on a nationwide level.

There have been cases where OCCP has imposed fines on third parties (competitors, clients and suppliers of the parties to the concentration) for not providing information in the course of a market test carried out in a merger control case. Such penalties were relatively low and aimed at 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 had 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 of 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.

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, nor are any fast-track procedures available.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The Act sets out a two-stage merger review procedure; the first stage takes up to one month, which is potentially extendable to five months if the concentration requires an in-depth review in the second stage.

There are no official pre-notification contacts before the formal submission of the notification; however, the Guidelines indicate that it is possible to contact the OCCP before filing.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Office for Competition and Consumer Protection (OCCP) will clear concentrations that do not result in significant impediment to competition (SIEC) in the market, in particular, by the creation or strengthening of a dominant position in the market. This means that, in practice, the OCCP follows the SIEC test.

The Act of 16 February 2007 on competition and consumer protection (the Act) defines ‘dominant position’ as a position of an 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 and decisions under article 20.2 of the Act, which offers clearance despite SIECs.

20 | Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures; full-function and non-full-function joint ventures are caught by the Act.

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 cause a SIEC in the market, including by the creation or strengthening of a dominant position, in any case where it is justifiable – 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 although the concentration in question could pose a significant risk to competition at that particular moment, the following reasons should be taken into account: the transaction would contribute to economic and technological development, and would have a positive impact on the national economy as well as other benefits.

In Decision No. DOK-29/07 of 8 March 2007, the OCCP pointed out that the concentration in question 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, *PGE/Energa*) suggest that the current approach is different and the OCCP is unwilling to follow the above rationale.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The Act does not explicitly provide for efficiencies to be a reason to clear a transaction that may otherwise in principle harm competition; however, in some cases, the OCCP took that into account when assessing the transaction.

In one of its decisions (Decision No. DKK-1/2011 of 13 January 2011 *PGE/Energa*), the OCCP took into account economic efficiencies in the process of examining the concentration in question; however, the OCCP eventually prohibited this transaction.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Office for Competition and Consumer Protection (OCCP) may, by means of a decision, prohibit the implementation of a 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 (eg, order a division of the undertaking).

The OCCP may also impose a fine if the transaction is closed despite its veto.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. Under the Act of 16 February 2007 on competition and consumer protection (the Act), the OCCP may clear a concentration provided the undertakings concerned fulfil certain conditions (conditional clearance).

These conditions may involve, in particular:

- disposal of all or some of the assets of one or several undertakings;
- divesture of control over an undertaking or undertakings, in particular by disposing a block of stocks or shares, or dismissing one or several persons from the management or supervisory board; or
- granting a competitor exclusive rights.

The decision will determine the time limit for meeting the conditions.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

In the case of transactions that are considered to significantly restrict competition on the relevant market (owing to substantial aggregation of market share or reduction of strong competitors on the market), the OCCP will likely issue a 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 tends to impose structural rather than behavioural remedies, such as the obligation to permanently dispose of specified assets (eg, Decisions No. DKK-9/09 of 25 February 2009, No. DKK-64/10 of 12 July 2010, and No. DKK-128/2011, No. DKK-70/11 and No. DKK-40/2014 of 31 March 2014).

Regarding behavioural remedies, in Decision No. DKK-49/08 of 19 June 2008, the OCCP gave clearance on the condition that the undertaking withdraw from and not initiate any actions designed to acquire any ownership rights in the other undertaking. In Decision No. DKK-156/2017 of 4 October 2017, the OCCP gave clearance on the condition that the acquirer, within the agreed time, would sell all the electric energy produced in one of the assets of the acquired company through the commodity exchange.

In Decision No. DKK-51/2019 of 25 February 2019, the OCCP combined both structural (divestment of part of the business) and behavioural (certain length of the contracts with clients and price limits for certain clients) remedies to allow the concentration and protect the competition landscape of the markets concerned.

In practice, parties submit their proposal of commitments to the OCCP when the latter raises concerns over a transaction. Although the commitment proposal is subject to the OCCP's revision, 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 OCCP 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 the enforcement of commitments. The OCCP obliges the acquiring party to submit such information within a period 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 also apply to foreign-to-foreign mergers.

In Decision No. DOK-36/2004 of 18 May 2004, the OCCP gave clearance on the condition that an undertaking based in France 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 Concentrations 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 regarding their conformity with the ban on anticompetitive agreements and therefore, if the undertakings refuse to change them, it may result in the instigation of the antimonopoly proceedings to assess whether the anticompetitive arrangement infringes Polish competition law. This

means that, in principle, the OCCP does not make clearance for concentrations dependent on the previous amendment of ancillary restraints.

To sum up, although the Guidelines Regarding the Assessment of Concentrations 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 when 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. This means that they do not have access to files nor can they appeal against the decision; however, third parties may at their own initiative file comments, or they may be asked by the Office for Competition and Consumer Protection (OCCP) to file input regarding important aspects of the case.

The OCCP keeps a register of all notified concentrations, which may be helpful for third parties. It is available on the OCCP's website.

When it comes to complicated transactions, the OCCP will, in principle, organise a market test and send questionnaires to competitors, clients and suppliers, allowing them to take a position.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The fact that a notification has been submitted, the date of submission, the notifying party and the current status of the proceedings are available at the OCCP's website.

During antimonopoly proceedings, undertakings are obliged to disclose all information available, including information that may involve business secrets. The OCCP may, on an ex officio basis or on application of the undertaking concerned, limit access to some information for other parties (if there is more than one party to the proceedings). In such a case, the undertaking should file all documents in two versions: one confidential and the other non-confidential, the latter being available for all parties.

In March 2017, the OCCP published guidelines providing further clarification on the conditions the undertaking should meet to successfully apply for limitations on other parties' access to the case files (including merger control proceedings) on the grounds of business secrets protection.

As of January 2015, the notifying party is obliged to submit a brief (up to 500 words) description of the intended concentration. This description is posted on the OCCP's website immediately after notification and should therefore be drafted in such a way that it does not contain secret information.

Furthermore, in the case of imposing conditions on an undertaking, the OCCP, following an application from 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 the case of the above-mentioned application, the OCCP does not involve such deadlines in the publicly available version of the decision. This is aimed at protecting the commercial interests of the undertakings concerned.

There is a general obligation on 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 proceedings. 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 are those involving the competition authorities of other EU member states. OCCP officials attend meetings of the Advisory Committee established by the EU Merger Regulation, which provides detailed rules of cooperation between member states and the European Commission in concentration cases.

There are currently three binding bilateral agreements between the OCCP and its Ukrainian and Hungarian counterparts.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

An appeal arises from a decision of the Office for Competition and Consumer Protection (OCCP) to the Court of Competition and Consumer Protection (the Court). 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 three months following 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, which is also open for appeal. Where justified, prior to transmitting an

appeal to the Court, or repealing or amending its decision, the OCCP may also perform additional activities to clarify objections presented in the appeal.

To the best of our knowledge, one merger appeal case – a prohibition decision in the energy sector (Decision No. DKK-1/2011, *PGE/Energa*) – was upheld by the Court. A second case, the OCCP's prohibition for the takeover of Merlin by NFI Empik (Decision No. DKK-12/2011 of 2 March 2011), which was an intended concentration in online sales of non-specialised books and music CDs, was withdrawn by the undertaking that lodged the appeal a few days before the Court hearing. In another case, the OCCP issued a prohibition decision in the media sector that forbade Agora SA from acquiring the Eurozet sp z.o.o. media group (Decision No. DKK-1/2021 of 7 January 2021). The decision, however, was quashed by the Court of Appeals in 2023 and the concentration was ultimately implemented.

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?

The source of the following data is the Office for Competition and Consumer Protection (OCCP).

In 2022, there were 342 new concentration control proceedings before the OCCP.

OCCP activities	Number
Issued decisions	
Concentration approval	327
Phase I decisions	317
Phase II decisions	10
Conditional approval	1
Other data	
Discontinuance of proceedings	3
Return of the notification of the intended concentration to the applicant	21
Proceedings moved to Phase II	12
Average time of proceedings conducted in Phase I	38 days*
Average time of proceedings conducted in Phase II	283 days†
Cases are given an opinion in terms of the impact of concentration on the Polish market in connection with proceedings before the European Commission	316
New explanatory proceedings	2
* The actual case settlement period, taking into account the dates subject to exclusion under article 96, section 2 of the Act. † The actual case settlement period, taking into account the dates subject to exclusion under article 96(a), section 8 of the Act.	

Concentration approvals between 2018 and 2022

	2018	2019	2020	2021	2022
Concentration approvals	228	261	242	299	327
Conditional approvals	0	5	1	4	1

Key cases

In Decision No. DKK- 69/2022 of 2 March 2022, the OCCP unconditionally cleared in Phase II the acquisition of Mall Group (e-commerce site active in central and eastern Europe) and WE|DO (a delivery service operating on the territories of Czech Republic and Slovakia) by Allegro.pl (an e-commerce platform and an e-commerce retailer). Allegro.pl, as well as its own e-commerce platform, operates price comparison site Ceneo.pl, together with online ticket selling service eBilet.pl. Due to such an established position in the e-commerce market, the investigation was moved to phase II, where it was found that this acquisition will not have a fundamental impact on the market.

In Decision No. DKK-82/2022 of 16 March 2022, the OCCP conditionally cleared the merger of Polski Koncern Naftowy Orlen (PKN Orlen) and Polskie Górnictwo Naftowe i Gazownitwo (PGNiG). PKN Orlen is active in the sectors of refining, petrochemicals, liquid fuels and elec-tricity. In addition, it is the largest recipient of natural gas in Poland and is an active seller of natural gas. PGNiG, on the other hand, is active in the extraction of natural gas, its import and storage, as well as the distribution and sale of the gas. It is worth noting that PGNiG was the largest supplier of natural gas in Poland.

The OCCP conducted market research into the wholesale and retail markets for natural gas. During the research, it was found that, in the retail market, PGNiG is growing as market leader and both of the parties have been excluding competition. The key matter that was considered was the ownership of Gas Storage Poland by PGNiG. The ownership was considered by the OCCP to incentivise preferential treatment for PGNiG for storage of the natural gas. Therefore, after the merger the joint entity would, in the view of OCCP, be able to limit the use of storage facilities to other participants in the aforementioned markets.

In the end, the decision was given upon the condition that the parties would sell Gas Storage Poland. Dividing the ownership of storage facilities from its management enabled more access to the infrastructure by external parties and had the effect of creating a better environment for importing natural gas to Poland.

Reform proposals

35 | Are there current proposals to change the legislation?

All changes to the merger control regime in Poland were covered by the amendments to the Act of 16 February 2007 on competition and consumer protection that came into force on 18 January 2015.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

No updates at this time.

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Portugal

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Voluntary or mandatory system?	Mandatory.
Notification trigger/ filing deadline	Combined market share in Portugal higher than 50 per cent; combined market share in Portugal equal to or higher than 30 per cent and lower than 50 per cent, provided that the individual turnover in Portugal of at least two participant undertakings exceeds €5 million; or combined turnover in Portugal of more than €100 million, provided that the individual turnover in Portugal of at least two participant undertakings exceeds €5 million. Two or more concentrations made within a period of two years among the same individuals or legal entities, which considered individually would not be subject to prior notification, are deemed a sole concentration subject to such prior notification when the set of concentrations reaches the turnover figures. 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, the date of disclosure of the announcement of the acquisition of a controlling shareholding in a listed company, or, in the case of a public procurement procedure, after the definitive award of the contract and before the closing. When the participant undertakings show serious intent to conclude an agreement or, in the case of a public takeover bid or of an exchange offer, the undertakings show public intent to carry out the offer, the concentration may be notified before the above deadlines. Projected concentrations may be the object of pre-notification assessment by the Competition Authority (the Authority).
Clearance deadlines (Phase I/Phase II)	Phase I: within 30 working days of the notification's effective date (extendable 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 clearance. Phase II: within 90 working days, counted as of the effective date of the notification (extendable, 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 clearance.
Substantive test for clearance	Concentrations falling within the scope of Law No. 19/2012 of 8 May 2012, as amended, 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.

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Penalties	Penalties are applied within a sanctioning procedure launched by the Authority, which shall be subject to the opportunity principle, pursuant to which the Authority may, on public interest grounds, grant different degrees of priority in respect of the matters it is called to assess. Failure to file: fines up to 10 per cent of the total worldwide turnover in the year preceding that of the decision; periodic penalty payments up to 5 per cent of the average daily total worldwide turnover in the year preceding that of the decision, applied per day. Violation of obligation of suspending transaction until clearance: fines of up to 10 per cent of the total worldwide turnover in the year preceding that of the decision. Non-compliance with the decision that prohibited the transaction or that approved it with conditions or obligations attached: fines up to 10 per cent of the total worldwide turnover in the year preceding that of the decision, legal transactions being null and void.
Remarks	Filing subject to fees. The obligation of suspending a transaction may be derogated by the Authority.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Merger control in Portugal 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.

Following a complex legislative process, the Act was recently amended by Law No. 17/2022 of 17 August 2022, which transposed the ECN+ Directive into Portuguese law. The ECN+ Directive is aimed at empowering the competition authorities of EU member states to be more effective enforcers and to ensure the proper functioning of the internal market. The amended version of the Act entered into force on 16 September 2022.

Decree-Law No. 125/2014 of 18 August 2014, which was also amended by Law No. 17/2022, adopted and approved the current statutes of the Competition Authority (the Authority).

The 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, the management report and the accounts, including the balance sheet). The member of government in charge of economic affairs (currently the Minister of Economy) may also be called to intervene in merger control proceedings through an extraordinary appeal.

Without prejudice to the competence of the government in respect of competition policy, the members of the Board of the 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 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 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 (ie, a full-function joint venture).

However, a concentration does not exist in the case of:

1 an acquisition of shareholdings or assets by an insolvency receiver in the framework of an insolvency procedure;
2 the acquisition of a shareholding merely as a guarantee; or
3 the acquisition by credit institutions, financial companies or insurance companies of shareholdings in undertakings with a corporate object that differs from that of any of those three types of companies, when the acquisition is made with a mere temporary nature and for resale purposes.

Regarding point (3), the concentration does not exist as long as:

- the acquisition is not made on a lasting basis;
- the voting rights associated with the acquired shareholdings are not exercised with the purpose of determining the competitive behaviour of the concerned undertakings, or are solely exercised with the purpose of preparing the total or partial transfer of such undertakings, the assets thereof or the acquired shareholdings; and
- such a transfer occurs within one year of the date of acquisition (which may be extended by the Authority if the acquirers show that the transfer was not possible within such a period because of reasons worthy of consideration).

3 What types of joint ventures are caught?

Merger control provisions apply to 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 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, this is the case for:

- the acquisition of the whole or part of the capital, 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 the decisions of the corporate bodies of an undertaking.

To date, 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 of the concentration, 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 of the concentration, a share equal to or higher than 30 per cent and lower than 50 per cent of the national market for a particular good or service, or for a substantial part of it, is acquired, created or reinforced, provided that in the preceding financial year the individual turnover in Portugal, net of directly related taxes, of at least two undertakings taking part in the concentration exceeds €5 million; or
- in the preceding financial year, the group of undertakings taking part in the concentration 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 those conditions may, nevertheless, be investigated as restrictive practices.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Notification to the 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?

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 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 a position on the notified operation. Such powers do not interfere with the regulatory authorities' own legally attributed powers.

In cases of concentrations in the media sector (newspaper, news, television or radio companies), a negative opinion of the Portuguese Regulatory Authority for the Media is binding upon the Authority to the extent that it is grounded on risks to the freedom of expression and the plurality of opinions.

Provisions influencing, directly or indirectly, mergers in specific sectors may also be found in the relevant area's legislation.

Companies that, by law, are in charge of the management of services of general economic interest or companies that have the nature of a legal monopoly 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, merger operations must comply notably with the relevant provisions of the Commercial Companies Code and the applicable rules of the Securities Code.

In accordance with EU law, in particular article 14 of Regulation (EU) 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector, a gatekeeper shall inform the European Commission, irrespective of whether it is notifiable to the European Commission under the EU Merger Regulation or to a competent national competition authority under national merger rules, of any intended concentration where the merging entities or the target of concentration provide core platform services or any other services in the digital sector, or enable the collection of data.

As a general rule, the Portuguese legal system does not impose any specific regulation on foreign direct investment (FDI). Nevertheless, there are sensitive areas where a reasoned statement prior to the acquisition may be advisable, albeit not mandatory, regarding the acquisition of strategic assets. Decree-Law No. 138/2014 establishes the framework for safeguarding strategic assets essential to ensure defence, national security and the provision of services fundamental to the national interest in the areas of energy, transport and communications.

The Portuguese FDI legal scheme may be triggered when a transaction results, directly or indirectly, in the acquisition of control, by a person or persons from third countries outside the EU and the EEA, over strategic assets, regardless of their legal form.

Recently, with the entry into force of Regulation (EU) 2022/2560 of 14 December 2022 on foreign subsidies distorting the internal market, concentrations that distort the internal market must be notified to the European Commission prior to their implementation if:

- at least one of the interested parties is established in the European Union and generates an aggregate turnover in the European Union of at least €500 million; and
- combined aggregate financial contributions of more than €50 million from third countries were granted in the three years preceding the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest in the case of:
  - an acquisition, to the acquirer or acquirers and the acquired undertaking;
  - a merger, to the merging undertakings; or
  - a joint venture, to the undertakings creating a joint venture and the joint venture.

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;
- if 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 the latter cases, the awarding public entity shall, in the public procurement programme, set the rules regarding the interplay between the public procurement procedure and the merger control regime established in Law No. 19/2012 of 8 May 2012 (the Act).

Furthermore, when the undertakings taking part in the concentration show to the Competition Authority (the Authority) a serious intent to conclude an agreement or, in the case of a public takeover bid or an exchange offer, the undertakings show a public intent to carry out the bid or offer, the concentration may be notified to the 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 that it adopted on 27 December 2012.

Implementing a concentration that is subject to prior notification without fulfilling such a requirement may give rise to a sanctioning procedure launched by the Authority. The procedure is 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.

Implementation without prior notification is punishable with fines, which, for each of the undertakings concerned, cannot exceed 10 per cent of the corresponding total worldwide turnover in the year immediately preceding that of the final decision adopted by the 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 most recent full year in which the infringement took place.

In addition, the Authority may decide to impose periodic penalty payments not exceeding 5 per cent of the average daily total worldwide turnover in the year immediately preceding that of its decision per day of delay, counted from the date the decision is notified.

An ex officio merger control procedure may be initiated by the Authority. This procedure was notably initiated by the Authority in the case of the acquisition of the Hospital of São Gonçalo de Lagos by Grupo HPA, a transaction implemented at the end of 2017 that, although subject to mandatory prior notification, had not been notified to the Authority, which the acquirer did only after the ex officio procedure was initiated.

The above-mentioned sanctions have been applied in practice, as shown by the fines for failure to notify in the following decisions:

- Decision of 26 June 2014: the Authority imposed fines of approximately €6,900 and approximately €112,000 on the National Pharmacies Association and on Farminveste, respectivey;
- Decision of 27 December 2017: the Authority imposed a fine of €38,500 on two companies of the Vallis group;
- Decision of 19 March 2020: the Authority imposed a fine of €155,000 on Grupo HPA;
- Decision of 19 August 2021: the Authority imposed a fine of €300,000 on Fidelidade SGOIC;
- Decision announced by the Authority on 21 October 2021: the Authority imposed fines of €60,000 on Grupo SFI Gestión de Participaciones Minoritarias and €35,000 on AOC Health GmbH for gun jumping;
- Decision of 6 September 2022: the Authority imposed a fine of €2,500,000 on Santa Casa da Misericórdia de Lisboa; and
- Decision announced by the Authority on 19 December 2023: the Authority imposed a fine of €75,000 on LusoPalex – Produtos de Saúde Unipessoal, Lda.

10 | Which parties are responsible for filing and are filing fees required?

In the case of full mergers, the 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.

With regard to filing fees (which were readopted pursuant to Law No. 17/2022 of 17 August 2022), according to the Authority's Regulation No. 1/E/2003 of 3 July 2003, the basic fees payable for the appraisal of concentrations are:

- €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 are doubled when the Authority decides to initiate proceedings in the following cases:

- concentrations of which the Authority becomes aware and that, although 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 elements essential 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 not to oppose the concentrations.

If the Authority, during the first phase of the merger control procedure, considers the transaction to be likely to affect competition and decides to proceed with an in-depth investigation, a further fee of 50 per cent of the basic fee is payable.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The waiting period for a Phase I decision is 30 working days from the date on which the notification is effective. This deadline may be suspended if requests for additional information are made by the Authority. It may also be suspended for 20 working days if the notifying party offers commitments. Prior hearing of the notifying party and of interested third parties that have submitted observations also suspends the deadline.

When a Phase II in-depth investigation takes place, it must be completed within a maximum of 90 working days from the effective date of the notification. This deadline may be suspended if requests for additional information are made by the Authority. It may also be suspended for up to 20 working days upon request of the notifying party or with such a party's agreement. Prior hearing of the notifying party and of the interested third parties that have submitted observations, which must take place no later than 75 working days from the effective date of the notification, also suspends the deadline.

The Act prohibits the implementation of concentrations subject to prior notification before the concentration is filed. Furthermore, until tacit or express clearance is granted, a concentration subject to prior notification shall not be put into effect. This, however, does not prevent

the implementation of a public takeover bid to purchase or an exchange offer that has been duly notified to the 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 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 Authority, the individuals or legal entities that acquired 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 Authority, which may attach conditions or obligations to the derogation to ensure effective competition.

Furthermore, the Authority may adopt any measures it considers necessary or adequate to restore the situation to the situation that existed prior to the breach, notably divestment.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Until tacit or express clearance is granted, a concentration subject to prior notification shall not be (partially or totally) put into effect, and legal transactions carried out in breach of such suspension obligation are ineffective. Furthermore, the violation of such suspension obligation is punishable with fines, which, for each of the concerned undertakings, cannot exceed 10 per cent of the corresponding total worldwide turnover in the year immediately preceding that of the final decision adopted by the Authority.

To date, the Authority's decision record does not include any cases concerning a specific violation of the suspension obligation (all cases refer to the implementation of concentrations that were not notified despite being subject to mandatory prior notification); however, it should not be concluded that the Authority does not investigate and punish any such violations.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

To date, the Authority's public record of decisions does not include any case concerning a violation of the suspension obligation; however, it should not be concluded that the Authority

does not investigate and punish any such violations, 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 Act does not specifically address this situation; solutions must therefore be found on a case-by-case basis and would not differ from those applicable to local mergers.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

There is no 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 the regular notification form, which was adopted by the Authority as an attachment to Regulation No. 993/2021 of 2 December 2021, which revised the notification forms adopted by the previous Regulation No. 60/2013 of 14 February 2013.

The purpose of Regulation No. 993/2021 is to reduce and simplify the information required for a merger notification, requesting only the information and documents that, in general, are necessary to organise the file. It also permits a broader application of the simplified notification form, also attached to the Regulation.

Pursuant to Regulation No. 993/2021, the following information must be provided in the regular notification form:

- a summary of the transaction;
- the identity of the parties, including an indication of their activities (and, in the case of the notifying party, of the activities of the entities with which it has interdependent links), an indication of their turnovers for the last year, and the submission of their individual and consolidated accounts and reports;
- an indication of other competition authorities to which the transaction is being notified;
- an 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, including the submission of the relevant contractual, public bid or public tender documents (as applicable), its economic and financial structure, and the submission of reports, studies or other documents prepared for the purposes of assessing the notified transaction;
- the control structure of the participant undertakings, including:

- the identity of the members of their boards of directors;
- copies of the articles of association;
- the structure of ownership and control means before and after the concentration, for which organisation charts may be used;
- 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 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 (a list of the members of the participating undertakings' boards of directors who hold similar positions in undertakings active in or related to the relevant markets defined in the concentration, even if those companies are outside the business sphere of the notifying parties, and a 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 an indication of the market shares trend of the participant undertakings and of the five major competitors in the past three years in each of the related markets;
- information on the relevant markets, notably their size in value and in quantity in the past 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 the consumers' or end users' preferences regarding certain products or brands, after-sales services, network effects and consumption habits;
- information on the participants, which must include an 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.

Regulation No. 993/2021 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. 993/2021 also includes a simplified notification form, which 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 criteria established in Regulation No. 993/2021, as follows:

- None of the parties to the concentration performs economic activities in either the same relevant geographic or product markets (no horizontal overlap), 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

any other parties to the concentration operate. This criterion also applies to situations of change from joint to exclusive control in which, prior to the concentration, the party acquiring exclusive control is not active outside the joint venture in markets where the joint venture is present, 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 joint control (other than the undertaking that had exclusive control) are not active outside the joint venture in markets where this joint venture is present, in upstream or downstream vertically related markets, or in neighbouring markets.

- 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 20 per cent (previously 15 per cent) or their combined market share exceeds 20 per cent (previously 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.
- The parties are engaged in activities in vertically related markets, 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.
- The parties to the concentration are engaged in activities in neighbouring markets, provided that the individual or combined market shares in any of those 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, within seven working days of the filing, invites the notifying party to complete the notification. In such a case, the notification becomes effective only on the date the missing elements are filed.

In addition, in 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 the 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.

Under the Act, in the case of the provision of false or inaccurate information in response to the Authority's request for information in merger control proceedings, individuals (eg, directors) may be held responsible for the infringement. Fines ranging between 10 and 50 account units (currently, one account unit corresponds to €102) may be imposed.

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 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.
- Within 30 working days of the date on which the notification is effective, the Authority shall complete the investigation and shall accordingly decide:

  - that 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-day 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.

The lack of a decision within the 30-working-day period 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. This procedure, which is currently 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 (eg, because they only consist of a transfer of a market share, as opposed to an increase).

If the Authority decides to initiate an in-depth investigation, this must be completed within 90 working days of the effective date of the notification. This deadline may be suspended if requests for additional information are made by the Authority. It may also be suspended for up to 20 working days upon request of the notifying party or with such a party'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 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 the latter case, the 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 be considered a decision not to oppose the concentration.

In the case of concentrations that occurred within less than five years, of which the Authority becomes aware and that, although subject to mandatory notification, have not been notified, the procedures initiated ex officio by the Authority shall be subject to the above time limits.

The above time frames may, to a certain extent, be accelerated if, during a pre-notification assessment, all the required data and all relevant competition issues are discussed and clarified with the Authority, thereby avoiding future suspensions and allowing for a swifter response by the Authority. Typically, non-complex merger control proceedings take approximately one month.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The timetable for the merger clearance procedure is as follows:

- If the notification is complete, it becomes effective on the date it is filed together with the document that confirms the payment of the due filing fee. If the notification is incomplete or includes inaccurate data, the Authority, within seven working days, invites the notifying party to complete the notification, and the notification becomes effective on the date the missing elements are filed. The notifying party may at any time withdraw the notification or waive its rights or legitimate interests.
- Within five working days of the date on which it is effective, the 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.
- Within 30 working days of the date on which the notification is effective, the Authority shall complete the investigation and shall accordingly decide:
  - that 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 time frames may, to a certain extent, be accelerated if, during a pre-notification assessment, all the required data and all relevant competition issues are discussed and clarified with the Authority, thereby avoiding future suspensions and allowing for a swifter response by the Authority. Typically, non-complex merger control proceedings take approximately one month.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Concentrations falling within the scope of Law No. 19/2012 of 8 May 2012 (the Act) are forbidden if they create significant impediments to competition in the Portuguese market or

in a substantial part of it, in particular if the 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 those 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 those facilities offered to competing undertakings;
- technical and economic progress, to the extent that it does not create an obstacle to competition and provided that 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.

The 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 the EU Merger Regulation.

With regard to the failing firm defence, in its Guidelines on the Economic Analysis of Concentration Operations, the Competition Authority (the Authority) specifically considers that it may be used as a potential argument to be taken into account in the appraisal of a concentration, provided that the alleged firm whose insolvency is imminent is indeed in financial difficulties and alternative scenarios with a less serious impact on competition may be excluded.

Reportedly, the failing firm defence has only been used twice by the Authority, most recently in *Grupo HPA/Hospital S Gonçalo de Lagos* (Case No. 45/2018).

20 | Is there a special substantive test for joint ventures?

Joint ventures, which have as their object or effect the coordination of competitive behaviour between the undertakings that remain independent, shall – in respect of those coordination aspects – be assessed under the provisions of the Act governing prohibited agreements and practices.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

Concentrations are forbidden if they create significant impediments to competition in the Portuguese market or in a substantial part of it. In the Guidelines on the Economic Analysis of Concentration Operations, the Authority addresses various aspects that it considers in the assessment of a concentration, including market dominance (market shares and 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?

Law No. 18/2003 of 11 June 2003, as amended, 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 possible industrial policy considerations. Since then, a more rigorous and competition-oriented system of merger control has been in place.

Nevertheless, the current statutes of the Authority – adopted and approved by Decree-Law No. 125/2014 of 18 August 2014, as amended by Law No. 17/2022 of 17 August 2022 – have, in very debatable terms, maintained one possibility already contemplated in the Authority's former statutes of the application of non-competition criteria, which, despite their exceptional nature, may bring about some distortions to the system.

Prohibition decisions adopted by the 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 whenever the resulting benefits to fundamental strategic interests of the national economy are deemed to exceed the inherent disadvantages for competition. A 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 was used in *Brisa/AEA* (Case No. 22/2005). The terms of the ministerial decision adopted in this case did not remove the concerns that the procedure may raise, and 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 the 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 end users and consumers.

In assessing concentrations, the Authority takes into account a number of factors, including technical and economic progress where the concentration provides efficiency gains to end users and consumers.

In its Guidelines on the Economic Analysis of Concentration Operations, the Authority also addresses efficiencies, notably stating that it will only consider efficiencies with a high likeliness of being implemented, efficiencies that are specific to the concentration and verifiable efficiencies. According to the Guidelines, it is up to the undertakings to allege and demonstrate possible efficiencies that may be associated with a concentration in a timely fashion.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Competition Authority (the Authority) may:

- 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 within less than five years of which the Authority becomes aware and that, although subject to mandatory notification, have not been notified to adopt measures necessary or adequate to re-establish, to the extent possible, the situation that existed 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 such cases, the Authority may also adopt measures necessary or adequate to re-establish, to the extent possible, the situation that existed prior to the concentration, notably divestment;
- following a sanctioning procedure (subject to the opportunity principle), impose fines of up to 10 per cent of the total turnover worldwide in the year immediately preceding that of the final decision adopted by the Authority where undertakings fail to give prior notification of concentrations under Law No. 19/2012 of 8 May 2012 (the Act), execute concentrations that had been suspended or prohibited by the Authority, or do not comply with the conditions or obligations imposed;
- following the aforementioned sanctioning procedure, impose fines on individuals between 10 and 50 account units (currently, one account unit corresponds to €102) where undertakings refuse to provide or provide false information; and
- following the aforementioned sanctioning procedure, impose periodic penalty payments of up to 5 per cent of the average daily total turnover worldwide in the year immediately

preceding that of the Authority's decision per day of delay counted from the date the decision is notified where the undertakings:

- do not comply with an Authority decision that imposed a sanction or ordered the adoption of certain measures; or
- fail to give prior notification of concentrations under the Act.

Legal transactions relating to a concentration are null and void if they put into effect operations condemned by an order that prohibited the concentration, if they breach the conditions and obligation attached to a clearance decision or if they disregard measures imposed to re-establish effective competition.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The notifying party may, at any time during the merger control proceedings, offer commitments to preserve effective competition, in which case the review period is suspended. Such commitments may include divestment or other structural or behavioural remedies.

During the suspension, the Authority may request information it deems necessary to assess the commitments offered. Moreover, the authorisation of a concentration may be subject to conditions or obligations designed to maintain effective competition. Furthermore, if a prohibited transaction has already gone ahead, the Authority may impose appropriate measures to ensure effective competition, such as divestment or the relinquishing of corporate control.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

At any time during the merger control proceedings, the notifying party may offer commitments, including divestment and other structural or behavioural remedies to preserve effective competition. For this purpose, the Authority issued the Guidelines on the Adoption of Commitments in Merger Control on 28 July 2011, which address the selection, design, execution and monitoring of commitments in merger control proceedings.

Although the Authority expresses in these Guidelines its preference for structural remedies, such a preference is not clearly reflected in the existing case law. In fact, both structural and behavioural remedies have been implemented (see, notably, *Sonaecom/PT*, Case No. 8/2006; *BCP/BPI*, Case No. 15/2006; *Arena Atlântida/Pavilhão Atlântico*Atlântico, SA*, Case No. 38/2012; *Kento*Unitel*Sonaecom/ZON*Optimus*, Case No. 5/2013; *Rubis/Repsol Assets*, Case No. 39/2017; *Pigments/Ativos Ferro*, Case No. 16/2020; *JCDecaux/Concessão de Publicidade Exterior em Lisboa*, Case No. 36/2021; and *PVM/Mondelez*, Case No. 4/2023).

Behavioural remedies and the corresponding supervision obligations have been applied for periods ranging from two to five years (see *Unibetão/Sicóbetão*, Case No. 30/2005; *TAP/PGA*, Case No. 57/2006; *Sonae Distribuição/Carrefour*, Case No. 51/2007; *Pingo Doce/Plus*, Case No. 01/2008; and *TRPN/Internorte*, Case No. 49/2010).

Furthermore, the Authority may adopt measures, notably divestment, that are necessary or adequate to re-establish effective competition in cases:

- where a prohibited concentration has already been put in effect (see *TAP/SPdH*, Case No. 12/2009);
- involving ex officio proceedings initiated by the Authority in respect of concentrations that occurred within less than five years of which the Authority becomes aware and, although subject to mandatory notification, have not been notified; and
- 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?

Three cases may be mentioned where remedies were applied in foreign-to-foreign mergers.

In the *Dreger Medical/Hillenbrand* merger (Case No. 44/2003), the 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 for 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 No. 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.

Recently, in the concentration *PVM/Mondelez* (Case No. 4/2023), the non-opposition decision was accompanied by structural obligations, in which PVM, the acquiring party, undertook several obligations, such as:

- to nominate two independent representatives with monitoring functions;
- to find an acquirer for a number of its trademarks and, if approved by the Authority, enter into a licence agreement,
- obligations relating to the condition of preserving the economic viability and competitiveness of the licensed trademarks; and
- obligation of non-involvement.

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 the concentration.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

In the absence of a required notification, the Competition Authority (the Authority) may initiate proceedings ex officio on the basis of information on the transaction that 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 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 Authority, any interested parties that have submitted observations shall be heard by the Authority.

Furthermore, during the investigation, the Authority may request from any private or public entities the information it deems necessary for the decision.

The 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 a position on the notified operation. Such powers do not interfere with the regulatory authorities' own legally attributed powers.

In the cases of concentrations in the media sector, a negative opinion of the Portuguese Regulatory Authority for the Media is binding upon the Authority to the extent that it is grounded on risks to the freedom of expression and the plurality of opinions.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Within five working days of the date the notification becomes effective, the 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 Law No. 19/2012 of 8 May 2012 (the Act), the confidentiality of commercial information provided by third parties within the merger control proceedings may also be protected.

The Authority's merger database, which may be accessed through its website, provides information on all concentration cases that have been notified and decided by the Authority since its creation in January 2003. Besides giving access to non-confidential versions of the decisions adopted since the Authority's creation, the merger database also provides other data relating to the procedures, including relevant dates, descriptions of the undertakings involved and the economic activities in question in each operation.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

According to its statutes, the Authority is responsible for keeping contacts with other countries' competition authorities and establishing cooperative links with those authorities, as well as with EU and international authorities. It is also responsible for carrying out the tasks conferred upon EU 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.

With regard to merger control, the above responsibilities indicate that the Authority is expected to maintain informal contacts with other competition authorities in multi-jurisdictional filings; however, no formal agreements with other competition authorities regarding merger control are publicly known. Nevertheless, at a multilateral level, the Authority participates in various forums and groups, notably the European Competition Network and the International Competition Network.

The notification form includes, as mandatory information, indication of the other EU 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 outlined the creation of a specialised court to handle competition, regulation and supervision matters: the Court of Competition, Regulation and Supervision (the Specialised Court). The Specialised Court was established in the town of Santarém on 30 March 2012.

The Specialised Court is the exclusive first instance for review of all the decisions adopted by the Competition Authority (the Authority); therefore, decisions of the Authority adopted in merger control proceedings, as well as decisions of the member of government responsible for the economy within extraordinary appeal proceedings, may be appealed to the Specialised Court.

This Specialised Court's rulings are subject to review by the Appellate Court of Lisbon, the decisions of which, although 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 Authority adopted in proceedings initiated in respect of infringements of merger control rules (under Law No. 19/2012 of 8 May 2012, these infringements constitute quasi-criminal minor offences) may also be appealed to the Specialised Court. The decisions of this court may be appealed to the Appellate Court of Lisbon, as a court of last resort, if they:

- apply a fine higher than €249.40;
- impose ancillary sanctions;
- acquit the defendant or close the case in situations where either the Authority has imposed a fine higher than €249.40 or the fine has been claimed by the public prosecutor's office; or
- reject the appeal of the Authority's decision.

Time frame

33 What is the usual time frame for appeal or judicial review?

With regard to 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, judicial proceedings, including appeals, may be expected to last for 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 2023, 81 merger control cases were concluded by the Competition Authority (the Authority), comprising:

- 73 clearance decisions without conditions or obligations attached;
- six decisions where it was found that the notified transaction was not subject to prior notification;
- one decision closing the proceedings following the withdrawal of the corresponding notification; and
- one clearance decision with conditions and obligations attached.

As at 30 May 2024, the Authority had adopted the following 23 decisions in merger control cases:

- 19 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 clearance decision with conditions and obligations attached.

Competition in specific sectors (eg, telecommunications, energy, oil and ports' operations) continues to be a cause for concern for the Authority.

Reform proposals

35 Are there current proposals to change the legislation?

Currently, there are no proposals to change the legislation. However, there is an ongoing public consultation on the draft Guidelines on the Methodology for Imposing Fines under Article 69 of Law No. 19/2012 (the Act). The proposed changes include:

- increasing the maximum additional percentage to be added to the base fine from 25 per cent to 30 per cent for cases of particularly serious infringements;
- the reduction of the multiplication factor corresponding to the duration of the infringement, with a reduction in the multiplication factor after the fifth year up to and including the 10th year of the duration of the infringement. Subsequent years are not considered for calculation purposes.

One relevant factor is that the current proposal also maintains that the specific fine amount is only disclosed to the addressee in the sanctioning decision.

There is also a public consultation on the draft Terms of the Settlement Procedure, with the aim of creating greater predictability and legal certainty. The draft Terms of the Settlement Procedure are structured as follows:

- general considerations about the object and purpose of the Terms of the Settlement Procedure;
- the procedural initiative to the procedure adopted by the Authority in the investigation phase of a case,
- settlement discussions;
- the submission of a settlement proposal to the Authority;
- the final decision in cases using the settlement instrument; and
- the particularities of access to the file in which a settlement procedure takes place.

The above projected changes may also be relevant in cases of sanctioning proceedings related to infringements of merger control provisions (eg gun jumping).

UPDATE AND TRENDS

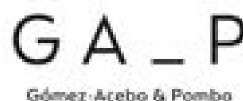
Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

One of the more relevant decisions adopted in 2023/2024 was a gun-jumping decision, as announced by the Competition Authority (the Authority) on 19 December 2023, in which the Authority imposed a fine of €75,000 on LusoPalex – Produtos de Saúde Unipessoal, Lda. The fine was reduced, in light of the cooperation shown both during the phase of reviewing the transaction, which was notified a posteriori, and also during the course of the sanctioning proceedings, which concluded with recourse to a settlement procedure.

No less relevant was the merger case *PVM/Mondelez* (Case No. 4/2023), where the Authority adopted a non-opposition decision with attached conditions and obligations. To acquire the exclusive control over the chewing gum business of the Mondelez Group in the markets it operated in North America and Europe, including Portugal, the acquiring company, Perfetti Van Melle Group BV, a company active worldwide in the production and sale of confectionery products, offered to the Authority a structural commitment to license some of its trade-marks, by a pre-determined deadline.

Finally, in the case *Vodafone/Cabonitel* (Case No. 55/2022), the Authority adopted a draft decision that was submitted to the parties, rejecting the commitments offered by Vodafone in respect of the intended acquisition by Vodafone Portugal SA of sole control over Cabonitel SA, which had been already subject to a phase II in-depth investigation. At the time of writing, the full details of this transaction, including the final decision, are not yet public.



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Romania

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Notification trigger/ filing deadline	The notification has to be submitted to the RCC prior to the implementation of the concentration.
Clearance deadlines (Phase I/Phase II)	Phase I: 45 days as of the effective date. Phase II: five months as of the effective date.
Substantive test for clearance	The RCC assesses whether the intended concentration would significantly impede effective competition in the market, in particular as a result of the creation or strengthening of a dominant position.
Penalties	If a merger is implemented before a clearance decision is received, the RCC may impose a fine of between 0.5 and 10 per cent of the undertaking's total annual turnover in the preceding financial year. In addition, the RCC may order measures aimed at restoring efficient competition in the relevant market.
Remarks	Not applicable.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Merger control, as well as the other main areas of competition law, is governed primarily by the Competition Law 21/1996 (the Competition Law), as republished and amended. The provisions of the Competition Law are further complemented by the provisions of the Regulation on Economic Concentrations, approved by Romanian Competition Council (RCC) Order No. 431/2017, and 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.

Ancillary restraints are covered by the guidelines regarding ancillary restraints, approved by RCC Order No. 387/2010. Remedies are covered by the guidelines on remedies in the merger sector, approved by RCC Order No. 688/2010, and the relevant market is covered by the guidelines on the definition of the relevant market, approved by RCC Order No. 388/2010.

The authority in charge of enforcing the merger control rules in Romania is the RCC. Furthermore, according to the Romanian foreign direct investment (FDI) screening regime, the approval of the FDI Screening Commission is required for transactions that might 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 or more undertakings.

3 | What types of joint ventures are caught?

The creation of a joint venture may amount to a merger, provided that the joint venture is a full-function joint venture (ie, an undertaking that carries out its activity on a lasting basis and performs all functions of an autonomous economic entity).

4 Is there a definition of 'control' and are minority and other interests less than control caught?

'Control' is defined by article 9(6) of the Competition Law as the possibility of exercising decisive influence on an undertaking. Control may arise on the basis of rights, contracts or any other elements that, either separately or taken together, and taking into account the legal or factual considerations involved, allow a party to exercise a decisive influence over the behaviour of an undertaking, in particular through:

- ownership or rights to use over all or part of the assets of an undertaking; or
- rights or contracts conferring a decisive influence over the structure of an undertaking, the voting process or the decision-making process of the management bodies of an undertaking.

The acquisition of a minority shareholding may amount to a notifiable concentration if – and only if – it is considered to amount to an acquisition of control, in particular through the existence of veto rights concerning certain strategic decisions of the respective undertaking. There are no plans that have been made public to review legislation regarding review transactions that do not involve control acquisition.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The merger control provisions are applicable to concentrations where the undertakings concerned generated combined worldwide turnover exceeding €10 million in the previous financial year, and each of at least two of the undertakings concerned achieved Romanian turnover exceeding €4 million in the previous financial year. There is no intention that has been publicly announced to set up alternative thresholds based on transaction value.

Transactions falling below the above thresholds may only be scrutinised on national security grounds based on the FDI screening mechanism.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing is mandatory and there are no exceptions.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign transactions are subject to merger control by the RCC if the respective parties meet the turnover thresholds test. The lack of local effects, although 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?

Under the Romanian FDI regime, foreign investments in sectors deemed sensitive from a national security perspective, and which exceed €2 million in value (ie the *de minimis* exemption), are subject to a mandatory filing. Both EU and non-EU investors carrying out such an investment in Romania are under the screening scope.

According to the Decision of the Supreme Council of National Defence, no. 73 dated 27 September 2012, transactions in the following sectors are subject to review from a national safety perspective:

- citizens' and communities' security;
- border security;
- energy security;
- transport security;
- supply systems for security of vital resources;
- critical infrastructure security;
- security of information and communication systems;
- security of financial, tax, banking and insurance activities;
- production and distribution of weapons, ammunition, explosives and toxic substances;
- industrial security;
- protection against disasters;
- protection of agriculture and the environment; and
- protection of the privatisation of state-owned companies or of their management teams.

The FDI Law also specifically refers to the list of sectors in Article 4 of the EU Regulation No 2019/452, which establishes a framework for the screening of foreign direct investments into the European Union.

For non-EU investors, a standstill obligation and fines of up to 10 per cent of the investor's global turnover for a standstill breach are provided. For EU investors, the FDI Law does not currently provide for a standstill obligation and related gun-jumping fines. However, the government may prohibit the investment if it affects the security or public order of Romania or is likely to affect projects or programmes of interest for the European Union.

Following legislative amendments at the beginning of December 2023, the mandatory screening regime is now extended to minority non-controlling shareholdings that allow EU or non-EU investors to effectively participate in the management of the undertaking concerned.

Concentrations in certain sectors – such as the financial, media, energy and telecommunications sectors – may be subject to a notification obligation to sector regulators.

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 must be notified to the Romanian Competition Council (RCC). The notification may be submitted following the entry into a binding agreement concerning the transaction (eg, 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 the 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 21/1996 (the Competition Law) states that it must be made before implementing the transaction. Consequently, there are no sanctions for late filing.

10 Which parties are responsible for filing and are filing fees required?

The notification must be filed by the party or parties acquiring control. Should the transaction involve a merger or the creation of a full-function joint venture, both parties acquiring control will file the notification.

An initial filing fee of approximately €1,000 is payable prior to the submission of the notification, and proof of payment must be submitted to the RCC together with the notification. An additional fee of 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 of the RCC issuing 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 cannot be implemented prior to clearance (standstill obligation). The RCC may, in particularly justified cases, upon request of the parties, grant a derogation from the standstill obligation.

Pre-notification

According to the Romanian Regulation on Economic Concentrations (the Merger Regulation), parties are advised to initiate pre-notification contact with the RCC at least two weeks prior to the submission of the notification. Although 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 of whether the notification meets the formal requirements.

Effective date

The notification becomes 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 Competition Law;
- issue a clearance decision authorising the merger if the transaction raises no competition 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 competition concerns and those concerns have not been removed through the commitments put forth by the parties.

In accordance with past RCC reports, the average duration of a Phase I merger notification, from filing to clearance, is 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;
- a conditional authorisation decision, subject to commitments; or
- a negative decision, prohibiting the merger.

Both the 45-day period and the five-month period are mandatory and cannot be extended. Should the RCC fail to issue a decision before those deadlines, the transaction will be deemed to have been 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 of up to 10 per cent of the total worldwide turnover obtained in the previous financial year or, if the sanctioned company did not generate turnover in the previous year, of the most recent turnover registered by the company. If the offending company is a non-resident entity, the turnover on the basis of which the fines are assessed is replaced with the sum of the following:

- turnover achieved by each of the companies registered in Romania and controlled by the infringing party;
- turnover derived in Romania by each of the non-resident companies controlled by the infringing party; and
- any turnover obtained in Romania by the infringing party and accounted for in its financial statements.

Newly established companies that have yet to register turnover may be sanctioned with fines between approximately €3,000 and €500,000. In addition to the fines, the RCC may order, following the examination of the transaction, any interim measures aimed at restoring and maintaining the conditions of effective competition in the relevant market.

In practice, the RCC has a rich decisional practice of sanctioning companies for failure to comply with the standstill obligation.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for implementing the merger before receiving clearance from the RCC are also applicable in foreign-to-foreign mergers.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Although the Competition Law does not expressly provide for carve-out solutions, there are two potential solutions to permit closing before clearance in a foreign-to-foreign merger.

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, among other things:

- 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, dissolving or spinning off the target;
- selling assets of the target;
- laying off 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 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 has not been tested in practice, prior notification of the RCC is advisable.

Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

The merger filing in connection with 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 and simplified notification forms are provided as an annex to the Merger Regulation and are similar to the forms applied by the European Commission.

Among other things, the following must be provided:

- information on the parties to the concentration (eg, names, registered seats, excerpts from the commercial register, nature of the business, ownership and control; description of the undertakings' business; and 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, regardless of whether it is intentional, may result in a fine ranging from 0.1 to 1 per cent of the total turnover obtained in the previous financial year.

The Competition Law also envisages the possibility of submitting a simplified notification in certain cases that usually do not give rise to competition law concerns, as follows:

- when parties acquire joint control over an undertaking that does not carry out any business in Romania or has only an insignificant business in Romania (ie, has a turnover below the €4 million threshold);
- transactions where there is no horizontal overlap or where parties are active in 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 undertaking concerned.

The RCC may, in specific circumstances, move from a simplified notification to a full-form notification.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

As a matter of principle, the vast majority of concentrations are cleared in Phase I.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Pre-notification

According to the Merger Regulation, parties are advised to initiate pre-notification contact with the RCC at least two weeks prior to the submission of the notification. Although 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 of whether the notification meets the formal requirements.

Effective date

The notification becomes 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.

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- launch a Phase II investigation if the transaction raises competition concerns and those concerns have not been removed through the commitments put forth by the parties.

In accordance with past RCC reports, the average duration of a Phase I merger notification, from filing to clearance, is 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;
- a conditional authorisation decision, subject to commitments; or
- a negative decision, prohibiting the merger.

Both the 45-day period and the five-month period are mandatory and cannot be extended. Should the RCC fail to issue a decision before those deadlines, the transaction will be deemed to have been tacitly approved and closing is allowed.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test applied by the Romanian Competition Council (RCC) in merger control proceedings is the same test as that applied by the European Commission (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 this has been done successfully.

20 | Is there a special substantive test for joint ventures?

There is no special test for joint ventures; however, if the RCC finds that the effect or object of a full-function joint venture is not the creation of an autonomous economic entity, 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 they are compatible with a normal competition environment. Within this evaluation, the RCC will take into account:

- the need to protect, maintain and develop effective competition in 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?

Although the main factor taken into account in the assessment of a merger is the effect on competition of the merger, non-competition-related issues may also be taken into account, for example, when the implementing measures prior to clearance are mainly for the benefit of consumers.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

Although economic efficiencies are not expressly provided for in the Romanian Regulation on Economic Concentrations, it is arguable that one of the theories of harm (technical and economic progress insofar as it benefits the consumer and is not an impediment to competition) refers to efficiencies.

In practice, the RCC uses the approach taken in the European Commission's guidelines when confronted with a case where the aggregate market shares come close to 40 per cent, and it looks at reduction of costs and prices, increase in innovation or improvement of supply when assessing efficiencies.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Transactions may also be prohibited or conditionally approved within the context of the mandatory foreign direct investments screening mechanism.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

If, during their analysis, Romanian Competition Council (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. They must also 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 contact with the RCC before formally transmitting their proposed commitments to better understand the competition concerns raised by the transaction and 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 merger control proceedings.

In Phase I, remedies should be submitted before the notification becomes effective or, at the latest, within two weeks of the effective date.

In Phase II, remedies should be summited within 30 days of the opening of the Phase II proceedings. In exceptional circumstances, the parties may request an extension of 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, which the RCC may do to restore the situation prior to the implementation of the merger, or the levying of a fine of between 0.5 and 10 per cent of the total turnover.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Foreign-to-foreign transactions that do not have effects on the Romanian market but become subject to notification given the parties' turnover should not require remedies.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

As a matter of principle, in accordance with the Romanian Regulation on Economic Concentrations, a clearance decision covers the related ancillary restraints. Having said that, the parties will carry out an individual assessment on what amounts to an ancillary restraint, taking into account the guidelines regarding ancillary restraints, approved by RCC Order No. 387/2010.

In practice, the RCC will usually inform the parties of the existence of any restrictions that, prima facie, do not qualify as ancillary restraints.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

As a matter of practice, the Romanian Competition Council (RCC) will publish a short press release on its website stating that it is 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 competitors, clients, suppliers or other relevant authorities (such as sector regulators) regarding the merger.

Furthermore, should the parties propose commitments and they are accepted by the RCC, such commitments are published on the RCC's website and all interested parties can submit observations within a set time frame.

Competitors or undertakings affected by a merger clearance decision may challenge the decision before the administrative courts.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The RCC and its representatives are under an obligation not to disclose business secrets (ie, information that is defined as a business secret by law or by the undertakings concerned). Business secrets, among other things, encompass any business information that has actual or potential economic and market value, 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 being confidential in all documents sent to the RCC. The RCC will publish a non-confidential version of the clearance decision on its website.

Other documents published by the RCC (eg, 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 (ECN), 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 EU member states based on the Waiver Form, contained in an annex to the Romanian Regulation on Economic Concentrations.

The RCC, as a national competition authority of an EU member state, has all the rights and obligations pursuant to the EU Merger Regulation. The RCC has an active contribution and cooperation role within the ECN in the form of the 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 decisions issued by the Romanian Competition Council (RCC), 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 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 European Commission as an amicus curiae and requesting that a preliminary ruling procedure in front of the Court of Justice of the European Union be initiated). Usually, the appeal proceedings in front of the Bucharest Court of Appeals last for between 12 and 18 months from the first hearing, while the proceedings before the High Court of Cassation and Justice last for approximately 12 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 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 Romanian Competition Council (RCC) has taken a rather non-interventionist approach the past and has successfully increased its efforts in reducing the merger control procedure review timelines.

Reform proposals

35 Are there current proposals to change the legislation?

There is no publicly discussed initiative to amend the merger regulation 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?

In 2023, the Romanian Competition Council cleared 74 mergers. Among these, only one was cleared with commitments: the acquisition of Gedeon Richter Farmacia SA and Pharmafarm SA by Mediplus Exim.

The FDI Screening Commission issued 105 decisions authorising transactions from a national security perspective.

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Saudi Arabia

Fares Al-Hejailan and **Ibrahim Attar**
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Voluntary or mandatory system?	Mandatory.
Notification trigger/ filing deadline	Notification of an economic concentration transaction is required where the combined global turnover of the entities party to the economic concentration transaction exceeds 200 million Saudi riyals (there is no minimum local turnover threshold); the transaction has nexus to a Saudi market; and there is an acquisition or change in control as a result of the transaction. Transactions need to be notified at least 90 days in advance of closing.
Clearance deadlines (Phase I/Phase II)	The General Authority on Competition (GAC) has 90 calendar days to reach a decision following acceptance of a filing. If no decision is reached after 90 days, the parties may proceed with their transaction. The regime is suspensory and does not provide any exceptions to the suspension obligation.
Substantive test for clearance	The factors set out in the Competition Law and its Implementing Regulations for the consideration of economic concentrations suggest that the GAC's review will entail an economic analysis based on the effects of the merger on competition and will look beyond the market shares of the merging entities.
Penalties	Failure to file can result in a fine of up to 10 per cent of the total annual sales value of the products or services that are the subject of the violation. If it is impossible to estimate the annual sales, the fine may not exceed 10 million riyals.
Remarks	Not applicable.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The Competition Law was adopted by Royal Decree No. M/75 dated 6 March 2019 and came into force on 23 September 2019, replacing the previous competition law. The overall objective of the Competition Law is to protect and encourage fair competition, and to combat and prevent monopolistic practices that affect lawful competition or consumer interest to lead to an improved market environment and economic development.

The General Authority for Competition (GAC) is the regulatory body in charge of implementing and enforcing the Competition Law. The GAC has primary jurisdiction over any matters arising from the application of the Competition Law and its Implementing Regulations, even in cases of conflict or overlap with the jurisdiction of other government bodies.

The Implementing Regulations were issued by the GAC board of directors and came into force on 24 September 2019.

The GAC has also issued specific guidance regarding its interpretation of the rules relating to economic concentration transactions and the circumstances under which transactions (including foreign-to-foreign transactions) are notifiable in Saudi Arabia (the EC Guidelines). The EC Guidelines, among other matters, set out who the GAC considers as parties to an economic concentration transaction, specific guidelines with respect to nexus and control, and the method for calculating turnover.

Scope of legislation

2 | What kinds of mergers are caught?

Notification of an economic concentration transaction is required where:

- the combined global turnover of the entities party to the economic concentration transaction exceeds 200 million Saudi riyals;
- worldwide annual turnover of the target exceeds 40 million riyals;
- combined annual turnover of all parties exceeds 40 million riyals in the Kingdom of Saudi Arabia; and
- there is an acquisition or change in control as a result of the transaction.

An economic concentration transaction, under the Competition Law, is:

> *any act that results in the total or partial transfer of ownership of assets, rights, equity, shares, or obligations of an entity to another, or the joining of two or more administrations in a joint administration or any other form that leads to the control of a firm(s) including influencing its decision, the organisation of its administrative structure, or its voting system.*

3 What types of joint ventures are caught?

Full-function joint ventures are reportable, while non-full-function joint ventures are usually considered by the GAC as not reportable.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

Economic concentration transactions are only notifiable where there is an acquisition of control. Control can be either joint or sole, and exists where an undertaking has the right or ability to exercise decisive influence over another undertaking with regard to the activities of the other undertaking, including the ability to decisively influence the undertaking's strategic or operational decisions.

The term 'decisive influence' refers to the power to determine decisions relating to the strategic commercial behaviour of an undertaking. This includes but is not limited to the budget, business plan, major investments or the appointment of senior management.

Means of control can include the following elements:

- direct or indirect ownership of more than 50 per cent of the capital or business assets of another undertaking;
- the power to exercise more than half the voting rights in another undertaking or where two or more undertakings operating together in a coordinated manner jointly have the power to exercise more than half of the voting rights in another undertaking (including pursuant to a shareholders' agreement);
- the right to appoint more than half of the members of the supervisory board, administrative board or bodies legally presenting the controlled undertaking (whether by a shareholders' agreement or other means);
- the right to manage another undertaking's affairs by way of ownership rights or by contract; and
- certain types of purely economic relationships that create a situation of extensive economic dependence (eg, very important long-term supply agreements coupled with structural or other extensive links).

In relation to contractual control, the contract must generally lead to control of the management and the resources of the controlled undertaking. The contracts should have a long duration with no early termination rights for the party granting contractual control rights.

Contractual agreements relating to the right to use the assets of an undertaking if the agreements grant an undertaking the right to veto strategic business decisions could result in the finding of an 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 Saudi regime requires notification of an economic concentration transaction where:

1. the combined global turnover of the entities party to the transaction exceeds 200 million riyals;
2. the worldwide annual turnover of the target exceeds 40 million riyals; and
3. the combined annual turnover of all parties exceeds 40 million riyals in the Kingdom of Saudi Arabia.

For the purposes of calculating the combined turnover threshold, the GAC considers the entities that are party to the transaction to include the purchaser group (on a consolidated level) and the target group (on a consolidated level).

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory and must be made at least 90 days prior to the completion of a transaction.

The Competition Law does not apply to public establishments and fully state-owned enterprises, provided that those entities are solely authorised by the government (by virtue of royal decree or a resolution of the Council of Ministers) to provide the goods, services or commodities that are the subject of the transaction.

It is possible for the GAC to grant exemptions, on a case-by-case basis, to transactions that result in an economic concentration if the exemptions would lead to better market performance, provide benefits to consumers that outweigh any detrimental effects to competition and do not grant exempted entities conditions that would enable them to force competitors out of the relevant market. Decisions relating to those exemptions will be based on a recommendation of a technical committee formed by the GAC to study those exemptions.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Competition Law expressly captures foreign-to-foreign economic concentration transactions that have an effect on the Saudi market or on fair competition in Saudi Arabia and that meet the combined worldwide turnover test for the parties to the transaction.

Undertakings and transactions that take place outside Saudi Arabia have an effect in Saudi Arabia where there is a sufficient nexus between the economic concentration and a market inside Saudi Arabia.

The GAC has articulated a new nexus test for transactions whereby it considers nexus to be established if the parties to a transaction, on an aggregate basis, generated a turnover of more than 40 million riyals in the Kingdom of Saudi Arabia.

The GAC may still consider, on a case-by-case basis, certain transactions not notifiable if the target generates no revenues in the Kingdom of Saudi Arabia or a closely connected foreign market.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Yes, foreign investment is not permitted in a number of sectors, which are specified in a list maintained by the Ministry of Investment of Saudi Arabia (MISA). The relevant sectors include:

- the industrial sector, including oil exploration, drilling and production, but not services related to the mining sector that are listed in the international industrial classification codes, Central Product Classification (CPC) 5115 and CPC 883; and
- service sectors:
    - catering to military sectors;
    - security and detective services;
    - real estate investment in Mecca and Medina;
    - tourist orientation and guidance services related to hajj;
    - recruitment services;
    - commission agents that are internationally classified under CPC 621; and
    - the fishing and hunting of marine living resources.

In 2016, MISA announced that it would permit 100 per cent foreign ownership in certain sectors (eg, retail and wholesale trade), subject to a number of obligations and requirements, including a minimum share capital requirement of 20 million riyals. Entities with 100 per cent foreign ownership must invest at least 200 million riyals over five years after their licence is granted.

For other sectors, countries that are not part of the Gulf Cooperation Council must apply for and obtain a foreign investment license from MISA.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Transactions resulting in an economic concentration must be notified to the General Authority for Competition (GAC) at least 90 days prior to completion.

Failure to file can result in a fine of up to 10 per cent of the total annual sales value of the products or services that are the subject of the violation. If it is impossible to estimate the annual sales, the fine may not exceed 10 million Saudi riyals.

The GAC may also, at its discretion, impose a fine not exceeding three times the gain made by a violating entity as a result of the transaction if aggravating circumstances are present.

The GAC also has the power to require violating entities to:

- stop a violation;
- dispose of certain assets, shares or property rights, or perform any other act to ensure the removal of the violation;
- pay a daily fine not exceeding 10,000 riyals until the violation ceases (the fine may be doubled if the violation is not stopped within the period specified by the GAC); or
- temporarily close down an entity for a 30-day period if the violation is not stopped within 90 days of the GAC's notification of violation.

The GAC can increase the penalties beyond the above-mentioned limits should an entity be a repeat offender.

The Competition Law also establishes a right of action before the competent courts for natural or legal persons who suffer harm as a result of a violation of the Competition Law.

10 Which parties are responsible for filing and are filing fees required?

The obligation to file falls on all parties to an economic concentration transaction (ie, seller, purchaser and target).

The GAC board has set the filing fee at proportion of 0.0002 (ie, 0.02 per cent) of the combined turnover of all parties participating in the transaction, with a cap of 250,000 riyals in total.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The GAC has 90 calendar days to provide a decision following acceptance of a filing. If no decision is reached after 90 days, the parties may proceed with their transaction.

The regime is suspensory and does not provide any exceptions to the suspension obligation.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Closing a transaction prior to receiving clearance from the GAC can result in the same fines as those that apply for failure to file. The GAC may also require the parties to terminate or unwind the transaction.

The GAC issued its first fine for failure to file in 2024 under the new regime with respect to a local-to-local transaction.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Closing a foreign-to-foreign transaction prior to receiving clearance from the GAC can result in the same fines as those that apply for domestic transactions.

To date, there are no public records of the GAC imposing a fine on parties for closing a notifiable foreign-to-foreign transaction prior to receiving clearance.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

In theory, hold-separate arrangements may be a solution, but such arrangements have not yet been tested with the GAC.

Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

The Competition Law applies to public takeovers but does not provide special rules for them.

The Mergers and Acquisitions Regulations (the M&A Regulations) issued by the Capital Markets Authority require that where a public offer for shares would, if completed, be subject to the Competition Law, the offeree company and the offeror must, among other things, notify the GAC pursuant to the applicable provisions of the Competition Law.

The M&A Regulations further provide that an offer that is subject to the Competition Law must contain a condition that the offer will lapse if the GAC notifies the offeror or the offeree company in writing that it objects to the deal or has placed it under study and review, as specified in the Competition Law.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The filing must be made using the online portal on the GAC website. The GAC usually requires the submission of an economic report or an annex with the filing.

The report or annex usually covers information on the relevant markets, the value of the notifying party's or parties' sales in those markets, the positive effects of the concentration on the markets and the competitive dynamics in the markets. Supporting documentation – namely, the signed transaction agreement and the constitutional documents and financial statements of the entities party to the transaction – must also be provided.

The Competition Law and its Implementing Regulations do not contemplate derogations from the amount of information to be provided.

Provision of false information or failure to provide required documentation within 15 days of the GAC's request could result in the invalidation of an approval, rejection of a filing or the imposition of a fine not exceeding 2 million riyals.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

Upon notification, the GAC will verify whether all the necessary information has been provided. If the notification is complete, the GAC will notify the relevant parties to pay the filing fees. Once the filing fees have been paid, the GAC will provide confirmation of the commencement of the review period.

If the GAC requires additional information or certain information is missing from the filing, the relevant parties will be informed of the information that must be provided.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The GAC can take up to 90 calendar days to provide a decision following formal filing. It can approve, conditionally approve or reject the filing.

The 90-calendar-day period begins from the date on which the GAC accepts the completed file, and can be paused if it requires additional information as part of its review and there is a delay in the provision of that information.

In practice, the GAC has provided approvals within shorter time frames where it found no competition concerns, although this cannot be guaranteed.

There is no fast-track review procedure.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

When reviewing economic concentration transactions, the General Authority for Competition (GAC) must maintain and encourage fair competition in Saudi markets, and will take into account the following factors:

- the structure of the relevant markets and the level of actual or potential competition between firms in Saudi Arabia or abroad;
- the financial positions of the parties;
- the availability and existence of alternative commodities or services that are available to consumers, vendors and clients;
- product differentiation;
- consumer interest and welfare;
- the potential impact of the transaction on prices, quality, diversification, innovation or development in the relevant market;
- actual or potential harm or benefits to competition as a result of the transaction;
- growth in supply and demand and trends in the relevant market or commodities;
- barriers to entry or exit in the relevant market, including the continuation or expansion of those barriers and regulatory barriers;
- whether the transaction will create or strengthen a significant market concentration or dominant entity (or group of entities) in a relevant market;
- the level and historical trends of anticompetitive practices in a relevant market, either by parties to the transaction or entities that are influential in those markets; and
- the views of the public, the parties and sector-specific regulators.

The Implementing Regulations of the Competition Law further require that conditional approvals and rejections be reasoned.

20 | Is there a special substantive test for joint ventures?

Although the Competition Law and its Implementing Regulations do not set out a special substantive test for joint ventures, the GAC's guidelines on economic concentration transactions provide some guidance on the reportability of full-function joint ventures.

Full-function joint ventures are formed when a joint venture forms an autonomous economic undertaking or performs the economic functions of an autonomous economic undertaking on a lasting basis. The joint venture is able to bring about a lasting change in the structure of the undertaking concerned and in the relevant market.

General elements of full-function joint ventures are that they:

- operate in a market and perform the functions normally carried out by a commercial undertaking operating in that market;
- have management dedicated to their day-to-day operations and access to sufficient resources (including finance, staff and assets) to conduct their business activities on a lasting basis;
- intend to operate for a sufficiently long period to bring about a lasting change in the structure of the undertakings concerned; and
- possess sufficient autonomy from their parent undertakings in terms of operational decision-making.

A non-full-function joint venture can become a full-function joint venture if:

- the parent undertakings enlarge the scope of the joint venture activities during its lifetime, including through the commencement of commercial sales to third parties in an open market;
- the joint venture is enlarged, such as through the acquisition of another undertaking from the parent undertakings;
- the parent undertakings transfer significant additional assets, contracts, know-how or other rights to the joint venture, and this transfer constitutes or enables the expansion of the joint venture's activities, products or geographic scope; or
- there is a change in the organisational scope of the joint venture.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The factors set out in the Competition Law and its Implementing Regulations for the consideration of economic concentrations suggest that the GAC's review will entail an economic analysis based on the effects of the merger on competition and will look beyond the market shares of the merging entities.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

In the context of exemptions, the GAC can consider other non-market factors relating to a transaction; however, those factors are not set out in detail and will be balanced against effects on competition.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies are a factor for consideration in the GAC's review of a filing, although these are balanced against potential effects on fair competition.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The General Authority for Competition (GAC) may exercise a number of powers to mitigate the effects of transactions, including:

- imposing conditions on the parties as part of its approval;
- prohibiting the transaction; and
- requiring parties to dispose of assets.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, the GAC may adopt a clearance decision subject to conditions.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The Competition Law and its Implementing Regulations do not specify the conditions or the timing relating to remedies.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The GAC has required firms to comply with conditions in foreign-to-foreign transactions (most notably in the clearance decision of Uber's acquisition of Careem in 2019).

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Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

There is no specific guidance on whether a clearance decision would cover ancillary restrictions.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Yes, the Competition Law's Implementing Regulations permit the General Authority for Competition (GAC) to consider the views of the public, market participants and sector-specific regulators in its review of a transaction. The Implementing Regulations also allow any natural person or any concerned party to raise an objection or report an anticompetitive practice to the GAC. The complaint can be anonymous.

The Competition Law establishes a right of action before the competent courts for natural or legal persons who suffer harm as a result of a violation of the Competition Law.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Commercial information will usually be protected from disclosure through the confidentiality obligations to which the GAC is subject under the Competition Law. Specifically, the Law requires the GAC's members and employees to maintain the confidentiality of information and documents that are obtained from firms through investigations and prohibits them from providing that information to any other party without the approval of the GAC.

Separately, the filing forms for economic concentrations contain statements relating to the GAC's obligation to maintain the confidentiality of the information provided.

The Competition Law also provides that a firm may not conceal information from the GAC on the pretext of confidentiality or for any other reason.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Competition Law permits the GAC to liaise with competent foreign authorities with respect to practices occurring outside Saudi Arabia that have an effect on competition within Saudi Arabia.

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JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Decisions of the General Authority for Competition (GAC) with respect to violations of the Competition Law are heard before the GAC Committee on the Adjudication of Violations (the GAC Committee), which also issues the GAC's decisions in relation to violations.

A decision of the GAC Committee can be appealed before the competent court within 30 days of notification of the decision, after which the decision becomes final.

Decisions relating to fines or the temporary suspension of business are, in principle, effective and enforceable upon issuance (rather than on the determination of any appeal), unless a decision is issued by the competent court to stay their enforcement.

Time frame

33 What is the usual time frame for appeal or judicial review?

A decision of the GAC Committee can be appealed before the competent court within 30 days of notification of the decision, after which the decision becomes final.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Based on publicly available information, there has not been any enforcement action by the General Authority for Competition (GAC) in the context of foreign-to-foreign mergers, although there was enforcement action against parties for failure to file under the old regime and with respect to a recent local-to-local transaction.

In July 2014, the GAC issued its first prohibition decision. The decision concerned Saudi Vitrified Clay Pipe Company's proposed acquisition of Ceramic Pipes Company (Al Khazif for Pipes Co). Details of the prohibition were not published and the transaction related to Saudi entities.

Since then, the GAC also prohibited Delivery Hero's proposed acquisition of The Chefz in December 2021 and the acquisition of Best Gas Carrier Company by National Gas and Industrialization Company in February 2022.

Reform proposals

35 Are there current proposals to change the legislation?

The Gulf Cooperation Council is currently considering draft legislation that would create a unified competition law applicable to all Gulf Cooperation Council countries.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The General Authority for Competition has been more active in following up on non-reported local transactions and has been more active in penalising companies that have violated provisions of Saudi competition law.

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Serbia

Katarina Ranđelović
Wolf Theiss

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Notification trigger/ filing deadline	The merger notification must be submitted to the Commission within a period no later than 15 calendar 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 be submitted as early as when 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 (Phase I/Phase II)	After submitting the complete filing, the Commission will decide either within one month of submission of a complete filing (in Phase I) or within four months of 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 and 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 a failure to file and breaches 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 the dissolution of the concentration, the sale of shares or the termination of a contract, or take other measures necessary to re-establish the status that existed before the implementation of the concentration (measure of de-concentration).
Remarks	Not applicable.

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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), which replaced the Competition Act 2005. The LPC introduced some changes. In essence, however, it maintained the competition law framework established under the Competition Act 2005.

Since its entry into force, the LPC has been amended, and its current version has been applicable since 8 November 2013. In addition to the LPC, the government has passed two regulations regarding merger control aspects: the Regulation on the Form and Manner of Filing a Notification of a Concentration (current 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 National Assembly.

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 National Assembly.

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 of the date of the acquisition and that, during that period, the ownership status has not been used to influence the undertaking's market behaviour. Further, the acquisition of control by a bankruptcy administrator in the course of bankruptcy proceedings is not deemed to be a concentration.

In addition, the acquisition of shares or a participating interest in an undertaking by a company for the management of investment funds or an investment fund does not qualify as a concentration, provided that the ownership status has not been used to influence the

undertaking's market behaviour and 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 in the Serbian market, in particular where such a 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?

Article 5(2) of the LPC 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 claims owing to existing business practice determined by the controlling undertaking.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Commission must be notified of a concentration when in the business year preceding the concentration:

- the combined worldwide turnover of the undertakings concerned exceeded €100 million, and the turnover of at least one undertaking concerned exceeded €10 million in Serbia; or
- the combined turnover of the undertakings concerned exceeded €20 million in Serbia, and the turnover of each of at least two undertakings concerned exceeded €1 million in Serbia.

In addition, the LPC provides for a filing obligation in the case of certain public takeover bids even where the above thresholds are not met. This provision generally relates to joint-stock companies, the shares of which are traded on a Serbian stock exchange. Under certain conditions, public takeover bids may be implemented prior to clearance.

Further, the LPC introduced the possibility of opening an ex officio investigation into concentrations where, even when the turnover thresholds set out above are not met, the undertakings concerned have a market share in Serbia of at least 40 per cent; however, there is no Commission practice yet in this regard.

The aggregate turnover of an undertaking 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 within the preceding two years are deemed to constitute one single concentration that occurred on the date of the occurrence of the most recent transaction.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If the jurisdictional thresholds are met, the filing of a notification to the Commission is mandatory.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers are subject to Serbian merger control if the turnover of the parties to the concentration exceeds the jurisdictional thresholds. 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.

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8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The most important rules in this context are set out below.

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 a company by a Serbian bank are subject to prior approval by the National Bank of Serbia.

In 2008, the Commission and the National Bank of Serbia signed the Protocol on Cooperation in Antitrust Matters in the Financial Sector. In the Protocol, the two institutions undertook to exchange information and operate jointly and in a harmonised manner in the event of a violation of competition in the financial sector.

In 2015, changes to the Banking Law were adopted, making it clear that the Commission (and not the National Bank of Serbia) is competent to review anticompetitive aspects of concentrations in the financial sector.

Insurance

All corporate transformations of insurance companies (including mergers) must also be approved by the National Bank of Serbia.

There are similar rules for investment funds, voluntary pension funds, the telecommunications industry and the media sector.

Public takeover bids

The LPC provides for a filing obligation in the case of a public takeover bid even where the jurisdictional thresholds are not met. The provision generally relates to the (direct or indirect) acquisition of control over open joint-stock companies, the shares of which are traded on the Serbian stock exchange (exceptionally also closed joint-stock companies can be caught).

On 11 November 2009, the Commission issued a statement on the filing deadline for notifications in the case of public takeover bids. The statement had been requested by the Serbian Securities Commission because of the unclear wording of the LPC. The LPC provides that the notification must be filed within 15 days of the announcement of the public takeover bid or its closing (whichever occurs first). The confusion occurred because of the fact that an undertaking launching a takeover bid does not know the exact percentage of the shareholding it will have acquired until the bid is closed (and, as such, whether the shareholding will confer control on the bidder once the bid is closed).

The Commission clarified that in such a 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 has 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, Serbian takeover legislation has been amended in the meantime to support the interpretation given by the Serbian Securities Commission.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Law on the Protection of Competition (LPC) provides that a merger notification has to be submitted to the Commission for the Protection of Competition (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 be submitted as early as when 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 the payment of this procedural penalty is set out in the Commission's decision imposing the penalty and cannot be less than one month or more than three months following the delivery of the decision.

10 Which parties are responsible for filing and are filing fees required?

Article 63(3) of the LPC provides that the notification has to be submitted by the person or undertaking acquiring control of all or part of one or more undertakings. In all other cases, the undertakings concerned must jointly submit the notification of a concentration.

The filing fees are determined by a specific tariff (revised on 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 an 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 whether the concentration will not prevent, restrict or distort competition in the market, especially by creating or strengthening a dominant market position. The Commission must then issue its decision within one month of the submission of the notification. Upon the 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, upon the 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 of the Commission's approach to the suspension obligation having changed as a consequence of the current 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:

1. 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
2. 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).

Regarding point (2), the deadline for payment of the fine is set out in the Commission's decision imposing this fine and cannot fall 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 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 of whether the above measure of de-concentration has been applied in practice thus far; 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 into 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 those proceedings, the company that had 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. As a result, the acquirer was required to pay the higher Phase II fees of €50,000 (instead of only €25,000 for Phase I). The Commission applied the same (punitive) approach in at least three other cases in 2014 (all involving unreported acquisitions by a major Serbian telecommunications operator).

Further, in 2014, the Commission opened investigative proceedings into 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 into 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 finding that no concentration in fact occurred.

In late 2016, the Commission opened investigative proceedings into a local software developer for not reporting its acquisition of sole control over a local computer retailer (the

software developer had previously reported its acquisition of joint control over the latter). The company was eventually subject in 2017 to a fine amounting to 0.25 per cent of its turnover generated in Serbia in the preceding year (ie, approximately €56,000).

In late 2019, the Commission opened another investigation into a Croatian food and retail conglomerate for not reporting its acquisition of a number of local companies active mainly in the food sector. In February 2021, the Commission issued a clearance decision for that acquisition, while at the same time subjecting the acquirer to a fine amounting to approximately €75,000 for failure to file.

In September 2021, the Commission opened an investigation into a local company active in the property management sector for not reporting its acquisition of control over another local company. In January 2023, the Commission imposed a fine on the acquirer alone in the amount of approximately €62,500 for failure to file.

In December 2021, the Commission imposed a fine on a Serbian pharmacy that failed to notify its acquisition of sole control over the business of a Serbian health institution. The fine was imposed on the acquirer alone and amounted to 0.06 per cent of the company's turnover generated in Serbia in 2018 (approximately €24,600).

In October 2022, the Commission initiated investigations into a leading Serbian company active in the physical-technical security market for not reporting its acquisition of control over two local companies, as well as into a local e-commerce firm that connects customers and merchants on an online shopping platform, for failure to file its acquisition of control over a North Macedonian company.

Finally, in March 2023, the Commission initiated an investigation into a leading local company active in the hotels and catering sector for not reporting its acquisition of control over the business of a local Serbian hotel. The decisions following these investigative proceedings, however, have not yet been rendered.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for closing before clearance are also applicable to foreign-to-foreign mergers; however, we are not aware of any cases in which the Commission has applied these sanctions to such mergers since the introduction of the LPC in November 2009. Under the provisions of the Competition Act 2005, only one case was reported where misdemeanour proceedings were initiated against a Croatian company in connection with a foreign-to-foreign merger.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Formally, there are no solutions that might be acceptable to permit the implementation of foreign-to-foreign mergers outside Serbia before clearance in Serbia.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The LPC provides for a filing obligation in the case of a public takeover bid even where the jurisdictional thresholds are not met. The provision generally relates to the (direct or indirect) acquisition of control over open joint-stock companies, the shares of which are traded on the Serbian stock exchange (exceptionally also closed joint-stock companies can be caught).

On 11 November 2009, the Commission issued a statement on the filing deadline for notifications in the case of public takeover bids. The statement had been requested by the Serbian Securities Commission because of the unclear wording of the LPC. The LPC provides that the notification must be filed within 15 days of the announcement of the public takeover bid or its closing (whichever occurs first). The confusion occurred because of the fact that an undertaking launching a takeover bid does not know the exact percentage of the shareholding it will have acquired until the bid is closed (and, as such, whether the shareholding will confer control on the bidder once the bid is closed).

The Commission clarified that in such a 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 has 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, Serbian takeover legislation has been amended in the meantime to support the interpretation given by the Serbian Securities Commission.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

On 2 February 2016, an updated Regulation on the Form and Manner of Filing a Notification of a Concentration entered into force. The Regulation determines the information to be submitted in a merger filing and, for the first time, distinguishes 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 impact on competition 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 that 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 those cases, the Commission can ask for a long-form notification under certain conditions (one of the 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 Commission to review and assess restrictions that are directly related and necessary to the transaction (otherwise known as ancillary restraints), it must submit a long-form notification.

Short-form filings must in principle provide certain basic information about the business activities of the undertakings concerned, and 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 Commission 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 an original and must also be legalised), 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 three most recently completed business years (instead of only for the year immediately 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 of 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 attached documents must 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 have been approved. In our experience, the Commission typically decides before 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 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 is thus subject to the Commission's discretion.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Commission for the Protection of Competition (the Commission) determines in its assessment whether the notified concentration will lead to a significant prevention, restriction or distortion of effective competition, in particular whether it will result in the creation or strengthening of a dominant position in the relevant market.

The Law on the Protection of Competition (LPC) provides the following general criteria for the assessment of 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 in the relevant market;

- 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 will assess whether the establishment of the joint venture is likely to trigger spillover effects on the competitive behaviour of the parent companies.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The theory of harm applied by the Commission is in general very much in line with the approach under EU competition law. In addition to a test of dominance (over 40 per cent market share), the Commission will consider anticompetitive effects that could potentially arise out of a concentration (eg, loss of current and potential competition, unilateral effects resulting from horizontal mergers, joint dominance, conglomerate effects and vertical effects).

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The LPC exempts companies performing activities in the public interest as well as official monetary institutions if the application of the LPC could prevent them from performing activities in the public interest (ie, from performing entrusted affairs).

According to its 2009 Report, the Commission rejected a merger notification regarding the acquisition of 51 per cent of the shares in the public Serbian petroleum company NIS owing to a lack of jurisdiction. The Commission took the view that the Law on Confirming the Agreement in the Oil and Gas Sector (Official Gazette – International Agreements, No. 83/2008) required Serbia to sell 51 per cent of the shares in NIS to the acquirer and constituted a *lex specialis*. It therefore did not have jurisdiction to assess this concentration.

We are not aware of the Commission's approach having been affected by the current 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 for the Protection of Competition (the Commission) is competent, among other things, to issue a clearance decision or a conditional clearance decision, or to prohibit the concentration.

The Commission will prohibit the concentration if the conditions for approval are not fulfilled. If the Commission understands (following a first assessment of the case) that the notified concentration may not fulfil the conditions for approval, it will inform the notifying party about the relevant facts, evidence and other elements on which this assessment is based. The notifying party may then present its view before the Commission and propose modifications (conditions and obligations) to meet the requirements for approval within a 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 that are 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.

Ancillary restraints are specifically addressed in the Regulation on the Form and Manner of Filing a Notification of a Concentration, which became applicable in February 2016. The Regulation makes clear that the notifying party must submit a long-form notification if it wishes the Commission to review and assess restraints that are directly related and necessary to the transaction. For the time being, there is no further guidance available on how the Commission will assess them.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Law on the Protection of Competition (LPC) provides the undertakings concerned with the possibility to propose conditions and obligations to remedy competition concerns; however, since the LPC does not specify the type of remedies acceptable to receive merger clearance, such remedies 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 sector), 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 of any conditional clearance decisions being 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 ultimately conditionally approved the concentration in early 2013 (the commitments, among other things, included the divestment of a part of the target's business in Serbia to an unrelated, financially healthy 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 its Serbian business operations) and one in the airline industry (where the commitments of the undertakings concerned included, among other things, an obligation to release certain daily slots at 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 and committed to offer for sale the underperforming sugar factories prior to any business decision to permanently close those factories. The 2017 conditional clearance decision 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 a 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 occurred in the yeast sector that subjected the undertakings mostly to reporting obligations. In 2019, there were at least two more conditional clearances – one in the retail sector of domestic home appliances, TV audio and video equipment, mobile and fixed phones, computers and IT equipment (where the acquirer committed to either divest, sublease or terminate the lease on a number of retailing outlets in several cities in Serbia) and the other in the sector for the production and selling of fresh bread in several cities in Serbia (where the acquirer committed to various reporting obligations, including regarding its future wholesale prices and rebate policy).

Finally, in February 2024, the Commission conditionally approved the acquisition of Strauss Adriatic by Atlantic Group after an in-depth investigation that lasted eight months. It decided that Atlantic will have to divest its production operations in Belgrade and comply with other obligations related to reporting and labelling products over the next five years. This acquisition is subject to structural and behavioural remedies.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

As there are no specific provisions in the LPC that identify the type of remedies acceptable and the practice of the Commission in this regard is scarce, much is left to the discretion of the Commission.

The 2014 conditional clearance cases were interesting in the sense that the commitment processes (including the timing issues related thereto) followed the procedural steps and formalities applicable under the EU regulatory framework. This may have been a consequence of the fact that the undertakings had to coordinate their commitment process before the Commission with the applicable 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?

The 2014 conditional clearance cases were interesting in the sense that the commitment processes (including the timing issues related thereto) followed the procedural steps and formalities applicable under the EU regulatory framework. This may have been a consequence of the fact that the undertakings had to coordinate their commitment process before the Commission with the applicable 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.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Where the notifying party wishes the Commission to review and assess restrictions that are directly related and necessary to the transaction (otherwise known as ancillary restraints), it will need to make a request and submit a long-form notification.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

In Phase I proceedings, customers and competitors are typically not involved in the review process.

In Phase II proceedings, the Commission for the Protection of Competition (the Commission) may require information and data from the undertakings concerned, competitors, customers, complainants, public bodies and organisations (eg, communal authorities, statisticians and tax authorities). Third parties can also submit observations to the Commission.

The Law on the Protection of Competition (LPC) explicitly defines who is not considered 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 its website general information about decisions made on the infringement of competition (eg, the infringement of the filing or standstill obligations) and orders to initiate ex officio proceedings. Notices on the submission of merger filings are 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 that the Commission 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 applicable order on the protection of the source or 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 surrounding region (ie, Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, Montenegro, Romania and Slovenia). In June 2010, it concluded a memorandum of understanding with the Austrian Federal Competition Authority that, among other things, refers to the exchange of case-related information.

In 2012, cooperation agreements were signed with the competition authorities of Kazakhstan, Romania and Russia, and 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 Co-operation and Development, and the Secretariat of the United Nations Conference for Trade and Development. In September 2013, the Commission became a member of the EU 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 Serbia in Belgrade.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

A legal action may be filed with the Administrative Court, which became operational in 2010, against a final decision of the Commission for the Protection of Competition (the Commission). In 2021, the Administrative Court annulled a Commission decision in which the Commission had rejected a company's appeal against the president of the Commission's rejection of the merger notification. The case was returned to the Commission for a new decision.

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 on the Protection of Competition 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 for the Protection of Competition (the Commission) (still under the provisions of the Competition Act 2005) initiated, with regard to a foreign-to-foreign merger, misdemeanour proceedings against a Croatian company (and a responsible person within the company) at a misdemeanour court for implementing a concentration without obtaining the Commission's prior approval. When the misdemeanour court rejected the Commission's request, it filed an appeal, the outcome of which has not been published. Further details of this case have not been made public.

In 2017, the Commission imposed its first fine for failure to notify, and other fines followed in 2021 and 2023. In general, enforcement activities of the Commission are increasing in frequency.

One of the current concerns of the Commission is the possibility of enforcing sanctions in the event of a foreign-to-foreign merger (ie, in situations where the undertakings concerned, although they do not have a registered entity in Serbia, realise income on the basis of their product sales in this market, thus meeting the turnover thresholds).

Reform proposals

35 Are there current proposals to change the legislation?

Following the remarks and recommendations of the European Commission expressed in its 2012 Progress Report for Serbia, the Law on the Protection of Competition (LPC) was amended in late 2013. Furthermore, the Regulation on the Form and Manner of Filing a Notification of a Concentration started to apply in February 2016.

The Commission is expected to provide guidance on frequently asked questions in the merger control sector.

A working group set up within the Serbian government to prepare a new competition protection law circulated the first proposal of the new law for comments from the public in 2018. The proposal was updated and circulated for an additional round of comments in early 2019.

The proposal attempts to consolidate into existing rules the Commission's practices since its establishment. It also attempts to reconcile the procedural aspects of the Commission's work with the Law on Administrative Proceedings.

With regard to merger control, it has been proposed that the jurisdictional thresholds for notifiable concentrations should be increased (something that has long been lobbied for by industry representatives) and that a mandatory filing obligation should be introduced 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 have been extended. Furthermore, the procedure for requesting a derogation from the suspension obligation (eg, in cases of public takeovers or privatisations) shall be facilitated.

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 December 2023 and February 2024, the Commission for the Protection of Competition (the Commission) issued two decisions related to Atlantic Group and Strauss Adriatic, the two biggest producers and wholesalers of ground coffee in Serbia. On 29 December 2023, the Commission issued a decision imposing penalties on Atlantic Group and Strauss Adriatic for concluding a restrictive agreement by way of aligning business strategies through the exchange of information on the pricing policy and future wholesale prices of ground coffee in the Serbian market. On 28 February 2024, the Commission issued a merger clearance, conditionally approving the acquisition of Strauss by Atlantic Group. The Commission also found that the parties used public announcements to signal the behaviour related to the

pricing policy and resale price maintenance. Finally, the Commission imposed fines in the amount of approximately €1.6 million for Atlantic Group and €400,000 for Strauss Adriatic. The proposed acquisition is subject to structural and behavioural remedies; the Commission conditionally approved it after in-depth investigation that lasted eight months, deciding that Atlantic will have to divest its production operations in Belgrade and comply with other obligations related to reporting and labelling products over the next five years.

Moreover, in December 2023, the Commission found that the companies KTG Solucije and Eco sense Subotica agreed on the terms of participation in the procedures of several public procurements, thus concluding a restrictive agreement. For the first time, however, the Commission reduced the fine after it established that that the conditions for the application for leniency, which was submitted during the mentioned proceeding, had been met.

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Notification trigger/ filing deadline	No deadline as notification is voluntary.
Clearance deadlines (Phase I/Phase II)	The indicative timelines for Phases I and II are 30 and 120 working days respectively.
Substantive test for clearance	The test is whether or not the merger has resulted in, or may be expected to result in, a substantial lessening of competition within any market in Singapore for goods or services.
Penalties	If the Competition and Consumer Commission of Singapore (the Commission) finds that the infringement of the section 54 prohibition was committed intentionally or negligently, a financial penalty may be imposed on any of the merger parties, which may not exceed 10 per cent of each party's business turnover in Singapore for each year of infringement, up to a maximum of three years.
Remarks	Not applicable.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The relevant piece of legislation is the Competition Act 2004, which was passed in October 2004. The Competition Act is administered and enforced by the Competition and Consumer Commission of Singapore (the Commission). The Competition Act, with some exclusions (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 have resulted, or may be expected to result in, a substantial lessening of competition within any market in Singapore (section 54 prohibition).

Laws against anticompetitive behaviour in respect of particular industry sectors, such as telecommunications, media, post, gas and electricity, can be found in other statutes 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 regulator 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 its 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 occurs if:

- two or more undertakings, previously independent of one another, merge;
- one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or
- the result of an acquisition by one undertaking (the first undertaking) of the assets (including goodwill), or a substantial part of the assets, of another undertaking (the second undertaking) is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate, the part concerned of the business in which that undertaking was engaged immediately before the acquisition.

Section 54(7) of the Competition Act provides that a merger shall not be deemed to occur if:

- the person acquiring control is a receiver or liquidator acting as such or is an underwriter acting as such;
- all the undertakings involved in the merger are, directly or indirectly, under the control of the same undertaking;
- control is acquired solely as a result of a testamentary disposition, intestacy or the right of survivorship under a joint tenancy; or
- control is acquired by an undertaking, the normal activities of which include the carrying out of transactions and dealings in securities for its own account or for the account of others under the circumstances set out in section 54(9) of the Competition Act.

As set out in the Fourth Schedule to the Competition Act, the section 54 prohibition does not apply to any merger:

- if the economic efficiencies arising or that may arise from the merger outweigh the adverse effects owing to the substantial lessening of competition in the relevant market in Singapore;
- that has been approved by any minister or regulatory authority (other than the Commission), pursuant to any requirement for such approval imposed by or under any written law;
- under the jurisdiction of any regulatory authority (other than the Commission) 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 certain specified activities under the Third Schedule, such as the supply of licensed and regulated ordinary letter and postcard services, potable piped water, wastewater management services, licensed bus services, licensed and regulated rail services, or licensed and regulated cargo terminal operations.

Where the Commission proposes to make an unfavourable decision, the merging parties may apply to the Minister for Trade and Industry to exempt the merger on public interest considerations.

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 a 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 control over an undertaking 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. Joint control is characterised by the possibility of a deadlock resulting from the power of two or more parent companies to reject proposed strategic decisions, and a requirement that these shareholders must reach a consensus in determining the commercial activities of the joint venture.

A joint venture is subject to the section 54 prohibition only if it operates in a market and performs the functions normally carried out by undertakings operating in that market. Joint ventures that take over one specific function within the parent companies' business activities – for example, research and development 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 for an initial start-up period is not precluded from being regarded as 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 a joint venture for it to perform its functions. Provisions that provide for the dissolution of the joint venture, the withdrawal of one or more 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, the agreement must be for a sufficiently long period to bring about a lasting change in the structure of the undertakings concerned or provide for the possible continuation of the joint venture beyond this period.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The essence of control is the ability to exercise decisive influence in relation to an undertaking.

For this purpose, control over an undertaking is regarded as existing under section 54(3) of the Competition Act 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, there is a rebuttable presumption that decisive influence exists; 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.

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. Generally, the Commission may consider whether any additional agreements with the undertaking allow

the party to influence the undertaking's strategic commercial behaviour, such as long-term supply agreements and financial arrangements.

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?

Singapore has a voluntary merger notification regime, which means that there is no obligation, or mandatory requirement, for merger parties to notify their merger situations to the Commission, either before or after the implementation of a merger. It is the responsibility of merger parties to self-assess their merger and to ensure that it does not infringe section 54 of the Competition Act.

In general, mergers should be notified to the Commission if the merger parties think that the merger may result in a substantial lessening of competition within any market in Singapore. Merger parties should note the risk that if a merger is not notified, the Commission may investigate a merger or anticipated merger on its own initiative if it has reasonable grounds for believing that the section 54 prohibition has been infringed or will be infringed, and has the ability to subsequently give directions or impose financial penalties in respect of any infringement.

The Commission is unlikely to consider that merger or anticipated merger gives 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 per cent and 40 per cent, and the post-merger market share of the three largest firms (ie, the concentration ratio of the three largest firms) is 70 per cent or more.

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 of all of the parties in the financial year preceding the transaction is below S$50 million.

The above thresholds are stated in the Commission Guidelines on Merger Procedures and are merely indicative. The Commission may investigate merger situations that fall below these thresholds in appropriate circumstances. Conversely, merger situations that meet or exceed the thresholds may not necessarily infringe the section 54 prohibition.

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 an anticipated merger is voluntary.

Merger parties may make an application to the Commission either under section 57 of the Competition Act in respect of an anticipated merger or under section 58 of the Competition Act for mergers that have been carried into effect.

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, the Competition Act will apply to any merger or anticipated merger, notwithstanding that the merger takes place outside Singapore or that any party to the merger resides outside Singapore. Notification to the Commission for a decision in respect of a foreign-to-foreign merger will likewise be voluntary.

8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

In March 2024, the Significant Investments Review Act 2024 came into force. The Significant Investments Review Act provides Singapore with an updated toolkit to regulate significant investments into critical entities through (a) ownership and control provisions over designated entities to ensure the reliability of critical functions which they provide; and (b) powers that can be exercised against any entity that has acted against Singapore's national security interests.

In addition, some sectors and industries have specific requirements on foreign ownership. For example:

- sections 11 and 12 of the Newspaper and Printing Presses Act 1974 require the approval of the Minister for Communications and Information before any person can become a substantial shareholder (defined under section 81 of the Companies Act 1967), a 12 per cent controller or an indirect controller of a newspaper company; and
- section 38 of the Telecommunications Act 1999 requires that approval from the Info-communications Media Development Authority must be obtained before any party becomes a 12 per cent controller or a 30 per cent controller; obtains effective control over a designated telecommunications licensee; or acquires any business (or any part of such a business) of a designated telecommunications licensee as a going concern.

In addition to the general framework provided by the Competition Act, there are also sector-specific competition regulatory frameworks.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no deadlines for notification, nor are there 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.

If the merger parties wish to notify their merger to the Competition and Consumer Commission of Singapore (the Commission) for a decision, they may do so at any time before, during or after the merger. In the case of completed mergers, parties are encouraged to notify as soon as possible after completion. Parties that wish to apply for a decision for an anticipated merger should only do so once the parties have a bona fide intention to proceed with the transaction and the merger has been made public (or if the parties have no objection to the Commission publicising their merger).

In deciding whether to notify a merger and when to notify the Commission, merger parties should bear in mind that the Commission may unwind a merger that has already been effected and (in the case of intentional or negligent infringements) impose financial penalties.

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 and anticipated mergers are:

- where the net aggregate 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 net aggregate 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 net aggregate turnover of the target undertaking or asset is above S$600 million, the fee payable is S$100,000.

If the merging parties are small or medium-sized enterprises (SMEs), or if the acquiring party is an SME and direct or indirect control in the SME will not be (or has not been) acquired, the filing fee will be S$5,000. Under the Competition (Fees) Regulations 2007, SMEs are undertakings with an 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?

Notification is voluntary and there is no requirement to suspend the implementation of a merger or anticipated merger before clearance. However, parties who give effect to or proceed with mergers without clearance do so at their own commercial risk.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

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 (ie, the prohibition on mergers and acquisitions that have resulted, or may be expected to result in, a substantial lessening of competition within any market in Singapore), 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, among other things, require a merger to be dissolved or modified.

Parties should also note that the Commission can impose interim measures where it has not completed its investigations but has a reasonable suspicion that the section 54 prohibition has been infringed or will be infringed. It may make such directions as it considers appropriate for the purpose of preventing merger parties from taking any action that might prejudice the Commission's ability to consider the merger situation or to impose appropriate remedies.

Interim measures may also be imposed to prevent serious, irreparable damage to a particular person or category of persons, or to protect the public interest. These measures may 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 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.

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.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There is no prohibition against closing before clearance; however, parties should take note of the actions that the Commission may take if the merger is found to have an anticompetitive effect in Singapore.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

There are no special rules in the Competition Act. Takeovers and mergers of listed companies in Singapore are subject to non-statutory rules in the Code on Take-overs and Mergers (the Takeover Code), which is administered by the Securities Industry Council. Parties involved in public takeover bids should refer to the Takeover Code and the Guidance Note on the Merger Procedures of the Competition Commission of Singapore under Appendix 3 of the Takeover Code.

An offeror making a mandatory general offer subject to the Takeover Code must 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 below 30 per cent or a level that is less than the 1 per cent limit on acquisitions in any six-month period before the mandatory general offer was triggered.

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, 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 help merger parties ascertain what information will be required by the Commission during the merger review process, help the Commission to understand the transaction early on, and clarify the information and evidence that will be required in Form M1. The Commission is prepared to engage in PNDs for anticipated mergers that are 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 depend on the preference of the merger parties, the complexity of the transaction and the potential concerns raised by the merger. The Commission considers PNDs to be most useful where parties can provide a draft Form M1.

During the PND, the Commission will help to identify the information needed to provide a complete submission and any other useful information that might expedite its review. For mergers that involve more complex products or that raise potential competition issues, PNDs minimise the risk that the mergers will not be cleared in Phase I. The Commission will generally not, in the context of PNDs, give its views on whether a merger situation is likely to require a Phase II assessment or if it would lead to a substantial lessening of competition.

The Commission will review a merger situation in one or two phases, and the level of detail required will increase with each phase. For each phase, merger parties must submit the duly completed merger review Forms M1 and M2, respectively (available on the Commission's website).

Form M1 requires information relating to, among other things:

- 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;
- conglomerate effects, if there is a potential conglomerate 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, among other things:

- the market conditions in the relevant markets, including the structure of demand and supply;
- the importance of research and development;
- the prevalence of cooperative agreements;
- possible efficiency gains arising from the merger;
- the likely effects of the merger; and
- any applicable failing firm or division arguments that the merger parties wish to submit.

The 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, 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 that is over and above what is required under Forms M1 and M2.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

Two separate processes are available to parties before formal notification to the Commission. First, subject to section 55A of the Competition Act and the Commission's Guidelines on Merger Procedures, parties may seek confidential advice from the Commission on whether

an anticipated merger is likely to raise competition concerns in Singapore and whether a notification is advisable. Second, parties may engage the Commission in PNDs to discuss the content and timing of their notifications to expedite the merger review process.

To obtain confidential advice from the Commission, parties must meet three conditions set out in section 55A of the Competition Act:

- 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;
- the anticipated merger must not be in the public domain – in exceptional circumstances, the Commission may consider giving confidential advice in relation to anticipated mergers that are no longer confidential, but the requesting party or parties must provide good reasons for why they wish to receive confidential advice and not proceed with a notification; and
- in the Commission's view, the merger situation must raise a genuine issue relating to the competition assessment in Singapore, so there must be some doubt as to whether the merger situation raises concerns such that notification may be appropriate (eg, 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, but there would be no genuine issue if both merger parties have an insignificant market presence in Singapore).

Confidential advice may be requested through the Commission's hotline or by email. The Commission will then agree on a provisional timeline for parties to submit full information similar to that required in Form M1. No third-party enquiries will be carried out and third-party contact details are not required.

The Commission will carry out an internal assessment of the merger and may meet with the requesting parties. At the end of the process, it will provide 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 required information. The advice is not binding on the Commission, and the merger may be investigated regardless of the advice given.

PNDs are similarly commenced by contacting the Commission through its hotline or by email. No specific timetable is given, although the Commission states that their length and formality depend on the preference of the merger parties, the complexity of the transaction and the concerns that the merger may raise. The Commission states that PNDs are most useful where a draft Form M1 is provided.

The formal notification process begins with the filing of Form M1 with the Commission. The Commission will first determine if the application is complete, with the necessary supporting documents and filing fees. Once a completed Form M1 is accepted, the Phase I review commences. The Commission will gather information about the effect on competition of the merger situation from the applicant or applicants and from third parties. This is expected to be completed within 30 working days.

If the Commission is unable to form the conclusion during the Phase I review that the merger situation does not raise competition concerns, it will provide the applicant or applicants with

a summary of its key concerns, and, upon the filing of a complete Form M2 and response to the Phase II information request, the Commission will proceed to Phase II review. A Phase II review entails a more detailed and extensive examination of the effects of the merger situation. Accordingly, the Commission endeavours to complete it within 120 working days.

During the review process, 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.

18 | What is the statutory timetable for clearance? Can it be speeded up?

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, where day one is the working day after the Commission receives a completed Form M1. 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

The indicative time frame of 120 working days for a Phase II review commences when the Commission notifies the applicant or applicants that the merger situation has proceeded to a Phase II review, and after the Commission receives a complete Form M2 and a response to the Phase II information request that the Commission deems satisfactory. In any case, the Phase II review period will not commence until the expiry of the indicative time frame of 30 working days for Phase I review.

Throughout the course of the application, the Commission may request further information above and beyond that required in Form M1 or Form M2. Failure to furnish such information may result in the Commission exercising its discretion to determine the application without providing a decision.

Although 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 if, for example, the merger parties do not respond to the Commission’s request for information in time or when commitments are being considered. The indicative time frames may also be extended in exceptional circumstances, upon informing the merger parties in writing in advance.

There is currently no mechanism in place to accelerate a merger clearance decision by the Commission.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

For the Competition and Consumer Commission of Singapore (the Commission) to clear a 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).

The counterfactual is usually forward-looking and should not involve a violation of competition law. In many cases, the best guide to the appropriate counterfactual will be the prevailing conditions of competition in the market without the merger. The Commission may also 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 competition conditions might not prevail even without the merger as the failing firm may exit the market if the merger does not occur (known as the failing firm defence). In those cases, the counterfactual will have to reflect the likely firm failure and the resulting loss of competition.

As set out in the Fourth Schedule to the Competition Act, the section 54 prohibition (ie, the prohibition on mergers and acquisitions that have resulted, or may be expected to result in, a substantial lessening of competition within any market in Singapore) does not apply to a merger:

- if the economic efficiencies arising or that may arise from the merger outweigh the adverse effects owing to the substantial lessening of competition in the relevant market in Singapore;
- that has been approved by any minister or regulatory authority (other than the Commission), pursuant to any requirement for such approval imposed by or under any written law;
- under the jurisdiction of any regulatory authority (other than the Commission) 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 certain specified activities, such as the supply of licensed and regulated ordinary letter and postcard services, potable piped water, wastewater management services, licensed bus services, licensed and regulated rail services, or licensed and regulated cargo terminal operations.

20 Is there a special substantive test for joint ventures?

No, the same test applies.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The Commission has set out the factors that it will take into account in its assessment of the competitive effects of a merger in its Guidelines on the Substantive Assessment of Mergers.

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 two close competitors merge and, as a result of the merger, the merged entity finds it profitable to raise prices (or reduce output, quality or innovation) because of the loss of competition between the merged entities. Non-coordinated effects may also arise in markets where innovation is an important feature of competition, and where one or more of the merging parties is a key innovator and has the potential to exert significant competitive pressure in the future on other firms in the market.

While the profits from non-coordinated effects are generally captured by the merger parties, rival firms in the market may also find it profitable to raise their prices independently because of the loss of competitive pressure arising from the merger.

Coordinated effects may arise where the merger increases the possibility that, post-merger, firms in the same market may find it profitable to coordinate their behaviour by raising prices or reducing quality, output or innovation. The Commission will consider the structure of the market, market characteristics and any history of coordination in the market concerned.

In the case of non-horizontal mergers, the Commission's Guidelines on the Substantive Assessment of Mergers 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, the creation of barriers to entry and the ability of customers to exercise countervailing power.

While conglomerate mergers typically do not result in the substantial lessening of competition, competition concerns may arise in mergers between parties in closely related markets. With respect to conglomerate mergers, the Commission will consider the potential coordinated and non-coordinated effects, barriers to entry and the ability of customers to exercise countervailing power.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

Under section 57(3) of the Competition Act, 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. This power may be exercised on the application of a merger party who has been notified that the Commission proposes to issue a decision that the section 54 prohibition has been infringed.

Section 2 of the Competition Act defines 'public interest consideration' as 'national or public security, defence and any other considerations that the Minister may, by order in the Gazette, prescribe'. As at 5 April 2024, the Minister has not gazetted any other matters as public interest considerations.

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 the merger increases rivalry in the market such that it is likely to prevent a substantial lessening of competition from occurring. For example, the efficiency gains from a merger between two of the smaller firms in a market may enable the merged entity to exert greater competitive pressure on its larger competitors.

Second, efficiencies may 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. Where merger parties can demonstrate that the efficiencies will be sufficient to outweigh the adverse effects resulting from the substantial lessening of competition, the merger may be excluded from the section 54 prohibition (ie, the prohibition on mergers and acquisitions that have resulted, or may be expected to result in, a substantial lessening of competition within any market in Singapore) pursuant to paragraph 3 of the Fourth Schedule to the Competition Act.

To be taken into account by the Commission, efficiencies must be demonstrable (ie, they are clear and quantifiable), merger-specific (ie, they will only arise from the merger), timely (ie, the benefits will materialise within a reasonable period) and sufficient in extent (with reference to the magnitude of the efficiencies). Such efficiencies could include lower costs, greater innovation, greater choice or higher quality.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Where the Competition and Consumer Commission of Singapore (the Commission), upon completion of its investigations, decides that a merger has infringed – or that an anticipated merger, if carried into effect, will infringe – the section 54 prohibition (ie, the prohibition on mergers and acquisitions that have resulted, or may be expected to result in, a substantial lessening of competition within any market in Singapore), 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 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;
- 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 business year preceding the date on which the decision of the Commission is taken or, if figures are not available for that business year, the business year immediately preceding it. Information on the calculation of financial penalties is generally set out in the Commission's Guidelines on the Appropriate Amount of Penalty in Competition Cases and, particularly in respect of infringements of the section 54 prohibition, its Guidelines on Merger Procedures.

The Commission may accept commitments at any time during a Phase I or Phase II review, or during an investigation before a final decision on whether there has been an infringement of the section 54 prohibition. Commitments are generally proposed by the merger parties and must be aimed at remedying, mitigating or preventing the competition concerns that have been identified as arising from the merger situation.

If the Commission considers the proposed commitments to be acceptable in principle, 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.

Commitments are binding on the parties when they are accepted by the Commission and are enforceable in the District Court.

The Competition Act also gives the Commission the power to take interim measures.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Merger parties may propose, and the Commission may accept, commitments at any time during a Phase I or Phase II review, or during an investigation before a final decision on whether there has been an infringement of the section 54 prohibition.

Commitments are generally proposed by the merger parties, although the Commission may invite merger parties to consider whether they want to offer commitments, for instance, where it believes that the competition issues seem amenable to be remedied by commitments. The commitments must aim to prevent or remedy the adverse effects to competition identified.

Generally, the Commission will only accept commitments that sufficiently and clearly address the adverse effects to competition and are proportionate to them. If the Commission considers proposed commitments to be acceptable in principle, 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.

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 ongoing monitoring by the Commission. Typically, structural remedies require the sale of one of the overlapping businesses that have led to the competition concern. The Commission's Guidelines on Directions and Remedies state 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 acquirer'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 structural remedies will be impractical or disproportionate to the nature of the concerns identified. Further, behavioural remedies may sometimes be necessary to support structural remedies.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

In its Guidelines on Merger Procedures, 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 all the competition concerns identified in Phase I.

If the commitments proposal does not adequately address all competition concerns, the Commission will proceed to a Phase II review. During the Phase II review process, the Commission may call for a state of play meeting and set out its competition concerns in a Phase II issues letter.

If, towards the end of a Phase II review, the Commission is of the preliminary view that the merger situation is likely to give rise to a substantial lessening of competition, it will issue a statement of decision (provisional) to the merger parties, stating the facts on which the Commission relies and its reasons. The statement of decision (provisional) may outline any 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. The Commission may consider and impose alternative remedies that differ from those proposed by the parties.

If the Commission considers the proposed commitments to be acceptable in principle, 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.

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 of the basis for the application and demonstrate how the change would address any competition concerns persisting at the time of the application and would not give rise to new competition concerns.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

From the publicly available decisions as at 5 April 2024, six mergers were cleared conditional upon the Commission receiving remedies or commitments:

- the proposed acquisition by SEEK Asia Investments Pte Ltd of the JobStreet Business in Singapore;

- the proposed acquisition by ADB BVBA of all the shares of Safegate International AB from Fairford Holdings Private AB;
- the proposed acquisition by Times Publishing Limited of Penguin Random House Pte Ltd and Penguin Books Malaysia Sdn Bhd;
- the completed acquisition of Innovative Diagnostic Private Limited and Quest Laboratories Pte Ltd by Pathology Asia Holdings Pte Ltd;
- the proposed acquisition by London Stock Exchange Group PLC of Refinitiv Holdings Limited; and
- the proposed acquisition by Talace Private Limited of Air India Limited.

Of the cases above, only the *ADB/Safegate,* the *London Stock Exchange/Refinitiv* and the *Talace/Air India* mergers concerned foreign-to-foreign transactions.

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 Commission's Guidelines on the Substantive Assessment of Mergers 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 to the Competition Act.

To be directly related, the restriction must be economically connected with the merger but ancillary or subordinate to its main object. A restriction is likely to be necessary if, for example, in the absence of the restriction, the merger would not go ahead or could only go ahead at substantially higher costs over an appreciably longer period, or with considerably greater difficulty.

In 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 regarding whether any agreements, arrangements or provisions that are not integral to the merger, but that are concluded in conjunction with the merger, qualify as ancillary restrictions.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Competition and Consumer Commission of Singapore (the Commission) requires the provision in the notification form of the contact details of:

- each merger party's five most significant competitors in each relevant market, in Singapore and generally;
- at least three potential competitors, if any, where vertical, conglomerate and/or non-co-ordinated effects are identified;
- each merger party's 10 most significant direct customers; and
- if the customers are not end users, the 10 most significant end users in each of the relevant markets.

The Commission may contact such parties to solicit feedback in relation to the notified mergers.

The Commission will gather information about the effect on competition of the merger situation from the applicant and from third parties, including customers, competitors, suppliers, and other regulatory bodies and government departments, where relevant. The details of the merger will be published on the public register on the Commission's website.

Complainants may make complaints to the Commission through its online form, by telephone or by email. The Commission will acknowledge receipt of the complaint within five working days and may ask for further information or launch a formal investigation if there are reasonable grounds for suspecting that the merger may result in a substantial lessening of competition. Although the Commission prefers that complaints not be anonymous, it 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 against any undertaking that is or that has, at the material time, been a party to the infringement. Such rights of private action will only arise after the Commission has made a decision that a merger has infringed the section 54 prohibition (ie, the prohibition on mergers and acquisitions that have resulted, or may be expected to result in, a substantial lessening of competition within any market in Singapore) 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 (with the exception of an application for confidential advice), the Commission will publish the details of notified mergers or anticipated mergers on the public register on its website. The information provided will usually include:

- the names of the merger parties;
- a description of:
    - the transaction;
    - the business activities of the merger parties worldwide and in Singapore;
    - the overlapping goods or services, including brand names; and
    - 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 effects on competition of the merger.

Third parties are invited to submit their views 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 to which it relates, 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 its Guidelines on Merger Procedures, the Commission specifically cautions against blanket and overly wide confidentiality claims.

The Commission will generally treat parties' submissions on confidentiality seriously. In exceptional circumstances, it may be necessary to disclose confidential information, in which case the Commission 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, although 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 necessary to facilitate the enforcement or administration of competition laws.

As at 5 April 2024, the Commission has concluded cooperation agreements with the following enforcers:

- the Japan Fair Trade Commission;
- the Indonesia Competition Commission;
- the Competition Bureau of Canada;
- the Philippine Competition Commission; and
- the State Administration for Market Regulation of the People's Republic of China.

Generally, the memorandums formalise and reinforce existing cooperation and technical assistance activities between the Commission and foreign agencies, including on areas such as case notification, information exchange and enforcement coordination, as well as technical cooperation and experience sharing.

On 16 May 2019, the Commission announced that it had joined the International Competition Network's Framework on Competition Agency Procedures as a founding member. The Procedures advance basic and non-binding principles on procedural fairness and transparency among competition agencies, and enable closer cooperation between participating agencies through dialogues to better understand each other's processes.

Form M1 includes specific questions on whether the parties intend to notify (or have notified) competition agencies in other jurisdictions about the merger. Parties are requested to notify the Commission of any material change in status in relation to any notifications to overseas competition agencies, including, for example, approvals, unfavourable decisions and negotiations of commitments. Parties are also asked if they would be willing to provide the Commission with a waiver allowing the Commission to exchange confidential information with competition agencies in other jurisdictions.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

There is a right of appeal to the Competition Appeal Board (the Board) against any decision by the Competition and Consumer Commission of Singapore (the Commission) in respect of a merger or anticipated merger or any direction (including interim measures) imposed by the Commission. An appeal against the Commission's decision in respect of a merger or anticipated merger may be made by any merger party, while an appeal against a direction may be made by the person to whom the Commission gave the direction.

The Board can confirm, impose, revoke or vary a direction, or make any other direction or decision, provided that 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 an imposed direction will not operate to suspend that direction, except in the case of appeals against financial penalties. The infringement decision and the direction will remain in effect (unless suspended by an interim order made by the Board or, in the case of a further appeal, the relevant appeal court).

Parties may make further appeals against the decisions of the Board to the General Division of the High Court and then to the Court of Appeal, but only on points of law and the quantum of the financial penalty. Such an appeal can only be made by a party to the proceedings in which the decision of the Board was made. The General Division of the High Court may determine any such appeal by confirming, modifying or reversing the decision of the Board and making such further or other order on appeal.

It is also possible to bring an action in judicial review. To do so, parties must make an application under Order 20 of the Rules of Court 2021, before a judge, for permission to bring an action in judicial review. Once permission is granted, parties must make the judicial review application within 14 days.

On 29 December 2020, the Board dismissed Uber's appeal against the Commission's 2018 decision that found that Grab and Uber had infringed the section 54 prohibition (ie, the prohibition on mergers and acquisitions that have resulted, or may be expected to result in, a substantial lessening of competition within any market in Singapore). This was the first and only appeal in respect of the section 54 prohibition to the Board. The Board upheld the Commission's directions and financial penalties, and awarded the Commission its costs of the appeal.

As at 5 April 2024, there have been no appeals from the Board to the courts and no cases of judicial review in respect of the Commission's 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 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 it 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 2021. Under Order 24, Rule 5 of the Rules of Court, no application for a mandatory, prohibiting or quashing order may be made unless permission to make such an application has been granted. Permission to apply for a mandatory, prohibition or quashing order will not be granted unless the application was made within three months of the date of the omission, judgment, order, conviction or proceedings that gave rise to the application.

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 at 5 April 2024, a total of 109 mergers and acquisitions have been notified to the Competition and Consumer Commission of Singapore (the Commission), of which 98 have been cleared, six have been withdrawn, two anticipated mergers have been abandoned and three mergers are pending.

In addition to the notified mergers, on 27 March 2018, the Commission commenced an investigation into Grab's acquisition of Uber's Southeast Asian business in exchange for Uber's acquisition of a 27.5 per cent stake in Grab. The investigations concluded with the Commission issuing an infringement decision. On 29 December 2020, the Board dismissed Uber's appeal against the decision.

Reform proposals

35 Are there current proposals to change the legislation?

There are no current public proposals to revise or change the Competition 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?

One key case pending a decision by the Competition and Consumer Commission of Singapore (the Commission) is the possible acquisition by Grab Rentals Pte Ltd, a wholly-owned subsidiary of Grab Holdings Limited, of 100 per cent of the shares of Trans-cab Holdings Ltd. The Commission was unable to conclude at the end of its Phase I review that the acquisition does not give rise to any competition concerns. As such, the Commission is currently carrying out a more in-depth Phase II review.

Separately, on 2 February 2024, the Commission issued a set of interim measures to Delivery Hero SE, Foodpanda GmbH (Germany) and Delivery Hero (Singapore) Pte Ltd (collectively, Delivery Hero) as well as Grab Holdings Inc (Grab) in relation to the possible acquisition by Grab of the whole of part of the business of Delivery Hero in Southeast Asia, including Singapore. The interim measures were aimed at ensuring the market remains open and contestable until the completion of the Commission's investigations into the possible transaction. While the interim measures have ceased effect since 23 February 2024 after the Commission was informed that the possible transaction had been abandoned, the Commission is continuing to monitor the market and will take further action necessary to protect the market.

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Slovakia

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Voluntary or mandatory system?	The filing of a notification with the Antimonopoly Office of the Slovak Republic (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). Among other things, a notification can be filed with the AMO prior to the conclusion of a formal agreement.
Clearance deadlines (Phase I/Phase II)	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 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 of 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 Phases I and II periods, even repeatedly, by a total of up to 30 working days. The AMO may request the parties to propose conditions (commitments) within 30 working days of the delivery of such request. This effectively stops the clock – that is, the Phases I and II reviews or decision-making periods are not in effect until the parties submit their proposed commitments or the 30-day period expires (whichever occurs first).
Substantive test for clearance	The AMO examines whether the concentration will significantly impede effective competition in the relevant market, in particular due to the creation or strengthening of a dominant position.
Penalties	In the event of a failure to notify the concentration or a 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 that has not achieved any turnover, or when its turnover cannot be calculated.
Remarks	Not applicable.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

In 2021, Act No. 187/2021 on Protection of Economic Competition (the Act) became effective. Among other things, the Act implements the ECN+ Directive.

Changes introduced by the Act in the area of merger control only partially modify the provisions governing notification criteria. The Act specifically abolishes a specific notification threshold for creating full-function joint ventures. This has allowed the merger control rules to be more efficient as extraterritorial joint ventures not active in the territory of Slovakia are no longer subject to review, unless the JV partners already have significant activities in Slovakia.

The other substantive change is a declaration according to which joint-control concentrations (not only joint ventures) are also to be reviewed under the article on coordination. Other major changes regarding the merger control regime concern procedural changes (starting from the assessment period), the possibility of imposing periodic penalty payments for infringements with regard to the merger control regime, the possibility of imposing temporary remedies in certain cases, and specific provisions regarding the covid-19 pandemic situation and turnover calculations.

Some other aspects are regulated by soft law, such as the guidelines on pre-notification contacts, turnover calculation, details of simplified notification, details of granting an exemption from the prohibition of merger implementation and the guidelines on ancillary restraints. These guidelines have been under partial formal revision owing to the formal changes introduced by the Act.

The filing fee is determined by the Act on Administrative Fees. The General Administrative Procedural Act applies to any procedural matter that is not specifically regulated in the Act.

The relevant authority for merger control (and competition law in general) is the Antimonopoly Office of the Slovak Republic (AMO). More information on the AMO may be found on its website.

Scope of legislation

2 | What kinds of mergers are caught?

The Act defines the following (if on a lasting basis) as a concentration:

- a merger, spin-off or similar corporate reorganisation, including economic mergers (ie situations in which 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(s), 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
- they exercise those voting rights only with a view to preparing for the sale of the undertaking or part thereof or the sale of securities and, upon the sale, they will lose control, provided that the sale is effected within one year of the date of acquisition of the securities.

If the disposal is not reasonably possible within this period, it may – upon request – be extended by the AMO. Further exemptions exist under special laws, such as with regard to the acquisition of control over an undertaking by liquidation trustees under the Commercial Code or by the bankruptcy trustee under the Bankruptcy Act.

3 | What types of joint ventures are caught?

The creation of a joint venture controlled by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity (full-function joint venture), constitutes a concentration. If the creation of the joint venture has as its object or effect the coordination of the competitive behaviour of undertakings, the AMO appraises the coordination in accordance with the cartel prohibition (article 4 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 for the exercising of a decisive influence over the composition, voting or decision-making of the undertaking's bodies.

Minority interests are caught only if they confer control by any of the means described above.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The AMO must be notified of a concentration where, in the business year preceding the concentration:

- the combined aggregate Slovak turnover of the undertakings concerned amounted to at least €46 million, and each of at least two of the undertakings concerned achieved a turnover of at least €14 million in Slovakia; or
- the worldwide aggregate turnover of at least one of the undertakings concerned amounted to at least €46 million; and
- in the case of a merger, spin-off or similar corporate reorganisation of two or more separate undertakings, including economic mergers (ie situations where the undertakings concerned become economically combined, while retaining their legal independence, especially in the case of joint economic management) the aggregate turnover of at least one other undertaking concerned amounted to at least €14 million in Slovakia, or, in the case of the acquisition of direct or indirect control by an undertaking or several undertakings over another undertaking or part of another undertaking or undertakings, the target (different from the undertaking meeting the worldwide €46-million threshold) generated an aggregate turnover of at least €14 million in Slovakia.

The Act abolished a separate turnover threshold for joint ventures; however, joint ventures can still be notifiable in accordance with the above turnover thresholds.

For the purpose of turnover calculation, 'turnover' means the total of the revenues, yields or incomes from the sale of goods or services, minus discounts and indirect taxes. If applicable, financial assistance granted to the undertaking also has to be added in the total.

Financial assistance means financial aid granted from public sources that concerns an activity performed by the undertaking and that will be reflected in the price of its goods. The undertaking must be the recipient of that aid.

The decisive period for which the turnover is calculated is not only the previous business year, but also the last pre-pandemic business year (ie 2019) if the turnover in the previous business year did not meet the turnover threshold. The provision in this regard is a reaction to the temporary decrease of turnovers in certain industries owing to the covid-19 pandemic.

The aggregate turnover of an undertaking includes:

1. the turnover of the undertaking concerned;
2. the turnover of the 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 the undertaking's bodies; or
    - has the right to manage the undertaking's business;
3. the turnover of the undertakings that have the rights referred to in point (2) in an undertaking concerned;
4. the turnover of the undertakings in which the undertakings referred to in point (3) have the rights referred to in point (2); and
5. the turnover of the undertakings in which two or more undertakings referred to in points (1) to (4) have joint rights as referred to in point (2).

In the case of an acquisition of direct or indirect control over one or several undertakings or their part(s), only the turnover pertaining to the acquired undertakings (or the relevant parts) that are subject to the concentration is taken into account for the purpose of turnover calculation.

The aggregate turnover of an undertaking concerned does not include the turnover generated between companies belonging to the same group. The turnover generated by a joint venture is proportionally divided between the joint venture partners exercising the rights set out in point (2) above.

Two or more concentrations that are effected between the same undertakings or between undertakings from the same respective economic groups within two years are deemed to constitute one single concentration that occurred on the date of the occurrence of the last concentration.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If a transaction constitutes a concentration within the meaning of the Act and exceeds the jurisdictional thresholds, filing is mandatory.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign transactions are subject to Slovak merger control provisions if they qualify as a concentration and meet the jurisdictional thresholds. The currently applicable jurisdictional thresholds intensified the local nexus requirement of notifiable concentrations. As a result, many foreign-to-foreign transactions that previously required a filing in Slovakia now usually fall outside the scope of the AMO's jurisdiction.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

A new foreign direct investment (FDI) regime came into effect in Slovakia in 2023.

Transactions carried out by foreign investors (and, in some cases, EU investors, eg when a transaction is financed using funds supplied by a public authority from a third country) are subject to mandatory FDI screening if the local target is active in one or more of the following sectors:

1. Manufacturing of firearms;
2. Production, research, development or innovations of military technology or equipment;
3. Production, research, development or innovations of dual use items;
4. Production, research, development or innovations in the field of biotechnology in the healthcare sector;
5. Operating an element of critical infrastructure;
6. Operating a basic service (as designated by the National Security Office);
7. Providing digital services in the cloud computing sector;
8. Manufacturing, research or development of encryption technology or components thereof, or being in possession of such components;

9 Having a broadcasting licence;
10 Providing shared platform services;
11 Publishing of periodic press;
12 Operating a news web portal; and
13 Operating a press agency.

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 must be notified to the Antimonopoly Office of the Slovak Republic (AMO) prior to its implementation (ie, before any rights or obligations resulting from a concentration are executed) and after:

- an agreement on which the concentration is based has been concluded;
- the acceptance of a bid in a public tender has been announced;
- a state authority's decision has been delivered to an undertaking (eg, certain sector-specific approvals);
- announcement of a takeover bid;
- the day on which the European Commission informed an undertaking that the transaction falls within the jurisdiction of the AMO; or
- the day on which a particular event that led to the concentration occurred.

The notification can also be filed with the AMO prior to the conclusion of an agreement or other event causing the concentration to arise, provided that it results in a concentration that requires a filing with the AMO. The 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 imposes a fine of:

- up to 10 per cent of the undertaking's worldwide turnover generated in the preceding business year; or
- up to €330,000 on an undertaking that generated turnover not exceeding €330 or has not achieved any turnover, or when its turnover cannot be calculated.

The AMO is entitled to take into consideration the turnover generated in previous business years if there is a reasonable suspicion that an artificial decrease of the undertaking's turnover in the preceding business year occurred.

The Act also introduces periodic penalty payments, which secure the proper and timely execution of the relevant duties. If the obligation is not fulfilled, this sanction forces the obliged subject to remedy the unlawful state of affairs in the shortest time possible. The Act also responded to the ECN+ Directive by authorising the AMO to use any interim measures necessary for the protection of the market and its conditions.

10 | Which parties are responsible for filing and are filing fees required?

The responsibility for the submission of the filing depends on the type of the concentration. Against this background, the filing has to be submitted:

- jointly by the parties to the concentration in the case of a merger or amalgamation of two or more independent undertakings;
- by the selected bidder in the case of a public tender;
- jointly by the parties to the concentration in the case of a decision issued by a state authority on a merger or amalgamation of undertakings pursuant to special legislation;
- by the proposer of the takeover bid in the case of a takeover bid; and
- by the undertaking or undertakings that acquire control over another undertaking or its part, or other undertakings or their parts in any other cases.

The filing fee is determined by the Act on Administrative Fees. It currently amounts to €5,000 (with a decrease if the notification is made in electronic form).

The responsibility for the failure to notify the AMO passes to the economic successor who continues the commercial activity of his or her predecessor once the predecessor has stopped the legal or actual execution of this activity.

11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The waiting period falls under the statutory timetable for clearance.

The intended concentration must not be implemented prior to clearance (ie, the undertakings concerned may not exercise rights or obligations arising from the intended concentration until the AMO issues a clearance decision (suspension obligation)); however, the Act 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.
- A public takeover bid or transactions with securities in the securities market through which control is acquired from various subjects may be implemented, provided that:

    - the concentration is immediately notified to the AMO (ie, as soon as the acquirer learns that it has acquired control); and
    - the undertaking acquiring control does not exercise its voting rights related to those 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 to do so, such as serious financial problems or insolvency threats.

The AMO decides on the exemption request within 20 working days of its submission. If the AMO asks for 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 imposes fines. In addition, it may oblige the parties to restore the level of competition to the level that existed prior to the implementation of the concentration, especially by ordering the division of a company or the transfer of rights, or the imposition of other obligations.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for closing before clearance are also applicable in the case of foreign-to-foreign mergers. In the past few years, the AMO has imposed fines of between €1,000 and €14 million for infringing the standstill obligation. In other cases, fines have been imposed on undertakings based outside Slovakia (in particular in the Czech Republic and Hungary).

On 16 October 2018, the AMO Department of Concentrations issued a decision imposing a fine of €600,000 in aggregate on entrepreneur J&T Finance Group SE, Czech Republic (JTFG), and a fine of €7,751 in aggregate on Ladislav Bödők, Slovakia (LB). In the decision, the AMO submitted that the parties to the proceedings had breached the Act as they failed to notify the concentration resulting from the acquisition of joint control by the entrepreneurs JTFG and LB over Panta Rhei.

The parties to the proceedings also breached the Act as a result of exercising their rights and obligations resulting from the aforementioned concentration before the issuance of a valid decision concerning that concentration, which had already been implemented to the fullest extent (ie the entrepreneurial JTFG had acquired an ownership interest in Panta Rhei), and this was followed by the parties to the proceedings exercising joint control over that company.

The highest fine imposed for breach of the standstill obligation so far is the fine imposed on a specific holding company last year. In this case, the undertaking concerned appealed against the decision of the AMO; thus the decision is currently under review.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

In general, foreign-to-foreign concentrations are assessed and treated in the same way as domestic concentrations. The Act does not provide for hold-separate (carve-out) solutions.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

Certain actions related to public takeover bids are, by law, exempted from the standstill obligation.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Details concerning the content of the notification and the documents required are set forth in Decree No. 189/2021, which entered into force on 1 June 2021. The Decree does not contain notable changes, just the changes based on the adoption of the Act and several additional precise provisions.

The Decree sets out the following situations in which 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, which is also the case 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 the categories of goods that are produced or imported, including the applicable territories, possible product or geographical market definition based on those product categories, briefly stated characteristics of the markets, a statement on the existence or non-existence of affected markets and the possibility to use the short-form notification, total market size, individual market shares held by the parties, and most important competitors);
- information on cooperative effects;
- reasons for and effects of the concentration and the impact on competition;
- reasons why a short-form notification is allowed and sufficient under the Act and Guidelines regarding the short-form notification;
- 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, which 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; however, this need not 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 where the AMO could get the information. 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 a certified translation or an affidavit that uncertified translations are correct and complete. If only copies are submitted, an affidavit confirming that the copy is true to the original must be submitted.

In practice, the AMO tends to agree to the submission of certain documents (eg, 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 to up to 1 per cent of the total turnover for the preceding accounting period.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

In practice, it is our experience that the AMO adheres to mandatory deadlines and usually strives to clear cases within Phase I proceedings. The Act does not provide for the possibility of requesting expedited proceedings.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The AMO recommends that pre-notification contact with the AMO is initiated before the notification is formally submitted, even if the case does not raise substantial merger control concerns. Although the provision of a draft merger notification is not mandatory, practice shows that this is usually welcomed by the AMO. Pre-notification contacts should be initiated at least two weeks prior to the intended formal submission of the notification to the AMO.

Under the Act, following the formal submission of the notification, the AMO assesses the completeness of the filing. The AMO then issues an official letter informing the parties about the initiation of proceedings and of the completeness of the filing. It is recommendable to be in contact with the AMO during this stage to ensure that this period is short.

If the AMO finds that the submitted notification does not contain all the required information, it will issue a request to complete the missing information. Once the filing is accepted as complete, the AMO issues an official confirmation letter to this effect. Only complete notification starts the assessment period.

The subsequent handling of the case depends on whether Phase I or Phase II proceedings are applied. If the concentration does not require an in-depth analysis owing to the identification of competition concerns in respect of its compatibility with Slovak competition law

rules, the AMO issues a decision within 25 working days of receipt of the complete notification (Phase I proceedings).

According to the Act, the decision does not have to include reasoning; however, if reasoning is included, it shall provide general information about the parties to the concentration and the business sectors or relevant markets where the parties are active. Phase I decisions usually contain simplified reasoning.

In cases that require in-depth analysis because of the identification of competition law concerns (Phase II proceedings), within the deadline for the Phase I proceedings, the parties must be informed about the initiation of Phase II proceedings in writing. Once the AMO has initiated Phase II, it must issue a decision within 90 working days, starting from the last day of the Phase I proceedings period.

If the AMO requests from the parties additional information or documents that it considers relevant for the assessment of the case, this effectively stops the clock. If the notification contains false (misleading) information, the clock is reset and starts running only as of the day following the delivery of the correct 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 of delivery of the request. The request effectively stops the clock; in other words, the above-described Phases I and II review or decision-making periods are not in effect until the parties submit their proposed conditions or commitments or upon the expiry of the 30-working-day period (whichever occurs first).

Upon receipt of a justified request, the 30-working-day deadline may be prolonged and 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 by publication or in another manner, or it may appoint an independent trustee to supervise the fulfilment of the conditions or commitments.

Before issuing its final decision in Phase II, the AMO must inform the parties about its assessment of the matter and conclusions, and ask 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 delivery or if the parties waive the right of appeal.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Antimonopoly Office of the Slovak Republic (AMO) follows the significant impediment to effective competition (SIEC) test, which is also applied by the European Commission; therefore, the AMO assesses whether the concentration significantly distorts effective competition in the relevant market, in particular owing to the creation or strengthening of a dominant position.

20 | Is there a special substantive test for joint ventures?

There is a special substantive test for joint ventures and for joint control, which are assessed under the SIEC test and under the coordination provision (if the conditions for coordination are met).

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The AMO examines whether the concentration will cause a SIEC in the relevant market, in particular owing to the creation or strengthening of a dominant position. This may especially be the case if an undertaking or several undertakings are not subject to substantial competition or can act independently as a result of their economic power.

As Act No. 187/2021 on Protection of Economic Competition (the Act) does not contain any market share presumptions, each case requires an individual assessment on a case-by-case basis.

The Act does not list specific additional factors that are 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, the market structure and possible future developments, barriers to entry, existence of competitors, intentions of companies to enter the market, supply and demand structure, and price development.

When assessing the concentration on this basis, the AMO enjoys wide discretion. Among other things, 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 to the European Commission.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The Act does not expressly mention economic efficiencies. In practice, however, the AMO would most likely take them into consideration (in particular if the parties refer to them in the notification).

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Based on the assessment of the concentration under the substantial test, the Antimonopoly Office of the Slovak Republic (AMO) may issue:

- a decision approving the concentration;
- a decision approving the concentration, provided that certain conditions and obligations imposed on the undertakings concerned are observed and met; or
- a prohibition decision.

After clearance has been granted, the AMO:

- on its own initiative, has to reverse a decision that has been made subject to conditions and decide on the concentration anew if the parties fail to fulfil the conditions imposed;
- at the request of the parties, may change a decision that has been made subject to conditions if:
  - the situation in 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 must within 30 working days submit proposals suggesting certain conditions and related commitments in view of eliminating competition law concerns. In general, the AMO accepts both structural and behavioural remedies.

The AMO may test draft conditions and commitments by directly inviting natural persons and legal entities to provide comments and observations by making them public on its website or in any other manner. Among other things, the conditions and commitments may include an obligation to appoint an independent trustee to monitor compliance with the agreed conditions and commitments at the cost of the parties.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

If the AMO identifies competition law concerns, the notifying party is obliged within 30 working days to provide a proposal for commitments and conditions. If the notifying party fails to meet this deadline, the AMO may prohibit the concentration.

The AMO does not usually consider any proposals submitted after the expiry of the 30-working-day deadline; however, upon a justified request, the AMO may accept them even after the expiry of the deadline provided that the remaining period for issuing the decision still allows for a proper review or assessment of the proposal.

No explicit timetable is set for the execution of the divestment or other remedy. The timetable is set in individual decisions based on the individual characteristics of each case.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

We are not aware of any foreign-to-foreign mergers in which the AMO has requested remedies.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

An AMO clearance decision also covers restrictions directly related to and necessary for the implementation of the intended concentration. Details are set out in the AMO's Guidelines on Restrictions of Competition Relating Directly to a Concentration and Being Essential for its Realisation.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The fact that a notification has been submitted is made public on the website of the Antimonopoly Office of the Slovak Republic (AMO) and the Commercial Bulletin, inviting third parties to submit their observations and comments on the intended concentration.

Although third parties have the right to be heard, they do not enjoy procedural rights comparable with those of the notifying parties (eg, third parties in particular generally have no right to appeal the AMO's decision). Under the previous Act on Protection of Economic Competition, effective until mid-2021, third parties could receive access to the file if they were able to demonstrate their legitimate interest. Act No. 187/2021 on Protection of Economic Competition (the Act) does not provide the same opportunity to third parties.

The AMO may also gather information ex officio, in particular by contacting customers and competitors to obtain their opinions on the intended concentration or to request information, clarification or documents related to the concentration. The AMO may also market test the proposals for conditions or commitments.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The fact that a notification has been submitted is made public on the AMO's website and in the Commercial Bulletin. The AMO also publishes its decisions in a similar way. The AMO may, however, not disclose information or documents that contain business secrets that are subject to protection under special laws (eg banking secrecy) or that are marked as being confidential information.

Undertakings are asked to explicitly mark any business or confidential information as such in the notification and in any other comments, statements and documents sent to the AMO, including reasoning regarding why confidentiality has been requested. To be specific, with regard to notification of the concentration, the notifying party must provide reasons for the requested confidentiality and provide a non-confidential version of the notification. The AMO has published guidance on the assessment of information that is marked as business secrets, confidential information or personal data.

The parties may otherwise be requested by the AMO to provide a non-confidential version of the information or documentation, including reasons for the requested confidentiality. Only under exceptional circumstances could the protected information be made accessible by the AMO to another party to the proceedings (with the consent of the affected party) or to its representative (in the absence of such consent).

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 AMO's annual report, its employees were actively involved in European Commission cases as rapporteurs within the Advisory Committee as well as in various working groups with the European Commission. Moreover, the AMO maintains close cooperation with the Czech competition authority, including through the regular exchange of experience and know-how, discussion of legal and other current issues and the organisation of seminars, conferences and workshops. Bilateral cooperation also exists with the Hungarian and Austrian competition authorities.

An important legislative development that is relevant to the implementation of the ECN+ Directive through the Act is the enactment of international mutual assistance. The Act lays down the competency of the AMO to provide assistance in the matter of notification and delivery of relevant documentation to a party to the proceedings in other EU member states.

The AMO also supports the execution of foreign final decisions that impose a fine or periodic penalty payment. In this way, the AMO's decisions are also enforceable in other EU member states, which is particularly important because there have previously been cases in which a fined company ceased to exist or function in the Slovak market, making it difficult to recover fines.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Within 15 days of its delivery, the decision of the Antimonopoly Office of the Slovak Republic (AMO) may be appealed to the Council of the AMO. The decision of the Council may be appealed to the Bratislava Administrative Court within two months of its delivery. The decision of the Bratislava Administrative Court may be challenged only on limited occasions before the Supreme Administrative Court.

Filings with the courts do not have a suspensive effect; however, the courts may grant a suspension of the enforceability of the decision at a party's request, provided that serious harm would otherwise occur to the applicant.

There are very few cases in which the AMO has prohibited concentrations in the past; thus, merger control decisions of the AMO have been only very rarely challenged.

Time frame

33 What is the usual time frame for appeal or judicial review?

In general, the AMO must issue a decision within three years of the initiation of proceedings (without prejudice to the time limits for issuing a decision in Phase I and Phase II of merger control proceedings). The judicial review performed by the Bratislava Administrative Court and the Supreme Administrative Court is not subject to any time restrictions; therefore, the time frame largely depends on the complexity of the case and the cooperation of the parties.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

All concentrations notified in 2023 were approved. Two of those concentrations were cleared in Phase II with commitments.

The Antimonopoly Office of the Slovak Republic (AMO) does not distinguish between local mergers and foreign-to-foreign mergers in its assessment, but Act No. 187/2021 on Protection of Economic Competition (the Act) considerably decreases the number of notified cases with regard to extraterritorial joint ventures, owing to the abolishment of the notification threshold related to joint ventures. All foreign-to-foreign mergers that have been notified to the AMO have been cleared.

Reform proposals

35 Are there current proposals to change the legislation?

At the time of writing, there are no official 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?

An amendment to Act No. 187/2021 on Protection of Economic Competition (the Act) became effective on 15 May 2024, mostly giving the Antimonopoly Office of the Slovak Republic (AMO) the right to carry out market investigations under the Digital Markets Act (the DMA), as well as investigations aimed at verifying that the obligations of gatekeepers under the DMA are being met.

As far as key decisions taken in 2023 by the AMO are concerned, fines exceeding €7 million were imposed by a single decision on a number of undertakings for bid-rigging in the construction field in the energy sector.

One decision in relation to abuse of a dominant position was issued by the AMO, which imposed a fine of €57,939 on a civil association of authors for imposing unfair prices.

All concentrations reviewed in 2023 except two were approved by the AMO in Phase I proceedings and no fines related to concentrations were imposed.

Since 1 March 2023, the AMO has had a new chair, who intends to expand the scope of the AMO's activities.

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Slovenia

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Voluntary or mandatory system?	The filing of a notification with the Competition Protection Agency (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 asks the parties to provide a notification of the concentration because their combined market share in Slovenia exceeds 60 per cent, the merger notification must be submitted no later than 30 days after receiving this request.
Clearance deadlines (Phase I/Phase II)	If the concentration does not raise serious doubts as to its compatibility with Slovenian competition law rules, the CPA must issue its decision within 25 working days of receiving a complete notification (Phase I). There is no legal presumption that the concentration has received approval once the waiting period expires. In cases that raise serious doubts as to their compatibility with Slovenian competition law rules, the CPA initiates Phase II proceedings within 25 working days of receiving 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 II decision is extended by 15 working days.
Substantive test for clearance	The CPA assesses whether the intended concentration will result in a significant impediment to effective competition within the territory of Slovenia, or 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.
Remarks	Not applicable.

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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 Prevention of Restriction of Competition Act (the Act). The Act became effective in January 2023 and was last amended on 30 January 2024 (the amendment became effective in February 2024).

The information and documents to submit in a merger control notification are set out in the Decree on 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 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 National Assembly (on the proposal of the government) for a term of five years. The Agency Director is the chair (president) of the Agency Council.

For each case, the Agency Council sets up a separate decision panel (comprising all members of the Agency Council who in turn appoint a panel chair from their midst). 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 (administrative sanction) on undertakings is adopted in one unified procedure under the Act (before the current version of the Act came into force, a separate misdemeanour procedure had to be instigated).

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
- 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.

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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 the undertaking; or
- they exercise those 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, it may – upon request – be extended by the CPA.

3 What types of joint ventures are caught?

The creation of a joint venture by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity (full-function joint venture), constitutes a concentration.

If the creation of this joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent (ie, the joint venture partners), the CPA appraises this coordination in accordance with the cartel prohibition (prohibition of restrictive agreements, article 5 of the Act).

If the CPA concludes that the exemption criteria set out in article 5 of the Act are not met, it will not approve the concentration (article 10(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 must inform the CPA of the concentration if a combined market share of the undertakings concerned exceeds 60 per cent in Slovenia. The CPA may then request notification of the concentration within 25 working days of the date on which the undertakings concerned informed the CPA (article 66(3) of the Act).

At present, it is unclear whether the above market share test would also be met if one undertaking 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 that create a notifiable joint venture.

For the turnover calculation, the net revenues from the sale of products and the provision of services in Slovenia have to be taken into account. Turnover generated by sales or services between companies belonging to the same group is not taken into account.

Where the concentration consists of the acquisition of control in part of one or more undertakings, regardless of whether these parts qualify as a legal entity, only the turnover relating to the parts that are subject to the concentration are taken into account for the purpose of turnover calculation. Two or more transactions that take place within a two-year period between the same persons or undertakings are treated as one and the same concentration arising on the date of the last transaction.

Specific rules apply to the calculation of the turnover of credit, and financial institutions where the financial income from shares, loans granted and operating receivables have 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 EU Merger Control Regulation are not subject to the Slovenian merger control regime (one-stop-shop principle).

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If a transaction constitutes a concentration within the meaning of the Act and exceeds the jurisdictional thresholds, filing is mandatory.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign concentrations are subject to the merger control regime if the jurisdictional thresholds are met. The undertakings concerned could be exposed to fines (administrative sanctions) in the case of a breach of the filing obligation. It is not required that any of the undertakings concerned have a registered seat or local branch in Slovenia. To date, the CPA's practice has not developed a de minimis or effects-based exemption.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The Act does not contain any provisions that specifically relate to foreign investment or special sectors; however, provisions related to merger control, foreign direct investment and other relevant approvals can be found, among other things, 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 Mass Media Act, 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 Mass Media Act, the Ministry of Culture may refuse to grant such approval if the merger results in the creation of a dominant position:

- in 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 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, among other things, 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 (AKOS). The Electronic Communication Act provides specific rules for the cooperation between the AKOS and the CPA.

Among other things, both authorities are authorised to exchange relevant information and cooperate in determining and analysing relevant markets and identifying significant market power. The AKOS 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 AKOS when assessing sector-specific mergers.

Financial sector

In the case of an 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 shareholdings without the prior consent of the competent regulatory body results in the loss of voting rights based on the shares beyond the qualified shareholding.

Foreign direct investment

In 2020, Slovenia established a foreign direct investment (FDI) screening mechanism, which was amended in 2023. The FDI screening mechanism is applicable to investments aiming to establish or maintain lasting and direct links between the foreign investor (ie, any foreign citizen or entity from a non-EU country) and an economic entity established in Slovenia through direct or indirect acquisition of at least 10 per cent participation in capital or voting rights in a Slovenian target company. Such investments may include takeovers, mergers, greenfield investments and acquisition of real estate (acquisitions by foreign investors of real estate essential to critical infrastructure or in the vicinity of such infrastructure is also subject to FDI screening).

The commission established by the Ministry of Economic Development and Technology conducts a preliminary screening procedure and, if it is established that the FDI may pose a threat to public order of Slovenia, it can propose that an in-depth procedure is carried out by the Ministry of Economic Development and Technology. The latter may decide to authorise, condition or prohibit a particular FDI if the investment poses a threat to the security and public policy of Slovenia, such as where it may have an effect on any of the following areas:

- critical infrastructure;
- critical technologies and dual-use items;
- supply of critical sources;
- access to sensitive information;
- freedom and pluralism of the media; and
- certain programmes and projects in the interest of the European Union.

The decision is particularly based on a preliminary evaluation of whether:

- the foreign investor is directly or indirectly controlled by third-country (non-EU) governments, including national authorities or third-country (non-EU) armed forces, including through ownership structure or significant funding;
- the foreign investor has already been involved in activities affecting security or public policy in an EU member state;
- there is a serious risk that the foreign investor engages in illegal or criminal activities;
- the foreign investor reached a takeover threshold in the target and obtained with the successful takeover bid at least 10 per cent of voting rights or 75 per cent of shares with voting rights;
- the foreign investor obtained through the target at least a 20 per cent market share in critical sources in Slovenia; and
- the foreign investor obtained 25 per cent or 50 per cent of shares or voting rights in the target.
- A decision to prohibit an individual FDI during the screening procedure will require measures to rectify the effects of the FDI, including disposal of the target's shares.

The applicable FDI must be notified to the Ministry of Economic Development and Technology no later than 15 days after the day of the execution of the respective agreement or the publication of the takeover offer.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A merger notification has to be submitted to the Competition Protection Agency (CPA) no later than 30 days after the conclusion of the agreement, the announcement of a public bid or the acquisition of a controlling interest (whichever of these triggering events occurs first). The same applies to CPA notification due to the parties having a combined market share exceeding 60 per cent. If the CPA requests the parties to notify the concentration because their combined market share in Slovenia exceeds 60 per cent, the merger notification must be submitted no later than 30 days from receipt of this request.

In the case of a failure to notify the concentration within the filing deadline, the CPA may impose fines in the amount of up to 10 per cent of the annual turnover generated by the undertakings involved in the concentration (including other undertakings belonging to the same group) in the preceding business year. In addition, a fine between €5,000 and €10,000 may be imposed on the responsible persons of such undertakings, and (if applicable) a fine between €3,000 and €5,000 on a natural person already controlling at least one undertaking.

If the nature of the infringement of the filing obligation is particularly serious (eg, owing to the amount of damage inflicted, the pecuniary benefit, the infringer’s intent or unlawful gain), a fine 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.

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 is €2,000.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The intended concentration must not be implemented prior to clearance as undertakings are not allowed to exercise rights and obligations arising from the intended concentration until the CPA issues a clearance decision (suspension obligation).

If the CPA requests the parties to notify the concentration because their combined market share in Slovenia exceeds 60 per cent, the undertakings must cease implementing the concentration as of the date of receipt of this request.

Under exceptional circumstances, the CPA may (upon the request of the parties) permit the implementation of the concentration prior to clearance, if such an implementation is essential to maintain the full value of the investment or to perform services of general interest.

The suspension obligation does not have an effect on the implementation of public bids pursuant to the Takeovers Act, provided that the acquirer does not exercise voting rights or exercises them only in accordance with a permit for early implementation granted by the CPA.

The duration of the waiting period depends on whether Phase I or Phase II proceedings are applied.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

In the case of closing before clearance, the CPA may impose fines.

In addition, the CPA may file a legal action with the competent civil court to declare the implementation (the exercise of rights and obligations), which is contrary to the suspension obligation, null and void (articles 12(5) and 68(3) of the Prevention of Restriction of Competition Act (the Act)). We are not aware of this legal action having been filed by the CPA to date.

According to article 77 of the Act, the CPA may impose measures on undertakings to restore the situation to that which existed prior to the implementation, in particular through the division of the undertaking or the disposal of all the shares acquired.

13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for closing before clearance are also applicable to foreign-to-foreign mergers.

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 the implementation is essential to maintain the full value of the investment or to perform services of general interest.

The Act does not explicitly provide for hold-separate (carve-out) solutions. Given that the Slovenian merger control regime assesses the effects of a merger in the Slovenian market, depending on the transaction structure, it may be 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 of such solutions having been tested with the CPA to date.

Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

Public takeover bids are primarily monitored by the Security Market Agency and are subject to the provisions of the Takeovers Act. The CPA has to be informed of the intended public bid by a simple written notice on the day such intention is published. Further, the CPA must be provided with the bid document (ie, the prospectus).

Public takeovers that lead to notifiable concentrations within the meaning of the Act require the submission of a merger notification to the CPA no later than 30 days after the announcement of the public bid. Importantly, the suspension obligation does not apply to the implementation of public bids within the meaning of the Takeovers Act, provided that the acquirer does not exercise voting rights or exercises them only in accordance with 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 (the Form) are set out in the new Decree on the Contents of the Concentration of Companies Notification Form, which is valid from February 2024. 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. Among other things, the following must 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; and annual reports);
- description of the intended concentration;
- originals or certified copies of all documents on the basis of which the concentration takes place;
- definition of the relevant markets;
- the total size of the relevant markets and market shares of the undertakings concerned;
- information on main competitors, customers and suppliers, the structure of supply and demand, market entry, the relevance of research and development, efficiency gains, etc;
- information on indispensable ancillary restrictions; and
- (if available) copies of analyses, reports or studies related to the relevant market.

If none of the undertakings concerned, together with other undertakings in the group, are engaged in economic activity in the same relevant product or service market and geographic market (horizontal overlap); or in a relevant product or service market that has a vertical relationship with, or is a closely related adjacent market to, a relevant product or service market in which any other party to the concentration operates, the detailed information on the markets does not need to be provided. In any case, the parties must provide information on the definition of the relevant markets.

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 must be submitted in the Slovenian language. Documents on the basis of which the concentration takes place must be provided in certified copies; all other documents attached to the filing may be provided in simple copies.

The notification needs to be complete and must include accurate and true information. If information is missing in the notification, the CPA may ask the notifying party to supplement the required information before 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. Further, for providing incorrect or misleading information in the notification, the CPA may also impose a procedural fine on the undertaking of up to 1 per cent of the undertaking's annual turnover in the preceding business year.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

The CPA decides in Phase I proceedings whether the concentration does not raise serious doubts in respect of its compatibility with Slovenian competition law rules. The CPA must then issue its decision within 25 working days of receipt of a complete notification.

In cases that raise serious doubts in respect of their compatibility with 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 the 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.

Following the adoption of the current Act in January 2023, the CPA may also decide in simplified proceedings if:

- none of the undertakings concerned, together with the other undertakings in the group, are engaged in economic activity on the same relevant product or service market and geographic market (horizontal overlap); or on a relevant product or service market that has a vertical relationship with, or is a closely related adjacent market to, a relevant product or service market on which any other party to the concentration operates;
- the combined market share of all undertakings concerned in the concentration, together with other undertakings in the group active in the same relevant product or service market (horizontal relationships), does not exceed 15 per cent under all plausible market definitions;
- the individual or combined market share of the undertakings concerned in the concentration, together with other undertakings in the group active in the product or service market that is vertically related to the market in which any other undertaking concerned in the concentration operates (vertical relationships), does not exceed 25 per cent in any of the vertically related markets under all plausible market definitions; or
- the undertaking concerned, together with other undertakings in the group, acquires sole control over an undertaking over which it already has joint control.

There are also certain exceptions to the simplified proceedings explicitly set out in the Act.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The Act does not provide for the possibility of obtaining a waiver, and there is no formal procedure in respect of extensions of the waiting periods. There is no legal presumption that the concentration has obtained approval once the statutory waiting period has expired; therefore, depending on the CPA's workload, in practice Phase I clearance decisions are often rendered around two to two-and-a-half months after the submission of the notification.

The CPA may also decide in simplified proceedings; however, the Act does not provide for a different timeline in this respect.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Competition Protection Agency (CPA) assesses whether the intended concentration would result in a significant impediment to effective competition within the territory of Slovenia, or in a substantial part of it, in particular because of the creation or strengthening of a dominant position.

We are not aware of any cases in which the CPA has taken 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 5 of the Prevention of Restriction of Competition Act (the Act).

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

Among other things, the CPA investigates an intended concentration on the basis of:

- market position of the undertakings involved in the concentration;
- options for financing the undertakings involved;
- 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; however, in practice, it is not unlikely that the CPA would take into account non-competition issues in a similar way to the European Commission.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies (described rather generally as 'technical and economic development') are part of the appraisal of the concentration and are taken into account on the condition that they are advantageous to 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 Competition Protection Agency (CPA) assesses whether an 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 owing to the creation or strengthening of a dominant position.

The parties may propose remedies at any time and submit comments and evidence to remove the CPA's concerns; however, ultimately, if the remedies proposed or comments submitted by the parties cannot eliminate the CPA's concerns, 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 75 of the Prevention of Restriction of Competition Act (the Act), the notifying party may submit remedies to eliminate serious doubts regarding the compatibility of the concentration with Slovenian competition rules. The Act does not distinguish between structural and behavioural remedies. In practice, depending on the case, both may be accepted by the CPA.

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26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Remedies can be submitted within 45 days of the decision of the CPA to initiate Phase II proceedings. Remedies proposed after the deadline will only be assessed by the CPA, if the CPA may clearly deduct on the basis of available data that such corrective measures will entirely and without doubt remedy the detected effects on competition. In this case, the time limit for the CPA to issue its decision is extended by 15 working days.

When assessing the proposed remedies, the CPA takes into account their nature and scope, and 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, the CPA may require the notifying party to provide a report on the implementation of the imposed remedies.

At the request of the notifying party, the CPA may also amend its decision on remedies due to changed circumstances beyond the control of the notifying party, which occurred after the decision was adopted. If an amendment is not possible, the CPA may annul its previous decision and decide on the compatibility of the concentration with competition, or impose other measures on the notifying party.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The CPA has previously conducted a market test in relation to remedies proposed by undertakings participating in a foreign-to-foreign merger. The transaction concerned the market for the wholesale supply of sports television channels.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

In the merger filing, among other things, the parties have to provide information on indispensable ancillary restrictions related to the transaction. If the CPA issues a clearance decision either in Phase I or Phase II, that decision is deemed to cover restrictions directly related to and necessary for the implementation of the intended concentration.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Competition Protection Agency (CPA) publishes a list of notified concentrations on its website. Phase I decisions are also made public on the CPA's website.

In a similar way, in Phase II proceedings, both the fact that the 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 and a brief summary of the grounds for initiation of the proceedings, and invites third parties to submit their observations and comments. Non-confidential versions of the decisions of the Administrative Court issued following judicial reviews into CPA decisions are published on the CPA's website.

Third parties that are able to demonstrate their legally recognised interest may lodge an application for participation in the proceedings. The request must be filed with the CPA within 30 days of 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 Phases I and II proceedings. Although the CPA is not legally obliged to consider such information, it usually takes it into account when assessing the case.

The CPA may also, in the course of the proceedings, approach third parties (eg, competitors, customers and suppliers) on its own initiative, in particular via written requests for information.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The CPA publishes a list of notified concentrations on its website. Phase I decisions are also made public on the CPA's website.

In a similar way, in Phase II proceedings, both the fact that the 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 and a brief summary of the grounds for initiation of the proceedings, and invites third parties to submit their observations and comments. Non-confidential versions of the decisions of the Administrative Court issued following judicial reviews into CPA decisions are published on the CPA's website.

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, among other things, 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 in the merger notification and in 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. We are not aware of any such cases of disclosure with regard to merger proceedings.

Information on the initiation of the procedure as well as the Phases 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 up front 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 Organisation for Economic Co-operation and Development 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 decision of the Competition Protection Agency (CPA) can be filed with the Administrative Court. 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 proceedings in front of the CPA.

An appeal against a decision of the Administrative Court can be filed with the Supreme Court.

We are not aware of any merger cases that have been through judicial review, as the undertakings involved usually address the CPA's concerns by offering corrective measures (commitments).

Time frame

33 What is the usual time frame for appeal or judicial review?

Legal action has to be filed with the Administrative Court within 30 days of the date on which the CPA's decision was served. Based on court statistics for 2022, the average duration of a procedure before the Administrative Court is seven months.

The appeal procedure before the second instance court (ie, the Supreme Court) usually lasts for between several months and one year before 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?

The number of notified and cleared mergers has remained relatively stable in recent years. The Competition Protection Agency (CPA) cleared most concentrations that were notified, with the notifying party proposing corrective measures only in exceptional cases.

Reform proposals

35 Are there current proposals to change the legislation?

In February 2023, the Slovenian legislator adopted an amendment to the Prevention of Restriction of Competition Act (the Act). A key change introduced by the Act that directly affects merger control is the introduction of a deadline for proposing remedies. In addition, the new Decree on the Contents of the Concentration of Companies Notification Form was adopted. This clearly reduces the amount of information that needs to be provided if there are no overlaps between the undertakings involved.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In the past few years, the Competition Protection Agency (CPA) has become stricter in assessing notified concentrations and is very efficient in tracking non-notified concentrations (in particular, foreign-to-foreign mergers) or any prohibited actions during the waiting period before a decision on merger clearance is issued.

At the end of 2023, the CPA issued its first-ever administrative sanction in a unified administrative and offence proceedings (the Veterinary Association was fined €43,000). Previously,

proceedings were carried out in two stages, with breaches established in administrative proceedings and fines determined in offence proceedings. This significantly prolonged the process. Furthermore, the fine was determined on the basis of a submitted proposal for settlement by the Veterinary Association, which enabled the CPA to issue a lower fine for the breach (which lasted almost eight years) than it would have otherwise.

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Notification trigger/ filing deadline	**Thresholds** **Size-of-person test** The general jurisdictional thresholds for notification are as follows: • a party (including its affiliates that are affiliates both before and after the completion of the business combination) to the business combination should have total worldwide assets or annual worldwide turnover of 300 billion won or more as of the most recent fiscal year end; and • the other party (including its affiliates that are affiliates both before and after the completion of the business combination) to the business combination should have total worldwide assets or annual worldwide turnover of 30 billion won or more as of the most recent fiscal year end. **Size-of-transaction test** A transaction that previously may not have been caught by the general jurisdictional thresholds will be notifiable if: • the transaction value exceeds 600 billion won; and • the target company has a substantial level of activity in the Korean market, by providing products or services in the Korean market, or having research and development facilities or personnel in Korea. **Filing deadline** In principle, a filing needs to be made within 30 days of the consummation of the underlying transactions. However, if a large company (with total assets or annual turnover of 2 trillion won or more on a consolidated basis) is involved in the business combination (except for in the case of an interlocking directorate), the notification becomes a pre-closing obligation, in which case a filing should be made any time after the execution of the transaction agreement, but before the consummation of the transaction.
Clearance deadlines (Phase I/Phase II)	The Korea Fair Trade Commission (KFTC) has 30 days as of the filing to issue its decision on whether to grant clearance. At the discretion of the KFTC, the 30-day period may be shortened or it may be extended by up to an additional 90 days.

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Quick Reference Table	
Substantive test for clearance	The essence of the substantive test is the question of whether the 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 for determining whether there is any anticompetitive effect.
Penalties	Failure to file a business combination report or consummation of the transaction before obtaining the KFTC's clearance in a pre-closing filing may result in the imposition of an administrative fine of up to 100 million won.
Remarks	Amendments to the Monopoly Regulation and Fair Trade Act, including the introduction of a size-of-transaction test as part of the jurisdictional thresholds for mergers, took effect on 30 December 2021.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The relevant legislation principally consists of the Monopoly Regulation and Fair Trade Act (MRFTA), which was first enacted in 1980.

Additional legal authority is found in the Enforcement Decree promulgated pursuant to the MRFTA, as well as the guidelines and standards issued by the Korea Fair Trade Commission (KFTC). The KFTC is the regulatory authority that oversees and enforces antitrust and competition laws in Korea.

Scope of legislation

2 | What kinds of mergers are caught?

The following types of transactions are notifiable under article 11(1) of the MRFTA, provided that they meet the jurisdictional thresholds:

- the acquisition of 20 per cent (15 per cent in the case of a publicly listed company in Korea) or more of the voting shares of another company;
- the acquisition of additional voting shares of another company by a shareholder who already owns 20 per cent (15 per cent in the case of a publicly listed company in Korea) or more of the voting shares of the company, which results in the shareholder becoming the largest shareholder of the company;
- the acquisition of all, or a substantial part of, the business or assets of another company (provided that the business or assets are at least 5 billion won or 10 per cent of the company's total assets);
- the statutory merger of one company with another company;
- the establishment of a new joint venture company; and
- the establishment of an interlocking directorate, which refers to an arrangement where a director, an officer or an employee of a company whose annual turnover or total assets exceeds two trillion won concurrently serves as a registered director of another company (excluding cases where the interlocking directorate is between affiliated companies).

3 | What types of joint ventures are caught?

The establishment of a new joint venture company by two or more parties will be notifiable if it meets the jurisdictional thresholds.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Control is not one of the factors considered in determining whether a particular business combination is notifiable. There are cases where a business combination may still be notifiable even if the acquiring party does not acquire control of the target company (ie, if the acquiring party acquires 20 per cent (15 per cent when the target company is a publicly listed

company in Korea) of the shares of the target company), so a business combination that does not result in an acquisition of control may still be caught if the transaction meets the jurisdictional thresholds.

The concept of control is important when the KFTC reviews the business combination for any anticompetitive effect. If the business combination does not give rise to the acquiring party's obtention of control of the target company, the business combination is generally presumed to have no anticompetitive effect.

In the case of a stock deal or the establishment of a joint venture company, an ownership ratio of 50 per cent or more will be regarded as control. In addition, even if the acquiring party's ownership ratio in the target company is less than 50 per cent, the acquiring party will be regarded as having control over the target company if the acquiring party can wield substantial influence over the general management of the target company in light of various factors, including interlocking directorate status, the degree of stock ownership dispersion, the relationship among shareholders, and the business relationship between the acquiring party and the target company.

In the case of an interlocking directorate, control is recognised if the number of interlocking directors is one-third or more of the total number of directors of the target company, or one or more of the interlocking directors is appointed as a representative director who can wield substantial influence over the general management of the target company.

In the case of the establishment of a joint venture company, control is assumed to have been acquired if:

- two or more of the companies participating in the establishment of a joint venture company are required to have joint control over the new joint venture company; and
- one or more of the other control factors for stock deals described above is met.

Control is always recognised in asset deals and statutory mergers.

The KFTC's Merger Review Guidelines introduced the concept of joint control through which, even if the acquiring party cannot exercise sole control over the target company, if it has the ability to exert material influence over the target company together with a co-acquiring company or an existing shareholder, the acquiring party is deemed to have control over the target company.

According to the Merger Review Guidelines, the KFTC determines whether there is joint control by considering various factors, including ownership stake, power to designate directors and officers, power to veto key business decisions, contractual commitment to jointly exercise voting rights and administrative power to operate the business.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Size-of-person test

The general jurisdictional thresholds for notification are as follows:

- a party (including its affiliates that are affiliates both before and after the completion of the business combination) to the business combination should have total worldwide assets or annual worldwide turnover of 300 billion won or more as of the most recent fiscal year end; and
- the other party (including its affiliates that are affiliates both before and after the completion of the business combination) to the business combination should have total worldwide assets or annual worldwide turnover of 30 billion won or more as of the most recent fiscal year end.

In the case of an asset deal (ie, the acquisition of all, or a substantial part of, the business or assets of the target company), the same thresholds apply other than in respect of the asset or business transferring company whose total assets and turnover are instead determined on a stand-alone basis without adding those of its affiliates.

Size-of-transaction test

The amended MRFTA, which took effect on 30 December 2021, introduces a size-of-transaction test that imposes a filing obligation even if the target company's turnover or total assets do not meet the foregoing general jurisdictional thresholds. Based on this standard, a transaction that previously may not have been caught by the general jurisdictional thresholds will be notifiable if:

- the transaction value exceeds 600 billion won; and
- the target company has a substantial level of activity in the Korean market, including selling or providing products or services in the Korean market, or having research and development facilities or personnel in Korea.

The transaction value is calculated based on the methodology set out in the table below.

Type of transaction	Transaction value calculation methodology
Share acquisition	Purchase price of the shares + (if applicable) book value of the shares of the target company already held by the acquirers at the time of the transaction + amount of assumed liabilities
Merger	Value of shares issued to target's shareholders in consideration of the merger + (if applicable) cash consideration + amount of assumed liabilities
Business transfer	Purchase price + assumed liabilities
Establishment of a joint venture company	Capital contribution amount of the largest shareholder specified in the joint venture agreement

The target is found to have a substantial level of activity in Korea if the target either:

- provided goods or services to at least 1 million persons in the Korean market in any month during the past three years; or
- spent research and development-related budget in Korea exceeding 30 billion won in any year during the past three years.

Even if the jurisdictional thresholds are not met, the KFTC may, at its own initiative, conduct a review of any business combination that it determines may potentially restrict competition in the relevant market.

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing with the KFTC is a mandatory requirement if the parties meet the relevant requirements.

There are some exceptions to the mandatory filing requirement. For example, if a company acquires shares of an investment company under the Financial Investment Services and Capital Markets Act, the company will not be subject to merger notification requirements under the MRFTA.

There is also no notification requirement if the head of the central administrative agency concerned had consulted the KFTC in advance regarding the business combination under the provisions of different legislation.

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, in addition to the general jurisdictional thresholds, a local nexus requirement is satisfied. A foreign-to-foreign merger is defined as a merger where both parties or the target is a company established or headquartered in a foreign country. The local nexus requirement is met if the foreign party(ies) each have an annual turnover in Korea of 30 billion won or more during the most recent complete fiscal year.

In the case of the establishment of a joint venture company in Korea, the local nexus requirement does not apply, even if the companies participating in the establishment of the joint venture company are foreign.

8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

The primary law regulating foreign direct investments in Korea is the Foreign Investment Promotion Act, which requires a pre-closing notification for a qualified foreign direct investment. The acquisition of 10 per cent or more shares in a Korean company and the appointment of director(s) as a minority shareholder with less than 10 per cent shares qualify as a foreign direct investment. This notification needs to be made with a foreign exchange bank in Korea (virtually any bank in Korea) and takes only one or two business days.

There are certain sector-specific restrictions on the ownership of shares in a Korean company by a foreign investment under special laws. In such case, the relevant sector regulator has the concurrent authority to review and approve certain types of business combinations in addition to the KFTC. The following represent some of the regulators that have such authority:

- the Ministry of Science and ICT (pursuant to the Telecommunications Business Act), which regulates the telecommunications sector;
- the Financial Services Commission (pursuant to the Act on the Structural Improvement of the Financial Industry and the Financial Holding Companies Act), which regulates the financial sector; and
- the Ministry of Science and ICT and the Korea Communications Commission (pursuant to the Broadcasting Act), which regulate the broadcasting sector.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

In principle, a filing needs to be made within 30 days of the consummation of the underlying transactions (eg, a merger or the acquisition of shares). However, if a large company (with total assets or annual turnover of 2 trillion won or more on a consolidated basis) is involved in the business combination (except for in the case of an interlocking directorate), the notification becomes a pre-closing obligation. In this case, the filing must be made after the date the transaction agreement is signed and before the closing date, meaning that the transaction for the business combination cannot be consummated until clearance is received from the Korea Fair Trade Commission (KFTC). The parties can opt to make a voluntary request for a preliminary review of the transaction even before a triggering event takes place.

Failure to file a business combination report may result in the imposition of an administrative fine of up to 100 million won. In 2023, the KFTC imposed administrative fines totalling 380 million won over 23 cases for failure to file.

10 Which parties are responsible for filing and are filing fees required?

The acquiring company is responsible for filing the business combination report with the KFTC. When establishing a joint venture company, the party that has the largest shareholding in the company is responsible for filing. There are no filing fees in Korea.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

All notifications (both pre- and post-merger notifications) are subject to a 30-day initial review period after the filing date. This period may, at the discretion of the KFTC, be extended by up to an additional 90 days, in which case the total review period may last for up to 120 days.

However, the actual review period may be longer than 120 days as the issuance of a request for information by the KFTC stops the clock.

In the case of a transaction that is subject to the pre-closing notification obligation, the parties are prohibited from closing the transaction until the KFTC provides clearance.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The KFTC may impose sanctions for gun jumping when there are anti-competitive effects from the transaction at hand by initiating a legal action to nullify business combinations.

However, for transactions with no substantive competition issues, the KFTC usually imposes an administrative fine of up to 100 million won on the company responsible for filing. If a violation is detected by the KFTC, a merger filing must be made and the KFTC issues a notice of the administrative fine after providing the clearance.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The KFTC may impose sanctions on gun jumping in foreign-to-foreign mergers as well. The KFTC imposed sanctions on five foreign companies in 2012 for violation of the merger control rules (including failure to file, delay in filing and closing before clearance). Recent data on such sanctions is not open to the public.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There are no exceptions for gun jumping in Korea. The KFTC has never accepted any solutions (eg, hold-separate arrangements) or exceptions in a foreign-to-foreign merger subject to pre-closing clearance that would permit closing before clearance.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

In the case of public takeover bids, the merger filing is a post-closing requirement because the actual acquisition shares cannot be fixed in advance. However, the parties may file a voluntary review request with the KFTC based on the expected shareholding ratio from the 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 reporting party must provide the KFTC with sufficient information to allow the KFTC to review the underlying transactions. Full details of transactions are required, and various forms must be completed and submitted together with supporting documents.

The KFTC provides a list of the necessary documentation relating to the proposed transaction to enable it to determine whether there will be any anticompetitive impact on the market. Under this general rule, data or information on the financial statements of the parties, the identities of the shareholders of the parties, financial statements of affiliated companies (including organisation charts) and market information in the relevant sector are required. If the KFTC deems it necessary, it may request additional data or information.

If the KFTC case handler discovers any incomplete or incorrect information, a request for supplementary information may be issued.

The KFTC may impose a negligence fine of up to 100 million won for providing misleading information. Further, provision of fraudulent information in response to the KFTC's request for information may be subject to a criminal penalty, including a fine of up to 150 million won.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

There is no distinction of review phases, such as Phase I and Phase II, in Korea and there is no official process for pre-notification consultation with the authority.

To expedite the review process, the notification may be filed on a voluntary basis before the triggering event takes place. For a voluntary review request, the same set of documents as those required for the official notification must be submitted. If the KFTC case handler concludes that there are no substantive competition issues, clearance may be given without a commissioners' deliberation procedure.

If the KFTC case handler identifies serious anticompetitive concerns during the merger review process and determines that remedies are required, an examiner's report with proposed remedies (a document similar to the statement of objections issued by the European Commission) will be issued. The notifying party will be given the opportunity to submit its rebuttal brief after receiving the examiner's report and there will be a hearing held by the KFTC to deliberate on the matter. After the hearing, the KFTC will determine whether remedies are required and, if so, what types of remedies will be appropriate. The KFTC will then render its final decision, with a press release and the written decision being posted on its website.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The KFTC has 30 days as of the filing to issue its decision on whether to grant clearance. However, a shorter review period of 15 days will apply for mergers that qualify for a simplified review. At the discretion of the KFTC, the 30-day or 15-day period may be shortened or it may be extended by up to an additional 90 days.

A common reason for an official extension of the review period is the complexity of the transaction. However, in any case, the KFTC's requests for additional information stops the clock and the review period may be extended until the KFTC obtains the supplementary documents.

A simplified review process applies if the merger falls under any of the following:

- a business combination between affiliates;
- a business combination that does not result in the acquisition of control;
- a conglomerate merger that does not involve a large company (ie, a company, together with its affiliates worldwide, that has total worldwide assets or worldwide annual turnover of 2 trillion won or more);
- a conglomerate merger that does not involve overlapping or supplemental products between the merging parties (however, this does not apply to cases in which the acquiring party is an online platform entity and the acquired party provides its goods or services to five million or more people on monthly average basis);
- a business combination that is clearly not for managerial purposes but is a simple investment activity;
- a business combination previously reviewed by the KFTC through the voluntary preliminary review process that did not result in any finding of anticompetitive impact; or
- a business combination in which the target is a foreign company and does not have any impact on the domestic market (eg, establishment of a foreign joint venture to develop natural resources or engage in the sale of fixed assets such as overseas power generation facilities).

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The essence of the substantive test is whether the 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 for determining whether there is any anticompetitive effect.

If the combined market share of the parties meets all the elements stated below, the business combination is presumed to have an anticompetitive effect on the relevant market:

- the merging companies have a combined market share of at least 50 per cent in the relevant market or the top three companies in the market have a combined market share of at least 75 per cent in the relevant market;
- the combined market share of the merging companies is the largest in the relevant market; and
- the combined market share of the merging companies exceeds the market share of the second-ranked company in the market by more than 25 per cent.

The Merger Review Guidelines stipulate a safe harbour, which assumes that competition is not substantially restrained if the degree of market concentration and any changes to market concentration following the merger fall under any of the following:

for horizontal mergers:

- where the Herfindahl-Hirschman Index (HHI) (referring to the sum of the squares of the market share of each competitor in a relevant market) is less than 1,200;
- where the HHI is at least 1,200 but less than 2,500 and the HHI increase is less than 250; or
- where the HHI is at least 2,500 and the HHI increase is less than 150; or
- for vertical or conglomerate mergers:
- where, in each of the relevant markets, the HHI is less than 2,500 and the market shares of the parties to the merger is less than 25 per cent in the relevant markets;
- where each of the parties to the merger is ranked no higher than fourth in each of the relevant markets; or
- where the market share of each of the parties to the merger in each of the relevant markets is less than 10 per cent.

Other than market share, factors to be comprehensively considered include unilateral anti-competitive effect, coordinated anticompetitive effect, level of foreign competition, possibility of new entry, and existence of similar products and adjacent markets.

A failing company defence is allowed if the target meets the statutory test, eg, whether the target company has been experiencing capital erosion for a substantial length of time. There are very few cases in which the Korean Fair Trade Commission (KFTC) has actually cleared a transaction based on a failing firm exception.

20 | Is there a special substantive test for joint ventures?

No. Normal review procedures for business combinations also apply to joint ventures and there are no special rules for a non-full-function joint venture in Korea.

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 on the nature of the transaction involved:

- horizontal mergers: the degree of market concentration, unilateral effect, coordinated effect, overseas competition, barriers to entry, substitutable goods and the existence of an adjacent market;
- vertical mergers: vertical foreclosure and coordinated effects in the market; and
- conglomerate mergers: elimination of potential competition, exclusion of competitors and increased barriers to entry.

Other factors may also be considered when reviewing a merger involving information assets (usually for companies in research and development-intensive industries). The Merger Review Guidelines amended in 2019 provide that the KFTC may also consider the following factors:

- whether the information assets obtained through the merger are difficult to replace;
- whether the merger will increase the incentive and the ability of the merging companies to restrict competitors' access to the information assets;
- whether the restriction on access to the information assets resulting from the merger is expected to have an anticompetitive effect; and
- whether the merger is likely to result in weakening non-price competition, such as the quality of services related to the information assets.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

In principle, the KFTC does not take into account any non-competition issues, such as national security, in its review process. However, the MRFTA provides an exception by allowing the consideration of efficiency-enhancing factors, such as contributions to employment, regional economic development, stable energy supplies and improvements to the environment.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiency is a factor that permits the KFTC to clear a transaction even when a certain degree of anticompetitive impact is anticipated. The efficiency argument is often presented but has been accepted in only a few cases.

When considering the efficiency argument, the KFTC normally tries to determine whether a transaction will result in economies of scale, cost reductions and contributions to employment and regional economic development, among other things.

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 the transaction must also be the last resort (ie, there must be no substitute measures that could be used to achieve the same result).

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Korea Fair Trade Commission (KFTC) may issue corrective orders to the parties of a business combination that has an anticompetitive impact on the relevant market. These corrective orders include structural remedies (eg, divestiture of all or part of the shares acquired, or transfer of business) and behavioural remedies. If the parties do not comply with a corrective order, the KFTC may induce compliance by imposing fines based on the number of days of non-compliance.

In the Merger Remedy Guidelines, the KFTC makes it clear that, in principle, it will first consider structural remedies and consider behavioural remedies only as a means to support the structural remedies.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The KFTC may impose structural and/or behavioural remedies to the extent that they can rectify anticipated anticompetitive effects through a corrective order.

The KFTC's corrective order to remedy competition concerns may include:

- prohibiting a merger; or
- requiring:
    - the disposition of all or part of the shares acquired;
    - the resignation of an officer;
    - a transfer of business;
    - the cancellation of debt guarantees; and
    - a public announcement of the fact that certain corrective measures have been imposed;
    - imposing restrictions on business practices that may produce anticompetitive effects; and
    - any other corrective measures necessary to remedy violations of competition law.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Although the KFTC does not operate an official programme for merging parties to voluntarily present a remedy proposal or a pre-consultation programme as part of the merger review process, the parties may contact the case handler and discuss possible remedies.

Typically, to draft the proposed remedy section of the examiner's report, the case handler issues requests for information on the market situation and makes verbal enquiries to the parties from time to time. The case handler may also conduct a market survey by contacting the parties' major customers and competitors to gain a better understanding of the market situation and the feasibility of possible remedies. The parties may also request a face-to-face meeting with the case team if necessary to discuss remedy proposals.

If a divestiture remedy is decided at the hearing, in a typical case, the parties will be required to formulate a divestiture plan, seek a potential purchaser and regularly report to the KFTC case handler the progress being made in implementing the remedy within a certain time frame. The time frame is usually three to six months, but can be extended upon the parties' request.

From 7 August 2024, the KFTC will introduce an official procedure through which the merging parties may propose remedial measures to address the anticompetitive concerns.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

In 2007, the KFTC issued its first corrective measure in connection with a foreign-to-foreign merger.

Further, in 2008 and 2010, despite the review process not having been completed, the parties in a foreign-to-foreign merger decided to abandon the transaction after anticompetitive concerns were raised by various competition authorities, including the KFTC.

In 2011, the KFTC imposed structural remedies on a proposed foreign-to-foreign merger in the computer hard disk drive industry.

In 2013, the KFTC imposed remedies on two foreign-to-foreign mergers: one involving the semiconductor manufacturing equipment industry and another involving the TV SOC (system on chip, an integrated circuit that integrates all components of an electronic system) industry.

In 2017, in a merger between two foreign chemical companies, the KFTC imposed a structural remedy requiring the divestment, within six months of closing, of certain assets that one of the parties owned. Also, in a share acquisition of a foreign ocean shipping company, the KFTC ordered the parties to withdraw from a consortium involving a specific sea lane.

In January 2018, the KFTC imposed structural remedies on a foreign-to-foreign merger in the mobile semiconductor industry (including near-field communication technology).

In February 2020, the KFTC imposed a structural remedy requiring the divestment of assets in a merger case involving Danaher's acquisition of General Electric's biopharma unit.

Finally, in October 2023, the KFTC imposed behavioural remedies in a merger between a semiconductor solution company and a server virtualisation software company.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

There are no rules on the review of ancillary restrictions in Korea. Even if the KFTC reviewed certain ancillary restrictions (eg, non-compete provisions of a joint venture agreement) in its merger review, this does not mean that the KFTC also approved those ancillary restrictions. The KFTC may conduct an investigation into the legality of those ancillary restrictions any time after the transaction is 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?

Yes, any interested party to a merger may file its opinion with the Korea Fair Trade Commission (KFTC) during the review process. However, because the fact that a merger filing is made with the KFTC is not public information in Korea and, except for very high profile cases where the KFTC's merger review is known to the public through media coverage, usually interested parties become involved through the KFTC's request for information in cases where there is a substantive competition issue. The KFTC may ask competitors or customers to provide information or data to assess the impact on market competition.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The KFTC and its personnel are strictly prohibited from revealing, publishing or otherwise using information acquired while carrying out their duties other than for the purpose of enforcing the MRFTA. The KFTC does not disclose the fact that a notification has been filed. Usually, if there are no significant competition issues, no information relating to the filing will be disclosed to the public.

In cases where there are competition concerns and the KFTC issues a decision to impose remedies, the KFTC will usually issue a press release and the final decision will be posted on the KFTC's website. The KFTC will also issue a press release summarising its decision in high-profile cases even if no remedies are imposed.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The KFTC has played a major role in the International Competition Network's discussion about merger control issues. It also actively participates in many forums on competition issues in the Organisation for Economic Co-operation and Development.

In addition, the KFTC has been involved in many bilateral discussions with many antitrust authorities in jurisdictions including China, Japan, the European Union, Germany and the United States.

For the review of a business combination with substantive competition issues, the KFTC cooperates with antitrust authorities in foreign jurisdictions that have similar anticompetitive concerns in designing effective corrective measures; for example, the KFTC cooperated with antitrust authorities in the United States and the European Union in Broadcom's acquisition of VMware.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

The parties may appeal a decision of the Korea Fair Trade Commission (KFTC) to the Seoul High Court and/or to the KFTC for reconsideration. The review at the Seoul High Court is on a de novo basis and the parties may present new evidence or call witnesses without limitation. However, a court appeal case relating to the KFTC's merger review is very rare.

Time frame

33 | What is the usual time frame for appeal or judicial review?

Any merging parties that wish to challenge a decision of the KFTC may file an appeal with the Seoul High Court within 30 days of receipt of the KFTC's written decision.

The Seoul High Court, an appellate court, has exclusive jurisdiction over any appeal arising from the decisions of 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 2023, 927 business combinations were notified to the Korea Fair Trade Commission (KFTC), 188 of which were mergers where notifying parties were foreign companies. In the same year, the KFTC imposed remedies in two cases (Hanwha's acquisition of Daewoo Shipbuilding & Marine Engineering and Broadcom's acquisition of VMware) and imposed administrative fines in 23 cases for reporting violations.

Reform proposals

35 Are there current proposals to change the legislation?

The KFTC proposed an amendment to the MRFTA on 20 June 2023 and the amendment passed the National Assembly on 6 February 2024. The contents of the changed act are as follows and are scheduled to take effect from 7 August 2024:

Expanding scope of exempted transactions

The KFTC intends to reduce the number of merger notifications by expanding the scope of exempted mergers. The following types of mergers, which are generally regarded as not having a substantial impact on the market, will be considered for exemption:

- mergers and business transfers between a parent company and a subsidiary when the acquiring company already holds at least a 50 per cent interest – and, thereby, sole control – in the acquired company;
- the establishment of a private equity fund; and
- an interlocking directorate that constitutes less than one-third of the total number of directors in the target company, provided that none of the interlocking directors hold the position of representative director.

Voluntary remedy proposal system

From 7 August 2024, the KFTC intends to implement a formal system under which a company will submit a voluntary remedy proposal that promptly and effectively resolves anticompetitive concerns surrounding a merger. The KFTC will review and grant clearance if it believes that the plan is appropriate and sufficient.

This new system is expected to provide benefits not only in resolving anticompetitive concerns related to the proposed merger, but also in developing remedies that are better suited for the situation and easier to implement. Additionally, the system is expected to reduce the KFTC's merger review period, enhancing the efficiency of the process.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Hanwha's acquisition of Daewoo Shipbuilding & Marine Engineering

The Korea Fair Trade Commission (KFTC) decided to conditionally approve Hanwha's acquisition of a 49.3 per cent stake in Daewoo Shipbuilding & Marine Engineering on 1 May 2023. The KFTC concluded that there were significant anticompetitive concerns in the domestic military ship parts market and the domestic military ship market. It also decided that there were no anticompetitive concerns for other markets (eg, LNG carriers).

To prevent foreclosure effects, the KFTC imposed behavioural remedies, such as prohibiting unfair discrimination, unfair refusal to deal and providing competitor's business secrets to affiliates.

Broadcom's acquisition of VMware

The KFTC decided to conditionally approve Broadcom's acquisition of a 100 per cent stake in VMWare on 19 October 2023. The KFTC determined that there are risks that the merging companies would leverage their dominance in the server virtualisation software market to exclude competitors from the FC HBA market by impairing compatibility.

To address these concerns, the KFTC decided to impose a behavioural remedy to guarantee compatibility measures for 10 years from the closing of the transaction.

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Spain

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Voluntary or mandatory system?	Mandatory system. Form of notification: special form. Detailed information similar to EU Form CO. In Spanish. Short notification for straightforward cases is also available.
Notification trigger/ filing deadline	Combined turnover in Spain of over €240 million and at least two parties have turnover of over €60 million each; or combined market share in Spain (or in a defined market within Spain) of 30 per cent or more, unless the turnover in Spain of the target or the target's asset value does not exceed €10 million and the individual or combined market share of the parties does not amount to 50 per cent or more in any affected market in Spain or in any defined geographical market within Spain. Filing prior to completion.
Clearance deadlines (Phase I/Phase II)	Phase I: one month, extended by 10 days if commitments offered. Fifteen days if the transaction qualifies for the simplified procedure, provided that the notifying party has previously engaged in pre-notification contacts. Phase II: three months, extended by 15 days if commitments offered. If no unconditional clearance, the Ministry of the Economy has 15 days to decide whether to request government intervention. If it does, the government has one month to make a decision. Suspension until clearance.
Substantive test for clearance	Whether the notifiable concentration might prevent the maintenance of effective competition in the whole or part of the national market.
Penalties	Failure to file: fines up to 1 per cent of the worldwide turnover of the relevant undertaking if the parties fail to file a concentration carried out through a public takeover bid in Spain before the statutory deadline; or the parties fail to file a concentration upon ex officio request by the National Markets and Competition Commission (CNMC) within the statutory deadline; or the parties fail to file a concentration upon ex officio request by the CNMC. Implementation before clearance: fines of up to 5 per cent of the worldwide turnover of the relevant undertaking. Non-compliance with relevant final decision: fines of up to 10 per cent of the worldwide turnover of the relevant undertaking and potential daily penalties of up to 5 per cent of the infringing undertaking's daily worldwide turnover per day of delay.
Remarks	If the Ministry of the Economy requests the government's intervention at the end of Phase II, the government's decision is based on general public policy and general interest criteria.

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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) 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 the entry into force of Law No. 3/2013 setting up the National Markets and Competition Commission (CNMC), the authority entrusted with the enforcement of the Competition Act is the CNMC. The start of operations of the CNMC and the subsequent ceasing of operations of the former National Competition Commission took place on 7 October 2013. The CNMC is the entity resulting from the merger of the Spanish competition, energy, telecommunications, railways, audiovisual, airports and postal regulators.

The CNMC is led by a board of 10 members entrusted with decision-making powers, 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.

Under the Competition Act, the CNMC has the final decision on merger control proceedings in the majority of cases, and the government has only limited decision-making powers in merger control matters if it decides to intervene on the basis of non-competition grounds. Within the CNMC, the Competition Directorate is entrusted with investigative powers for merger control and the board acts as the decision-making body.

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.

Law No. 2/2011 of 4 March on 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. 22/2021 of 28 December on the Annual Budget of the State for 2022 amended the relevant filing fee for simplified procedure cases.

In November 2015, the CNMC issued a new version of the guidelines on simplified proceedings to adapt it to the new institutional framework brought about by the creation of the CNMC. The guidelines reflect the nature of the CNMC (ie, that it was formed as a result of the merger of various sector-specific regulators).

Since then, mergers taking place in regulated sectors under the supervision of the CNMC have benefited from short-form notifications – something that had been 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 proceedings of public administration bodies), which, among other things, modified the concept of working days. Under Law No. 39/2015, Saturdays are no longer working days in respect of administrative deadlines, including those applicable to merger control proceedings.

In July 2020, and following the adoption of the ECN+ Directive, the government published a draft bill to reform the Competition Act. Although this draft aimed at implementing the ECN+ Directive, it also included more ambitious reforms than those in the ECN+ Directive. By way of illustration, the draft bill included, among other things, amended merger filing thresholds, and amended review periods for short-form notifications and Phase II proceedings.

In late April 2021, the Council of Ministers passed Royal Decree No. 7/2021 of 27 April, implementing into Spanish law the ECN+ Directive and reforming the Competition Act accordingly; however, it did not include the ambitious proposals included in the draft bill and amended the Competition Act merely to implement the ECN+ Directive. Key measures concerning merger control include enhanced cooperation powers enabling the effective exchange of information with other national competition authorities and the European Commission, as well as higher fines for infringements in the context of merger control.

In June 2023, Royal Decree-Law No. 5/2023 of 28 June was approved, which includes some amendments to the Competition Act related to the merger control procedure. These amendments entail a reduction of the deadline for simplified transactions from one month to 15 days and a reduction of the deadline for prior consultations from three months to one month. At the same time, the deadline for in-depth reviews has been lengthened and the Phase II investigation deadline was extended from two months to three months.

Recently, the programme agreed by the coalition underpinning the new Spanish government includes a reorganisation of the institutional framework of the CNMC. This would de-merge the current CNMC creating a specific authority responsible for regulating and supervising the energy sector. Competition enforcement will remain with the CNMC.

In February 2024, the Spanish Ministry for Ecological Transition and the Demographic Challenge published the draft bill for a law that would re-establish the National Energy Commission. Among other things, the draft bill provides that the new authority will review the acquisition of assets and shares in companies that:

- carry out regulated activities;
- are in charge of operating the electricity market;
- carry out activities relating to the technical management of the gas system;
- are active in the hydrocarbon sector (including activities such as oil refining, pipeline transportation and storage of oil products); or
- own the relevant assets to carry out such activities or critical infrastructure related to the energy sector.

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Such review powers are without prejudice to any other relevant authorisations that may be required, including under EU and Spanish merger control rules as well as Spanish foreign investment regulations.

The draft bill with these amendments has already been sent to the Spanish parliament and is currently pending. Such a reform is expected to be adopted by the end of 2024 according to public sources.

Scope of legislation

2 What kinds of mergers are caught?

The Competition Act provides that transactions capable of being caught are 'any project or transaction involving a concentration of undertakings'. The concept of concentration is aligned with the EU Merger Regulation (EUMR) and includes transactions that affect on a lasting basis the structure of control of the undertakings concerned, usually through:

- a merger between two or more formerly independent companies;
- the acquisition of control of the whole or parts of one or more undertakings; or
- the creation of a joint venture and the acquisition of joint control of an undertaking that performs on a lasting basis all the functions of an autonomous economic entity.

3 What types of joint ventures are caught?

The Competition Act states that full-function joint ventures are caught by the merger control rules. Spanish merger control provisions are aligned with EU competition rules in this respect.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Act provides for a definition of 'control' that is modelled on the definition under the EUMR. Under the Competition Act, having control entails the possibility of exercising decisive influence on an undertaking; thus, minority and other interests not conferring control are not caught by the Competition 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?

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 (the market share threshold can be satisfied by the target company only); or
- the aggregate turnover in Spain of the companies involved exceeded €240 million during the preceding financial year, provided that the turnover in Spain of each of at least two parties exceeded €60 million.

As provided for in the EUMR, the Royal Decree provides that the turnover is deemed to be the amount derived from the sale of products or the provision of services (excluding turnover taxes) in the preceding financial year in Spain and must be considered for the acquirer on a group basis. The turnover of the target company should only include the amount derived from the sale of products or the provision of services attributable to the target company.

In addition, there are sector-specific rules for turnover calculation, in particular for banks and other financial institutions and insurance undertakings.

To the best of our knowledge, the CNMC has only referred one case below the thresholds set forth in the Competition Act to the European Commission, which was the proposed acquisition of Autotalks by Qualcomm in August 2023. Although the transaction did not reach the notification thresholds set out in the EUMR, and it was not notifiable in any EU member state, Spain together with other member states submitted initial referral requests to the European Commission pursuant to Article 22(1) of the EUMR following the European Commission's Article 22 guidance adopted in 2021.

The Competition Act does not apply to any transaction caught by the provisions of the EUMR (with exceptions, provided for in the EUMR).

The Competition Act provides for a formal consultation procedure so that the merging parties may, before notification, consult the CNMC with regard to whether their transaction amounts to a concentration or whether it exceeds the thresholds. Following the approval of Royal Decree-Law No. 5/2023, the CNMC now has a one-month deadline to issue a decision under the consultation procedure.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory for transactions that exceed either of the two thresholds for notification. There are no exceptions.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers must be notified if they meet one of the two thresholds for notification. Foreign-to-foreign mergers are notified to the CNMC on a regular basis. There is no local effects or nexus test, with the exception of the two thresholds.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Spain has traditionally had separate rules on foreign investment that may be relevant to certain acquisitions and require specific notifications or prior approvals depending on the sectors involved.

On 18 March 2020, Royal Decree-Law No. 8/2020 on urgent extraordinary measures to deal with the economic and social impact of the covid-19 pandemic was published and entered into force, declaring a state of emergency in Spain. These rules were further amended by Royal Decree-Law No. 11/2020 of 31 March, Royal Decree-Law No. 34/2020 of 17 November, Royal Decree-Law No. 12/2021 of 24 June, Royal Decree-Law No. 27/2021 of 23 November and Royal Decree-Law No. 20/2022 of 27 December. The rules included revised rules imposing restrictions on foreign investments in Spain, in line with Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (the EU FDI Regulation), which entered into force on 11 October 2020.

Nevertheless, although the rules of Royal Decree-Law No. 8/2020, as amended, were initially of an extraordinary nature and aimed at dealing with the covid-19 pandemic, the new regime has become permanent for non-EU or European Free Trade Association (EFTA) investors. The current legal instruments are the first step in the process of implementing the EU FDI Regulation, which inspired such instruments. In fact, a new implementing regulation entered into force in September 2023; Royal Decree No. 571/2023 of 4 July on Foreign Investment develops the current legal framework for screening foreign direct investments.

Under the new regime, investors from outside the European Union or the EFTA are not allowed to acquire, directly or indirectly, a stake equal to or greater than 10 per cent of the share capital or control over the whole or parts of a Spanish company active in a strategic sector without prior authorisation. These sectors comprise:

- critical infrastructure;
- critical technologies and dual-use items;
- supply of critical inputs (in particular, energy), strategic connectivity services, and raw materials and resources related to food safety;
- sectors with access to sensitive information (in particular, personal data); and
- communication media.

The concept of control applicable to the test is drawn from merger control rules and is therefore understood as the possibility of exercising decisive influence over the whole or parts of the Spanish company, including acquisitions of assets and business lines. This includes, among other things, veto rights over strategic decisions, which may trigger a foreign investment filing requirement regardless of the shareholding actually acquired.

Authorisation is also necessary, irrespective of the activities of the target, if:

- the foreign investor is directly or indirectly controlled by the government of a third country;
- the foreign investor has made investments or participated in activities in sectors affecting security, public policy and public health in another EU member state; or

- there is a serious risk that the foreign investor will engage in illegal or criminal activities affecting public security, public order or public health in Spain.

Further, from 19 November 2020, the restrictions on foreign investments also apply to certain investments in Spanish companies carried out by residents of other EU or EFTA countries. This regime is temporary and was meant to end on 30 June 2021; however, it has now been extended and shall be in force until 31 December 2024. It is yet to be seen whether this temporary regime will be further extended.

Direct or indirect investments in Spanish companies by EU or EFTA investors trigger a filing requirement in Spain, provided that the target company is:

- either a listed company or a private company and the investment is worth more than €500 million; and
- active in a strategic sector in Spain.

Filing is mandatory in Spain. Transactions executed without the required authorisation will be invalid and have no legal effect until approval has been obtained. Fines may also be imposed up to the transaction's financial value.

With regard to the Competition Act, there are no special rules for specific sectors, except for specific turnover calculation rules for the financial and insurance sectors.

To achieve internal coordination, in the case of merger control, the different sectoral directorates of the CNMC may notify the Competition Directorate of any merger within their respective sectors if they believe it might be caught by the merger control provisions of the Competition Act.

In the energy sector, certain acquisitions of interests or assets in the electricity and gas sectors must be communicated to the CNMC. The CNMC is entitled to impose conditions on the acquisition if the acquirer is not a country in the European Union or the European Economic Area, and in the case of a real and sufficiently serious threat to the supply of electricity, gas or hydrocarbons. The draft bill of the law for the re-establishment of the National Energy Commission nevertheless foresees that such review powers will be granted to the National Energy Commission once it is approved by the Spanish parliament, expected by the end of 2024 according to public sources.

Certain acquisitions in the Spanish banking, insurance, defence and media sectors, among other sectors, may also require specific approvals from the relevant authorities.

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 in the affected region.

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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 Law No. 15/2007 on the Defence of Competition (the Competition Act) must be notified to the National Markets and Competition Commission (CNMC) prior to completion (ie, prior to putting the transaction into effect). There are no specific deadlines for filing if the transaction has not been put into effect.

However, with regard to Spanish public takeover bids (ie, those subject to authorisation by the Securities Market Commission (CNMV)), filings must be made before, or up to five days after, submitting the bid to the CNMV. Failure to notify within the five-day deadline may give rise to the imposition of fines of up to 1 per cent of the worldwide annual turnover of the undertakings concerned.

In addition, a 20-day deadline for filing is applicable only in cases where the CNMC requests parties for filing a transaction ex officio. Failure to notify before the deadline may give rise to the imposition of fines of up to 1 per cent of the annual worldwide turnover of the undertakings concerned. In addition, such filings do not benefit from the legal deadlines to which the CNMC is bound.

10 Which parties are responsible for filing and are filing fees required?

The offeror or acquirer is responsible for filing in the case of an acquisition. For mergers or in the case of the acquisition of joint control (ie, joint ventures), the filing must be made jointly by the merging parties or by the parties acquiring joint control, respectively.

The following filing fees for merger control proceedings are payable:

- €5,502.15 if the Spanish turnover of all the companies involved in the transaction does not exceed €240 million;
- €11,004.31 if the Spanish turnover of all the companies involved in the transaction exceeds €240 million but not €480 million;
- €22,008.62 if the Spanish turnover of all the companies involved in the transaction is higher than €480 million and does not exceed €3 billion; and
- a fixed amount of €43,944 if the Spanish turnover of all the companies involved in the transaction exceeds €3 billion, plus an additional €11,004.31 for each €3 billion exceeding the aforementioned turnover up to a maximum of €109,806.

The filing fee for mergers notified under the short-form procedure is €1,576.51. 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 the transaction to be implemented before clearance. In those 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 the 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 a derogation has been granted in exceptional circumstances. For instance, in *COPE/Vocento/PuntoRadio* (C/0493/13), the former National Competition Commission conditionally allowed the parties, a week after a formal filing was carried out, to implement a temporary agreement on the non-exclusive assignment of sports radio content. The transaction was subsequently cleared in Phase I with remedies.

In November 2016, in *Daimler/Hailo/mytaxi/Negocio Hailo* (C/0802/16), the CNMC allowed the parties to carve out Spain by partially lifting the suspension obligation; that is, it allowed the parties to close the deal on a global basis, provided that 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.

Similar to the EU Merger Regulation (EUMR), the Competition Act states that public takeover bids are not subject to the general suspension obligation, provided that certain conditions are met.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The Competition Act provides for a fine of up to 5 per cent of the worldwide turnover of the notifying party or parties in the financial year immediately preceding that in which the fine is imposed if the transaction is put into effect before clearance. The amount of the fines imposed by the CNMC can vary depending on the particular features of the transaction.

The CNMC has taken action against a significant number of non-filed mergers and has imposed several fines in this regard over the past years. In fact, this is one of the key enforcement priorities of the regulator. Many of these cases refer to transactions that met the market share threshold.

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For example, in late 2019, the CNMC fined Grupo Nufri €12,800 for failure to notify the acquisition of Grupo Indulleida. The CNMC noted that the purchase agreement did not contain a condition precedent by which closing of the transaction was made conditional on clearance (or tacit approval) of the transaction; however, in assessing the infringement, the CNMC took into account that:

- Grupo Nufri voluntarily notified the transaction as soon as they were aware of the breach of the standstill obligation (ie, only three months after closing);
- the breach of that obligation had no adverse effects and did not create an illicit benefit for Grupo Nufri; and
- the transaction posed no competition concerns, given that once the transaction was notified it was unconditionally cleared in Phase I.

Lastly, the infringing company benefited from a reduction of the proposed fine based on both the voluntary acknowledgement of the infringement and early payment of the fine.

Although there were no fines for gun jumping during 2020, the CNMC continued actively pursuing potential infringements in this regard. In September 2020, and to our knowledge for the first time ever in the context of the review of a notified transaction, the CNMC carried out dawn raids at the premises of various funeral services undertakings for the alleged breach of the suspension obligation in connection with previous transactions, as well as the provision of misleading information.

In February 2021, the CNMC opened an investigation into Funespaña for allegedly having implemented the acquisition of Alianza Canaria without prior approval. The CNMC concluded that it had breached the standstill obligation and fined Funespaña €100,000.

Similarly, in April 2021, the CNMC opened an investigation into Albia for allegedly having implemented the acquisition of Tanatorios Móstoles and fined Albia €300,000.

In May 2021, the CNMC opened another formal investigation in the context of *DGTF/Parpública/TAP* for a potential breach of the suspension obligation. The CNMC determined that DGTF (a public entity of the Portuguese state) had breached the standstill obligation when acquiring sole control over TAP Airlines and fined DGTF €30,000; however, the infringing company benefited from a 40 per cent reduction of the proposed fine (€50,000) based on both the acknowledgement of the infringement and voluntary payment of the fine.

The increased enforcement efforts continued in 2022, with a record number of six cases.

In February 2022, the CNMC opened a formal investigation into Luxida for allegedly having implemented the acquisition of Eléctrica Santa Clara without prior approval and fined Luxida €12,000. As in other recent cases, the infringing company benefited from a 40 per cent reduction of the proposed fine (€20,000), based on both its acknowledgment of the infringement and voluntary payment of the fine.

From March to April 2022, the CNMC opened three formal investigations in the funeral services market:

- two into Albia for having implemented the acquisitions of Funeraria Tanatorio La Paz SL and Tanatorio de Marín SL without prior approval – in June 2022, the CNMC fined Albia €250,000 and €25,000 for each case, respectively; and
- one into Funespaña for having implemented the acquisition of Funeraria San Vicente SL in 2018 without prior approval – in June 2022, the CNMC fined Funespaña €100,000.

In September 2022 the CNMC opened a formal investigation into Xfera Móviles, which is a subsidiary of the Spanish telecommunications operator MásMóvil, for having implemented the acquisition of Grupo Ahí+ without prior authorisation. In December 2022, the CNMC fined Xfera Móviles €1.5 million, which is still the highest gun-jumping fine imposed by the CNMC under the Competition Act to date. The CNMC had previously requested MásMóvil to notify the transaction, which was cleared unconditionally in April 2022.

In the same vein, in September 2022, the CNMC opened a formal investigation into Electra Alto Miño, an electric power distributor, for allegedly failing to notify the acquisition of certain electricity distribution assets located in a small town in the autonomous community of Galicia. In December 2022, the CNMC imposed a fine of €30,000 on Electra Alto Miño.

During 2023 and 2024 this trend has continued and the CNMC has continued to pursue unreported transactions. In December 2023, the CNMC opened a formal investigation into KKR Genesis Bidco for allegedly failing to notify the acquisition of GeneraLife, a reproductive medicine services group. In April 2024, the CNMC imposed a fine of €683,322 on KKR Genesis Bidco, following a 40 per cent reduction of the proposed fine based on both the voluntary acknowledgement of the infringement and early payment of the fine. In March 2024, the CNMC opened a formal investigation into GeneraLife for allegedly failing to notify the acquisition of Clínicas Ginemed, a reproductive medicine services group. The result of this investigation is pending.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Yes. The then-competent National Competition Commission (CNC) initiated in 2011 for the first time an investigation for alleged gun jumping in the context of a foreign-to-foreign merger (ie, the parties did not have any relevant corporate presence in Spain). The acquisition by Dorf Ketal Chemicals (India) Private Limited of the titanates and zirconates business of EI DuPont de Nemours & Company was allegedly put into effect before it was authorised by the CNC. The CNC fined Dorf Ketal Chemicals (India) Private Limited €35,400 (3 per cent of the parties' turnover in Spain).

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 was identified.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

In principle, there should be no reason for the Spanish authorities to object to a hold-separate arrangement if it means that the implemented transaction has no impact on the Spanish market.

In November 2016, in *Daimler/Hailo/mytaxi/Negocio Hailo* (C/0802/16), the CNMC allowed the parties to carve out Spain by partially lifting the suspension obligation; that is, it allowed the parties to close the deal on a global basis, provided that 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.

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 CNMV, and the bid will be conditional on 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 before or within five days of submitting the bid to the CNMV; and
- 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 Royal Decree No. 261/2008 (the Royal Decree). For straightforward cases raising no issues, which are specifically listed in article 57 of the Royal Decree, 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 the data that comprises business secrets 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 the official forms for standard merger notifications (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 must 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, among other things:

- 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 then-competent CNC stated that approximately 26 per cent of the merger control filings made in Spain during that period were short form. The proportion has since risen significantly, accounting for nearly 58 per cent of filings cleared during 2023.

The amendments to the Competition Act introduced by Royal Decree-Law No. 5/2023 of 28 June establishes a reduction to 15 working days for the clearance time frame for notifications made under the short form if a complete draft notification form is submitted to the CNMC prior to formal submission. In other 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 a fine of up to 5 per cent of the total worldwide turnover of the infringing undertaking. Most notably, in March 2023, the CNMC opened an investigation into the Spanish telecommunications operator MásMóvil for allegedly providing such information during the preliminary investigation of the acquisition of Grupo Ahí+ by its subsidiary, Xfera Móviles. The final decision published on 12 July 2023 did not find grounds for action. More recently, in February 2024, the CNMC opened an investigation into Rheinmetall, a company active in the military sector, for allegedly providing incomplete as well as misleading information in the context of its acquisition of Expal Systems in 2023. The investigation is ongoing.

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, extendable 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 CNMC's board of 10 members entrusted with decision-making powers 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 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.

This trend gained momentum in 2021, when a number of transactions unconditionally cleared in Phase I were subject to lengthier reviews – such as *Ned Suministro GLP/Activos Cepsa*, *Auxquimia/Budenheim*, *Goodgrower/Vithas*, *AkzoNobel*, *Coatings/Industrias Titan* and *Bimbo/Siro Medina* – and continued in 2022, with the same happening in, for example, *Visalia/Servigas*, *Delivery Hero/Glovo*, *Sercomisa/Mediterránea Pitiusa*, *Promsa/Hanson*, *Iturri/Rodríguez López Auto*, *Albia/Tanatorio La Paz* and *Funespaña/Funeraria San Vicente*, as well as in 2023, for example *Tecno Fast/Alquibalat*, *Abanca/Targobank*, *Sonepar Iberica/Digamel - Digamel Arousa* or *Segurcaixa Adeslas/IMQ Seguros y Grupo IMQ*.

It is possible to clear a transaction in Phase I through commitments or undertakings presented by the parties. Recent precedents show the positive impact on timing of choosing to offer Phase I remedies where potentially required. In 2019, *MIH Food Delivery Holdings/Just Eat* was subject to remedies and cleared within less than one month of formal filing. Likewise, in 2020, *Areas/Autogrill* was cleared in Phase I with remedies about one month after formal filing. More recently, in October 2022, *Hefame/Cofarcu* was cleared in Phase I with remedies in less than one month. In 2023, *Alcampo/Activos Dia* was also cleared in Phase I with remedies in 40 days from formal filing. It is reasonable to assume that some of these deals entailed lengthy pre-notification contact.

In practice, while straightforward transactions (mainly short-form notifications) may be (and in practice are, generally) cleared prior to the expiry of the statutory deadline for Phase I, an increased level of scrutiny from the CNMC is also leading to protracted review periods in transactions subject to the ordinary form.

On the other hand, the possibility of stopping the clock to request information from third parties may also affect the duration of the review period, which may be extended well beyond the statutory deadline. Recent examples include *CaixaBank/Bankia* and *Enoplastic/Sparflex* in 2021, cleared approximately four and five months after formal filing, respectively,

Sercomisa/Mediterránea Pitiusa and *Edilians/La Escandella* in 2022, cleared approximately five and two-and-a-half months after formal filing, respectively. In 2023, *Wonderbox/Smartbox* and *Ebiquity/Mediapath* were cleared approximately three and four months after formal filing, respectively.

Phase II investigations

The basic period for Phase II investigations is three months, extendable by 15 working days where the parties submit commitments. In Phase II, the CNMC normally requests comments from interested third parties, although the CNMC is increasingly making such requests in Phase I investigations. The merging parties may also request a hearing with the CNMC.

If the CNMC decides to clear the transaction unconditionally, the decision puts an end to the Phase II investigation, and the government cannot further intervene in the merger review process regarding the transaction.

Despite the statutory periods mentioned above, in practice, Phase II cases have taken much longer for clearance because of the possibility of stopping the clock in cases where additional information is required. For instance, and as examples of Phase II case duration, *Schibsted/Milanuncios* was cleared in seven months, *Telefónica/DTS* was cleared in six months and *JCDecaux/CEMUSA* was cleared in five months (time periods calculated from filing).

More recent examples show longer review periods in practice. In 2019, *Quirón/Clínica Santa Cristina* was cleared approximately nine months after filing. Further, in September 2020, the CNMC cleared *Çimsa/Activos Cemex* subject to commitments almost 15 months after filing.

In the same fashion, in 2021, *Mooring & Port Services/Cemesa Amarres de Barcelona* was cleared approximately nine months after filing, *Boyacá/SGEL/JV* was cleared approximately 10 months after filing, and *Mémora/Rekalde/Irache* and *Boyacá/SGEL/JV* were cleared approximately nine months after filing.

In this regard, it is also worth noting the *Santa Lucía/Funespaña* transaction, which was cleared approximately 21 months after filing; however, this long review period should be regarded as an exception rather than a trend considering the atypical circumstances surrounding the case, including, among other things:

- the suspension of the legal deadlines during the state of emergency declared as a result of the covid-19 pandemic;
- the intervention of a number of interested third parties;
- inspections carried out in a number of companies operating in the sector (funeral services), including the parties to the transaction; and
- the accumulation of a number of closely related transactions to the review of the deal.

No Phase II transactions were cleared in 2022, and 2023 continued the trend, with long review periods extending well beyond the statutory deadline; for example, *Logista Publicaciones/Distrisur* was cleared almost eight months after filing, while *Grimaldi/TFB* was cleared more than ten months after filing.

Phase III investigations

In 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 latter case, the government's decision must be based on certain specified public interest criteria other than competition.

In those 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 broadcasters from four to three; the *Antena 3/La Sexta* merger would leave only two such operators.

The then-competent CNC imposed conditions that were more severe than the remedies that it 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 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 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, extendable by 10 working days if commitments are submitted; however, during this phase of the investigation, there is scope for contact with the authorities, particularly if they require additional information, either formally (which stops the clock) or informally.

Although not statutorily provided and institutionalised as in an EUMR context, the Competition Directorate can also request information from third parties as a sort of market test, which the CNMC has been using increasingly often in recent years.

Given the statutory deadlines provided for in the Competition Act for third parties to respond, if a market test takes place, or an ex officio case or other exceptional situations occur (ie, the covid-19 pandemic), the review period is extended in practice up to approximately 2.5 months, as of formal filing. Recent examples include *Nomar/Argenta y Cifre*, *Henry Schein/Casa Schmidt – Activos*, *Flutter/Stars* and *SIX/BME* in 2020; *AkzoNobel Coatings/Industrias Titan*, *MásMóvil/Euskaltel* and *Westinghouse Electric Spain/Tecnatom* in 2021; *Sercomisa/Mediterránea Pitiusa*, *Promsa/Hanson*, *Albia/Tanatorio La Paz, Edilians/La Escandella* and *Votorantim CementosEspaña/Activos Heidelberg* in 2022; and *Ebiquity/Mediapath*, *Tecno Fast/Alquibalat* or *Sonepar Iberica/Digamel – Digamel Arousa* in 2023

For straightforward cases raising no concerns, the CNMC tends to issue a decision prior to the expiry of the one-month deadline for Phase I. The average time frame for a decision to be delivered by the CNMC is approximately 20 days, provided that no market test takes place and there are no commitments submitted by notifying parties that need to be assessed. Recent experience shows that in short-form cases, clearance can be obtained in less than 10 working days, although this ultimately depends on the CNMC's workload at the time of filing.

Phase II investigations can last between three (basic period) and more than six months (owing to the possibility of stopping the clock if additional information is required). During the Phase II investigation, the Competition Act provides for requests for information to interested third parties (although the CNMC is making such requests in Phase I investigations increasingly often), which are also granted the possibility of submitting their observations to the CNMC, as well as the possibility for the merging parties to request a hearing before the CNMC.

Although there is no way to speed up the review process, engaging early on in pre-notification discussions with the CNMC and offering commitments at an early stage of the process, if required, can ultimately have a positive impact on timing.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test for clearance is whether the transaction 'may prevent the maintenance of effective competition in whole or in part of the national market'. The test is set out in Law No. 15/2007 on the Defence of Competition (the Competition Act), together with additional criteria that the National Markets and Competition Commission (CNMC) may consider when adopting its decision on a proposed transaction. Examples of such criteria include:

- the structure of the relevant markets;
- the competitive position and economic strength of the parties involved in the transaction;
- the actual and potential level of competition;
- suppliers and consumers' available choices;
- the 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; therefore, joint ventures (either cooperative or concentrative) are assessed under the same substantive test provided for in the Competition Act (ie, whether they prevent the maintenance of effective competition in whole or in part of the national market).

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The Spanish substantive test (ie, whether the deal prevents the maintenance of effective competition in whole or in part of the national market) is aligned with the present substantive test provided for in the EU Merger Regulation. The CNMC 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 related to competition. The analysis by the CNMC should be strictly on competition grounds – although, in a Phase II investigation, the relevant consumers' associations may be consulted.

However, if the government intervenes in the merger control review (Phase III), the Competition Act expressly states that such a decision must be based on certain public interest criteria different from competition criteria, including:

- national defence and security;
- protection of public security and public health;
- free movement of goods and services within the national territory;
- protection of the environment;
- promotion of technical research and development; and
- maintenance of the sector's regulatory objectives.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

In practice, the Competition Act allows the authorities to take into account efficiencies in the review process. It explicitly mentions efficiencies as one of the substantive criteria for assessing mergers.

According to the Competition Act, the CNMC will only take into account efficiencies that are of direct benefit to consumers, merger-specific, substantial, timely and verifiable. In practice, this means that significant evidence must be adduced by the parties. To this effect, there is a specific section in the notification form dealing with efficiencies. The CNMC enjoys certain discretion in considering any efficiency claim.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The National Markets and Competition Commission (CNMC) and the government may order any appropriate measures to restore effective competition, including divestments or the unwinding of the transaction. Fines of up to 5 per cent of the average worldwide turnover of the infringing undertaking in the preceding financial year may be imposed per day if the parties have been required to unwind the transaction and have delayed doing so or if the parties do not comply with the undertakings imposed by the CNMC or the government.

Further, failure to comply with a decision issued by the CNMC in the context of merger control proceedings is a very serious infringement under Law No. 15/2007 on the Defence of Competition (the Competition Act). The fine for this type of infringements amount to 10 per cent of the infringing company's worldwide turnover in the preceding 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. The commitments are amendments to the transaction or other appropriate remedies to restore competition. The CNMC may market test the commitments with third parties to assess their effectiveness in addressing the competition concerns arising from the transaction. In addition, the CNMC and the Spanish government may impose conditions in Phase II and Phase III investigations, respectively. In 2021, the CNMC imposed conditions for the first time in *Santa Lucía/Funespaña* and *Boyacá/SGEL/JV*. Prior to 2021, the then-competent National Competition Commission imposed conditions in 2012 (*Antena 3/La Sexta*) and in 2008 (*Abertis/Axion*).

Divestiture is one of the options available to the parties, as are any other appropriate measures to restore competition; however, the CNMC is keener than the European Commission to accept behavioural remedies.

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 the remedies.

With regard to behavioural remedies, the CNMC is likely to impose an obligation on the parties to submit information periodically to the CNMC to allow effective monitoring of the implementation of the remedies.

To date, the CNMC has closed 45 merger investigations subject to commitments in Phase I. More than half of these took place in the past five years, showing that the CNMC and parties are becoming more ready to remedy competition concerns up front and proceed with closing transactions early. Recent examples include:

- *ServiRed/Sistema 4B/EURO 6000*, *BP/Petrocorner*, *Talleres Alegría/Duro Felguera Rail* and *Naviera Armas/Trasmediterránea* in 2018;
- *Lyntia/Negocio Iberdrola*, *Cirsa/GGSO*, *Cofares/Cofarta* and *MIH Food Delivery Holdings/Just Eat* in 2019;
- *Areas/Autogrill*, *Pigments/Negocio Ferro* and *Grupo Bimbo/Fábrica de Paterna de Siro* in 2020;
- *Unicaja Banco/Liberbank*, *Sofisport/Grupo Maxam*, *CaixaBank/Bankia* and *Enoplastic/Sparflex* in 2021;
- *Hefame/Cofarcu*, *Karnov/TR España/WK España*, *Wedding Planner/Zankyou Ventures* and *KKR/IVI* in 2022; and
- *Alcampo/Activos Dia*, *Wonderbox/Smartbox*, *and Ebiquity/Mediapath* in 2023.

Likewise, the parties can offer remedies in Phase II cases, as was the case in *Quirón/Clínica Santa Cristina* in 2019, *Çimsa/Activos Cemex* in 2020, *Mooring & Port Services/Cemesa Amarres de Barcelona* and *Mémora/Rekalde/Irache* in 2021, and *Logista Publicaciones/Distrisur* and *Grimaldi/TFB* in 2023 (in 2022 there were no Phase II clearances).

If the transaction is subject to Phase III, the government can impose any kind of remedies on the parties, including divestments, to clear the transaction; however, the government's decision will be based on public interest criteria, which differ from competition criteria.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To date, there is no precedent for remedies being imposed by the CNMC on a purely foreign-to-foreign transaction (ie, where the parties involved do not have any corporate presence in Spain).

In 2017, in *Integra/Codman Neurosurgery Business*, in which Integra was active in Spain only through an independent distributor, the CNMC accepted remedies in Phase I, comprising the divestiture of a viable business in the market where competition concerns had been identified. The remedy ensured that the divested business would have the necessary means (eg, portfolio of products, brand licences, know-how, stocks, production facilities and supply agreements) required to sell the products and services concerned in Spain.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Competition Act expressly states that ancillary restraints that are directly linked to and essential for implementing the concentration will be covered by the clearance decision. Contrary to the current self-assessment approach followed by the European Commission, the CNMC typically deals with ancillary restraints in its clearance decisions. The notification

form and short form each contain a specific section on ancillary restraints where the merging parties must provide detailed information on ancillary restrictions.

The CNMC will carefully 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 CNMC has 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 parties; however, a third party may initiate proceedings by filing a complaint, making the National Markets and Competition Commission (CNMC) aware of a notifiable transaction that has not been notified. In such case, the CNMC would request ex officio the notifying parties to file the transaction within 20 days.

With regard to customers' and competitors' rights in the review process, although they are very limited in a Phase I investigation (ie, complainants may informally approach the authority), they are greater in a Phase II investigation (if opened), where they can become involved in the procedure as interested third parties if they ask to intervene.

Moreover, the CNMC usually contacts and sends questionnaires to customers, suppliers and competitors of the notifying parties and relevant consumer associations in Phase II merger control cases and sometimes also in Phase I cases. This is a trend observed in the past few years; the CNMC has increasingly done market testing in Phase I in cases such as *Nomar/Argenta y Cifre*, *Flutter/Stars* and *SIX/BME* in 2020, and *AkzoNobel Coatings/Industrias Titan* and *MásMóvil/Euskaltel* in 2021.

Market testing became even more relevant and widespread in 2022 and 2023. Relevant examples include *KKR/IVI*, *Wedding Planner/Zankyou Ventures*, *Karnov/TR España/WK España,Algeco/Balat*, *BSC/MI TECH,Promsa/Hanson*, *Caja Rural De Navarra/Inversions Fenec*, *Sercomisa/Mediterránea Pitiusa*, *Votorantim Cementos España/Activos Heidelberg*, *Albia/Tanatorio La Paz*, *Norton/Avast* and *Edilians/La Escandella* in 2022, and *Ebiquity/Mediapath*, *Tecno Fast/Alquibalat*, *Sonepar Iberica/Digamel - Digamel Arousa* in 2023.

The CNMC usually pays close attention to any feedback received from the market.

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 CNMC is reasonably transparent. The fact of the notification is made public on the CNMC's website within one to three days of the transaction being 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 of publication on the CNMC's website is that potentially interested parties may become aware of the commencement of Phase II proceedings if they want to request leave to intervene and submit comments on the transaction.

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 the data that comprises business secrets to have it treated as strictly confidential, and it must provide a non-confidential version of the notification form.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Yes, mainly with the EU authorities. In this regard, following recent amendments, Law No. 15/2007 on the Defence of Competition provides for enhanced cooperation powers for the CNMC with respect to its merger control activity and transactions subject (or potentially subject) to merger control in other EU member states or the European Commission.

In practice, the CNMC, subject to prior waiver from the notifying parties, may exchange with the European Commission and other EU member states' national competition authorities any factual or legal elements, including confidential information, and use those elements as evidence.

The CNMC also cooperates with other antitrust authorities in the context of the Organisation for Economic Co-operation and Development and the International Competition Network. In addition, it interacts with Latin American authorities in the Latin American, Caribbean and Ibero-American competition forums.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Decisions of the Competition Directorate can be appealed to the board of 10 members entrusted with decision-making powers that leads the National Markets and Competition

Commission (CNMC), provided that certain conditions are met. Decisions of this board can be challenged before the Spanish National High Court. The government's final decision on merger control proceedings in Phase III investigations may be subject to judicial review by the Spanish Supreme Court. Experience shows limited appeal activity with regard to merger control decisions and unsuccessful outcomes.

Time frame

33 | What is the usual time frame for appeal or judicial review?

Although it is difficult to give a time frame, experience has shown that the Spanish Supreme Court's judicial review of government decisions may take between two and four years.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In recent years, transactions have been subject to increased levels of scrutiny by the National Markets and Competition Commission (CNMC). In 2023, the CNMC cleared 69 transactions, putting an end to the significant upwards trajectory in merger control activity that began in 2021 (104 cleared transactions in 2021 and 95 transactions cleared in 2022, compared with the 59 transactions that were cleared in 2020).

Most were unconditionally cleared in Phase I, three were cleared subject to remedies in Phase I (*Alcampo/Activos Dia, Wonderbox/Smartbox, Ebiquity/Mediapath*) and some were cleared following an in-depth review by the CNMC. No transactions were prohibited. However, three transactions were abandoned by the parties following a lengthy review, including *BSC/MI TECH*, which was abandoned during Phase II proceedings, almost eight months after filing, and *Algeco/Balat*, which was abandoned during Phase II proceedings, more than 13 months after filing.

Remedies

Phase I remedies offered in *Ebiquity/Mediapath*, *Wonderbox/Smartbox*, and *Alcampo/Activos Dia* included behavioural remedies, in line with precedents from previous years. This confirms the trend towards the use of behavioural remedies in Phase I in Spain, whereas the European Commission favours divestments. *Alcampo/Activos Dia* combines both behavioural and structural remedies, showing the CNMC's willingness to consider hybrid remedy packages.

Following what was learned from *Bimbo/Panrico II* in 2016, the CNMC accepted fix-it-first remedies in *BP/Petrocorner* and *Naviera Armas/Trasmediterránea* in 2018, *Çimsa/Activos Cemex* in 2020, and *Enoplastic/Sparflex* and *Sofisport/Grupo Maxam* in 2021 and *Alcampo/Activos Dia* in 2023.

Enforcement action shows that the CNMC is willing to monitor remedies, and that this has been a traditional enforcement priority. In 2013, the then-competent National Competition Commission fined Telecinco €15.6 million (the highest fine to date in the context of merger control proceedings) for having failed to implement the remedies that it accepted in the *Telecinco/Cuatro* merger. In the same case, in 2015 and 2016, the CNMC fined Telecinco €3 million each year regarding further failure to implement the remedies.

During 2017 and early 2018, the CNMC continued to closely monitor compliance with remedies, as shown by *Telecinco/Cuatro*, *VeriFone/Hypercom*, *Redsys/Redy*, *Integra/Codman Neurosurgery Business* and *DIA/Eroski Activos*, in which the CNMC confirmed a decision to the effect that the parties had complied with the remedies.

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. In April 2021, it fined Repsol €850,000 for breaching such commitments.

In 2019, the CNMC fined Telefónica €1.5 million for breaching the commitments undertaken in its acquisition of DTS in 2015.

In late 2020, the CNMC closely monitored compliance with remedies and identified a potential breach of the commitments that Disa Corporación Petrolífera made in the context of *DISA/Shell/SAE/JV*. In this respect, in March 2021, the CNMC opened formal proceedings against Disa for an alleged breach of commitments and fined the company €1 million.

In June and September 2022, the CNMC identified two different potential breaches of commitments undertaken in *Telefónica/DTS,* and fined Telefónica €5 million in September 2022, €6 million in March 2023 and €5 million in July 2023.

In January 2024 the CNMC opened a formal investigation in relation to an alleged failure to comply with commitments undertaken by Naviera Armas when it acquired Transmediterránea back in 2018. In March 2024, the CNMC fined Naviera Armas €750,000. However, the infringing company benefited from a 40 per cent reduction of the proposed fine (€300,000) based on both the acknowledgement of the infringement and voluntary payment of the fine, resulting in an effective fine of €450,000.

Gun jumping

The CNMC has continued to take action against companies for breach of the suspensory obligation applicable to merger control proceedings (ie, closing the transaction prior to clearance). Most of these cases relate to transactions meeting the market share threshold, as the relevant jurisdictional analysis can present challenges in the absence of well-established precedents.

Although the CNMC investigated eight potential gun-jumping cases in 2016, gun-jumping cases decreased after that; however, in recent years, increased enforcement effort has been put into identifying and fining this type of infringement.

In January 2021, the CNMC required Albia (a subsidiary of the Santa Lucía Group) to notify the acquisition of Tanatorios Móstoles because the transaction satisfied the market share

threshold provided for in Law No. 15/2007 on the Defence of Competition (the Competition Act). Following a formal investigation against Albia in the context of the transaction, the CNMC fined Albia €300,000 for gun jumping in late July 2021.

In May 2021, the CNMC opened another formal investigation into *DGTF/Parpública/TAP* for potential breach of the suspension obligation and fined DGTF €30,000.

In February 2022, the CNMC opened a formal investigation into Luxida for allegedly having implemented the acquisition of Eléctrica Santa Clara without prior approval and fined Luxida €12,000.

Following this trend, in the following months, the CNMC opened two formal investigations against Albia for allegedly having implemented the acquisitions of Funeraria Tanatorio La Paz SL (March 2022) and Tanatorio de Marín SL (April 2022) without prior approval. In June 2022, the CNMC fined Albia €250,000 and €25,000 for each case, respectively. The CNMC also opened another investigation into Funespaña, a subsidiary of the insurance group Mapfre, for gun jumping in the acquisition of Funeraria San Vicente SL in 2018. In June 2022, the CNMC fined Funespaña €110,000. Notably, the CNMC learnt of these transactions in the context of the Phase II investigation of *Santa Lucía/Funespaña*.

In September 2022, the CNMC opened a formal investigation into MásMóvil's subsidiary Xfera Móviles for allegedly having implemented the acquisition of Grupo Ahí+ without prior authorisation. The CNMC also opened formal investigations into Electra Alto Miño for gun jumping in the acquisition of electricity distribution assets in a small town in the autonomous community of Galicia. Both proceedings concluded in December 2022 with the imposition of fines of €1.5 million and €30,000, respectively. The fine imposed on MásMóvil is the highest fine to date for a gun-jumping infringement.

During 2023 and 2024 this trend has continued and the CNMC has continued pursuing unreported transactions. In December 2023, the CNMC opened a formal investigation into KKR Genesis Bidco for allegedly failing to notify the acquisition of GeneraLife, a reproductive medicine services group. In April 2024, the CNMC imposed a fine of €683,322 on KKR Genesis Bidco, following a 40 per cent reduction of the proposed fine based on both the voluntary acknowledgement of the infringement and early payment of the fine. In April 2024, the CNMC opened a formal investigation into GeneraLife for allegedly failing to notify the acquisition of Clínicas Ginemed, a reproductive medicine services group. This investigation is pending.

Lastly, in July 2023, the Spanish High Court in the *Consenur* case annulled a CNMC gun jumping fine against Consenur for failure to notify a transaction. Most notably, while the High Court endorsed the CNMC's findings on the relevant market, it nevertheless considered that Consenur's alternative market definition was reasonable as it was based on precedents from other competition authorities, including the European Commission. This judgment highlights the importance of considering available precedents from the CNMC and other competition authorities as well as the need to adopt a cautious approach to Spanish merger control analysis.

Reform proposals

35 Are there current proposals to change the legislation?

Following the reform of the Spanish competition rules that entered into force between September 2007 and March 2008, Spain's competition regime has been in line with EU rules and has streamlined the authorities responsible for competition enforcement in Spain; however, the CNMC can adopt soft law (guidelines, notices, etc) to assist in the interpretation of key issues relating to Spanish merger control provisions. The former National Competition Commission did so in October 2011 with regard to simplified proceedings.

The Competition Act was amended in April 2021 to implement the ECN+ Directive and, in June 2023, additional amendments were made, affecting the deadlines for some proceedings. Some additional amendments had been going through Parliament in the context of the approval process of the law creating the Financial Customer Protection Authority; however, the 2023 call for a general election interrupted the approval process for these amendments and the new draft bill of the law creating the Financial Customer Protection Authority presented to the Spanish parliament in April 2024 does not include the amendments to the Competition Act at this stage.

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 2023, the number of merger filings (80 notifications) was significantly lower than the number for 2022 and 2021 (103 and 102 notifications, respectively), which may be explained by a slowdown in M&A activity during 2023.

The enforcement record shows a mature and consistent approach to merger control scrutiny, as most transactions were unconditionally cleared in Phase I and only three were cleared subject to remedies in Phase I and two transactions were cleared subject to remedies in Phase II. No transactions were prohibited in 2023, while one entered Phase II in 2023 (*BSC/MI TECH*) and two have entered Phase II in 2024 so far (*Smurfit Bulgaria/Artemis BIB* and *JCDecaux España/Clear Channel España*). *Algeco/Balat* and and *BSC/MI TECH* were abandoned by the parties in February 2023 and May 2023, respectively.

Recent enforcement continues to show increased scrutiny in Phase I reviews (where market testing and Phase I reviews with remedies have increased) and a willingness to accept behavioural remedies in both Phase I and Phase II. Similar to previous years, all the cases cleared in 2022 subject to remedies in Phase I included behavioural remedies, which shows that the CNMC is continuing to make use of behavioural remedies in Phase I – contrary to the practice of the European Commission, which favours divestments. The remedies offered by the parties in such transactions also show that the CNMC is willing to address proportionality concerns by accepting behavioural remedies as well as hybrid remedies packages. In its Action Plan 2023, the CNMC explained that its key priorities for 2023 with regard to

merger control include fostering an agile review of unproblematic transactions and ensuring the protection of the incentives to innovate, as well as analysing the impact of its decisions with remedies.

The CNMC has also maintained its scrutiny of and enforcement against gun-jumping in Spain. Following a record number of six cases in 2022, including the highest fine ever imposed to date (€1.5 million), the CNMC initiated two formal investigations in the fertility sector in December 2023 and April 2024. Gun-jumping continues to be a key enforcement priority for the CNMC, which actively monitors unreported transactions that may require prior merger control approval.

Lastly, the CNMC has welcomed the new Article 22 guidance published by the European Commission in 2021. In 2023, following the General Court's judgment in *Illumina/Grail*, it referred one case to the European Commission (*Qualcomm/Autotalks*) together with a number of competition authorities in the EU, even though the transaction did not meet Spanish merger control thresholds. Pending the Court of Justice's judgment in *Illumina/Grail*, this signals the CNMC's willingness to cooperate closely with the European Commission under the new Article 22 guidance. In fact, prior to the new Article 22 guidance, the CNMC had already targeted acquisitions in the digital space on the basis of the market share threshold and referred these to the European Commission (*Facebook/WhatsApp* and *Apple/Shazam*).

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Sweden

Johan Carle, **Stefan Perván Lindeborg** and **Andreas Johansson**
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Notification trigger/ filing deadline	Before a change of control on a lasting basis.
Clearance deadlines (Phase I/Phase II)	Phase I: 25 days, extended to 35 days in case of commitments. Phase II: three months.
Substantive test for clearance	Significant impediment of effective competition in Sweden as a whole or a substantial part thereof (as under EU law).
Penalties	No pecuniary sanctions for gun jumping unless expressly stated in a decision by the Swedish Competition Authority, but ex post prohibition is possible.
Remarks	The Swedish merger control regime is harmonised with that of the European Union to a significant extent.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Swedish merger control is governed by the Swedish Competition Act (the Act), which entered into force in November 2008. The changes on merger control introduced through the Act were largely intended to bring Swedish competition law even further in line with the EU Merger Regulation (EUMR).

The Swedish Competition Authority (the Authority) has primary responsibility for the administration of the Act. In January 2018, it gained the power to block a transaction, when previously it had been necessary to take such a case to court. Now, a prohibition decision from the Authority can be appealed to the Patent and Market Court, with further appeal to the Patent and Market Court of Appeal.

The Patent and Market Court and the Patent and Market Court of Appeal were both established in September 2016. Previously, orders concerning prohibitions and other sanctions were made by the Stockholm District Court and on appeal by the Market Court (as a result, older case law references the previous court system).

Scope of legislation

2 | What kinds of mergers are caught?

The Act's merger control rules are based on the concept of a concentration, which is intended to correspond completely to the concept of a concentration under the EUMR. This concept is defined in a general way to allow a dynamic interpretation in line with EU law, including existing, as well as future, case law of the Court of Justice of the European Union.

More precisely, the Act prescribes that a concentration within the meaning of the Act arises if there is a change of control on a lasting basis when:

- two or more previously independent undertakings merge; or
- one or more persons already controlling at least one undertaking, or one or more undertakings, acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

The Authority refers to the European Commission's Consolidated Jurisdictional Notice and its guidance on the concept of concentration under the EUMR.

3 | What types of joint ventures are caught?

The Act is applicable to all joint ventures constituting a concentration within the meaning of the Act (ie, all full-function joint ventures). The Authority refers to the European Commission's Consolidated Jurisdictional Notice and its guidance on the concept of full-function joint ventures.

To the extent the creation of a full-function joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the provisions on anticompetitive cooperation between undertakings.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The Act's definition of a concentration follows the relevant rules of the EUMR. In short, acquisitions of minority interests are only caught by the merger rules if they involve a de facto acquisition of control.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Act provides for mandatory notification where:

- the undertakings concerned by the concentration attain a combined turnover in Sweden of more than 1 billion Swedish kronor; and
- each of at least two of the undertakings concerned has a turnover in Sweden exceeding 200 million kronor.

If the first but not second threshold is met:

- the Authority has jurisdiction to order a concentration to be notified, even post-closing, where particular grounds exist to do so (ie, risk of substantive competition concerns, see *EasyPark/Inteleon* from 2019 and *S:t Eriks/Meag VA-System* from 2021); and
- the parties can make voluntary notification.

When calculating the turnover of the undertakings concerned, two or more transactions that have taken place within a two-year period between the same persons or undertakings are treated as one and the same concentration.

The Authority refers to the European Commission's Consolidated Jurisdictional Notice and its guidance on calculation of turnover and on the concept of undertakings concerned.

If a concentration has a Community dimension (ie, meets the turnover thresholds in article 1 of the EUMR), the concentration should instead be notified to the European Commission.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If the transaction falls within the scope of the Act and the turnover thresholds are met, filing is mandatory. There are no exceptions to this rule.

The parties may also notify a transaction voluntarily where the first but not second threshold is met. As the Authority also has the power to order a notification in this context, a voluntary

filing may be advisable where the transaction leads to or augments already high market shares in the Swedish market or a substantial part thereof, or where the parties have vertically overlapping activities and either of the parties has a strong position upstream or downstream.

The number of transactions notified to the Authority on a voluntary basis has on average been approximately two per year during the past five years.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign transactions are, in the view of the 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. If the thresholds are met, the transaction is presumed to have local effects in Sweden.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The Act contains no special merger rules relating to particular areas of the economy; however, such rules are sometimes contained in sector-specific legislation.

On 1 December 2023, the Swedish new act for a Foreign direct investment review mechanism (the FDI Act) entered into force. The new FDI Act allows foreign direct investments to be screened for security risks and, if necessary, restricted or prohibited. For the FDI Act to apply, there should be an investment in a so-called protected activity (both terms further defined in the FDI Act and related legislation). Although the aim is to control foreign investments, Swedish and EU investors must also notify their transactions if the FDI Act is applicable.

There are also specific provisions in the Protective Security Act on transfers of security-sensitive activities.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A notification of a concentration must be made before it is implemented. There are no pecuniary sanctions for not notifying a transaction to the Swedish Competition Authority (the Authority); however, should the Authority become aware of a qualifying but unnotified transaction, it may order the parties to notify, subject to a fine.

Should the Authority find that a completed transaction was not permitted under the Swedish Competition Act (the Act), it retains the right to prohibit the transaction until up to two years

after the transfer of control bringing about the transaction. Failure to notify brings with it the risk of the transaction being annulled ex post.

Filing under the Act can be made as soon as the undertakings concerned can demonstrate to the Authority a good faith intention to implement the concentration. This means that an unsigned copy of the agreement or a letter of intent is normally sufficient as a basis for notification. There are practical advantages to pre-notification contact with the Authority.

10 Which parties are responsible for filing and are filing fees required?

A transaction should be notified by the merging parties together or the party or parties acquiring control. There are no filing fees.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

From the date of receipt of a complete notification, the Authority has a preliminary period of 25 working days (Phase I) in which to take a decision either stating that there are no grounds for action or that it will initiate a special investigation (Phase II); however, if an undertaking offers commitments to remedy concerns during Phase I, the preliminary investigation period is increased to 35 working days.

After a decision to carry out a special investigation (Phase II), the Authority has an additional three months in which to decide whether the transaction should be prohibited or cleared. The three-month period may be extended if the notifying parties agree to it or there are compelling reasons for doing so. The decision of the Authority to extend the period can be appealed to the Patent and Market Court.

On average in 2023, Phase I cases were resolved by the Authority within 15 working days and Phase II cases within 136 calendar days.

Before clearance, no party to the concentration may take any steps to complete the transaction. This standstill requirement can be waived by the Authority under exceptional circumstances. The Authority also has the power to order the parties to the transaction to respect the standstill requirement, subject to a fine. If the Authority clears the transaction before the deadline, the parties to the concentration may complete the transaction.

The Authority has the power to suspend the time limit (stop the clock) if, for example, the parties do not provide requested information in due time. During the preliminary investigation period, the parties may also request that the Authority suspends the time limit for as many days as the 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 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 enforce this rule, the Authority can order the parties to respect the standstill period subject to a fine. Without this active step by the Authority, there are no pecuniary sanctions, but there is nonetheless the risk of the Authority subsequently deciding not to clear the transaction, which the parties may be ordered to respect subject to a fine. In such cases, divestiture of the company or purchased assets (or similar) will be required.

In 2014, a completed, voluntarily notified transaction in the online real estate advertisement sector was blocked (*Swedbank/Svensk Fastighetsförmedling*). In 2019, the Authority ordered a transaction to be notified that had been completed over two months earlier (it was later cleared unconditionally in Phase II (*Easypark/Inteleon*)). In 2021, an order to notify a transaction was issued by the Authority almost five months after it was completed (it was cleared unconditionally in Phase I (S:t *Eriks/Meag VA-System*)).

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Before the 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 enforce this rule, the Authority can order the parties to respect the standstill period subject to a fine. Without this active step by the Authority, there are no pecuniary sanctions, but there is nonetheless the risk of the Authority subsequently deciding not to clear the transaction, which the parties may be ordered to respect subject to a fine. In such cases, divestiture of the company or purchased assets (or similar) will be required.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Act provides for an exemption from the standstill requirement on a case-by-case basis; however, this is a general provision that is not specific to foreign-to-foreign transactions, and there must be particular reasons to justify such a departure from normal procedure.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The Act does not include any special rules applicable to public takeover bids; however, it provides that the prohibition of a transaction will have no effect on the validity of acquisitions made on a Swedish or foreign stock exchange, on another authorised marketplace or at a public auction. In those cases, the buyer may instead be required to divest what has been acquired.

The Act does not contain any explicit rule similar to that found in the EU Merger Regulation (EUMR) 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 provided that they are not voted on; however, the 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 that 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 Authority's website. The form includes questions on the parties, competitors, market conditions, etc, similar to the Form CO requirements for notifications under the EUMR.

The information required by the form is relatively extensive. The time necessary for the preparation of the form varies widely from case to case, as does its size, depending mainly on whether the transaction involves any affected markets.

It is sometimes possible to secure, on an informal basis, waivers from the Authority for information confirmed as being unnecessary in a specific case. Discussions on waivers may be held during pre-notification meetings. There is no formalised equivalent to the simplified notification form available at EU level for uncomplicated transactions.

A notifying party must formally declare in the filing that all information provided is true, correct and complete. If the Authority considers that the information provided is misleading or deficient in some way, the filing will not be considered to be complete, and the time will not start to run.

During the review process itself, the Authority can request additional information from the parties under penalty of a fine. If necessary, the Authority can stop the clock until the required information is provided.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

Upon receipt of a complete notification, the Authority has 25 working days to conduct a preliminary investigation (Phase I); however, if an undertaking offers commitments, Phase I is increased to 35 working days. Before the end of the preliminary investigation, the Authority has to either clear the transaction or decide to initiate a special investigation (Phase II).

If Phase II is launched, the Authority must decide within three months whether the transaction should be prohibited or cleared. It may extend the three-month period by a maximum of one month at a time with the parties' consent or if there are other compelling reasons.

The Authority has the power to suspend the time limit if, for example, the parties do not provide requested information in due time (ie, to stop the clock). During Phase I, the parties may also ask the Authority to suspend the time limit for as many days as the Authority deems appropriate. This possibility is available if the parties need additional time to address a competition concern.

A prohibition decision or conditional clearance from the Authority can be appealed to the Patent and Market Court and must be ruled upon within six months of receipt (subject to extension). An appeal against a judgment by the Patent and Market Court can be made to the Patent and Market Court of Appeal, which must pass final judgment within three months of the expiry of the period for appeal.

No measures may be taken in respect of a transaction, notified or not, when more than two years have passed since the concentration occurred.

Pre-notification contacts are advised and recommended by the Authority, especially for more complex transactions with affected markets. There are practical advantages to pre-notification contact with the Authority.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Upon receipt of a complete notification, the Authority has 25 working days to conduct a preliminary investigation (Phase I); however, if an undertaking offers commitments, Phase I is increased to 35 working days. Before the end of the preliminary investigation, the Authority has to either clear the transaction or decide to initiate a special investigation (Phase II).

If Phase II is launched, the Authority must decide within three months whether the transaction should be prohibited or cleared. It may extend the three-month period by a maximum of one month at a time with the parties' consent or if there are other compelling reasons.

The Authority has the power to suspend the time limit if, for example, the parties do not provide requested information in due time (ie, to stop the clock). During Phase I, the parties may also ask the Authority to suspend the time limit for as many days as the Authority deems appropriate. This possibility is available if the parties need additional time to address a competition concern.

There are no set timetables for hearings, requests for information or other measures during the investigation. The Authority may, from time to time, in the course of the investigation send questions to the parties and request additional information, typically coupled with a deadline.

When the notification has been filed, the Authority will normally contact competitors and other third parties listed in the notification to invite comments on the proposed transaction. There is no formal distinction between different categories of third parties. No companies other than the notifying party or parties 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 Authority seeks to clear uncomplicated cases (those clearly involving no affected markets) before the expiry of Phase I. On average, in 2023, Phase I cases were resolved by the Authority within 15 working days and Phase II cases within 136 calendar days.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Under the Swedish Competition Act (the Act), a transaction shall be prohibited if it would significantly impede the existence or development of effective competition in Sweden as a whole, or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position. The test is harmonised with the EU Merger Regulation.

The assessment of the Swedish Competition Authority (the Authority) will take account of all relevant factors including, for example, market shares, barriers to entry, buyer power and potential countervailing efficiencies. Where relevant, a failing firm defence would be considered by the Authority.

A transaction may be prohibited only if it does not involve 'the setting aside of essential national interests of security or resources' (Chapter 4, section 1, paragraph 2 of the Act). This exclusion applies only in very special circumstances.

20 | Is there a special substantive test for joint ventures?

In addition to the substantive test for clearance, the Act provides that, to the extent that 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 rules on anticompetitive cooperation between undertakings.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The Authority will typically consider possible unilateral, coordinated, vertical and conglomerate effects of a concentration when evaluating whether it would significantly impede the existence or development of effective competition in Sweden as a whole, or a substantial part thereof.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

Non-competition issues are not part of the Authority's review process, with the exception that a transaction cannot be prohibited if doing so would jeopardise important national interests of security or resources (a rare exception).

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 Authority's 2018 merger control guidance 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 Authority refers to the European Commission's guidelines on the assessment of horizontal mergers and its guidance on the assessment of economic efficiencies.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If the substantive test is met, the Swedish Competition Authority (the Authority) can either prohibit the transaction or accept and make binding appropriate commitments from the parties to remedy the identified concerns. Remedies could include an order to divest or to take other pro-competitive action. Any commitments given by the parties may be linked to a fine.

Acquisitions made on a stock exchange or any other recognised market, or at an auction, may not be prohibited; instead, the disposal of the acquired assets 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 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 identified competition concern.

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 Authority.

Structural undertakings as well as behavioural undertakings are accepted by the Authority. Compliance with undertakings is often ensured through a fine to be imposed in the event of a breach.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Commitments may be proposed by the parties at any stage during the procedure. In Phase I, if commitments are offered, this initial period is extended to 35 days. In Phase II, an application to extend the time limit is required if a remedy is offered later than three weeks before the end of this in-depth period. The basic conditions applicable to a divestment or any other remedy are, in short, that they are sufficient to eliminate the adverse effects of the concentration.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

This is rare; however, in the mid-1990s, the Authority obliged the parties to a foreign-to-foreign transaction to divest assets located outside Sweden to remedy competition issues on the Swedish market.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A decision by the Authority to clear a transaction also covers restrictions directly related and necessary to the implementation of the notified concentration. There are no specific guidelines published by the Authority on ancillary restraints, but the preparatory works and the Authority's other guidelines indicate that the European Commission's notice on ancillary restraints shall give guidance in matters concerning such restraints under the Swedish Competition Act.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Customers and competitors (and suppliers in some instances) will be invited to comment on the proposed transaction. No companies other than the notifying party or parties are treated as parties to the procedure.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

All notifications are mentioned together with a brief summary in the Swedish Competition Authority (the Authority) case list, which is publicly available on its website. The Authority also publishes the final decision in each case.

As for confidentiality, whereas the general rule in Sweden is that all documents held by a public authority are in the public domain, rules on confidentiality and business secrets are contained in the Public Access to Information and Secrecy Act, which provides that information shall be secret if it relates to a party's business, innovations or research and development, insofar as disclosure could cause the party to suffer injury. There must, however, be particularly strong reasons for refusing full access to the file to a party to the proceedings.

Information provided by the parties during pre-notification contact is covered by absolute secrecy – that is, without the requirement that disclosure could cause injury.

Where the granting of confidentiality has been an issue, the Authority has generally adopted a cooperative attitude in relation to the party requesting confidentiality.

In certain circumstances, the Authority can give a party access to confidential information through a data room procedure, during which certain information contained in the Authority's investigation file will be held available at its premises (the data room) to which only a restricted group will have access for a limited period.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Authority may, where appropriate, contact the European Commission or any national competition authority formally or informally. Since 2004, Sweden has had an agreement with Denmark, Norway and Iceland on cooperation on competition issues. This was revised and extended in September 2017 to include Finland and Greenland.

As a result of the agreement, information exchange between the national competition authorities concerned is facilitated, including in the area of merger control. The national competition authorities hold conference calls and yearly meetings within the framework of the agreement to update each other on current trends and ongoing investigations.

The Best Practices on Cooperation between EU National Competition Authorities in Merger Review were adopted in November 2011 by the EU Merger Working Group.

Under EU merger control rules, the Authority cooperates with the European Commission and the other EU member states' competition authorities concerning referral cases.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Prohibition and conditional clearance decisions of the Swedish Competition Authority (the Authority) can be appealed to the Patent and Market Court. Decisions and orders of the Patent and Market Court may be appealed to the Patent and Market Court of Appeal, but leave to appeal is required. There is also a possibility, subsequent to a decision by any of these courts, of reviewing the decision on application of the Authority where the decision has been based on false information provided by a party. This application must occur within one year of the date of the decision.

The *Arla/Klassiska Ostar* case is the only transaction to have been prohibited by the Authority since it acquired the power in 2018 to take such decisions.

Time frame

33 What is the usual time frame for appeal or judicial review?

A prohibition or conditional clearance decision can be appealed to the Patent and Market Court. The Court has six months from receipt of the appeal to make a ruling. If an appeal is made against the judgment of the Patent and Market Court, the Patent and Market Court of Appeal shall give a ruling within three months of expiry of the period of appeal.

The time limits may be extended by the courts if the parties to the transaction agree to it or where there are special reasons for an extension.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Since 1993, the Swedish Competition Authority (the Authority) has taken action to prohibit 14 mergers. This somewhat underestimates the degree of regularity with which the Authority may have reached negative conclusions, as other transactions have simply been abandoned on receipt of the draft summons (or, after the 2018 reform, a statement of objections in the form of a draft decision) without the Authority needing to take formal action. One example is a concentration in the draining insulation industry (*Vestum/Isodrän/MDT Markvaruhuset*) that was abandoned in January 2023 after the Authority voiced serious concerns in a draft decision during Phase II.

There have also been cases resolved via commitments, avoiding the need for prohibition altogether. Previously rare, a slowly growing number of cases are being cleared with commitments in Phase I (with one such decision in each of 2018, 2019, 2020 and 2023). In 2021,

the Authority cleared two concentrations with commitments in Phase II; however, in 2022, no concentrations were prohibited or cleared after commitments.

Reform proposals

35 Are there current proposals to change the legislation?

The Authority received increased powers in January 2018 and can now prohibit a transaction without taking action in court to do so. This power was exercised for the first time in 2019.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In 2023, 82 transactions were notified to the the Swedish Competition Authority (the Authority). The number of notifications decreased from 2022 and 2021 (121 and 135 notifications, respectively).

In terms of the review period, the Authority has continued to be successful in dealing efficiently with Phase I cases, averaging 15 working days in 2023 (a small decrease from 16 days in 2022). Whereas the review period for cases which went on to Phase II was somewhat higher than previous years (averaging 136 calendar days in 2023, compared to 128 in 2022), the Authority attributes this to the fact that both of the two investigations which went on to Phase II had advanced to the stage where a Statement of Objections had been shared with the parties before they could be concluded.

Of the total of 85 concentrations tried by the SCA in 2023, 83 were approved in Phase I. Only one case decided on in Phase I involved commitments. Of the two cases which went on to Phase II, one resulted in the parties withdrawing the notification, whereas the other was unconditionally approved.

Tidnings AB Marieberg/Albert Bonnier/Readly International concerned publishing firm Bonnier's purchase of Readly, which provides digital subscription services for magazines and newspapers. Competing publishers voiced concerns that the transaction would enable Bonnier to, eg, promote its own titles, exclude other publishers' titles and worsen competing publishers' terms for accessing Readly's platform. After the Authority informed the parties of its concerns, the parties offered voluntary commitments which resulted in Phase I approval. The commitments entail competitively neutral treatment of competing publishers on the Readly platform, and are valid for seven years.

Vestum/Isodrän/MDT Markvaruhuset concerned the production and sale of draining insulation products. The Authority voiced concerns over the transaction's effect on competition as it would, eg, result in the vertical integration of the closest competitors with a very high joint market share, in combination with the lack of effective substitutes for customers. The

parties decided to abandon the intended concentration in January 2023, having received the Authority's Statement of Objections approximately one month prior.

Remondis/Delete Group relates to a concentration between providers of industrial cleaning services. After a Phase II review, in October 2023, the Authority informed Remondis of its intention to prohibit the transaction. Following Remondis's response to the Statement of Objections and an oral hearing, the Authority unconditionally approved the transaction in November 2023. The Authority has stated that the decision to approve the transaction was due to the fact that the investigation did not sufficiently indicate that the concentration would significantly impede effective competition, and that statutory review periods did not allow for further investigatory measures.

One transaction (*Accountor/Plus Accounting och Payroll*) was notified on a non-mandatory basis. The Authority did not request any transactions below the thresholds to be notified. This is a decrease from 2022 in which three transactions were notified on a non-mandatory basis, of which one (*S:t Eriks/Meag VA-System*) was notified after a request from the Authority. That year, 2022, was the first since 2019 (and 2013 before that) in which the Authority requested a notification.

The Authority's jurisdiction to accept or order a filing in cases where only the first of the two mandatory thresholds is met means that transacting parties involved in competitively sensitive deals need to think carefully about whether to proceed without filing, or to file voluntarily, to pre-empt potential interest from the Authority.

In 2023, factors such as inflation, increased interest rates and higher prices also led the Swedish government to commission an investigation to consider the need for new competition rules. The investigation is to consider whether an obligation to inform the Authority of mergers falling below the thresholds in certain sectors with a high level of concentration, similar to the rules which have been adopted in Norway and Iceland, should be implemented. The assignment must be reported by 28 February 2025.

In conclusion, 2023 was less busy than 2022, the number of notifications having been in the same range as the pandemic year 2020. The first months of 2024, however, suggest that this year will see an increase in transactions. The coming years may also see the introduction of rules to inform the Authority of mergers falling below the thresholds for certain companies and/or sectors with a high level of concentration.

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Notification trigger/ filing deadline	Aggregated turnover of 2 billion Swiss francs worldwide or 500 million francs in Switzerland and individual turnover of at least two enterprises involved of 100 million francs in Switzerland. Prior to completion of merger.
Clearance deadlines (Phase I/Phase II)	Phase I: one month (clearance or opening of investigation). Phase II: Until the end of the investigation (the Competition Commission shall complete its investigation within four months unless prevented from doing so for reasons attributable to the undertakings concerned).
Substantive test for clearance	No dominant market position created or enhanced that is liable to eliminate effective competition. Improvement of competition in other markets outweighing dominant market position.
Penalties	Penalty of up to 1 million francs. Fine of up to 20,000 francs (on the individual manager).
Remarks	Not applicable.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Swiss merger control is mainly governed by the Federal Act on Cartels and Other Restrictions of Competition (CartA) as well as the Ordinance on the Control of Concentrations of Undertakings (together, the Competition Law). The Competition Law came into effect on 1 July 1996 and was revised in 2004. Further minor amendments have since been made.

Merger control is enforced by the Competition Commission (ComCo). ComCo has between 11 and 15 members (currently 12) elected by the Federal Council, the majority of whom must be independent experts. It is based in Berne.

The cases are prepared and processed by the Secretariat of ComCo. The Secretariat is divided into four departments responsible for product markets, infrastructure, services and construction, respectively.

In March 2024, the Federal Council decided to reform ComCo and its Secretariat. A first draft of the new regulation is expected by mid-2025.

Scope of legislation

2 | What kinds of mergers are caught?

Transactions that are subject to merger control are:

1. statutory mergers of previously independent undertakings;
2. acquisition of control over a previously independent undertaking or parts thereof, including through the acquisition of equity interests or the conclusion of agreements; and
3. acquisition of joint control over an undertaking (joint venture).

Regarding point (2), 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, ComCo has decided that the acquisition of a minority interest may qualify as an anticompetitive agreement if the undertakings concerned intend to cooperate.

3 | What types of joint ventures are caught?

Three different types of joint ventures are caught by merger control:

- acquisition of joint control over an existing undertaking;
- 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 undertakings 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 undertaking by acquiring its shares or by any other manner. In particular, this ability is deemed to exist if an undertaking 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 undertaking.

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.

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 the decisions of the executive bodies, and need 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 business year prior to the merger, the undertakings 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 francs; and
- at least two of the undertakings involved in the transaction must have reported individual turnovers in Switzerland of at least 100 million francs.

These monetary amounts are relatively high compared to other jurisdictions. Turnover is calculated on a consolidated basis but excludes 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, ComCo's notification form 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.

According to ComCo, to convert notification thresholds or turnover from a foreign currency into Swiss francs, the most recent annual average exchange rate published by the Swiss National Bank should be used. If an undertaking's financial year does not correspond to the calendar year, the applicable exchange rate should be calculated based on the monthly average exchange rates as also published by the Swiss National Bank.

In addition, pursuant to article 9, paragraph 4 of the CartA, a proposed concentration triggers a merger notification obligation irrespective of any turnover thresholds if:

- one of the undertakings concerned has been held to be market dominant in Switzerland in a final and non-appealable decision; and
- the concentration concerns either that market or an adjacent, upstream or downstream market.

ComCo does not publish a list of undertakings that are held to be dominant, and it tends to interpret article 9, paragraph 4 of the CartA broadly. According to ComCo, the joint venture and the companies controlling the joint venture must be considered when determining whether a notification obligation is triggered.

Further, according to a recent decision by the Federal Administrative Court, a notification obligation is triggered if it cannot be ruled out from the outset that the dominant position might have effects on competition in any market affected by the proposed concentration. The transaction does not need to concern a market that is directly adjacent to the dominated market.

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory prior to completion of the transaction, provided that the turnover thresholds are reached or a market dominant position within the meaning of article 9, paragraph 4 of the CartA has been established in a final, non-appealable decision. Violations of the notification obligation may be sanctioned by ComCo.

As an exception to this principle, the competent competition authorities are of the opinion that the reporting obligation does not apply due to the lack of effects on the Swiss market if, on the one hand, a joint venture has neither activities nor sales in or to Switzerland and to territories adjacent to Switzerland and, on the other hand, such activities or sales in Switzerland are neither planned nor expected in the future. The exception is applied very narrowly.

The Federal Council intends to implement a partial revision of the CartA. A draft for the revised CartA includes a simplification of the notification obligation. For international mergers that are also assessed by the European Commission, the notification obligation will no longer be required if each of the product markets affected by the transaction can be delineated geographically in such a way that it includes Switzerland and at least the European Economic Area. This draft will be discussed by the Federal Assembly from mid-2024. The Federal Assembly may change or reject the proposed revision in the political debate. If the

Federal Assembly agrees on the revisions, the changes to the merger control regime are not expected to come into force before 2025.

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 that the relevant turnover thresholds are reached with respect to Switzerland or a market dominant position pursuant to the meaning of article 9, paragraph 4 of the CartA has been established in a final, non-appealable decision. According to the Federal Supreme Court, whenever the Competition Law thresholds 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 the Swiss merger control regime without, at the same time, being subject to relevant foreign merger control rules.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

In December 2023, the Federal Council presented the draft legislation on the Foreign Investment Control Act. According to this draft legislation, only takeovers of Swiss companies should be subject to notification if a foreign state investor gains control, a (security) critical sector is affected and the de minimis or turnover thresholds are exceeded. The draft legislation is currently being debated in the Federal Assembly and remains subject to change. It is not expected to enter into force before 2026.

Currently, there are no generally applicable Swiss acts (ie, catch-all rules in foreign trade legislation) that prohibit or require a specific screening of foreign investments in Switzerland on the basis of national interest, regardless of the industry sector; however, foreign investments in companies engaged in certain regulated industries and sectors in Switzerland might require government permission or approval. For example, special authorisations are required if the merger transaction involves banks or Swiss real estate companies.

In particular, if a bank incorporated under the laws of Switzerland becomes foreign-controlled, or if, in the case of a foreign-controlled bank, the foreign holders of a direct or indirect qualified participation in the Swiss bank change, a new special licence for foreign-controlled banks must be obtained prior to that 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 ComCo, which is given a right of consultation only; however, the notification must still be addressed to ComCo if the jurisdictional thresholds for notification are met. This was first applied on 19 March 2023, when FINMA approved the early completion of the takeover of Credit Suisse by UBS.

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 Immovable Property in Switzerland by Foreign Non-Residents if the acquiring person

qualifies as a 'person abroad' under this Federal Act. Accordingly, the parties of a merger involving a foreign undertaking 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 undertakings 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 undertaking 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 francs. The Competition Commission (ComCo) has considerable discretion in determining the specific sanction to be imposed but takes into account the circumstances of the individual case, and the general principles of proportionality and equal treatment.

To date, ComCo has imposed several fines on undertakings that did not file or filed a notification too late. In contrast, to date, no managers of such undertakings have been fined. The amount of the sanction depends on the particular circumstances of the case, in particular the size of the company, the nature and gravity of the violation, and any aggravating or mitigating circumstances, or both. In assessing the aggravating and mitigating circumstances, the subjective elements (ie, whether the notification requirement was breached intentionally or negligently) are to be taken into account.

10 | Which parties are responsible for filing and are filing fees required?

In the case of a statutory merger, the notification must be made jointly by the companies involved. Where control over an undertaking is acquired, the filing must be made by the undertaking or the undertakings acquiring control.

If a joint notification is made, the undertakings must designate at least one common representative to ComCo.

For a Phase I investigation, there is a lump sum filing fee of 5,000 Swiss francs. In a Phase II investigation, the Secretariat of ComCo charges an hourly rate of 100 to 400 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 undertakings are not allowed to complete the concentration (provisional ban). ComCo informs the undertakings concerned of the opening of an investigation within this one-month period. If no notice is given within that time frame, the concentration may be implemented without reservation.

The provisional ban does not apply if ComCo, prior to the expiry of the one-month period, notifies the undertakings that it considers the concentration to be in compliance with the Federal Act on Cartels and Other Restrictions of Competition (CartA) and the Ordinance on the Control of Concentrations of Undertakings (together, the Competition Law) (comfort letter).

If ComCo decides to open an investigation, the provisional ban is automatically extended until the end of the investigation. Alternatively, ComCo, at the request of the undertakings, at any stage of the procedure, may authorise the implementation of the merger for good cause, in particular if the merger otherwise could not be completed or the undertakings would suffer great financial loss.

The Federal Council intends to implement a partial revision of the CartA. A draft for the revised CartA provides for the possibility to extend the waiting period with the consent of the undertakings and for good cause by up to a month in Phase I and up to two months in Phase II. This draft will be discussed by the Federal Assembly from mid-2024. The Federal Assembly may change or reject the proposed revision in the political debate. If the Federal Assembly agrees on the revisions, the changes to the merger control regime are not expected to come into force before 2025.

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 undertaking fails to comply with the provisional ban on closing the merger after notification to ComCo, the undertaking may face a fine of up to 1 million Swiss francs. In addition, the undertaking may be required to take measures to reinstate effective competition 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 for 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 rules are applicable to foreign-to-foreign mergers, such mergers are also subject to the ordinary sanctions regime. ComCo has already fined undertakings in

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 are applicable.

To our knowledge, hold-separate arrangements have never been put into practice or accepted by 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 arguments regarding competition 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 those cases, 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, ComCo will substantially follow the rules of the EU Merger Regulation on public takeover bids. It is also 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?

ComCo issues a standard notification form. The notification form basically requires undertakings to provide the following information and materials:

- the company name, the registered office and a description of the business activity of the parties to the merger;
- a description of the proposed merger, including the objectives to be achieved by it;
- turnovers, gross premium revenues or gross income, as the case may be, of the undertakings 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 undertakings 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 that 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 and 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. ComCo may, for valid reasons, release the applicant from the obligation to provide certain information and materials.

According to article 40 of the CartA, undertakings concerned in concentrations and affected third parties shall generally provide the competent 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 CartA, or by fines of up to 20,000 francs against the defaulting natural person pursuant to article 55 of the CartA.

In both cases, the competent competition authority must have, among other things, issued a binding decision on the duty to provide information that has not been fulfilled or has not been fulfilled correctly by the addressee of the decision.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

In the first step of an investigation (which is normally the pre-notification phase during which the Secretariat of ComCo reviews a draft notification), the Secretariat usually requests further information from the parties. The undertakings involved in the merger must furnish ComCo with any additional information that it may request.

In the second step, unless the filing obviously raises no concerns, the Secretariat sends out questionnaires to competitors, suppliers and customers of the undertakings involved. The answers received will usually have an important bearing on the position taken by ComCo.

If 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. ComCo also 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 undertakings involved to define the scope of any remedies.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Within one month of receiving the complete notification, ComCo must notify the undertakings of whether it intends to initiate an investigation (Phase I of the procedure). If, within this period, no notification is made by 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 ComCo for review, thus enabling ComCo to communicate its position shortly after formal notification is made.

If 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 undertakings concerned. Currently, there is no possibility for ComCo to prolong Phase I without initiating a Phase II procedure.

The Federal Council intends to implement a partial revision of the CartA. A draft for the revised CartA provides the possibility to extend Phase I of the procedure by a maximum of a month and Phase II of the procedure by a maximum of two months with the consent of the undertakings and for good cause. This draft will be discussed by the Federal Assembly from mid-2024. The Federal Assembly may change or reject the proposed revision in the political debate. If the Federal Assembly agrees on the revisions, the changes to the merger control regime are not expected to come into force before 2025.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The currently applicable substantive test is the test to ascertain whether there exists a creation or strengthening of a dominant position. On this basis, a merger is to be cleared based on one of the following two criteria:

- the undertakings 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 the improvement outweighs the harmful effects resulting from the creation or strengthening of the dominant position in the relevant market.

The substantive test as such is not directly affected by special circumstances. For example, a failing company defence is taken into account by the Competition Commission (ComCo) as part of the causality test (ie, the concentration must be causal to the creation or strengthening of the dominant position).

According to ComCo's past practice, a failing company defence is possible if one or more parties to the concentration would disappear from the market within a short time without external support, the other parties would absorb most of or all the market shares of the

disappearing company, and there is no solution that is less harmful to competition than the proposed concentration.

For compelling public reasons (employment or regional development), a concentration of undertakings that has been prohibited by ComCo may be authorised by the Federal Council at the request of the undertakings.

The ongoing revision of the Federal Act on Cartels and Other Restraints of Competition (CartA) seeks to adopt the significant impediment to effective competition test as the relevant standard for merger control. A draft for the revised CartA will be discussed by the Federal Assembly from mid-2024. The Federal Assembly may change or reject the proposed revision in the political debate. If the Federal Assembly agrees on the revisions, the changes to the merger control regime are not expected to come into force before 2025.

20 | Is there a special substantive test for joint ventures?

The CartA and the Ordinance on the Control of Concentrations of Undertakings do not provide for any specific substantive rules with respect to joint ventures.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The substantive test for clearance in Switzerland is that of market dominance. Applying this test, ComCo also investigates coordinated effects in cases of oligopolies and unilateral effects. In addition, 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, 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 ComCo takes its decisions.

In connection with a merger involving banks, the Swiss Financial Market Supervisory Authority (FINMA) has the power to clear a merger that it deems necessary for reasons of creditor protection, which takes precedence over competition issues. In those cases, FINMA replaces ComCo, which is given a right of consultation only. This provision was applied for the first time on 19 March 2023, when FINMA approved the early completion of the takeover of Credit Suisse by UBS.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

ComCo takes – to a certain extent – economic efficiencies into account. It assesses whether and to what extent efficiency gains may positively affect competition, and whether those gains are passed on to the consumers. Further, economic efficiency gains in one market may outweigh certain deficiencies of the merger in another.

As an example, (input) foreclosure effects of a transaction could lead to higher consumer prices if a vertically integrated company ceases to supply the downstream markets; however, according to 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 that the undertakings involved do not comply with an order of the Competition Commission (ComCo) prohibiting a merger, ComCo can take all appropriate measures to reinstate effective competition. These measures include the cancellation of the merger transaction and the termination of control by the acquiring undertaking 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. Swiss 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 undertakings concerned with ComCo; these 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 must eliminate all of ComCo's material objections to the proposed merger. According to 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 that are involved, namely the European Commission.

To date, 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 ComCo.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

In general, ComCo only deals with ancillary restraints, in particular non-compete obligations that are directly related and necessary to the merger. ComCo's case practice, 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 competent competition authorities for a formal or informal ruling.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

In most cases, the Competition Commission (ComCo) will send out questionnaires to customers and competitors soliciting their opinions on a filed merger; however, customers and competitors have no formal procedural rights and ComCo is neither required to issue questionnaires nor bound by any answers submitted.

If ComCo decides to open investigation proceedings (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 frame. Third parties must submit their statements in writing.

Since 2008, 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 undertakings. Third parties also have the right to access the file. On appeal, however, third parties have no such rights. In particular, according to the case law of the Federal Supreme Court, third parties are not entitled to any remedies against a ComCo decision 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 investigation proceedings (Phase II), as well as the final decision of ComCo authorising or prohibiting a merger, are published in both 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 ComCo to keep such information strictly confidential. 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 cooperation on the application of their competition laws provides a framework for 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 Federal Act on Cartels and Other Restrictions of Competition, through which the parties will be informed about and have the right to comment on ComCo's decisions to share the parties' information with foreign competition authorities.

Moreover, Switzerland and Germany signed an administrative agreement on cooperation between their competition authorities on 1 November 2022, which came into force on 1 September 2023. The agreement aims to ensure the efficient enforcement of competition law in cross-border situations. For this purpose, the agreement enables cooperation between ComCo and the German Federal Cartel Office, including the exchange of information in merger proceedings. Since the thresholds for a merger control filing are higher in Switzerland than in Germany, the exchange of information in the area of merger control is likely to have little impact from a Swiss perspective.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Decisions of the Competition Commission (ComCo) are subject to appeal to the Federal Administrative Court. The decision of the Federal Administrative Court is in turn subject to review by the Federal Supreme Court; however, third parties have no right of appeal against merger decisions.

According to the Federal Supreme Court, parties to a joint venture are not obliged to jointly appeal against a ComCo prohibition decision; hence, an appeal by just one party is sufficient.

Time frame

33 What is the usual time frame for appeal or judicial review?

An appeal against ComCo decisions 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?

In 2023, the Competition Commission (ComCo) received 33 merger notifications, bringing the number back down to its previous level after a significant increase in 2022. ComCo objected to one of these merger notifications after the preliminary examination (Phase I) and conducted two investigation proceedings (Phase II). In January 2024, ComCo issued its decision prohibiting the merger between Swiss Post and Quickmail Group.

Regarding the filing obligations, ComCo is increasingly scrutinising transactions that have very little connection to Switzerland and applies exceptions to the filing obligations that are based on the lack of such connection very narrowly.

Reform proposals

35 Are there current proposals to change the legislation?

The Federal Council intends to implement a partial revision of the Federal Act on Cartels and Other Restrictions of Competition (CartA). The core element of the intended revision is the modernisation of the Swiss merger control regime by changing the current qualified market dominance test to the significant impediment to effective competition test. The revision will further provide the possibility to extend deadlines in the investigation procedure with the consent of the undertakings and for good cause and includes a simplification of the notification obligation. In case of international mergers that are also assessed by the European Commission (EC), the notification obligation will no longer be required if each of the product markets affected by the transaction can be delineated geographically in such a way that it includes Switzerland and at least the European Economic Area. A copy of the merger notification to the EC will need to be submitted to ComCo. A draft for the revised CartA will be discussed by the Federal Assembly from mid-2024. The Federal Assembly may change or reject the proposed revision in the political debate.

If the Federal Assembly agrees on the revisions, the changes to the merger control regime are not expected to come into force before 2025.

In December 2023, the Federal Council published draft legislation that seeks to introduce a targeted sector-specific foreign investment control regime in Switzerland and aims to regulate acquisitions of domestic companies operating in particularly critical sectors by foreign state-controlled investors. The draft legislation is currently being debated in Swiss Parliament and remains subject to change. It is not expected to enter into force before 2026.

In March 2024, the Federal Council decided to reform ComCo and its Secretariat. The reform aims to further separate the preparation of cases by the Secretariat of ComCo from ComCo's decision-making process, and to further professionalise ComCo by restructuring it. A first draft of the new regulation is expected by mid-2025

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 takeover of Credit Suisse by UBS, which was completed on 12 June 2023, is the first case in which the Swiss Financial Market Supervisory Authority (FINMA) has replaced the Competition Commission (ComCo) as the competent authority to review a merger. The change of competence took place because Credit Suisse was in danger of failing and creditor interests were at stake.

Although FINMA approved the early completion of the takeover on 19 March 2023, this does not mean that an assessment of the takeover under Swiss competition law has been waived. In Switzerland, FINMA has carried out this assessment, involving ComCo in the process

of the evaluation of the relevant data on the effects of the acquisition on the markets in Switzerland. Thus, ComCo submitted its statement to FINMA in November 2023. ComCo's statement has not yet been published at this time. However, FINMA is exceptionally competent in Switzerland to definitively approve the pre-approved acquisition or to approve the merger with conditions and obligations. Like FINMA, foreign supervisory authorities as well as other competent authorities have also approved the merger.

ComCo conducted a Phase II merger investigation in 2023 regarding the merger of Swiss Post and the Quickmail Group. In January 2024, ComCo issued its decision prohibiting the merger.

In December 2023, the Federal Council published draft legislation that seeks to introduce a targeted sector-specific foreign investment control regime in Switzerland and aims to regulate acquisitions of domestic companies operating in particularly critical sectors by foreign state-controlled investors. The draft legislation is currently being debated in Swiss Parliament and remains subject to change. It is not expected to enter into force before 2026.

In March 2024, the Federal Council decided to reform ComCo and its Secretariat. The reform aims to further separate the preparation of cases by the Secretariat of ComCo from ComCo's decision-making process, and to further professionalise ComCo by restructuring it. A first draft of the new regulation is expected by mid-2025.

Finally, the Federal Council intends to implement a partial revision of the Federal Act on Cartels and Other Restrictions of Competition (CartA). Now that the consultation process is completed, the Federal Council has unveiled its draft legislation. The core element of the intended revision is the modernisation of the Swiss merger control regime by changing the current qualified market dominance test to the significant impediment to effective competition test. The draft also includes a simplification of the notification obligation. For international mergers that are also assessed by the European Commission, the notification obligation will no longer be required if each of the product markets affected by the transaction can be delineated geographically in such a way that it includes Switzerland and at least the European Economic Area. The revision will further provide the possibility to extend deadlines in the investigation procedure with the consent of the undertakings and for good cause and includes a simplification of the notification obligation. The Federal Assembly may change or reject the proposed revisions in the political debate. If the Federal Assembly agrees on the revisions, the changes to the merger control regime are not expected to come into force before 2025.

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Taiwan

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Notification trigger/ filing deadline	A notification filing must be made where a combination meets any of the thresholds set out in the Fair Trade Act of 1991 (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 Fair Trade Commission (FTC) accepts the complete filing materials, provided that this period may be shortened or extended by the FTC by written notice as it deems necessary. The filing thresholds include: • where any of the parties has a 25 per cent share in a market in Taiwan or as a result of the merger the enterprises will have a 33 per cent market share; • 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 had sales, in the preceding fiscal year, in Taiwan exceeding NT$2 billion; and • where the Taiwan-sourced annual turnover of one of the parties is NT$15 billion in general, with another party having NT$2 billion of the same, or NT$30 billion in the case of a financial enterprise with another party having NT$2 billion of the same. The FTC published draft amendments to the FTA on 6 June 2023. Pursuant to the amendments, the market share thresholds for merger filings have been removed, leaving only the turnover filing thresholds in place. The amendments are at the proposal stage and the exact effective date has not yet been announced.
Clearance deadlines (Phase I/Phase II)	Clearance before closing is required. The reviewing authority has 30 working days from accepting the complete filing materials to acquiesce, object, unilaterally shorten the review period or unilaterally extend the review period for an additional 60 working days; thus, filing should be made at least 90 working days before the scheduled closing.
Substantive test for clearance	Generally, whether the economic benefits of the combination outweigh the restrictions on competition that result from the combination.
Penalties	Fines range from NT$200,000 to NT$50 million. The FTC also has broad equitable powers to block or unwind unauthorised combinations. Further, according to the Administrative Penalty Act, if the benefit gained exceeds the maximum statutory fine permitted, the fine may be increased to an amount comparable to the benefit gained.
Remarks	No carve-outs are allowed. Where required, the notification must be made in a timely manner or the parties will be subject to a penalty.

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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 monopolies 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 of the FTA, most recently revised in April 2022; and
- the Fair Trade Commission (FTC) Guidelines on Handling Merger Filings (the Guidelines), first promulgated in July 2006 and amended in July 2016, with the most recent amendment in June 2023.

Article 10 of the FTA places mergers and acquisitions in the broader category of enterprise combinations. 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 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 the combination (ie, a hostile takeover), the FTC must inform the objecting party of the justification for the combination filing and seek the opinion of the objecting party on such a filing.

At the national level, the FTC is the governmental 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.

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.

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 controlling and subordinate relationships exist where:

- an enterprise holds or acquires more than half of the total number of voting shares, or contributes more than half of the total capital, of another enterprise;
- an enterprise directly or indirectly controls the personnel, finances or business operations of another enterprise;
- 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 (thus, the assigned or leased enterprise has controlling power over such other enterprise); or
- a person or a group and their related persons hold a majority of the total number of outstanding voting shares, or contributes more than half of the total capital, of another enterprise.

In addition, a relationship between enterprises would be presumed to be a controlling and subordinate relationship 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

- the same shareholders hold at least 50 per cent or more of the total number of outstanding voting shares of another enterprise, or contribute at least 50 per cent or more of the total capital stock of another enterprise.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Article 11 of the 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:

- one of the participating enterprises to the combination has a market share of at least one-quarter;
- post-combination, the resulting enterprise will have a market share of at least one-third; or
- the sales revenue during the previous fiscal year of any enterprise that is a party to the combination exceeds a figure set by the FTC.

The current sales thresholds promulgated by the FTC for parties in a combination are for total sales during the previous fiscal year in Taiwan to be at least:

- NT$15 billion, where one party is not a financial institution (eg, bank, securities company, insurance company or financial holding company); or
- NT$30 billion, where all parties are financial institutions; and
- NT$2 billion, for one other party.

The FTC is authorised by the FTA to establish other new thresholds of sales revenue for certain industries as the need arises. On 2 December 2016, the FTC amended the Guidelines and adopted a turnover threshold that further provided that a merger control filing is required if the combined global sales volume in the immediately preceding fiscal year of all parties to a combination exceeds NT$40 billion and at least two of the parties each have sales volume in Taiwan for the same year of at least NT$2 billion.

According to the amended 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 covered major products, competitors and customers, and fewer covered years of market and economic information. 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.

The FTC further published the revised Guidelines on 30 June 2023 and added two additional scenarios that would be eligible for simplified filings:

- foreign-to-foreign combinations that occur offshore and with a consideration not exceeding NTD NT$2.5 billion; and
- combinations notified based on the market share thresholds under article 11 of the FTA that fall under one of the following criteria:

  - horizontal combinations where the Taiwan turnover for the relevant products or services in the previous fiscal year do not exceed NT$200 million;
  - vertical combinations where the Taiwan turnover for the relevant products or services in the respective individual product or service market do not exceed NT$200 million; or
  - combinations where parties to the combination did not generate any sales revenue in Taiwan in the previous fiscal year.

However, general filing may become applicable if the FTC determines that:

- the combined market share of the top two enterprises in a relevant market reaches two-thirds of that market; or
- the combined market share of the top three enterprises in a relevant market reaches 75 per cent of that market (except for where the combined market share of the enterprises participating in a combination is less than 10 per cent) and:

  - the combination involves major public interest;
  - one of the parties to the combination is a holding company as defined in either the Financial Holding Company Act or the Taiwan Stock Exchange Corporation Regulations for the Review of Stock Exchange Listing Applications by Investment Holding Companies;
  - the scope of the relevant market or the market shares of the combining enterprises is difficult to determine; or
  - the relevant market of the combining enterprises shows high barriers to entry, high market concentration, any other major disadvantages, etc.

To calculate the sales revenue thresholds noted above, the sales revenue of the participating enterprises to the combination shall be aggregated with the sales revenue of all enterprises that have control over the participating enterprise, enterprises that the participating

enterprises have control over and all enterprises that are controlled by the ultimate parent enterprises of the participating enterprises.

The 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. To calculate the shareholdings or capital contributions of the above individual or group, the shareholdings or contributions of the following related parties shall be included:

- the individual, the individual's spouse and the individual's blood relatives within the second degree of kinship (related natural persons);
- an enterprise in which the related natural persons hold more than one-half of the total number of outstanding voting shares or total capital;
- an enterprise in which the related natural persons act as its chair, president or a director representing a majority of directors;
- the preceding 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 preceding 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 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 and amended on 28 June 2023 titled 'Types of Combinations Exempted from Merger Filings', the notification of a combination to the FTC is not required for:

- a combination between enterprises that already have a controlling and subordinate relationship;
- a combination between enterprises that are controlled by the same controlling company;
- when 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;
- when 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; or
- a foreign-to-foreign joint venture that does not carry out any economic activities in Taiwan.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

When the thresholds are met, notification is required. The Principles for Handling Applications of Extraterritorial Combinations (the Principles), first enacted in August 2000 and according to which the FTC may decide not to exercise jurisdiction, were abolished by the FTC on 30 June 2023. The amended Guidelines were released on the same day. After the amendments, foreign-to-foreign mergers, which used to be governed by the Principles, are now governed and handled by the Guidelines; that is to say, in principle, a foreign-to-foreign transaction would need to be filed in Taiwan according to the Guidelines unless it fulfils the criteria for being exempted from merger filing (including but not limited to the scenario of a foreign-to-foreign joint venture carrying out no economic activities in Taiwan). However, a simplified procedure could apply if such a foreign-to-foreign transaction fits any one of the criteria under the Guidelines.

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 a liberalisation of restrictions on foreign investment, it still prohibits or restricts foreign investment for 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 Taiwanese 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 Taiwanese Ministry of Economic Affairs promulgated regulations on 30 June 2009 (most recently amended in December 2020) with respect to investments from

mainland China and the establishment of mainland Chinese companies' branch offices or agencies in Taiwan. To date, a considerable number of industries (including textiles, certain kinds of infrastructure or manufacturing, banks, securities, insurance and certain Type II (non-facility based) telecommunications) are currently allowed to receive investment from mainland China.

In addition, the Taiwanese currency, the New Taiwan dollar, is not freely convertible. If a combination were to involve the inward remittance of more than US$50 million or its equivalent by any company involved in the transaction, that company would be required to seek approval from Taiwan's central bank on this and any other currency-related issue.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no specific rules on filing deadlines; however, the notification must be filed at least 30 working days prior to the consummation of the combination. Sanctions for not filing include fines ranging from NT$200,000 to NT$50 million for each violation of the Fair Trade Act of 1991 (FTA) (the 2015 FTA amendments increased the lower limit from NT$100,000 to NT$200,000) and orders to cease or unwind the combination. Fines have long been imposed for failure to file.

10 Which parties are responsible for filing and are filing fees required?

The following are responsible for filing:

- all enterprises participating in a combination where the combination consists of a merger, 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 may also be the enterprise with ultimate control) – in the case of foreign-to-foreign merger filings, the enterprise with ultimate control shall be responsible for filing;
- the transferee or lessee of another enterprise's business or assets;
- 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 a 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 Taiwanese branch or subsidiary; however, the Fair Trade Commission (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 the 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 extension period, the combination cannot take place.

Where the FTC extends the deadline, the enterprises may combine after the expiry of this extended deadline or the parties may combine before the deadline if the FTC issues a decision allowing them to do so. The parties may not combine if the FTC issues an objection to the combination, or if false or misleading statements are found in the enterprises' notification.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

A combination that is required to be notified to the FTC may not legally be implemented if the FTC objects to the combination. If the combination is implemented anyway, the enterprises may be punished.

In practice, in cases where a combination occurred without the requisite notification, the FTC imposed a fine on the participating enterprise that would have been responsible for the filing and required that the participating enterprises supplement the filings. If there is no FTC objection after the waiting period has ended, the combination may take place.

One unresolved legal issue is whether a combination is void per se if it is not notified or if it is to be deemed valid unless and until the FTC declares it to be illegal, and thus void ab initio. One district court held that a combination that triggered the application requirement was void because no prior approval had been 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. If the takeover falls within the definition of 'combination' and any of the jurisdictional thresholds are met, notification to the FTC is mandatory.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The FTC requires the following information in a notification of an enterprise combination:

- a form describing the combination and the parties involved, the target closing date of the combination, contact information and domicile of the combining enterprises, and the name of the attorney and power of attorney, if applicable;
- basic information about each enterprise involved, including incorporation documents, business items, employment statistics, turnover for the previous fiscal year and total capital, as well as the turnover for the previous fiscal year of the controlling and subordinate enterprises of the enterprise involved;
- the balance sheet and income statement of the preceding year for each enterprise involved;
- a 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 three goods, and the overlapping goods that 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 most recent financial report and prospectus or annual report of combining enterprises that are listed on the Taiwan Stock Exchange or the Taiwanese 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 the merger and prescribe a period for the enterprise to unwind, to dispose of all or a part of the shares, to transfer a part of the operations, to remove certain persons from certain positions or make any other necessary dispositions. It may also impose an administrative penalty of no less than NT$100,000 and no more than NT$1 million upon such an 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 reflect 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 a director or such an 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 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 jurisdictional thresholds and whether all required documents have been submitted. If the combination does not fall within the jurisdictional 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 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 Taiwanese governmental 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?

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 length of the clearance periods for combinations can vary significantly based on the complexity of each combination.

SUBSTANTIVE ASSESSMENT

Substantive test

19| What is the substantive test for clearance?

The three jurisdictional thresholds relate to market share and revenue of sales for the previous fiscal year in the relevant product and geographic markets. Revenue of sales generally comprises the total sales of an enterprise. Market share, on the other hand, is a more complex matter.

To calculate the market share of an enterprise, the Fair Trade Commission (FTC) must first identify the relevant market. To do this, the FTC will consider the following factors under the Principles for Deciding the Scope of the Relevant Market (the Instructions), enacted and promulgated in March 2015 and most recently amended in November 2023 :

- 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 article 3 of the Instructions, 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 and pricing structure;

- characteristics and uses of products or services and consumer behaviour;
- compatibility and substitutability of the technology, specifications and standards for the product/service;
- the transactional relationship and indirect network effects between the different sides under a multi-sided market structure
- previous records showing that substitution between products or services has occurred;
- costs incurred by purchasers for turning to substituted products or services;
- the degree to which purchasers turn to other products or services because of changes in prices of certain products or services;
- points of view of purchasers and competitors;
- relevant laws and regulations; and
- other relevant facts.

The geographical market means 'a region or scope in which the combining enterprises supply particular goods or services, and the trading counterpart can select or switch easily to other suppliers. In applying demand substitutability and supply substitutability to determine the geographical market, pursuant to the Instructions, the FTC may take 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.

Further, in recognising that digital platforms often employ different language versions of the same website or application in different regions, the November amendment to the Instructions added language and local culture of a region as a factor to be used when defining the geographical market of a particular product/service.

In addition to the consideration of the product market and geographical market, the FTC may, depending on the case, examine how time influences the scope of the relevant market. The Instructions further provide examples of three approaches for determining the relevant market, which the FTC may use, on non-binding and non-priority bases: reasonable interchangeability of use analysis, cross-elasticity analysis and hypothetical monopoly test.

After the relevant market is identified, market share is calculated by considering the production, sales, stock, and import and export turnover of the enterprise in relation to the total market. Article 11 of the Fair Trade Act of 1991 (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 FTC Guidelines on Handling Merger Filings (the Guidelines) the notifying party may present the following factors regarding the overall economic benefit in response to the FTC:

- economic efficiency;
- consumer benefits;
- one of the notifying parties is in a weak position in the proposed transaction;
- one of the notifying parties is a failing firm; or
- other factors that could influence the economic benefits.

However, where the FTC needs to make a decision on a notified combination, it may attach conditions or burdens 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:

1. economic efficiency (this means that the overall economic benefits can be achieved in a relatively short period of time, the combination of the enterprises would be the only way to achieve such benefits and the benefits can be passed on to consumers);
2. consumer benefits;
3. the combining enterprises have been in a disadvantaged position in trade;
4. one of the combining enterprises is in extreme operational difficulties; and
5. other concrete results relating to overall economic benefits (for point 4, this includes the enterprise being unable to repay its debts in the short term; except through combination, the enterprise is unable to use other methods less restrictive to competition to remain

in the market; 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 an event, the FTC may assess the combination based on factors such as the market shares of the combining enterprises, homogeny of the products or services, production capacity and import competition.
- Coordinated effects: after the combination, the combining enterprises and their competitors restrict each other's business activities or, despite the absence of such restriction, the enterprises and their competitors take uniform actions, thus causing the market to be actually void of competition. If this occurs, the FTC may assess the combination based on factors including whether the market situation would be beneficial to concerted actions from enterprises, the degree of difficulty in monitoring violations and the effectiveness of punitive measures.
- Degree of market participation: this includes 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.

Further, the FTC will consider competition restraint to be obvious and shall further assess the overall economic benefits where:

1. the combined market share of the combining enterprises reaches half of the market;
2. the combined market share of the top two enterprises in a relevant market reaches two-thirds of the market; or
3. the combined market share of the top three enterprises in a relevant market reaches three-quarters of the market (for points (2) or (3), the combined market share of the combining enterprises should reach 20 per cent).

Vertical combinations

The FTC may take into consideration the following factors to assess the restraint on competition resulting from the combination (such as vertical foreclosure):

- the possibility for other competitors to select trading counterparts after the combination;
- the degree of difficulty for enterprises not participating in the combination to enter the relevant market;
- the possibility for the combined enterprises to abuse their market power in the relevant market and other factors that may contribute to market blockage;
- the possibility of increased costs for competitors; and
- the possibility to implement concerted actions.

Conglomerate combinations

The factors used to assess restraint on competition resulting from horizontal or vertical combinations shall become applicable if the relevant market of the enterprises in a conglomerate combination (ie, a combination that does not involve vertical or horizontal factors) possesses significant potentiality for competition that will cause a situation similar to a horizontal or vertical combination. The FTC may take into account the following factors to assess the significant potentiality for competition (eg, possible conglomerate effects):

- the impact of the elimination of legal restrictions on the combining enterprises operating businesses across industries;
- the possibility of the combining enterprises operating business across industries as a result of technological advancements;
- the original plans of the combining enterprises to develop business across industries outside the combination; and
- other factors that affect the significant potentiality for competition.

Factors such as harm to innovation and common ownership concerns have not been clearly defined under the Guidelines; however, when making a decision regarding a combination, the FTC can impose burdens on a clearance if allowing such a combination may harm innovation. For example, the FTC imposed certain burdens in the combination between Nokia and Microsoft in which it required Nokia to authorise its standard-essential patent based on fair, reasonable and non-discriminatory (FRAND) terms.

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 the 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 such benefits.

The FTC may consider the following factors in conducting its analysis:

- increased efficiency with regard to the use of assets;
- lowered production and transport costs;
- economies of scale and diversification of services;
- whether there is a practical and effective savings plan;
- whether the combination lowers the variable costs of doing business; and
- the general impact of the combination on prices or services to consumers.

The FTC only considers efficiency benefits that have been passed down to consumers in one form or another.

The Guidelines added a provision that requires the FTC to consider the overall economic benefit of the combination even when obvious concerns arise regarding restraint on competition. The Guidelines state that when a filing raises obvious concerns of competition restraint, the FTC will review the considerations submitted by the filing enterprise regarding overall economic benefits from the combination.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If a combination occurs without the requisite notification or is disallowed by the Fair Trade Commission (FTC), the FTC may, in addition to imposing fines ranging from NT$200,000 to NT$50 million for each violation of the Fair Trade Act of 1991 (FTA), issue orders prohibiting the combination, set a deadline before 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 an 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 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 reflect 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 a director or such an individual to be separately fined if it is found that he or she has acted with intent or gross negligence. This fine can also be applied to the director or individual if the breach of duty is attributable to an act of a staff member, employee or any other person with the authority to act on behalf of the director or individual.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The February 2002 amendments to the FTA gave the FTC the right to order additional conditions or burdens 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.

Although the FTC has the requisite power, it has yet to order a divesture undertaking. The FTC is authorised to order the dissolution of an enterprise or the suspension of its operations if that enterprise fails to comply with its orders. Further, according to the amended FTC Guidelines on Handling Merger Filings dated 30 June 2023, the FTC may now consult with the participating parties on potential conditions or remedies (or both) in the form of structural measures regarding the organisation of the participating parties, or in the form of behavioural measures, prior to issuing a formal decision.

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 being prohibited to do so by the FTC or fail to abide by conditions set by the FTC. The FTC can prohibit a combination, or prescribe a period for an 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 the 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 legal provisions that address ancillary restrictions.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

In the event that one of the participating parties to the combination does not agree to the combination (ie, a hostile takeover), the Fair Trade Commission (FTC) must inform the objecting party of the justification for the combination filing and seek the opinion of the objecting party on the combination filing.

Further, the FTC is allowed to solicit opinions from the public; therefore, if customers or competitors are aware of a notification to the FTC, they may submit their views, but the FTC is under no statutory obligation to accept or take such views into account.

Additionally, the FTC may require related third parties to make statements, or require relevant organisations or individuals to submit records, documents and other necessary materials. The FTC is also authorised to dispatch personnel to inspect the offices, place of business or other locations of relevant organisations.

Under the Fair Trade Act of 1991 (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?

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 Administrative Procedure Law and 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. The FTC has entered into cooperative treaties with the antitrust authorities in Australia, Canada, Eswatini, France, Indonesia, Japan, Mongolia, Hungary, New Zealand and Panama.

FTC policy statements note that, in recent years, there has been a trend towards large combinations between multinational corporations, the parent companies of which are located in advanced industrialised countries. Although 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 local competition authorities coordinate and scrutinise the impact on competition of such transactions. Accordingly, it is the FTC's policy to broadly interpret its jurisdiction in offshore transactions that may have an impact on Taiwanese competition.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

The 2015 amendments to the Fair Trade Act of 1991 (FTA) allow an enterprise or person dissatisfied with a Fair Trade Commission (FTC) decision to appeal the decision directly to the Taipei High Administrative Court and finally to the Supreme Administrative Court without first submitting to a review procedure by the Appeals Committee of the Executive Yuan, as previously required. This change was instigated after Taiwan's Grand Justice Council opined that decisions by an independent agency are exempt from review by its direct superior authority.

Time frame

33 | What is the usual time frame for appeal or judicial review?

According to the Code of Administrative Procedure, if the requirement to first appeal to the superior authority is waived by law, parties dissatisfied with administrative decisions may file for judicial review within two months of receiving such decisions; thus, after the FTA's 2015 amendments, parties dissatisfied with FTC decisions may file for judicial review directly

within two months of receiving such decisions. Judicial review could last for anywhere from eight months to one-and-a-half years before reaching a final resolution.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

According to the publicly accessible database maintained by the Fair Trade Commission (FTC), between October 2013 and April 2024, there were 14 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 or that could constitute abuses of market power; and
- the provision of certain business information, such as pricing arrangements, to the FTC for a certain period of time.

According to a report issued by the chair of the FTC in the Legislative Yuan, the FTC will be 'looking closely to the progress of investigations of international antitrust cases and will use those as references when enforcing' the Fair Trade Act of 1991 (FTA) and will 'maintain open communication with other foreign agencies in charge of competition law in order to thwart international cartels and anti-competition activity'. In the future, decisions made by foreign agencies may be more likely to be scrutinised by the FTC.

Reform proposals

35 Are there current proposals to change the legislation?

The FTC published draft amendments to the FTA on 6 June 2023, pursuant to which the thresholds regarding market shares for merger filings were removed, leaving only the thresholds regarding turnover in place. The draft amendments are still at the proposal stage within the FTC and have not been submitted for the legislature's review.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Key policy

The Fair Trade Commission (FTC) amended the Principles for Deciding the Scope of the Relevant Market (the Instructions) on 22 November 2023 to meet the needs of the digital economy and of digital platforms. The amendments include:

1 Adding definitions for "multi-sided market" and "indirect network effect":

Since digital platforms can rarely be categorised in terms of a traditional, one-sided market, the FTC added the following definitions:

- Multi-sided market: refers to a market in which enterprises create commercial value by providing platform services allowing two or more economic groups of users to interact and, thus, with indirect network effects.
- Indirect network effects: refers to the effects on the value of a product or service that are acquired via a platform by an economic group of users where such value is affected by the number of users belonging to the other economic groups on such platform.

2 Additional factors to consider when defining a product/service market

In order to more appropriately define a particular product/service market in the digital economy, in addition to taking into account traditional factors such as price changes, characteristics, and uses of the product/service, the FTC added additional factors to be considered such as (1) the pricing structure; (2) consumer behaviour; (3) the compatibility and substitutability of the technology, specifications and standards for the product/service; and (4) the transactional relationship and indirect network effects between the different sides under a multi-sided market structure.

3 Additional factors to consider when defining the geographical market

Recognising that digital platforms often employ different language versions of the same website or application in different regions, the FTC included language and local culture of a region as a factor to be used when defining the geographical market of a particular product/service.

4 Hypothetical monopoly test

Prior to the amendments, the hypothetical monopoly test (the HMT) used for defining a relevant market only employed the SSNIP method (ie, small but significant non-transitory increases in price). However, the SSNIP method does not apply well to the multi-sided market characteristics of digital platforms, and, as such, the FTC included the SSNIC method (ie, small but significant non-transitory increases in costs) and the SSNDQ method (ie, small

but significant non-transitory decreases in quality) in the amendments so that they could be utilised for HMTs where the price is zero.

In addition, the FTC published draft amendments to the Fair Trade Act of 1991 (FTA) on 6 June 2023. Pursuant to the draft amendments, the thresholds regarding market shares for merger filing have been removed, leaving only the thresholds regarding turnover in place. The draft amendments are at the proposal stage and the FTC is currently collecting comments from the public for the draft amendments before submitting for the legislature's review.

Notable case

The FTC ruled in January 2024 that that Dafu Media Co, Ltd (Dafu) and Kbro Inc (Kbro) had violated the remedies imposed in the FTC's 2010 approval of the companies' combination.

In 2010, Dafu acquired Kbro (along with the 12 cable system operators under the Kbro Group) and submitted a combination filing to the FTC. However, since Dafu was an affiliate of Taiwan Mobile Co, Ltd (Taiwan Mobile), one of Taiwan's leading telecommunication companies, which also indirectly controlled seven cable system operators, the FTC imposed 13 conditions in its approval of the combination, including that the 12 cable system operators under the Kbro Group could not jointly operate with the other cable system operators controlled by Taiwan Mobile and, when serving as a distributor of TV channels, could not jointly offer TV channels with other distributors controlled by Taiwan Mobile.

However, in 2019, the FTC received reports that the 12 cable system operators under the Kbro Group had violated the remedies described above. After conducting an investigation, the FTC decided to levy a fine of NT$50 million (approximately US$1.7 million) on Dafu and Kbro (along with the 12 cable TV operators under the Kbro Group), respectively, in accordance with Article 39 of the FTA. This marked the largest fines ever levied by the FTC for a violation of combination conditions.

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Weerawong, Chinnavat & Partners Ltd

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Voluntary or mandatory system?	Mandatory system. The only exceptions to mandatory filing are mergers for the purposes of internal restructuring and reorganisation between business operators that are part of a single economic unit or mergers that do not fall within the scope of application of the Trade Competition Act BE 2560 (2017) (the Act).

Notification trigger/ filing deadline	Pre-merger approval is required for any merger that results in the creation of either:
	• a monopoly – that is, a situation where there is only one business operator in any given market:
	  • possessing absolute power over the determination of the price and supply of its products or services; and
	  • having a sales turnover of at least 1 billion baht; or
	• a business operator having dominant market power by:
	  • any single business operator having a market share in the previous year of 50 per cent or more and a sales turnover of at least 1 billion baht; or
	  • any of the top three business operators together having a market share in the previous year of 75 per cent or more and a sales turnover of at least 1 billion baht each (excluding any business operator that, in the previous year, had a market share of less than 10 per cent).
	Pre-merger approvals are required to be filed prior to closing.
	Post-merger notification is required for any merger in which the sales turnover of any one business operator, or the aggregate turnover of all business operators conducting a merger, amounts to 1 billion baht or more and that does not cause a monopoly or result in a business operator having dominant market power.
	Post-merger notifications are required to be filed within seven days of closing.

Clearance deadlines (Phase I/Phase II)	For pre-merger approvals, the Trade Competition Commission (the Commission) must complete the consideration of a pre-merger approval within 90 days of submission. When a decision cannot reasonably be made within 90 days, the Commission may extend the period of consideration by up to 15 additional days. There is no provision in the Act that allows the pre-merger approval process to be expedited. In practice, the Commission generally takes a significant portion of the 90 days and tends to issue decisions relatively close to the end of this statutory period. For post-merger notifications, there is no statutory timetable for the Commission to verify the notification. In practice, the Commission may take anywhere from three to eight months from receipt of the notification to provide an acknowledgement.

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Quick Reference Table	
Substantive test for clearance	The Commission must consider whether the merger: • is reasonably necessary for the business of the relevant parties; • assists the promotion of the business of the relevant parties; • poses no serious harm to the Thai economy; and • has no material effect on the due interest of consumers in general.
Penalties	For pre-merger approvals, an administrative sanction not exceeding 0.5 per cent of the total value of the merger transaction. In addition, the Commission may order a business operator to suspend, cease or modify the merger if it has sufficient evidence to believe that the business operator is in violation of the pre-merger approval requirement. For post-merger notifications, an administrative sanction not exceeding 200,000 baht and a daily fine not exceeding 10,000 baht throughout the period of the violation. If a company is subject to an administrative fine, a director, manager or any person responsible for ensuring that the company complies with merger control legislation will be subject to the same sanction.
Remarks	Not applicable.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Merger control in Thailand is generally governed by the Trade Competition Act BE 2560 (2017) (the Act), together with regulations issued under the Act.

The Trade Competition Commission (the Commission) is in charge of issuing regulations on merger control, reviewing and making decisions on pre-merger approvals and post-merger notifications, and imposing fines and sanctions (including the suspension, cessation or modification of mergers).

The Office of the Commission (the TCCT) is in charge of the Commission's administrative functions, such as monitoring business operators for violations of the Act, receiving complaints in respect of alleged violations of the Act and making recommendations to the Commission.

Disputes relating to alleged offences under the Act, and civil claims for damages or appeals against administrative orders issued by the Commission, are subject to the jurisdiction of the Intellectual Property and International Trade Court and the Administrative Court.

The application of the Act also covers state-owned enterprises and public organisations, although exemptions exist for duties specified by law or cabinet resolutions for the enhancement of national security, public benefit or the provision of utilities. The Act does not apply to certain industries where merger control is already regulated by specific legislation for that industry. Although this is subject to changes in law (such as the introduction of competition law-specific merger control regimes in particular industries), the current position of the TCCT is that these currently include the telecommunications, broadcasting and television and energy sectors.

Scope of legislation

2 | What kinds of mergers are caught?

Mergers subject to the jurisdiction of the Act include:

- amalgamations;
- acquisitions of shares, including:
    - the acquisition of shares, warrants or other convertibles of 25 per cent or more of the total voting rights of a public company listed on the Stock Exchange of Thailand at the end of any day; or
    - the acquisition of more than 50 per cent of the total voting rights of a private company, an unlisted public company or a public company listed on a stock exchange other than the Stock Exchange of Thailand at the end of any day, including that:
    - shares acquired by the spouse of a natural person are included in the number of shares being acquired; or

  - shares acquired by a natural or juristic person that holds more than 30 per cent of the voting rights of a juristic person and by a business operator belonging to the single economic unit (definition provided below) are included in the number of shares being acquired; and

- the acquisition of more than 50 per cent of the total value of tangible assets or intangible assets (for example, leasehold rights or intellectual property rights) of another business operator relating or connected to the ordinary business operations of that other business operator in the preceding financial year.

Exemptions

Mergers for the purpose of internal restructuring or reorganisation between business operators in the same business group that are recognised as a single economic unit are exempt from merger control provisions (ie, pre-merger approvals and post-merger notifications).

The term 'single economic unit' refers to a case where business operators have a relationship in policy or directive power.

'Relationship in policy' is defined as a relationship between two or more business operators whose guidelines, policies or procedures on management, administration or business operations are under the directive power of the same business operator.

'Directive power' is defined as the power to control by any of the following means:

1 holding shares with voting rights in a business operator of more than 50 per cent of the total voting rights in the business operator;
2 having the power to control the majority of votes in a meeting of shareholders of a business operator, either directly or indirectly;
3 having the power to control the appointment or removal of at least half of all directors of a business operator, either directly or indirectly; or
4 having the directive power under points (1) or (2) at every hierarchical level, starting from the directive power under points (1) or (2) up to the business operator that is at the ultimate level of command.

3 | What types of joint ventures are caught?

The formation of a joint venture company is not currently regulated by the merger control provisions of the Act; however, the creation of a joint venture by acquiring an existing business may be deemed an indirect acquisition of shares or assets of the target company and are potentially caught by the Act (assuming that the change of control thresholds are met).

Notwithstanding the above, the TCCT is currently undergoing a review and revision of the merger control regime, with the revised scheme anticipated to potentially include joint ventures.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The definition of 'control' is tied to the following quantitative thresholds:

- acquisitions of shares, including:
    - the acquisition of shares, warrants or other convertibles of 25 per cent or more of the total voting rights of a public company listed on the Stock Exchange of Thailand at the end of any day; or
    - the acquisition of more than 50 per cent of the total voting rights of a private company, an unlisted public company or a public company listed on a stock exchange other than the Stock Exchange of Thailand at the end of any day, including that:
        - shares acquired by the spouse of a natural person are included in the number of shares being acquired; or
        - shares acquired by a natural or juristic person that holds more than 30 per cent of the voting rights of a juristic person and by a business operator belonging to the single economic unit (definition provided below) are included in the number of shares being acquired; and
- the acquisition of more than 50 per cent of the total value of tangible assets or intangible assets (for example, leasehold rights or intellectual property rights) of another business operator relating or connected to the ordinary business operations of that other business operator in the preceding financial year.

Acquisitions of minority interests, even with veto rights, do not meet these thresholds and are not regulated by 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?

Thresholds for pre-merger approval

Pre-merger approvals are required for any merger that results in the creation of either:

- a monopoly, namely a situation where there is only one business operator in any given market:
    - possessing absolute power over the determination of the price and supply of its products or services; and
    - having a sales turnover of at least 1 billion baht; or
- a business operator having dominant market power by:

- any single business operator having a market share in the previous year of 50 per cent or more and a sales turnover of at least 1 billion baht; or
- any of the top three business operators together having a market share in the previous year of 75 per cent or more and a sales turnover of at least 1 billion baht each (excluding any business operator that, in the previous year, had a market share of less than 10 per cent).

Thresholds for post-merger notification

Post-merger notification is required for any merger in which the sales turnover of any one business operator, or the aggregate turnover of all business operators conducting a merger, amounts to 1 billion baht or more and that does not cause a monopoly or result in a business operator having dominant market power.

There are no circumstances where pre-merger approval or post-merger notification, as applicable, is required if the relevant thresholds are not met.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Pre-merger approval and post-merger notification are mandatory. The only exceptions to mandatory filing are mergers for the purposes of internal restructuring and reorganisation between business operators that are part of a single economic unit or mergers that do not fall within the scope of application of the Act.

The term 'single economic unit' refers to a case where business operators have a relationship in policy or directive power.

'Relationship in policy' is defined as a relationship between two or more business operators whose guidelines, policies or procedures on management, administration or business operations are under the directive power of the same business operator.

'Directive power' is defined as the power to control by any of the following means:

1. holding shares with voting rights in a business operator of more than 50 per cent of the total voting rights in the business operator;
2. having the power to control the majority of votes in a meeting of shareholders of a business operator, either directly or indirectly;
3. having the power to control the appointment or removal of at least half of all directors of a business operator, either directly or indirectly; or
4. having the directive power under points (1) or (2) at every hierarchical level, starting from the directive power under points (1) or (2) up to the business operator that is at the ultimate level of command.

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 where the parties to the merger satisfy the domestic presence test, which requires both the acquirer and the target (and each of

their respective single economic units) to have a presence in Thailand through a branch or subsidiary.

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 piece of 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 need to comply with the provisions of the FBA as well as those of the Act.

Special sectors – such as telecommunications, broadcasting and television, and energy – have specific legislation governing mergers. The Act does not apply to mergers in special sectors, provided that the specific legislation governing mergers in the relevant sector addresses competition concerns.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Pre-merger approvals

If a pre-merger approval is required, the business operator must receive approval from the Trade Competition Commission (the Commission) before the completion of the merger. If the business operator fails to do so, the business operator will be subject to:

- an administrative sanction comprising a fine not exceeding 0.5 per cent of the total value of the merger transaction; and
- a civil claim, through which any person who suffers damage from a violation of pre-merger approval regulations by a business operator may claim for damages.

If a company is subject to an administrative sanction, a director, manager or any person responsible for ensuring that the company complies with Thai merger control legislation will be subject to the same sanction.

In addition, the Commission may order a business operator to suspend, cease or modify the merger if it has sufficient evidence to believe that the business operator is in violation of the pre-merger approval requirement.

Post-merger notifications

The merging parties must notify the Commission within seven days of the completion of the merger.

If a business operator fails to do so, the business operator will be subject to an administrative sanction, which is a fine not exceeding 200,000 baht and a daily fine not exceeding 10,000 baht throughout the period of the violation.

If a company is subject to an administrative sanction, a director, manager or any person responsible for ensuring that the company complies with merger control legislation will be subject to the same sanction.

Precedent cases

There are currently no precedent cases where the Commission has held business operators to be in violation of the pre-merger approval obligations. There have been eight cases between 2019 and May 2023 in which the Commission has held that business operators failed to comply with the post-merger notification requirements. The business operators, as well as their management, were fined.

10 | Which parties are responsible for filing and are filing fees required?

Although not set out explicitly in law, the following has been taken from informal consultation with the Office of the Commission (TCCT), together with precedent cases:

- in amalgamations, the merging entities are jointly responsible for any pre-merger approvals and the new entity resulting from the merger is responsible for any post-merger notifications;
- in asset acquisitions, the acquirer of the assets is responsible for both pre-merger approvals and post-merger notifications; and
- in share acquisitions, the acquirer of the shares is responsible for both pre-merger approvals and post-merger notifications.

There is a filing fee of 250,000 baht for pre-merger approvals. There is no filing fee for post-merger notifications.

11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

For pre-merger approvals, the Commission must consider an application for clearance of the merger within 90 days of submission of the complete application. If a decision cannot reasonably be made within 90 days, the Commission may extend the period by up to 15 days. A transaction cannot be closed until clearance has been obtained.

From experience, the Commission typically takes the entire 90 days to provide 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 a business operator is required to obtain permission from the Commission before conducting a merger but fails to do so, the business operator will be subject to:

- an administrative sanction comprising a fine not exceeding 0.5 per cent of the total value of the merger transaction; and
- a civil claim, through which any person who suffers damage from a violation of pre-merger approval regulations by a business operator may claim for damages.

If a company is subject to an administrative sanction, a director, manager or any person responsible for ensuring that the company complies with the merger control legislation will be subject to the same sanction.

In addition, the Commission may order a business operator to suspend, cease or modify the merger if it has sufficient evidence to believe that the business operator is in violation of the pre-merger approval requirement.

There are no precedent cases.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Sanctions apply to foreign-to-foreign mergers that fall within the jurisdiction of Trade Competition Act BE 2560 (2017) (the Act), including the domestic presence test (which requires both the acquirer and the target (and each of their respective single economic units) to have a presence in Thailand through a branch or subsidiary).

There are no precedents for the imposition of sanctions on foreign-to-foreign transactions, although the TCCT does monitor these.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Although the Thai authorities have not provided an official statement in support of solutions that might be acceptable to permit closing before clearance in foreign-to-foreign mergers, we believe that it is possible to put in place hold-separate or ring-fencing arrangements, or both, to allow merging parties to close a transaction outside Thailand if this can be done without implementing the merger in Thailand. The TCCT should be consulted in advance.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

There are no special merger control rules applicable to public takeover bids. Where public takeovers fall within the definition of a 'merger' under the Act, the parties have to comply with the merger control provisions; the parties can, however, provide that merger control clearance is a condition precedent to the public takeover bid.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Pre-merger approvals

The documents to be submitted are:

- the application form;
- the merger plan and implementation timeline;
- details of the merging parties and the target company, which must at a minimum include the shareholding structure, voting rights, and sales turnover and market shares of the parties and the target company;
- studies and analyses in respect of the merger transaction, which must comprise:
    - analysis of the shareholding structure and controlling power of the merging parties for the purpose of ascertaining the relationship in policy or directive power before and after the merger;
    - analysis of the markets for the products or services relevant to the merging parties for the purpose of ascertaining the effects arising from the merger, which must at a minimum include:
        - market structure before and after the merger transaction;
        - market scope;
        - market share of each of the merging parties before and after the merger transaction;
        - the sales turnover of each of the merging parties before and after the merger transaction;
        - the effect of the merger transaction in respect of:
            - market concentration, market entry and expansion (taking into consideration relevant factors, such as governmental laws and regulations, logistical costs, access to patent rights of existing technologies, or access to raw materials or other resources necessary for production);
            - non-coordinated effects (ie, effects as a result of each of the merged entities gaining profit by increasing prices or a reducing the quality of the product as a result of a reduction in competition); and
            - coordinated effects (ie, effects as a result of business operators' tendency to jointly increase prices after a merger transaction);

    - effect on the economy or consumers as a whole and other effects on competition in the market (if any); and
    - efficiencies in the market after the merger transaction; and

- studies and analyses relating to business-related necessity and benefit in the promotion of business, damage to the economy and consumer benefits as a whole.

Post-merger notifications

The documents to be submitted are:

- the notification form;
- a copy of:
    - the documents submitted to the Ministry of Commerce, in the case of an amalgamation;
    - the documents submitted to the Securities and Exchange Commission, in the case of a share acquisition by tender offer;
    - the definitive documents relating to the share or asset acquisition (eg, share purchase agreement and appraisal report);
    - the minutes of the executive committee meeting or shareholders' meeting at which the merger transaction is approved from each of the merging parties or documents evidencing the parties' intention to enter into the merger transaction;
- other particulars in respect of the merger transaction;
- annual meeting reports and audited financial statements for the previous three years from each of the merging parties;
- a copy of the list of shareholders of each of the merging parties before and after the merger transaction; and
- power of attorney (if any) authorising agents (eg, lawyers) to handle the filing.

The post-merger notification form also requires detailed information to be included in the form itself. Parties are required to include market definition analyses, the market share figures of the transaction parties (and their competitors in the relevant market), and detailed revenue breakdowns of provided goods and services along with more extensive information relating to entities within the same single economic unit as the acquirer and target.

All information and documents submitted to the TCCT must be in hard copy in the Thai language (or translated into the Thai language).

Business operators that intentionally provide false or misleading information to the TCCT may be subject to criminal penalties under the Criminal Code for the submission of false information to government officials.

In addition, approval of a pre-merger approval can be revoked by the TCCT if it becomes aware of such false or misleading information. Furthermore, any person whose rights or interests are adversely affected by the approval of the TCCT may file a case with the Administrative Court for revocation of the approval.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

For pre-merger approvals, the process starts when the relevant business operators submit an application to the TCCT. The TCCT will verify the completeness of the application and forward the completed application to the TCC within seven days of the date of receipt of the application. The TCCT may require additional information from business operators conducting a merger by issuing a letter requesting information or inviting the applicant to offer clarification, and may also serve notices of invitation on relevant business operators or third parties to offer opinions and information to assist the consideration of the transaction.

For post-merger notifications, there is no description of how the Commission and the TCCT investigate a post-merger notification; however, they have the authority to request additional information and clarification. They may also serve notices of invitation on relevant business operators or third parties to offer opinions and information to assist the consideration of the transaction.

Pre-consultation is not required before submission of an application for a pre-merger approval or post-merger notification; however, the TCCT recommends that the parties carry out pre-consultation with officers for a pre-merger approval. There is no formal process for pre-consultation.

18 | What is the statutory timetable for clearance? Can it be speeded up?

For pre-merger approvals, the Commission must complete the consideration of a pre-merger approval within 90 days of submission. When a decision cannot reasonably be made within 90 days, the Commission may extend the period of consideration by up to 15 additional days. There is no provision in the Act that allows the pre-merger approval process to be expedited. In practice, the Commission generally takes a significant portion of the 90 days and tends to issue decisions relatively close to the end of this statutory period.

For post-merger notifications, there is no statutory timetable for the Commission to verify the notification. In practice, the Commission may take anywhere from three to eight months from receipt of the notification to provide an acknowledgement.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Section 52 of the Act requires that the Trade Competition Commission (the Commission) consider whether the merger:

- is reasonably necessary for the business of the relevant parties;
- assists the promotion of the business of the relevant parties;
- poses no serious harm to the Thai economy; and

- has no material effect on the due interest of consumers in general.

Further, the Commission will also review the impact to competition arising from the merger (such as market entry, coordinated effects, non-coordinated effects).

20 | Is there a special substantive test for joint ventures?

The formation of a joint venture company is not currently regulated by the merger control provisions of the Trade Competition Act BE 2560 (2017) (the Act); however, the creation of a joint venture by acquiring an existing business may be deemed an indirect acquisition of shares or assets of the target company, and therefore potentially caught by the Act (assuming that the change of control thresholds are met).

Notwithstanding the above, the Commission is currently undergoing a review and revision of the merger control regime, with the revised scheme anticipated to potentially include joint ventures.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The Commission will consider factors such as market concentration, potential for coordinated effects and non-coordinated effects, and barriers to market entry for newcomers.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The Commission must consider whether the merger:

- is reasonably necessary for the business of the relevant parties;
- assists the promotion of the business of the relevant parties;
- poses no serious harm to the Thai economy; and
- has no material effect on the due interest of consumers in general.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

Only a few cases of merger control have been considered by the Commission. In those cases, economic efficiency was considered along with other factors in determining whether to allow each merger.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If a business operator fails to comply with Thai merger control requirements, the Trade Competition Commission (the Commission) is empowered to impose fines. In cases where pre-merger approval is required, the Commission may, in addition, suspend, cease, rectify or modify the merger.

The Commission is also empowered to set any conditions for approval of the merger.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

It is possible to remedy competition issues and, in granting approval for a merger, the Commission is empowered to specify the time period and any conditions for compliance, including divestment and behavioural remedies.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

There are no specific provisions, notifications, guidelines or sufficient precedent on this matter.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There is currently no precedent where the Commission has required remedies in a foreign-to-foreign merger.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

There are currently no specific provisions, notifications, guidelines or sufficient precedent 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 approval, the Trade Competition Commission (the Commission) requests the applicant to provide information about its customers and competitors. The Commission is further empowered to invite any person to provide facts, explanations, advice or opinions; therefore, customers and competitors may be invited to provide information.

In addition, any person suffering damage due to a violation of the Trade Competition Act BE 2560 (2017) (the Act) can initiate an action for compensation from the offender; therefore, any persons (including customers and competitors) who suffer damage as a result of the violation are entitled to file complaints. Furthermore, the Act specifically allows the Consumer Protection Board, or organisations or foundations recognised by the Consumer Protection Board, to initiate actions for compensation on behalf of consumers or members of those organisations or foundations, as applicable.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Act does not require any public disclosure of the process. The Commission publishes its decisions on pre-merger approvals (and has increasingly begun to publish decisions relating to post-merger notifications), but the names of parties and any pieces of sensitive commercial information are redacted.

Confidential information is protected under the Act. Any person who reveals restricted or confidential information concerning a business or operations of a business operator may be subject to a term of 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 non-compliance with the Act.

Information may, however, be disclosed in the course of performance of a government service, or for the purpose of an inquiry or a 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, and be required to pay compensation for its misconduct and the injury suffered by the injured party.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Thailand has signed economic partnership agreements with certain countries that 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 the enforcement of competition rules.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Orders of the Trade Competition Commission (the Commission) to suspend, cease, rectify or modify a merger that has not obtained approval and orders to grant (with conditions) or deny approval of a merger are subject to judicial review. A business operator may file an appeal with the Administrative Court. Any appeal of a decision of the Administrative Court may be submitted to the Supreme Administrative Court and the determination of the Supreme Administrative Court will be final. The administrative courts can only overturn a Commission decision on the basis of illegality, undue process or abuse of discretion.

There is currently only one example of this occurring. Following TCC approval of the Charoen Pokphand Group's acquisition of Tesco in 2020, 37 consumer advocacy groups filed a case with the Administrative Court to seek revocation of the approval or, alternatively, the imposition of conditions on Charoen Pokphand and the issue of an injunction, until the Court rendered its judgment or ordered otherwise. The Court refused to issue an injunction, ruling that the merger had been approved in accordance with the rules and procedures of the Trade Competition Act BE 2560 (2017).

Time frame

33 | What is the usual time frame for appeal or judicial review?

Business operators to whom orders to suspend, cease, rectify or modify a merger, or grant or deny approval of a merger, are directed must file an appeal with the Administrative Court within 60 days of receipt of the Commission's decision.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Trade Competition Commission (the Commission) provided clearance for two pre-merger approvals in 2023 and imposed notification obligations pursuant to the mergers (eg, providing updates to the Commission of the effects of the merger). Of the 10 pre-merger approvals submitted to the Commission, only the Charoen Pokphand acquisition of Tesco (2020) and the Bangchak acquisition of Esso (2023) have required remedial measures.

A key enforcement concern of the Commission is centred on digital platforms and marketplaces, including mergers in this space and a particular focus on the protection of small and medium-sized enterprises.

Reform proposals

35 Are there current proposals to change the legislation?

The Office of the Commission (the TCCT) is currently reviewing the Trade Competition Act BE 2560 (2017) (the Act) as part of its duty to review the Act on a five-year basis. The review process began in 2022 and is currently ongoing, and we understand from informal discussions with officers at the TCCT that the review and revisions will be finalised in 2025.

This review constitutes the first wholesale analysis of the Act and its enforcement, and the TCCT has arranged for input through a variety of means, including focus group research. Although the changes will primarily focus on aspects of the Act unrelated to merger control, there may be amendments relating to extraterritorial enforcement or joint ventures.

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 case of the past year was the completed merger between Bangchak and Esso, which was the second case in which the Trade Competition Commission (the Commission) imposed conditions on merging parties. These conditions included: (i) Bangchak cannot increase its shareholdings in government entities for a period of five years after closing; or (ii) Bangchak to retain its contracts and agreements with customers in the petroleum industry entered into with Esso, until the end of their terms.

Another notable case from 2022 was the completed merger between True and DTAC – Thailand's second- and third-largest mobile operators, respectively – into True Corporation. The merger was under the jurisdiction of the National Broadcasting and Telecommunication Commission (NBTC), rather than the Commission, as section 4 of the Trade Competition Act BE 2560 (2017) (the Act) provides a specific carve-out for the application of the Act (including to mergers) conducted in industries with specific legislation governing competition law. The NBTC allowed the merger on certain conditions, including conditions relating to price ceilings, the forced separation of the True and DTAC brands for a period of four years, and the maintenance of service contracts that had already been provided to consumers.

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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 (Phase I/Phase II)	Phase I: within 30 calendar days of a complete filing. Any written request by the Turkish Competition Authority (the Authority) for missing information will cut the review period and restart the 30-calendar-day period from the first day. Phase II: within six months of opening Phase II, extendable by an additional period of up to six months.
Substantive test for clearance	The significant impediment to effective competition test is applicable.
Penalties	Penalties for not filing: a monetary fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision shall be imposed on the incumbent undertakings (acquirers in the case of an acquisition or both merging parties in the case of a merger). Turnover-based monetary fines: if, at the end of its review of a notifiable transaction that was not notified, the Turkish Competition Board (the Board) decides that the transaction significantly impedes effective competition, the undertakings shall be subject to fines of up to 10 per cent of their turnover generated in the financial year preceding the date of the fining decision. Managers or employees of parties that had a determinant effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the relevant party. Invalidity of transaction: a notifiable concentration is invalid (with all associated legal consequences) unless and until it is approved by the Board. The implementation of a notifiable transaction is suspended until clearance by the Board is obtained; therefore, a notifiable merger or acquisition shall not be legally valid until the approval of the Board is given and such notifiable transactions cannot be closed in Türkiye before Board clearance is obtained. Failure to notify correctly: in the case of the submission of incorrect or incomplete information, the 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. The minimum fine for 2023 is 105,688 lira.
Remarks	Not applicable.

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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 Law No. 4054 on the Protection of Competition dated 13 December 1994 (the Competition Law) and communiqués published by the Turkish Competition Authority (the Authority). In particular, article 7 of the Competition Law governs mergers and acquisitions.

The Authority is a legal entity with administrative and financial autonomy. The Authority comprises the Turkish Competition Board (the Board), presidency and service departments, including six divisions with a sector-specific work distribution that handle competition law enforcement work through approximately 284 case handlers. A research and economic analysis department as well as leniency, decisions, information technology, external relations, management services, strategy development, internal audit, consultancy, media and public relations, human resources, and cartel and on-site investigation support units assist the six technical divisions and the presidency in the completion of their tasks.

On 24 June 2020, Law No. 7246 on the Amendment to the Competition Law (the Amendment Law) was published in the Official Gazette and entered into force.

Article 7 of the Competition Law authorises the Board to regulate, through communiqués, which mergers and acquisitions should be notified to the Authority to gain validity. Further to this provision, Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4) was published on 7 October 2010, replacing Communiqué No. 1997/1 on Mergers and Acquisitions Requiring the Approval of the Competition Board as of 1 January 2011.

Communiqué No. 2010/4 is now the primary instrument for assessing merger cases in Türkiye. It sets forth the types of mergers and acquisitions that are subject to the Board's review and approval, bringing about some significant changes to the Turkish merger control regime. The secondary legislation (Communiqué No. 2021/3), which provides details on the process and procedure related to application of the de minimis principle, came into force on 16 March 2021. Further, the Board enacted secondary legislation through the Communiqué on the Commitments to be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition and Abuse of Dominant Position (Communiqué No. 2021/2), published on 16 March 2021 alongside the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position, published on 15 July 2021. On 4 March 2022, the Authority published Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 (the Amendment Communiqué). The Amendment Communiqué introduced new rules concerning the Turkish merger control regime that fundamentally affect merger control notifications submitted to the Authority.

Pursuant to article 7 of the Amendment Communiqué, the changes introduced by the Amendment Communiqué became effective on 4 May 2022. One of the most significant developments that the Amendment Communiqué entails is the increase of the applicable

turnover thresholds for concentrations that require mandatory merger control filing before the Authority and the introduction of threshold exemptions for undertakings that are active in certain markets or sectors.

Scope of legislation

2 What kinds of mergers are caught?

The Amendment Law amends article 7 of the Competition Law and introduces the significant impediment to effective competition test, similar to the approach under the EU Merger Regulation (EUMR). Under the Amendment Law, the Authority may prohibit transactions that could significantly impede competition, along with those that may create a dominant position or strengthen an existing dominant position in the market.

Communiqué No. 2010/4 defines the scope of notifiable transactions in article 5 as follows:

- a merger of two or more undertakings; or
- the 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 of or all its shares, an agreement or other instruments.

Pursuant to article 6 of Communiqué No. 2010/4, the following transactions do not fall within the scope of article 7 of the Competition Law and therefore will not be subject to the approval of the Board:

- intra-group transactions and other transactions that do not lead to change in control;
- temporary possession of securities for resale purposes by undertakings whose normal activities are to conduct transactions with those securities for their own account or for the account of others, provided that the voting rights attached to such securities are not exercised in a way that affects the competition policies of the undertaking issuing the securities;
- acquisitions by public institutions or organisations further to the order of law, for reasons such as liquidation, winding up, insolvency, cessation of payments, concordat or privatisation purposes; and
- acquisition by inheritance as provided for in article 5 of Communiqué No. 2010/4.

In addition to the above, the Authority also introduced Communiqué No. 2017/2 amending Communiqué No. 2010/4. 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, which dictated that the 'thresholds . . . are re-determined by the Board biannually'.

As a result of this 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, so the Board is now 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.

3 What types of joint ventures are caught?

According to article 5(3) of Communiqué No. 2010/4, joint ventures are subject to notification to, and approval of, the Board. To qualify as a concentration subject to merger control, a joint venture must be of a full-function character and satisfy two criteria:

- joint control in the joint venture exists; and
- the joint venture must be an independent economic entity established on a lasting basis (full-function joint venture).

Additionally, regardless of whether the joint venture is full-function, it should not have as its object or effect the restriction of competition among or between the parties and the joint venture itself within the meaning of article 4 of the Competition Law, which prohibits restrictive agreements. If the parent undertakings of a joint venture operate in the same market, or the downstream, upstream or neighbouring market, as the joint venture, this could lead to coordination between independent undertakings that restricts competition within the meaning of article 4 of the Competition Law.

If the nature of the joint venture turns out to be non-full-function, although such joint ventures are not subject to a merger control filing obligation, they may fall under article 4 of the Competition Law. The parties can undertake a self-assessment individual exemption test, which is set out under article 5 of the Competition Law, on whether the joint venture meets the conditions for individual exemption (which are very similar to, if not the same as, the EU regime). Notifying the transaction for an individual exemption is not a positive duty of the parties, but it is an option granted to them.

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 the EUMR. 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 to have been acquired by persons or undertakings that are the holders of rights, that are entitled to the rights under the agreements concerned, or, despite not being the holders of the rights or entitled to rights under those agreements, have de facto power to exercise these rights.

In short, much like the EU regime, mergers and acquisitions resulting in a change of control are subject to the approval of the Board under the Competition Law. 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 the management of the company (eg, privileged shares conferring management powers), the nature of control could be deemed to have changed (eg, 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?

Pursuant to the Amendment Communiqué, a transaction must be notified before the Authority if one of the following increased turnover thresholds is met:

- the aggregate Turkish turnover of the transaction parties exceeds 750 million liras, and the Turkish turnover of at least two of the transaction parties each exceeds 250 million liras; or
- either:
  - the Turkish turnover of the transferred assets or businesses in the acquisition exceeds 250 million liras, and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion liras; or
  - the Turkish turnover of any of the parties in the merger exceeds 250 million lira, and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion liras.

Accordingly, the Amendment Communiqué increased the previous turnover thresholds of:

- 30 million liras to 250 million liras;
- 100 million liras to 750 million liras; and
- 500 million liras to 3 billion liras.

Furthermore, the Amendment Communiqué introduced a threshold exemption for undertakings that are active in certain markets or sectors. Pursuant to the Amendment Communiqué, the turnover threshold of 250 million liras will not apply to acquired undertakings that are active in, or assets related to, the fields of digital platforms, software or gaming software, financial technology, biotechnology, pharmacology, agricultural chemicals, or health technology (target companies) if they:

- operate in the Turkish geographical market;
- conduct research and development (R&D) activities in the Turkish geographical market; or
- provide services to users in the Turkish geographical market.

The Amendment Communiqué does not seek a Turkish nexus in terms of the activities that trigger the threshold exemption; in other words, it would be sufficient for the target company to be active in the fields of digital platforms, software or gaming software, financial technology, biotechnology, pharmacology, agricultural chemicals, or health technology (the specified fields) anywhere in the world for the threshold exemption to become applicable, provided that the target company:

- generates revenue from customers located in Türkiye;
- conducts R&D activities in Türkiye; or
- provides services to Turkish users in any fields other than the abovementioned ones.

Accordingly, for the exemption on the local turnover thresholds to become applicable, the Amendment Communiqué does not require revenue to be generated from customers located in Türkiye, R&D activities to be conducted in Türkiye or services to be provided to Turkish users concerning the specified fields.

The tests provided under article 7(b) of the Competition Law are two separate tests: article 7(b)(i) is applicable only in acquisition transactions (as well as joint ventures), while article 7(b)(ii) is applicable only in merger transactions.

Where the transaction does not meet the relevant thresholds, the transaction is not 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 nor are there 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 Competition Law regardless of whether the transaction parties have a Turkish nexus or generate any Turkish turnover; in other words, whether transaction parties have a Turkish nexus is not relevant for the analysis of if the transaction is notifiable under the Turkish merger control regime. Additionally, according to Communiqué No. 2010/4, whether an affected market exists will not be considered in assessing whether a transaction triggers the notification requirement; however, the concept of 'affected market' carries weight in terms of the substantive competition assessment and the notification form.

8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Article 9 of Communiqué No. 2010/4, along with the general items to be taken into account in calculating the total turnover of the parties to the transaction, sets forth specific methods

of turnover calculation for financial institutions. Those special methods of calculation apply to banks, financial leasing companies, factoring companies and insurance companies, etc.

Banking Law No. 5411 provides that the provisions of articles 7, 10 and 11 of the Competition Law shall not be applicable on the condition that the sectoral share of the total assets of the banks subject to merger or acquisition does not exceed 20 per cent. Turkish competition legislation provides no special regulation applicable to foreign investments.

The Amendment Communiqué introduced a threshold exemption for undertakings that are active in certain markets or sectors. Pursuant to the Amendment Communiqué, the turnover threshold of 250 million liras will not apply to target companies that are active in, or assets related to, the specified fields if they operate in the Turkish market, conduct R&D activities in the Turkish market or provide services to users in the Turkish market.

If the target company's activities fall into the specified fields, the thresholds that apply are as follows:

- the aggregate Turkish turnover of the transaction parties exceeds 750 million liras; or
- the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion liras.

Accordingly, when an undertaking that falls within the definition and criteria above is being acquired, the transaction is notifiable if the aggregate Turkish turnover of the target company and the acquirer exceeds 750 million liras or the worldwide turnover of the acquirer exceeds 3.75 billion liras.

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

Law No. 4054 on the Protection of Competition dated 13 December 1994 (the Competition Law) provides no specific deadline for filing. It is important that the transaction is not closed before the approval of the Turkish Competition Board (the Board) is granted.

Penalties for not filing

If the parties to a merger or acquisition that requires the approval of the Board realise the transaction without obtaining the approval of the Board, a monetary fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) shall be imposed on the incumbent undertakings (acquirers in the case of an acquisition, and both merging parties in the case of a merger), regardless of the outcome of the Board's review of the transaction.

The minimum fine is revised annually through a communiqué published each year. For 2023, the minimum fine is 105,688 liras.

Invalidity of the transaction

Another very important sanction, which is more of a legal than economic character, is set out under article 7 of the Competition Law and article 10 of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4): a notifiable merger or acquisition that is not notified to and approved by the Board shall be deemed legally invalid, with all its legal consequences.

Termination of infringement and interim measures

Article 9(1) of the Competition Law (introduced by Law No. 7246 on the Amendment to the Competition Law) states that, should the Board find any infringement of article 7, it shall inform the parties concerned through a resolution of the behaviour that should be followed or avoided to establish competition and of structural remedies, such as the transfer of certain activities, shareholdings or assets.

The amendment introduces a first behavioural, then structural remedy rule for article 7 violations; therefore, where the behavioural remedies are ultimately considered to be ineffective, the Board will order structural remedies. Undertakings must comply with the structural remedies ordered by the Board within a minimum period of six months.

Termination of transaction and turnover-based monetary fines

If, at the end of its review of a notifiable transaction that was not notified, the Board decides that the transaction falls within the prohibition provisions of article 7 (ie, the transaction significantly impedes effective competition), the undertakings shall be subject to fines of up to 10 per cent of their turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Managers or employees of parties that had a determinant effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the applicable party.

In determining the monetary fines on the parties, the Board takes into consideration repetition of the infringement, the infringement's duration, the market power of the undertakings, the undertakings' decisive influence in the realisation of the infringement, whether the undertakings comply with the commitments given, whether the undertakings 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; and
- return all shares and assets, if possible, to the entities that owned these shares or assets before the transaction or, if such a measure is not possible, assign these to third parties

and forbid participation in control of these undertakings until this assignment takes place, and 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 to have been filed only on the date when the information is completed upon the Board's subsequent request for further data.

In addition, the Turkish Competition Authority (the 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 those 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 in Turkish merger control proceedings.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Board, upon its preliminary review (Phase I) of the notification, will decide either to approve or to investigate the transaction further (Phase II). It notifies the parties of the outcome within 30 days of a complete filing. In the absence of any such notification, the decision is deemed to be an approval through an implied approval mechanism introduced by article 10(2) of the Competition Law.

The Authority can send written information requests to the parties, any other party relating to the transaction, or third parties such as competitors, customers or suppliers. Any written request by the Authority for missing information will cut the review period and restart the 30-calendar-day period from the first day, counted as of the date on which the responses are submitted.

If a notification leads to an investigation (Phase II), it changes into a full-fledged investigation. Under Turkish law, the investigation takes about six months. If deemed necessary, this period may be extended only once for an additional period of up to six months by the Board.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

There is an explicit suspension requirement. If a merger or acquisition is closed before clearance, the substantive test is the main issue for the determination of the consequences. If the Board reaches a conclusion that the transaction significantly impedes effective competition in any relevant product market, the undertakings concerned as well as their employees and directors could be subject to monetary fines and sanctions. In any case, a notifiable merger or acquisition not notified to and approved by the Board shall be deemed legally invalid, with all its legal consequences.

The wording of article 16 of the Competition Law envisages imposing a monetary penalty if merger or acquisition transactions subject to approval are realised without the approval of the Board. The monetary fine is 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) in Türkiye.

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 for 2023 is 105,688 liras.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The foreign-to-foreign nature of a transaction does not prevent the imposition of any administrative monetary fine (either for suspension requirement or for violation of article 7 of the Competition Law) in and of itself. In the case of failure to notify (ie, closing before clearance), foreign-to-foreign mergers are caught under the Competition Law regardless of whether the transaction parties have a Turkish nexus or generate any Turkish turnover, and whether there is an affected market or not.

As an example, in the *Sims Metal/Fairless* decision (16 September 2009, No. 09-42/1057-269), where both parties were only exporters into Türkiye, the Board imposed an administrative monetary fine on Sims Metal East LLC (the acquirer) subsequent to the first paragraph of article 16 of the Competition Law, totalling 0.1 per cent of Sims Metal East LLC's gross revenue generated in the 2009 fiscal year, because of closing the transaction before obtaining the approval of the Board.

Similarly, the Board's *Longsheng* (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 wherein the Board imposed turnover-based monetary fines based on violations of the suspension requirement in foreign-to-foreign transactions.

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 have been realised (ie, closed) on the date on which the change in control occurs. It remains to be seen whether this provision will be interpreted by the Authority in a way that allows the parties to a notification to carve out the Turkish jurisdiction with a hold-separate agreement.

This has been rejected by the Board so far (eg, the Board's *Total SA* decision dated 20 December 2006, No. 06-92/1186-355; and its *CVR Inc-Inco Limited* decision dated 1 February 2007, No. 07-11/71-23), with the Board arguing that a closing is sufficient for the suspension violation fine to be imposed and that further analysis of whether a change in control actually took effect in Türkiye 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 which the Board's Communiqué No. 1998/4 was replaced with Communiqué No. 2013/2 on the Procedures and Principles to be Pursued in Pre-Notifications and Authorisation Applications to be Filed with the Competition Authority for Acquisitions via Privatisation to Become Legally Valid (Communiqué No. 2013/2).

According to Communiqué No. 2013/2, it is mandatory to file a pre-notification before the public announcement of tender and receive the opinion of the Board in cases where the turnover of the undertaking or the asset or service production unit to be privatised exceeds 250 million liras.

Further, Communiqué 2013/2 promulgates that for the acquisitions to become legally valid through privatisation, which requires pre-notification to the Authority, it is also mandatory to get approval from the Board. The application should be filed by all winning bidders after the tender but before the Privatisation Administration's decision on the final acquisition.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 (the Amendment Communiqué) requires a more complex notification form, which is similar to the European Commission's Form CO.

The Amendment Communiqué introduces a new sample notification form that aims to make the filings entirely digital via e-Devlet, an elaborate system of web-based services. There has been an increase in the amount of information requested, including the global relevant product markets that the parties operate in, globally overlapping markets and market-sharing data regarding such globally overlapping activities, and data with respect to supply and demand structure, imports, potential competition and expected efficiencies.

Additionally, if a given transaction would give rise to an affected market or markets in Türkiye, the new sample notification form requires the disclosure of information regarding import conditions, supply structure, demand structure, market entry conditions, and potential competition and efficiency gains.

Some additional documents are also required, such as the executed (or current copies and sworn Turkish translations) of some of the transaction documents and annual reports, including the balance sheets of the parties, detailed organisational structure charts and, if available, market research reports for the relevant market. Bearing in mind that each subsequent request by the Board for incorrect or incomplete information will prolong the waiting period, providing detailed and justified answers and information in the notification form is to the advantage of the parties. 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) will be applied on natural persons or legal entities that qualify as an undertaking or as an association of undertakings, as well as the members of those associations in cases where incorrect or misleading information is provided by the undertakings or associations of undertakings in a notification filed for the approval of a merger or acquisition.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

The Board, upon its preliminary review of the notification (ie, Phase I) will decide either to approve or to investigate the transaction further (ie, Phase II). It notifies the parties of the outcome within 30 calendar days 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 by the relevant legislation. Any written request by the Authority for missing information will stop the review process and restart the 30-calendar-day period on the date of the provision of that information.

If a notification leads to a Phase II review, it turns into a fully fledged investigation. Under Turkish competition law, Phase II investigations take about six months. If necessary, the Board may extend this period once by up to six months.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Pursuant to article 10 of the Competition Law, if the Board, upon its preliminary review of the notification, decides to further investigate the transaction, it shall notify the parties within 30 days of the filing and the transaction will be suspended, and additional precautionary actions deemed appropriate by the Board may be taken until the final decision is rendered.

Article 13(4) of Communiqué No. 2010/4 states that if the transaction needs to be further investigated (ie, Phase II review), the provisions of articles 40 to 59 of the Competition Law shall be applied to the extent that 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.

Neither the Competition Law, 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.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

The substantive test is the significant impediment to effective competition (SIEC) test under article 9(1) of Law No. 4054 on the Protection of Competition dated 13 December 1994 (the Competition Law), introduced by Law No. 7246 on the Amendment to the Competition Law (the Amendment Law), similar to the approach under the EU Merger Regulation. With this test, the Turkish Competition Authority (the Authority) will be able to prohibit not only transactions that may create a dominant position or strengthen an existing dominant position, but also those that could significantly impede competition.

Although the Turkish Competition Board (the Board) has started to apply the SIEC test in its decisions, it has not published detailed assessments pertaining to the implementation of the test; however, as the guidelines and secondary legislation to the Competition Law have not been revised and new guidelines have not yet been introduced, how the SIEC test will be incorporated remains unclear.

Having said that, in terms of creating or strengthening a dominant position, article 3 of the Competition Law defines 'dominant position' as any position enjoyed in a certain market by one or more undertakings by virtue of which those undertakings have the power to act independently of their competitors and purchasers in determining economic parameters, such as the amount of production, distribution, price and supply.

According to the Guidelines on Abuse of Dominance, the threshold of 40 per cent could only constitute a presumptive element for an undertaking having a dominant position; therefore, the Board also considers various market characteristics as indicators of competition pressures in the market, which can potentially set off or abate the effects of high market shares and concentration levels. Prominent examples of such factors are:

- the competitors' capacity to increase production in response to increases in price levels;
- the merged entity's capacity to impede the growth of competitors;
- countervailing buying power; and
- potential competition or lack of barriers to entry.

The test does not vary by sector.

20 | Is there a special substantive test for joint ventures?

The Board evaluates joint venture notifications according to two criteria: existence of joint control in the joint venture and the joint venture being an independent economic entity established on a lasting basis (ie, having adequate capital and labour, and an indefinite duration).

In recent years, the Board has consistently applied the full-function test when determining whether the joint venture is an independent economic entity. If the transaction is found to bring about a full-function joint venture in light of the two criteria mentioned above, the SIEC test will be applied.

Additionally, under the merger control regime, a specific section in the notification form aims to collect information to assess whether the joint venture will lead to coordination. Article 13/III of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4) provides that the Board will carry out an individual exemption review on notified joint ventures that emerge as independent economic units 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 criterion in the Authority's assessment of mergers and acquisitions in Türkiye. That said, in recent years, there have been a couple of exceptional cases where the Board discussed the coordinated effects under a joint dominance test and rejected the transaction on those grounds (eg, the Board's *Ladik* decision dated 20 December 2005, No. 05-86/1188-340). Those cases related to the sale of certain cement factories by the Savings Deposit Insurance Fund.

The Board evaluated the coordinated effects of the mergers under a joint dominance test and blocked the transactions on the grounds that the transactions would lead to joint dominance in the relevant market. The Board took note of factors such as structural links between the undertakings in the market and past coordinative behaviour in addition to entry barriers, the 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, the Council of State ruled by mentioning, among other things, that the Competition Law prohibited only single dominance and therefore stayed the execution of the decision by the Board, which was based on collective dominance. No transaction has been blocked on the grounds of vertical foreclosure or conglomerate effects, and few decisions discuss these theories of harm.

Although no transaction has been blocked on the grounds of vertical foreclosure or conglomerate effects, in the *Toyota/Vive* decision (6 April 2017, No. 17-12/143-63), the Board provided an assessment of the main factors that should be considered for the evaluation of the

conglomerate concentrations. This decision is significant because the Board did not previously focus on conglomerate effects of transactions, although conglomerate effects were an important issue for the European Commission in 2017 (eg, *Qualcomm/NXP* and *Bayer/Monsanto*).

The transaction concerns the acquisition of sole control over Vive BV by Toyota. Although the parties to the transaction submitted that there would not be an affected market since their activities did not horizontally or vertically overlap in Türkiye, the Board decided that the transaction would lead to a conglomerate concentration, given that the activities of the parties were complementary to and substitutable for each other. Accordingly, the Board asserted that foreclosing the market to competitors was realised through unilateral conduct 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 when 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 the 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 (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 in the market for ophthalmic lenses. At the end of its review, the Board conditionally cleared the transaction based on certain structural commitments.

Pursuant to article 9(1) of the Competition Law, introduced by the Amendment Law, the SIEC test allows for a more reliable assessment of unilateral and cooperative effects that might arise as a result of mergers or acquisitions, as it focuses more on whether and how much competition is impeded as a result of a transaction.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

Mergers and acquisitions are assessed on the basis of competition criteria rather than public interest or industrial policies. In view of that, the Authority has financial and administrative autonomy, and is independent in carrying out its duties. Pursuant to article 20 of the Competition Law, no organ, authority, entity or person can give orders or directives to affect the final decisions of the Board.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

Efficiencies that result from a concentration may play a more important role in cases where the activities of the parties overlap in Türkiye, regardless of their combined market shares. Unlike the previous sample notification form, the new form introduced by Communiqué No.

2022/2 on the Amendment of Communiqué No. 2010/4 does not allow for the omission of relevant sections of the notification form on efficiencies based on the parties' market shares in the affected markets.

The Board may take into account efficiencies in reviewing a concentration to the extent that they operate as a beneficial factor in terms of better-quality production or cost savings, such as reduced product development costs through the integration, and reduced procurement and production costs.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The powers of the Turkish Competition Board (the Board) during the investigation stage are very broad.

Article 9 of Law No. 4054 on the Protection of Competition dated 13 December 1994 (the Competition Law) provides that if the Board establishes that article 4, 6 or 7 of the Competition Law is infringed, it may notify the undertaking or associations of undertakings concerned of a decision with regard to the actions to be taken or avoided to establish competition and maintain the situation before infringement, and forward its opinion on how to terminate such an infringement or the behavioural or structural measures to be imposed. Article 9(1) of the Competition Law (introduced by Law No. 7246 on the Amendment to the Competition Law) introduces the first behavioural, then structural remedy rule for article 7 violations.

Mergers and acquisitions prohibited by the Board are not legally valid, and the transaction documents are not binding and enforceable even if the closing is done prior to the clearance.

Pursuant to article 13(5) of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4), authorisation granted by the Board concerning mergers and acquisitions also covers the limitations that are directly related and necessary to the implementation of transactions. The principle is that parties to the transaction should determine whether the limitations introduced by the merger or acquisition exceed this framework.

Furthermore, articles 13(4) and 14(2) of Communiqué No. 2010/4 stipulate that in its authorisation decision, the Board may specify conditions and obligations aimed at ensuring that any such commitments are fulfilled.

The Board may at any time re-examine a clearance decision, and decide on the 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. As a result of a re-examination, the Board may decide a prohibition and the application of pecuniary sanctions.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Board may grant conditional approvals to mergers and acquisitions, and those transactions may be implemented provided that measures deemed appropriate by the Board are taken and the parties comply with certain obligations.

In addition, the parties may present some additional divestment, licensing or behavioural commitments to help resolve potential issues that may be raised by the Board. These commitments are increasing in practice and may 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?

The form and content of divestiture remedies vary significantly in practice. The Guidelines on Remedies set out all applicable procedural steps and conditions. The parties must submit detailed information as to how the remedies will be applied and how they will resolve any competition concerns.

The parties can submit to the Board proposals for possible remedies during either the preliminary review (Phase I) or the investigative period (Phase II).

Although the parties can submit remedies during Phase I, the notification is deemed filed only on the date of submission of the commitments. In any case, a signed version of the remedies containing detailed information on their context and a separate summary should be submitted to the Authority. The Guidelines on Remedies also provide a form that lists the necessary information and documents to be submitted in relation to the remedies.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There have been several cases where the Board has accepted remedies or commitments (eg, divestments) proposed to, or imposed by, the European Commission when the remedies or commitments ease competition law concerns in Türkiye (see, for example, *Agilent-Varian* dated 18 February 2010, No. 10-18/212-82; *Cookson/Foseco* dated 20 March 2008, No. 08-25/254-83; *Bayer/Monsanto* dated 8 May 2018, No. 18-14/261-126; *Synthomer* dated 6 February 2020, No. 20-08/90-55, and *Suez* dated 8 September 2022, No. 22-41/561-225.

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-compete obligation should be directly related and necessary to the concentration, restrictive only for the parties, and proportionate. As a result, for instance, a restriction may be viewed as ancillary if its nature, geographic scope, subject matter and duration are limited to what is necessary to protect the legitimate interests of the parties entering into the notified transaction.

The Board's approval decision will be deemed to cover only the directly related and necessary extent of restraints in competition brought by the concentration (non-compete, non-solicitation, confidentiality, etc). This will allow the parties to engage in self-assessment and the Board will no longer have to devote a separate part of its decision to the ancillary status of all restraints brought with the transaction. If the ancillary restrictions are not compliant, the parties may face article 4, 5 and 6 examinations under 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?

Pursuant to article 15 of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4), the Turkish Competition Board (the Board) may request information from third parties, including the customers, competitors and suppliers of the parties, and other persons related to the merger or acquisition. According to article 11(2) of Communiqué No. 2010/4, if the Turkish Competition Authority (the Authority) is required by legislation to ask for another public authority's opinion, this would cut the review period and restart it anew from day one.

Third parties, including the customers and competitors of the parties, and other persons related to the merger or acquisition may participate in a hearing held by the Board during the investigation, provided that they prove their legitimate interest.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Communiqué No. 2010/4 introduced a mechanism in which the Authority publishes the notified transactions on its official website, including only the names of the undertakings concerned and their areas of commercial activity; therefore, once notified to the Authority, the existence of a transaction is no longer a confidential matter.

If the Board decides to have a hearing during the investigation, hearings at the Authority are, in principle, open to the public. The Board may, on the grounds of the protection of public morality or trade secrets, decide that the hearing shall be held in private.

The main legislation that regulates the protection of commercial information is article 25(4) of Law No. 4054 on the Protection of Competition dated 13 December 1994, and Communiqué No. 2010/3 on Regulation of the Right to Access to File and the 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 on the undertakings; therefore, undertakings must request confidentiality from the Board and justify their reasons for the confidential nature of the information or documents that are requested to be treated as commercial secrets. This request must be made in writing.

Although the Board can also ex officio evaluate the information or documents, the general rule is that information or documents that are not requested to be treated as confidential are accepted as being not confidential.

The final decisions of the Board are published on the Authority's website after confidential business information has been taken out.

Under article 15(2) of Communiqué No. 2010/3, the 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 Turkish competition law. In such cases, the Authority can disclose any 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 European Economic Community Türkiye Association Council (Decision No. 1/95) authorises the Authority to notify and request the Directorate-General for Competition at the European Commission to apply relevant measures if the Board believes that transactions realised in the territory of the European Union adversely affect competition in Türkiye. Such provision grants reciprocal rights and obligations to the parties (ie, the European Union and Türkiye); thus, the European Commission has the authority to request the Board to apply relevant measures to restore competition in relevant markets.

The European Commission has been reluctant to share any evidence or arguments with the Authority in the few cases where the Authority has explicitly asked for them.

Apart from that, the Authority has cooperation agreements in place with several antitrust authorities in other jurisdictions. It also develops training programmes for cooperation purposes. In recent years, programmes have been organised for the board members of the Competition Commission of Pakistan, top managers of the National Agency of the Kyrgyz Republic for Antimonopoly Policy and Development of Competition, members of the

Mongolian Agency for Fair Competition and Consumer Protection, and board members of the competition authority in Northern Cyprus.

Similar programmes have also been developed in cooperation with the Azerbaijan State Service for Antimonopoly Policy and Consumer Rights Protection, Uzbekistan's Antimonopoly Committee, and the Antimonopoly Committee of Ukraine. These programmes were created according to the relevant bilateral cooperation agreements.

The Authority's cooperation agreements can be found on its website. The Authority has signed memorandums of understanding with Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Egypt, Mongolia, Portugal, Romania, Russia, South Korea and the Turkish Republic of Northern Cyprus. In addition, the Authority has signed memorandums of cooperation with Albania, Azerbaijan, Georgia, Kazakhstan, Kosovo, Kyrgyzstan, Libya, Morocco, North Macedonia, Peru, Serbia, Tunisia and Ukraine.

As part of its general framework, the Authority has also organised the Istanbul Competition Forum in collaboration with the United Nations Conference on Trade and Development (UNCTAD) since 2019 to discuss and debate a wide range of key and emerging competition law issues. The Authority takes part in projects led by the Organisation for Economic Co-operation and Development (OECD), the UNCTAD, the International Competition Network (ICN), the World Trade Organization and the World Bank. In cooperation with the Statistical, Economic and Social Research and Training Centre for Islamic Countries (SESRIC), operating under the Organisation of Islamic Cooperation, the Authority provides technical assistance for the training of competition agency personnel from Islamic countries that have recently adopted competition legislation.

On 23 January 2024 the Competition Counsel of Turkic States was established. Kazakhstan, Kyrgyzstan, Azerbaijan, Uzbekistan, Turkish Republic of Northern Cyprus, Hungary and Türkiye are the member states of the said counsel.

Between 2021 and 2023, the Authority participated in the following programmes:

- UNCTAD Intergovernmental Group of Experts on Consumer Protection Law and Policy 2023;
- OECD - Using Microdata For Start-Up And Venture Capital Analysis: Resources, Challenges and Opportunities;
- OECD Competition Committee, Working Parties 2 and 3;
- OECD Global Forum on Competition;
- International Conference on Competition and Consumer Protection, organised by the Georgian National Competition Agency;
- International Conference on Digital Transformation, organised by the Morocco Competition Council;
- VII Annual International Conference – Antimonopoly Policy: Science, Practice, Education, organised by the Russian Federal Antimonopoly Service;
- UNCTAD Intergovernmental Group of Experts on Consumer Protection Law and Policy 2022;
- CMA Data, Technology and Analytics Conference 2022; and
- OECD Workshop on Hub and Spoke Cartels for Competition Officials, with the Latvian Competition Authority.

As at April 2024, the Authority's Annual Activity Report for 2023 had not yet been published.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

In accordance with Law No. 6352, which took effect on 5 July 2012, the administrative sanctions decisions of the Turkish Competition Board (the Board) can be submitted for judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the reasoned decision of the Board. Decisions of the Board are considered as administrative acts; thus, legal actions against them shall be taken in accordance with the Administrative Procedural Law.

In accordance with article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Board; however, upon request of the plaintiff, the court, by providing its justifications, may decide to stay the execution if the execution of the decision is likely to cause irreparable damages and the decision is highly likely to have been taken contrary to the provisions of the Law.

A significant development in Turkish competition law enforcement was the change in the competent body for appeals against the Board's decisions. On 28 June 2014, legislation enacted by Law No. 6545 on the Amendment of the Turkish Criminal Law and Other Laws created a three-level appellate court system comprising administrative courts, regional courts (appellate courts) and the High State Court. The regional courts will go through the case file both on procedural and substantive grounds, and investigate the case file and make their decision considering the merits of the case. The decision of the regional court will be subject to the High State Court's review in exceptional circumstances, which are set forth in article 46 of the Administrative Procedure Law.

Time frame

33 What is the usual time frame for appeal or judicial review?

The time frame for appeal to the Council of State against final decisions of the Board is 60 days starting from the receipt of the reasoned decision. The judicial review period before the administrative courts 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 courts' 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 general procedural laws and usually lasts for 24 to 30 months.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

According to the Merger and Acquisition Status Report 2023 of the Turkish Competition Authority (the Authority), the Turkish Competition Board (the Board) reviewed a total of 217 transactions (three of which concern privatisation, and the rest were mergers and acquisitions). The transactions included 206 mergers and acquisitions that were approved unconditionally; none of the notified transactions were rejected in 2023. Ten were out of the scope of the merger control regime (ie, they either did not meet the turnover thresholds or fell outside the scope of the merger control system owing to a lack of change in control). Of those transactions, one concentration remains under Phase II review.

Generally, the Authority pays special attention to transactions in sectors where infringements of competition law are frequently observed and the level of concentration is high. Concentrations that concern strategic sectors (eg, automotive, programming and broadcasting, financial services, construction, telecommunications and energy) are under particular scrutiny.

The consolidated statistics regarding merger cases in 2023 show that the generation, transmission and distribution of electricity sector; the computer programming sector; and the consulting and related activities sector, each had 11 notifications. This was followed by wholesale trade in stores devoted to a specific commodity, and retail trade in stores devoted to a specific commodity, with six notifications each. Sector reports published annually by the Authority also indicate concentration trends.

The Authority handles transactions and possible concentrations in the Turkish cement and aviation sectors with particular scrutiny. There are a number of ongoing investigations in the cement sector. It would also be accurate to report that the Authority has a particular sensitivity regarding the markets for construction materials; in addition to cement, markets for construction iron, aerated concrete blocks and ready-mixed blocks were investigated, and offenders were fined by the Authority.

To the extent that these decisions were also supported by concerns over high levels of concentration, it would be prudent to anticipate that the Authority will scrutinise notifications of transactions leading to a concentration in any one of the markets for construction materials.

The Authority also made the following publications on the following dates:

- 11 March 2022: final report on the Authority's review of the fresh fruit and vegetable sector;
- 30 March 2023: final report on the Authority's review of the fast-moving consumer goods retail sector;
- 7 April 2023: preliminary report on the Authority's review of the online advertising sector;
- 18 April 2023: the Authority's study titled 'Reflections of Digital Transformation on Competition Law';

- 28 September 2023: the Authority opened a public consultation on the draft of the Regulation on Active Cooperation for Detecting Cartels (Leniency Regulation);
- 16 December 2023: Regulation on Active Cooperation for Detecting Cartels entered into force, replacing the former leniency regulation, which had been in force since 15 February 2009. The Leniency Regulation, inter alia, extended full immunity to both cartel parties and facilitators, including hub-and-spoke cartels and, to establish a clear distinction between the leniency programme and the settlement procedure, it introduced a new requirement of a 'document that holds value', obliging applicants to provide documents considered valuable in reinforcing the Authority's ability to establish the existence of the cartel.

Reform proposals

35 Are there current proposals to change the legislation?

The Authority is in the process of considering legislative action concerning digital markets. Its intent can also be found within the final report of its review of e-marketplace platforms, published on 14 April 2022, which states that the Authority is working on digital market regulations and mentions Regulation (EU) 2022/1925 (the Digital Markets Act) as a basis for these regulations.

It is expected that regulations focusing on gatekeepers mentioned in the report will be incorporated as an addition to article 6 of Law No. 4054 on the Protection of Competition dated 13 December 1994, which regulates abuse of dominant position, or possibly as a separate article, while also being reflected in secondary legislation. The amendment is expected to constitute the most drastic change to Turkish law on digital markets and is speculatively expected to reinforce the Digital Markets Act with increasing antitrust focus on digital markets; however, the proposed text of the Turkish act is not publicly available and its details remain unknown.

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?

Besides the publication of Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 on 4 March 2022, there were no significant changes to Turkish competition legislation in 2023. Notable merger control decisions of the past year include those outlined below.

Anadolu Etap İçecek/CCI

In the *Anadolu Etap İçecek/CCI* decision of 6 April 2023, No. 23-17/318-106, the transaction concerned the acquisition of a certain percentage of shares and sole control of Anadolu Etap Penkon Gıda ve İçecek Ürünleri Sanayi ve Ticaret AŞ (Anadolu Etap İçecek) by Coca-Cola İçecek AŞ (CCI). In its assessment, the Turkish Competition Board (the Board) reviewed

Anadolu Etap İçecek's market shares in the fruit juice concentrate and fruit puree markets from 2020 to 2022.

The Board acknowledged the potential risk of exclusive supply to CCI, which could limit access for other customers. However, it underscored the typical vertical integration in the market and the ease of customers switching suppliers due to product homogeneity and seasonality. With 57 competitors present and three vertically integrated entities sourcing inputs from Anadolu Etap İçecek, the Board concluded that alternative suppliers exist, entry barriers are low, and the market is price-sensitive, making it commercially unreasonable for Anadolu Etap İçecek to solely supply CCI.

The Board asserted that the competitive landscape would not substantially change, giving the company's significant export sales and domestic transactions with CCI. The Board highlighted CCI's significant presence in the fruit juice market based on its 2022 market share. The Board examined whether CCI's exclusive sourcing from Anadolu Etap İçecek could lead to customer foreclosure risks for competitors in the upstream market. This assessment included considering (i) the combined entity's ability to foreclose access to the downstream market by way of reducing its purchases from competitors in the upstream market; (ii) its incentive to reduce its purchases from competitors in the upstream market; and (iii) the potential negative effects on consumers in the downstream market.

The Board assessed that even though Anadolu Etap İçecek met most of CCI's demand, CCI had been filling in the gaps in Anadolu Etap İçecek's product line by acquiring certain items from other suppliers. Supplier selection was shown to be mostly influenced by consumer criteria, including product variety and price. As a result, the Board found that CCI had no motivation to foreclose on customers, allaying worries about negative impacts on the downstream market. The Board concluded that the transaction, which involves Anadolu Grubu Holding AŞ's continued joint control over Anadolu Etap İçecek and its sales relationship with CCI, along with Anadolu Etap İçecek's strong export-oriented sales and the suitability of the relevant market for exports, would not give rise to anti-competitive effects.

Additionally, the presence of vertically integrated structures among major players, and the lack of brand loyalty in the fruit juice concentrate and fruit puree market further supported this conclusion. Within the scope of its evaluation presented above, the Board determined that the transaction will not significantly impede effective competition in the vertically affected markets in Türkiye and cleared the transaction.

Activision Blizzard/Microsoft

In *Activision Blizzard/Microsoft* dated 13 July 2023, No. 23-31/592-202, the Board issued an eye-catching decision relating to market foreclosure. The transaction concerns a reverse triangular merger in which Anchorage Merger Sub Inc (Merger Sub), will merge with Activision Blizzard, making Activision Blizzard the surviving company and a 100 per cent subsidiary of Microsoft.

The Board approved the transaction after Microsoft's commitments to the European Commission addressed its concerns of market foreclosure. The Board deemed these commitments valid for Türkiye and applicable to future entrants into the Turkish market, leading to the clearance of the transaction. The Board determined horizontal overlap between

the parties in (i) game publishing, (ii) game distribution, (iii) game-related licensed product sales, and (iv) online display advertising operations, but noted the existence of powerful competitors in each of those sectors with significant market shares, including Electronic Arts Inc and Valve Corporation. Despite potential growth in this list post-transaction, the Board concluded that the transaction would not significantly hinder competition, considering both unilateral and coordination-inducing effects from the horizontal overlaps analysis.

Regarding the vertically affected markets, the Board evaluated that there is vertical overlap between the upstream market for the development and publishing of games, and the parties' activities in the downstream markets for (i) digital distribution of console and computer games, (ii) console hardware, and (iii) cloud gaming services. The Board found that Microsoft's attempt to impose input foreclosure in console hardware and digital game distribution markets would not be financially feasible, considering Sony's dominance, Microsoft's market shares, and cross-play value.

Microsoft committed to keeping the Call of Duty (CoD) video game and Activision Blizzard's content available on current and additional channels, including a 10-year deal with Nintendo for CoD on Nintendo consoles. The Board also noted Microsoft's reliance on third-party games to sustain console hardware activities without customer foreclosure incentives. In the digital game distribution market, the proposed combined undertaking was deemed incapable and unmotivated to impede competitors' access to Activision Blizzard's games or limit customers, given Microsoft's low market share, market competition, and strong competitors.

Regarding unilateral effects in the cloud gaming services market, the Board assessed that even if Microsoft were to enter the Turkish market with cloud gaming services, input foreclosure would not be economically viable. This was attributed to Microsoft's global share, the presence of numerous influential players in the cloud gaming services market, and the parties' limited share in the game development and publishing market. Additionally, Microsoft's revenue reliance on third-party developers' games was identified as a factor preventing customer foreclosure. The Board assessed Microsoft's commitments to the European Commission regarding the cloud gaming market in Türkiye. Microsoft's provided information confirmed that the Streaming Provider Licence, the first open licence for streaming rights for Activision Blizzard games, would be valid globally for 10 years. The second licence, the Consumer Licence, would also be valid globally for a 10-year period for existing and potential consumers. Consequently, the Board concluded that these commitments would be applicable in Türkiye for 10 years. Microsoft's agreements with other cloud gaming providers, including Nvidia, Boosteroid Games and Ubitus, were considered in addressing concerns related to the transaction. Lifecell, the sole official cloud gaming service provider in Türkiye offering Nvidia's GFN services, indicated no competitive concerns. Instead, Lifecell highlighted the potential for a broader game library and improved accessibility to Xbox and Activision Blizzard games through Microsoft's agreement with Nvidia.

The Board concluded that the transaction would not raise anti-competitive concerns unilaterally in the cloud gaming services market and noted the deterrent effect of numerous market players against coordination among undertakings. The Board concluded that the transaction would not significantly impede competition and could be cleared.

Meanwhile, in a key judgment from 2023, the Turkish Constitutional Court issued an individual application decision (application number 2019/40991, dated 20 June 2023, which may have

an impact on the Authority's on-site inspection processes. The Authority's regular procedure permits its case handlers to perform on-site inspections with a certificate of authority issued by the Board, as stipulated by Law No. 4054. However, the Constitutional Court found that the provision of law that enabled on-site inspections without a court warrant violated Article 21 of the Turkish Constitution, which protects domicile immunity. Therefore, the Authority may have to apply to the Criminal Judgeship of Peace to obtain a warrant before conducting on-site inspections, a process which was already set out under the law but only occasionally applied by the Authority when companies refused to cooperate. The Constitutional Court further stated in its decision that to prevent similar infringements in future, the Turkish Grand National Assembly has the discretionary power.

Further, on 26 October 2023, a cooperation and information-sharing protocol was signed between the Authority and the Personal Data Protection Authority. It was stated in the announcement that, given the competitive concerns raised by big data technology, cooperation was imperative. Maintaining effective competition and raising awareness, particularly in digital markets, are the key targets of the protocol.

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Ukraine

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Notification trigger/ filing deadline	Merger clearance from the Antimonopoly Committee of Ukraine is required if, in the financial year immediately preceding the year of the concentration: • the combined worldwide value of assets or turnover of the parties to the concentration exceeded €30 million and the value of Ukrainian assets or turnover of each of at least two parties exceeded €4 million; or • the value of assets in Ukraine or the Ukrainian turnover of one party exceeded €8 million and the worldwide turnover of at least one other party exceeded €150 million. The parties should be considered at the group level. In case of acquisitions, assets/turnover of the undertakings that lose control post-transaction should not be attributed to the target if the target (i) does not have any assets in Ukraine, (ii) is not active in Ukraine (including, eg, by way of cross-border supplies to Ukraine), and (iii) was not active in Ukraine during the two preceding financial years.
Clearance deadlines (Phase I/Phase II)	Preview period: 15 calendar days. Phase I review period: up to 30 calendar days. Phase II review period: up to three months starting from the day when parties provide the additionally requested data. Certain transactions that reasonably raise no competition issues: fast-track simplified 25-day review procedure.
Substantive test for clearance	No monopolisation or substantial restriction of competition in the Ukrainian market.
Penalties	The statutory maximum fine for pre-clearance closing or closing without clearance is up to 5 per cent of the consolidated turnover from the year immediately preceding the year in which the fine is imposed. In practice, the actual fines are lower.
Remarks	The merger control regime remains in force during the war in Ukraine.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

Ukrainian merger control legislation includes:

- the Law on Protection of Economic Competition 2001 (the Competition Law);
- the Law on the Anti-Monopoly Committee 1993;
- the Resolution Approving the Regulation on the Procedure for Filing Applications with the Anti-Monopoly Committee of Ukraine for Obtaining its Prior Approval of the Concentration of Undertakings 2002;
- the Methodology for Establishment of the Monopoly (Dominant) Position of the Undertakings on the Market 2002;
- the Guidelines on Calculation of Fines for Violation of Ukrainian Competition Law 2016;
- the Guidelines on the Assessment of Horizontal Mergers 2016;
- the Guidelines on the Assessment of Non-Horizontal Mergers 2018;
- the Guidelines on the Definition of Control 2018;
- the Guidelines on the Assessment of Joint Ventures 2019; and
- the Guidelines on the Application of SSNIP Test 2020.

The Anti-Monopoly Committee of Ukraine (AMC) is the primary state authority entrusted with ensuring the protection of competition. It has powers to investigate and grant or refuse clearances for mergers (concentrations), and to investigate and penalise violations of the merger control regime. If the AMC refuses to approve a concentration, the Cabinet of Ministers may overrule the decision under certain conditions.

Scope of legislation

2 What kinds of mergers are caught?

The Competition Law uses the term 'concentration', which is defined quite broadly to cover the following transactions:

the merger or consolidation of previously independent undertakings;

the acquisition of direct or indirect control over an undertaking, including through:

- the acquisition or lease of the assets of an undertaking (including in the process of its liquidation);
- obtaining rights that allow decisions to be made over the business activity of the undertaking; binding orders to be given or management functions of the undertaking to be performed; and/or decisive influence over the formation of the management body, and on the results of voting or decision-making by the undertaking's bodies;
- the acquisition of participation interests (shares or equity) in the undertaking; or
- appointments to certain positions (eg, chair, deputy chair, or more than half the members of decision-making or supervisory corporate bodies), etc, if the same persons already hold those positions in other undertakings (ie, cross-directorship);

- the establishment by two or more undertakings of a new undertaking that will independently carry out a fully functional business activity on a lasting basis.

With regard to point (2), although the provision lists only some examples of notifiable transactions, it is intended to cover acquisitions in respect of any kind of control.

In the case of multiple acquisitions, the AMC requires each acquisition that formally qualifies as a concentration to be notified separately; that is, acquisitions of shares in a number of entities from the same seller shall be cleared by the AMC by issuing the applicable number of separate clearance decisions.

The Competition Law also provides for a number of exemptions from the filing obligation. In particular, the following transactions do not qualify as concentrations, meaning that no merger clearance is required irrespective of the parties' turnover or asset value figures:

- the establishment of a new undertaking that will not independently carry out a fully functional business activity on a lasting basis (such establishment may be regarded as a concerted practice and may require antitrust clearance);
- the acquisition of participation interests (shares or equity) that qualifies as a financial buyer transaction (ie, the shares are acquired by a financial institution for the purposes of further resale within one year (may be extended), provided that the acquirer does not exercise voting rights attached to the acquired shares);
- the acquisition of control over an undertaking, or part thereof, by a receiver or a representative of a state authority (eg, in an insolvency procedure);
- intra-group transactions, provided that control relations within the group were established in compliance with Ukrainian merger control rules;
- the acquisition by a bank or another financial institution of shares or assets of an undertaking if the acquisition is made in recovery proceedings and is provided by the restructuring plan approved in accordance with the Law on Financial Restructuring 2016, assuming that those shares or assets will be further resold to a third party within the ensuing two years; and
- the acquisition by a bank of shares or assets of an undertaking as a result of enforcement of a pledge (mortgage), if further resale of such shares/assets is made within a one-year period (may be extended) and provided that the bank does not exercise voting rights attached to shares/conduct business with the assets in the meantime.

3 What types of joint ventures are caught?

The Competition Law states that the establishment by two or more undertakings of a new undertaking that will independently carry out a fully functional business activity on a lasting basis qualifies as a concentration.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Law provides for a very broad definition of 'control', referring to the ability to exercise decisive influence (including via blocking rights) on the strategic decisions related to the business activity of an undertaking. In particular, control is deemed to exist if an undertaking:

- directly or indirectly holds or manages more than 50 per cent of the shares, participation interest or votes, or is entitled to receive at least 50 per cent of the profits of another undertaking;
- owns, or has the right to use (eg, lease), all or a major part of the assets of another undertaking;
- is authorised to appoint the chief executive officer (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 the positions of CEO, vice CEO, chair, vice chair or more than 50 per cent of the members of said board or committee, etc, of two undertakings); or
- otherwise controls another undertaking (eg, through contractual (management) arrangements).

In 2018, the AMC introduced the Guidelines on the Definition of Control, which provide further guidance regarding the concept of control. In particular, the Guidelines:

- distinguish between negative and positive sole control – negative control arises where a shareholder has veto rights with respect to strategic decisions but cannot adopt those decisions independently;
- recognise the difference between de jure and de facto types of sole control – in contrast to de jure control, de facto control may arise because of specific case-by-case circumstances (eg, a minority shareholder may have decisive influence at the general meeting level, relying on prospective assessment of past shareholder participation and voting patterns); and
- clarify that veto rights over budgets, business plans, strategic investments, appointments of senior management or activities in certain markets will generally be regarded as control.

The Guidelines further clarify that a change to the quality of control occurs in situations where there is a change from sole to joint control or vice versa, or an increase in the number or a change to the identity of controlling shareholders. No changes to the quality of control arise in the case of a switch from negative to positive sole control or changes to the level of shareholdings of the same controlling shareholders, provided that the powers they have remain the same.

Standard minority shareholder protection rights (eg, veto rights on changes to the statute, an increase or decrease in capital, or liquidation) are generally not regarded as conferring control over the undertaking.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A transaction that qualifies as a concentration requires merger clearance by the AMC if it satisfies either of the following tests:

- the combined worldwide value of the assets or turnover of the parties to the concentration exceeds €30 million and the value of the Ukrainian assets or turnover of each of at least two parties exceeds €4 million; or
- the value of the assets in Ukraine or the Ukrainian turnover of one party exceeds €8 million and the worldwide turnover of at least one other party exceeds €150 million.

All figures are taken from the financial year immediately preceding the year of the concentration.

In either case, the parties to a concentration should be considered at their group level, taking into account all control relations. In the case of acquisitions, the assets/turnover of the undertakings that lose control post-transaction should not be attributed to the target if the target (i) does not have any assets in Ukraine, (ii) is not active in Ukraine (including, eg, by way of cross-border supplies to Ukraine), and (iii) was not active in Ukraine during the two preceding financial years.

Concentrations that fall below these thresholds do not require merger clearance by the AMC. However, the parties may voluntarily file those concentrations; for instance, where the thresholds cannot be checked comprehensively or the check requires appreciable efforts.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory. Apart from transactions that do not qualify as concentrations, there are no other exceptions.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

An obligation to notify arises if the parties meet the Ukrainian filing thresholds, irrespective of the overall effect of the transaction in Ukraine; thus, even foreign-to-foreign deals that have no reasonable nexus to Ukraine and its competitive environment may be caught.

However, pursuant to the general provisions of the Competition Law, an argument can be made that any application of the turnover or asset thresholds should be qualified by the effects doctrine. Under this interpretation, it may be argued that foreign-to-foreign mergers do not require clearance if they lack a reasonable local nexus and cannot have any anticompetitive effect in Ukraine.

Nevertheless, this argument runs contrary to the current and past approaches of the AMC in its application of the merger control rules. The AMC claims that such transactions are subject to clearance as it has exclusive authority to determine whether a particular transaction may impact competition in Ukraine, and verification of impact is conducted while reviewing a merger case and granting clearance.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Ukraine introduced sanctions against certain Russia-related companies. The list includes companies that are mainly from Russia and Ukraine, as well as several companies from other jurisdictions.

The AMC will reject merger control notifications or drop their review (if the notifications have already progressed to Phase I or II) if:

- 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
- a particular type of sanction applies to a given individual or entity (eg, prohibition on disposal of assets or equity).

Foreign companies are subject to certain restrictions (eg, they are restricted from owning agricultural land) and limitations (eg, a Ukrainian air carrier cannot obtain a Ukrainian air transportation licence if a foreign entity owns 50 per cent or more of the carrier's share capital).

In addition, special rules apply to the review of notifications that concern the capitalisation and reorganisation of Ukrainian banks. The AMC will review them and grant clearances within 10 days of receipt of a complete set of documents.

Also, temporal exemption (until the end of the martial law in Ukraine and for 90 days after that) from merger clearance was introduced for certain cross-border transactions in the military/defence sector that aim to bolster Ukraine's defence capabilities.

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 clearance by the Anti-Monopoly Committee of Ukraine (AMC) is obtained before the concentration is implemented. 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 the fine is imposed, but in practice, the fines in merger cases are considerably lower. The Guidelines on Determination of Fines for Violation of Ukrainian Competition Law 2024 (the Guidelines on Fines), says that the base fine for such violation may be up 30 per cent or up to 15 per cent (depending on the actual consequences of violation) of the turnover on the relevant (and adjacent) markets for the previous financial year. The base fine may be further increased or decreased based on aggravating/attenuating factors and some other circumstances. The fine calculated under the Guidelines on Fines

should not exceed the statutory ceiling provided by the law (5 per cent of the turnover in the year preceding the fine decision).

A fine may be imposed on one undertaking or a group of undertakings whose actions or omissions have led to violation of the Law on Protection of Economic Competition 2001 (the Competition Law) (in practice, on the acquiring party, on the founding partners in the case of the establishment of a joint venture, or on the merging entities).

Fine decisions have been publicly available since mid-July 2015. Since then, the AMC has imposed more than 100 fines for failure to notify, or closing or integrating activities before clearance. In most cases, the fines did not exceed 510,000 hryvnas and were likely imposed for implementing non-problematic transactions. The AMC publishes only redacted versions of decisions on its website and it is not possible to comprehensively analyse the factors behind the calculation of a fine. Average fines are expected to increase with the adoption of the new Guidelines on Fines.

In addition to financial penalties, the other drawbacks of non-compliance are:

- potential third-party damages claims (double the amount of actual damages sustained);
- reputational issues (information about the imposed fine, the identity of the parties and a non-confidential version of the decision are published by the AMC on its website);
- possible complications for the Ukrainian clearance of future transactions as the AMC may sometimes scrutinise these more actively; or
- hypothetically, invalidation of the transaction.

10 | Which parties are responsible for filing and are filing fees required?

Filing is a joint obligation for the participating undertakings, which can mean the acquirer and the target, the founding partners with respect to joint ventures, or merging entities. The controlling seller can also be the applicant on the target's side.

The filing fee is 42,500 hryvnas per notifiable event. A transaction may require multiple notifications depending on its structure.

11 | What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The parties are subject to a standstill obligation. Closing prior to clearance constitutes a violation of Ukrainian merger control rules. The suspension requirement applies globally and Ukrainian merger control rules do not provide for any possibilities to obtain individual derogation or avoid sanctions by carving out Ukraine.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The same sanctions apply in the case of closing or integrating the activities of the merging businesses (even partly) before clearance as those that apply in the case of not filing at all.

In practice, closing a non-problematic transaction before clearance but after filing is likely to receive a more favourable treatment by the AMC than omitting notification completely.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Yes. There were at least three such cases in 2022, which concerned the acquisition of a food packaging business in Italy, Poland and Spain. The fine in each case was approximately 431,000 hryvnas.

There were also two such cases in 2023. In both, the transactions were notified to the AMC prior to clearance; the AMC then opened Phase II, after which parties carved out Ukraine from the scope of the deal and closed before clearance. In the first case the fine was 5.8 million hryvnas and in the second the fine was 24.9 million hryvnas.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There are no such solutions. Hold-separate or carve-out arrangements would not help to avoid liability, but may be treated by the AMC as a mitigating factor when deciding the amount of a fine.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

For public takeovers, auctions and tenders, the notification can be made both before and after the start of the bid, but, as a general rule, not later than 30 days after announcing the winner.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The requirements differ depending on the procedure and include:

- for the simplified procedure:

  - a description of the transaction structure, the timeline for its implementation, along with the draft or copy of transactional documents (share purchase agreement, memorandums of understanding, etc) and information if clearance is sought or has been granted in other jurisdictions;
  - a description of the source of financing, indicating the terms and conditions, and submitting documents to confirm the availability of own funds (eg, balance sheet) or to evidence that a financial institution lending funds does not acquire control over the borrower as a 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, a 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; and

- for the standard procedure (in addition to the above simplified procedure list):

  - detailed economic analysis of the transaction's effect on the Ukrainian market;
  - information regarding membership of associations; and
  - parties' excerpts from the trade register or similar (notarised and apostilled or legalised).

Furthermore, along with the hard copy of the notification, parties are required to provide a flash drive with an electronic version (PDF, Word document, etc) of the notification and all documents attached to it.

Documents to be submitted to the AMC should be duly certified and translated into Ukrainian. Confidential information should be properly marked in the notification so that the AMC treats it accordingly.

With regard to information missing from the notification, the following scenarios may arise:

- If required information is missing from the start, the AMC 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 a scenario, no sanctions are applied.
- If the parties fail to submit information upon request within the Phase II review, the AMC may close a merger case without ruling on the essence. The parties, however, may resubmit their application.

The provision of wrong or false information in the filing may result in a fine of up to 1 per cent of the applicable party's turnover in the year immediately preceding the year when the fine is imposed.

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?

Ukrainian law does not provide for formal consultations with the AMC before notifying a merger, although informal consultations are usually possible. After notifying a merger, the standard review process will include the following steps:

- In the preview period, the AMC has 15 calendar days to decide whether the notification is complete and can be accepted for substantive review (Phase I). If it considers the notification incomplete, it can be rejected without review on the substance. In this case, the parties would need to file a supplemented notification anew, restarting the process.
- The Phase I review 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 lasts for up to 30 calendar days, during which the AMC will either grant clearance or initiate Phase II.
- If the AMC sees any grounds to prohibit the concentration, it can initiate a Phase II review, which involves a close analysis of the transaction and the associated competition concerns, and an examination of expert opinions and other additional information. Phase II may last up to three months from the date when the AMC receives all requested information from the parties. Additional requests from the AMC may extend the review period.

A fast-track simplified 25-day review procedure is available for transactions where only one party is active in Ukraine, or the parties' combined shares do not exceed 15 per cent in the relevant markets and 20 per cent on vertically related markets.

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, with no prolongation being possible; and
- Phase II review period (if competition concerns are identified): three months after receipt by the AMC of all requested data (extendable if additional documents, information or expert opinion are required).

A fast-track, simplified 25-day review procedure is available for certain transactions that reasonably raise no competition concerns.

The AMC usually takes the whole of the Phase I review period to review transactions and adopts the relevant decisions during the final week before the deadline. In practice, it is possible to request a faster review, although there is no formal procedure for this.

The Competition Law states that if the AMC has failed to adopt any decision on the concentration before or on the date that the Phase I or Phase II period expires clearance by tacit consent is deemed to have been granted. In practice, the AMC tends to issue formal clearances.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

Pursuant to the Law on Protection of Economic Competition 2001, the Anti-Monopoly Committee of Ukraine (AMC) will approve a 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. Otherwise, the transaction will be prohibited unless the parties offer sufficient remedies.

The test for dominance is as follows:

- above 35 per cent market share if held individually;
- above 50 per cent market share if held collectively by two or three undertakings with the largest market shares; and
- above 70 per cent market share if held collectively by four or five undertakings with the largest market shares.

Under the Guidelines on the Assessment of Horizontal Mergers 2016 and the Guidelines on the Assessment of Non-Horizontal Mergers 2018, the following countervailing factors can be considered while reviewing concentrations:

- the likelihood that buyer power would act as a countervailing factor;
- the likelihood that entry would maintain effective competition on the relevant markets; and
- the 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.

Under the Guidelines on the Assessment of Horizontal Mergers 2016, the AMC is also required to assess whether the concentration would result in any of the following effects:

- unilateral or non-coordinated effects – whether the merger would eliminate important competitive constraints on one or more firms, which consequently would increase market power; and
- coordinated effects – whether the merger would change the nature of competition such that firms that previously were not coordinating their behaviour would have been significantly more likely to coordinate and raise prices or otherwise harm effective competition.

Further, under the Guidelines on the Assessment of Non-Horizontal Mergers 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' abilities or incentives to compete by combining products in closely related markets to leverage a strong market position from one market to another by means of tying or bundling practices; and
- coordinated effects – the possibility of non-horizontal mergers increasing the likelihood of tacit coordination.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

The AMC predominantly considers competition issues. Other considerations may still be used as supporting arguments, although they are unlikely to be decisive.

The Cabinet of Ministers may overrule an AMC prohibition decision when the positive effects of the transaction on the public interest outweigh the negative impact of the restriction of competition caused by the transaction.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The AMC may take into account economic efficiencies when reviewing a notification, although such arguments are unlikely to be decisive. In cases that pose serious competition concerns, adequate remedies would nevertheless be required.

However, economic or other efficiencies are taken into account by the Cabinet of Ministers, which may 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 the 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 Anti-Monopoly Committee of Ukraine (AMC) can prohibit a concentration if it leads to monopolisation or a substantial restriction of competition in the Ukrainian market.

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 (eg, divestitures) or behavioural (eg, restrictions on the use or management of certain assets or price increases).

Under the Law on Protection of Economic Competition 2001, if during the Phase II review the AMC sees any grounds for a merger to be prohibited, it shall inform the parties of those 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.

Offering remedies during Phase I is not prohibited, but would most likely automatically bring the case to Phase II as Phase I review implies the absence of any substantive competition concerns; thus, the initiation of discussions on remedies with the AMC is unlikely to help the avoidance of a Phase II investigation.

In practice, remedies in most cases are behavioural and conditional clearances often include reporting requirements that allow the AMC 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 and 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?

Over approximately the past five years, the AMC has cleared transactions subject to binding commitments in less than 5 per cent of foreign-to-foreign mergers.

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 (eg, 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 Anti-Monopoly Committee of Ukraine (AMC) may involve third parties (competitors, suppliers and consumers, experts, etc) in the merger case review process if its decision on the notified transaction may significantly affect rights and interests in competition. Third parties may be involved during Phase II. The AMC acts fully autonomously when deciding on the issue and its decision is then communicated to the notifying parties.

Third parties can submit their observations and objections – in particular, relating to the notified transaction and its impact on the market. Such submissions are then attached to the case as evidence and must be considered 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 a request for information or documents, the AMC 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?

Confidentiality does not automatically apply to information submitted, but may be available to the parties on their request. The parties shall provide a grounded justification when applying for confidentiality, as well as a non-confidential version of the information. If not satisfactorily justified, the parties' confidentiality request will be rejected by the AMC.

The AMC is required to publish short notices regarding its resolutions on the initiation of a Phase II review, non-confidential versions of its decisions in merger and concerted practice applications or cases, and decisions in cases on competition law violations within 10 working days of the adoption of the resolution or decision. The AMC may also publish on its website other information on Phase II and violation cases, if it deems this appropriate.

The AMC also publishes on its website a short note of the resolution or decision made containing 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 by the AMC with other competition authorities is usually based on bilateral treaties. Ukraine has entered into cooperation agreements with, among others, the European Union, Bulgaria, Hungary, Latvia, Lithuania and Slovakia. Also, in 2023 the AMC entered into the Memorandum on Regional Cooperation with 10 competition authorities of Central and Eastern Europe. The AMC may exchange information with these authorities about current or past cases, or cooperate with them more broadly (eg, regarding the introduction of changes to competition legislation).

The AMC also cooperates with international organisations, such as the Organisation for Economic Co-operation and Development, the UN 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 Anti-Monopoly Committee of Ukraine (AMC) prohibits the concentration, the Cabinet of Ministers may still grant clearance if positive effects on the public interest outweigh the negative impact of the restriction of competition, unless that restriction is not necessary for achieving the purpose of the concentration or it jeopardises the market economy system. Nevertheless, there are no publicly available cases of the Cabinet granting clearance for a concentration that was prohibited by the AMC. There was a case in 2005 in which the Cabinet ordered the establishment of a state corporation, despite this having been prohibited by the AMC, but there is little publicly available information about the case.

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 of 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 court – the Supreme Court of Ukraine (the commercial court of cassation).

Because there have been very few AMC prohibition decisions, and in each of those cases the AMC 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 AMC clearance decisions.

Nevertheless, there have been several notable appeal cases, including regarding the AMC clearance decision in the *Procter & Gamble/Olvia-Beta Cleaning Products* assets case, in which the definition of the relevant product market was 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 of the receipt of the decision. Consideration of cases may last:

- at first instance, up to 135 calendar days;
- at appeal, up to 75 calendar days; and
- at cassation, up to 80 calendar days.

These terms are not always adhered to because of the courts' heavy workload, insufficient personnel, the necessity of conducting additional investigations, and collection of documents and information, among other factors.

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 Anti-Monopoly Committee of Ukraine (AMC) statistics, in 2023, the AMC reviewed 596 merger notifications.

Of these, 312 were cleared, 254 were rejected by the AMC or withdrawn by the parties, and in one case the AMC did not take any decision. The vast majority of applications did not raise competition concerns and were cleared within Phase I. Phase II investigations were initiated in 14 cases.

Reform proposals

35 | Are there current proposals to change the legislation?

The merger control legislation was substantially updated in 2023. According to the AMC, it is working on further changes to the law. The draft amendments are likely to be published in mid-2024.

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

The changes to the competition law became effective on 1 January 2024. In particular, these changes have slightly remodelled the notification thresholds, which may now also catch transactions where a target is not present in Ukraine, but has worldwide turnover at a group level (ie, including controlling parents) of more than €150 million, provided that the acquirer has Ukrainian assets or turnover over €8 million.

The changes have also partially resolved the problem of attributing the assets and turnover of the exiting seller to the target. Now, the assets and turnover of the seller(s) that cease to control the target post-transaction should not be counted towards the target if the target (i) does not have any assets in Ukraine, (ii) is not active in Ukraine (including, eg, by way of cross-border supplies to Ukraine), and (iii) was not active in Ukraine during the two preceding financial years.

Also, the changes have clarified the full-functionality criterion that is applicable to the establishment of joint ventures and also introduced some other improvements (eg, clarified rules for application of simplified review procedure, removed requirement to notify acquisition of minority non-controlling investments).

Revised Merger Regulation

The Merger Regulation was updated in February 2024 to align with the changes to the law and to introduce other improvements to the procedure. In particular, the revised document clarified rules applicable to calculation of thresholds, specified the timeline and procedure of Phase II, detailed the procedure of negotiating remedies, and clarified rules applicable to review of transactions resulting from auctions/tenders.

New Guideline on Fines

The new Guideline on Fines was introduced in February 2024. It contains rules that the Antimonopoly Committee of Ukraine should follow when determining the amount of fine in different situations. In particular, according to this document, the fine for failure to notify mergers may reach up to 30 per cent or 15 per cent of turnover on the relevant (and adjacent) market for the previous year, depending on the existence of negative effects for the market.

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Notification trigger/ filing deadline	Notification is triggered if one of the below thresholds are met: • turnover threshold: total annual sales of the parties in the market during the preceding fiscal year exceeds an amount to be determined by the UAE Council of Ministers; or • market share threshold: combined share of the parties' transactions as compared to the total transactions in the relevant market during the preceding fiscal year exceeds the percentage which is to be determined by the UAE Council of Ministers. Filing deadline: At least 90 days prior to completion of the transaction.
Clearance deadlines (Phase I/Phase II)	The statutory period is 90 days extended for another 45 days. The clock does not start until the fulfilment of all conditions with the complete application. If a decision is not made within the statutory period, it is deemed to be rejected.
Substantive test for clearance	The substantive test for clearance is: • the level of actual and potential competition in the relevant market; • the ease with which new undertakings can enter the relevant market; • the potential impact on prices of relevant goods or services; • whether there are systemic barriers that hinder the entry of new competitors; • the likelihood of a dominant position emerging in the relevant market; • the potential impact on innovation, creativity, and technical competence; • the contribution required to promote investment or export, or to enhance the ability of UAE undertakings to compete globally; and • the impact on consumer interests.
Penalties	**Failure to file** • 2 per cent and 10 per cent of their annual sales or revenue from services in the UAE from the previous financial year. • In cases where sales data cannot be determined, fines can range from 500,000 dirhams to 5 million dirhams). These penalties are subject to doubling in instances of recurrence. **Gun-jumping** 50,000 dirhams and no more than 500,000 dirhams.
Remarks	None.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Federal Decree-Law No. 36/2023, which entered into force 29 December 2023, replaced the previous competition law, Federal Decree-Law No. 4/2012 in the UAE.

As to the implementing regulations, the Cabinet Resolution No. 37 of 2014 concerning the implementing regulations of Federal Decree-Law No. 4 of 2012 are still applicable pending the issuance of the new implementing regulations of the Federal Decree-Law No. 36/2023.

The Ministry of Economy/authority is leading the enforcement and is the relevant authority that sets mandates and competencies in relation to competition.

Scope of legislation

2 | What kinds of mergers are caught?

All types of mergers can be caught. Transactions involving mergers and acquisitions are referred to as 'economic concentrations'. Economic concentration is defined quite widely under Federal Decree-Law No. 36/2023 as: 'any act that results in a whole or partial transfer (merger or acquisition) of title or usufruct of property, rights, shares, stocks or obligations of an organisation to another organisation which would enable an organisation or a group of organisations to have direct or indirect control over an organisation or a group of other organisations'.

3 | What types of joint ventures are caught?

The definition of 'economic concentration' under Federal Decree-Law No. 36/2023 is very broad and may apply to a wide range of joint ventures. Establishments are widely defined to include any person (or any related person) or group of persons practising an economic activity in the UAE, regardless of the legal form.

At the moment, there are no guidelines to rely upon in relation to joint ventures. It is still not clear whether joint ventures should be full function for them to be notifiable.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

There is no specific 'control' assessment for merger control, unlike the EU. To elaborate, while the definition of economic concentrations refers to 'control', it was not addressed further nor defined in Federal Decree-Law No. 36/2023.

In essence, control is not considered as a determining factor in the context of a UAE merger control filing. Rather, the determining factor will always be whether or not such transactions create dominance in a way that would negatively impact competition.

Consequently, acquisitions of minority interests can also be caught where the relevant thresholds are met. It remains to be seen the extent to which the Federal Decree-Law No. 36/2023 and new implementing regulations (once issued) 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?

A notification is required if any of the below is met:

- turnover threshold: total annual sales of the parties in the market during the preceding fiscal year exceeds an amount to be determined by the UAE Council of Ministers; or
- market share threshold: combined share of the parties' transactions as compared to the total transactions in the relevant market during the preceding fiscal year exceeds the percentage that is to be determined by the UAE Council of Ministers.

We are not aware of any circumstances in which transactions falling below these thresholds have been investigated. If transactions below thresholds still manage to negatively impact on competition in the UAE, then the authority would have the discretion to review such transactions.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing is mandatory, and a transaction cannot close until approval is granted. Federal Decree-Law No. 36/2023 has now removed the list of sectors exempted under Federal Decree-Law No. 4/2012. A sectorial exemption is only granted if the relevant sector already regulates competition matters through its own laws or regulations – that is, it has established rules addressing anticompetitive practices, relevant exemptions, and procedures for approval of merger filings. Furthermore, Federal Decree-Law No. 36/2023 allows sectors lacking specific competition rules to apply to the authority to request oversight in regulating competition within their sectors.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Federal Decree-Law No. 36/2023 also extends to foreign-to-foreign transactions that meet jurisdictional thresholds and have the potential to impact competition in the UAE market. The specific type of UAE nexus required to trigger a filing under Federal Decree-Law No. 36/2023 remains unclear. This is anticipated to be clarified in the upcoming cabinet resolutions and/or implementing regulations.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no specific rules on foreign investment, special sectors or the like. Federal Decree-Law No. 36/2023 has now removed the list of sectors exempted under Federal Decree-Law No. 4/2012. A sectorial exemption is only granted if the relevant sector already

regulates competition matters through its own laws or regulations – that is, it has established rules addressing anticompetitive practices, relevant exemptions and procedures for approval of merger filings. Furthermore, Federal Decree-Law No. 36/2023 allows sectors lacking specific competition rules to apply to the Ministry of Economy to request oversight in regulating competition within their 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?

Filing must be made at least 90 days prior to the completion of a transaction. The application for approval of an economic concentration must be filed at least 90 days prior to completion of the transaction.

As to the sanctions for not filing, Federal Decree-Law No. 36/2023 stipulates the conditions for completing an economic concentration. Entities found in violation face fines ranging between 2 per cent and 10 per cent of their annual sales or revenue from services in the UAE from the previous financial year.

In cases where sales data cannot be determined, fines can range from 500,000 dirhams to 5 million dirhams.

Adiitionally, UAE courts hold the authority to temporarily shut down facilities belonging to infringing companies for periods ranging from three to six months. Moreover, judgments against violators can be publicly disclosed in two local daily newspapers, ensuring transparency and deterrence against future breaches.

10 Which parties are responsible for filing and are filing fees required?

Federal Decree-Law No. 36/2023 requires the 'concerned establishments' to submit a notification for approval of the transaction. Said decree does not allocate responsibility between buyer and seller for submission of the filing (the relevant provision merely states that the 'concerned establishments' are required to submit a request for clearance to the Ministry of Economy). That being the case, it is typically the buyer (in an acquisition) that leads the clearance request process and typically signs the request for clearance. In the context of a true 'merger', the typical approach is submitting a jointly signed clearance request.

To be clear, this concerns procedural practice on merger control clearance and does not reflect any statutory position on allocation of liability for a failure to notify (which, as mentioned, remains unspecified).

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 seller or business being acquired.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The statutory period is 90 days extended for another 45 days. The clock does not start until the fulfilment of all conditions with the application. If a decision is not made within the statutory period, it is deemed to be rejected. This represents a departure from the previous Federal Decree-Law No. 4/2012, which considered the end of the statutory period as implicit approval.

Review clock stoppage occurs under the following circumstances:

The authority requests additional information from the parties, which can occur:

- when inviting interested parties to express their views on the transaction (based on basic information published on the website);
- if any interested party wishes to submit data or documents to the authority related to the transaction; or
- when the authority requires a technical opinion or further information.

Every interested party has the right to file an objection regarding the transaction. The implementing regulations of Federal Decree-Law No. 36/2023 should specify the modalities, timelines, and mechanisms for the above. Given these potential interruptions, the 90 days + 45 days review timeline should be regarded only as an estimated time frame, which may be extended if any of the aforementioned events occur.

The regime is suspensory. The parties must not carry out any actions or procedures to complete the economic concentration operations until clearance of the transaction by the authority.

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?

Federal Decree-Law No. 36/2023 prohibits the establishments concerned from initiating any actions or procedures to conclude the transaction during the review period. Entities found in violation face fines ranging no less than 50,000 dirhams and no more than 500,000 dirhams.

Furthermore, an aggrieved party has the right to resort to claim for compensation should they suffer damages as a result of the violation of the provisions of Federal Decree-Law No. 36/2023.

Additionally, UAE courts (upon conviction) hold the authority to temporarily shut down facilities belonging to infringing companies for periods ranging from three to six months.

Moreover, judgments against violators can be publicly disclosed in two local daily newspapers, ensuring transparency and deterrence against future breaches.

13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Federal Decree-Law No. 36/2023 does not distinguish between mergers involving local or foreign entities. There are no different sanctions for foreign-to-foreign mergers. Closing before clearance, or any other form of integration before clearance, may result in a fixed fine of between 50,000 dirhams and no more than 500,000 dirhams.

14 | What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There are no sufficient enforcement cases to provide a definitive view on this. It is not clear what would be acceptable for the authority in relation to hold-separate or other arrangements.

Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

Federal Decree-Law No. 36/2023 does not address specifically public takeover bids. The UAE Securities and Commodities Authority deals with all approvals for mergers and takeover bids related to public companies listed on the Abu Dhabi Securities Exchange or the Dubai Financial Market.

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 form is quite detailed. The parties are required to share details including but not limited to their sales volume, identify their competitors, identify their most important clients, volume of ordering goods, their most important agreements along with other information and data necessary for the authority to complete their assessment. The parties are also required to submit a report on the economic dimensions and competition effects of the economic concentration. This report must highlight the positive impacts on the relevant market and outline the obligations and proposed procedures by the relevant organisations to mitigate any possible negative effects of the transaction.

In addition, the parties are required to comply with the procedural requirements for the merger filing as outlined under the current implementing regulations. It is expected that these formalities and requirements are to change once the new implementing regulations are issued.

If the information provided is missing, these would be requested through an RFI for the parties to complete. If, however, the information provided is wrong or misleading, the authority will have the power to revoke the clearance with the right to take appropriate legal actions against the violating parties(s) arising from said breach.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

The review or investigation is not split into phases. The authority will review the filing form and supporting documents and may request additional documents and information from the parties. Federal Decree-Law No. 36/2023 does not provide specific timeframes for the individual phases of the investigation.

The parties may submit a remedies proposal either with the original application, or within 30 days of the date the application is considered as complete (ie, all conditions and formalities satisfied).

18 | What is the statutory timetable for clearance? Can it be speeded up?

The timetable for review is 90 days as of receipt of a complete notification, which may be extended by a further 45 days. Federal Decree-Law No. 36/2023 and implementing regulations do not currently provide for an expedited review process. It remains to be seen if this will be addressed in the upcoming implementing regulations.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The authority employs a substantive test that assesses various criteria when reviewing notifications:

- the level of actual and potential competition in the relevant market;
- the ease with which new undertakings can enter the relevant market;
- the potential impact on prices of relevant goods or services;
- whether there are systemic barriers that hinder the entry of new competitors;
- the likelihood of a dominant position emerging in the relevant market;
- the potential impact on innovation, creativity, and technical competence;
- the contribution required to promote investment or export, or to enhance the ability of UAE undertakings to compete globally; and
- the impact on consumer interests.

20 | Is there a special substantive test for joint ventures?

There is no special substantive test for Joint ventures. They are treated similarly to other transactions, focusing on whether they meet jurisdictional thresholds and assessing potential restrictive practices or abuses of dominant positions. Apart from evaluating economic concentration aspects, the authority examines whether a joint venture could be deemed a restrictive agreement or involve abuse of dominance.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The authorities will investigate any harmful effects on competition. These include market dominance, unilateral effects, coordinated effects, conglomerate effects, vertical foreclosure, harm to innovation and common ownership concerns. Each of these factors plays a crucial role in assessing the potential anticompetitive effects of transactions on the relevant markets in the UAE.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

While the crux of competition assessment is the impact on competition, other topics such as public interest could be considered by the authority when making their assessment.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

Federal Decree-Law No. 36/2023 allows for contracts and economic activities to be exempt from the provisions related to restrictive agreements, abuse of dominant position, economic dependency, predatory pricing if they are essential for advancing economic growth, enhancing performance of corporations, and competitiveness, refining production or distribution systems or delivering specific advantages to consumers. These exemptions may be considered by a decision made by the Minister of Economy or authorised representative in collaboration with the relevant authority. This is as long as granting such exemptions will not result in the total elimination of competition within the relevant market or a substantial part thereof.

While these exemptions do not specifically address economic concentration, they are good parameters to gauge the position of the authority when it comes to economic efficiency.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The authorities have the power to conduct investigations and make recommendations to the Minister of Economy on the appropriate actions. The authorities have the authority to approve a transaction unconditionally or stipulate conditions and remedies. The authority also has the power to revoke clearance if the circumstances under which it was granted change, if the parties fail to meet the specified conditions, or if the approval was based on

misleading or incorrect information. In such cases, the authority has the right to take appropriate legal actions against the parties responsible for the breach.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Federal Decree-Law No. 36/2023 allows parties to submit an undertaking on the measures they will take to prevent possible anticompetitive effects of a transaction. These could include possible remedies to mitigate any potential concerns.

In addition, the authority has the powers to approve a transaction conditional on the fulfilment of certain terms or obligations. These obligations could be in the form of remedies.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

These are not addressed under Federal Decree-Law No. 36/2023. It remains to be seen if they will be addressed in the upcoming implementing regulations.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

We are not aware of the track record of the authority in in requiring remedies in foreign-to-foreign mergers. This is mainly due to decisions of the authority not being made public to date.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A clearance decision is issued in one of three forms: first, a clearance decision that approves the transaction if it does not harm competition or if it benefits competition in a way that outweighs any negative effects; second, a conditional clearance that requires the involved parties to comply with specified conditions (remedies); or third, a decision to reject the transaction altogether.

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?

Federal Decree-Law No. 36/2023 allows the authority to invite ‘interested parties’ to express their views on the transaction. In addition, the authority has the right to seek assistance of

any party it deems appropriate when assessing the transaction. Interested parties have not been defined and could be construed to include customers or competitors.

In addition, said interested parties have the right to file an objection with the authority in relation to the transaction. It is expected that the upcoming implementing regulations address who the interested parties are and outline the periods and modalities for this 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 authority may publish basic information on their website on the transaction.

Federal Decree-Law No. 36/2023 mandates the authority to safeguard the confidentiality of sensitive information that, if disclosed, could cause significant harm. Information reviewed during the notification process cannot be disclosed unless authorised by the concerned parties or requested by relevant authorities.

Breaching these confidentiality obligations can result in penalties stipulated by Federal Decree-Law No. 36/2023, ranging from 50,000 dirhams and no more than 200,000 dirhams.

Documents submitted as part of the notification must be clearly marked as 'confidential', and non-confidential summaries can also be provided. The summaries must sufficiently outline the content of the confidential information.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The UAE is a member of the Arab Competition Network that was established in 2022 by competition authorities from the Middle East and North Africa.

The goal of the Arab Competition Network was to enhance the cooperation and harmonisation between Arabic-speaking antitrust authorities and to support its members within the Middle East and North Africa region to develop their merger control and antitrust regimes along with their enforcement activities.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Federal Decree-Law No. 36/2023 stipulates that any interested party can file a written appeal against any decision issued based on the provisions of said law. This appeal can be filed with the Minister of Economy, the head of the concerned authority, or the head of the regulatory body, as the case may be.

Time frame

33 | What is the usual time frame for appeal or judicial review?

The appeal must be submitted within 15 working days of receiving the notification of the decision provided all supporting documents are submitted. The authority shall issue the final decision within 30 days of the date of submission of the appeal.

The absence of a response to such appeal shall be considered as a rejection of that appeal. The decision in the appeal may not be further reviewed or appealed to the authority; however, it may be appealed with the competent court within 30 days of notification of the decision, or within the lapse of 30 days with no response.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

We are not aware of the recent enforcement track record of the authority given that these decisions have not been made public to date.

Reform proposals

35 | Are there current proposals to change the legislation?

Federal Decree-Law No. 36/2023 which entered into force 29 December 2023, replaced the previous competition law, Federal Decree-Law No. 4/2012 in the UAE. The implementing regulations of Federal Decree-Law No. 36/2023 are expected to be issued imminently along with several key cabinet decisions.

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?

Federal Decree-Law No. 36/2023 introduced significant changes to merger filings particularly with the introduction of turnover thresholds. This change is arguably one of the most significant developments, given the impact a turnover threshold would have on the notifiability of transactions in the UAE.

The specific type of UAE nexus required to trigger a filing under remains unclear. This is anticipated to be clarified in the upcoming cabinet resolutions and/or implementing regulations. Other key decisions expected include (but is not limited to) exemptions for government

entities, the value of filing fees, mechanisms for filing objections to merger applications, procedures for stopping the review clock and details of the formalities required for merger filing applications.

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United Kingdom

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Voluntary or mandatory system?	Voluntary system. Form of notification: Competition and Markets Authority's prescribed form. In English.
Notification trigger/ filing deadline	The turnover in the United Kingdom of the enterprise being taken over exceeds £70 million, or combined share of supply in the United Kingdom of 25 per cent created or enhanced. Filing: no formal time limit.
Clearance deadlines (Phase I/Phase II)	Phase I: 40 working days. Phase II: 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 has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.
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 media mergers, public health emergencies, water mergers and financial stability.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

The primary legal basis for merger control in the United Kingdom is the Enterprise Act 2002, which came into force on 20 June 2003. In April 2014, the Enterprise Act 2002 was significantly amended by the Enterprise and Regulatory Reform Act 2013. In particular, the Office of Fair Trading and the Competition Commission were merged into a single authority, the Competition and Markets Authority (CMA). The CMA's primary duty is to seek to promote competition, both within and outside the United Kingdom, for the benefit of consumers. Published guidance explains how the provisions work in practice, and secondary legislation implements some of the provisions.

The Enterprise Act 2002 established an administrative procedure for merger control, which is now solely implemented by the CMA. In limited cases that raise defined public interest issues, the secretaries of state for business and trade or culture, media and sport may also be involved in decision-making processes.

Under the general Enterprise Act 2002 merger regime:

- the CMA has a duty to refer mergers (anticipated or completed) for a Phase II review where it believes that there is, or could be, a relevant merger situation that has resulted, or may be expected to result, in a substantial lessening of competition (SLC) in the United Kingdom – exceptions to the duty to refer exist in certain circumstances;
- following a reference for a Phase II investigation, the CMA conducts a more detailed analysis to determine whether:
  - a relevant merger situation has been or will be created;
  - that relevant merger situation has resulted, or may be expected to result, in an SLC within any markets within the United Kingdom; and
  - it should take any action to remedy any SLC it has identified; and
- different rules are in place for public interest, special public interest, energy network and water merger cases.

In certain circumstances, the CMA has the discretion not to make a referral, despite there being a realistic prospect that the merger will lead to an SLC in a market or markets within the United Kingdom. These exceptions are:

- when the markets concerned are not of sufficient importance to justify a reference (the de minimis exception);
- in the case of anticipated mergers, when the arrangements concerned are insufficiently far advanced, or insufficiently likely to proceed, to justify a reference; or
- when any relevant customer benefits arising from the merger outweigh the SLC concerned and any adverse effects of the SLC concerned.

More information about these exceptions is available on the CMA's website (see 'Mergers: Exceptions to the duty to refer (April 2024)').

Digital Markets, Competition and Consumers Act

After receiving views from a range of interested parties on its consultations on 'Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers' and 'A new pro-competition regime for digital markets', the draft Digital Markets, Competition and Consumers Bill (the DMCC Bill) was introduced to Parliament on 25 April 2023.The DMCC Bill received Royal Assent on 24 May 2024, becoming the DMCC Act, and is expected to enter into force in autumn 2024.

The DMCC Act is the most significant reform to UK competition and consumer laws since the CMA was established in 2014. It will make significant changes to the UK merger control thresholds in the Enterprise Act 2002, including a new acquirer-focused threshold which is aimed in part at targeting so-called 'killer acquisitions', as well as introducing a new mandatory transaction reporting requirement for digital firms that have strategic market status.

National Security and Investment Act 2021

The National Security and Investment Act 2021 (the NSI Act) came into force on 4 January 2022, introducing a new investment screening regime that significantly enhances the government's powers to intervene in transactions on grounds that they could threaten national security. The new regime introduced for the first time a mandatory and suspensory notification requirement for certain deals involving sensitive sectors, with significant penalties for non-compliance as well as broad powers for the government to call in transactions that fall below the mandatory thresholds but may still give rise to national security risks.

The NSI Act replaced the national security aspects of the Enterprise Act 2002's public interest regime but has not otherwise affected that regime. Information relating to the introduction of the NSI Act can be found on the government's website.

Scope of legislation

2 | What kinds of mergers are caught?

The Enterprise Act 2002 applies to any 'relevant merger situation', which may be a completed or anticipated merger (an anticipated merger may be a merger that has been signed but not yet completed or a merger in contemplation).

The CMA must make a reference for a Phase II review where it believes that there is, or there could be, a relevant merger situation that has resulted in, or may be expected to result in, an SLC. Where these conditions are met, a reference for a Phase II review must be made, unless one of the exceptions to the duty to refer applies or, where appropriate, the CMA seeks and accepts undertakings in lieu of a reference from the merging parties.

A relevant merger situation will arise when the following three conditions are satisfied:

- two or more enterprises cease to be distinct (ie, are brought under common ownership or control), or there are arrangements in progress or in contemplation that will lead to the enterprises ceasing to be distinct;
- the merger has not yet taken place or took place no 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 earlier of the announcement or the time the CMA was informed of it); and
- the transaction meets certain jurisdictional thresholds (either the share of supply test or the turnover test).

The Enterprise Act 2002 defines an 'enterprise' as the 'activities, or part of the activities, of a business' that could be carried out for gain or reward (it need not, therefore, be a separate legal entity). CMA guidance (see 'Mergers: Guidance on the CMA's jurisdiction and procedure' (25 April 2024) and the 'Merger Assessment Guidelines' (updated in March 2021) (the Revised MAGs)) indicates that an enterprise may comprise any number of components, most commonly including some combination of the assets and records needed to carry on the business and the employees working in the business, together with the benefit of existing contracts or goodwill, or both. A business need not currently be trading to constitute an enterprise, and the Enterprise Act 2002 does not require that a business (or part thereof) be of any minimum scale or include any particular combination of components to constitute an enterprise.

See the CMA's June 2014 decision in Eurotunnel/SeaFrance.

3 What types of joint ventures are caught?

The creation of a new joint venture, or a change in control or influence over an existing joint venture, may give rise to a relevant merger situation, provided that the share of supply test or the turnover test is met.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

A relevant merger situation will arise when two or more enterprises cease to be distinct (ie, are brought under common ownership or control, or there are arrangements in progress or in contemplation that will lead to the enterprises ceasing to be distinct). The CMA documents 'Mergers: Guidance on the CMA's jurisdiction and procedure' and the Revised MAGs provide guidance on the meaning of 'control'.

Section 26 of the Enterprise Act 2002 distinguishes three levels of interest (in ascending order): material influence, de facto control and controlling interest.

Material influence

Material influence is the lowest level of control that can give rise to a relevant merger situation. When assessing material influence, the CMA focuses on the acquirer's ability to materially influence policy relevant to the behaviour of the target entity in the marketplace (ie, the management of the target's business, including its strategic direction and its ability to define and achieve its commercial objectives).

A shareholding of over 25 per cent is likely to be seen as conferring material influence as it will usually allow the holder to veto special resolutions (even when all remaining shares are held by only one other shareholder).

Shareholdings of below 25 per cent will typically be less likely to confer material influence; however, the CMA may examine any shareholding on a case-by-case basis. The CMA's guidance notes that even shareholdings of less than 15 per cent may amount to material influence when other factors are present, such as board representation, the acquiring shareholder's industry standing and contractual relationships between the enterprises.

For example, see:

- the CMA's 2019 Phase I decision to refer the case to Phase II in Amazon's intended acquisition of a 16 per cent stake in Deliveroo; and
- the Court of Appeal's decision in 2010 upholding a finding that BSkyB's acquisition of a 17.9 per cent stake in ITV gave rise to material influence.

Material influence is a lower threshold than that of decisive influence under the EU Merger Regulation (EUMR), which means that the UK regime can catch transactions that are not caught by the EUMR. For example, see the Ryanair/Aer Lingus merger inquiry.

De facto control

De facto control arises when an entity acquires control over a target's policy, notwithstanding that it holds less than 50 per cent of the voting rights in the target company (ie, it does not have a controlling interest). De facto control requires the ability to unilaterally determine (as opposed to just materially influence) a company's policy.

There is no bright-line distinction between factors that might give rise to material influence and those giving rise to de facto control; however, de facto control is likely to include situations where the acquirer has, in practice, control over more than half of the votes actually cast at shareholder meetings.

Controlling interest

Also known as de jure control or legal control, a 'controlling interest' generally means a shareholding conferring more than 50 per cent of the voting rights in a company. Only one shareholder can have a controlling interest, but it is not uncommon for a company to be subject to the control of two or more major shareholders at the same time, such as in a joint venture in which a minority parent has material influence over the company's policy and the majority parent owns a controlling interest.

In some exceptional cases, a shareholding in excess of 50 per cent may not amount to a controlling interest where an agreement with the other shareholders restricts the majority owner's rights (eg, Coca-Cola Company/Fresh Trading Limited, where a shareholding increase from around 20 per cent to above 50 per cent did not give rise to legal control as the acquirer did not obtain additional voting rights during either shareholder or board meetings).

A change from material influence to de facto control or a controlling interest, or from de facto control to a controlling interest, can constitute a new relevant merger situation.

Assessing theories of harm

The CMA states in its Revised MAGs that, in formulating theories of harm, it will generally assess a merger on the basis of the specific shareholding or influence that will result from the merger situation in question. This means that a theory of harm with respect to a firm that is acquiring material influence over another may be different – and require different analyses – to that involving a firm acquiring a full controlling interest.

However, the CMA notes that in some 'rare instances', if it has evidence that a buyer is contemplating another transaction that will further increase its shareholding or influence over the target but still remain within the same overall level of control, the CMA may take this into account in its competition assessment and consideration of remedy options.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Enterprise Act 2002 provides alternative thresholds based on the share of supply and turnover, respectively.

Share of supply

The share of supply test is satisfied only when the merger itself creates or enhances a 25 per cent share of supply or purchases of any goods or services in the United Kingdom, or in a substantial part of the United Kingdom.

The share of supply test is not a market share test and allows wide discretion in describing the goods or services, which need not amount to relevant economic markets and may differ from the relevant economic market identified for the purposes of the CMA's substantive assessment of the merger.

In 2019, the CMA asserted jurisdiction over the Roche group's acquisition of Spark Therapeutics, even though Spark had generated no sales in the United Kingdom. The CMA's finding of jurisdiction was based on the parties' combined number of UK-based employees engaged in research and development activities, as well as the number of UK patents procured from an administrative patent authority.

Turnover

The turnover test is met if the annual UK turnover of the enterprise being acquired exceeds £70 million. This is determined by aggregating the total value of the turnover in the United Kingdom of the enterprises that cease to be distinct and deducting:

- the UK turnover 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 UK turnover of the highest value of all turnovers concerned.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing in the United Kingdom is voluntary. However, regardless of whether it has received a merger notification from the parties, the CMA may open a merger investigation on its own initiative and subsequently refer the merger for a Phase II investigation (which carries the risk of remedies being imposed even when the transaction has already completed); therefore, a large number of deals are, in practice, notified prior to completion to give the parties legal certainty.

The CMA has a duty to track merger activity to determine whether any unnotified merger may give rise to an SLC. It, therefore, has mergers intelligence staff who monitor the market for information on transactions that have not been notified and present potential candidates for investigation to the mergers intelligence committee, which meets weekly. The CMA has significant powers to impose interim measures that enable it to prevent or unwind actions that might prejudice the outcome of an investigation or impede remedial action.

The CMA's 'Guidance on the CMA's mergers intelligence function'(December 2020) describes the steps that the CMA will take before deciding whether to investigate an unnotified merger. The CMA can intervene as soon as it has reasonable grounds for suspecting that arrangements for a merger are in progress or are being contemplated, but it mainly uses interim orders in the context of completed mergers.

The CMA welcomes short briefing papers of a maximum of five pages in length from merging parties explaining why they do not propose to submit or have not submitted a merger notice to the CMA. It also welcomes complaints from concerned third parties. A merger notice filing must be made using the form prescribed by statute or by a submission containing the same information.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

There is no system of mandatory notification in the United Kingdom. It is implicit in the jurisdictional criteria that at least one of the enterprises will be active within the United Kingdom, although it need not be incorporated within the United Kingdom. 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 United Kingdom, the CMA will consider whether sales are made directly or indirectly (via agents or traders) and the extent to which a firm is active at each level of trade. The CMA has increasingly adopted a broad interpretation of the required local nexus with the United Kingdom, asserting jurisdiction in *Roche/Spark* despite the target not having any sales in the United Kingdom. See also:

- the CMA's approach to jurisdiction in Sabre/Farelogix (which was subsequently confirmed by the Competition Appeal Tribunal in Sabre v CMA); and
- the Court of Appeal's confirmation of the Competition Commission's jurisdiction over the AkzoNobel/Metlac merger (June 2013).

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The United Kingdom does not have a domestic legal framework that specifically governs inward foreign direct investment; however, the NSI Act has introduced a new screening regime for investments in a wide range of sensitive and strategic sectors with, for the first time, mandatory filing and pre-approval requirements for certain acquisitions, and significant civil and criminal penalties for non-compliance.

In addition, the Enterprise Act 2002 contains special rules for mergers involving public interest issues and special public interest cases. Previously, mergers giving rise to potential national security concerns were also governed by the Enterprise Act 2002's public interest regime; however, the national security element of the public interest regime was replaced by the NSI Act on 4 January 2022.

NSI Act

Mandatory and suspensory notification for investments in designated sectors

The government has identified 17 sectors that fall under the scope of the mandatory notification regime, including advanced materials, artificial intelligence, communications, computing hardware, defence, military and dual-use technologies, quantum technologies and synthetic biology. Acquisitions of certain shareholdings in businesses active in one of these designated sectors are now subject to a new mandatory notification system with statutory review timelines.

Transactions that are within the scope of the mandatory notification regime are not permitted to complete until clearance is given by the government, and transactions that complete before receiving clearance are void.

Further information can be found in:

- 'National Security and Investment Act: guidance on notifiable acquisitions' – guidance on the 17 mandatory sectors and notifiable transactions; and
- 'Check if you need to tell the government about an acquisition that could harm the UK's national security' – guidance on the types of acquisitions that are covered by the NSI Act.

Voluntary notification and call-in powers apply to a broader range of deals

The government is also able to call in deals that fall outside the mandatory regime but that may give rise to national security risks. This power extends to lower levels of control over target entities (the lowest level being material influence, which can arise at shareholdings of 15 per cent and, exceptionally, less) and certain asset deals.

Transactions may be called in by the government for a national security review for up to six months after the secretary of state 'becomes aware' of the deal, provided that this occurs within five years of the acquisition taking place. Parties are, therefore, encouraged to voluntarily notify the government of deals that could lead to national security risks, and the government has indicated that deals involving assets or entities that are 'closely linked' to the 17 mandatory sectors are more likely to be called in.

Minority acquisitions and asset acquisitions are in scope

There are no financial or share of supply thresholds, and the NSI Act applies to investors from any country, including domestic UK investors.

Parties acquiring a qualifying entity or asset that is in, from or has a connection to the United Kingdom should check whether the level of control being acquired is within the scope of the new regime. An acquisition will be within the scope of the rules if it meets any of the following thresholds:

- the shareholding or voting rights being acquired in a qualifying entity meet or cross certain percentage thresholds:
    - from 25 per cent or less to more than 25 per cent;
    - from 50 per cent or less to more than 50 per cent; or
    - from less than 75 per cent to 75 per cent or more;
- the voting rights being acquired in a qualifying entity allow the acquirer to pass or block resolutions governing the affairs of the entity;
- the acquirer will hold material influence over the qualifying entity (this is the same test as that under the UK merger control regime); or
- the acquirer will be able to use a qualifying asset, or direct or control its use, or will be able to do so more than it could prior to the acquisition of the entity (eg, acquiring the right to appoint members of the target's board, which enables the acquirer to influence its strategic direction).

Timing

The key timing aspects of the new regime are as follows:

- Once a notification has been submitted (on either a mandatory or voluntary basis), the government has up to 30 working days to carry out its initial screening of the transaction and decide whether to issue a call-in notice. If it does not issue a call-in notice at the end of this initial 30-working-day period, the parties are free to proceed with the acquisition.
- If the government issues a call-in notice, it has a further 30 working days to decide whether to clear the transaction, impose remedies, or block or unwind the transaction. This 30-working-day assessment period may be extended by an additional 45 working days by the government or longer by agreement with the acquirer.
- If the government issues a request for information, the clock is stopped up until the request has been complied with.

These fixed statutory timelines are intended to offer more predictability and certainty to investors than the public interest regime under the Enterprise Act 2002, under which timelines are set by the government on a case-by-case basis, largely at the discretion of the relevant secretary of state.

When government expects to exercise its call-in powers

An acquisition can be called in for an assessment if the secretary of state 'reasonably suspects the acquisition has given, or may give, rise to a risk to national security' or 'arrangements are in progress or contemplation which, if carried into effect, will result in an acquisition that may give rise to a risk to national security'.

The NSI Act intentionally does not set out the circumstances in which national security is, or may be, considered to be at risk to ensure that national security powers are 'sufficiently flexible to protect the nation'. Each qualifying acquisition will, therefore, be assessed on a case-by-case basis, taking into account all relevant considerations and considering certain risk factors.

The secretary of state has issued guidance on how it expects to exercise its powers to issue a call-in notice under the NSI Act (see 'National Security and Investment Act 2021: Statement for the purposes of section 3)'. According to this guidance, the secretary of state considers that:

- acquisitions involving target entities involved in one or more of the 17 mandatory notification sectors are 'more likely to be called in' (and, although not subject to mandatory notification, acquisitions of material influence over such target entities are also more likely to be called in);
- acquisitions involving target entities that undertake activities that are closely linked to the activities in the 17 mandatory notification sectors are more likely to be called in than those that are not closely linked;
- acquisitions involving target entities outside the 17 mandatory notification sectors are 'unlikely to be called in as national security risks are expected to occur less frequently in these areas'; and
- loans, conditional acquisitions, futures and options are 'unlikely to pose a risk to national security and so are unlikely to be called in'.

This guidance also identifies the three primary risk factors that the secretary of state will consider when making its assessment:

- Target risk: whether the target is being used, or could be used, in a way that raises a risk to national security.
- Acquirer risk: whether the acquirer has characteristics that suggest there is, or may be, a risk to national security from the acquirer having control of the target (eg, the sectors of activity of the acquirer, technological capabilities and 'links to entities which may seek to undermine or threaten the national security of the UK'). The secretary of state has confirmed that it will not make judgements based solely on an acquirer's country of origin; however, ties or allegiances to a 'state or organisation which is hostile to the UK' will be taken into account.

- Control risk: the amount of control that has been, or will be, acquired through the qualifying acquisition, with a higher level of control increasing the level of national security risk. The control risk is assessed alongside the target and acquirer risk on the grounds that, when the target or acquirer risk is low, the secretary of state is less likely to call in that acquisition, regardless of the level of control being acquired.

Wide-ranging powers to impose conditions on (or block) deals

After the government has issued a call-in notice and carried out its review of the transaction, the secretary of state may clear the acquisition or, 'if necessary and proportionate', issue a final order to impose certain conditions, unwind the transaction or block an acquisition completely.

Final orders may include both structural conditions (eg, excluding certain parts of an entity or certain assets from the acquisition, or requiring government approval of proposed business locations) and behavioural conditions (eg, a regular on-site security inspection or interviews with staff). Typical conditions are expected to involve restricting the number of shares acquired and ring-fencing sensitive information or technology.

A final order will remain in place until varied or revoked by the relevant secretary of state, although an expiry date may be applied to some of its conditions or to the whole order. A publication notice for each final order will be published on the government's website, setting out information such as to whom the order applies, the start date, those subject to the order and a summary of its contents. The government will redact sensitive information from the publication notice, and the parties may also be required to keep some or all of the terms of the order private.

Information requests

The government has wide-ranging powers to request information from parties to inform its decision-making at every stage of the process, including powers to require individuals to provide evidence in person.

Sanctions

Non-compliance with the mandatory regime risks significant criminal and civil sanctions, including fines of up to 5 per cent of worldwide turnover or £10 million (whichever is greater) and imprisonment for up to five years.

Public interest regime

The secretary of state has powers under the Enterprise Act 2002 to intervene in merger cases that raise a public interest consideration (section 42) or special public interest cases (section 59). Interventions are generally made by the secretaries of state for business and trade or culture, media and sport.

The secretary of state may issue a public interest intervention notice under section 42 of the Enterprise Act 2002 if it considers that a merger involves one or more statutory public interest considerations. In a limited number of 'special public interest cases', section 59

allows the secretary of state to intervene in mergers over which the CMA does not have jurisdiction under its normal rules.

The relevant public interest grounds are:

- media ownership and plurality;
- the stability of the UK financial system;
- the need to maintain the capability to combat and mitigate the effects of public health emergencies (introduced in June 2020 in response to the covid-19 pandemic); and
- new public interest considerations that may be added by the secretary of state.

Previously, this list of public interest grounds also included national security considerations; however, the national security provisions of the public interest regime were replaced by the NSI Act.

The NSI Act, the public interest regime and the CMA's general merger control regime are intended and designed to operate alongside each other; however, if it is considered necessary and proportionate, the government can intervene with the merger control regime where it considers that competition remedies being required by the CMA run contrary to national security interests.

Broadly, where the secretary of state issues a public interest intervention notice over a merger on public interest grounds, that merger 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 only dependent on public interest issues.

Where the secretary of state issues an intervention notice specifying a 'media public interest consideration', the Office of Communications is required to report whether the merger will or may be expected to operate against the public interest, to assist the secretary of state in its decision regarding whether there is a plurality concern requiring further investigation by the CMA (see, for example, the intervention notice issued by the Secretary of State for Culture, Media and Sport in respect of DMG Media Limited's acquisition of JPIMedia Publications Limited in January 2020).

In 2021, the secretary of state issued public interest intervention notices on national security grounds in four mergers:

- Parker-Hannifin Corporation/Meggitt Plc in October 2021;
- Taurus International Ltd and others/Perpetuus in September 2021;
- Cobham Ultra Acquisitions Limited/Ultra Electronics Holdings plc in August 2021; and
- NVIDIA Corporation/ARM Limited in April 2021.

In November 2023 and January 2024, the secretary of state issued public interest intervention notices on grounds of media ownership and plurality in relation to the proposed (and subsequently abandoned) acquisition of Telegraph Media Group by RB InvestCo Ltd.

Energy network mergers

The Energy Act 2023 introduced a special merger regime applicable in certain circumstances to mergers involving two or more energy network enterprises of the same type in Great Britain. It is intended to ensure that such mergers do not substantially prejudice the ability of the Office of Gas and Electricity Markets (Ofgem) to carry out comparisons between companies when setting price controls.

Under the special energy network merger regime, the CMA and Ofgem have specific roles during the merger review process, and the merger can be reviewed for both competition concerns and for potential impact on Ofgem's ability to carry out its price control functions. More information can be found in 'Energy network mergers: Guidance on the CMA's Procedure and Assessment'.

Water mergers

There is also a special regime for water and sewerage mergers. In some circumstances, water mergers are subject to mandatory reference to the CMA and are governed by the Water Industry Act 1991 (as amended by the Enterprise Act 2002 and the Water Act 2003) and the Water Act 2014.

Other regulated utilities

There are currently no special provisions for other regulated utilities (eg, gas, telecommunications or rail), which are subject to the Enterprise Act 2002 merger regime, although various regulatory approvals are required for the acquisition of certain regulated businesses and businesses operating in the financial or insurance sector.

The Industry Act 1975 confers on the secretary of state the power to prohibit changes of control over important manufacturing undertakings, where the change of control would be contrary to UK interests. This power has not been used in practice.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

As there is no mandatory requirement to notify the Competition and Markets Authority (CMA) of a merger, there are no filing deadlines and no sanctions apply if a notification is not made; however, where parties do not notify, they take the risk that, regardless of whether 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 four-month period 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.

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 a transaction.

Filing is executed by providing a merger notice (or by a submission containing the same information). Any person carrying out an enterprise to which the notified arrangements relate may file a merger notice. It is not necessary for merger notices to be made jointly.

In certain limited circumstances, merging parties may seek informal advice from the CMA prior to notification. The CMA has also stated that it is open to informal briefings from companies to advise on whether a potential merger is likely to come under CMA scrutiny for good faith confidential transactions giving rise to genuine issues. The parties must be prepared to acknowledge any theory of harm that could reasonably lead to a Phase II reference.

The CMA will not offer informal advice where there is sufficient guidance already from case precedents, nor will it advise on structuring options for water mergers. As the CMA is unable to consult third parties, any advice given is qualified accordingly and based on the assumption that the information provided is accurate.

The CMA is not legally bound by its initial response to informal briefing notes submitted by merging parties. For example, in 2020, it launched an investigation into Takeaway.com's acquisition of Just Eat after reconsidering its position regarding the transaction to consider, in particular, whether Takeaway.com would have re-entered the UK market were it not for the Just Eat acquisition.

Subject to certain exceptions, any merger that is investigated by the CMA is subject to a fee, which is payable either on the CMA's publication of a reference decision or a decision not to make a reference. The submission of a briefing note does not attract a merger fee, although a fee may be payable if the CMA subsequently opens an investigation.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The main review periods in a UK merger review process are as follows:

- Phase I review: a binding 40-working-day period applies.
- Consideration of any undertakings in lieu of reference for a Phase II review: the parties have up to five working days from receiving a decision that the test for reference for a Phase II review is met (a substantial lessening of competition (SLC) decision) to offer undertakings in lieu (although they can do so earlier). The CMA has up to 10 working days as of the date of its SLC decision to provisionally decide whether to accept the undertakings in lieu, and a total of 50 working days as of the date of its SLC decision formally to accept the undertakings in lieu. This deadline can be extended by 40 working days for 'special reasons', such as needing further consultation with third parties or if the case involves an upfront buyer.

- Phase II review: the review period is 24 weeks from the date of reference, with the possibility for the CMA to extend this by eight weeks.
- Implementation of Phase II remedies: the CMA has 12 weeks (extendable by six weeks for special reasons) to accept any final undertakings offered by the parties to obtain conditional clearance.

Merging parties can request that their case be fast-tracked by the CMA to proceed more quickly to offering remedies (with the objective of achieving a Phase I clearance with remedies) or to an in-depth Phase II investigation.

To request a fast-track process, the merging parties must accept that the CMA has evidence that objectively justifies a belief that the test for a Phase II referral is met at an early stage in the investigation, and the merging parties must agree to waive their right to challenge that position during Phase I or must accept at Phase II the conclusions on the existence of an SLC made at Phase I.

A request for a fast-track process may not always be granted, and such requests are made on a without prejudice basis. The CMA takes into account its administrative resources and the efficient conduct of the case in deciding whether to agree to use the fast-track procedure. It has used this power in a number of cases so far, including:

- Cargotec Corporation/Konecranes Plc (blocked following a Phase II review in March 2022);
- Admiral Taverns/Hampden Pub Estate (remedies accepted in lieu of a Phase II referral in January 2022);
- Huws Gray Ltd/Grafton Plc (remedies accepted in lieu of a Phase II referral in January 2022);
- Carpenter Co/Recticel NV/SA (remedies accepted following a Phase II review in January 2023);
- Sika AG/MBCC Group (remedies accepted following a Phase II review in February 2023); and
- Microsoft/Activision (ex cloud streaming rights) (remedies accepted following a Phase I review (and prior prohibition decision in Microsoft/Activision Blizzard) in October 2023).

Although the Enterprise Act 2002 regime allows parties to close transactions without notifying the CMA, there are, in practice, significant constraints on merging parties' freedom once the CMA starts to review a merger, whether following notification or on its own initiative. The CMA has powers to impose initial enforcement orders (IEOs) to prevent further integration and 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 previously indicated that it will rarely use such powers for anticipated mergers and that it will normally make IEOs in investigations of completed mergers, which will remain in force until clearance is granted or remedial action is taken.

However, recent CMA practice has seen it imposing IEOs prior to closing, although in some cases these are caveated to specifically allow closing to occur (eg, Cochlear/Oticon and viagogo/StubHub) or are designed to take effect upon closing, should the parties decide to complete the transaction (eg, Roche/Spark).

There are penalties for failing to comply with IEOs. 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 atemplate IEO to which additional restrictions may be added, and has released updated guidance on the use of IEOs and derogations in merger investigations (see 'Interim measures in merger investigations').

If a Phase II reference is made, the Enterprise Act 2002 prohibits, except with the consent of the CMA, any party to a completed merger from undertaking further integrations or any party to an anticipated merger from acquiring an 'interest in shares' in another. The CMA will rarely grant its consent.

The Enterprise Act 2002 also provides the CMA with the power to accept undertakings or to make an order preventing the parties to a merger from taking action that might prejudice the eventual outcome of the merger reference. Any Phase I IEOs will usually be in force for the duration of the Phase II inquiry and may be supplemented where appropriate with additional restrictions.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Merger notification is not compulsory, although constraints on integration may be imposed by the CMA. A person who has sustained loss as a consequence of a breach of a statutory restriction preventing the acquisition of interests in shares or further integration may bring an action for damages.

The breach of such a provision is also enforceable by civil proceedings brought by the CMA for an injunction, interdiction, or any other appropriate relief or remedy. Similar provisions apply in relation to any breach of an undertaking or order.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Merger notification is not compulsory, so sanctions cannot be imposed simply for closing before clearance is granted unless this has involved breach of a statutory obligation, an undertaking or an order.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Enterprise Act 2002 regime does not prevent closing prior to clearance. There are 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 CMA (or, previously, to the Office of Fair Trading or the Competition Commission).

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The conduct of takeovers and mergers of public companies is regulated by the Takeover Code (the Code), issued and enforced by the Panel on Takeovers and Mergers (the Panel). In July 2021, the Panel updated the Code to make certain changes relating to offer conditions and, in particular, conditions relating to regulatory and merger control clearance.

Prior to these updates, the Code distinguished between offers with conditions relating to merger control clearance from the CMA or the European Commission and offers with conditions falling within the jurisdiction of another regulator. This meant that if a takeover was subject to review under either the UK or EU merger control regimes, the offer was required to automatically lapse if either authority opened a Phase II review before the later of the first closing date or the date when the offer became, or was declared, unconditional in respect of acceptances.

However, under the updated Code, offers are no longer required to automatically lapse if a Phase II review is initiated by EU or UK competition authorities; instead, conditions relating to EU or UK merger control are subject to the same material significance test as other offer conditions (Rule 13.5 of the Code). Bidders are now required to set a long-stop date for the offer, and the bidder or target may request an extension to the long-stop date if a material official clearance or regulatory authorisation condition has not been satisfied or waived.

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'swebsite.

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 2024, the CMA published a revised merger notice template following a consultation process. This 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 takes 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 were not affected, and the changes mostly reflected the CMA's existing practice.

The time required to complete a merger notice depends on the complexity of the case and the ability of the parties to collate the relevant information promptly. The CMA will not commence its 40-working-day review period until it is satisfied that the merger notice is complete and, in practice, a series of pre-notification discussions have been completed. The CMA states that it will endeavour to review submissions and revert to the parties within a reasonable time frame, generally within five to 10 working days of receipt (although this can be longer depending on the complexity of the case).

The CMA has the power to impose penalties on merging parties for breach of procedural requirements, including the failure to comply with document requests or providing inaccurate information. For example, in September 2020, the CMA imposed two penalties of £25,000 and £30,000 against Amazon in respect of the*Amazon/Deliveroo* merger for late provision of information.

In addition to civil penalties for failing to provide information, under section 117 of the Enterprise Act 2002, it is a criminal offence to knowingly or recklessly supply information that is false or misleading in a material respect to the CMA.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

The Enterprise Act 2002 provides for two phases of investigation.

First, the CMA carries out a preliminary (Phase I) investigation to decide whether there is or may be a relevant merger situation, and there is a realistic prospect that the merger will result in an SLC. If the affirmative is true, the CMA has a duty to refer the merger for a Phase II investigation.

Where a reference to Phase II is made, the CMA 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 those effects.

In making its Phase I assessment, the CMA will gather supplementary information from the merging parties and seek to verify that information with third parties (eg, competitors, major customers or suppliers). The CMA will conduct a state of play meeting and, where competition issues are raised, it will generally meet with the parties to discuss their submissions (an issues meeting).

To help the parties prepare for this meeting, the CMA sends an issues letter to the parties to the merger. This will set out the core arguments and evidence in favour of referring the case.

Following the issues meeting, all the evidence, including the main parties' and any third parties' submissions, will be considered by the CMA. Following an internal CMA case review meeting, there is a separate decision meeting at which the case is debated and scrutinised. The final decision is then communicated to the parties to the merger.

Although previously granted only in exceptional circumstances, the CMA's 'Merger Assessment Guidelines' (updated in March 2021) set out the situations in which the parties can request that their case be fast-tracked to proceed more quickly to offering remedies (with the objective of achieving a Phase I clearance with remedies) or to an in-depth Phase II investigation.

To request a fast-track process, the merging parties must accept that the CMA has evidence that objectively justifies a belief that the test for a Phase II referral is met at an early stage in the investigation, and they must agree to waive their right to challenge that position during Phase I or must accept at Phase II the conclusions on the existence of an SLC made at Phase I.

The recently adopted Digital Markets, Competition and Consumers Act (the DMCC Act) – which received Royal Assent on 24 May 2024 – puts the existing fast-track procedure on statutory footing by giving the CMA discretion to automatically refer a merger straight to Phase II, where the merging parties have requested this, without needing to consult on the referral or issue a reasoned decision.

18 | What is the statutory timetable for clearance? Can it be speeded up?

Pre-notification for voluntary notifications

The CMA states in its 'Guidance on the CMA's jurisdiction and procedure' (updated in January 2021 and amended in January 2022 and April 2024) that there will typically be a minimum of two weeks from the initial contact between the parties and the CMA before submission of a draft merger notice. During this initial period, the parties submit a case team allocation request form, and the CMA allocates a case team of CMA staff to review the transaction and liaise with the parties.

Once the parties have submitted a draft merger notice, pre-notification discussions can begin. The duration of pre-notification will differ on a case-by-case basis: cases raising complex or prima facie competition concerns will typically entail longer pre-notification periods than straightforward cases.

During pre-notification, the CMA case team engages with the parties on the nature and scope of the information, and internal documents that the case team considers will need to be provided in the merger notice. The CMA will also typically issue information requests to the merging parties to complete the notification and ensure it has sufficient information to commence its investigation. It may also engage with third parties and in some cases may issue a public invitation to comment, inviting third-party submissions about the potential competitive impact of the merger.

Once the CMA is satisfied that the merger notice is complete and contains the information required under the Enterprise Act 2002, it confirms this to the merging parties and confirms the statutory deadline for its Phase I decision.

Own-initiative investigations

Where a transaction is not voluntarily notified by the merging parties, the CMA may, where it considers it appropriate, send an enquiry letter to the merging parties requesting further information about the transaction.

As with voluntary notifications, the CMA will also likely engage with third parties and may issue a public invitation to comment. In addition, it will consider whether interim measures are necessary to prevent or unwind pre-emptive action.

When the CMA has sufficient information to begin its investigation, it confirms this to the merging parties and confirms the statutory deadline for its Phase I decision. In deciding whether to investigate any merger on its own initiative, the CMA will consider whether, on the information available to it, there is a reasonable chance that the test for a reference to Phase II will be met.

Phase I review

The CMA follows a statutory, 40-working-day Phase I timetable. The key milestones during the CMA's Phase I review are as follows.

- Working day one: the 40-working-day initial period for the CMA's Phase I investigation begins on the first working day after it confirms to the merger parties that it has received a complete merger notice or that it has sufficient information to begin its investigation (eg, in own-initiative investigations).
- Working days 15 to 20: the CMA holds a state of play discussion with the merging parties (typically by video conference).
- Typically by working day 25: in cases raising more complex or material competition issues, the CMA holds an issues meeting with the parties (either in person or via video conference). To help the parties prepare for this meeting, the CMA sends an issues letter to the parties, setting out the core arguments and evidence in favour of referring the case to Phase II. The views expressed in the issues letter are not binding or final. Following the issues meeting, all the evidence, including the main parties' and any third parties' submissions, will be considered by the CMA. The merging parties may provide written responses to the issues letter (before or after the issues meeting).
- Working days 25 to 40: after the issues meeting (if one is held), the CMA holds an internal case review meeting to discuss the merger. This is followed by a separate internal decision meeting at which the case is debated and scrutinised. After those meetings, the appointed Phase I decision-maker for the case decides whether the duty to refer the merger to a Phase II investigation has been met.
- By end of working day 40: the CMA provides the merger parties with its reasoned decision.

At the end of its Phase I review, the CMA makes one of the following decisions:

- unconditional clearance;
- clearance subject to legally binding undertakings; or
- reference for a Phase II investigation.

Where the CMA considers that remedies may be required, the following timetable applies:

- Zero to five working days after Phase I decision: the merging parties decide whether to offer undertakings in lieu of a reference to remedy the CMA's concerns. If so, the parties submit a completed remedies form and the draft undertakings in lieu to the CMA. If no undertakings are offered within this five-working-day period, the CMA will refer the transaction to Phase II.
- Up to 10 working days after Phase I decision: the CMA considers any undertakings in lieu that have been offered by the parties and decides whether to provisionally accept the proposed remedy (or a modified version). If the CMA rejects the proposed undertakings, the CMA will refer the transaction to Phase II.
- Within 50 working days of Phase I decision: this period covers agreement and acceptance of the proposed undertakings. During this period, the CMA publishes the draft undertakings for third-party comment and considers whether to formally accept (with a possible further, shorter consultation if required, following any material changes to the draft undertakings). If undertakings in lieu are not agreed, the CMA will refer the transaction to Phase II.
- Implementation of undertakings in lieu: if a remedy is agreed, the CMA publishes the final undertakings. It then assesses – and, as appropriate, approves – proposed purchasers of the businesses being divested (this occurs prior to acceptance of the undertakings in upfront buyer cases).

Phase II review

Following a public consultation, the CMA implemented a number of procedural changes to its process for Phase 2 reviews on 25 April 2024. The new regime introduces more opportunities for oral advocacy by the merging parties, as well as allowing for discussion of possible remedies throughout the review process. The revised 'Guidance on the CMA's jurisdiction and procedure' reflects these changes.

The basic Phase II period is 24 weeks as of the date of the Phase I reference and can be extended by eight weeks at the CMA's discretion for special reasons.

The key milestones during the CMA's Phase II review are as follows:

- Weeks one to six – initial information gathering: The merging parties organise initial meeting(s) with the CMA, which will typically include a teach-in (potentially in the form of a site visit) and an 'initial substantive meeting' in which the merger parties set out their views on the competition issues raised in the phase 1 decision, sharing an agenda in advance for the CMA's consideration. To supplement its existing evidence base, the CMA may also issue information requests to the merging parties, develop any consumer surveys, and conducts calls and meetings with third parties to the extent necessary..
- Weeks seven to 14 – preparation and publication of interim report: the CMA analyses the evidence it has received and holds periodic update calls with the merging parties. Material and evidence may be 'put back' to the parties to check for factual accuracy and to identify any confidential information
- Around weeks 12-14: the CMA publishes its interim report.
- Weeks 15 to 24 – post-interim report: the CMA considers responses from the merging parties and third parties to the interim report. Within 14 calendar days of the publication of the interim report, the merger parties may submit a Phase 2 Remedies Form along

with a non-confidential summary of the remedy proposal which is published for third party comment.

- Around weeks 16-18: Main parties hearing. The CMA holds a hearing with the merger parties (and third parties, where appropriate). The CMA will also consult on proposed remedies, conducting calls/meeting with third parties and the merging parties as required. There may be a further put-back process where new evidence has been obtained since the publication of the interim report.
- Weeks 18-21: Interim report on remedies. Where relevant, the CMA produces the 'Interim Report on Remedies' and discloses this to merger parties for comment with a deadline of seven calendar days. The CMA may hold a call with merger parties to discuss the interim report on remedies and their response if the CMA considers this necessary.
- By the end of week 24: the CMA publishes its final report (subject to any extension of the statutory deadline).
- Week 36: the CMA has 12 weeks to accept final undertakings and make a final order (subject to a six-week extension if there are special reasons to do so).

The new DMCC Act allows the CMA and the merging parties to agree an extension to the 24-week statutory timeline for Phase 2 investigations.

Stop-the-clock powers

The regulator has the power to stop the clock and extend the relevant statutory deadline (eg, in circumstances where the parties have not responded to an information request) and may use this power in relation to the four-month statutory deadline for deciding whether to refer a completed merger. The clock restarts once the party has produced the documents or supplied the information requested, and the CMA has confirmed that the documents or information provided form a satisfactory response.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Competition and Markets Authority (CMA) updated its 'Merger Assessment Guidelines' in March 2021 (the Revised MAGs). The Revised MAGs contain the CMA's latest guidance on the CMA's substantive approach when investigating mergers and supersede the CMA's previous guidelines from 2010. There are several areas in which the CMA has departed from its previous guidelines in favour of a more qualitative, case-by-case approach to merger assessment.

With regard to the substantive test for clearance, if the CMA finds that a relevant merger situation has been created (or arrangements are in progress or in contemplation that if carried into effect, will result in the creation of a relevant merger situation), it must decide whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition (SLC) within any market or markets in the United Kingdom.

Although the CMA is required to determine whether a merger it investigates will lead to an SLC and the concept of an SLCis a key legal test in the Enterprise Act 2002, the term 'substantial lessening of competition' is not defined in the Enterprise Act 2002. The Revised MAGs, however, provide guidance on the CMA's approach.

Under the two-phase merger control regime, the CMA is required to apply different evidential thresholds when assessing whether an SLC is or is expected to be created.

In Phase I, the CMA applies a realistic prospect threshold, under which it has a duty to refer for Phase II investigation any relevant merger situation where it believes, objectively and justified in light of the evidence, that it is or may be the case that the relevant merger situation has resulted or may be expected to result in an SLC. If the CMA believes the likelihood of an SLC is 'greater than fanciful' but less than 50 per cent, it has a 'wide margin of appreciation' in deciding whether to refer.

At the end of its Phase I investigation, the CMA can clear a merger unconditionally, decide the test for reference is met and refer the merger for Phase II investigation or accept undertakings in lieu of a reference to remedy the competition concerns.

In Phase II, the CMA applies a balance of probabilities threshold. The realistic prospect threshold is intentionally a lower and more cautious threshold for an SLC finding than that applied by the CMA at Phase II. In a Phase II investigation, the CMA inquiry group decides whether:

- there is a relevant merger situation falling within the UK merger control regime;
- that relevant merger situation has resulted, or may be expected to result, in an SLC; and
- it should take action to remedy any SLC identified.

The CMA will apply a balance of probabilities threshold to its analysis (ie, analysing whether it is more likely than not that an SLC will result).

Under the Revised MAGs, the CMA considers that 'substantial' in the context of an SLC can have a range of meanings and will depend on the facts of the case. In addition, the Revised MAGs provide that a lessening of competition can be substantial even where the relevant market (or segment) is small in total size or value.

When deciding whether a lessening of competition is substantial, the CMA may also consider whether there is limited competition in the market to begin with (eg, because of regulation) or whether the market 'is large or is otherwise important' to UK customers. In making the assessment, the CMA will draw up theories of harm to provide a framework for its assessment.

On the use of evidence in assessing whether there may be an SLC, the Revised MAGs do not have a prescriptive list of evidence that the CMA will take into account; instead, the CMA will, in each case, undertake reasonable evidence gathering, consider the evidence available and decide what weight to place on that evidence. This will depend on various factors, including the theories of harm being investigated, the nature of competition in the marketplace and the evidence that is available.

The CMA has a wide margin of appreciation in its use of evidence and, given the case-specific nature of merger investigations, it may apply different methodologies and approaches in different cases. In assessing evidence, the CMA states that it is not required to make precise predictions about the future, such as whether any particular innovations will take place or whether a specific price rise or a particular degradation of service quality will take place after a merger. This was confirmed by the Competition Appeal Tribunal (CAT) in Tobii AB v Competition and Markets Authority [2020] CAT 1.

In the context of sectors that are characterised by 'fast-moving technological and commercial developments or assessments of potential or dynamic effects that are particularly dependent on the evolution of competitive conditions', the types of evidence available to the CMA may be more restricted. In those cases, the CMA may place particular weight on evidence such as internal documents, the expected number of competitors after the merger, and the views and expansion plans of market participants.

The Revised MAGs note that previous experience has shown that the evidence the CMA uses and the weight it attaches to different types of evidence have evolved over time with its decisional practice. For example, the CMA notes it has 'increasingly interrogated the merger firms' internal documents' and has more closely scrutinised evidence on deal valuation.

The CMA's substantive assessment requires it to compare the prospect for competition with the merger against a counterfactual situation without the merger. In Phase I, where there is a realistic prospect of multiple potential counterfactuals, the CMA chooses the worst-case scenario (ie, where the merging parties exert the strongest competition constraints on each other and where third parties exert the weakest competition constraints), provided that this scenario is realistic. In Phase II, the CMA will select the most likely conditions of competition as the counterfactual.

Although the CMA has historically chosen pre-merger situations for counterfactuals, it has recently adopted a more expansive approach, particularly in cases involving digital markets. Recent examples include Microsoft/Activision (April 2023),Cellnex/CK Hutchison UK towers (August 2021), Meta/Giphy (April 2021), *Amazon/Deliveroo* (December 2019) and PayPal/iZettle (November 2018). This reflects a general evolution in the CMA's substantive approach in relation to dynamic markets in particular, with an increasing focus on merging parties' internal documents, deal valuation materials and other evidence from third-party sources, such as third-party forecasts and analyst reports.

20 | Is there a special substantive test for joint ventures?

When a joint venture constitutes a relevant merger situation, the substantive test for clearance will be the same as that for any other merger.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The CMA is concerned with horizontal (unilateral and coordinated), vertical and conglomerate effects of mergers.

In assessing horizontal mergers, the CMA is concerned with horizontal unilateral (or non-co-ordinated) effects, coordinated anticompetitive effects, and the loss of potential and dynamic competition.

The CMA's latest approach to the assessment of horizontal unilateral effects is set out in its Revised MAGs. Key changes in its approach from those contained in previous guidelines include the following.

Closeness of competition

Merging parties do not need to be the closest competitors. Where the CMA finds evidence that competition mainly takes place among few firms in a given market, any two would normally be sufficiently close competitors that the elimination of competition between them would raise competition concerns, subject to evidence to the contrary. The smaller the number of significant players, the stronger the prima facie expectation that any two firms are close competitors.

The CMA does not specify how few the number of firms needs to be.

Measures of concentration

The Revised MAGs removed certain thresholds, including the statement that the CMA will not usually be concerned with mergers that reduce the number of firms in the market from five to four, and references to the Herfindahl–Hirschman Index.

Two-sided platforms

The Revised MAGs provide more detail on factors that the CMA will consider when examining two-sided platforms, such as media publishers or social media platforms (which serve consumers on one side and advertisers on the other), shopping centres (which serve retail tenants and shoppers) and online food delivery platforms (restaurants and consumers).

In deciding whether to examine each side separately or both sides together, the CMA will consider:

- how competition works: where competition primarily involves improvements to one side of the platform, the CMA may assess each side separately;
- competitive conditions: where these are different on each side, they may be assessed separately; and
- network effects: where these are strong in both directions, this will likely lead to a single overall assessment.

In addition, in the CMA's view, network effects mean that platform mergers are more likely to give rise to competition concerns.

The Revised MAGs note that unilateral effects may also arise from the elimination of potential or dynamic competition, signalling a move away from the CMA's previous framework of actual versus perceived potential competition in favour of a framework that focuses on the loss of future competition and the loss of dynamic competition.

Relevant evidence of a loss of future competition, where the loss arises because the merger involves a potential entrant or firm that would have expanded in the future absent the merger, will include the ability and incentives of the firm to enter a market, any well-developed plans or significant steps that have already taken regarding entry, steps that incumbent firms are taking in anticipation of entry and a past history of entry into related markets. The Revised MAGs provide that the CMA can conclude that one of the merger firms would have entered absent the merger 'without concluding on the precise characteristics of the product it would launch, or which particular assets . . . it might acquire in order to enter'.

A loss of dynamic competition, where existing and potential competitors interact in an ongoing dynamic competitive process (eg, by investing in innovation), affects customers in the present rather than at a future point in time when entry or expansion would have occurred. Examples of relevant efforts or investments include:

- developing new products or improving existing ones;
- introducing more efficient or disruptive business models;
- introducing new features that benefit customers but also increase customer stickiness; or
- sacrificing short-run margins (or even operating at a loss) to attract users to a platform and thus benefit from network efficiencies and achieve a minimum efficient scale, scale up a distribution network or establish a reputation.

The CMA provides examples from digital markets and the pharmaceutical industry, where dynamic competition may be considered particularly relevant. The CMA's approach to dynamic competition was recently considered in the CAT's June 2022 judgment in *Meta/Giphy*, which upheld the CMA's substantive approach. The CMA's prohibition of *Microsoft/Activision* in April 2023 was also based on the CMA's conclusion that the merger could be expected to result in an SLC in the dynamic market for cloud gaming services.

With regard to coordinated effects, the Revised MAGs refer to concerns from some commentators that enforcement in this area should be strengthened. The three conditions for coordination remain unchanged (ie, the ability to reach a common understanding of the terms of coordination, coordination being internally sustainable and coordination being externally sustainable); the CMA's previous guidance expressly provided that all three conditions had to be satisfied for coordination to be possible, but this requirement was removed from the Revised MAGs.

As noted by the CMA in the Revised MAGs, coordinated effects have been considered by the CMA relatively infrequently in the past; however, the possibility of coordinated effects has been an issue in a number of merger cases, such as in Breedon Group plc/Cemex Investments Limited (2020), J Sainsbury plc/Asda Group Ltd (2019) and Yorkshire Purchasing Organisation/Findel Education Limited (2020).

CMA guidelines indicate that, in its appraisal of mergers, it will also investigate vertical foreclosure effects – in other words, 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.

In its Revised MAGs, the CMA reframed its guidance on how it will assess the ability of merging parties to foreclose rivals by restricting access to inputs. When assessing whether

the merged entity will have the ability to engage in input foreclosure, the Revised MAGs state that the CMA will typically focus on two issues:

- upstream market power: if downstream rivals can easily switch away from the upstream party to a range of effective alternative suppliers, they will be less likely to suffer harm than if the merged entity occupies an important position upstream; and
- the importance of the input: the merged entity could only harm the competitiveness of its rivals if the input it supplies plays an important role in shaping downstream competition.

The starting point for an assessment regarding upstream market power is the structure of the upstream market.

In assessing the importance of the input, the CMA considers all foreclosure mechanisms. For example, it will not only consider the proportion of rivals' costs that the input accounts for but also the role it plays as a determinant of product quality or the rate of innovation.

The CMA has frequently investigated vertical mergers. In several cases, it has found that these gave rise to competition concerns, in particular when one of the merger firms had a degree of pre-existing market power that it would be able to use to foreclose its rivals (see, for example, Tobii AB/Smartbox).

On 14 April 2022, the CMA published an ex post evaluation of vertical mergers, carried out by E.CA Economics on the CMA's behalf. The CMA retained E.CA to review four of the CMA's previous merger decisions (all dating from 2017) that considered vertical theories of harm and assess whether there had been a post-merger lessening of competition that has led to a detriment for consumers (see E.CA, 'Ex-post Evaluation of Vertical Mergers: Report for the Competition and Markets Authority').

In the context of conglomerate mergers, adverse effects principally result from the fact that a merger may allow the merging firms to foreclose competition through tying or bundling, or gain increased market power over a portfolio of products. The Revised MAGs indicate that, in assessing the feasibility of a combined offering, the CMA may have regard to how the market, products and business models may evolve in the feature.

The CMA states that concerns about conglomerate effects 'may be greatest in nascent and digital markets', but that anticompetitive effects may not emerge in full until after the market has reached maturity. Assessment of nascent markets will, therefore, 'likely be subject to a degree of uncertainty'; however, the CMA states that this will not in itself preclude it from concluding that the SLC test is met on the basis of all the available evidence.

The CMA has not yet specifically investigated common ownership concerns, but it will do so if this is relevant to a particular transaction. Recent cases suggest that the CMA is increasingly taking a long-term view of potential competition concerns and considering loss of innovation theories of harm, such as in Adobe/Figma,Ladbrokes/Coral, Thermo Fisher/Roper Technologies, *Sabre/Farelogix*, Experian/Clearscore and Illumina/PacBio.

The CMA states that the theories of harm that are relevant will depend on:

- the levels of the supply chain at which the merger firms operate;

- the links between the merger firms and their rivals;
- the nature of competition and how firms go about winning customers from each other; and
- any long-running dynamics in the relevant sectors.

The relevant theories of harm may also depend on the level of control that one merger firm is acquiring over the other, indicating that the CMA may apply a different analysis to a firm acquiring material influence versus a firm acquiring full legal control.

The CMA states that it will generally take a forward-looking approach to the assessment of any theories of harm, considering the effects of the merger both now and in the future.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

Except for the cases where a special regime applies, the substantive test for clearance is a solely competition-based test.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The CMA may consider economic efficiencies both in Phase I and Phase II investigations, although it has 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 the 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 an SLC 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 Phase II, the CMA may, 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 it 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 instances of an SLC, again drawing on views of the sector regulator with regard to the expected benefits.

The Revised MAGs have further limited the extent to which countervailing factors will be found to alleviate competition concerns. In particular, countervailing buyer power has been removed as a stand-alone factor in the section on countervailing factors.

Regarding entry and expansion, the CMA has maintained its position that new entry must be timely, likely and sufficient; however, regarding timeliness, not only must the entry or expansion be timely, but 'the effectiveness of that entry or expansion on market outcomes must be timely'.

In addition, the Revised MAGs state that small-scale entry that is not comparable to the constraint eliminated by the merger is unlikely to prevent an SLC.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If, following a Phase II review, the Competition and Markets Authority (CMA) concludes by a two-thirds majority of the investigating panel that the merger will have an anticompetitive outcome, it will take steps to remedy, mitigate or prevent the substantial lessening of competition (SLC) and adverse effects resulting therefrom to the extent that the steps are reasonable and practicable. It may take remedial action itself to preserve or restore the status quo, increase the level of competition for the merged firms, or prevent possible exploitative or anticompetitive behaviour on the part of the merged firm.

Given that mergers are able to complete prior to an investigation by the CMA, in some cases, the remedy imposed may involve unwinding the transaction or making divestments. See, for example, *Tobii AB/Smartbox*(2019), Bottomline Technologies/Experian Limited (2019), TVS Europe Distribution Limited/3G Truck & Trailer Parts (2021),FNZ/GBST (2021) and *Meta/Giphy*(2021).

The CMA may also recommend the taking of actions by others.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Undertakings may be offered to remedy any identified adverse competition concerns in both Phase I (to prevent a reference to Phase II) and Phase II (to remedy any adverse findings the CMA identifies following a reference).

In both Phase I and Phase II, the CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects, and will then select the least costly and intrusive remedy that it considers to be effective. The CMA will seek to ensure that no remedy is disproportionate, and it may also have regard to any relevant customer benefits arising from the merger.

The CMA notes that, in unusual circumstances, it is possible that any effective remedy will result in disproportionate costs that far exceed the scale of the SLC or will give rise to a disproportionate loss of relevant customer benefits. In those cases, the CMA will select the remedy that minimises the level of costs or loss of relevant customer benefits. In cases where all feasible remedies are likely to be disproportionate, the CMA may conclude that no remedial action should be taken, although 'such instances are expected to be extremely rare' (see 'Merger remedies'). Generally speaking, structural remedies are more commonly accepted by the CMA than behavioural remedies.

In Phase I, 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. It has published guidance on the criteria it applies when considering whether to accept undertakings in lieu (see 'Merger remedies'). Broadly, it will only do so where it is confident that all potential competition concerns identified would be resolved without the need for further investigation.

Consequently, undertakings in lieu are only likely to be appropriate where the competition concerns raised are remedied in a clear-cut way and the remedies proposed are readily able to be implemented. As such, the CMA has stated in its guidance that it is unlikely to accept behavioural remedies in Phase I and, more generally, that behavioural remedies are unlikely to deal with potential competition issues as comprehensively as structural remedies. That the CMA considers there to be a high bar for showing that a behavioural remedy can address a competition concern was restated in a speech by the CMA's chief executive in February 2023.

Behavioural remedies are slightly more common in Phase II. For example, in June 2020, the CMA accepted behavioural remedies in Phase II in respect of various acquisitions by Bauer Media Group. In the particular circumstances of the case, the CMA was concerned about the effectiveness of a full divestment remedy and instead decided a behavioural remedy would be more appropriate. However, in *Microsoft/Activision* (2023), the CMA rejected the parties' proposed behavioural remedy to commit to licensing certain game titles royalty-free to certain cloud gaming providers for 10 years. The CMA noted that one reason for rejecting the behavioural remedy was that it would be difficult for the CMA or a monitoring trustee to monitor and enforce it. A restructured transaction, under which Microsoft did not purchase cloud gaming rights held by Activision, was subsequently cleared by the CMA: Microsoft / Activision Blizzard (ex-cloud streaming rights).

Recent practice indicates that it is becoming more likely that the CMA will require an upfront buyer where the package does not relate to a stand-alone business or where there is only a small number of candidate purchasers.

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, it must consider the need to achieve as comprehensive a solution

as is reasonable and practicable to the SLC and any resulting adverse effects. Between 1 January 2023 and 31 March 2024, the CMA accepted undertakings in lieu of a reference to Phase II in 10 cases.

In respect of its own actions, the CMA has the choice of seeking undertakings or imposing orders. Its order-making power is broad but limited to the factors set out in the Enterprise Act 2002. The undertakings that can be agreed upon are not as limited and, therefore, provide greater flexibility. In each case, the CMA must consider the appropriateness of remedies, and their cost, proportionality and effectiveness.

Between 1 January 2023 and 31 March 2024, the CMA accepted remedies in three cases out of a total of 11 closed phase 2 cases (although the remedies in Cérélia/Jus-Rol required the full divestment of the acquired business). Of the 11 closed phase II cases, two were abandoned by the merging parties. Five cases were cleared without remedies (*Viasat/Inmarsat, Copart/Hills Motors, Broadcom/VMWare, UnitedHealth Group/EMIS, Arcelik/Whirlpool*), and *Microsoft/Activision* was prohibited (before being cleared subject to remedies upon the later reassessment of the transaction based on a revised transaction structure).

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Under the Enterprise and Regulatory Reform Act 2013, parties have five working days to offer undertakings in lieu after receiving the CMA's Phase I reference decision; however, parties may propose undertakings in lieu at any stage during Phase I. The CMA has 10 working days from the SLC decision to accept any undertakings in lieu in principle, and a total of 50 working days from the decision to formally accept undertakings in lieu (subject to one extension of up to 40 working days for special reasons).

In Phase II, there is a statutory deadline of 12 weeks (extendable once by up to six weeks for special reasons) as of the CMA's final report to implement remedies. Within this period, the CMA consults with the main parties and then publishes a draft set of undertakings or an order for third-party comment. Once the undertakings or the order are finalised, the CMA publishes a notice of acceptance of undertakings or a 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 those in domestic mergers if a foreign-to-foreign merger falls within the CMA's jurisdiction.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Mergers and ancillary restrictions to mergers are generally excluded from prohibitions under Schedule 1 to the Competition Act 1998, as amended by the Enterprise and Regulatory Reform Act 2013.This extends to any provision of the agreement that is directly related and

necessary to the implementation of the merger provisions (ie, ancillary restraints) that 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.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Competition and Markets Authority (CMA) generally gives third parties the opportunity to intervene and frequently relies on the views of those parties to verify information.

In Phase I, the CMA will actively seek the views of relevant third parties (eg, competitors, major customers or suppliers) and will request views from third parties in all public merger situations by means of an invitation to comment notice published through the Regulatory News Service and on the CMA's website. Third parties also have the opportunity to comment on the purpose and effect of any proposed undertakings in lieu of a reference.

Similarly, where a merger has been referred for Phase II review, the CMA requires information about the markets involved, and invites evidence from both main parties and third parties that are likely to be affected by the merger. Particular third parties may be invited to attend an individual hearing with the case team or, if the CMA considers it appropriate, it may hold a public or joint hearing for third parties.

Third parties may also be able to bring judicial review proceedings to challenge any decision by which they are aggrieved.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The CMA has stated its commitment to transparency while maintaining appropriate confidentiality. Its approach is set out in its 'Transparency and disclosure: Statement of the CMA's policy and approach' document. The fact of there being 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.

The Enterprise Act 2002 provides for all decisions to be published (although it is the CMA's policy to give an opportunity to request the excision of confidential information from those decisions), and for details of all undertakings and orders that have been agreed and accepted

or imposed under the Enterprise Act 2002 to be recorded in a public register of undertakings and orders, which can be found on the CMA's website.

With regard to protecting commercial information from disclosure, the CMA has confidentiality obligations under Part 9 of the Enterprise Act 2002. The Freedom of Information Act 2000 must be taken into account as it confers a right for an applicant to be informed in writing of whether the public authority (including the CMA and sectoral regulators) holds information of the description specified in the request and, if so, to have that information disclosed.

Some important exceptions to the duty on the authority to disclose information under the Freedom of Information Act 2000 exist that may protect information provided under the Act (eg, where disclosure would constitute an actionable breach of confidence or is otherwise prohibited under another piece of legislation).

Personal data is also subject to the Data Protection Act 2018, Part 9 of the Enterprise Act 2002 and the UK 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?

Cooperation with the European Commission and EU national competition authorities

Prior to the United Kingdom's formal departure from the European Union on 31 January 2020 (and until the transition period came to an end on 31 December 2020, during which arrangements for the discharge of the CMA's functions were largely unaffected), if a merger had a European Community dimension under the EU Merger Regulation (EUMR), the European Commission had exclusive competence to review that merger within the European Union, including with respect to its effects on any UK market. In that situation, the CMA did not have the competence to carry out its own competition assessment, except where all or part of the case was transferred under the relevant referral provisions of the EUMR.

At the end of the transition period, the CMA ceased to be a competent authority of an EU member state for the purposes of the EUMR and it is no longer a member of the European Competition Network. As a result, the European Commission's review of a merger will no longer cover the merger's effects within the United Kingdom; instead, transactions may be subject to parallel merger reviews by both the CMA and the European Commission, as was the case with, for example, *Meta/Giphy*, *NVIDIA/ARM*, *Cargotec Corporation/Konecranes Plc*,*Microsoft/Activision* and *Adobe/Figma*.

Where a merger is subject to parallel UK and EU reviews, the CMA has stated that it will continue to cooperate with the European Commission. Although the full extent and manner in which the CMA and the European Commission will continue to cooperate are continuing to emerge, the CMA's 'Guidance on the functions of the CMA after the end of the Transition Period' notes that there can be 'substantial benefits' to the parties and to the authorities 'encouraging communication and cooperation between the competition authorities'.

Moreover, the guidance states that, where possible and appropriate, the CMA will endeavour to coordinate merger reviews relating to the same or related cases with the European Commission and other national competition authorities. Where national legislation prevents the exchange of confidential information, the CMA and other national competition authorities may seek permission from the parties to exchange such information (waivers may be provided by the parties for the CMA to discuss a case with competition authorities in other jurisdictions, if relevant).

Further, the United Kingdom's Trade and Cooperation Agreement with the European Union (which entered into force on 1 May 2021) contains provisions requiring the United Kingdom to have and maintain a competition regime (tackling anticompetitive agreements and practices, abuses of dominance and anticompetitive mergers), as well as provisions for negotiation of a separate agreement on cooperation with the European Commission and the authorities of EU member states.

The European Commission continues to be competent for the monitoring and enforcement of any UK elements of commitments given in connection with decided EU merger cases; however, the Withdrawal Agreement provides an option to transfer the responsibility for the monitoring and enforcement of the UK elements of the commitments to the CMA by mutual agreement between the European Commission and the CMA.

Ahead of the expiry of commitments made by British Airways and American Airlines to the European Commission, the CMA launched an investigation into the Atlantic Joint Business Agreement. To prevent an enforcement gap (and given the exceptional market uncertainty owing to the covid-19 pandemic), in September 2020 and April 2022, the CMA imposed interim measures to extend the terms of the European Commission's commitments until March 2026.

Cooperation with other national competition authorities

Prior to the end of the transition period, the CMA signed a new framework in September 2020 with five of its international counterpart authorities. The Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (MMAC) was signed by the CMA, the Australian Competition and Consumer Commission (ACCC), New Zealand's Commerce Commission, Canada's Competition Bureau, the US Department of Justice and the US Federal Trade Commission as a statement of the authorities' collective intent to deepen cooperation on competition enforcement.

The MMAC includes a memorandum of understanding that focuses on reinforcing and improving existing cooperation and coordination on investigations, as well as a model agreement to support the development of individual arrangements among participants, which may include the exchange of case information and assistance in individual competition investigations to the extent permitted by applicable national laws.

Other recent examples of the CMA's cooperation with other national competition authorities include the following:

- in March 2021, the CMA and its counterpart organisations in the United States, Canada and Europe assessed their investigative approaches to pharmaceutical mergers 'to

ensure that investigations include fresh approaches that fully analyse and address the varied competitive concerns that these mergers and acquisitions raise';

- in April 2021, the CMA issued a joint statement with Germany's Federal Cartel Office and the ACCC on the need for rigorous and effective merger enforcement, particularly in respect of 'dynamic and fast-paced markets'; and
- in November 2021, following an invitation from the G7, the CMA hosted a two-day summit with the heads of the G7 competition authorities to discuss cooperation across digital markets.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

The Enterprise Act 2002 provides the Competition Appeal Tribunal (CAT) with the power to review decisions adopted in merger cases. Any person aggrieved by a decision of the Competition and Markets Authority (CMA) or a decision of the relevant secretary of state, in connection with a reference or a possible reference can apply to the CAT for a review. The Enterprise Act 2002 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. For example, in Unichem v Office of Fair Trading (2005), the CAT quashed, at the request of a third-party competitor, a decision by the Office of Fair Trading not to refer a merger to the Competition Commission on the grounds that the Office had failed to test and verify key evidence sufficiently.

Examples of cases that have been referred to the CAT include:

- Somerfield/Morrison Supermarkets (2006), in which the CAT held that, in deciding what was reasonable action appropriate for remedying, mitigating or preventing a substantial lessening of competition, the Competition Commission had a clear margin of appreciation;
- Ticketmaster/Live Nation (2010), in which the CAT quashed the decision of the Competition Commission;
- ICE/Trayport (2017), in which the CAT rejected most of ICE's grounds of appeal, upholding only one aspect (that a subsidiary part of the decision was not sufficiently reasoned) and remitting that point to the CMA for reconsideration;
- *Eurotunnel/Sea France* (2016), in which the CAT quashed the Competition Commission's decision imposing remedies and remitted the case to the Competition Commission for reconsideration of whether two enterprises had ceased to be distinct;
- JD Sports Fashion/Footasylum (2020), in which the CAT quashed the CMA's final report on the merger insofar as its conclusions were based on the CMA's assessment of the likely effects of the covid-19 pandemic on the relevant markets, on the merging parties and the merged entity, and on the competitive constraints that were likely to apply to the merging parties and the merged entity;
- *Meta/Giphy* (2021), in which the CAT rejected most of Meta's grounds for appeal, upholding only one aspect (that the CMA failed to properly consult via its provisional

findings and wrongly excised portions from its decision) and remitting that point to the CMA for reconsideration; and
- *Cérélia/Jus-Rol* (2024), in which the CAT rejected Cérélia's appeal, but held that while the CAT must adhere to a judicial review standard, as a specialist tribunal it is entitled to closely examine the adequacy of factual and economic evidence relied upon by the CMA in merger review decisions .

Time frame

33 What is the usual time frame for appeal or judicial review?

An application to the CAT for judicial review of a merger control review under the Enterprise Act 2002 must be made within four weeks of the date on which the applicant was notified of the disputed decision or the date of publication of the reasons for the decision, whichever is earlier.

The cases that have been heard by the CAT under the Enterprise Act 2002 regime have generally been dealt with quickly, within two to five months, and in some cases within a month of the case being registered with the CAT (eg, IBA Health Ltd v Office of Fair Trading and, following the Competition Commission's concession, *Ticketmaster/Live Nation)*. In J Sainsbury Plc and Asda Group Limited v CMA, the parties' application, which challenged the lawfulness of the CMA's timetable to review the merger, was heard two days after being lodged with the CAT. In *Meta/Giphy*, Meta's application was heard four months after being lodged.In *Cérélia v CMA*, Cérélia's application was heard four and a half months after being lodged.

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 January 2023 and 31 March 2024, the Competition and Markets Authority (CMA) reached an outcome on a total of 41 cases in Phase I. Of these, two transactions were abandoned and four were found not to give rise to CMA jurisdiction; for the remaining cases, the CMA:

- gave unconditional clearances in Phase I to 19 mergers;
- accepted undertakings in lieu of a referral to Phase II in 10 cases; and
- referred six cases to Phase II.

Of the 11 Phase II reviews that were completed in the same period:

- five were unconditionally cleared;
- three were cleared subject to remedies, although the remedy imposed in one case was the full divestment of the acquired business (*Cérélia/Jus-Rol*);
- one was prohibited (*Microsoft/Activision*); and

- two were cancelled or abandoned.

Merger references considered by the CMA over the past few years have related to a broad range of sectors, including supermarkets, hospitals, platforms and consumer products.

Reform proposals

35 | Are there current proposals to change the legislation?

Published at the beginning of 2020, theCMA's plan to reform competition and consumer protection for the 2020s aims to 'bring the CMA closer to consumers' and their needs. The three key goals of the plan are to:

- understand markets and consumers better;
- explain why competition matters, and explain the CMA's work and priorities; and
- advocate for consumers' interests, including via legislative reforms.

The plan and, in particular, the legislative reforms proposed to advocate for consumers' interests, build upon proposals from February 2019 made by the CMA's then chair, Lord Tyrie, in a letter to the Department for Business, Energy and Industrial Strategy, as it was then called.

Since then, the government has published several consultations and other papers concerning proposals to reform UK competition laws, in particular 'Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers' and 'A new pro-competition regime for digital markets'. Both of those papers were published in July 2021.

In May 2022, the government announced that both the broader reforms to competition and consumer law and the new regime for digital markets would be consolidated and consulted on together as part of a single Digital Markets, Competition and Consumers Act (the DMCC Act).

DMCC Act

After receiving views from a range of interested parties on government consultations, the DMCC Act was passed and received Royal Assent on 24 May 2024.

The DMCC Act is the most significant reform to UK competition and consumer law since the CMA was established in 2014 and is expected to be in force by autumn 2024. In relation to merger control, the key changes in the DCC Act to the current merger control regime are:

- updating the current merger control jurisdictional thresholds by:
    - raising the target turnover test threshold from £70 million to £100 million to adjust for inflation and preserve the original effect of the test;
    - introducing a new acquirer-focused threshold to enable review of killer acquisitions and other mergers that do not involve direct competitors, under which the CMA would be able to review a merger if:

    - the acquirer has both an existing share of supply of at least 33 per cent of goods or services supplied or acquired in the United Kingdom or a substantial part thereof, and a UK turnover of more than £350 million; and
    - the other party has a UK nexus (ie, it is a UK business or body, at least part of its activities are carried out in the United Kingdom, or it supplies goods or services in the United Kingdom); and
  - creating a small merger safe harbour, exempting mergers from review where each party's UK turnover is less than £10 million to reduce the burden on small enterprises and microenterprises; and

- delivering more effective and efficient merger investigations by:

  - allowing the CMA and the merging parties to agree an extension to the Phase II timetable;
  - enhancing and streamlining the merger fast-track procedure by putting the existing fast-track procedure on statutory footing, giving the CMA discretion to automatically refer a merger straight to Phase II where the merging parties have requested this, without needing to consult on the referral or issue a reasoned decision; and
  - replacing the requirement on the CMA to publish merger notices in the London, Edinburgh and Belfast gazettes with a requirement to do so on the CMA's website.

In addition to merger control, the DMCC Act introduces a new regulatory regime for digital markets in the United Kingdom by establishing an ex ante regulatory framework. The DMCC Act builds on the CMA's February 2021 Digital Markets Strategy and the government's consultation on 'A new pro-competition regime for digital markets' in July 2021. Both were in turn informed by the proposals for reform in the March 2019 Furman Report on unlocking digital competition and the June 2019 Lear Report on the evaluation of past merger decisions in the digital sector.

The key features of this new digital regime relevant to merger control are:

- providing statutory powers to the Digital Markets Unit within the CMA, which was launched in April 2021 in a non-statutory form to carry out preparatory work overseeing the implementation of a new pro-competition regulatory regime for digital markets; and
- establishing a bespoke merger regime for firms designated with strategic market status, which would include the following proposed measures:

  - there is a new mandatory reporting requirement on firms with strategic market status to report any merger to the CMA:
    - that results in the strategic market status firm having qualifying status in respect of shares or voting rights in a target that carries on activities in the United Kingdom, or supplies goods or services to a person or persons in the United Kingdom; and
    - where the value of all consideration for the target is at least £25 million;
  - the qualifying status condition is met where the percentage of shares or voting rights in the target increases from:
    - less than 15 per cent to 15 per cent or more;
    - from 25 per cent or less to more than 25 per cent; or
    - from 50 per cent or less to more than 50 per cent; and

- if a firm with strategic market status is required to report a merger pursuant to this reporting requirement, to allow the CMA to consider whether to open an investigation into the transaction, the firm must not allow the transaction to take place:
  - without reporting the transaction to the CMA; and
  - until a short waiting period (approximately five working days) has expired.

A similar notification requirement would also apply to the formation by a firm with strategic market status of a joint venture that would carry on activities in the United Kingdom, or supply goods or services to persons in the United Kingdom, if the total value of capital, assets and any other consideration provided to the firm or firms with strategic market status is at least £25 million.

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?

Annual Plan for 2024 to 2025

In its Annual Plan for 2024 to 2025, the Competition and Markets Authority (CMA) stated that, when exercising its functions, it will focus on several key priorities in the next three years, with the following being relevant to the UK merger control regime:

- The CMA will consistently focus actions on the core areas of consumer spending and time, 'particularly for people who need help the most' to protect people from harmful practices and deter anticompetitive behaviour. In particular, the CMA will look to act in areas of essential spending and where people are under particular financial pressure (such as travel, caring for ourselves and others, and accommodation); to deter cartels in public procurement; and tackle potential competition issues in UK labour markets.
- The CMA will take action to 'enable open access to markets', and 'help emergent sectors to develop into high growth, innovative and competitive markets'. Such actions may be taken 'across both established and emergent markets', and involve intervention at an early stage of market development. In particular, the CMA will enable businesses to access digital markets such as cloud services, e-commerce and digital advertising; and encourage effective competition and consumer protection in emergent markets, including the development and deployment of AI foundation models.
- The CMA will '[h]elp accelerate the UK's transition to a net zero economy', '[p]rioritise sectors that offer the biggest potential for impact on innovation and productivity' and '[p]romote resilience through competition'. The CMA notes that effective competition mitigates 'the risks of over-reliance on a limited number of suppliers in a given market' and that it will be 'alert to strategically important markets'. In particular, the CMA will focus on markets for sustainable products and services, including through encouraging competitive markets for climate technology.

Reflections on merger control by CMA's chief executive

In a speech in November 2023, the CMA's chief executive, Sarah Cardell, reflected on five aspects of the UK merger control regime.

First, Cardell noted that while it is the role of the CMA to assess whether a transaction will substantially lessen competition – there is no legal basis for the CMA to take into account the wider impact on economic growth. However, merger control is a key part of ensuring open, competitive markets, which are critical to attracting investment and driving economic growth. The CMA is continuing to look for ways to minimise the burden on merging parties and ensure that the CMA focusses its resources on the most appropriate cases.

Second, Cardell underlined the importance of intervening in early-stage markets to avoid the risks associated with under-enforcement in dynamic and evolving markets. She stated that '[m]erger control remains the most effective way to avoid situations of market power being created in the first place, including in emerging markets. Looking forward, you should expect scrutiny of such deals to remain a priority for the CMA'.

Third, Cardell strongly refuted any suggestion that the CMA is influenced by political considerations, and in particular 'the speculation that political intervention influenced the outcome of the *Microsoft/Activision* case'. She stated that 'there was no attempt by any politician, political advisor, or government official to influence our decision-making in that case. The reason that the deal was, eventually, able to proceed was down to Microsoft's decision to fundamentally restructure the deal in a way that addressed our competition concerns. Nothing else.'

Fourth, Cardell highlighted changes to the Phase II process that are intended to provide more opportunities for merging parties to engage with decision makers, including on remedies.

Fifth and finally, Cardell addressed the suggestion that the *Microsoft/Activision* case has opened the door for a 'Phase 3' review: ie, that merging parties should hold back their best remedies during a phase II review, as they will still have the opportunity to re-notify a new, restructured deal if the original transaction is blocked. Cardell emphasised that holding back does not increase the chances of clearance at phase II, it simply extends the overall process and thereby increases the financial pressure and commercial uncertainty for the parties.

Legislative reforms to the merger control regime

The Digital Markets, Competition and Consumers Act (the DMCC Act) received Royal Assent on 24 May 2024.

The DMCC Act is the most significant reform to UK competition and consumer law since the CMA was established in 2014 and is expected to be in force by autumn 2024. It proposes significant changes to the UK merger control thresholds, including a new acquirer-focused threshold, and introduces a new mandatory transaction reporting requirement for digital firms that have strategic market status.

The DMCC Act builds on previous government consultations on reforms to the competition regime, including reforms to merger review, in particular in the following two consultations:

- 'Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers', which sought views on proposals to:
    - promote competition to drive enterprise, innovation, growth and productivity;
    - update consumer rights to keep pace with markets; and
    - strengthen the enforcement of consumer law; and
- 'A new pro-competition regime for digital markets', which set out proposals to 'drive greater dynamism in our tech sector, empower consumers and drive growth across the economy', building on the advice of the CMA's Digital Markets Taskforce and the recommendations made by the Digital Competition Expert Panel, chaired by Professor Jason Furman, in early 2019.

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Voluntary or mandatory system?	Mandatory system. Each party must submit a filing. Filing fee (paid by acquiring person) is between US$30,000 and US$2.335 million, depending on the size of the transaction.
Notification trigger/ filing deadline	Must satisfy the commerce test, size-of-parties test (for deals valued between US$119.5 million and US$478 million) and size-of-transaction test, and not qualify for an exemption. No filing deadline.
Clearance deadlines (Phase I/Phase II)	Thirty-day initial waiting period (15 days for all-cash tender offer or transfer in bankruptcy). Can be shortened by early termination or extended by issuance of a second request. Phase II period ends on the 30th day after compliance by all parties with the second request (in the case of a cash tender offer or transfer in bankruptcy, Phase II ends on the 10th day after compliance by the acquiring person with the second request). Transaction suspended until waiting periods have been observed.
Substantive test for clearance	Whether the transaction may substantially lessen competition or tend to create a monopoly.
Penalties	Failure to file: fine of up to US$51,744 per day; divestiture can be required. Transaction cannot be implemented prior to clearance. Same penalties apply if the transaction is consummated before approval.
Remarks	Special rules can apply to certain industrial sectors (telecommunications and banking).

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

Section 7 of the Clayton Act, enacted in 1914 and amended in 1950, is the principal US antitrust statute governing mergers and acquisitions. Section 7 prohibits acquisitions of assets or stock where 'the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly'. Transactions may also be challenged under section 1 or 2 of the Sherman Act as unreasonable restraints of trade or as attempts at monopolisation. The Federal Trade Commission (FTC) also has the authority under section 5 of the FTC Act to challenge a transaction as an 'unfair method of competition'.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act) was enacted to give the federal agencies responsible for reviewing the antitrust implications of mergers and acquisitions – the FTC and the Antitrust Division of the Department of Justice (together, the antitrust agencies) – the opportunity to review the antitrust issues presented by certain acquisitions of assets, non-corporate interests or voting securities before those acquisitions are completed.

Pursuant to congressional authorisation, the FTC, with the agreement of the Antitrust Division, has promulgated detailed and complex rules (the Rules) governing pre-merger notification under the HSR Act. Both the HSR Act and the Rules were amended significantly in February 2001, and the Rules again underwent significant revision in 2005 and 2011.

On 27 June 2023, the FTC issued a Notice of Proposed Rule Making that would amend the HSR Form and Instructions. The proposed changes would significantly expand the types of information and documents that filing parties must provide to the antitrust agencies. Some of the key proposed additions include a transaction rationale, information on horizontal and non-horizontal relationships, labour market information, ordinary course business documents relating to areas of overlap and information on prior acquisitions. Parties would also be required to submit more documents including the transaction agreement, transaction evaluations and any prior agreements between the filing parties. The comment period with respect to the proposed rules closed on 27 September 2023 with the FTC receiving over 700 comments. It is not clear when or whether the proposed changes will be enacted. The antitrust agencies also have jurisdiction to investigate and challenge transactions under the US antitrust laws noted above, regardless of whether they have been notified under the HSR Act and of whether 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 the 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) as those that are available to the government, although a private party may be subject to certain equitable defences (eg, 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 antitrust agencies have taken the position that it should be given a broad interpretation similar to the interpretation that 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 those 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, a limited liability company (LLC) or a 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 those 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 Act 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. Any acquisition that results in the acquiring person holding voting securities of another company valued in excess of US$119.5 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. 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 Rules include a definition of 'control'; however, this definition is used primarily to determine which companies should be included within the acquiring or acquired persons categories. The basic principles used in determining whether 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 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 on 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$478 million (adjusted annually) or less but greater than US$119.5 million (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 Act US dollar thresholds are adjusted annually to reflect changes in the gross national product. The current thresholds will be in effect from 6 March 2024 until early 2025.

Commerce test

The commerce test requires that either the acquiring or acquired party be engaged in US commerce or in any activity affecting US commerce.

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 the 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 the acquiring person holds 50 per cent or more of the entity, thus potentially requiring HSR Act notification.

An HSR Act filing is not required in connection with any particular acquisition unless it will result in the acquiring person holding assets or voting securities with an aggregate total value in excess of US$119.5 million (adjusted annually). In most cases, this threshold is cumulative – for example, if an acquirer already owns US$80 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$125 million.

However, although 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.

Size-of-the-parties test

The size-of-the-parties test does not apply to transactions resulting in holdings valued in excess of US$478 million (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. Generally speaking, this test is satisfied if one party (including all entities in its corporate family) has worldwide sales or assets of US$23.9 million or more (adjusted annually) and the other has worldwide sales or assets of US$239 million or more (adjusted annually). Sales and assets, as a general rule, are defined as those set forth in a party's most recent regularly prepared income statement and balance sheet.

'Acquiring person' and 'acquired person' are terms of art under the HSR Act and the Rules. To summarise a complex definition, these terms include not only the entity making the acquisition and the entity being acquired, but also the entire corporate family of which each is a part; thus, assuming that a corporate family's assets or sales, or both, are US$239 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$23.9 million or more (adjusted annually).

Exemptions

Once it is determined that a proposed transaction meets the jurisdictional tests described above, the next step in determining whether 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 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 (adjusted annually).

The application of each of these exemptions will depend on the particular circumstances of the transaction, and on the limits and conditions to those exemptions set forth in the HSR Act and the Rules.

Finally, transactions that fall below the HSR Act thresholds or are otherwise exempt from HSR Act reporting can still be investigated and challenged even after they are consummated.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If the threshold requirements are met and no exemption is available, filing under the HSR Act is mandatory; that is, the proposed transaction cannot be consummated until the filing is completed and the applicable waiting periods 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 antitrust 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 antitrust 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 United States exceeding US$119.5 million during the acquired person's most recent fiscal year. Even if the acquisition exceeds this threshold (adjusted annually), the acquisition will be exempt if:

- both the acquiring and acquired persons are foreign;
- the aggregate sales in or into the United States in the most recently completed fiscal year, and the aggregate total assets in the United States of the acquiring person and the acquired person are both less than US$262.9 million; and
- the assets that will be held as a result of the transaction are valued at US$478 million or less.

Acquisitions of voting securities of non-US issuer

Regarding 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 United States valued at over US$119.5 million or made aggregate sales in or into the United States of over US$119.5 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$119.5 million thresholds described above (adjusted annually) is exceeded.

Regarding 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 either holds assets in the United States valued at more than US$119.5 million or made aggregate sales in or into the United States of more than US$119.5 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$119.5 million thresholds (adjusted annually) is exceeded. Even if neither of the US$119.5 million thresholds described above (adjusted annually) is exceeded, the transaction will be exempt where:

- both the acquiring and the acquired persons are foreign;
- the aggregate sales in or into the United States in the most recently completed fiscal year, and the aggregate total assets in the United States of the acquiring person and the acquired person are both less than US$262.9 million; and
- the value of the voting securities that will be held as a result of the transaction is US$478 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$119.5 million threshold (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 those 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 (eg, 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 Department of the Treasury).

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NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no specific deadline for filing under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act). The parties can submit their filings at any time after the execution of a letter of intent (which can be non-binding) or a definitive agreement.

However, if a transaction is covered by the HSR Act, it cannot be consummated until all required filings have been made and the applicable waiting periods have been observed. Additionally, even after filings are submitted, it is a violation of the HSR Act for an acquiring party to take steps that have the effect of transferring beneficial ownership of the target business to the acquirer prior to the expiry of the waiting period. Failure to comply with the HSR Act can result in a fine of up to US$51,744 per day (adjusted annually), and the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) (together, the antitrust 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 instances in which a required filing has not been made, or the waiting period has not been observed, the antitrust agencies have not hesitated to seek significant penalties; they have brought at least 22 failure to file cases in the past 15 fiscal years and have obtained fines ranging from US$180,000 to US$11 million.

In 2016, the DOJ filed suit against ValueAct Capital for a failure to make an HSR Act 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 2019, Canon Inc and Toshiba Corporation were fined US$2.5 million each in connection with the acquisition by Canon of Toshiba Medical Systems Corporation (TMSC) from Toshiba. The complaint filed by the DOJ on behalf of the FTC alleged that Canon and Toshiba devised a scheme that 'had no purpose' other than to quickly complete the sale of TMSC and avoid the HSR Act's waiting period requirements.

Also in 2019, the DOJ filed suit against Third Point LLC and three funds it manages for failure to file under the HSR Act when the shares of Dow Inc held by the three Third Point funds converted to shares of the newly formed DowDuPont Inc following the merger of Dow Inc and EI du Pont de Nemours & Company. The three Third Point funds were required to collectively pay US$609,810 in civil penalties, and they and Third Point LLC are barred from committing future violations of the HSR Act in connection with corporate consolidations. The three Third Point funds and Third Point LLC were at the time already under a federal court order stemming from allegations that they violated the HSR Act in connection with their 2015 acquisitions of voting securities of Yahoo! Inc.

In 2022, investment fund operator Biglari Holdings Inc agreed to a US$1.4 million civil penalty to settle claims that acquiring additional shares of Cracker Barrel Old Country Store Inc violated the HSR Act. According to the complaint, the FTC's Premerger Notification Office contacted the firm and asked why no filing had been made with respect to certain March 2020 share acquisitions. The purchases, together with the firm's prior holdings in the company, met the size-of-transaction and size-of-person tests in transactions that were not covered by the five-year period allowable under the firm's earlier filing. Biglari was a repeat offender, having previously been required to pay US$850,000 for HSR Act violations related to purchases of Cracker Barrel shares in 2012.

Individual investors are also at risk when they do not comply with the HSR Act. In December 2018, the FTC fined James Dolan, the executive chair and a director of Madison Square Garden Company (MSG), US$609,810 for failing to report his receipt in September 2017 of MSG restricted stock units in connection with his compensation. Mr Dolan had filed in August 2016 for the then-applicable US$50 million HSR Act threshold (adjusted annually) and was thus permitted under the HSR Act to acquire additional MSG voting securities valued up to the then-applicable US$100 million filing threshold (adjusted annually). The MSG shares received by Mr Dolan in September 2017 resulted in him holding MSG shares valued in excess of the threshold. This was Mr Dolan's second HSR Act violation.

In December 2021, Werner Enterprises Inc founder Clarence L Werner agreed to a US$486,900 civil penalty to settle claims that he violated the HSR Act multiple times between 2007 and 2019 by acquiring Werner Enterprises stock by exercising his stock options and engaging in a series of open-market purchases without filing for HSR Act clearance. Each acquisition, together with his prior holdings in Werner Enterprises, caused him to cross the then-applicable US$100 million HSR Act filing threshold (adjusted annually). Notably, the FTC alleged that several of the purchases were made after Mr Werner became aware that prior purchases violated the Act.

In the same month, Richard Fairbank, chief executive officer of Capital One Financial Corporation, agreed pay a US$637,950 civil penalty to settle FTC charges that his 2018 acquisition of Capital One Financial stock violated the HSR Act. The complaint alleged that Mr Fairbank failed to file for HSR Act clearance before acquiring Capital One Financial voting securities in excess of the then-applicable US$100 million filing threshold (adjusted annually).

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 in accordance with 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 have the acquired person pay the fee.

Transactions valued at less than US$173.3 million are subject to a filing fee of US$30,000. Transactions valued at US$173.3 million or more but less than US$536.5 million are subject to a filing fee of US$105,000. Transactions valued at US$536.5 million or more but less than US$1.073 billion are subject to a filing fee of US$260,000. Transactions valued at US$1.073 billion or more but less than US$2.146 billion are subject to a filing fee of US$415,000. Transactions valued at US$2.146 billion or more but less than US$5.365 billion

are subject to a filing fee of US$830,000. Transactions valued at US$5.365 billion or more are subject to a filing fee of US$2.335 million.

This fee must be submitted at the time the notification form is filed; otherwise, 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 antitrust agencies review it. If the antitrust agencies take no action, the transaction may be consummated when the waiting period has expired. The antitrust 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 government 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 waiting period

The parties may request that the antitrust agencies terminate the waiting period before it has run its full course, and the antitrust agencies may, at their discretion, grant such requests.

When early termination is granted, the antitrust agencies must publish a notice of their action in the Federal Register. This notification only identifies the acquiring person, the acquired person and the acquired entity. None of the confidential business information filed by the parties is disclosed.

On 4 February 2021, the FTC announced that the antitrust agencies would temporarily suspend grants of early termination of the waiting period. As at April 2024, this suspension is still in place.

Extension of waiting period

The agency responsible for reviewing a particular transaction may, before the end of the initial 30-day waiting period, issue what is generally referred to as a second request, seeking additional information from the parties to a transaction. The issuance of a second request extends the waiting period to the 30th day (or, in the case of a cash tender offer or a transfer in bankruptcy covered by 11 USC section 363(b), the 10th day) after the date of substantial compliance with the request for additional information. In some cases, the parties may also withdraw and refile under the HSR Act, which starts a new initial 30-day (or 15-day) waiting

period. This voluntary process gives the competent 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$51,744 per day (adjusted annually), and the antitrust agencies may seek to unwind a transaction that has been consummated in violation of the HSR Act. The antitrust agencies have imposed fines for failure to file and observing the waiting period.

In 2019, Canon Inc and Toshiba Corporation paid a combined US$5 million to settle claims that they had devised a complex scheme to avoid observing the waiting period required by the HSR Act for Canon's acquisition of Toshiba's subsidiary, TMSC. The DOJ's complaint alleged that Toshiba sold its subsidiary prior to notifying the antitrust agencies because it was facing financial difficulties and needed to recognise the proceeds of the sale of its subsidiary by the end of its 2015 fiscal year.

In October 2015, Len Blavatnik, an investor, agreed to pay civil penalties of US$656,000 to settle a complaint brought by the FTC for his failure to make an HSR Act filing relating to his August 2014 acquisition of TangoMe shares worth approximately US$228 million. Blavatnik had previously violated the HSR Act in 2010 and did not consult HSR Act counsel prior to acquiring the TangoMe shares.

Merging parties may also be fined for gun jumping (ie, 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 periods). In November 2014, a federal court ordered Flakeboard America Limited and SierraPine, both makers of MDF particle boards, to pay the DOJ fines of almost US$5 million for pre-closing actions that allegedly violated HSR Act gun-jumping and Sherman Act provisions under a settlement agreement.

Additionally, the Antitrust Division, in January 2010, fined Smithfield Foods and Premium Standard Farms for an alleged gun-jumping violation in which 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 those that are applied to domestic

transactions. For example, in 1997, Mahle GmbH, a German piston manufacturer, and Metal Leve SA, a Brazilian competitor, were each fined US$2.8 million for failure to file and observe the HSR Act waiting period prior to closing an acquisition by Mahle of 50.1 per cent of Metal Leve. Both companies manufactured diesel engine parts through US subsidiaries.

In 2019, two companies headquartered in Japan, Canon Inc and Toshiba Corporation, were fined US$2.5 million each in connection with the acquisition by Canon of a Toshiba subsidiary, TMSC, a company with operations in the United States. The complaint filed by the DOJ on behalf of the FTC alleged that Canon and Toshiba devised a scheme that 'had no purpose' other than to quickly complete the sale of TMSC and avoid the HSR Act's waiting period requirements.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There are no special remedy rules or practices applicable to foreign-to-foreign mergers. If the transaction gives rise to competition 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 detailed and complex rules promulgated by the FTC with the agreement of the Antitrust Division (the Rules), which govern pre-merger notification under the HSR Act, contain provisions that are applicable only to tender offers. If the transaction in question is a cash tender offer (or a transfer in bankruptcy covered by 11 USC section 363(b)), the statutory initial waiting period is 15 days (instead of the usual 30 days). If a second request is issued in the 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.

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 both 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 each 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, 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 must 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 and 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 memorandums, and 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 antitrust agencies also require the submission of certain documents analysing synergies or efficiencies to be achieved in the transaction. Private equity and other investment funds making acquisitions must also include certain activities of associates and portfolio investments that are not controlled by the acquirer but are engaged in an industry similar to the target's operations.

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 competition 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 Form is true, correct and complete.

In June 2023, the FTC issued a Notice of Proposed Rule Making that would amend the HSR Form and Instructions. The proposed changes would significantly expand the types and extent of information and documents that filing parties must provide to the antitrust agencies at the outset of the review process. Some of the key proposed additions include the transaction rationale, information on horizontal and non-horizontal relationships, labour market information, ordinary course business documents relating to areas of overlap and information on prior acquisitions. In terms of extra documentation, the parties would be required to provide items such as drafts of the transaction agreement, transaction evaluations and any prior agreements between them. It is not clear when or if these proposed changes will be enacted.

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. The antitrust agencies then decide between themselves which 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 a further review of the transaction, it notifies the other agency and obtains clearance. If both antitrust 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 the request is not mandatory during the initial waiting period, but a failure to respond may leave the reviewing 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.

Often, the information provided to the reviewing agency during the initial waiting period will be sufficient to allow it to terminate its investigation. It is not uncommon for the parties to submit some form of letter or position paper to the reviewing agency during the initial waiting period, addressing the reviewing agency's questions and explaining in detail why the transaction will not substantially lessen competition or create a monopoly. It is also very common for the reviewing agency to contact the parties' customers and competitors to obtain additional information regarding the industry, and to interview executives from the merging firms.

For mergers that continue to raise significant antitrust issues at the end of the initial waiting period, the procedure available to the antitrust agencies is to issue a request for additional information and documentary material or, as it is more commonly referred to, a second request. In some cases, the parties may also withdraw and refile under the HSR Act, which starts a new initial 30-day (or 15-day) waiting period. This voluntary process gives the reviewing 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, data 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. In September 2021, the FTC announced that its second requests also include requests related to a transaction's effect on labour markets, the cross-market effects of a transaction and how the involvement of investment firms could be detrimental to a post-transaction firm's incentives to compete. If the changes proposed in the Notice of Proposed Rule Making issued in June 2023 come into effect, certain types of information usually requested as part of a second request will need to provided upon initial submission of the HSR Form eg, information on labour markets and vertical relationships.

Compliance with a second request is 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.

The antitrust agencies have implemented a number of reforms to the second request process that are 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; however, the FTC announced in September 2021 that its staff will only consider requests for modifications after the companies under investigation have:

- identified and described the business responsibilities of the employees and agents responsible for relevant lines of business;
- identified the employees responsible for negotiating, analysing or recommending the transaction; and
- provided information about how they maintain responsive data.

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 impact of the transaction on competition.

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, seek a court order enjoining the transaction or take other enforcement action for alleged violation of US antitrust laws. Alternatively, the parties and the reviewing agency may enter into a consent agreement, which is a form of settlement that is designed to address the anticompetitive effect that the reviewing agency believes may result if the transaction proceeds as planned.

In many transactions subject to a second request, the reviewing agency and the parties may put in place a timing agreement, which is a deviation from the initial 30-day waiting period (to, for example, 90 days). A timing agreement is purely contractual and encourages an orderly process in which parties comply with a second request and the reviewing agency analyses the transaction to determine whether to grant clearance, block the deal or seek remedies. It is aimed to be mutually beneficial for both the parties and the reviewing agency – the latter gets certainty on timing, and the former gets certainty on the number of custodians, the number of depositions, the availability of meetings with FTC leadership, etc. Generally, the timing agreement will include a provision about seeking a preliminary injunction.

If the reviewing agency takes no action, the parties are free to consummate the transaction at the end of the second 30-day waiting period.

18| What is the statutory timetable for clearance? Can it be speeded up?

If a transaction is subject to the HSR Act, the closing of the transaction must be delayed for an initial 30-day waiting period (or, in the case of a cash tender offer or a transfer in bankruptcy covered by 11 USC section 363(b), a 15-day period) following the filing of the Form. The parties may request that the antitrust agencies terminate the waiting period before it has run its full course, and the antitrust agencies are statutorily permitted to, at their discretion, grant such requests.

On 4 February 2021, the FTC announced that the antitrust agencies would temporarily suspend grants of early termination of the waiting period. As at April 2024, the suspension is still in place.

If the competent 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. Before the February 2021 suspension of early termination grants, the antitrust agencies generally granted requests for early termination swiftly for transactions that clearly raise no competition concerns.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Clayton Act prohibits acquisitions the effect of which 'may be substantially to lessen competition or to tend to create a monopoly'. The Merger Guidelines issued by the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) (together, the antitrust agencies), set out the analytical frameworks or guidelines adopted by the agencies when reviewing mergers. The Horizontal Merger Guidelines were first released in 1992 to guide the antitrust agencies' determination of whether to challenge a horizontal merger and describe their approach to counsel and the business community. The current Merger Guidelines, published in December 2023, unify the approach to horizontal and vertical transactions and consolidate the previous Horizontal Merger Guidelines and Vertical Merger Guidelines into a single document. The guidelines contained in the Merger Guidelines are as follows:

- Guideline 1: Mergers raise a presumption of illegality when they significantly increase concentration in a highly concentrated market;
- Guideline 2: Mergers can violate the law when they eliminate substantial competition between firms;
- Guideline 3: Mergers can violate the law when they increase the risk of coordination;
- Guideline 4: Mergers can violate the law when they eliminate a potential entrant in a concentrated market;
- Guideline 5: Mergers can violate the law when they create a firm that may limit access to products or services that its rivals use to compete;
- Guideline 6: Mergers can violate the law when they entrench or extend a dominant position;
- Guideline 7: When an industry undergoes a trend towards consolidation, the agencies consider whether it increases the risk a merger may substantially lessen competition or tend to create a monopoly;
- Guideline 8: When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series;
- Guideline 9: When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform;

- Guideline 10: When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers, creators, suppliers or other providers; and
- Guideline 11: When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition.

According to the FTC, the Merger Guidelines present 'factors and frameworks' that the antitrust agencies use to assess the risk of transactions. The revised guidance aims to 'reflect modern market realities, advances in economics and law, and the lived experiences of a diverse array of market participants.' In comparison to previous guidance, these frameworks can be seen as supporting heightened scrutiny from the antitrust agencies. The Merger Guidelines contain structural market-based presumptions (including for vertical mergers) the antitrust agencies will use to determine whether a transaction is anticompetitive and guidance on how to apply these presumptions in specific settings. Notably, the thresholds for such presumptions are lower than those contained in the Merger Guidelines' predecessor, bringing more transactions within the scope of what the antitrust agencies deem anticompetitive.

New anticompetitive theories underpin the Merger Guidelines, demonstrating the antitrust agencies' willingness to depart from the traditional market definition framework for assessing whether a transaction may harm competition. The Merger Guidelines focus on preventing 'dominant' firms from having the ability to 'entrench or extend' their 'dominant position' in the market, on concentration trends beyond what is presented in any particular transaction and on the transaction's effect on labour markets, among others.

Although the Merger Guidelines have no force of law, they are highly influential in the antitrust agencies' determination of whether to challenge mergers. The current Merger 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 United States have historically been resolved at the antitrust agency level, rather than challenged in court, the current Merger Guidelines provide important insight into how best to address agency concerns. Having said that, the current leadership of the antitrust agencies have shown an increased willingness to litigate merger cases.

The Merger Guidelines provide for a few types of rebuttal evidence and defences that may negate the inference that a transaction is likely to harm competition. However, the weight the antitrust agencies will place on such evidence seems to be less than under previous guidance. While the Merger Guidelines recognise the potential for merger efficiencies to enhance competition and benefit consumers, notably they do not view vertical transactions as inherently less problematic, nor do they recognise that there are certain well-established efficiencies to vertical transactions. Furthermore, pro-competitive effects in one market are not enough to overcome challenges presented by the transaction in labour markets. Note also that in extreme cases a failing firm defence may be taken into account; however, in practice, these situations are very rare as there are onerous requirements for establishing the defence.

The current Bank Merger Act provides a separate framework under which bank mergers are analysed which focuses heavily on market shares. However, following the banking turmoil

of early 2023, Assistant Attorney General Jonathan Kanter stated in a June 2023 speech that the DOJ would be reassessing the prevailing approach to bank merger enforcement. Separately, the Office of the Comptroller of the Currency released a Notice of Proposed Rulemaking in January 2024 and the Federal Deposit Insurance Corporation released a Proposed Statement of Policy on Bank Merger Transactions in March 2024, each detailing their own approaches to evaluating Bank Merger Act applications which move away from the traditional market share analysis. At the time of writing, the DOJ has yet to release any updated bank merger guidelines.

20 | Is there a special substantive test for joint ventures?

Joint ventures involving competitors that completely eliminate competition between the parties and that do not terminate within a sufficiently limited period (ie, in general, 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 the acquisition by three polyethylene terephthalate (PET) resin producers of a PET production facility that was under construction. 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 antitrust agencies pursuant to a framework described in their 2000 Antitrust Guidelines for Collaborations Among Competitors.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

Market share analysis is only one method of antitrust analysis in the United States. The competent agency, if it believes that the transaction may raise competitive concerns, will examine all aspects of competition in the relevant markets.

Horizontal transactions

In recent years, as well as looking at 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, the antitrust agencies have been particularly concerned with transactions that prompt consolidation concerns or remove nascent or potential competitors.

In the pharmaceutical industry, the FTC filed a complaint against private equity firm Welsh Carson, Anderson & Stowe and US Anesthesia Partners (USAP) which argued that the parties had deliberately engaged in an anticompetitive scheme which involved Welsh Carson engaging in 'roll-up' tactics to acquire 'nearly every large anesthesia practice in Texas'. USAP and Welsh Carson then allegedly protected their dominance with price-setting agreements with independent anesthesia groups and a market allocation agreement to avoid competing with a major rival. The FTC noted it would seek equitable relief, including potential divestitures and unwinding of prior deals which fell below the HSR Act reporting requirements.

As a result of similar roll-up tactics by private equity firm JAB Consumer Partners, the FTC imposed a consent order on JAB as a condition of its acquisition of competing veterinary clinic operator SAGE Veterinary Partners, LLC in June 2022. The order requires JAB to obtain the FTC's approval before acquiring a speciality or emergency veterinary clinic within 25 miles of any JAB-owned clinic anywhere in California or Texas. The company must also notify the FTC in writing 30 days prior to acquiring any speciality or emergency veterinary clinic within 25 miles of a clinic owned by JAB anywhere in the United States that otherwise is not required to be reported under the HSR Act. The purpose of the order is to ensure the FTC has visibility of future consolidation.

Due to similar concerns over consolidation in the US airlines industry, the DOJ sued to block the acquisition of Spirit Airlines by JetBlue in March 2023. The District Court for the District of Massachusetts agreed with the DOJ's proposed theories of harm, that the customers who rely on Spirit as a low-cost alternative to other airlines would likely be harmed as the merger would result in fewer low-cost seats for airline passengers and higher fares. Despite launching an appeal in the First Circuit in which the parties argued the district court ignored the pro-competitive benefits of the merger, the deal was terminated in March 2024.

This decision comes after the DOJ's successful lawsuit to block the Northeast Alliance between JetBlue and American Airlines in May 2023. The DOJ argued that the series of agreements between the parties was part of a larger plan by American Airlines to achieve consolidation in the US airlines industry. The District Court for the District of Massachusetts agreed and ruled in favour of the DOJ in May 2023. American Airlines is now appealing the decision to the Court of Appeals for the First Circuit.

Elimination of potential competition – where one of the merging firms is about to enter the relevant market – continues to be a growing concern.

Several recent cases illustrate this focus. In December 2023, the FTC filed a complaint and sought a temporary restraining order and preliminary injunction to block the acquisition of an exclusive licence by Sanofi to Maze Therapeutics Inc's developmental drug for the treatment of Pompe disease. The FTC argued that the licence would effectively protect Sanofi's monopoly as the only supplier of FDA approved drugs in the treatment of Pompe disease and eliminate a nascent competitor ready to enter the market, ultimately leading to higher prices and less innovation in the market for such drugs. The deal was terminated in response to the complaint.

In July 2022, the FTC filed a complaint for a temporary restraining order and preliminary injunction against Meta's proposed acquisition of Within Limited, a virtual reality studio, alleging the transaction violated section 7 of the Clayton Act by substantially lessening competition in the virtual reality fitness app market. The court endorsed two potential competition theories:

- actual potential competition (ie, the acquisition would substantially lessen competition because it deprives the virtual reality fitness app market of competition that would have arisen from Meta's independent entry into the market); and
- perceived potential competition (ie, the acquisition would eliminate the competitive influence that Meta exerts on firms within the relevant market by virtue of its presence on the fringes of the market).

The court denied the FTC's request for a preliminary injunction in January 2023 and the deal closed shortly thereafter. The FTC withdrew its complaint in February 2023. Although the FTC was unsuccessful in blocking Meta's acquisition of Within, the decision endorsed the two potential competition theories as basis for bringing legitimate claims under section 7.

In 2021, the DOJ sued to block book publisher Penguin Random House LLC from buying its publishing rival, Simon & Schuster Inc. The case alleged buy-side competition harms in:

- the market to acquire US publishing rights to books from authors (the DOJ argued the merger would create monopsony power and cause harm to suppliers (ie, authors) in the form of lower advances); and
- in the narrower market to acquire US publishing rights to anticipated top-selling books.

The complaint alleged that the merged firm would account for close to half of the market for the acquisition of US publishing rights to anticipated top-selling books and that it would be more likely to engage in coordination with its three remaining close rivals. The case went to trial in August 2022. The District Court for the District of Columbia ruled in favour of the DOJ in October 2022 and the DOJ obtained a permanent injunction to block the transaction. The District Court found the harm to authors sufficient to block the deal despite no evidence that the combined entity would raise prices for consumers. A key takeaway from this case is that monopsony claims are a viable theory of harm for antitrust agencies and the DOJ may be emboldened to pursue more monopsony cases in the context of the labour market specifically – assistant attorney general Jonathan Kanter called the decision 'a victory for workers more broadly'.

In February 2024, the FTC filed an administrative complaint to block the proposed acquisition of supermarket chain Albertsons by Kroger. As part of the complaint, the FTC argued that the merger would diminish the bargaining power of grocery workers and potentially lead to decreased wages and worse benefits for the 700,000 employees of both companies. Several attorneys general have now joined the suit to block the merger.

In June 2022, the DOJ filed a complaint over technology and management consulting firm Booz Allen Hamilton Holding Corp's proposed acquisition of EverWatch Corp, a defence firm; however, the DOJ was unsuccessful and the court allowed the parties to close the deal. The court rejected the DOJ's theory of harm, which focused on loss of competition due to a singular non-solicitation agreement contract and found that the proposed market definition of a single contract for a single customer at a single moment in time was too narrow.

In an initial decision announced in February 2022, an FTC administrative law judge dismissed an administrative complaint alleging that Altria Group Inc and Juul Labs Inc entered a series of agreements, including Altria's acquisition of a 35 per cent stake in Juul, that eliminated competition in the US market for closed-system electronic cigarettes. The judge found that, since Altria acquired its stake in Juul, the relevant market had become more competitive and that the evidence failed to prove that Altria's removal of its own e-cigarette products from the market had substantially harmed competition or was likely to do so in the future. In June 2023, the FTC vacated the judge's initial decision and dismissed the complaint in the public interest.

The antitrust agencies also continue to address direct competition concerns, particularly in the pharmaceutical and healthcare sectors where there is increased political and public interest in the need to protect against rising costs.

In November 2023, the FTC filed a complaint against John Muir's acquisition of San Ramon Region Medical Center from Tenet Healthcare Corporation on the basis that John Muir and San Ramon Medical were head-to-head competitors in in-patient general acute care services and the elimination of actual competition between the two would ultimately result in higher healthcare prices for consumers. The deal was terminated in response to the complaint.

The FTC also filed a complaint against IQVIA Holdings in July 2023 to block its acquisition of DeepIntent from Propel Media due to head-to-head competition between IQVIA's Lasso Marketing and Propel's DeepIntent in programmatic advertising for healthcare products. The District Court for the Southern District of New York ruled in favour of the FTC, agreeing that the merger would 'substantially impair competition in the relevant market' and noting that granting a preliminary injunction against the deal was in the public interest. The parties terminated the deal following the ruling by the district court.

Vertical transactions

Historically, challenges of transactions involving vertical issues were uncommon. Although a number of transactions were subject to consent decrees, which the antitrust agencies based on vertical theories (eg, the *Ticketmaster/LiveNation* acquisition, the *Comcast/NBCUniversal* joint venture, and Google's acquisition of ITA Software), *AT&T/Time Warner* (decided in 2018) was the first vertical merger challenge brought in decades. With the explicit inclusion of theories of harm regarding vertical mergers in the 2023 Merger Guidelines, it is no longer true to say that vertical mergers are viewed as inherently less problematic by the antitrust agencies.

A number of recent actions by the current leadership of the antitrust agencies show that they are focused on transactions raising vertical theories of harm.

The FTC filed an administrative complaint to block the takeover of game developer Activision Blizzard by Microsoft in December 2022, alleging a vertical theory of harm which proposed that Microsoft has a practice of acquiring third-party gaming studios that provide inputs to its gaming consoles and video subscription services and then making such inputs 'exclusive to its own consoles and/or subscription services'. The FTC argued such behaviour would allow Microsoft to raise prices, degrade quality and reduce consumer choice across relevant product markets. The FTC subsequently filed suit in federal court in June 2023. The suit showed not only the FTC's willingness to pursue vertical theories of harm but also the antitrust agencies' focus on analysing series of acquisitions and overall strategy. The District Court for the Northern District of California denied the FTC's motion for a preliminary injunction, citing that the FTC had to show that the combined firm has the ability *and* incentive to withhold the *Call of Duty* game from its rivals, and that competition would probably be substantially lessened as a result of the withholding, which it did not. Furthermore, the district court also disagreed that the combined firm would have the incentive to foreclose competitive access to the game, agreeing with Microsoft's arguments that it would face significant reputational harm if it attempted to restrict access to the game and finding Microsoft's commitments to maintain *Call of Duty* on all existing platforms persuasive. In

July 2023, the FTC appealed the district court's decision to the Court of Appeals for the Ninth Circuit. The Court of Appeals did not grant the FTC's motion to block the deal. The full appeal was heard in December 2023 after the parties closed the deal in October, following approval from UK regulators. The Court of Appeals has not yet issued its ruling on the appeal.

The FTC engaged in an administrative trial to block Illumina's US$7.1 billion proposed acquisition of Grail, a maker of multi-cancer early detection tests that utilise DNA sequencing technology. The FTC alleged that Illumina is the only provider of DNA sequencing technology that is a viable option for multi-cancer early detection tests in the United States and thus that Illumina is incentivised to foreclose or disadvantage Grail's rivals. Although the FTC's complaint was dismissed by an administrative law judge in September 2022, the FTC then reversed the dismissal in April 2023 and ordered Illumina to divest Grail (Illumina closed the transaction in August 2021). Illumina subsequently filed an appeal with the Court of Appeals for the Fifth Circuit. The Court of Appeals issued an opinion finding that there was substantial evidence supporting the FTC's ruling that the deal was anticompetitive. The court endorsed a flexible approach to market definition and noted that for R&D markets, products must be more than speculative (eg, have clinical validation/FDA trials) to be included in the market. Notably, the court recognised the vertical merger theory of harm, holding that a vertical merger could be illegal if 'the merged firm will have the ability and incentive to foreclose rivals from sources of supply or distribution'. Importantly, the court also endorsed the 'dated' *Brown Shoe* precedent cited in the Merger Guidelines when assessing whether the acquisition would harm competition, providing support for future enforcement of vertical deals under a more flexible test without rigid economic analysis. The court ultimately remanded to the FTC its order requiring Illumina to divest Grail. However, Illumina announced it would proceed with the divestment of Grail in December 2023 after decisions from the European Commission requiring the deal to be unwound.

Additionally, the FTC sued to block Lockheed Martin Corporation's proposed US$4.4 billion vertical acquisition of Aerojet Rocketdyne Holdings Inc, which supplies critical components for the missiles made by Lockheed and other defence contractors. The FTC's complaint alleged that if the deal were allowed to proceed, Lockheed would use its control of Aerojet to harm rival defence contractors and further consolidate multiple markets that are critical to national security and defence. In February 2022, the parties abandoned the transaction.

In December 2021, the FTC filed a complaint against Nvidia's proposed acquisition of Arm, both semiconductor companies, on the basis that the deal would harm competition in three worldwide markets in which Nvidia competes using Arm-based products, and that Nvidia may gain access to competitively sensitive information on some of its rivals that are licensees of Arm. In February 2022, the parties abandoned the transaction.

The DOJ, along with the states of Minnesota and New York as co-plaintiffs, alleged both horizontal and vertical harms in its February 2022 lawsuit to block UnitedHealth Group Inc's US$13 billion acquisition of health technology firm Change Healthcare Inc. The DOJ alleged that the merger would reduce competition in the markets for commercial insurance (through vertical harms) and the processing of claims (where the parties compete head-to-head). Regarding the commercial insurance market, the DOJ alleged that the merger would allow United to use its control over Change's technologies to disadvantage its health insurance rivals by raising their costs and reducing or withholding quality improvements and innovations from rivals that rely on Change's technologies. In September 2022, the DOJ's attempt

to block the transaction was denied and the parties closed the deal in October 2022. In March 2023, the DOJ and the states of Minnesota and New York agreed to voluntarily dismiss their appeal of the court's September 2022 decision.

Interlocking directorates

In 2023, the FTC successfully sought a consent order in the first case in 40 years that enforces Section 8 of the Clayton Act which prohibits interlocking directorates. A US$5.2 billion deal between Quantum Energy Partners and EQT Corporation, which are direct competitors in the production and sale of natural gas in the Appalachian Basin, would have resulted in Quantum becoming one of EQT's largest shareholders with a seat on its board, in violation of the interlocking directorates provisions of the Clayton Act. The consent order requires Quantum to divest its EQT shares, prohibits it taking a seat on EQT's board and protects against the exchange of competitively sensitive information.

The DOJ also appears willing to pursue illegal interlocking directorate. In April 2024, it expressed concerns over positions held by two directors of both Warner Bros Discovery Inc and Charter Communications Inc. Both companies provide video distribution services to their customers, making them competitors. The two directors subsequently resigned from Warner Bros, although did not admit any wrongdoing.

To date, the antitrust agencies' enforcement efforts in regards to interlocking directorates has resulted in the prevention of appointment or resignation of directors of at least 24 companies, including Definitive Healthcare Corp and ZoomInfo Technologies Inc, Maxar Technologies Inc and Redwire Corp, and Littlefuse Inc and CTS Corp.

Conglomerate theories

Finally, although conglomerate theories, or portfolio effects, have been investigated by the antitrust agencies, historically there had not been any merger challenges brought on the basis of such theories.

However, in May 2023, the FTC sued to block Amgen's proposed US$27.8 billion acquisition of Horizon Therapeutics. Six state attorneys general joined the suit and endorsed the FTC's theories of harm that proposed Amgen's practices of cross-market bundling and rebates could result in pressuring pharmacy benefit manufacturers into favouring Horizon's two monopoly products: Tepezza and Krystexxa, which are the only drugs available for treatment of thyroid eye disease and chronic refractory gout, respectively. Protecting the revenues for these two drugs was central to the valuation of the deal and, as such, Amgen would have strong incentives to raise the prices of the drugs in the future and to seek to prevent any competitors entering the market. Notably, this was a case with no horizontal or vertical overlaps. However, intervention by the FTC was likely to have been prompted by consolidation concerns in the pharmaceutical industry, along with Amgen's objectionable past practices. The parties agreed to a consent order that imposes various behavioural remedies on Amgen, including a prohibition on bundling its existing drugs with Tepezza and Krystexxa and from using rebates or contracts to disadvantage competitors.

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 antitrust agencies have traditionally pointed out that they do not and cannot consider non-competition factors in their merger reviews. In particular, the antitrust agencies have recently noted that environmental, social and governance initiatives are not exempt from the application of US antitrust laws.

However, it is worth noting that the Merger Guidelines state that a transaction's effect on labour markets can be a stand-alone basis on which to challenge transactions and that these negative impacts cannot be sufficiently overcome by pro-competitive benefits in other markets by themselves.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The Merger Guidelines clarify how the antitrust agencies analyse and evaluate claims that mergers will result in efficiencies and lower prices. The FTC chair was quoted in 1997 as saying that presentation of efficiencies from a merger 'won't change the result in a large number of cases, [rather they will have] the greatest impact in a transaction where the potential anticompetitive problem is modest and the efficiencies that would be created are great'. In 2022, Lina Khan, the current chair of the FTC, was quoted as saying that 'the word efficiency doesn't appear anywhere in the antitrust statutes'.

The Merger Guidelines note that 'cognizable efficiencies must be of sufficient magnitude and likelihood that no substantial lessening of competition is threatened by the merger in any relevant market'. The Merger Guidelines lay out four factors for determining whether an efficiency is 'cognizable':

- the efficiencies must be merger-specific and alternative ways of achieving the efficiencies will be considered;
- the efficiencies must have been verified (or be verifiable) using a reliable methodology. Pro-competitive effects which are vague, speculative and difficult to verify or quantify will not be accepted;
- the efficiencies must prevent a reduction in competition, not merely benefit the merging parties;
- efficiencies will only be recognised if they do not result from the anticompetitive worsening of terms for the merged firm's trading partners.

In sum, the Merger Guidelines' discussion of efficiencies provides a useful clarification of the issue. The Merger 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.

In February 2024, after the proposed merger between JetBlue and Spirit Airlines was blocked by the District Court for the District of Massachusetts, the parties filed a brief requesting the Court of Appeals for the First Circuit to reverse the ruling on the basis that, among other things, the district court failed to recognise and give proper weight to the pro-competitive benefits of the transaction, which they alleged to be increased competition against the dominant airlines and potential cost-savings for customers. The parties did not proceed with the appeal and abandoned the deal shortly after.

Similarly, in the December 2023 hearing of the FTC's appeal against the district court's decision not to block Microsoft's acquisition of Activision, the Court of Appeals for the Ninth Circuit challenged the parties' arguments that benefits for consumers were automatically pro-competitive. The Court of Appeals has not yet issued its ruling following the appeal.

Additionally, in October 2022, a district court judge excluded testimony concerning Penguin Random House's proposed acquisition of Simon & Schuster supporting Penguin's claims that the merger would lead to efficiencies, on the basis that its expert witness was not able to independently verify the numbers he was presenting as part of his argument.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) (together, the antitrust agencies) have the power to subpoena documents and information in a merger investigation. In addition, the antitrust agencies have the authority to seek an injunction in federal court prohibiting the completion of a proposed transaction. The antitrust agencies do not have the authority to preliminarily enjoin a transaction themselves, but if a court preliminarily enjoins a transaction, both antitrust agencies may seek a permanent injunction from the court. As a practical matter, however, parties usually abandon a transaction if a preliminary injunction is issued. Mergers and acquisitions can, under some circumstances, also be challenged by state attorneys general and private parties.

The FTC may also bring administrative proceedings to determine the legality of mergers or other transactions. In addition, the FTC may issue an order, following an administrative trial, that permanently enjoins the transaction. In April 2023, the Supreme Court held that parties can challenge the constitutionality of the FTC's use of the administrative courts in a federal district court before the administrative trial is complete. This is likely to increase constitutional challenges such as those brought by the parties in *Illumina/Grail* as part of their appeal to the Court of Appeals for the Fifth Circuit. In the appeal, the parties raised four constitutional challenges regarding non-delegation, executive power, due process and equal protection, though the court quickly disposed with each of these, finding them foreclosed by Supreme Court precedent. Similarly, the parties in *Black Knight/Intercontinental Exchange* argued their constitutional rights to due process, equal protection, 'right to a jury trial' and 'right to adjudication before a neutral arbiter' would be violated by FTC administrative proceedings, as well as claiming FTC administrative proceedings are invalid due to job

protections for commissioners and administrative law judges, which they characterised as a breach of the separation-of-powers doctrine in the constitution before the District Court for the Northern District of California in April 2023.

In March 2024, several Supreme Court justices also indicated that they were open to limiting the opportunities for lower courts to defer to federal agencies' legal interpretations in disputes over rulemaking.

In April 2022, Doha G Mekki, principal deputy assistant attorney general for the DOJ, announced that the DOJ is willing to file complaints to enjoin mergers prior to the merging parties' certification of compliance with its second request. Additionally, both the FTC and the DOJ have expressed an increased willingness to litigate merger cases in recent times.

For example, in March 2023, the DOJ filed a complaint with the District Court for the District of Massachusetts to block the takeover of Spirit Airlines by JetBlue. The district court ruled in favour of the DOJ, blocking the deal in January 2024, which resulted in the parties ultimately terminating the merger. This case followed on from the DOJ's successful suit against the Northeast Alliance between American Airlines and JetBlue, which was blocked by the District Court for the District of Massachusetts in July 2023, although American Airlines has now appealed the decision to the Court of Appeals for the First Circuit.

In July 2023, the FTC filed an administrative complaint against the proposed acquisition of Propel Media by IQVIA Holdings. The District Court for the Southern District of New York ruled in favour of the FTC and blocked the acquisition in December 2023.

In May 2023, the FTC filed a complaint with the District Court for the Northern District of Illinois Eastern Division to block Amgen's proposed US$27.8 billion acquisition of Horizon Therapeutics. In June 2023, six state attorneys general joined the lawsuit with the FTC to block the deal. Ultimately, the parties were able to agree to a consent order in September 2023, which allowed the deal to close.

Additionally, the FTC engaged in an administrative trial to block Illumina's US$7.1 billion proposed acquisition of Grail. Although the FTC's complaint was dismissed by an administrative law judge in September 2022, the FTC then reversed the dismissal in April 2023 and ordered Illumina to divest Grail. Illumina filed its appeal against the administrative decision in the Court of Appeals for the Fifth Circuit in April 2023 and in December the court issued its decision remanding to the FTC its order requiring Illumina to divest Grail. However, ultimately Illumina announced it would divest Grail in December 2023, following decisions by the European Commission.

The FTC also filed an administrative complaint against Microsoft's acquisition of Activision Blizzard in December 2022. The District Court for the Northern District of California denied a motion to preliminarily block the deal in July 2023. The Court of Appeals for the Ninth Circuit heard an appeal against the decision in December 2023, in which it expressed scepticism over the supposed pro-competitive effects of the transaction. The Court of Appeals has yet to issue its ruling following the appeal.

Other examples of the antitrust agencies seeking to challenge transactions include the following:

- in March 2024, the DOJ's indication that it would pursue litigation caused the termination of Fresh Express's proposed acquisition of Dole's vegetable division;
- in February 2024, the FTC filed an administrative complaint against the proposed merger between Kroger and Albertsons;
- in January 2024, the FTC sued to block Novant Health's acquisition of two North Carolina hospitals from Community Health Systems, Inc;
- in December 2023, the FTC took action to block the grant of an exclusive licence from Maze Therapeutics to Sanofi;
- in December 2023, the FTC sued 7-Eleven, Inc for acquiring a fuel outlet in contravention of a 2018 FTC consent order;
- in November 2023, the FTC sued to block John Muir's acquisition of San Ramon Regional Medical Center;
- in October 2023, the FTC filed a complaint against the deal between QEP Partners and EQT Corporation;
- in March 2023, the FTC took action to block the proposed merger of Intercontinental Exchange Inc and Black Knight Inc;
- in September 2022, the DOJ sued to block Assa Abloy's proposed acquisition of Spectrum Brands' hardware and home improvement division;
- in August 2022, the FTC issued an administrative complaint against the proposed merger of Meta and Within Unlimited;
- in July 2022, the DOJ filed a motion for a preliminary injunction against Booz Allen Hamilton's proposed acquisition of EverWatch Corp;
- in June 2022, the FTC authorised an administrative complaint and suit to block the proposed merger of HCA Healthcare and Steward Health Care System;
- in June 2022, the FTC authorised an administrative complaint and suit to block the proposed acquisition of Saint Peter's Healthcare System by RWJBarnabas Health;
- in March 2022, the FTC filed a complaint against EnCap Energy's acquisition of EP Energy Corp;
- in February 2022, the FTC issued an administrative complaint to block the proposed merger of Lifespan Corp and Care New England Health System;
- in January 2022, the FTC sued to block Lockheed Martin Corporation's proposed vertical acquisition of Aerojet Rocketdyne Holdings Inc;
- in December 2021, the FTC sued to block Nvidia Corp's proposed acquisition of Arm Ltd;
- in November 2021, the DOJ filed a complaint to block Penguin Random House's proposed acquisition of Simon & Schuster;
- in November 2021 the DOJ sued to block US Sugar Corporation from acquiring Imperial Sugar Company;
- in September 2021, the DOJ filed a lawsuit challenging the operational partnership between American Airlines and JetBlue (Northeast Alliance);
- in December 2020, the FTC brought administrative proceedings to block Procter & Gamble's proposed acquisition of Billie Inc;
- in December 2020, the FTC issued an administrative complaint and authorised an action to block Hackensack Meridian Health Inc's proposed acquisition of Englewood Healthcare Foundation;
- in September 2020, the FTC challenged a proposed joint venture between Peabody Energy Corporation and Arch Coal Inc;
- in February 2020, the FTC issued an administrative complaint and, together with the Commonwealth of Pennsylvania, sued to block the proposed merger of Jefferson Health and Albert Einstein Healthcare Network;

- in February 2020, the DOJ sued to block the proposed acquisition of the Plastics Division of DS Smith PLC by Liqui-Box Inc; and
- in January 2020, the DOJ sued to block the proposed merger of ZF Friedrichshafen AG and WABCO Holdings Inc.

If the competent 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 FTC and, ultimately, abandonment of the transaction).

Failure to comply with any provision of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act) may result in a fine of up to US$51,744 for each day (adjusted annually) during which the person is in violation of the HSR Act. The antitrust 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 antitrust 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 US antitrust laws, the antitrust agencies may seek to undo the transaction through an action in a district court. This would be more likely where the competent agency believes the acquisition also violated substantive US merger laws.

Finally, the antitrust agencies have jurisdiction to investigate and challenge transactions that fall below the HSR Act notification thresholds, even after they are consummated. They have challenged more than 31 transactions in this regard since December 2008 in industries including pharmaceuticals, medical diagnostics, medical devices, chemical additives (oxidates), educational marketing databases, voting machines and food processing. Examples include the antitrust agencies' actions in respect of:

- Össur Hf and College Park Industries Inc's proposed acquisition of College Park (April 2020);
- BazaarVoice's 2012 acquisition of PowerReviews, its only serious competitor, in a transaction that was not reportable under the HSR Act (December 2014);
- Heraeus Electro-Nite Co LLC's 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 (January 2014);
- two acquisitions by Graco of competitors in the fast-set equipment market in 2005 and 2008 (April 2013); and
- Magnesium Elektron North America Inc's non-reportable US$15 million acquisition of Revere Graphics Worldwide Inc in 2007 (October 2012).

The FTC also issued special orders to Alphabet, Amazon, Apple, Facebook and Microsoft in February 2020 for the purposes of conducting a study on non-HSR reported acquisitions by these companies between 2010 and 2019. The study was published in September 2021 and forms the basis of the antitrust agencies' continued scrutiny of technology deals that may not be reportable under the HSR Act.

In 2021, the FTC withdrew the 1995 Policy Statement on Prior Approval and Prior Notice Provisions which had removed the FTC's practice of imposing prior approval conditions on parties who had previously violated antitrust laws. The FTC now includes such prior approval conditions in consent decrees, meaning parties subject to these conditions will need to notify the antitrust agencies of transactions that may otherwise be non-reportable under the HSR Act. As a recent example, in March 2024, XCL Resources, a subsidiary of EnCap Investment LP, sought the FTC's prior approval for the acquisition of Altamont Energy, LLC due to a prior approval condition contained in a 2022 consent order for EnCap's acquisition of EP Energy Corp.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

If the antitrust agency responsible for a given transaction determines that the transaction may harm competition in a relevant market, the parties and the competent agency may attempt to negotiate some modification to the transaction or settlement that resolves the competitive concerns expressed by the competent 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 that 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 competent 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 current leadership of the antitrust agencies have expressed less willingness to resolve alleged competition concerns with negotiated remedies. In particular, in January 2022, assistant attorney general Jonathan Kanter stated:

> *I am concerned that merger remedies short of blocking a transaction too often miss the mark. Complex settlements, whether behavioral or structural, suffer from significant deficiencies. Therefore, in my view, when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction. It is the surest way to preserve competition.*

Although the FTC has also expressed scepticism towards negotiated remedies, it has continued to resolve certain matters with remedies.

Divestitures

As an example of the current reluctance to accept divestitures as negotiated remedies, in September 2023, the DOJ rejected an offer by JetBlue to divest all of Spirit Airlines' holdings at Boston Logan International Airport and Newark Liberty International Airport, and up to five gates and ground facilities at Fort Lauderdale-Hollywood International Airport to Allegiant in

order to close the deal. The DOJ ultimately felt the merger could not be remedied by divestments and the deal was terminated in March 2024.

However, in May 2023, the DOJ agreed to a divestiture of assets by Assa Abloy AB in order to close its US$4.3 billion acquisition of Spectrum Holding Inc's hardware and home improvement business. Under the proposed settlement that was reached during the course of trial, Assa Abloy would be required to divest its Emtek and Schaub premium mechanical door hardware businesses, its Yale and August residential smart lock businesses in the United States and Canada along with other related smart lock assets.

The FTC has continued to resolve matters with remedies. In November 2023, the FTC approved a consent order which required Intercontinental Exchange, Inc to divest Black Knight's Optimal Blue and Empower businesses which were engaged in providing services in the mortgage orientation process to Constellation Web Solutions as part of the acquisition to assuage the FTC's concerns that the deal would combine the top two mortgage technology providers, resulting in less innovation, higher costs and a limited choice for consumers.

In December 2022, the FTC ordered Tractor Supply Company to divest some Orscheln stores, corporate offices and a distribution centre to Bomgaars and Buchheit (both farm store chains) to proceed with its acquisition of the rival chain Orscheln Farm and Home LLC. The FTC argued the acquisition would have otherwise harmed competition among farm stores in the US Midwest and South.

In July 2022, the FTC ordered Prince International Corp and Ferro Corp to divest three facilities for American Securities Partners VII LP (the parent of Prince) to acquire competitor Ferro. The FTC alleged the acquisition would allow the merged firm to unilaterally raise prices for porcelain enamel frit in North America and for forehearth colourants globally. They also argued it would eliminate Prince as an independent competitor for glass enamel globally, and increase the possibility of coordination between the merged firm and its largest competitor.

In June 2022, the FTC ordered JAB Consumer Partners to divest veterinary clinics in the states of California and Texas as a condition of its proposed acquisition of Sage Veterinary Partners LLC, a competitor clinic operator. The divestitures would protect competition in markets for speciality and emergency veterinary services. The FTC also imposed prior approval and prior notice requirements on JAB's future acquisitions of speciality and emergency veterinary clinics. Specifically, JAB must obtain prior approval before 'acquiring a specialty or emergency veterinary clinic within 25 miles of any then-owned JAB-owned clinic anywhere in California or Texas'. JAB must also provide notice to the FTC '30 days prior to acquiring any specialty or emergency veterinary clinic within 25 miles of a clinic owned by JAB anywhere in the United States that otherwise is not required to be reported' under the HSR Act.

In April 2022, the FTC required a divestiture in which the divested assets stayed within the parent company of the acquired firm. As a condition of Hikma Pharmaceuticals PLC's April 2022 acquisition of Custopharm Inc, the FTC required that Custopharm's parent company retain and transfer Custopharm's assets related to a generic corticosteroid to another of its subsidiaries. The FTC argued that the move was necessary to remove any

incentive for Hikma to terminate or delay the marketing of a similar product in its own development pipeline.

In March 2022, the FTC imposed a condition of EP Energy Corp's oil business in the state of Utah being sold before EnCap Energy Capital Fund XI LP could proceed with its acquisition. The divestiture would resolve the FTC's concerns that the acquisition would eliminate head-to-head competition between two of only four significant producers of Uinta Basin waxy crude oil. The FTC also argued that the acquisition could lead to an increased likelihood of collusion or coordination among the remaining competitors in the Uinta Basin.

Other cases in which divestitures have been required include:

- Medtronic Inc's acquisition of Intersect ENT Inc (June 2022);
- Buckeye Partner LP's proposed acquisition of assets belonging to Magellan Midstream Partners LP (June 2022);
- Boston Scientific Corp's acquisition of BTG PLC (February 2022);
- ANI Pharmaceuticals Inc's acquisition of Novitium Pharma LLC (January 2022);
- the merger between S&P Global Inc and IHS Markit Ltd (November 2021);
- BSA SA (Lactalis)'s acquisition of the Kraft Heinz Company (November 2021);
- General Shale Brick Inc's acquisition of Meridian Brick LLC (October 2021);
- Zen Noh Grain Corp's acquisition of grain elevators from Bunge North America Inc (June 2021);
- Danfoss AS and Eaton Corporation PLC's asset purchase agreement (June 2021);
- Stone Canyon Industry Holdings LLC and SCIH Salt Holdings' acquisition of Morton Salt Inc (April 2021);
- AbbVie Inc's acquisition of Allergan PLC (May 2020);
- Novelis Inc's acquisition of Aleris Corporation (May 2020);
- Dairy Farmers of America Inc's acquisition of Dean Foods Company (May 2020);
- Axon Enterprise Inc's acquisition of Vievu LLC (April 2020); and
- the merger between United Technologies Corporation and Raytheon Company (March 2020).

Behavioural remedies

Behavioural remedies may also be utilised in certain circumstances, although they have been uncommon in practice. Some examples of behavioural remedies are firewall provisions, non-discrimination provisions or access provisions.

Behavioural remedies are generally disfavoured because they create onerous monitoring requirements for the antitrust agencies and are not seen as a clean solution to addressing harm on competition. However, behavioural remedies have been accepted in two recent cases as being sufficient to address the potential anticompetitive effects of the transactions.

In October 2023, the FTC finalised a consent order that prevented the exchange of competitively sensitive and confidential information between Quantum and EQT Corporation, as Quantum would become one of EQT's largest shareholders with a seat on its board as part of the deal between the two direct competitors in the production and sale of natural gas in the Appalachian Basin. The deal would have violated the prohibition on interlocking directorates and the consent order addresses this issue by also requiring Quantum to divest its EQT

shares, prohibiting Quantum taking a seat on EQT's board and unwinding a separate joint venture between the companies.

In September 2023, the FTC and six state attorneys general reached a proposed consent order in regard to Amgen's acquisition of Horizon Therapeutics. Under the consent order, Amgen is prohibited from bundling its existing drugs with Horizon's Tepezza and Krystexxa (monopoly products in the treatment of thyroid eye disease and chronic refractory gout) and from using rebates or contracts to disadvantage competitors. Amgen must seek approval from the FTC for future acquisitions or agreements with businesses engaged in these markets. The consent order lasts for 15 years and the FTC has appointed a monitor to ensure the provisions are complied with.

Other examples of transactions in which behavioural remedies have been accepted include:

- Staples' acquisition of Essendant (January 2019);
- Northrop Grumman's acquisition of Orbital ATK (December 2018); and
- a proposed merger between two companies providing air ambulance transport services in the state of Hawaii (May 2018).

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

In fashioning an acceptable divestiture, the antitrust agencies' goals are to eliminate the competition problems raised by the transaction, find a buyer that can effectively and rapidly step into the competitive shoes of the divesting party and ensure that the buyer has all the assets necessary to enable it to be an effective competitor.

In this regard, the FTC published a helpful guide to its merger remedy process titled 'Negotiating Merger Remedies' in January 2012. In June 2019, the Bureau of Competition also published a guide for respondents and a guide for potential buyers regarding the merger remedy process.

Similarly, in September 2020, the DOJ released its updated Merger Remedies Manual. Consistent with the DOJ's preference for litigation to remedy alleged harm to competition, the Manual was withdrawn in September 2022.

The time in which a divestiture must be completed will differ from case to case. As an example, in April 2018, the FTC settled its charges that the proposed merger between Red Ventures and Bankrate would harm competition in the market for third-party paid referral services for senior living facilities. Under the terms of the settlement, the parties agreed to divest Caring.com no later than six months after the acquisition and provided transition services to an FTC-approved buyer.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The range of remedies are the same for domestic and foreign transactions. In most transactions, remedies involve the divestiture of certain assets, a business line or pieces of 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 pieces of intellectual property to a third-party competitor (or potential competitor).

The antitrust agencies do not discriminate between foreign-to-foreign mergers and mergers involving domestic undertakings when imposing remedies, provided that the requisite anti-competitive effects in the United States are found.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The HSR Act review process does not result in affirmative clearance or approval of a transaction or any ancillary arrangements; instead, if the antitrust agencies decide not to challenge a transaction, the applicable waiting period expires and the parties are free to close the transaction.

The antitrust agencies retain the legal right to challenge the transaction or any ancillary arrangements in the future; however, 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 process under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act). Nonetheless, as a practical matter, the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) (together, the antitrust agencies) are very likely to contact a broad group of interested parties if a transaction presents possible competition issues. The antitrust agencies often rely on information provided by such parties (particularly from customers) in deciding whether to conduct a detailed investigation or challenge a particular transaction.

Both of the antitrust agencies' procedures 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 by providing notice and an opportunity to file views.

Under certain limited circumstances, private individuals, as well as foreign and state governments, may sue in a 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 Notification and Report Form (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 administrative or judicial proceedings. The same is true of information submitted in response to a second request.

However, if early termination is requested and granted, notice of the fact of early termination will be published in the Federal Register and on the FTC's website. In addition, if the competent antitrust 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 efforts of United States to cooperate with other antitrust authorities during merger investigations continue to intensify. The United States has entered into various cooperation agreements with jurisdictions such as Australia, Brazil, Canada, Chile, Colombia, Germany, 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 agencies 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 US 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 memorandums of understanding with Russia, China, India and South Korea to facilitate the exchange of policy developments and best practices, and provides for cooperation on competition law enforcement matters as appropriate.

In September 2020, the antitrust agencies entered into the Multilateral Mutual Assistance and Cooperation Framework (MMAC) to strengthen cooperation between the United States and the competition agencies of Australia, Canada, New Zealand and the United Kingdom. The MMAC provides the basis for a contemplated series of agreements that would permit cross-border evidence gathering and the sharing of confidential information between the parties.

When dealing with merger reviews with international dimensions, parties or third parties may provide the antitrust agencies with waivers of confidentiality to enable cooperating agencies to discuss confidential information and analyses. In September 2013, the antitrust agencies issued a model waiver of confidentiality for parties and third parties to use in transactions

involving concurrent review by non-US competition authorities and a set of frequently asked questions to accompany the model waiver.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

If the agency responsible for reviewing a transaction determines that the transaction would violate the US antitrust laws, and if an acceptable consent arrangement cannot be negotiated, the competent agency may apply to a federal court for a preliminary injunction blocking the acquisition. The Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) (together, the antitrust agencies) are not required, however, to seek preliminary relief. Failure to seek such relief does not preclude the competent agency's challenge at a later time.

To obtain a preliminary injunction, the competent 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 a court or in FTC administrative proceedings. The preliminary injunction action may be essentially a mini-trial, during which the competent agency and the parties submit evidence to the court on antitrust issues. In some instances, the trial on the merits and the preliminary injunction motion have been combined in an action for a permanent injunction.

If the competent agency obtains an injunction from a 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 July 2023, the Court of Appeals for the Ninth Circuit upheld a district court's decision to deny the FTC's motion to preliminarily block the acquisition of Activision Blizzard by Microsoft. The full appeal was held in December 2023 and the Court of Appeals has yet to issue its ruling. The deal closed in October 2023 following approval from UK regulators.

In March 2022, the Court of Appeals for the Third Circuit affirmed a district court's decision to enjoin a merger between Hackensack Meridian Health Inc and Englewood Healthcare Foundation. The Court held that the combination was likely to substantially lessen competition for inpatient general acute care services in Bergen County, New Jersey. The parties abandoned the proposed transaction.

In March 2020, the DOJ prevailed in a first-of-its-kind arbitration that resolved the civil antitrust lawsuit filed by the DOJ in September 2019 challenging Novelis Inc's proposed merger with Aleris Corporation. Prior to filing the complaint, the Antitrust Division reached an agreement with the defendants to refer the matter to binding arbitration if the parties were unable to resolve the United States' competition concerns with the defendants' transaction within a certain period. Fact discovery proceeded under the supervision of a district court.

Pursuant to the arbitration agreement, following the close of fact discovery, the matter was referred to binding arbitration to resolve the issue of product market definition. A 10-day arbitration hearing was conducted and, as a result of the arbitration, Novelis was required to divest Aleris' entire aluminium auto body sheet operations in North America.

In June 2018, the District Court for the District of Columbia, despite objections from the DOJ, ruled that AT&T could acquire Time Warner without any conditions in a decision emphasising that vertical integration is often pro-competitive and lawful. The case marked the first time in 40 years that a court heard a fully litigated challenge to a merger proposing the combination of 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 had failed to prove that the transaction would violate US antitrust laws. The Court of Appeals for the DC Circuit upheld the District Court for the District of Columbia's decision in February 2019, and the DOJ decided not to seek Supreme Court review.

In March 2017, the FTC sued to block the merger of Advocate Health Care Network and NorthShore University HealthSystem, alleging that the combination would create the largest hospital system in the North Shore area of the state of Chicago. The FTC alleged that the combined entity would control more than 50 per cent of the general acute care in-patient hospital services in the area. Although a district court denied the FTC's initial request for a preliminary injunction, the Court of Appeals for the Seventh Circuit reversed the decision and, after further proceedings, the district court granted an injunction and the parties abandoned the merger.

Time frame

33 | What is the usual time frame for appeal or judicial review?

The usual time frame for resolution of an antitrust agency's application for an injunction to block an acquisition is approximately six to nine months. An appeal to a court of appeals of an injunction blocking a transaction may be heard within a few months of the grant of that injunction. It is rare for the Supreme Court to accept an appeal of a court of appeals decision.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) (together, the antitrust agencies) have been active in their enforcement of US merger laws in recent years. Numerous transactions have resulted in divestiture agreements or court challenges.

In addition, the antitrust agencies have become more active in making informal enquiries to the parties for further information during the initial Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act) waiting period. The FTC and the DOJ provide annual reports on their enforcement actions.

The antitrust 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, media, agriculture, and products and services related to the healthcare industry will, in particular, continue to be enforcement priorities.

Recently, the antitrust agencies have challenged deals based on vertical theories of harm and potential competition theories. Moreover, the antitrust agencies have shown a greater reluctance to resolve anticompetitive concerns with remedies, including structural remedies.

Reform proposals

35 | Are there current proposals to change the legislation?

US dollar thresholds in the HSR and the detailed and complex rules promulgated by the FTC with the agreement of the Antitrust Division (the Rules), which govern pre-merger notification under the HSR Act, are adjusted annually to reflect changes in the gross national product.

In June 2023, the FTC issued a Notice of Proposed Rulemaking containing extensive proposed changes to the HSR Form and Instructions. The changes would see much of the information usually requested during the waiting period or second request phase of a review requested at the outset of every transaction with the result being parties would need to gather substantially more information than under the current regime and need more time to prepare their initial filings. The Notice of Proposed Rulemaking has been subject to a public comment period and will now be reviewed again by the antitrust agencies. It is unclear if or when the proposed changes will take effect.

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 Act violations increased from a fine of US$16,000 per day to US$40,000 per day, which was adjusted to US$51,744 per day in January 2024. These higher maximum civil fines apply to violations that predate the effective date. The antitrust agencies adjust the maximum civil penalty thresholds to account for inflation every January.

In September 2019, the FTC amended the Rules as well as the HSR Act's Notification and Report Form filing instructions to incorporate the new 10-digit North American Product Classification System (NAPCS) codes introduced by the Census Bureau. Mandatory reporting of NAPCS codes began on 25 September 2019.

Owing to the covid-19 pandemic, beginning on 17 March 2020 and still in force as at April 2024, the FTC has implemented a temporary e-filing system for the submission of HSR Act filings and accompanying guidance.

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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?

Several significant developments took place in merger control in the past year.

Illumina/Grail

The notable case of *Illumina/Grail* continued to play out throughout 2023. The Federal Trade Commission (FTC) engaged in an administrative trial to block Illumina's US$7.1 billion proposed acquisition of GRAIL, a maker of multi-cancer early detection tests that utilise DNA sequencing. The FTC alleged that Illumina is the only provider of DNA sequencing that is a viable option for multi-cancer early detection tests in the United States and thus that Illumina is incentivised to foreclose or disadvantage Grail's rivals. In August 2021, Illumina proceeded to close the transaction without regulatory clearance from the FTC. In September 2022, an administrative law judge dismissed the FTC's complaint, stating that the FTC had failed to prove that Illumina's incentive to disadvantage competitors of Grail would be likely to result in a substantial lessening of competition. In April 2023, the FTC reversed the administrative law judge's dismissal and ordered Illumina to divest Grail, arguing that the acquisition would diminish innovation in the market for multi-cancer early detection tests, among other issues. Illumina filed a notice of appeal with the Court of Appeals for the Fifth Circuit. In addition to challenging the merits of the FTC's case, Illumina's appeal argued that the FTC's decision violates constitutional rights because of problems with the FTC's structure and how it functions. In December 2023, The Court of Appeals issued an opinion finding that there was substantial evidence supporting the FTC's ruling that the deal was anticompetitive. The court endorsed a flexible approach to market definition and noted that for R&D markets, products must be more than speculative (eg, have clinical validation/FDA trials) to be included in the market. Notably, the court recognised the vertical merger theory of harm, holding that a vertical merger could be illegal if 'the merged firm will have the ability and incentive to foreclose rivals from sources of supply or distribution'. Importantly, the court also endorsed the 'dated' *Brown Shoe* precedent cited in the Merger Guidelines when assessing whether the acquisition would harm competition, providing support for future enforcement of vertical deals under a more flexible test without rigid economic analysis. The court ultimately remanded to the FTC its order requiring Illumina to divest Grail; however Illumina announced it would proceed with the divestment of Grail in December 2023 after decisions from the European Commission requiring the deal to be unwound.

Challenge to the antitrust agencies use of administrative proceedings

Related to the constitutional challenge in *Illumina/Grail*, in April 2023, the Supreme Court held that parties can challenge the constitutionality of the FTC's use of administrative courts in a federal district court before the administrative trial is complete. Furthermore, in March 2024, some Supreme Court justices indicated they would be open to limiting the opportunities for lower courts to defer to federal agencies' (such as the antitrust agencies) legal interpretations in disputes over rulemaking in what would be a departure from the precedent set in *Chevron v Natural Resources Defense Council*.

Losses

The Department of Justice (DOJ) and the FTC have experienced some losses over the past year. This includes the rejection of the FTC's motion to block the acquisition of Activision Blizzard by Microsoft in July 2023. The district court held that 'the FTC has not shown a likelihood it will prevail' on the claim the acquisition 'may substantially limit competition' and that in fact 'the record evidence points to more consumer access to Call of Duty and other Activision content'. The Court of Appeals for the Ninth Circuit also denied a motion by the FTC to block the deal in July 2023, but the full appeal was not heard until December 2023 and the Court of Appeals has yet to issue its ruling in this regard.

In addition, although not outright losses, the FTC also approved consent orders requiring either divestitures or behavioural remedies in *Assa Abloy AB/Spectrum Brands*, *Amgen/ Horizon Therapeutics* and *Intercontinental Exchange/Black Knight* in 2023 which ultimately allows these deals to close.

However, despite recent losses, the FTC and the Antitrust Division of the DOJ (together, the antitrust agencies) remain committed to aggressive merger enforcement, with current FTC chair Lina Khan stating that the FTC 'will not hesitate to identify and impose broad relief to protect Americans and deter illegal activity now and in the future'.

Victories

The FTC had several merger litigation wins in 2023 resulting in the termination of several deals.

In December 2023, the District Court for the Southern District of New York blocked the proposed acquisition of Propel Media by Iqvia after the FTC filed an administrative complaint. The district court agreed that the acquisition would result in a market-leading position for Iqvia and would 'substantially impact competition' in the market for programmatic advertising for prescription drugs. The district court also noted that blocking this deal was in the public interest.

After filing administrative complaints against John Muir's proposed US$142.5 million deal to acquire sole ownership of San Ramon Regional Medical Center, LLC from Tenet Healthcare Corporation and against the grant of an exclusive licence from Maze Therapeutics to Sanofi for US$775 million, the parties in both cases agreed to terminate the deals.

The DOJ also had a merger litigation win in 2023. The DOJ sued to block JetBlue's US$3.8 billion acquisition of Spirit Airlines. The District Court for the District of Massachusetts agreed with the DOJ's proposed theories of harm, that the customers who rely on Spirit as a low-cost alternative to other airlines would likely be harmed as the merger would result in fewer low-cost seats for airline passengers and higher fares. Despite launching an appeal in the First Circuit, in which the parties argued the district court ignored the pro-competitive benefits of the merger, the deal was terminated in March 2024.

Similarly, the DOJ was successful in its litigation to prevent the Northeast Alliance between American Airlines and JetBlue. In May 2023, the District Court for the District of Massachusetts found that the agreement between JetBlue and American Airlines to stop competing in Boston and New York, violated Section 1 of the Sherman Act because it increased prices and

reduced choice for consumers in the domestic market for scheduled air passenger service. American Airlines has appealed the decision to the Court of Appeals for the First Circuit.

As mentioned above, the FTC also ultimately reached its desired outcome in the *Illumina/ Grail* case. While the Court of Appeals for the Ninth Circuit did not require the divestiture of Grail, the decision was a victory for the FTC in terms of its acceptance of the vertical theory of harm and agreement that there was substantial evidence supporting the FTC's ruling that the deal was anticompetitive. Illumina announced it would divest Grail in December 2023 as a result of decisions from the European Commission.

Outlook

Scrutiny of transactions involving potential competition theories continued to be a focus of US antitrust agencies over the past year. Other focuses include consolidation trends particularly in the pharmaceutical and airlines industries, elimination of nascent competition and vertical theories of harm.

In June 2023, a Notice of Proposed Rulemaking was issued that would amend the HSR Form and Instructions. The proposed changes would significantly expand the types of information and documents that filing parties must provide to the antitrust agencies. Some of the key proposed additions include a transaction rationale, information on horizontal and non-horizontal relationships, labour market information and information on prior acquisitions. In terms of extra documentation, the parties would be required to provide items such as the transaction agreement, transaction evaluations and any prior agreements between them. It is not clear when or whether the proposed changes will be enacted.

In January 2023, the FTC announced that it had increased the thresholds for interlocking directorates required by section 8 of the Clayton Act. Under this section, the previous thresholds were that no one person could serve as a director or officer of two competing corporations if each corporation had capital, surplus and undivided profits totalling more than US$10 million, unless the competitive sales of either corporation were less than US$1 million. The thresholds have been revised to US$45.257 million and US$4,525,700, respectively.

The FTC withdrew its approval of the Vertical Merger Guidelines in September 2021 and, in January 2022, the antitrust agencies launched a joint public review assessing both the Horizontal Merger Guidelines and the Vertical Merger Guidelines. The aim of the review was to ensure that the guidelines reflected 'modern market realities' and allowed the antitrust agencies to 'forcefully enforce the law against unlawful deals'. The new Merger Guidelines were published in December 2023.

2023 Merger Guidelines

The current, revised Merger Guidelines unify the approach to horizontal and vertical transactions and consolidate the previous Horizontal Merger Guidelines and Vertical Merger Guidelines into a single document. The Merger Guidelines present 'factors and frameworks' that the antitrust agencies use to assess the risk of transactions. The revised guidance aims to 'reflect modern market realities, advances in economics and law, and the lived experiences of a diverse array of market participants'. In comparison to previous guidance, these frameworks can be seen as supporting heightened scrutiny from the antitrust agencies.

The Merger Guidelines contain structural market-based presumptions (including for vertical mergers) determining whether a transaction is anticompetitive and guidance on how to apply these presumptions in specific settings. Notably, the thresholds for such presumptions are lower than those contained in the Merger Guidelines' predecessor, bringing more transactions to the attention of the antitrust agencies.

New anticompetitive theories underpin the Merger Guidelines, demonstrating the antitrust agencies' willingness to depart from the traditional market definition framework for assessing whether a transaction may harm competition. The Merger Guidelines focus on preventing 'dominant' firms from having the ability to 'entrench or extend' its dominant position in the market, on concentration trends beyond what is presented in any particular transaction and on the transaction's effect on labour markets, among others.

Assistant Attorney General Jonathan Kanter stated in a June 2023 speech that the DOJ would also be reassessing the prevailing approach to bank merger enforcement following the banking turmoil of early 2023. Separately, the Office of the Comptroller of the Currency released a Notice of Proposed Rulemaking in January 2024 and the Federal Deposit Insurance Corporation released a Proposed Statement of Policy on Bank Merger Transactions in March 2024, each detailing their own approaches to evaluating Bank Merger Act applications which move away from the traditional market-share analysis. At the time of writing, the DOJ has yet to release any updated bank merger guidelines.

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Voluntary or mandatory system?	Notification is mandatory if an economic concentration meets the filing thresholds.
Notification trigger/ filing deadline	Filing must be made before closing a notifiable transaction. Filing thresholds are based on the combined market share of the parties; the value of the transaction (applicable to onshore transactions only); the total assets of one of the parties (or, arguably, the total assets of all parties combined) (including affiliates) in Vietnam; or the total turnover of one of the parties (or, arguably, the total turnover of all parties combined) (including affiliates) in Vietnam. Different threshold values apply to transactions in different sectors.
Clearance deadlines (Phase I/Phase II)	The competent Vietnam competition authority (CVCA) will carry out the review of a filing in three stages. The statutory review process may take up to 180 days, plus seven working days as of the date the parties submit the filing to the CVCA until the issuance of the clearance decision.
Substantive test for clearance	An economic concentration is prohibited if it causes or is likely to cause a significant restraint of competition in the Vietnamese market. The substantive test will be based on: • the combined market share of the parties before and after the economic concentration; • the extent of the concentration in the relevant market before and after the concentration; • the relationship of the parties in the chain of production, distribution and supply of a specific type of goods or services; • the competitive advantage of the parties after the concentration; • the ability of the parties to increase the prices or profit margin after the economic concentration; and • the ability of the parties to exclude or prevent other enterprises from entering or expanding the market.
Penalties	Each party to a prohibited transaction could be exposed to an administrative fine of 1 to 5 per cent of its total revenue in the relevant market in Vietnam in the preceding fiscal year.

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Remarks	Competition law in general and the merger control regime in particular are relatively new in Vietnam, with limited enforcement practice. However, with the introduction of the Competition Law effective as of 1 July 2019 (the 2018 Competition Law), it is expected that enforcement will be more robust in the future. Under this regime, the government has moved away from the old market share test but applies a broader economic assessment of the market power of the parties and impact on competition of the transaction. This is more in line with international practice. The evolving legal framework and the lack of enforcement precedents result in difficulty in predicting the view of the CVCA in the interpretation and application of the relevant provisions of the 2018 Competition Law. In addition to the law, the parties should consider other market and economic factors around a transaction as well as the government's policy in respect of the relevant market when making a filing decision.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The most important piece of legislation regulating merger control is the Competition Law effective as of 1 July 2019 (the 2018 Competition Law). The 2018 Competition Law replaced the law that was effective between July 2005 and June 2019 (the 2004 Competition Law).

Two decrees implement the 2018 Competition Law:

- Decree 75, effective as of 1 December 2019, sets out administrative penalties for violations;
- Decree 35, effective as of 15 May 2020, sets out guidance on key aspects of an economic concentration, including the definition of 'control', filing thresholds and standards for assessing the competitive impact of a transaction; and
- Decree 3, effective as of 1 April 2023, sets out the function, power and organisation of the Vietnam Competition Commission (VCC).

Vietnam's merger control regime is overseen by the VCC, an agency that sits under the Ministry of Industry and Trade. The VCC has been fully operational since 1 April 2023. Before that, the merger control regime was administered by the Vietnam Competition and Consumer Protection Authority (VCCA), which also sits under the Ministry of Industry and Trade. On 1 April 2023, the VCC replaced and took over the functions of the two former authorities (ie, the VCCA, which was empowered to review and clear economic concentrations, and to investigate alleged violations of competition law; and the Vietnam Competition Council, which was empowered to hear and make decisions on cases investigated by the VCCA).

Scope of legislation

2 | What kinds of mergers are caught?

The 2018 Competition Law regulates economic concentrations in the following forms:

- mergers of enterprises (ie, the transfer by one or more enterprises of all its lawful assets, rights, obligations and interests to another enterprise and, at the same time, the termination of the business activities or the existence of the merging enterprises);
- consolidation of enterprises (ie, the transfer by two or more enterprises of all their lawful assets, rights, obligations and interests to form one new enterprise and, at the same time, the termination of the business activities or the existence of the consolidating enterprises);
- acquisition by an enterprise of shares or ownership interests or assets of another enterprise (ie, the purchase by one enterprise of all or part of the capital contribution or assets of another enterprise sufficient to control or govern the acquired enterprise or any of its trades or business lines); and
- joint venture between enterprises (ie, two or more enterprises together contributing a portion of their lawful assets, rights, obligations and interests to form a new enterprise).

The 2018 Competition Law contains a catch-all provision covering 'other forms of economic concentration in accordance with laws'. There is no further guidance on this; however, as the definition of 'enterprise' includes foreign companies operating in Vietnam, it is possible that an economic concentration may arise on the basis of a business cooperation contract between independent enterprises without creating a new entity.

3 What types of joint ventures are caught?

The definition of 'joint venture' under the 2018 Competition Law broadly covers all types of joint ventures between two or more enterprises (including greenfield joint ventures). Unfortunately, the Law is silent on important questions, such as whether:

- there needs to be joint control;
- the joint venture should be full function, including whether it:
    - needs to be autonomous in terms of operation; or
    - is established on a lasting basis; and
- the joint venture needs to operate in the same relevant market as either of the parties.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

There is a definition of 'control' in the context of acquisition transactions only. An acquirer will be deemed to have control over the target company or a business line of the target company if it:

- acquires more than 50 per cent of the charter capital or the voting shares of the target;
- acquires the right to own or use more than 50 per cent of the assets of the entire business or one business line of the target; or
- has the right to make decisions regarding any of the following in respect of the target:
    - (either direct or indirect) appointment or removal of a majority of or all the directors, the chair of the members council, or the chief executive officer or general director;
    - amendment of the charter; or
    - important business activities, those being the organisation of the business operation, business lines, the geographic scope of the operations, the mode of doing business, adjustment of the scope of the business and the business lines, and the forms and methods of raising, allocating and utilising capital.

The 2018 Competition Law is unclear on whether the minority protection rights of a shareholder would constitute control; however, in our experience, depending on the nature of the rights, the target (whether it is a public or private company) and how such rights work in the relevant agreements between the acquirer and the target or other shareholders of the target, it might not be viewed as conferring control on 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?

An economic concentration will be notifiable if it exceeds one of four thresholds (based on the fiscal year preceding the transaction):

1. the combined market share of the parties;
2. the cash value of the transaction (applicable to onshore transactions only);
3. the total assets of one of the parties (or, arguably, the total assets of all the parties combined on a group-wide basis) in Vietnam; or
4. the total turnover of one of the parties (or, arguably, the total turnover of all the parties combined on a group-wide basis) in Vietnam.

The applicable thresholds are set out in the table below.

Sector	Turnover	Assets	Transaction value	Combined market shares
Insurance	10 trillion dong	15 trillion dong	3 trillion dong	20 per cent or more in the relevant market in Vietnam
Securities	3 trillion dong	15 trillion dong	3 trillion dong	20 per cent or more in the relevant market in Vietnam
Credit institutions	20 per cent or more of the total turnover of credit institutions in Vietnam	20 per cent or more of the total assets of credit institutions in Vietnam	20 per cent or more of the total charter capital of credit institutions in Vietnam	20 per cent or more in the relevant market in Vietnam
All other sectors	3 trillion dong	3 trillion dong	1 trillion dong	20 per cent or more in the relevant market in Vietnam

The turnover and assets thresholds mentioned in points (3) and (4) refer to a group company, which is defined under Decree 35 as 'a group of enterprises which are under common control by one or more of the enterprises in the group or which are under the common management'.

The 2018 Competition Law is silent with regard to whether only the market shares of the direct parties to the transaction (as opposed to the market shares calculated on a group-wide basis) would be taken into account when it comes to determining whether the market share threshold test has been met; however, in precedent filings under the 2004 Competition Law, the competent Vietnamese competition authority (CVCA) took into account the market share on a group-wide basis, and the same approach may be expected to continue to apply.

The 2018 Competition Law is not clear on whether the turnover and assets thresholds will apply to each party to the economic concentration or on a combined basis of all the parties participating in the economic concentration; however, our experience suggests that, for the test to be satisfied, at least one of the parties to the concentration would need to meet the applicable turnover or assets thresholds.

The CVCA may launch an investigation into a transaction that does not meet the filing thresholds if it receives a complaint or there are signs that the transaction (despite not being notifiable) has the effect of significantly restraining competition within three years of the closing date of the transaction.

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing is mandatory if a transaction (regardless of whether it is onshore or offshore) constitutes an economic concentration and it meets one of the applicable filing thresholds. The 2018 Competition Law contains no exception.

However, article 1 of the Law states that the Law regulates 'economic concentrations that affect or are likely to affect a restraint of competition in the Vietnamese market'. One potential interpretation is, therefore, that an economic concentration transaction that does not affect and is not likely to affect competition in the market in Vietnam would not be covered by the 2018 Competition Law. Assessment of whether there is an effect or a likely effect on the Vietnamese market would need to be done on a case-by-case basis.

7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers must be notified in Vietnam if the relevant conditions are met.

8 | Are there also rules on foreign investment, special sectors or other relevant approvals?

Yes, in respect of onshore transactions. Foreign investors must obtain approval from the Department of Planning and Investment of the province where the target company is located when investing in Vietnam if the relevant conditions are met. For instance, foreign investors must obtain an investment registration certificate (which technically serves as permission for the investment in Vietnam) before applying for an enterprise registration certificate to incorporate a new joint venture company in Vietnam.

In addition, for a foreign investor to acquire a majority stake in a Vietnamese company, it must take steps to register its intention and obtain approval for the acquisition from the Department.

The licensing authorities have broad discretion in reviewing the applications. In practice, the authorities may take into account certain national security interests, public interests or domestic market protection measures during the licensing process, especially in sensitive sectors, such as oil and gas, infrastructure and energy, and banking and financial services.

In addition, there are foreign ownership shareholding caps in various investment sectors in Vietnam.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

If an economic concentration is notifiable, the parties must make the filing before the consummation of the transaction. In practice, the competent Vietnamese competition authority (CVCA) tends to accept that the deadline for the parties to make the filing is before the completion of their proposed transaction (rather than the signing of the transaction agreements).

If the parties fail to make the filing, they may each be exposed to an administrative fine of up to 5 per cent of the total turnover of each party (but not the turnover of its group companies) in the relevant market in Vietnam in the fiscal year prior to the year of the closing of the transaction. Depending on the specific violations, the parties may also be exposed to additional administrative sanctions, such as the confiscation of proceeds from the breach of the Competition Law effective as of 1 July 2019 and revocation of the relevant certificate or licence of the parties.

10 Which parties are responsible for filing and are filing fees required?

It is the responsibility of all the parties participating in the economic concentration to make the filing. All the parties must complete the notification form, and are liable for the truthfulness and accuracy of the information and documents submitted.

There are no filing fees.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Where a notification is required, the parties must wait for clearance to be issued before closing or implementing the transaction.

The CVCA will carry out the review of a filing in three stages:

- Checking the completeness of the documents: seven business days after the receipt of a filing, the CVCA will issue a written confirmation on the completeness of the file. If the file is incomplete, the CVCA will issue a written request for the parties to supplement the relevant documents and information within 30 days of the date of the request. If the parties cannot supplement the required documents within this 30-day period, the file will be returned to the parties.
- Preliminary review: the CVCA will carry out the preliminary review of the file within 30 days of the date that the CVCA issues a written confirmation on the completeness of the

file. After this 30-day period, the CVCA will issue a clearance decision or a written decision that the transaction is subject to an official review. If the CVCA does not respond during this 30-day period, the parties are allowed to implement the transaction.

- Official review: the official review of the file will take up to 90 days as of the date that the CVCA issues a written decision that the file is subject to an official review, which may be extended for an additional 60 days in complex cases, as determined by the CVCA.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If the parties implement a notifiable transaction before obtaining clearance, they are liable to an administrative fine from 0.5 per cent to 1 per cent of the total turnover of each party (but not at the group level) in the relevant market in Vietnam in the fiscal year preceding the year of the violation.

There is no reported case in which the CVCA has applied a sanction on any such gun-jumping conduct.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

If the parties implement a foreign-to-foreign notifiable transaction before obtaining clearance, they are liable to an administrative fine from 0.5 per cent to 1 per cent of the total turnover of each party (but not at the group level) in the relevant market in Vietnam in the fiscal year preceding the year of the violation.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The parties might consider lodging a written consultation letter to the CVCA for permission to close pending clearance. The CVCA will have discretion to decide whether to grant permission.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

No.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The parties must submit the following documents, among other things, in a filing:

- a prescribed form describing the proposed transaction and the details of the parties;
- a draft economic concentration agreement or term sheet, a memorandum of understanding or a draft summary of the terms of the proposed transaction;
- copies of the incorporation certificates or equivalent documents of each party;
- audited financial statements of each party for the two consecutive fiscal years preceding the economic concentration;
- a list of the affiliates of each party;
- a list of the products and services provided by each party;
- the market share data or a report of each party for the two consecutive years preceding the economic concentration;
- a plan for addressing any possible restraint of competition as a result of the economic concentration; and
- a report on the assessment of the positive impact of the economic concentration.

The CVCA may request additional documents and information. Submission of inaccurate information may expose the parties to an administrative fine of up to 50 million dong.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

The CVCA will carry out a three-stage review of the filing that includes:

- the checking of the completeness of the filing documents within seven business days of receipt of a filing;
- preliminary review of the file within 30 days of the date that the CVCA issues a written confirmation on the completeness of the file; and
- if the transaction does not pass the test in the preliminary review, the official review, which may take up to 150 days.

There is no requirement for pre-notification consultation.

In practice, where there are strong grounds for the parties to believe that their transaction has no impact on the Vietnamese market, the parties may consider submitting a consultation letter to the CVCA seeking an opinion regarding notification. There is, however, no guarantee that the CVCA will respond to the consultation letter or that the response will be obtained in a timely manner. The parties will only proceed with the official filing if the CVCA so requires in responding to the consultation letter.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The statutory timetable for the three-stage review is up to 180 days, plus seven working days as of the date that the parties submit the filing to the CVCA until the issuance of the clearance decision.

The statutory timetable may be shortened if the parties provide detailed information or documents of the proposed transaction to the CVCA and quickly respond to the CVCA's inquiries.

Besides the required documents for the filing, the parties should consider submitting any clearance decisions issued by the competent competition authorities in other jurisdictions (eg, the European Union, Japan and the United Kingdom) for the CVCA's consideration to speed up the process.

In practice, it often takes up to six months for the CVCA to review and make a decision on a transaction.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

Under the Competition Law effective as of 1 July 2019 (the 2018 Competition Law), an economic concentration is prohibited if it causes or is likely to cause a significant restraint of competition in the Vietnamese market. To assess this, the competent Vietnamese competition authority (CVCA) will consider the following matters:

- the combined market share of the parties before and after the economic concentration;
- the extent of the concentration in the relevant market before and after the concentration, which is assessed to determine the danger of creating or strengthening the market power of the enterprises involved and the ability to increase coordination between the enterprises in the relevant market;
- the relationship of the parties in the chain of production, distribution and supply of a specific type of good or service, which is assessed to determine the ability of the parties after the economic concentration to create superior competitive advantages as compared to other competitors, aimed at preventing or excluding competition from accessing the market;
- overall consideration of the competitive advantage brought about by the economic concentration in the relevant market, based on advantages regarding the product characteristics, the production and distribution chains, financial capacity, the brand name, technology, intellectual property rights and other advantages of the enterprise after the economic concentration;
- the ability of the enterprise to increase prices or profit margins after the economic concentration;
- the ability of the enterprise after the economic concentration to exclude or prevent other enterprises from accessing or expanding the market; and
- other specific factors in the relevant industry or sector that directly influence or significantly change the results of the assessment of the materiality of the restraint on competition of the relevant economic concentration.

In its preliminary review, the CVCA will issue a clearance for the transaction in one of the following cases:

- the combined market share of the parties proposing to participate in the economic concentration is less than 20 per cent in the relevant market;

- the combined market share of the parties proposing to participate in the economic concentration is 20 per cent or more in the relevant market, and the Herfindahl-Hirschman Index (HHI) of the enterprises competing in the market post-economic concentration is less than 1,800;
- the combined market share of the parties participating in the economic concentration is 20 per cent or more in the relevant market, the HHI in the market post-economic concentration is above 1,800 and the increase in HHI is less than 100 points; or
- the market share of the parties participating in the economic concentration that have a relationship with each other in the chain of production, distribution and supply of a specified type of good or of which the business lines provide mutual inputs or provide ancillary support to each other is less than 20 per cent in each relevant market.

20 | Is there a special substantive test for joint ventures?

No.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

To date, there is no jurisprudence on this.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

There is no indication in the 2018 Competition Law or guidance of any non-competition issues that must be considered in the review process; however, the CVCA may consider such issues in sectors where the government has a policy of protection of the domestic market (or state companies in it), or there are concerns about national security or public interest.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The 2018 Competition Law explicitly permits the CVCA to consider the economic efficiencies of a transaction when reviewing a filing. In doing so, the CVCA will look into the positive impact of the transaction on:

- the development of the relevant industry or sector;
- the development of science and technology;
- the promotion of the development of small and medium-sized enterprises; and
- the competitiveness of Vietnamese enterprises in the international market.

However, the Law is silent on the extent to which the economic efficiencies would affect the final decision of the CVCA on an economic concentration.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The competent Vietnamese competition authority (CVCA) has the power either:

1. to prohibit the transaction; or
2. to approve it subject to conditions.

If the parties fail to comply with the decision of the CVCA in point (1), each party participating in the economic concentration may be exposed to an administrative fine of between 1 and 5 per cent of its total revenue in the relevant market in Vietnam in the preceding fiscal year, as well as other sanctions (including the forced unwinding of the transaction, or monitoring by the competent state authorities for a certain period in respect of sale and purchase prices or other aspects of the economic concentration).

If the parties do not fully comply with the conditions set out in the conditional clearance in point (2), they may each be exposed to an administrative fine of between 1 and 3 per cent of their total revenues in Vietnam in the preceding fiscal year in the relevant market.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. The CVCA can issue a conditional clearance; it may impose the following conditions:

- division, separation or divestment of part of the equity interest or assets of the parties;
- monitoring of the purchase or selling price of goods, services or other transaction conditions in contracts signed by the relevant parties after the economic concentration;
- other measures to minimise the restraint on competition in the market; and
- other measures to enhance the positive impact of the economic concentration.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Divestments and other remedies are provisions introduced under the Competition Law effective as of 1 July 2019 (the 2018 Competition Law). There is no detailed guidance or precedent in practice. As such, their application would be dictated by the CVCA on a case-by-case basis when it grants conditional clearance.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The relevant provisions entered into force in July 2019 with the coming into force of the 2018 Competition Law, and there have not yet been any relevant decisions.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The 2018 Competition Law is silent on this question. As such, it would be dictated by the CVCA on a case-by-case basis when it grants the clearance.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Yes, the competent Vietnamese competition authority (CVCA) can seek the views of any enterprise or individual (eg, customers and competitors) about the proposed economic concentration to assist with its review of the transaction. For example, the CVCA announces on its official website that it is in the process of reviewing of a merger filing and asks all the competitors in the market to provide their views on the proposed merger.

In addition, any concerned person (eg, customers and competitors) may lodge a complaint to the VCA if it thinks that its lawful rights and interests have been infringed as a result of a breach of the provisions of the Competition Law effective as of 1 July 2019 (the 2018 Competition Law). The complaint must be made in writing, using a prescribed form issued by the CVCA, and must be submitted together with supporting evidence.

The CVCA will then consider the complaint to decide whether to investigate the case.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The CVCA must publish its clearance decisions (although, in practice, this has not always been respected by the CVCA) and may redact confidential information (if any) before the publication. There is no prescribed form for the clearance decision. In practice, the decision normally states the names of the parties, a basic description of the transaction and the CVCA's conclusion.

The CVCA also has a right to annually publish its activities on its website, and it may describe some of the notified economic concentrations in its annual report (eg, a brief description of the transaction as set out in the notification form and the CVCA's decision).

Despite the right to publish information, the CVCA has an obligation to keep confidential the information and documents provided by the relevant parties and individuals in accordance with the 2018 Competition Law.

The parties are recommended to expressly state in the notification form which information is confidential and should not be disclosed to any third party or the public without prior consent.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Under the 2018 Competition Law, the CVCA will coordinate with the relevant antitrust authorities in other jurisdictions in respect of the legal proceedings to promptly discover, investigate and deal with any practice showing signs of breach of competition law. The scope of coordination in competition legal proceedings includes consultation, exchange of information and documents or other appropriate activities of international cooperation in accordance with Vietnamese laws and international treaties of which Vietnam is a member.

In practice, the CVCA, has taken into account the view of competition authorities in established jurisdictions (such as the European Union) when it deemed this to be appropriate.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

If one of the parties to an economic concentration or a third party disagrees with a decision of the competent Vietnamese competition authority (CVCA) on the filing of the economic concentration (the CVCA decision) and has grounds to believe that the CVCA decision is unlawful or directly infringes its rights and lawful interests, the person (complainant) will be entitled to file a complaint (the first complaint) to the head of the CVCA within 90 days of receiving, knowing or being informed of the CVCA decision.

If the complainant does not agree with the decision of the head of the CVCA on the first complaint, it can file a second complaint to the Ministry of Industry and Trade within 30 days of the date of receipt of the first complaint (extendable to 45 days, applicable to remote areas with difficult travel conditions).

Alternatively, at any time within one year of the receipt of the CVCA decision and regardless of whether the complainant has made the above-mentioned complaints to the head of the CVCA or the Ministry of Industry and Trade, the complainant may initiate an administrative lawsuit before a competent court in Vietnam to request the judicial review and nullification of the CVCA decision. In that case, any pending review process by the head of the CVCA or the Ministry of Industry and Trade will be suspended.

Time frame

33 What is the usual time frame for appeal or judicial review?

The head of the CVCA must review the first complaint and issue its decision within 30 days of the date of its receipt (extendable to 45 days in complex cases and to 60 days in complex cases in remote areas with difficult travel conditions).

The Ministry of Industry and Trade must issue its decision on the second complaint within 45 days of its receipt (extendable to 60 days in complex cases and up to 70 days in complex cases in remote areas with difficult travel conditions).

An administrative lawsuit can be tried before a trial court or an appellate court as well as through cassation procedures. The time frame of the proceedings will depend on the complexity of the case.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The enforcement of the merger control regime has been very limited, although our expectation is that enforcement activity will increase over time.

Most filings in Vietnam were cleared unconditionally and a few filings were cleared coupled with general requests regarding post-transaction behaviour. Most of the notified transactions were acquisitions between foreign-owned companies incorporated in Vietnam or between foreign companies.

Apart from the *Grab/Uber* transaction, we are not aware of any case where the CVCA has blocked any transaction or has imposed any administrative fines on any party for failure to make a filing.

Grab/Uber

The 2019 transaction between Grab and Uber was investigated under the law that was effective between July 2005 and June 2019 (the 2004 Competition Law). In this case, the CVCA concluded that the transaction failed to make the filing required by law and that the transaction itself exceeded the prohibited market share threshold. In particular, the CVCA opined that the transaction was an economic concentration because Grab acquired the entirety of the assets of Uber Vietnam and, therefore, had control over all the business activities of Uber in Vietnam.

The CVCA identified the relevant markets of Grab and Uber in Vietnam as the market providing intermediary services connecting passengers and drivers of cars under nine seats on a software and switchboard basis in Hanoi and Ho Chi Minh City. Accordingly, the combined

market shares of Grab and Uber (for fiscal year 2017) in Hanoi and Ho Chi Minh City were 44.1 per cent and 82.68 per cent, respectively. As a result, according to the CVCA, the transaction between Grab and Uber should be prohibited under the 2004 Competition Law as the combined market share of the parties exceeded 50 per cent in the relevant market.

This case was then transferred to the Vietnam Competition Council (VCC) for hearing. The VCC, in its decision dated 11 June 2019, did not agree with the conclusion of the CVCA and decided that the transaction did not constitute an economic concentration, so there should not be any violation of Vietnamese competition law. The VCC explained that although Grab acquired the assets of Uber and had control over Uber, Grab did not have any voting rights over any part of the Uber's group company as required under the implementing decree of the 2004 Competition Law. Therefore, the transaction did not constitute an economic concentration under the 2004 Competition Law regime.

The CVCA subsequently lodged an appeal against the VCC's decision on 25 June 2019. This case is ongoing, and the final outcome is not available yet.

The *Grab/Uber* case is unprecedented in the 15 years of enforcement of the competition law regime in Vietnam. It was the first time that the CVCA publicly concluded that a transaction was in violation of Vietnamese competition law and must be prohibited. It shows the CVCA's proactive role in investigation and also in defending its views before the VCC. Regardless of the future outcome of *Grab/Uber*, the case may signal a more robust enforcement of Vietnamese competition law in the years to come.

Reform proposals

35 | Are there current proposals to change the legislation?

The government is still drafting implementing regulations for the Competition Law effective as of 1 July 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?

No updates at this time.

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Zambia

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Voluntary or mandatory system?	The Zambian competition regime is a mandatory system as notification is required once the prescribed threshold is reached. The merger regime is suspensory in nature.
Notification trigger/ filing deadline	Parties are required to notify prior to the implementation of a merger. There are no specific deadlines. Notification is triggered if any of the circumstances set out in section 24 of the Competition and Consumer Protection Act No. 24 of 2010 are satisfied.
Clearance deadlines (Phase I/Phase II)	The first step takes 45 calendar days wherein conditional approval can be granted, which allows parties to proceed with the merger. The second step takes 45 calendar days. The Competition and Consumer Protection Commission (CCPC) has a total of 90 days to issue a decision, subject to an extension of 30 days if notice in writing is given to the parties by the CCPC before the lapse of the 90-day period.
Substantive test for clearance	The CCPC carries out a competition assessment, a market assessment and a public interest assessment.
Penalties	The CCPC imposes an administrative fine of up to a maximum of 10 per cent of an enterprise's annual turnover. An enterprise may also be liable to criminal sanctions.
Remarks	Not applicable.

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 What is the relevant legislation and who enforces it?

The relevant piece of legislation is the Competition and Consumer Protection Act No. 24 of 2010 (the Act), which is enforced by the Competition and Consumer Protection Commission (CCPC).

Scope of legislation

2 What kinds of mergers are caught?

The Act provides that a merger occurs when:

- 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.

The Act contemplates that a merger may be achieved when:

- an enterprise purchases shares, leases assets or acquires an interest in any shares or assets belonging to another enterprise;
- an enterprise amalgamates or combines with another enterprise; or
- a joint venture occurs between two or more independent enterprises.

Scenarios in which control occurs are stated in the Act as when an enterprise or individual:

- beneficially owns more than half of the issued share capital of the enterprise;
- is entitled to the majority of the votes at a general meeting or has the ability to control the majority of those votes either directly or through a controlled entity of the controlled enterprise;
- has the power to appoint or veto the appointment of the majority of the directors of the enterprise;
- is the holding company of a subsidiary; or
- has the ability to control the majority of the votes of the trustees, appoint the majority of the trustees, or appoint or change the majority of the beneficiaries of the trust;
- has the ability to materially influence the policy of the enterprise in a manner comparable to a person who, in the ordinary commercial practice can exercise the elements of control referred to above;
- has the ability to veto strategic decisions of the enterprise such as the appointment of directors, and other strategic decisions which may affect the operations of the enterprise;
- buys or leases the core assets of another enterprise;
- has a market presence or a market turnover which is attributed to the assets bought or leased from another enterprise; or
- controls the assets bought or leased.

Internal re-organisations are not notifiable if they do not amount to a change in control.

Foreign-to-foreign mergers with a local nexus are also captured. A local nexus is established where locally established presence exists, either directly or indirectly through a subsidiary or subsidiaries, or through export sales of at least 10 per cent of the sales total into the relevant market over the preceding three years. This applies because a merger concluded outside Zambia can have an effect on competition in Zambia through its subsidiaries (eg, the presence of significant import sales is sufficient to meet the local nexus requirement).

3 What types of joint ventures are caught?

Not all joint ventures are subject to merger control provisions. The CCPC distinguishes between full-function joint ventures and joint ventures that are auxiliary to the activities of their parent enterprises.

A full-function joint venture, the assets or turnover value of which are above the notification threshold, must be notified to the CCPC as a merger. By definition, such a joint venture performs on a lasting basis all functions of an autonomous economic entity, competes with other enterprises in a relevant market, and has sufficient resources and staff to operate independently in such a market. Although full-function joint ventures generally conduct little business with their parent enterprises, there may be situations in which a joint venture uses its parent enterprise's networks or outlets to conduct its sales. A full-function joint venture may also rely entirely on an initial start-up period of sales to or purchases from its parent enterprises before it can become independently established in the market. The length of the start-up period depends on the characteristics of the market concerned.

Auxiliary joint ventures fulfil a specific purpose for their parent enterprises; for example, in sales, production or research and development. Such joint ventures will not be considered mergers subjected to control. However, parties to auxiliary joint ventures may have to apply to the CCPC for authorisation concerning restrictive agreements if:

- the parent enterprises together supply or acquire 15 per cent or more of goods or services of any description in a relevant market in Zambia (in the case of a horizontal agreement); or
- the parent enterprises individually supply or acquire, at either one of the two levels of the market that are linked by the agreement, 30 per cent or more of goods or services of any description in a relevant market in Zambia (in the case of a vertical agreement).

4 Is there a definition of 'control' and are minority and other interests less than control caught?

'Control' is defined in section 24(3) of the Act, which states that a person controls an enterprise if that person:

1. beneficially owns more than half of the issued share capital of the enterprise;
2. is entitled to exercise the majority of the votes that may be cast at a general meeting of the enterprise or has the ability to control the voting of a majority of those votes either directly or through a controlled entity of that enterprise;
3. is able to appoint or veto the appointment of a majority of the directors of the enterprise;

4 is a holding company and the enterprise is a subsidiary of that company;
5 in the case of a trust, has the ability to control the majority of the votes of the trustees, appoint the majority of the trustees, or appoint or change the majority of the beneficiaries of the trust;
6 has the ability to materially influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise the element of control referred to in points (1) to (5); or
7 has the ability to veto strategic decisions of the enterprise, such as the appointment of directors, and other strategic decisions that may affect the operations of the enterprise;
8 buys or leases the core assets of another enterprise;
9 has a market presence or a market turnover which is attributed to the assets bought or leased from another enterprise; or
10 controls the assets bought or leased.

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 is a new threshold for the mandatory notification of mergers to the CCPC. On 1 January 2023, the threshold increased following the issuance of the CCPC (General) (Amendment) Regulations (Statutory Instrument No. 106 of 2022) to aid in attracting and encouraging investment in Zambia by reducing the cost of doing business in the country, which is a current focus of the government. A merger is now notifiable to the CCPC if either the combined Zambian turnover or combined gross value of Zambian assets, whichever is higher, of the acquirer and the target in the relevant markets was at least 100 million fee units (30 million Zambian kwachas) in the most recent complete financial year.

However, the CCPC may, where it has reasonable grounds to believe that a merger falls below the prescribed thresholds, review a merger if it:

- is likely to create a position of dominance for a localised product or in a geographical market;
- is likely to contribute to the creation of a dominant position through a series of acquisitions that are not individually subject to prior notification;
- may substantially prevent or lessen competition;
- is concluded outside Zambia and has consequences in Zambia that require further consideration; or
- results in, or is likely to result in, competition and public interest factors that must be considered.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is only mandatory if the notification threshold is met. There are no exceptions to the filing obligation if the proposed merger meets the threshold. The Zambian merger regime is suspensory.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

If the target has no local turnover, no local assets and no corporate presence in Zambia, filing would not be required and therefore notification would not be required. However, an enterprise in Zambia that is controlled by a foreign enterprise as a subsidiary is subject to notification and review if the prescribed threshold is met by the local subsidiary. In that case, the turnover or assets that will be assessed will be those of the target that is duly registered in accordance with the laws of Zambia.

If control of a Zambian enterprise comes about purely as a result of a merger involving enterprises domiciled outside Zambia, the CCPC assesses the merger if it has a local nexus. The CCPC will only assert its jurisdiction over such transactions if the foreign enterprise has a local nexus of sufficient materiality.

Having a subsidiary domiciled in Zambia is sufficient to establish a local nexus. The local nexus consideration is fundamental when assessing whether foreign-to-foreign mergers are notifiable in Zambia. The CCPC will assert its jurisdiction if the threshold for merger notification is reached.

A local nexus may also arise if a foreign company generates a turnover in Zambia through export sales into the Zambian market. In this case, a transaction is considered to have an appropriate local nexus if the export sales have been at least 10 per cent of the target's total sales for the preceding three years (ie, at least 10 per cent of its sales each year or its sales average 10 per cent over these three years).

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?

All notifications must be filed prior to the merger being implemented. If the parties do not file, the merger is considered void.

10 Which parties are responsible for filing and are filing fees required?

There is no prescribed legal obligation as to which party must notify the Competition and Consumer Protection Commission (CCPC) as the Competition and Consumer Protection Act No. 24 of 2010 (the Act) simply requires that the parties to a merger that meets the prescribed thresholds must apply for authorisation of the proposed merger. Therefore, any

party to the merger transaction can make the notification, provided that all information concerning both parties is provided by completing the prescribed form, Form 1.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The CCPC completes the assessment of a notification and issues its determination on the case within 90 days of the application for authorisation of the proposed merger and payment of the filing fees. The period can be extended for a further 30 days and the CCPC is required to give the parties 14 days' prior notice regarding an extension before the lapse of the 90-day assessment period. This extension will be equivalent to the period during which the information was delayed, amounting to stopping the clock for this length of time.

If the CCPC fails to meet the overall 90-day deadline and the investigation has not been extended, the merger is deemed to have been approved.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The Act provides that an enterprise commits an offence and is liable to a fine not exceeding 10 per cent of its annual turnover if it:

- implements a merger without the approval of the CCPC; or
- implements a merger that is rejected by the CCPC.

As such, implementation of a merger without authorisation is an offence under the Act. Further, the merging parties can be punished by an administrative fine not exceeding 10 per cent of the annual turnover of the merging parties.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Yes, provided that they have a local nexus and are notifiable in Zambia. Puma Energy Zambia Limited was fined 50 million Zambian kwacha (2 per cent of its annual turnover based on its audited accounts) for breaching merger regulations.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Foreign-to-foreign mergers can be subject to Zambian merger control provisions if they:

- involve an economic activity that has an effect in Zambia; or
- have consequences in Zambia that require further consideration or a material bearing on the Zambian market, such as the existence of subsidiaries in Zambia or having made 10 per cent of their sales in Zambia in the preceding three years.

The CCPC will not allow closing to proceed before it has granted its approval. A reviewable merger that is implemented without the CCPC's authorisation is void.

Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

No.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The documentation required for the CCPC to commence its formal review process is the prescribed form, Form 1, and a supplementary information request form, both of which are fairly detailed.

Form 1 specifies that the following documents must accompany the application:

- two copies of the enterprises' most recent annual reports and audited accounts (including the balance sheet);
- a copy of the agreement or other documents relating to the transaction;
- a press release or other shareholder, 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 regarding the transaction.

Supplementary information requests may be issued prior to and during assessment, if needed. Further, applicants for merger approval may have pre-notification meetings with the CCPC to, among other things, determine the information required by the CCPC, which may result in a significant reduction to the amount of information required to be submitted. The CCPC may, at any time, revoke an approved merger if a party to the merger had submitted incorrect information in support of the merger.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

Consultation with the CCPC is possible and encouraged as it assists in determining the precise amount of information required in a notification and, in the majority of cases, results in a significant reduction to the amount of information required.

The merger approval process has two steps and applies to all merger cases. The CCPC begins its investigation immediately after the complete notification has been submitted. Thereafter, if the notification is acceptable, the CCPC through its board's Technical Committee issues interim authorisations. Final approval is granted by the CCPC's full board. Where interim authorisation has been granted, the parties are allowed to proceed with the transaction as though final authorisation has been granted.

An interim decision is the basis on which an interim authorisation can be made. Interim authorisation is given by the Technical Committee with reasons as to why the interim authorisation has been given, pending final authorisation from the full board. The interim decision might also contain a rejection.

The CCPC grants an interim authorisation where it is concluded after the first step that a merger is less than likely to harm competition and that no further evidence is likely to be uncovered to require a revision of this finding. An interim authorisation is granted after Technical Committee commissioners have considered the transaction after making a preliminary market assessment based on the information provided by the parties that made the application as well as information sourced from third parties.

The assessment aims to properly examine whether the proposed transaction would have the effect of substantially lessening competition in the relevant market or become detrimental to public interests in the Zambian economy, or both.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The CCPC completes the assessment of a notification and issues its determination on the case within 90 days of the application for authorisation of the proposed merger and payment of the filing fees. The period can be extended for a further 30 days and the CCPC is required to give the parties 14 days' prior notice regarding an extension before the lapse of the 90-day assessment period. This extension will be equivalent to the period during which the information was delayed, amounting to stopping the clock for this length of time.

The process can be speeded up if all the correct information required for the assessment is submitted by the parties to the merger. If there are no competition concerns, the CCPC can issue interim approval within 45 days, which enables the parties to close the transaction.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test against which a merger is assessed evaluates whether the merger is likely to reduce competition in a market within Zambia. The following factors are considered:

- a calculation of market shares and concentration;
- benefits to consumers;
- barriers to entry and market entry;
- the availability of substitutes;
- the removal of vigorous competitors; and
- the extent of import competition.

The Competition and Consumer Protection Commission (CCPC) carries out a competition assessment, a market assessment and a public interest assessment.

20 | Is there a special substantive test for joint ventures?

The following factors are considered:

- a calculation of market shares and concentration;
- benefits to consumers;
- barriers to entry and market entry;
- the availability of substitutes;
- the removal of vigorous competitors; and
- the extent of import competition.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

In the investigation and assessment of potential or likely violations of the Competition and Consumer Protection Act No. 24 of 2010, the CCPC administers various tests to ascertain whether the alleged violations have, or are likely to result in, any negative effects on the market to the consumer or the economy in general. These assessments include:

- the substantial lessening of competition or effect test;
- the dominance test;
- the public interest test;
- the abuse of dominant position test;
- the efficiency test; and
- the coordinated effects test.

In carrying out the substantial lessening of competition or effect test, the CCPC, when considering a proposed merger, assesses whether the merger is likely to prevent or substantially lessen competition. It also takes into account the likely and actual factors that affect competition in a defined market in Zambia.

The dominance test assesses whether the transaction, through abuse or acquisition of a dominant position of market power:

- would or would be likely to limit access to markets or otherwise unduly restrain competition; or
- has or would be likely to have an adverse effect on trade or the economy in general.

Finally, regarding the coordinated effects test, the CCPC has to consider whether the proposed merger would result in such a high market concentration that illegal coordination would become a risk.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The CCPC will consider public interest issues during assessments of mergers that result in:

- a significant benefit to the public;
- a rich transfer of skills and knowledge to people living and working locally to the place of business of a proposed merger; and
- the overall positive economic benefits that a merger promises to provide.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The CCPC always takes into account the economic benefits of a proposed merger. The improvements to the industry to which a merger is expected to contribute influences the assessment outcome for a proposed merger; for example, the growth of the energy industry ensured the approval of the *BP Africa Limited/Dana Oil* merger in the late 1990s.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Competition and Consumer Protection Commission (CCPC) has the power to suspend or revoke a merger approval if it has cause to believe that the merger approval was obtained fraudulently or tainted with deceit by withheld information.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The CCPC has the power to issue directives that it deems fit to be imposed on a merger for failure to comply with the regulations of the Competition and Consumer Protection Act No. 24 of 2010 (the Act).

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The CCPC will always indicate the period within which an issued remedy or directive is to be complied with or adhered to with the aim of encouraging compliance within a measurable amount of time. One of the commonly issued conditions is to suspend all implementation of a merger until clearance is issued by the CCPC.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The CCPC has a recent track record of providing remedies in foreign-to-foreign mergers. The CCPC usually approves foreign-to-foreign mergers with a local nexus and imposes conditions to address any competition concerns in appropriate cases.

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A clearance decision may cover ancillary restrictions in circumstances where an exemption or other authorisations would be required under the Act, which is assessed 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 review process is open to customers and competitors. At times, the Competition and Consumer Protection Commission (CCPC) requests members of the public to make submissions in relation to the merger.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The process of assessment of the merger by the CCPC is private until a decision of the board is rendered. The decisions rendered and appeal judgments determined by the CCPC Tribunal are uploaded on its website and published in executive summary-style statements.

To protect commercial information, confidential information is redacted in the CCPC's reports, decisions and judgments. Parties that gave information during the merger notification can declare such information to be confidential and give reasons. Confidential treatment may be requested for any information that falls within the meaning of 'confidential information', which is defined under section 2 of the Competition and Consumer Protection Act No. 24 of 2010 (the Act) as 'trade business, commercial or industrial information that belongs to an enterprise, has a particular economic value and is not generally available to or known by others'.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The CCPC cooperates with the Southern African Development Committee and the Common Market for Eastern and Southern Africa. It also has an informal alliance with the International Competition Network.

Further, section 65 of the Act states that a foreign competition authority may, where it has reasonable grounds to believe that anticompetitive practices in Zambia are damaging competition in the authority's country, request the CCPC to investigate and make an appropriate determination.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

In section 60, the Competition and Consumer Protection Act No. 24 of 2010 (the Act) provides for an appeal process wherein decisions of the Competition and Consumer Protection Commission (CCPC) can be appealed to the CCPC Tribunal within 30 days of the CCPC rendering its decision.

There have been a few judicial review cases attempted for decisions rendered by the CCPC, which have not been successful. This is because judicial review is not available when challenging CCPC decisions as the Act provides the method of dispute resolution, which is by way of an appeal.

Time frame

33 | What is the usual time frame for appeal or judicial review?

An appeal must be filed within 30 days to the CCPC Tribunal and, if judicial review is applicable, an application for judicial review must be made within 90 days of the decision.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The highest fine or sanction imposed by the Competition and Consumer Protection Commission (CCPC) to date was imposed in the energy sector.

The CCPC gave conditional approval to BP Africa Limited to acquire Castrol Oil in a merger transaction in August 2001. The parties did not comply with the conditions that were set by the CCPC and the CCPC proceeded to impose a fine of 2 per cent of annual turnover on Puma Energy Zambia Limited, which was a subsidiary of BP Africa Limited. The CCPC also fined Dana Oil, which had entered into a distribution agreement with BP Africa Limited for the distribution of Castrol Oil-branded products marketed or made available by BP Africa Limited within Zambia. The fine that was imposed on Dana oil was 0.1 per cent of its annual turnover, so that it could willingly abide by the CCPC's conditions.

The fines were imposed to deter BP Africa Limited and Dana Oil from failing to comply with the CCPC's conditions. The penalty was also meant to send a strong signal to various market players to not engage in similar conduct.

Also, in October 2012, Toyota Tsusho Corporation acquired a shareholding in CFAO Zambia of Pinault-Printemps-Redoute (now Kering), which resulted in a change of indirect control at CFAO Zambia. It also created a possible overlap between Toyota Tsusho Corporation and CFAO Zambia in the distribution of new vehicles and parts in Zambia. This foreign-to-foreign merger was initially blocked but was later cleared following changes to the distribution market.

Reform proposals

35 | Are there current proposals to change the legislation?

There are currently none that have been publicised.

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 is a new threshold for the mandatory notification of mergers to the Competition and Consumer Protection Commission (CCPC). Effective 1 January 2023, the threshold increased following the issuance of the CCPC (General) (Amendment) Regulations (Statutory Instrument No. 106 of 2022) to aid in attracting and encouraging investment in Zambia by reducing the cost of doing business in the country, which is a current focus of the government. A merger is now notifiable to the CCPC if either the combined Zambian turnover or combined gross value of Zambian assets, whichever is higher, of the acquirer and the target in the relevant markets was at least 100 million fee units (30 million Zambian kwachas) in the most recent complete financial year.

On 26 December 2023, the Competition and Consumer Protection (Amendment) Act No. 21 of 2023 was passed into law, effectively amending various provisions of the Competition and Consumer Protection Act No.24 of 2010. One of the cardinal amendments to note is that the COMESA Competition Regulations have been finally domesticated into law.

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