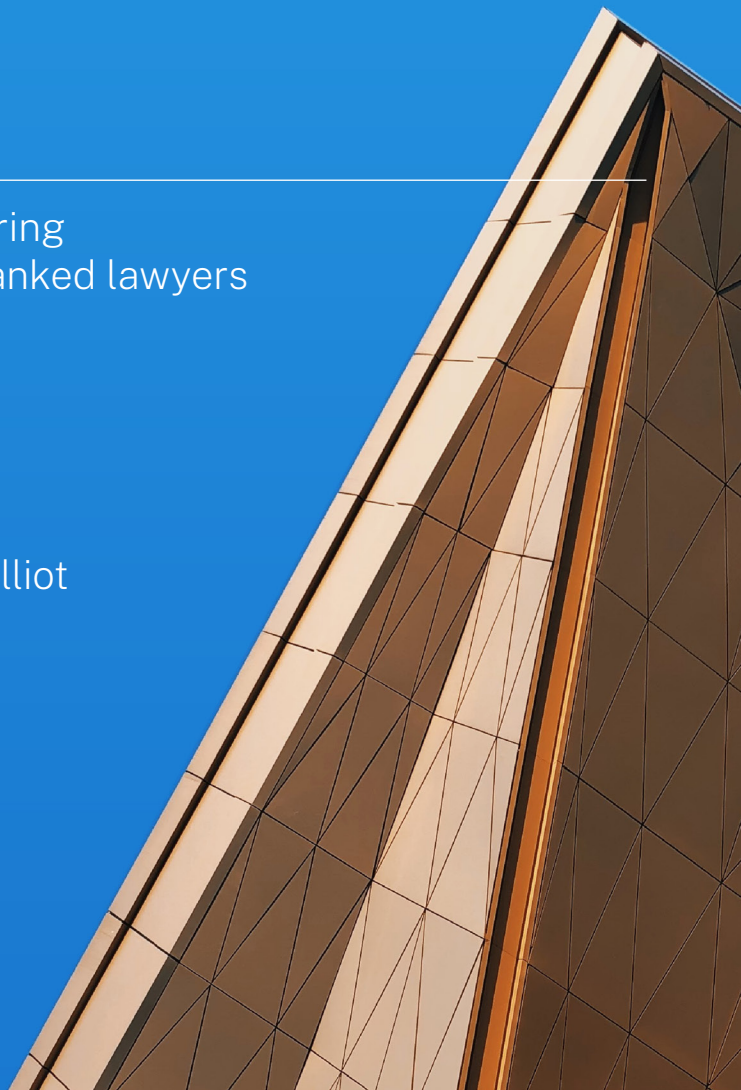

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Merger Control 2024

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Global Practice Guides

Merger Control

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2024

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CONTENTS

INTRODUCTION

Contributed by Jean-François Bellis and Porter Elliott,
Van Bael & Bellis p.5

ARMENIA

Law and Practice p.10

Contributed by Concern Dialog

AUSTRALIA

Law and Practice p.30

Contributed by Gilbert + Tobin

AUSTRIA

Law and Practice p.62

Contributed by bpv Huegel

CHILE

Law and Practice p.87

Contributed by Estudio Lizana

Trends and Developments p.111

Contributed by Estudio Lizana

CHINA

Law and Practice p.119

Contributed by Haiwen & Partners

Trends and Developments p.145

Contributed by JunHe LLP

CYPRUS

Law and Practice p.151

Contributed by Georgiades & Pelides

CZECH REPUBLIC

Law and Practice p.173

Contributed by HAVEL & PARTNERS

Trends and Developments p.192

Contributed by HAVEL & PARTNERS

ECUADOR

Trends and Developments p.200

Contributed by Lexvalor Abogados

EGYPT

Law and Practice p.209

Contributed by GLA & Company

EU

Law and Practice p.232

Contributed by Van Bael & Bellis

GERMANY

Law and Practice p.259

Contributed by Linklaters

Trends and Developments p.284

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GREECE

Law and Practice p.291

Contributed by Karatzas & Partners

HUNGARY

Law and Practice p.313

Contributed by Bán, S. Szabó, Rausch & Partners

INDIA

Law and Practice p.329

Contributed by AZB & Partners

INDONESIA

Law and Practice p.354

Contributed by ABNR Counsellors at Law

ITALY

Law and Practice p.374

Contributed by Rucellai & Raffaelli

Trends and Developments p.399

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JAPAN

Law and Practice p.405

Contributed by Ikeda & Someya

Trends and Developments p.427

Contributed by Ikeda & Someya

KUWAIT

Law and Practice p.436

Contributed by GLA & Company

MEXICO

Law and Practice p.453

Contributed by Von Wobeser y Sierra

Trends and Developments p.472

Contributed by Galicia Abogados, S.C.

CONTENTS

NIGERIA

Law and Practice p.479

Contributed by Streamsowers & Köhn

Trends and Developments p.500

Contributed by Streamsowers & Köhn

PERU

Law and Practice p.508

Contributed by Bullard Falla Ezcurra+

PHILIPPINES

Law and Practice p.530

Contributed by Villaraza & Angangco

POLAND

Trends and Developments p.552

Contributed by Sołtysiński Kawecki & Szlęzak

ROMANIA

Trends and Developments p.559

Contributed by GNP Guia Naghi & Partners

SAUDI ARABIA

Law and Practice p.566

Contributed by GLA & Company

SERBIA

Law and Practice p.590

Contributed by Subotić Law

Trends and Developments p.606

Contributed by Bojović Drašković Popović & Partners

SINGAPORE

Law and Practice p.613

Contributed by Drew & Napier LLC

SOUTH KOREA

Law and Practice p.636

Contributed by Lee & Ko

SWITZERLAND

Law and Practice p.659

Contributed by Homburger

Trends and Developments p.678

Contributed by Prager Dreifuss Ltd

TAIWAN

Law and Practice p.685

Contributed by Lee and Li, Attorneys-at-Law

Trends and Developments p.705

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THAILAND

Law and Practice p.711

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Trends and Developments p.721

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TÜRKİYE

Law and Practice p.727

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UAE

Law and Practice p.759

Contributed by GLA & Company

UK

Law and Practice p.781

Contributed by Van Bael & Bellis

Trends and Developments p.808

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UKRAINE

Law and Practice p.816

Contributed by AVELLUM

Trends and Developments p.834

Contributed by Avellum

USA

Law and Practice p.840

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Trends and Developments p.864

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INTRODUCTION

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Van Bael & Bellis is widely acknowledged as having one of the leading practices in EU and UK competition law, including merger control. From its main office in Brussels and its newest office in London, the competition team at Van Bael & Bellis has assisted clients at both the EU and national levels, notably appearing before the European Commission, the UK Competition and Markets Authority (CMA) and the EU and UK courts, where the firm has acted as counsel in many landmark cases. Within the field of merger control, Van Bael & Bellis has a

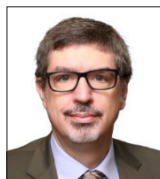
dedicated team of EU and UK specialists who regularly represent merging parties as well as complainants in cases involving key issues of jurisdiction, procedure and substantive law. The firm has succeeded in obtaining clearance for numerous complex transactions before the European Commission and the CMA. The team also routinely helps clients to obtain merger clearance from member state authorities for transactions that do not meet EU thresholds. The firm is frequently called on to co-ordinate merger control filing efforts across the world.

Contributing Editors



Jean-François Bellis is the co-founder and current chairman of Van Bael & Bellis. He has extensive experience assisting clients in a broad range of antitrust issues, including

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Porter Elliott is the co-head of competition law at Van Bael & Bellis and a leading expert on EU merger control law. For over 25 years, he has successfully guided dozens of complex and

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INTRODUCTION

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VAN BAEL & BELLIS

Deal Activity Down, but Regulatory Challenges Abound

Global M&A activity remained sluggish in 2023, with total deal value registering at approximately half of what it was in 2021. Deal volume also declined, although less dramatically, as smaller, mid-market transactions filled some of the gap left by fewer megadeals.

Unsurprisingly, this led to a decrease in the number of transactions subject to merger control approval in 2023. For example, the number of transactions notified to the European Commission (the “Commission”) hit an eight-year low.

The good news for most who are reading this is that many market analysts have forecast a significant rebound in M&A activity starting in 2024. Given this, it remains critical that companies and their advisers stay up to date on the most recent developments and trends in global merger control – of which there are many.

Indeed, despite the recent downtick in notifiable transactions, merger control enforcers have been anything but quiet, and getting deals approved is as challenging as ever.

International challenges

European Union

In the EU, the Commission continues its efforts to expand its jurisdiction to review transactions it considers to be anticompetitive, including those that are too small to meet either the EU filing thresholds or indeed the filing thresholds of any EU member state. Whereas it used to be straightforward to determine where merger control filings would need to be made in the EU, this is no longer the case.

When an EU filing is not required, jurisdictions such as Austria and Germany maintain low filing thresholds that are often met, and Portugal and Spain have market share thresholds that may be difficult to assess. Robust enforcement continues to be seen in other EU member states as well, with some embracing theories of harm that go beyond those typically considered by the Commission.

United States of America

In the US, regulators continue to push more adventurous theories of harm and make it increasingly difficult for merging parties to address concerns through remedies. Plans are also underway to replace the relatively straightforward Hart-Scott-Rodino (HSR) merger filing

INTRODUCTION

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form with a much more detailed version, similar in complexity to the one used in EU filings. Although the new HSR form has not yet been released, it is expected to include questions aimed at less traditional merger control considerations, such as the negative effects of mergers on labour markets.

United Kingdom

The UK's voluntary notification regime remains "voluntary" in name only, as the UK Competition and Markets Authority (CMA) continues to be keen to thoroughly investigate transactions it considers as meriting review, even when doing so requires stretching the relevant "share-of-supply" jurisdictional threshold. The CMA is also not shy to sometimes take a different substantive view compared to other jurisdictions, including the EU, when reviewing the same transaction.

Australia

Meanwhile, another long-time voluntary notification jurisdiction is overhauling its rules, with Australia announcing that it plans to introduce a mandatory merger control regime starting in January 2026. There are rumours that the Australian thresholds – while not yet publicly released – may be set quite low, such that a significant number of global deals would need to be notified.

Other jurisdictions

Of course, these are only some of the merger control jurisdictions that companies must bear in mind when seeking regulatory approval of their mergers. It is not unusual for global deals also to require notification and approval in countries such as Brazil, Canada, China, Japan, South Korea and Turkey, to name just a few.

Clearly, the challenges that both in-house and external counsel face on how to obtain merger

control approvals as quickly and efficiently as possible remain acute. This makes having a clear guide such as this one all the more essential. Indeed, the Chambers Merger Control 2024 guide provides answers to all the most pressing questions companies and their lawyers face with every notifiable transaction.

Filing location

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

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

A new challenge faced by merging parties is the possibility of having to make separate, potentially very onerous filings under the EU Foreign Subsidies Regulation (FSR), distinct from any merger control filing that may also be required. The FSR requires, inter alia, notification to and prior approval by the Commission of certain transactions where one party is established in the EU and the other (typically the acquirer, but also possibly a merging party or joint venture

INTRODUCTION

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partner) benefits from “financial contributions” meeting certain monetary thresholds. Although it is still early days for FSR filings, this is clearly proving to be a major additional challenge for companies to overcome before they can close their deal.

An increasing number of countries also have foreign direct investment (FDI) legislation that may also require additional filings and approvals. Although neither FDI nor subsidies fall within what one traditionally has in mind when speaking of “merger control”, they represent significant further hurdles merging companies now have to face. As such, the 2024 edition of the Chambers Merger Control guide covers FDI/subsidies review for each jurisdiction.

Substantive reviews

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

For example, is the legal test for assessing mergers based on maintaining effective competition, avoiding the creation or strengthening of a dominant position, or some other standard? Are vertical mergers (which are garnering more attention in the United States, in particular) subject to the same level of scrutiny as horizontal mergers? How are efficiencies considered by the regulator in its assessment? Is the agency’s analysis based purely on competition law principles or are there other (eg, public interest) considerations at play? What kinds of arguments are

most likely to be persuasive to each authority, and how does one ensure a consistent approach across jurisdictions at a time when international co-operation between regulators is more common than ever?

Timing

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

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

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

Conclusion

For the above reasons – and many more – navigating a global merger control filing and approval

INTRODUCTION

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process is a complex business, and it is only getting more complex every year. The Chambers Merger Control 2024 guide aims to cut through some of that complexity by providing the reader with a practical guide, in a user-friendly format, that covers many of the world's leading merger control jurisdictions.

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

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

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

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

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

ARMENIA



Law and Practice

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Concern Dialog

Contents

1. Legislation and Enforcing Authorities p.13

- 1.1 Merger Control Legislation p.13
- 1.2 Legislation Relating to Particular Sectors p.13
- 1.3 Enforcement Authorities p.13

2. Jurisdiction p.13

- 2.1 Notification p.13
- 2.2 Failure to Notify p.14
- 2.3 Types of Transactions p.15
- 2.4 Definition of "Control" p.16
- 2.5 Jurisdictional Thresholds p.16
- 2.6 Calculations of Jurisdictional Thresholds p.16
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.16
- 2.8 Foreign-to-Foreign Transactions p.17
- 2.9 Market Share Jurisdictional Threshold p.17
- 2.10 Joint Ventures p.18
- 2.11 Power of Authorities to Investigate a Transaction p.18
- 2.12 Requirement for Clearance Before Implementation p.18
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.18
- 2.14 Exceptions to Suspensive Effect p.19
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.19

3. Procedure: Notification to Clearance p.20

- 3.1 Deadlines for Notification p.20
- 3.2 Type of Agreement Required Prior to Notification p.20
- 3.3 Filing Fees p.20
- 3.4 Parties Responsible for Filing p.20
- 3.5 Information Included in a Filing p.20
- 3.6 Penalties/Consequences of Incomplete Notification p.21
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.21
- 3.8 Review Process p.21
- 3.9 Pre-notification Discussions With Authorities p.22
- 3.10 Requests for Information During the Review Process p.22
- 3.11 Accelerated Procedure p.22

4. Substance of the Review p.22

- 4.1 Substantive Test p.22
- 4.2 Markets Affected by a Transaction p.23
- 4.3 Reliance on Case Law p.23
- 4.4 Competition Concerns p.24
- 4.5 Economic Efficiencies p.24
- 4.6 Non-competition Issues p.24
- 4.7 Special Consideration for Joint Ventures p.24

5. Decision: Prohibitions and Remedies p.25

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.25
- 5.2 Parties' Ability to Negotiate Remedies p.26
- 5.3 Legal Standard p.26
- 5.4 Negotiating Remedies With Authorities p.26
- 5.5 Conditions and Timing for Divestitures p.26
- 5.6 Issuance of Decisions p.26
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.27

6. Ancillary Restraints and Related Transactions p.27

- 6.1 Clearance Decisions and Separate Notifications p.27

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.27

- 7.1 Third-Party Rights p.27
- 7.2 Contacting Third Parties p.28
- 7.3 Confidentiality p.28
- 7.4 Co-operation With Other Jurisdictions p.28

8. Appeals and Judicial Review p.28

- 8.1 Access to Appeal and Judicial Review p.28
- 8.2 Typical Timeline for Appeals p.28
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.29

9. Foreign Direct Investment/Subsidies Review p.29

- 9.1 Legislation and Filing Requirements p.29

10. Recent Developments p.29

- 10.1 Recent Changes or Impending Legislation p.29
- 10.2 Recent Enforcement Record p.29
- 10.3 Current Competition Concerns p.29

Concern Dialog is a top-tier, full-service law firm headquartered in Yerevan, Armenia, and has been a trusted partner to businesses and individuals seeking legal counsel and representation since 1998. Concern Dialog is renowned for its work in the areas of corporate law, labour law, competition law, tax law, contract law, family law (including child abduction cases), and regulatory issues. The firm has extensive experience in regulatory matters in the TMT, mining, energy, utilities, banking and finance, medical

services, real estate, and not-for-profit sectors. In addition to its highly regarded consulting and transaction practice, its litigation practice is regarded as one of the leaders in Armenia for landmark litigation and arbitration cases. Concern Dialog's membership of TagLaw and Next-law networks, as well as its co-operation with individual law firms from various jurisdictions, allow it to provide services to its Armenian clients more or less worldwide.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Regulations on merger control are mainly provided by the following:

- the Law on Protection of Economic Competition (“the Law”);
- the decision of the Competition Protection Commission (“the Commission”) on “defining the amount of assets and incomes of the participants of concentration subject to declaration, the procedure for declaration of concentration and the form of declaration”; and
- the Commission’s decision “on determining the methodology for choosing the means of liability and calculating the fine”.

In addition, there are other legal acts that contain regulations related to the sector, in particular, including the Code of Administrative Offenses and the Law on State Registration of Legal Entities, State Enrollment of Separate Divisions of Legal Entities, Institutions and Individual Entrepreneurs.

1.2 Legislation Relating to Particular Sectors

There are no separate regulations for foreign investments regarding the sector of merger control. Foreign investments are regulated by the Law on Foreign Investments. This is outside of the scope of this piece, as the law focuses mainly on the types of foreign investments, the rights of foreign investors and their protection, but not on merger control. At the same time, the Law also applies to those actions or behaviours of economic entities in foreign countries that may prevent, limit or prohibit economic competition or harm the interests of consumers in the Republic of Armenia.

Additionally, some industries, such as telecommunications or energy, have industry-specific laws that provide for certain regulations regarding foreign transactions and investments. In particular, transactions and investments in these industries, including foreign transactions and investments, require the approval of the Public Services Regulatory Commission.

1.3 Enforcement Authorities

The enforcement of merger control legislation has mostly been entrusted to the Commission, which carries out its activities in accordance with the Constitution, the Law and other legal acts, and is independent in carrying out its functions and the powers entrusted to it. The Commission is empowered by law to define the amount of assets and the income of the participants of concentrations subject to declaration, as well as procedures for declaration by concentrations, the forms of declaration, to allow or prohibit concentrations based on an assessment process, to impose fines for offences, and also has further powers related to merger control.

In addition, the Public Services Regulatory Commission exercises certain supervisory powers in some industries. As mentioned in **1.2 Legislation Relating to Particular Sectors**, in industries such as telecommunications or energy, the PSRC acts as a regulator, wielding the power to approve specific transactions and investments.

2. Jurisdiction

2.1 Notification

Certain types of transactions, investments and other action taken by economic entities are defined as “notifiable concentrations” in Armenia. Concentrations must be notified before the Commission prior to the closing of a transaction

(in cases where the concentration is determined to be declarable under the Law).

According to the Law, a concentration is defined as the following:

- the consolidation of economic entities;
- a merger of economic entities;
- the acquisition of 20% or more of the assets or shares of an economic entity by another economic entity;
- the acquisition of the right to use an intellectual property object, including a means of personalisation;
- the establishment of a legal entity by more than one economic entity; and
- any transaction, action, reorganisation or conduct of an economic entity which results in the entity directly or indirectly influencing the decision-making or competitiveness of another economic entity, directly or indirectly influencing the decision-making or competitiveness of another economic entity or having an impact on the competitive situation in any commodity market.

Moreover, only the transactions that meet the requirements below shall be deemed “notifiable” or declarable (and the consent of the Commission shall be obtained before closing of the relevant transaction):

- the total value (amount) of the assets or income of the participants of the concentration at the time of submitting the declaration of concentration or in the last financial year preceding it exceeded AMD4 billion, or the value (amount) of the assets or income of at least one of the participants at the time of submitting the declaration in the last financial year preceding it exceeded AMD3 billion;

- the total amount of income of the participants of the concentration that did not perform any activity in the fiscal year preceding the year of submitting the notification of concentration or carried out an activity for a period of less than 12 months in the 12 months preceding the submission of the declaration exceeded AMD4 billion, or the amount of income of at least one of the participants in the calculation of the 12 months preceding the submission of the declaration exceeded AMD4 billion, or the amount of income of at least one of the participants in the calculation of the 12 months preceding the submission of the declaration exceeded is AMD3 billion; and
- at least one of the participants of the concentration has a dominant position in any commodity market in Armenia.

The concentration within the group of persons is considered an exception to the above. The Law provides for the concept of the group of persons, according to which it is a group of legal and/or natural persons between which there is actual connection or control, and in respect of which at least one of the conditions stipulated by the Law is met. Accordingly, if the group of persons submits the list of economic entities that constitutes a group of persons and the justifications to the Commission at least one month before the concentration, it is sufficient to assess the authorisation of the relevant action, and declaration will not be required. In the meantime, the parties shall inform the Commission after the transaction has been closed.

2.2 Failure to Notify

As mentioned above, the obligation to notify on concentration is fulfilled through the submission of a declaration to the Commission. At the same time, failure to file gives rise to a liability, defined by the Law. If the economic entity is obliged to

submit a declaration but does not do so, it is threatened with a fine of up to AMD5 million. The amount of the fine may depend on the aggravating or mitigating circumstances based on the Commission's decision "on determining the methodology for choosing the means of liability and calculating the fine".

Examples of aggravating circumstances are the motives, circumstances and intention of committing an offence by the economic entity. When evaluating this, the Commission takes into account recidivism, or the economic entity knowing that it needed to declare the concentration but did not.

A mitigating circumstance can be, for example, the submission of evidence by the economic entity beyond the obligations stipulated by the Law, or cooperating with the Commission.

The law also provides for the possibility of applying accelerated proceedings. If the consequences of the offence have been eliminated and the commission of an offence has been accepted by the economic entity, accelerated proceedings may be applied during which only mitigating and aggravating circumstances are assessed. As a result of the accelerated proceedings, the amount of the fine imposed for not declaring the concentration cannot exceed half of the most severe penalty for the given offence – in other words, the amount of the fine can be up to AMD2.500.000.

The decisions regarding the application of liability by the Commission are posted on the website of the [Competition Protection Commission](#), blocking only information that is considered a trade secret. The amounts of the fines charged as liability for undeclared concentrations are different, depending on the various aggravating or

mitigating circumstances. For example, in one of the cases, a natural person participating in the concentration was fined AMD700,000 and the company AMD1 million. In another case, the company was fined AMD2 million, and in another AMD950,000, and so on.

2.3 Types of Transactions

The types of concentration were presented in **2.1 Notification**.

Sub-clause 6 of **2.1 Notification** is fairly wide in scope and defines concentration as encompassing not just traditional mergers or share acquisitions but also a wider range of transactions, actions, and even specific behaviours. These can include reorganisations, transactions or any activity that allows one economic entity to influence the decision-making or competitiveness of another, or that can have an impact on the competitive landscape in any commodity market. Therefore, technically, a shareholder agreement or changes to the Articles of Association might fall under the definition of a concentration if it influences the decision-making or competitiveness of another entity. For example, if there is an option agreement, which allows a third person to affect the decisions of the legal entity or its behaviour prior to the exercising of the option, this, theoretically, may constitute a concentration.

The following should be mentioned regarding internal reorganisations: the law provides that actions performed by a group of persons are also subject to declaration in certain cases. In particular, when the list of economic entities that constitutes a group of persons and the relevant justifications are not submitted to the Commission, the group of persons also files a declaration. An exception to this is considered an organisation, and a natural or legal person that

is a group of persons, if that natural or legal person exercises the powers of the sole executive body of that organisation for at least one year; or organisations, if the same natural or legal person exercises the powers of sole executive bodies of organisations for at least one year.

2.4 Definition of “Control”

“Control” can be characterised as influencing the decision-making or competitiveness of another economic entity.

In the case of acquisition of shares, the threshold is set at 20% of the value of the assets of the economic entity that realises the asset. Sub-clause 6 of **2.1 Notification** covers a wider range of activities that may be considered a concentration. However, in each case, the Commission has the authority to review and determine whether there is effectively a change in control.

2.5 Jurisdictional Thresholds

The Commission defines cases where only the concentration is subject to declaration if certain thresholds are exceeded. The conditions for the concentration to be declared are presented in clause **2.1 Notification**. In addition, there are no special thresholds for other separate sectors.

2.6 Calculations of Jurisdictional Thresholds

Thresholds are calculated based on the total value (amount) of the assets or income of the participants of the concentration at the time of submitting the concentration declaration, in the last financial year preceding it, or on the total amount of income of participants of the concentration that did not perform activities in the financial year preceding the year of submission of the declaration of concentration or carry out activities over a period of less than 12 months, calcu-

lated for the 12 months preceding the moment of submission of the declaration of concentration.

Thresholds are calculated based on the balance sheet of the company. For valuation, book value is taken into account, or the market value but this is used only if book value is not available. For example, in practice, there are cases when intellectual property created by a company’s employees is not registered in the balance sheet of the company. In this case, value is considered based on fair market value.

There is no clear regulation regarding foreign currency, but, in practice, sales or assets booked in foreign currency are converted to AMD based on the rate set by the Central Bank of Armenia that is in effect at the time of submitting the declaration.

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

Thresholds are calculated in relation to the assets and income of all participants in the concentration. Participants in the concentration are considered to be:

- in a merger, the entities reorganised in the form of merger;
- in a consolidation, the consolidating economic entities;
- in an acquisition of assets, the economic entities that realise and acquire assets;
- when shares are acquired, the economic entity acquiring the shares and the economic entity in whose statutory (dividend) capital the shares are acquired;
- when acquiring the right to intellectual property, as well as in the case of any transaction, action, reorganisation or the behaviour of economic entities, due to which the busi-

ness entity may directly or indirectly influence the decision-making or competitiveness of another economic entity or may directly or indirectly influence decision-making or competitiveness, or may gain influence on a competitive situation in any commodity market in the Republic of Armenia, the economic entities involved in the legal relationship; and

- when more than one economic entity is establishing a legal entity in the Republic of Armenia, by the founding economic entities.

Therefore, the sellers may also be considered participants in the concentration, depending on the type thereof. Since the legislation requires the assets and income of all participants be taken into account when calculating thresholds (and, when there is a group of persons, the group of persons also), the seller's turnover is also included with the target.

The group of persons includes all the economic entities included in that group, and therefore the calculation is based on the sum of the assets or the income value (amount) of the economic entities included in the group of persons.

The annual financial statements of the economic entity's activity as of the end of the financial year preceding the declaration are indicated in the declaration. In cases provided for by the decision of the Commission, the economic entity may also submit a financial report available as of a different date.

As mentioned above, the information on the assets and income will be calculated based on the results of the end of financial year preceding the declaration date. Therefore, any material change in numbers between the end of the preceding year and the date of submission will not be reflected in the declaration. The list of

entities that forms a group of persons with the participants of concentration will be submitted, and this should include details as of the date of declaration. Should this list change when the Commission is still considering the application, it is advised to notify the Commission in writing regarding such changes.

2.8 Foreign-to-Foreign Transactions

The Law directly provides that merger control also applies to any actions or behaviours of economic entities in foreign countries that may prevent, limit or prohibit economic competition or harm the interests of consumers in the Republic of Armenia. Therefore, merger control is also carried out over the transactions of foreign economic entities. A further regulation has established an exception for relations governed by uniform rules of competition in cross-border markets – ie, relations over which control is reserved to the jurisdiction of the Eurasian Economic Commission. However, the legislation provides for limited regulation of foreign entities.

2.9 Market Share Jurisdictional Threshold

In Armenia, concentration can take place:

- in the same commodity market (horizontal concentration);
- in different commodity markets with some interconnection (vertical concentration); and
- in different commodity markets (mixed concentration).

The Law directly provides that concentration is subject to declaration not only when it exceeds certain thresholds but also when at least one of the participants in the concentration has a dominant position in any commodity market in the Republic of Armenia.

Therefore, regardless of whether the merging parties act in the same or different commodity markets, having a dominant position in even one of them is sufficient for declaring a concentration, even if they do not exceed the statutory thresholds.

2.10 Joint Ventures

The establishment of a legal entity by more than one economic entity which acts as an independent economic entity is considered a joint venture, which is also a subject to merger control. There are no specific rules for joint ventures to determine whether they meet the jurisdictional thresholds. Joint ventures are governed by the rules that apply to other subjects of concentration.

2.11 Power of Authorities to Investigate a Transaction

A declaration of concentration is carried out for the purposes of assessing the competitive climate as a result of the concentration preventing, limiting, prohibiting competition, or identifying or predicting the potential for restricting economic competition in the relevant commodity market in any other way, or identifying the issue of leading to a dominant position or possible damage to the interests of consumers.

Since the actions of entities that do not exceed the thresholds do not pose a threat to the competitive situation in the market or possible damage to the interests of consumers, the concentrations of these economic entities fall outside the scope of the Commission's supervision, so they do not file a declaration.

The obligation to declare exists not only in the case of exceeding thresholds, but also when an economic entity occupies a dominant position in any commodity market regardless of whether

the thresholds are passed. Thus, there are possible cases when the Commission, as a result of certain investigations, decides that the economic entity occupies a dominant position in any commodity market, and applies measures of responsibility for not declaring.

There is no statute of limitations on authorities' ability to investigate a transaction.

2.12 Requirement for Clearance Before Implementation

A notifiable concentration can be implemented only after receiving the Commission's decision on the clearance of the concentration. Therefore, the concentration is subject to suspension until the Commission's clearance. Moreover, implementation without clearance causes certain negative consequences for economic entities, which will be discussed in 2.13 Penalties for the Implementation of a Transaction Before Clearance.

2.13 Penalties for the Implementation of a Transaction Before Clearance

The Law requires that a transaction subject to declaration be implemented after filing a declaration and obtaining the Commission's clearance.

The law provides for cases of unnotified and prohibited concentrations. A notifiable concentration is considered undeclared if it was implemented without filing a declaration and obtaining the Commission's clearance. Prohibited concentration is considered to be the case when, even if a declaration is submitted, the Commission has made a decision to prohibit it for some reason (for example, the mandatory performance of any obligation was violated by the economic entity).

Accordingly, liability is also provided for both cases. If the concentration was implemented without filing a declaration and obtaining the Commission's clearance (early closing), the economic entity could face a fine of up to AMD5 million (see **2.2 Failure to Notify**).

The amount of the fine imposed for implementation of the prohibited concentration is up to 10% of the revenue of the economic entity in the year preceding the offence. For an official of an economic entity and for the natural person participating in the concentration, a warning will apply, or a fine in the amount of AMD3 million-AMD5 million.

Furthermore, there could be other negative consequences. If the concentration subject to declaration is prohibited by the Commission's decision but has been established, the Commission makes a decision to:

- separate the merged legal entity;
- divide consolidated legal entities;
- dissolve the newly established legal entity;
- terminate the contract and return to the other party what each of the parties received before termination of the contract.

The last actions listed above are carried out if, due to such actions, favourable competitive conditions will be restored in the relevant commodity market, according to the results of the Commission's investigations.

In practice, there was a case when the Commission prohibited the acquisition of 100% of the shares of an Armenian company by a foreign organisation.

2.14 Exceptions to Suspensive Effect

The Law defines the reorganisations, actions and transactions that are not considered concentration. It is thus not necessary to file a notification for their implementation and wait for the clearance from the Commission. These include the following:

- reorganisations, the actions or transactions of economic entities that take place between economic entities that are a group of persons, if they have presented the list of economic entities included in the group of persons and justifications for being a group of persons;
- transactions on the acquisition of securities listed on stock exchanges;
- transactions concluded through auctions based on a court order; and
- acceptance of inheritance.

If concentration takes place in the form of realisation (sale) of the subject of collateral and thresholds are exceeded, only the economic entity acquiring the subject of collateral needs to file an application and notify the Commission to start the review process, if such a transaction is considered a concentration and exceeds the thresholds.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

As discussed above, if the transaction is subject to declaration, the economic entity must submit a declaration to the Commission before closing it. This is an unconditional obligation for economic entities. At the same time, there can be cases when the Commission's clearance is not required at all. Concentrations where the participants do not exceed the thresholds or occupy a dominant position on any commodity market do not submit a declaration and do not obtain

the clearance of the Commission before closing. In other words, such concentrations are set up without the clearance of the Commission.

The global closing of businesses or assets in the jurisdiction may be regulated by an agreement, where a condition precedent may be provided, that the closing of such a transaction in Armenia will come into effect only after obtaining the Commission's clearance.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

The notification of the concentration must take place before its implementation. Missing the deadline would be considered to be a declaration of the transaction after its closing. In this case, fines would apply, not for delay but for non-declaration of the concentration, and are discussed in **2.2 Failure to Notify**.

3.2 Type of Agreement Required Prior to Notification

The text of the agreement does not need to be finalised for the declaration, but it is only required for parties to determine the essential terms of the agreement, including the parties, the subject, the price, and the purposes of the transaction. The law does not provide for other requirements.

3.3 Filing Fees

There are no filing fees in Armenia.

3.4 Parties Responsible for Filing

The obligation to file a declaration is intended for the participants of the concentration and is covered in **2.7 Business/Corporate Entities Relevant for the Calculation of Jurisdictional**

Thresholds who are the participants of the concentration.

3.5 Information Included in a Filing

The declaration must include the following information: a) the description of the concentration; b) information about the participants, the amount of income and the value of the assets of the participant in the last financial year preceding the moment of submitting the declaration; c) information about the natural and legal entities included in the group of persons with the participant of the concentration; d) information on the acquisition of assets, the acquisition of shares, the acquisition of an object of intellectual property, transaction, action, reorganisation or behaviour of economic entities; e) the establishment of a legal entity in the Republic of Armenia by more than one economic entity; and f) the purpose, type, basis of the concentration, information about the participant of a concentration having a monopoly or dominant position in any commodity market and other information.

The following are attached to the declaration of concentration:

- the annual financial reports of the activity as of the end of the financial year preceding the declaration, and in the presence of the requirement for the mandatory audit of financial reports established by law, and the auditor's conclusion on these;
- if the person submitting the concentration declaration is a legal entity, a copy of the legal entity's charter;
- if the person presenting the concentration declaration is a natural person, a copy of the identity document;
- if presenting information on a group of persons, evidence of being considered a group of persons, except in cases defined by law;

- in the case of horizontal and vertical concentrations not carried out within the group of persons, the volumes of products produced, imported and sold during the year preceding the submission of the declaration of concentration, by assortment;
- in the case of horizontal and vertical concentrations not carried out within the group of persons, information on the services provided and the work performed during the year preceding the submission of the concentration declaration;
- in the case of horizontal and vertical concentrations that are not carried out within the group of persons, a description of production capacities and infrastructures;
- in the case of horizontal and vertical concentrations not carried out within a group of persons, the analysis performed by the participant of the concentration regarding the competitive situation arising in the commodity market (markets) as a result of the concentration;
- copies of the pledge agreement, if the right of pledge is subject to registration, the registration, confiscation notice and the documents certifying the fact that it has been handed over to the pledger, if the subject of the pledge is acquired by ownership by the concentration participant; and
- a document certifying the relevant powers if the declaration of concentration is submitted through a representative; if the powers of the representative are certified by power of attorney, it must also directly provide for the power to submit the concentration declaration to the Commission.

The application and the declaration of concentration must be submitted in Armenian. When presenting a document in a foreign language, it is necessary to simultaneously present its Arme-

nian translation carried out in accordance with the law.

3.6 Penalties/Consequences of Incomplete Notification

The Commission may request necessary documents and information from the participants of the concentration within the framework of the concentration assessment proceedings. Accordingly, specifying unreliable, false or incomplete information in the declaration of concentration causes liability under the law. Each participant of the concentration is responsible for the reliability of the information indicated or presented by them in the declaration of concentration. The amount of the fine imposed by an economic entity for not submitting documents or other information defined by the Law within the specified period or for submitting unreliable or incomplete information is up to AMD5 million.

Submission of false information by a participant in a concentration may also be grounds for prohibiting the concentration with all its consequences (see 2.13 Penalties for the Implementation of a Transaction Before Clearance).

Such fines are often applied in practice.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

See 3.6. Penalties/Consequences of Incomplete Notification.

3.8 Review Process

The general procedure for the implementation of administrative proceedings is applied to the concentration proceedings, according to which concentration proceedings consist of the initiation, current and final phases of the proceedings, which are interconnected. The basis for initiation of the concentration assessment proceedings is

the submission of the application and declaration in accordance with the Law. There are no separate deadlines for each phase. The term of the concentration assessment procedure is three months, which can be extended once for up to three months.

Mixed concentrations or concentrators of economic entities included in a group of persons are evaluated by the Commission in an accelerated procedure, the term of which is one month.

3.9 Pre-notification Discussions With Authorities

Economic entities have the right to apply to the Commission for obtaining a conclusion on the prevention, restriction, prohibition of economic competition and/or damage to the interests of consumers, as well as other issues related to the protection of economic competition, before relevant transactions or other actions. A conclusion on issues related to economic competition is provided within one month after the date of receiving the application. If necessary, the Commission may invite the applicant or other persons to a hearing or discussion of the Commission.

Such applications are frequently submitted to the Commission. Generally, the trade secrets information the process contains is kept confidential.

3.10 Requests for Information During the Review Process

As mentioned in clause 3.6 **Penalties/Consequences of Incomplete Notification**, the Commission can request additional information during the proceedings, to which the party is obliged to respond; failure to do so incurs liability of up to AMD5 million. In practice, similar requests are carried out fairly frequently.

3.11 Accelerated Procedure

Mixed concentration and concentration of economic entities included in a group of persons is permitted under an accelerated procedure, if there are no apparent grounds for rejecting the concentration. The concept of economic entities included in a group of persons is presented in clause 2.1 **Notification**, and the concept of mixed concentration in 2.9 **Market Share Jurisdictional Threshold**.

The Commission makes a decision on allowing the concentration under the accelerated procedure within one month after the initiation of the proceedings, which contains information on the participants of the concentration, their fields of activity or commodity markets and the justifications for allowing the concentration under the accelerated procedure.

The Law does not provide for other cases or circumstances of acceleration of clearance.

4. Substance of the Review

4.1 Substantive Test

Under the Law, the Commission shall consider whether:

- the concentration could impede, restrict, prohibit or otherwise degrade economic competition within the relevant commodity market;
- the concentration could result in the establishment or reinforcement of a dominant market position; or
- the concentration could harm consumer interests.

A critical issue here is that the guidelines and processes of the Commission for indicating the commodity market and the respective posi-

tions of the participants in such markets can sometimes be unpredictable. Although there is a procedure in place guiding the process, the Commission as an independent and specialised body is authorised to evaluate and indicate the relevant market. Further details of determining the commodity market are presented below in question 4.2 **Markets Affected by a Transaction**.

4.2 Markets Affected by a Transaction

Based on the Law, a concentration can take place in the following markets:

- horizontal concentration – in the same commodity market;
- vertical concentration – in different commodity markets with some interconnection; and
- mixed concentration – in different commodity markets.

The Commission considers various sources of information to determine the affected market, including official statistics, data from government bodies such as tax and customs authorities, research provided by businesses, information from individuals and legal entities involved in transactions, economic research and expertise, reports from specialised organisations and experts, data from information centres and services, input from consumer and producer associations, media reports, studies conducted by the Commission and the competition authorities of other states, marketing and sociological studies, state standards and regulations, and additional data from various market participants.

The legislation does not provide a minimum level below which competitive concerns are deemed unlikely. Each assessment of market impact is conducted individually, considering factors such as the specifics of business activities within the

commodity market, the number of economic entities involved, and the nature of their operations or legal relationships.

However, in general, a dominant position (of an economic entity) in a commodity market will be assumed if:

- an economic entity has market clout; in particular, it does not encounter any significant competition as a seller or acquirer, and/or based on its financial standing or other qualities it can have a decisive influence on the general conditions of circulation of goods in that commodity market and/or oust other economic entities from the commodity market and/or obstruct their entry into the commodity market;
- the entity is a seller or acquirer and captures at least one third of the given market in terms of sale or acquisition volumes;
- each of the two economic entities with the largest sale or acquisition volumes jointly capture, as sellers or acquirers, at least half of the market in terms of sale or acquisition volumes; and
- each of three economic entities with the largest sale or acquisition volumes jointly capture, as sellers or acquirers, at least two-thirds of the market in terms of sale or acquisition volumes.

4.3 Reliance on Case Law

The legislation does not explicitly provide for the application of case law; however, the Commission may take into account its previous decisions and use information from the studies of the competition authorities of other countries or international organisations engaged in competition protection. There are no notable examples or cases made public by the Commission where

such reliance on case law from other jurisdictions has been taken into consideration.

4.4 Competition Concerns

Declaration of concentration is carried out in order to assess the competitive landscape resulting from concentration to prevent, restrict, prohibit competition, or to identify or predict the possibility of restricting economic competition in any way on the relevant commodity market or to clarify the issue of dominant position or possible damage to the interests of consumers. Given this, the Commission has the authority to investigate all competition-related concerns.

4.5 Economic Efficiencies

In certain cases when assessing a concentration, the Commission may take into account efficiency considerations that could compensate for its potential anti-competitive effects, including technical and economic progress. However, the legislation does not specify the methods or tests to be used for this evaluation.

4.6 Non-competition Issues

Armenia's legal framework does not explicitly address non-competition concerns related to industrial policy, employment, the environment, or national security during the competition review process by the Commission. These factors are generally not taken into account as part of the assessment by the Commission. Moreover, it does not fall within the scope of the Commission's authorities to take into account such factors either.

However, the Commission does have the discretion to consider these issues if they are deemed relevant to evaluating the competitive landscape and potential impact on consumers. If such factors significantly influence market analysis, they can affect the Commission's final decision.

Additionally, besides the control carried out by the Commission, in specific sectors of higher importance, the Public Services Regulatory Commission (PSRC) carries out further controls. In the Energy and Telecommunications sector, in particular, the PSRC will consent to the merger prior to its closing. Among other issues, in these cases, the PSRC considers the following matters and has the right to withhold consent if:

- the documents and/or information submitted for consent do not comply with the requirements of the procedure established by the PSRC;
- in the assessment of the PSRC, the merger is prejudicial or likely to harm national security or the public interest; or
- in cases involving tenders or licences issued through auctions, where the requisite experience is not confirmed.

4.7 Special Consideration for Joint Ventures

Armenian legislation defines activities considered concentrations (for more details please see **2.1 Notification** and **2.10 Joint Ventures**). This includes the establishment of joint ventures as well as a further broader definition encompassing any transaction between economic entities that may affect the Armenian market. Therefore, establishing a joint venture, including possible coordination issues between parent companies, can be qualified as a concentration and be subject to declaration. It should be noted that the assessment process for concentrations is the same regardless of type, and that no special tests apply specifically to joint ventures.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

As mentioned in **2.1 Notification**, if the threshold established by the Commission is met, the declaration of the concentration becomes mandatory, and the participants are then obliged to submit to the Commission a concentration declaration and application. Subsequently, the Commission assesses the concentration and can either authorise or prohibit it through a binding decision. This is compulsory for all participants.

In order to prohibit the concentration, the Commission will show that:

- the concentration would result in prevention, restriction, blocking or otherwise worsening of economic competition in the relevant commodity market;
- the concentration would result in the establishment or strengthening of a dominant position;
- the concentration would harm the consumer interests;
- a participant to the concentration has not submitted information considered by the Commission to be essential for assessing the impact of the concentration in the relevant commodity market, and it is impossible to obtain the information from other sources; or
- a party to the concentration has submitted false information considered by the Commission to be essential for assessing the impact of the concentration in the relevant commodity market which has had a negative impact on the progress and results of the study conducted by the Commission.

In cases where there are grounds mentioned in the last four points above, the Commission shall allow the concentration if the participants can show that, as a result of this concentration on the commodity market, favourable competitive conditions will be ensured and the interests of consumers will not be harmed.

In cases where the Commission authorises a concentration, it may impose conditions and obligations on the participants that shall continue indefinitely unless otherwise specified. Breaching these conditions prohibits the transaction, subjecting it to the consequences applicable to prohibited concentrations.

Furthermore, if the Commission discovers a non-declared concentration, it has the authority to initiate proceedings to investigate potential breaches of economic competition laws. It can require participants to provide information, and may decide to either declare the concentration as non-declared or prohibited (for the consequences please see **2.13 Penalties for the Implementation of a Transaction Before Clearance**).

The Commission, as part of its activities, conducts comprehensive market monitoring. In practice, there have been instances where, during its monitoring activities, the Commission has identified changes in the ownership of a company through the State Register of legal entities. Based on this information, the Commission initiated administrative proceedings to determine whether there was a violation.

In another instance, the companies declared a concentration to the Commission where, during the assessment process, the Commission identified a prior transaction that should have been declared. Consequently, the Commission initi-

ated administrative proceedings and imposed a non-declaration fine of AMD2 million.

5.2 Parties' Ability to Negotiate Remedies

If the Commission has concerns regarding a proposed concentration, it can request further information and clarification from the participants. Following these enquiries – eg, if the Commission determines that the concentration would create a dominant market position – it may still conditionally approve the transaction.

Conditional approval hinges on the participants' justification for the concentration. This justification, for example, will demonstrate that the concentration will ultimately benefit the relevant commodity market and not harm consumer interests.

Justification can be achieved through offering remedies, which are assessed on a case-by-case basis. The Law itself does not prescribe specific remedies; rather, both divestitures or behavioural remedies can be considered.

5.3 Legal Standard

While the Law does not specify a legal standard for proposed remedies, in practice, the Commission will expect remedies to be sufficient to fully address the identified competition concerns.

5.4 Negotiating Remedies With Authorities

The concentration review process in Armenia is not divided into distinct phases. From the initial assessment, the Commission can engage with involved participants on various topics. This may include requesting additional information, discussing potential negative impacts on competition, and proposing remedies to address those concerns. Participants can also submit their own

views and propose remedies they believe would mitigate negative effects.

However, the Commission ultimately retains the discretion to apply and propose only the remedies it deems acceptable and impose remedies that may not be fully agreed upon by all parties.

These remedies are detailed in the Commission's final decision, outlining the specific conditions and obligations participants need to fulfil according to established deadlines.

5.5 Conditions and Timing for Divestitures

The approach to competition remedies is determined on a case-by-case basis, and there is no standard method. The specific terms and conditions imposed by the Commission depend on the industry involved and the parties in the concentration.

Completion may occur before or after the imposed conditions are met. Additionally, there is no set timeframe for compliance unless explicitly stated otherwise in the Commission's decision, or unless it derives from the specific remedy that will be met prior to completion.

Where participants fail to comply with the established conditions, the transaction becomes prohibited, subjecting it to the consequences applicable to prohibited concentrations.

5.6 Issuance of Decisions

The Commission issues a formal decision either allowing or prohibiting the concentration and sends it to all participants. Simultaneously, the Commission publishes a brief description of the transaction on its [website](#) indicating whether the transaction has been permitted or prohibited.

Confidential information will not only be withheld from public disclosure, but is not to be disclosed to the other participants involved in the concentration.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The Commission has not recently imposed prohibitions or required remedies on foreign-to-foreign transactions.

Current practice shows that, as assessed by the Commission, such transactions are generally considered unlikely to significantly affect Armenia's competitive market. Therefore, in most cases, the Commission authorises such transactions.

However, it is important to note that any foreign-to-foreign transaction which has an impact on the Armenian market and exceeds the thresholds set by the Commission still requires notification to the Commission – as these transactions are also qualified as concentrations under Armenian law.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

The Commission generally does not assess ancillary restraints during its review of concentrations. It should be noted that the review process does not involve examining draft transaction agreements, and the Commission primarily focuses on the potential impact of the concentration on the Armenian market. Consequently, restrictions or agreements established within the transaction agreement itself are not reviewed by the Commission.

However, if the Commission requests information related to the transaction's terms during their assessment, and this information might influence their evaluation of the concentration's impact, such information will be disclosed to the Commission. In such instances, it is possible that the Commission's decision might address these ancillary restraints, although, in our experience, such cases are unknown. The bottom line is that the consent of the Commission to exercise the concentration does not, in any case, ensure that all the terms of the agreement are in compliance with Competition law. For example, if there is a non-compete clause in the agreement, this might still serve as a grounds for concluding an anti-competition agreement (which will result in detrimental consequences for the parties) in the future.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third parties whose rights or legitimate interests may be affected by the administrative act of the Commission, which will be adopted as a result of the assessment proceedings, have the right to participate in the review process.

If a third party participates in the proceedings, it will have the right to:

- review the case materials, and take excerpts, photos, photocopies, and copies from them, except for confidential information;
- submit evidence;
- address questions to the participants in the proceedings;
- file motions and provide explanations;

- state its position regarding motions and arguments from other participants in the proceedings;
- request recusal; and
- appeal decisions of the Commission that are subject to appeal.

7.2 Contacting Third Parties

In cases where the Commission deems that information provided by third parties could influence the assessment decision, it is authorised to contact the third party and request the relevant information, which is considered pertinent to the assessment (including the third party's position on the concentration). Where such a request is made to a third party, the party is obliged to provide the Commission with all required information.

With regard to the form of the communication, the Law provides that decisions, notifications, or other documents from the Commission ("Correspondence") shall be dispatched via postal delivery, courier service, or delivered in person. Additionally, where stipulated by Law, correspondence may be sent via email or other approved means of communication. When the participants are legal entities or individual entrepreneurs, Correspondence is typically sent via both postal services and official email addresses, unless an alternative email address has been provided. For natural persons, Correspondence is ordinarily dispatched via postal delivery unless the individual has formally requested electronic communication.

There is no known practice where the remedies have undergone a market test.

7.3 Confidentiality

Decisions regarding the approval or prohibition of a concentration by the Commission are

publicly available and published on the [Commission's](#) official website. They include a brief overview of the transaction and the identities of the participants involved. Any information deemed commercial or confidential shall be kept confidential, and will not be subject to public disclosure. Moreover, commercial information and trade secrets will not be subject to disclosure to other participants in the concentration.

7.4 Co-operation With Other Jurisdictions

The Commission cooperates with other competition authorities around the world. They participate in various multilateral cooperations, such as the Eurasian Economic Commission, International Competition Network, OECD, and UNCTAD. Additionally, they have signed bilateral agreements with the competition authorities of countries such as Albania, Moldova, Russia, Poland and Greece, among others.

However, these agreements primarily focus on sharing non-confidential information. This means they often exchange experiences and best practices in competition enforcement rather than share sensitive details on specific cases.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Decisions of the Commission can be appealed administratively to the Commission itself, or judicially to the RA Administrative Court, within two months after the decision comes into force.

8.2 Typical Timeline for Appeals

As mentioned in 8.1 Access to Appeal and Judicial Review, decisions of the Commission can

be appealed within two months after the decision comes into force.

In practice, lawsuits have been filed against the Commission's decisions on applying a measure of responsibility, some of which were satisfied by the Administrative Court. For example, case No:/6081/05/22, in which the Administrative Court declared as invalid the Commission's decision No 320-A "On the application of a measure of responsibility against economic entities", and case No./1952/05/20, in which the Court declared as invalid Commission's 184-A decision with the same content.

8.3 Ability of Third Parties to Appeal Clearance Decisions

The Law does not regulate who has the right to appeal the Commission's clearance decision. Nevertheless, the Commission's review process does not include direct participation from third parties. This means third parties cannot appeal clearance on concentration.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

In general, mergers involving foreign direct investments in Armenia are governed by the RA law "On Protection of Economic Competition" and do not necessitate any specific filings. However, certain sectors, such as banking and electronic communications, require approval not only from the Commission but also from other regulatory bodies encompassing both foreign and local investments.

For example, in the banking sector, an individual or an affiliate may acquire a participation in the authorised capital of a bank as a result of one or

more transactions only with the prior consent of the Central bank of the RA (the CBA). To receive the CBA's preliminary consent for acquisition of the participation in the bank's statutory fund the person, through the request of the bank, must submit to the CBA (via the electronic system of CBA to which the bank has access) the documents and information specified by the relevant decision of the CBA.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

For the last few years there have been no major changes in legislation. However, most of the official clarification given by the Commission with regard to concentration has lost its power by decision of the Commission. Therefore, it can be inferred that new clarifications may be provided in near future.

10.2 Recent Enforcement Record

According to the website of the [Competition Protection Commission](#), recent enforcement actions include both prohibiting a concentration and imposing fines for failing to notify the Commission about the concentration. These cases involved Armenian entities, and there have not recently been any public records of similar actions for mergers solely between foreign companies.

With regard to fine amounts, for instance, in one case, both parties were fined AMD2 million each, and in another, the fine was AMD1 million for each party.

10.3 Current Competition Concerns

Currently, regulatory authorities have not expressed any specific concerns or identified notable trends in either merger reviews or enforcement actions.

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Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.33

- 1.1 Merger Control Legislation p.33
- 1.2 Legislation Relating to Particular Sectors p.33
- 1.3 Enforcement Authorities p.33

2. Jurisdiction p.34

- 2.1 Notification p.34
- 2.2 Failure to Notify p.36
- 2.3 Types of Transactions p.36
- 2.4 Definition of "Control" p.36
- 2.5 Jurisdictional Thresholds p.37
- 2.6 Calculations of Jurisdictional Thresholds p.37
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.37
- 2.8 Foreign-to-Foreign Transactions p.38
- 2.9 Market Share Jurisdictional Threshold p.38
- 2.10 Joint Ventures p.38
- 2.11 Power of Authorities to Investigate a Transaction p.38
- 2.12 Requirement for Clearance Before Implementation p.38
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.39
- 2.14 Exceptions to Suspensive Effect p.39
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.39

3. Procedure: Notification to Clearance p.40

- 3.1 Deadlines for Notification p.40
- 3.2 Type of Agreement Required Prior to Notification p.41
- 3.3 Filing Fees p.41
- 3.4 Parties Responsible for Filing p.41
- 3.5 Information Included in a Filing p.41
- 3.6 Penalties/Consequences of Incomplete Notification p.42
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.42
- 3.8 Review Process p.42
- 3.9 Pre-notification Discussions With Authorities p.45
- 3.10 Requests for Information During the Review Process p.45
- 3.11 Accelerated Procedure p.46

4. Substance of the Review p.46

- 4.1 Substantive Test p.46
- 4.2 Markets Affected by a Transaction p.48
- 4.3 Reliance on Case Law p.48
- 4.4 Competition Concerns p.48
- 4.5 Economic Efficiencies p.49
- 4.6 Non-competition Issues p.50
- 4.7 Special Consideration for Joint Ventures p.50

5. Decision: Prohibitions and Remedies p.50

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.50
- 5.2 Parties' Ability to Negotiate Remedies p.51
- 5.3 Legal Standard p.51
- 5.4 Negotiating Remedies With Authorities p.51
- 5.5 Conditions and Timing for Divestitures p.53
- 5.6 Issuance of Decisions p.53
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.53

6. Ancillary Restraints and Related Transactions p.54

- 6.1 Clearance Decisions and Separate Notifications p.54

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.54

- 7.1 Third-Party Rights p.54
- 7.2 Contacting Third Parties p.55
- 7.3 Confidentiality p.55
- 7.4 Co-operation With Other Jurisdictions p.56

8. Appeals and Judicial Review p.56

- 8.1 Access to Appeal and Judicial Review p.56
- 8.2 Typical Timeline for Appeals p.57
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.58

9. Foreign Direct Investment/Subsidies Review p.58

- 9.1 Legislation and Filing Requirements p.58

10. Recent Developments p.58

- 10.1 Recent Changes or Impending Legislation p.58
- 10.2 Recent Enforcement Record p.60
- 10.3 Current Competition Concerns p.61

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and Royal Commissions. The firm has always sought to challenge convention among Australia's leading corporate law firms, from its lean, responsive model to its pioneering adoption of technology – as well as Australia's first dedicated pro bono practice.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

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

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

- the ACCC Merger Guidelines 2008 ("Merger Guidelines");
- the ACCC Informal Merger Review Process Guidelines 2013 ("Informal Review Guidelines");
- the ACCC Merger Authorisation Guidelines 2017;
- the ACCC Media Merger Guidelines 2017; and

- the ACCC Use of Section 155 Powers.

1.2 Legislation Relating to Particular Sectors

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

The relevant legislation for foreign transactions and investments is outlined in **9.1 Legislation and Filing Requirements**.

1.3 Enforcement Authorities Enforcement by the ACCC

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

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

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

- injunctions preventing companies from completing transactions;
- forced divestiture following a merger or orders to unwind the transaction;
- compensation for customers or competitors; and
- penalties per contravention for companies of up to the greater of AUD50 million or three times the value of the benefit obtained if it can be determined (if the benefit cannot be determined, 30% of turnover during the breach period), and up to AUD2.5 million for individuals.

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

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

an injunction to prevent the transaction proceeding.

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

Enforcement by the Foreign Investment Review Board (FIRB)

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

2. Jurisdiction

2.1 Notification

Voluntary Notification Regime

In April 2024, the Australian government announced its proposed economy-wide merger control reforms that would replace the existing voluntary regime and its options for clearance (including informal merger review and merger authorisation) with a mandatory and suspensory regime. See **10.1 Recent Changes or Impending Legislation** for more information on those proposed reforms.

Until the reforms commence on 1 January 2026, Australia continues to have a voluntary merger notification regime. However, in practice, parties regularly notify the ACCC of transactions in Australia where there are horizontal or vertical overlaps.

Guidance thresholds

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

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

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

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

Industries of interest

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

In 2024, the ACCC's priorities include competition and consumer issues arising in relation to:

- essential services (with a focus on telecommunications, electricity, gas and financial services);
- the supermarket sector;

- the aviation sector;
- environment and sustainability; and
- digital platforms and the digital economy.

In recent years, the ACCC has shown particular interest in mergers in the health industry, financial services, telecommunications industries, and in acquisitions by large digital platform services. See **10.3 Current Competition Concerns** for further detail.

Informal Merger Clearance

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

As outlined in **10.1 Recent Changes or Impending Legislation**, the new merger regime that commences on 1 January 2026 will convert this voluntary process to a mandatory and suspensory process. The ACCC will be the first instance, administrative decision maker. If the ACCC does not raise competition concerns or does not make a decision within 30 working days, the merger will be permitted to proceed, with the option of “fast-track” determination if no concerns are identified after 15 working days. Where competition concerns are raised, the ACCC will undertake an in-depth “Phase II”

assessment to be completed within a four-and-a-half-month period.

Merger Authorisations

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

2.2 Failure to Notify

Penalties for Failing to Notify the ACCC

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

Penalties for Failing to Notify FIRB

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

Criminal penalties

For individuals, the penalty is up to ten years’ imprisonment or a fine of up to 15,000 penalty units (AUD4.695 million). For corporations, the

penalty is up to 150,000 penalty units (AUD46.95 million).

Civil penalties

The penalty amount is the lesser of either:

- 2,500,000 penalty units (AUD782.5 million); or
- the greater of: 5,000 penalty units (AUD1.565 million) for individuals (or 50,000 penalty units (AUD15.65 million) if the person is a corporation); or an amount determined by reference to the value for the action.

2.3 Types of Transactions

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

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

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

2.4 Definition of “Control”

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

In practice, the ACCC is most interested in acquisitions that result in a change in control. The ACCC’s Merger Guidelines indicate that the ACCC treats the acquisition of a controlling inter-

est in a company in the same way as the acquisition of all the company's shares. In most cases, a majority shareholding would deliver control of a company, but minority shareholdings with or without other interests may also be sufficient. Relevant factors include the ownership distribution of the remaining shares and distribution of voting rights.

However, the ACCC is increasingly focussing on minority interests in the context of common fund management and ownership among competing firms.

2.5 Jurisdictional Thresholds

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

Section 50 of the CCA prohibits acquisitions that have the effect or likely effect of substantially lessening of competition in a market in Australia, which may include a global market that includes Australia.

Under Section 50A, the CCA applies to foreign-to-foreign acquisitions of a controlling interest in a body corporate where that body corporate has a controlling interest in a corporation. If the transaction would not otherwise fall within Section 50, the ACCC may approach the Australian Competition Tribunal to declare that the transaction has the effect or is likely to have the effect of substantially lessening competition in a market. Section 50A was designed to apply to offshore acquisitions where the acquirer is not incorporated (or a registered foreign corporation) in Australia and does not carry on business in Australia, but which would impact competition

in a market in Australia. To date, Section 50A has not been invoked by the ACCC.

2.6 Calculations of Jurisdictional Thresholds

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

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

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

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

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

The ACCC requires information regarding the parties and their related bodies corporate to undertake the informal merger review and merger authorisation processes. To the extent there are any changes to the acquirer's or the target's

businesses that may impact on share calculations after the ACCC has been notified of the transaction, it would be prudent to update the ACCC with this information.

2.8 Foreign-to-Foreign Transactions

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

2.9 Market Share Jurisdictional Threshold

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

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

Consequently, it is possible for transactions that do not include any overlaps (ie, parties do not supply substitutable products) to be captured (eg, because the parties supply complementary products and one party has 20% or more share in their product).

2.10 Joint Ventures

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

Joint ventures may also be subject to other provisions of the CCA that relate to restrictive trade practices, such as the provisions regulating cartel conduct (which can attract civil and

criminal penalties) or contracts, arrangements or understandings that have the purpose or likely effect of substantially lessening competition (which can attract civil penalties). Exemptions to these provisions may apply if a joint venture meets certain criteria. Alternatively, parties may apply to the ACCC for authorisation of a joint venture for statutory immunity against breaching these provisions.

2.11 Power of Authorities to Investigate a Transaction

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

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

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

2.12 Requirement for Clearance Before Implementation

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

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

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

2.13 Penalties for the Implementation of a Transaction Before Clearance

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

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

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

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

2.14 Exceptions to Suspensive Effect

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

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

In practice, even where no undertaking not to complete has been provided to the ACCC, parties rarely complete a transaction that they have notified to the ACCC prior to the ACCC completing its review, including because of the regulator's ability to seek an injunction from the FCA to prevent completion. In 2021, the ACCC successfully obtained an interlocutory injunction from the FCA to prevent completion of Virtus Health's acquisition of Adora Fertility (Virtus/Adora) after the parties indicated they intended to complete notwithstanding that the ACCC had not completed its review.

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

2.15 Circumstances Where Implementation Before Clearance Is Permitted

As the Australian merger control regime is currently non-suspensory (see **2.12 Requirement for Clearance Before Implementation**), merger parties are not prohibited from completing a transaction before it is cleared by the ACCC. However, as explained in **2.14 Exceptions to Suspensive Effect**, if parties have given a court enforceable undertaking not to complete until the ACCC has completed its review, then it must

seek permission from the ACCC to vary the undertaking before the transaction can complete before clearance or authorisation. Though rare, there is a risk that the ACCC would apply to the FCA to seek an injunction to prevent completion (see **1.3 Enforcement Authorities**). In 2021, the ACCC successfully obtained its first interlocutory injunction from the FCA, preventing completion of the acquisition of Adora Fertility by Virtus Health pending a final determination on the merits, in circumstances where the ACCC review was ongoing. This was the ACCC's first such injunction since 1994, but its decision to engage in the court process to signals its strong attitude towards parties completing transactions before it can complete its review.

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

In respect of its proposed acquisition of Adora Fertility in 2021, Virtus offered the ACCC a temporary hold separate undertaking proposal under which Virtus would acquire Adora but would commit to take some steps to keep the Adora business separate from the Virtus business. The ACCC considered there were no compelling reasons other than commercial convenience for the transaction to proceed and that the proposed undertaking was inadequate and unlikely to have been effective in maintaining Adora as a vigorous and effective competitor. Instead, the ACCC

sought an urgent injunction to restrain competition of the proposed transaction.

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

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

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

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

However, if parties have a condition precedent requiring ACCC clearance and a global timetable for completion, they should be mindful of filing early enough to provide the ACCC sufficient time to review.

In 2022, ACCC chairperson Gina Cass-Gottlieb expressed the ACCC's concern that merger parties often notify the ACCC later than other jurisdictions due to the absence of a mandatory notification requirement in Australia, which may slow down the global merger clearance process given the need to independently review the transaction. In April 2023, this concern was referred to when the ACCC outlined its proposal to make Australia's merger regime mandatory and suspensory for meeting certain financial or economic thresholds.

On 10 April 2024, the government released its proposed reforms for merger control in Australia, which included the introduction of a mandatory and suspensory notification regime and prohibition on mergers above a threshold proceeding without approval by the ACCC or Australian Competition Tribunal. Exposure draft legislation is slated to follow later in 2024. It is proposed that the new merger control process will be in place and apply from 1 January 2026.

Section 10.1 **Recent Change or Impending Legislation** explains these proposed reforms in greater detail.

3.2 Type of Agreement Required Prior to Notification

There is no requirement that parties have a binding agreement before applying for ACCC clearance under the informal clearance process. Indeed, in some cases, a seller may require bidders in an auction process to obtain clearance before the seller will accept an offer. However, the ACCC will not consider a hypothetical transaction.

3.3 Filing Fees

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

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

3.4 Parties Responsible for Filing

Primary liability for a breach of Section 50 falls on the acquirer, as the acquirer is typically responsible for filing in Australia. However, the seller will

bear ancillary liability so will be closely involved in the process.

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

3.5 Information Included in a Filing Information Required for Informal Clearance Filing

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

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

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

Information Required for Merger Authorisation Application

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

- a public version of their application;
- a signed declaration that the information in the application is true, correct and complete;

- a Section 87B undertaking not to complete the transaction while the ACCC is considering the application; and
- the AUD25,000 lodgement fee.

The merger authorisation application requires information including:

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

3.6 Penalties/Consequences of Incomplete Notification

Invalid Notification Under the Informal Clearance Process

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

Invalid Notification Under the Merger Authorisation Process

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

If it considers that an application is invalid, no penalties apply. However, the ACCC will notify the applicant within the five-business day period and, in most cases, will provide the applicant

with an opportunity to rectify and re-submit the application (with no additional fee, provided the AUD25,000 lodgement fee was paid initially).

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

3.7 Penalties/Consequences of Inaccurate or Misleading Information

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

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

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

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

3.8 Review Process

Informal Clearance Timeline

The informal clearance process may involve the following processes.

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

the issues that the ACCC are “likely” to be of concern (“red lights”) and issues that “may” be of concern (“amber lights”). The ACCC will also establish a secondary timeline. Parties may need to address the matters raised in the SOI with additional submissions and information. The ACCC’s indicative timing for this stage is six to 12 weeks after publication of the SOI.

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

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

Under the proposed merger reforms, merger parties must notify the ACCC if a transaction meets certain thresholds. The actual thresholds have yet to be determined, but they will likely be based on monetary (such as turnover or transaction value) and share of supply. Further, to respond to concerns regarding creeping acquisitions, all mergers undertaken by either party within the previous three years will be aggregated for the purposes of assessing whether a merger meets the notification thresholds. Notably, the Government will not give the ACCC the power to “call-in” mergers that fall below the thresholds, although the ACCC may still inves-

tigate such mergers for potential breaches of other parts of the CCA.

Under the current regime, the ACCC must apply to the Federal Court to block a merger and prove that the transaction would have the effect or likely effect of substantially lessening competition.

Merger Authorisation Timeline

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

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

If the ACCC does not make a decision within this time, it is deemed to have refused the application. However, the 90-day time limit can be extended with the consent of the merger parties in writing prior to the expiration of the 90 days.

Practically, merger authorisation gives the parties more certainty as to timing. However, while the ACCC has generally been diligent in complying with statutory timeframes in other authorisation processes (ie, authorisation of contracts, arrangements or understandings that may be cartel conduct or may have the purpose, effect or likely effect of substantially lessening competition), in recent years it has typically taken more than 90 days to complete its merger authorisation processes.

On average in 2023, informal merger clearance took around 234 calendar days. In contrast, since the current merger authorisation regime was introduced in 2017, the ACCC has obtained

consents to extend the timeline in each of the merger authorisation reviews it has conducted, resulting in an average total review time of 173 calendar days:

- the review of ANZ's proposed acquisition of Suncorp Bank (ANZ/Suncorp) took 245 days, with a total of 90 days of extension;
- Brookfield LP and MidOcean's proposed acquisition of Origin Energy Limited took 127 days to review, with a total of 37 days of extension;
- the review of the merger of Linfox Armaguard and Prosegur Australia (Armaguard/Prosegur) took 259 days, making it the longest merger authorisation process to date, with a total of 170 days of extension;
- Telstra Corporation Limited and TPG Telecom Limited's proposed spectrum sharing arrangement (Telstra/TPG) is the longest merger authorisation review completed by the ACCC to date, taking 212 days in total and involving 122 days of extension (followed by around six months on appeal, as outlined below);
- the proposed amalgamation of BPAY, eftpos and the New Payments Platform Australia took 171 days in total to consider, ie, 81 days of extension; and
- Gumtree's proposed acquisition of Cox Australia Media Solutions took 107 days to review, ie, 17 days of extension.

An appeal of an ACCC decision to deny an application for merger authorisation to the Competition Tribunal would also require additional time, as was the case in:

- ANZ/Suncorp Bank - the parties filed their appeal on 25 August 2023 and the Tribunal set aside the ACCC's decision not to grant authorisation on 20 February 2024; and

- Telstra/TPG - the parties filed their appeal in December 2022, the matter proceeded to hearing in April 2023, and the Tribunal affirmed the ACCC's decision not to grant authorisation on 21 June 2023.

3.9 Pre-notification Discussions With Authorities

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

Discussion With the ACCC Before Initiating an Informal Clearance Process

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

Discussion With the ACCC Before a Merger Authorisation Application

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

- the applicant will have the opportunity to discuss their application and ensure that it is valid and contains adequate information; and

- the ACCC can indicate the issues that the applicant should address in their application, though the ACCC cannot provide its views on the likely outcome.

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

3.10 Requests for Information During the Review Process

Types of Information Requests

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

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

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

For Section 155 notices, the ACCC may provide a draft notice for the parties to comment on prior to serving the notice. A recent amendment has made it clear that the ACCC can serve a Section 155 on persons overseas.

If documents are withheld from a response to a Section 155(1)(b) notice on the basis of legal professional privilege, reasons must be provided for

each privilege claim. This process broadly aligns with the subpoena process and the approach taken by other corporate regulators in Australia such as the Australian Securities and Investments Commission.

Impact on Review Timeframe

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

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

3.11 Accelerated Procedure

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

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

4. Substance of the Review

4.1 Substantive Test

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

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

- Import competition: the degree of actual or potential direct competition from imported goods or services, including whether the supply of imports can respond to competitive signals in a timely and sufficient manner.
- Barriers to entry: the likelihood of timely and sufficient entry and expansion in relevant markets post-transaction. The ACCC will more likely have competition concerns where significant barriers exist. However, a transaction need not increase barriers to entry for it to be considered anti-competitive by the ACCC.
- Concentration and market shares: the extent to which the transaction will increase market concentration, including through considering the market shares of the merging parties and their competitors, and whether current market shares are likely to reflect future market share patterns.
- Countervailing power: the degree to which customers have countervailing power, which can weigh against the merged entity's market power. Countervailing power exists when buyers have special characteristics that enable them to credibly threaten to bypass

the merged firm (eg, through vertical integration and/or sponsoring new entry).

- Ability to increase prices or profit margins: the extent to which the transaction will give the merged entity a greater ability to significantly and sustainably increase prices or profit margins, as this may also indicate that the transaction is likely to give rise to a substantial lessening of competition or result in public detriments that outweigh public benefits. However, the ACCC recognises that increased profitability is not in itself a conclusive indicator of a substantial lessening of competition.
- Substitutes: whether substitutes are available and the degree to which they impose sufficient constraint on the merged entity, having regard to how closely the merger parties compete with each other and other market participants, and the ability of rivals to expand. This assessment is related to identifying the relevant product market(s) (see **4.2 Markets Affected by a Transaction**).
- Dynamic characteristics of the market: the degree and extent of any change to the nature of the market in the future. Dynamic changes may result from a range of factors including market growth, innovation, product differentiation and technological changes.
- Removal of a vigorous and effective competitor: vigorous and effective competitors can drive significant aspects of competition, such as pricing, innovation or product development, even though their own market share may be modest. Therefore, if a transaction involves acquiring a vigorous and effective competitor or a “maverick”, the ACCC will be more likely to consider that the transaction raises competition concerns.
- Vertical integration: if a merger involves both horizontal and vertical competition issues (for example, because one or more of the merger

parties operate at more than one level of the supply chain or each of them operates at a different level), the ACCC will assess the merger based on the combined potential horizontal and vertical impacts on competition.

Where parties seek merger authorisation from the ACCC, then the ACCC (or the Australian Competition Tribunal, if a review is sought) may only grant authorisation if it is positively satisfied that the proposed merger would either (i) not be likely to have the effect of substantially lessening competition; or (ii) would be likely to result in public benefits that would outweigh the public detriments that would likely result from the proposed merger.

In April 2023, ACCC chairperson Gina Cass-Gottlieb outlined the ACCC’s recommendations for legislative changes to expand the substantive test and introduce additional merger factors as part of a suite of economy-wide merger control reforms. In April 2024, the Australian government announced its proposed reforms for merger control in Australia, which included the introduction of a mandatory and suspensory notification regime and prohibition on mergers above a threshold proceeding without approval by the ACCC or Australian Competition Tribunal. At the time of writing, no draft legislation has been released for consultation.

Under the proposed regime, the ACCC must allow a merger to proceed unless the ACCC reasonably believes that the merger would have the effect or likely effect of substantially lessening competition. This test looks likely to be modified to include an express reference to considering whether a transaction “strengthens or entrenches a position of substantial market power”. This reflects a shift towards a more structural approach.

More information on these recommendations is provided at **10.1 Recent Developments or Impending Legislation**.

4.2 Markets Affected by a Transaction

Section 50(6) of the CCA defines “market” as a market for goods or services in Australia, a state or territory of Australia, or a region of Australia.

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

In relation to substitution, the ACCC is concerned with:

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

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

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

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

- the portability of the product (which may depend on its perishability or weight);

- transportation costs;
- the ease, cost or difficulties associated with obtaining the product from alternative regions; and
- changes in price between different geographic sources of supply.

4.3 Reliance on Case Law

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

However, if the ACCC brings court proceedings, then the court will have regard to, and be bound (as appropriate) by Australian case law (as would the Competition Tribunal, if parties appeal an ACCC decision to deny a merger authorisation application to the Tribunal).

4.4 Competition Concerns

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

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

Unilateral Effects

The ACCC will consider whether the transaction will give rise to or increase the likelihood of unilateral effects, which is when competitive constraints are weakened or removed such that the merged firm’s unilateral market power increases post-merger. A merged firm’s unilateral market power may increase if it has the abil-

ity and incentive to raise prices, reduce output or otherwise exercise market power it has gained.

Co-ordinated Effects

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

This may occur if a merger:

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

Vertical Effects

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

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

Conglomerate or Portfolio Effects

The ACCC will consider whether conglomerate mergers between firms that interact across related product markets will enable the merged

firm to foreclose rivals and reduce competition by bundling or tying products across a portfolio. Typically, a conglomerate firm would be able to do if it has sufficient market power in at least one functional level of the vertical supply chain or in one of the related markets.

4.5 Economic Efficiencies

Informal Merger Clearance

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

Merger Authorisation

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

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

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

Court Action

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

Under the government's proposed merger reforms, merger parties may, following the ACCC's Phase II determination, seek approval from the ACCC on the basis that the merger would result, or be likely to result, in a substantial benefit to the public which outweighs the anti-competitive detriment of the merger.

4.6 Non-competition Issues

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

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

4.7 Special Consideration for Joint Ventures

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

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

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

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

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

As explained further in **10.1 Recent Changes or Impending Legislation**, the government has proposed a mandatory and suspensory merger control regime that would automatically suspend the completion of transactions over certain thresholds until ACCC approval has been granted. The proposed regulatory framework would not give the ACCC "call-in" powers to review potentially problematic proposed acquisitions that fall below the threshold, although the ACCC could still investigate such mergers for potential breaches of different parts of the CCA.

5.2 Parties' Ability to Negotiate Remedies

Section 87B Undertakings

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

Commitments to the FCA

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

5.3 Legal Standard

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

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

5.4 Negotiating Remedies With Authorities

As the ACCC prefers structural undertakings over behavioural undertakings, it accepts the former more frequently.

Between 2022 and April 2024, the ACCC conducted informal clearance reviews of 48 mergers and accepted undertakings in nine, all structural in nature (noting that the divestiture undertaking accepted in the Dye & Durham/Link Administration transaction was later withdrawn when the transaction did not proceed).

In the merger authorisation context, the ACCC did not accept any of the undertakings offered in Telstra/TPG – all of which were behavioural. However, it did accept a behavioural undertaking when it approved the Brookfield LP and MidOcean proposed acquisition of Origin Energy Limited and Armaguard/Prosegur merger (see below for more detail).

Structural Undertakings

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

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

- (if necessary) to ensure compliance with the undertakings; and
- implementation within a timely manner.

Behavioural Undertakings

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

Recent behavioural remedies accepted by the ACCC in a merger review context include the following.

- In October 2023, the ACCC conditionally approved the application for merger authorisation in relation to the proposed acquisition by Brookfield and MidOcean of Origin (although the transaction subsequently fell over in December 2023). The applicants provided a draft ring-fencing undertaking offered by three Brookfield entities, a prohibition on Brookfield selling AusNet and Origin in the future in a manner that would result in a single corporate group holding more than a 10% interest in both, and independent audits and reporting requirements.
- The 2023 behavioural undertaking relating to the Armaguard/Prosegur merger, which includes a range of obligations which are intended to provide continuation of services, reduce uncertainty about price and service levels and provide opportunities for other cash-in-transit providers to make use of excess equipment to expand their existing operations. The undertaking will be effective for three years.
- The 2021 behavioural undertaking from Australian Payments Plus in connection with its acquisition of shares in BPAY, eftpos and New

Payments Platform Australia. The undertaking includes obligations on Australian Payments Plus to ensure the parties will supply prescribed services, explore and make available certain services, and to agree an industry-wide standard.

- The 2019 undertaking relating to ANZ Terminals' acquisition of GrainCorp Liquid Terminals Australia, which had both structural and behavioural elements. This undertaking required the parties to divest a terminal and ANZ Terminals to not lease further land in a specified area without ACCC consent.
- The 2018 undertakings relating to the acquisition of the majority interest in the WestConnex project by Sydney Transport Partners (a consortium led by Transurban). These include obligations on Transurban requiring it to publish important traffic data to ensure that the transaction would not lessen competition for future toll roads.

The ACCC did not accept any of the undertakings (all behavioural) offered by the parties in Telstra/TPG. It also rejected the long-term behavioural undertaking offered by Google in 2020 in relation to its proposed acquisition of Fitbit (Google/Fitbit), which it ultimately completed in 2021 without waiting for ACCC clearance. Under the undertaking, Google offered to behave in certain ways towards rival wearable manufacturers, not use health data for advertising and, in some circumstances, allow competing businesses access to health and fitness data. Though the European Commission accepted a similar undertaking from Google, the ACCC was not satisfied that such a long-term behavioural undertaking could be effectively monitored and enforced in Australia.

Also in 2020, the ACCC considered a behavioural undertaking offered by Woolworths in

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

5.5 Conditions and Timing for Divestitures

When to Offer a Section 87B Undertaking

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

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

How to Offer a Section 87B Undertaking

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

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

issues. The ACCC typically allows for two to three weeks to conduct these inquiries.

5.6 Issuance of Decisions

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

In December 2023, the ACCC accepted a divestment remedy from Petstock without an upfront buyer in relation to Woolworths' proposed acquisition of a 55% controlling interest, as well as a court-enforceable undertaking from Woolworths to support the Petstock divestiture. Petstock undertook to divest a package of sites and assets, including 41 retail stores to a purchaser to be approved by the ACCC.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions Informal Clearance Decisions

For transactions that are cleared in pre-assessment phase, the ACCC will provide the parties with a letter indicating it does not intend to conduct a public review (effectively a clearance letter), but the ACCC's decision will not be published on its website.

If a transaction is "cleared", after a public review the ACCC will publish a brief outline of its decision on the ACCC website, and provide the parties with a letter indicating it does not intend to oppose. This will typically involve a short summary of its reasons and a media release.

In some cases, the ACCC will publish a public competition assessment (PCA) that outlines in more detail the basis for reaching its final conclusion. The ACCC will typically publish a PCA if:

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

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

Merger Authorisation Decisions

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

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

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

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

Any arrangement which is not legitimately related to the transaction will not be covered by the ACCC's review and the parties may need to seek separate authorisation if the arrangement would

otherwise breach other CCA provisions, such as the prohibitions on cartel conduct or other contracts, arrangements and understandings that have the purpose, or are likely to have the effect, of substantially lessening competition.

In the merger authorisation context, the ACT's decision in *Telstra and TPG (No. 2)* [2023] ACompT 2 raised some uncertainty about whether merger authorisation is available for transactions that involve both an acquisition and other ancillary commercial arrangements, or whether parties should apply for general authorisation for both the merger and non-merger aspects of the transaction. In *Telstra Corporation's and TPG Telecom's* application for merger authorisation to enter into three interrelated agreements to facilitate mobile infrastructure and spectrum sharing in certain regional and urban fringe areas of Australia, the parties submitted that the three agreements were commercially and legally interdependent and therefore the effects of the three agreements to be considered as a whole. However, the ACT decided it could only have regard to the impacts arising from the agreement under which TPG authorised Telstra to use its spectrum, deciding that the other two agreements relating to sharing access were "coincident with, but not causally related to" the conduct that was subject to the merger authorisation application.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

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

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

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

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

7.2 Contacting Third Parties Informal Clearance Process

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

During a public review, the ACCC will conduct public market inquiries by publishing a market inquiries letter on its public register to ask interested parties to make submissions. The ACCC will also typically reach out directly to the merger parties' key customers. If an SOI is published, the ACCC will also invite interested parties to make submissions on the issues raised.

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

Merger Authorisation Process

The ACCC's merger authorisation process is public. The ACCC will publish a market inquiries letter on its website (along with copies of the applicant's submission and supporting documents) and ask interested parties to make submissions.

7.3 Confidentiality Confidentiality Under the Informal Clearance Process

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

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

Confidentiality Under the Merger Authorisation Process

The ACCC publishes merger authorisation applications on its public register. However, the merger parties can claim confidentiality over and request exclusion of material in the application from publication and provide the ACCC with a redacted version of the application for publication. As the merger authorisation process is public, the ACCC may test the breadth of confidentiality claims made by the applicant and/or third parties providing submissions.

Confidentiality Generally

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

7.4 Co-operation With Other Jurisdictions

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

- the United Kingdom's Competition and Markets Authority;
- the United States Federal Trade Commission and Department of Justice;
- the New Zealand Competition Commission;
- the European Commission;
- the Canadian Competition Bureau;
- the State Administration for Market Regulation of China;
- the Competition Commission of India; and
- the Fair Trade Commission of the Republic of Korea.

The ACCC chairperson Gina Cass-Gottlieb has highlighted the importance of the ACCC's close co-operation with overseas competition agencies, identifying digital platforms, mergers, anti-competitive conduct in global supply chains and financial services as key areas of critical international co-operation.

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

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

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Appealing Informal Clearance Decisions

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

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

Even if the ACCC decides to oppose a transaction under the informal clearance process, the parties are not prohibited from completing the transaction. However, such a decision is a strong

signal that the ACCC will initiate court action to prevent completion.

Under the proposed merger reforms commencing on 1 January 2026, merger parties or third parties (subject to having standing) may apply for limited merits review of ACCC determinations by the Tribunal. Parties and third parties may then apply for judicial review of the Tribunal's decision (but not the ACCC's determination) in the Federal Court. During limited merits review, the Tribunal may make a determination affirming, setting aside or varying the ACCC's determination and, for the purposes of the review, may perform all the functions and exercise all the powers of the ACCC.

The government's proposal indicates that the Tribunal's review will be limited to the material before the ACCC. While the Tribunal may seek "clarifying information", and the Tribunal may allow the parties to present new information or evidence which was not in existence at the time of the ACCC's determination. The government considers that limited merits review, rather than full merits review, appropriately balances procedural fairness by allowing for a change of circumstances to be taken into account and ensures merger parties have the incentive to place relevant information before the ACCC. It remains to be seen whether and how the limited merits review under the new regime will differ from the limited merits review available to parties currently in the merger authorisation process.

Alternatively, a fast-track review by the Tribunal may be sought, based only on the material before the ACCC. In these circumstances, the Tribunal would be bound by the findings of fact made by the ACCC.

Appealing Merger Authorisation Decisions

Merger authorisation decisions of the ACCC are subject to review via two avenues.

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

The Tribunal will make its decision based upon the materials that were before the ACCC, but it has the discretion to allow or request further evidence that was in existence at the time of the ACCC's decision or to address new circumstances. While the Tribunal has discretion to request further evidence clarifying the materials that were before the ACCC, this does not extend to evidence testing the reliability or credibility of that material.

Parties can seek judicial review of ACCC merger authorisation decisions in the Federal Court, but only on questions of law. The Full Federal Court can review the Tribunal's determinations regarding appeals of ACCC merger authorisation decisions, though also only on questions of law.

8.2 Typical Timeline for Appeals

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

Since the Harper Reforms, Telstra/TPG is the first merger authorisation decision to be appealed to the Australian Competition Tribunal. The parties filed their appeal in December 2022 and the matter proceeded to hearing in April 2023. On 21 June 2023, the Tribunal affirmed the ACCC's decision not to grant authorisation. ANZ/Suncorp Bank was the second merger authorisation

decision to be appealed to the Australian Competition Tribunal. The parties filed their appeal in August 2023 and on 20 February 2024, the Tribunal set aside the ACCC's decision not to grant authorisation.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties do not have a right to seek an injunction for a breach of Section 50 but may seek other remedies, as noted at 7.1 Third-Party Rights.

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

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

The relevant legislation and associated regulations for foreign transactions and investments in Australia (the foreign investment rules) govern the review of foreign investment proposals, including requiring certain foreign investments that meet the relevant criteria to seek approval from the Australian Treasurer. The Treasurer may block proposals that are contrary to the national interest (or national security, as applicable), or apply conditions to ensure a proposal is not contrary to the national interest (or national security, as applicable). The Treasurer's power to approve foreign investments is administered through FIRB.

Foreign investors who meet the notification criteria must submit an application for a "no objection notification" or an "exemption certificate"

to FIRB, depending on what better suits their circumstances.

A foreign person who takes a notifiable action without having first notified FIRB or takes a "significant action" prior to obtaining the Treasurer's approval can be subject to significant civil and criminal penalties, set out at 2.2 Failure to Notify.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

Merger Authorisation

The ACCC's current power to grant merger authorisation was the result of legislative reform in 2017. Merger authorisation was previously the responsibility of the Australian Competition Tribunal.

ACCC's Merger Reform Proposals

In April 2023, the ACCC chairperson Gina Cass-Gottlieb outlined the ACCC's economy-wide merger reform proposals. The reforms would change both the procedure of merger notification and review, as well as the substantive legal test as to whether a merger is anti-competitive.

The Australian Government's Merger Reform Proposals

The key aspects of the government's merger reforms, as announced in April 2024 and which are due to apply from 1 January, are as follows.

- Mandatory notification regime and prohibition on mergers above a threshold cannot proceed without approval: the reforms convert Australia's merger process from a voluntary regime to a mandatory and suspensory process. Merger parties will be prevented

from completing a transaction unless they have notified the ACCC and the deal has been cleared. All mergers within the previous three years by the acquirer or the target will be aggregated for the purposes of assessing whether a merger meets the notification thresholds. The government said this is a targeted measure to address concerns that some businesses are engaging in serial or creeping acquisitions or anti-competitive roll up strategies that increase prices and reduce quality and choice for consumers.

- **Decision maker and timeframes:** the ACCC will be the first instance administrative decision maker. If the ACCC does not raise competition concerns or does not make a decision within 30 working days, the merger will be permitted to proceed, with the option of “fast-track” determination if no concerns are identified after 15 working days. Where competition concerns are raised, the ACCC will undertake an in-depth “Phase II” assessment to be completed within a four-and-a-half-month period. Parties may apply for ACCC determination on substantial public benefits grounds or seek Tribunal review at this stage. The government provided an indicative review timeline of 50 working days but noted this is subject to Treasury consultation in 2024.
- **Clearance as an administrative decision and removal of the Federal Court:** critically, the Treasury intends for the process to have a greater focus on economic analysis and consideration of market structure, with less emphasis on evidentiary issues. A merger may proceed unless the ACCC “reasonably believes” it would have the effect or likely effect of substantially lessening competition. Parties will no longer have any ability to challenge the merits of an ACCC decision before the Federal Court. Instead, parties will be entitled to apply for limited merits review

before the Competition Tribunal. This will restrict parties to a review that is substantially “on the papers” limited to the material that had been put before the ACCC.

- **Transparency:** the government has indicated that the ACCC will be required to publish reasons for its decisions, together with any findings of fact. The ACCC does not look likely to be required to disclose the underlying evidence or data on which its decisions were based, or to expose this material to challenge. In that sense, the process appears to provide incrementally more transparency than the current informal clearance process, but significantly less than currently exists before the Federal Court or in the Competition Tribunal.
- **Merger notification thresholds:** the thresholds are still to be developed but will involve both monetary values (such as sales revenue, profitability or transaction value) as well as market share measures. The thresholds will be set with an objective that the ACCC will continue to assess approximately 300 mergers each year, consistent with the current process.
- **Role of market power and other structural factors in the competition test and merger factors:** the competition test would be expanded to expressly include consideration of “market position”, that is, a business’ economic and financial power, and whether a merger is likely to strengthen or entrench a position of substantial market power. This is consistent with a general move under the reforms towards emphasis on market structure in the analysis of mergers. The merger factors would also be expanded to include a number of structural considerations.

The Treasury will consult on the above later this year with exposure draft legislation to implement the reforms expected toward the end of 2024.

In parallel, the ACCC will consult on a range of issues raised by the changes, including merger notification thresholds, procedural safeguards, specific fees and exemptions. In 2025, the ACCC will consult on the form of notification.

10.2 Recent Enforcement Record

Recent ACCC Review Record

The ACCC conducted public reviews of 16 transactions through its informal merger review process in 2023. During this process:

- the ACCC opposed four transactions: Qantas/Alliance Airlines; Woolworths/SUPA IGA Karabar; Transurban Group/Horizon Roads Pty Ltd; Australian Clinical Labs Limited/Healius Limited;
- two mergers were withdrawn: Qube's proposed acquisition of Newcastle Stevedores and Greencross' proposed acquisition of Habitat; and
- three mergers were cleared subject to an undertaking: Sika AG/MBCC Group, Viva Energy/OTR Group and Woolworths/Petstock.

In 2023, the ACCC completed consideration of three merger authorisation applications:

- Armaguard/Prosegur;
- ANZ/Suncorp Bank; and
- Brookfield and MidOcean/Origin Energy.

The ACCC approved the Armaguard/Prosegur merger, subject to a behavioural undertaking, in June 2023. In August 2023, the ACCC denied authorisation for ANZ's proposed acquisition of Suncorp Bank, and the parties successfully appealed the decision to the Australian Competition Tribunal, which set aside the ACCC's decision in February 2024. In October 2023, the ACCC granted merger authorisation subject

to conditions for the proposed acquisition by Brookfield and MidOcean of Origin.

Recent ACCC Enforcement and Investigative Action

Noting that there are no fines or penalties for failing to notify, the ACCC has historically had limited success in taking action in the courts in relation to mergers. For example, the ACCC was unsuccessful in the high-profile enforcement proceedings that it brought against the merger parties in Pacific National's acquisition of Aurizon for alleged breaches of Section 50 of the CCA.

The ACCC does not always commence enforcement action where parties complete a reviewed transaction without ACCC approval. For example, the ACCC has not announced any enforcement action against Google for completing the acquisition of Fitbit in January 2021 without ACCC approval. It also investigated Qube/Newcastle Agri Terminal after the parties completed the transaction before the ACCC had completed its review, but announced in March 2022 that it would not pursue enforcement action against Qube. Its post-completion investigation into Facebook's acquisition of Giphy (which was not notified to any competition authority prior to completion) has also not resulted in any enforcement action since it commenced in 2021.

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

In 2023, shortly after the ACCC commenced its review of Woolworths' proposed acquisition of a majority interest in Petstock, the ACCC discovered that Petstock had completed a large number of acquisitions in the pet industry in recent years that had not been notified to the ACCC. In March 2023, the ACCC began investigating those prior acquisitions and, in December 2023, accepted a court-enforceable undertaking from Petstock to divest a package of sites and assets, including 41 retail stores.

10.3 Current Competition Concerns

As discussed in **2.1 Notification**, the ACCC identifies competition concerns in its compliance and enforcement priorities and in its inquiries. The ACCC's priorities for 2024-25 include competition and consumer issues arising in relation to:

- essential services (with a focus on telecommunications, electricity, gas and financial services);
- the supermarket sector;
- the aviation sector;
- environment and sustainability; and
- digital platforms and the digital economy.

As outlined in **10.1 Recent Changes or Impending Legislation**, the government has announced significant merger reforms which are due to commence on 1 January 2026.

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

In recent years, the ACCC has also shown particular interest in mergers in:

- the health sector – for example, it obtained an interlocutory injunction in 2021 to prevent the acquisition of Adora Fertility by Virtus Health;
- financial services – such as in the ANZ/Suncorp merger authorisation application; and
- in transactions in the digital and data space – such as MYOB/GreatSoft, Dye & Dun/Global X, Salesforce/Slack, Microsoft/Activision, Westpac/HealthPoint, www.realestate.com.au/Dynamic Methods (which was withdrawn) and Google/Fitbit.

AUSTRIA

Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.65

- 1.1 Merger Control Legislation p.65
- 1.2 Legislation Relating to Particular Sectors p.65
- 1.3 Enforcement Authorities p.65

2. Jurisdiction p.66

- 2.1 Notification p.66
- 2.2 Failure to Notify p.66
- 2.3 Types of Transactions p.67
- 2.4 Definition of "Control" p.67
- 2.5 Jurisdictional Thresholds p.68
- 2.6 Calculations of Jurisdictional Thresholds p.68
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.70
- 2.8 Foreign-to-Foreign Transactions p.70
- 2.9 Market Share Jurisdictional Threshold p.71
- 2.10 Joint Ventures p.71
- 2.11 Power of Authorities to Investigate a Transaction p.71
- 2.12 Requirement for Clearance Before Implementation p.71
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.72
- 2.14 Exceptions to Suspensive Effect p.72
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.72

3. Procedure: Notification to Clearance p.72

- 3.1 Deadlines for Notification p.72
- 3.2 Type of Agreement Required Prior to Notification p.73
- 3.3 Filing Fees p.73
- 3.4 Parties Responsible for Filing p.73
- 3.5 Information Included in a Filing p.73
- 3.6 Penalties/Consequences of Incomplete Notification p.74
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.74
- 3.8 Review Process p.75
- 3.9 Pre-notification Discussions With Authorities p.75
- 3.10 Requests for Information During the Review Process p.75
- 3.11 Accelerated Procedure p.76

4. Substance of the Review p.76

- 4.1 Substantive Test p.76
- 4.2 Markets Affected by a Transaction p.77
- 4.3 Reliance on Case Law p.77
- 4.4 Competition Concerns p.77
- 4.5 Economic Efficiencies p.77
- 4.6 Non-competition Issues p.77
- 4.7 Special Consideration for Joint Ventures p.78

5. Decision: Prohibitions and Remedies p.78

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.78
- 5.2 Parties' Ability to Negotiate Remedies p.78
- 5.3 Legal Standard p.80
- 5.4 Negotiating Remedies With Authorities p.81
- 5.5 Conditions and Timing for Divestitures p.81
- 5.6 Issuance of Decisions p.82
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.82

6. Ancillary Restraints and Related Transactions p.82

- 6.1 Clearance Decisions and Separate Notifications p.82

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.83

- 7.1 Third-Party Rights p.83
- 7.2 Contacting Third Parties p.83
- 7.3 Confidentiality p.83
- 7.4 Co-operation With Other Jurisdictions p.84

8. Appeals and Judicial Review p.84

- 8.1 Access to Appeal and Judicial Review p.84
- 8.2 Typical Timeline for Appeals p.84
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.85

9. Foreign Direct Investment/Subsidies Review p.85

- 9.1 Legislation and Filing Requirements p.85

10. Recent Developments p.85

- 10.1 Recent Changes or Impending Legislation p.85
- 10.2 Recent Enforcement Record p.86
- 10.3 Current Competition Concerns p.86

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matters, including merger control (EU, multi-jurisdiction and Austria). With its broad CEE network (“bpv LEGAL”, with offices in the Czech Republic, Slovakia, Hungary and Romania), bpv HÜgel’s roster of blue-chip clients includes some of the largest companies in Austria and multinationals from around the world.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

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

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

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

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

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

values, notification requirements and pre-notification.

The FCA, in co-operation with the German *Bundeskartellamt* (Federal Cartel Office or FCO), also published guidance on its transaction value-based notification threshold, as introduced in 2017 (including an English version). Based on the 2021 Amendment, the guidance was updated.

1.2 Legislation Relating to Particular Sectors

Following the Austrian Investment Control Act (*Investitionskontrollgesetz* 020 or the ICA 2020), which entered into force on 25 July 2020 and which is based on Regulation (EU) 2019/452, the acquisition of (parts of) undertakings, shares, substantial influence or even assets of undertakings is notifiable under the foreign-direct-investment screening (“FDI-screening”, see 9.1 Legislation and Filing Requirements).

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

1.3 Enforcement Authorities

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

The FCA and/or the FCP are responsible for applying to the Cartel Court (*Kartellgericht*, a special division within the Vienna Court of Appeals, *Oberlandesgericht Wien*) for an in-depth (Phase

II) investigation of a notified transaction. The Cartel Court is the only competent authority that is legally entitled to substantively rule on the legality of a notified transaction, eg, by prohibiting it or by granting clearance. Decisions and orders of the Cartel Court can be appealed to the Supreme Cartel Court (*Kartellobergericht*), a special division within the Supreme Court (*Oberster Gerichtshof*).

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

2. Jurisdiction

2.1 Notification

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

2.2 Failure to Notify

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

concerned of up to 10% of their consolidated worldwide turnover.

The Supreme Cartel Court has ruled that the failure to notify is generally considered a serious infringement of competition law. In fact, failure to notify has been in the focus of the FCA's practice in recent years. Recent fines, on average, have ranged from EUR20,000 to EUR120,000. For example, in March 2023, concerning the establishment of a joint venture, Hygiene Austria, Lenzing was fined EUR75,000, while against Palmers, which did not settle, the FCA requested an “adequate fine” at the Cartel Court. In January 2024, the Cartel Court imposed a fine of EUR28,000 on Granit Holding for the failure to notify the acquisition of all registered employees and the continuation of construction projects still to be completed by the target company Stvarnik Bau. Another fine of EUR120,000 was imposed on Vivendi in November 2023 concerning Vivendi's increase in the share capital to a total of 26.6% in Lagardère.

In a decision from November 2023, the Supreme Cartel Court followed the FCA's appeal regarding Merkur's (a subsidiary of REWE) failure to notify the takeover of a lease contract concerning sales areas of a food retail store. The Supreme Cartel Court has now ordered the Cartel Court (as court of first instance) to impose a fine on REWE of a “noticeable” amount.

As an outlier upwards, in August 2021, the Cartel Court imposed a fine of EUR9.6 million on Facebook/Meta for not filing its acquisition of US-based GIPHY in 2020. The acquisition itself received clearance with remedies by the Cartel Court (Phase II) and as confirmed by the Supreme Cartel Court.

The (Supreme) Cartel Court's decisions will be published on different websites.

2.3 Types of Transactions

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

- the acquisition of an undertaking or a substantial part of an undertaking;
- the acquisition of a right to an operating site of another undertaking through operational lease/transfer of a business;
- the indirect or direct acquisition of 25% or more, or 50% or more, of the shares or voting rights in an undertaking (independent of the acquisition of control);
- the establishment of cross-directorships, ie, acts that ensure that at least half of the members of the executive board or the supervisory board in two or more undertakings are the same;
- the achievement of any other relationship between undertakings whereby an undertaking may directly or indirectly exercise a decisive influence over another undertaking; and
- the creation of a joint venture that performs, on a lasting basis, all the functions of an autonomous economic entity.

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

- attaching special rights to preferential shares (eg, the minority shareholders' right to appoint more than half of the members of the supervisory board);

- a de facto controlling influence by minority shareholder who are highly likely to achieve a majority at the shareholders' meetings due to the percentage of shareholders in attendance; or
- minority shareholders acting together in exercising their voting rights.

2.4 Definition of "Control"

"Control" is not defined in the Cartel Act.

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

Joint Control

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

Sole Control

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

Acquisition of Shares

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

2.5 Jurisdictional Thresholds

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

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

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

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

According to this so-called “transaction-value-based” notification threshold (Section 9(4) of the Cartel Act), a concentration has to be notified to the official parties if:

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

For mergers that occur in the media sector, a special turnover calculation has to be applied. Depending on the status of the undertakings concerned (eg, newspaper, publisher) the respective turnover must be multiplied by a factor of 200 or 20. In January 2023, Heise Medien was fined EUR18,000 for not filing its acquisition of 100% of yeebase media. As both parties to the concentration were considered to be media undertakings in the meaning of the Cartel Act, their turnover had to be multiplied accordingly.

2.6 Calculations of Jurisdictional Thresholds

Classic Threshold

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

Concerning credit institutions, the turnover calculation is based on:

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

Value-of-Transaction Threshold

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

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

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

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

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

Satisfying the “domestic activity” requirement

In determining whether the transaction value-based threshold’s requirement of “domestic activity” by the target is satisfied, the focus is on current market-related activity. In contrast to Section 9(1) of the Cartel Act (see **2.8 Foreign-to-Foreign Transactions**), domestic activity is measured on the basis of domestic turnover only if this turnover adequately reflects the market position and the competitive potential of the target company (usually in mature markets). In this case, the FCA will routinely find that there is no domestic activity if the turnover of domestic target companies is below EUR1 million. However, domestic turnover over EUR1,000,000 does not necessarily establish significant domestic activity, and the whole of the circumstances will be taken into consideration by the authority. Besides the mentioned EUR1 million threshold, the above-discussed joint guidance of the FCA and German *Bundeskartellamt* identifies various criteria to measure activities which may be applied to different sectors and activities.

The measurement should be carried out in line with objective industry standards. For example, in the digital sector, the explanatory notes in Austria refer to user numbers (“monthly active users”) or the access frequency of a website (“unique visitors”) as examples of possible indicators. For instance, concerning Facebook’s planned acquisition of GIPHY, the FCA, in examining if GIPHY business activity focused on GIPHY’s user numbers and considered not only the direct use via GIPHY’s own website and app,

but also the users of other services, websites and apps of third parties that integrate GIPHY via programming interfaces (eg, Facebook, Signal, Snapchat). Concerning Salesforce's acquisition of Tableau Software the Cartel Court (as applied by the FCA) confirmed the target's substantial domestic activity based on the fact that the target had a market share in Austria of 5-10% in the software segment of modern BI platforms.

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

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

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

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

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

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

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

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control in Austria; a local presence is not required. If the thresholds are triggered, a filing is required unless the "effects doctrine" applies.

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

With the introduction of the second national threshold (see 2.5 Jurisdictional Thresholds), the "effects doctrine" can only apply if the target (without any turnover in Austria) will have, post-transaction, two parental undertakings,

which both hold at least 25% in the target and which both trigger the national thresholds (ie, combined Austrian turnover of EUR30 million and EUR1 million each).

2.9 Market Share Jurisdictional Threshold

There is no market share threshold in Austrian merger control.

2.10 Joint Ventures

Under Section 7(2) of the Cartel Act, Austrian merger control follows Article 3(4) of the EUMR, according to which “the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration”. Therefore, a joint venture must be newly created, must have sufficient resources to operate independently in a market and must be involved in activities beyond one specific function for the parent companies. Furthermore, the sale/purchase relationship between the joint venture and its parent companies must be limited and the joint venture must be intended to operate on a lasting basis. However, contrary to the EUMR (which, as made clear in *Austria Asphalt GmbH & Co OG v Bundeskartellamt*, ECLI:EU:C:2017:643, C-248/16, treats as concentrations only full-function joint ventures, whether newly created or converted from an existing undertaking), the creation of a non-full-function joint venture might also trigger an obligation to file in Austria. This is the case if one of the parent companies transfers a “substantial part of an undertaking” into the joint venture. A “substantial part” may include production facilities, customer lists, patents, etc. In specifying the term “substantial part”, the Supreme Cartel Court refers to whether a (potential) market position is, or will be, transferred with the transaction (Case No 16 Ok 8/01).

2.11 Power of Authorities to Investigate a Transaction

If the thresholds of Austrian merger control are not met, the Austrian competition authorities can investigate a transaction based on anti-trust criteria according to both Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Section 1 of the Cartel Act. There is also the possibility (though very rare in practice) that a merger which does not meet the turnover thresholds may still qualify as an abuse of dominance under Section 5 of the Cartel Act. Furthermore, in its *Towercast* judgment of 16 March 2023, the European Court of Justice (ECJ) ruled that national competition authorities (NCAs) and courts can review acquisitions by dominant entities under Article 102 of the TFEU, if those acquisitions are not notifiable under EU or national merger control laws.

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

2.12 Requirement for Clearance Before Implementation

Completion of a transaction must be suspended until clearance.

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

The Supreme Cartel Court ruled that a transaction had been implemented upon its registration in the company register and acceptance of a takeover bid (16 Ok 2/17f (7 December 2017)). The Court held that a transaction is deemed “implemented” once the acquirer obtains the

“opportunity to exercise economic influence”, regardless of whether, or when, it actually exercises that influence.

2.13 Penalties for the Implementation of a Transaction Before Clearance

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

2.14 Exceptions to Suspensive Effect

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

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

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

towards the target (Section 19(1)(2) of the Cartel Act).

As discussed at 2.12 **Requirement for Clearance Before Implementation**, the Supreme Cartel Court ruled that acceptance of a takeover bid is considered to be an implementation of a transaction (which requires immediate notification). Therefore, the authorities' former practice with regard to public bids of accepting the completion of acquisition of shares prior to clearance as long as the acquirer did not actually exercise influence in the target no longer seems applicable.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

The Austrian authorities do not have the statutory authority to grant derogations from the ban on closing a transaction prior to clearance.

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

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There are no deadlines for notification in Austria. As outlined at 2.12 **Requirement for Clearance Before Implementation**, completion before clearance is not allowed. With regard to fines

for failure to notify, see **2.2 Failure to Notify** and **2.13 Penalties for the Implementation of a Transaction Before Clearance**.

3.2 Type of Agreement Required Prior to Notification

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

3.3 Filing Fees

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

3.4 Parties Responsible for Filing

According to the Cartel Act, “the parties to the concentration” are entitled to file. The Cartel Act does not define this term; however, based on precedents, “parties to the concentration” covers the acquirer and the target company, but not the seller.

3.5 Information Included in a Filing

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

- accurate and exhaustive information on the circumstances that may create or may strengthen a dominant position or otherwise significantly impede effective competition;

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

Additional Information

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

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

If a presumption of dominance pursuant to Section 4(2) or (2a) of the Cartel Act is fulfilled (especially, a combined market share of at least 30%), information on possible countervailing factors such as buyer power, market entries, efficien-

cies, existence of a restructuring merger must be provided.

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

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

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

3.6 Penalties/Consequences of Incomplete Notification

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

Also, in this case and generally in practice, the official parties try to obtain missing information during Phase I. In complex cases, it might be useful to initiate pre-notification talks (see **3.9 Pre-notification Discussions With Authori-**

ties) with the official parties to gather feedback concerning the completeness of a notification upfront.

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

3.7 Penalties/Consequences of Inaccurate or Misleading Information

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

Fines that have been applied in practice include the following.

- In 2016, a fine of EUR50,000 was imposed on Grosso Holding GmbH, as it was not disclosed in the filing that two out of the three CEOs of Grosso Holding GmbH (as acquirer in the filed transaction) were also CEOs of an important competitor.
- In 2018, a fine of EUR212,000 was imposed on REWE International AG. When acquiring supermarkets from the insolvent Zielpunkt GmbH, REWE International AG agreed with the FCA in the respective merger control proceeding to close a Billa branch, which was near one of the supermarkets acquired

from Zielpunkt GmbH. However, REWE did not inform the authorities that it had specific plans to open a new Billa supermarket close by.

3.8 Review Process

The total duration of formal merger control proceedings (Phase I and Phase II) may amount to up to seven-and-a-half months, plus an additional two months, if the decision of the Cartel Court (as court of first instance) is appealed.

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

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

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

3.9 Pre-notification Discussions With Authorities

The FCA and the FCP do not expect to be consulted prior to each and every merger filing. Pre-notification talks are recommended if the merger is very complex, or if the merger could result in high market shares. Initiation of pre-notification

talks is not published on the FCA's website. The FCA and FCP can be also contacted in advance if there are doubts as to whether filing is necessary.

3.10 Requests for Information During the Review Process

Information requests do not suspend the review period. Extension of Phase I ("stop the clock" for two additional weeks) is only possible on request of the parties concerned, although receiving requests for information might cause the parties to apply for an extension of Phase I in the hope of avoiding a Phase II proceeding. Ultimately, parties might be also forced to "pull and refile" in order to avoid Phase II.

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

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

It is quite common that, during a Phase I investigation of a transaction that involves competitive overlaps, the FCA and/or the FCP will send requests for information to the parties concerned. The official parties also might initiate market investigations and thereby include third parties in the process. For example, concerning METRO's acquisition of AGM wholesale grocery markets in 2022, the FCA carried out an extensive market survey in Phase I. In the first request for information, 65 questions were put

to ten competitors of METRO and AGM. Most of the competitors expressed strong concerns. The second request for information with up to 87 questions was sent to about 1,200 large and small customers on the basis of an online survey.

3.11 Accelerated Procedure

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

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

In 2021, the official parties granted a waiver concerning their right to initiate a Phase II proceeding in only 3% of all notifications or, in concrete figures, in 10 out of 339 filings. The notifying party has to demonstrate that there is an urgent need for the transaction to be cleared early; eg, threat of insolvency is usually accepted as a reason for urgency.

4. Substance of the Review

4.1 Substantive Test

Austrian merger control uses the dominance test: a transaction will be prohibited if it cre-

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

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

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

While the Austrian authorities are required to investigate the case ex officio and may not simply prohibit a case based on the statutory thresh-

olds, these presumptions do have an impact on which cases are referred to Phase II.

4.2 Markets Affected by a Transaction

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

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

4.3 Reliance on Case Law

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

4.4 Competition Concerns

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

reveal an increasing emphasis on closeness of competition.

4.5 Economic Efficiencies

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

4.6 Non-competition Issues

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

In the case of a media merger, Austrian merger control also protects media diversity. The media transaction MFE MEDIAFOREUROPE N.V.; ProSiebenSat.1 Media SE was filed in Austria. Its legal standard of review was strictly limited to examine the effects of the transaction on media plurality (while, in terms of potential competition concerns, the transaction was examined by the EC under the EU Merger Control). In January 2023, the parties withdrew the notification (after the FCA initiated a Phase II proceeding in front of the Cartel Court). In November 2023, the notification was filed again. Based on media diversity concerns regarding (i) possible reduced local news and content and (ii) due to a stronger focus on the global group being a potential disadvantage for smaller countries such as Austria when marketing national advertising inventory, MFE and the official parties agreed on wide ranging remedies.

4.7 Special Consideration for Joint Ventures

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

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

5. Decision: Prohibitions and Remedies

5.1 Authorities’ Ability to Prohibit or Interfere With Transactions

In Phase I, the official parties cannot prohibit a transaction. In Phase II, only the Cartel Court may prohibit a transaction if it creates or strengthens a dominant position or if it results in a significant impediment of effective competition (see 4.1 Substantive Test). However, prohibition decisions in Austria are very rare (see 5.7 Pro-

hibitions and Remedies for Foreign-to-Foreign Transactions).

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

Appointing an Economic Expert Witness

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

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

5.2 Parties’ Ability to Negotiate Remedies

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

While only remedies accepted by the Cartel Court result in a formal (conditional) clearance decision, “informal” remedies entered into with

the FCA and the FCP to avoid Phase II or to obtain withdrawal of a Phase II request also have a binding effect. An undertaking that fails to comply with such remedies is deemed to have violated the standstill obligation, which may result in substantial fines.

Structural and Behavioural Remedies

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

A similar "Chinese Wall" remedy was agreed on in FUJIFILM/Hitachi (2021): Fujifilm committed itself to an ongoing and long-term supply to a manufacturer and to implement mechanisms to ensure that the trade secrets of this competitor are kept confidential and not disclosed to the respective acquired business from Hitachi. In Saubermacher/Pözlleitner (2023) the parties agreed with the FCP that the flow of information between, on the one side, Saubermacher and Pözlleitner (as the parent companies of the JV) and, on the other side, the JV is massively restricted by measures such as the separation of IT systems, internal guidelines and prohibitions on double employment. Reporting obligations

make it easier for the official parties to monitor the requirements.

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

In Gmundner Molkerei/ Milchwerk Jäger GmbH (2022), the official parties had concerns that the creation of a dairy joint venture might have negative effects on the market for the collection of raw milk due to the reduction in mutual competitive pressure between acquirer and target. In order to eliminate the competition concerns, the parties committed themselves to remedies, which included, inter alia, priority delivery rights to the farming milk suppliers, no deductions from the milk price for the delivery of short or excess quantities, and the right to pay surcharges for quality standards such as animal welfare or milk quality. Furthermore, farm milk suppliers may continue to sell their milk freely in "farm-gate sales" and direct sales (eg, to hotels, restaurants, etc). Earlier In 2022, the planned acquisition of Gmundner Molkerei by Salzburger Alpenmilch did not go through (after clearance with similar obligations by the official parties).

In addition, access remedies are relatively frequent. Concerning the acquisition of assets of DHL Austria by Austrian Post, remedies included, inter alia, access remedies whereby Austrian Post agreed for a period of ten years

to offer to conclude a contract with every logistics company with parcels for delivery to Austrian recipients. Concerning Meta's (Facebook's) acquisition of GIPHY, the Cartel Court imposed remedies on Meta, including, inter alia, a non-discriminatory access to GIPHY's GIF library for competing social media (for a period of five years), and access for alternative GIF libraries to GIPHY's GIF library under certain conditions, thereby enabling the establishment of an additional GIF provider alongside GIPHY (Meta) and Tenor (Google) for a period of seven years. With regard to the planned creation of a 50:50 joint venture between Saubermacher and Pölzleitner Holz (Saubermacher/Pölzleitner), the FCP agreed with the parties in Phase II (April 2023) to ensure third party access to wood storage sites (which were considered a scarce commodity due to the numerous permits required). Also based on a small market test, Pölzleitner and Saubermacher agreed to grant third parties non-discriminatory access to storage facilities at certain capacities and conditions on the basis of a published user agreement. Usually, concerning access remedies imposed, a monitoring trustee will be established to conduct ongoing review.

“Hold Separate” Remedies

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

- to continue operating the target's site;

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

However, structural remedies are also used. In Brau Union/Fohrenburger (2020), Brau Union agreed not to buy or lease any new restaurants in Vorarlberg and breweries based in Austria for the next five years. In Saubermacher/Pölzleitner (2023) the remedies concerned include an acquisition ban which applies to the relevant product and geographic market. In eBay/Adevinta (2021) the parties agreed, inter alia, to reduce its acquired 100% share of Adevinta, which runs with willhaben.at a platform in Austria, which competes with ebay.at, into a (maximum) 33% share within 18 months after closing. In December 2022, eBay effectively reduced its shareholding in Adevinta to 29.59%. In Metro/AGM (2022), Metro agreed to sell two out of nine acquired wholesale grocery markets of AGM. The FCA, in this regard, stated in general that structural restraints have a direct effect on the market structure after the merger by means of a one-time – usually stronger – intervention and are therefore usually more effective than behavioural restraints.

Media Diversity

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

5.3 Legal Standard

There is no specific legal standard that remedies must meet. Similarly to the European Commis-

sion, the Austrian authorities will assess whether the remedies proposed are suitable to address the specific competition concern(s) at issue.

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

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

Modifying Remedies

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

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

5.4 Negotiating Remedies With Authorities

There is no procedural regime for discussing remedies with the official parties, nor are there any strict deadlines. However, if the parties want to consider offering remedies in Phase I, these should be offered relatively early in the process, given the short time available to the

authorities (a maximum of six weeks). For example, in the acquisition of certain assets from the logistics network of DHL Austria (a subsidiary of Deutsche Post AG) by Austrian Post, detailed remedies were negotiated and agreed on within an extended pre-notification period and by extending Phase I to six weeks. Also, in Salzburger Alpenmilch/Gmundner Molkerei, several extensive requests for information were sent out and answered and various commitments agreed on in (an extended six-week) Phase I.

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

Negotiating and Proposing Remedies

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

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

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

5.5 Conditions and Timing for Divestitures

The Austrian authorities typically do not make completion of the transaction conditional on compliance with the remedies. However, nothing prevents the official parties from requiring an upfront buyer or fix-it-first solution if the cir-

cumstances of the case warrant such action. See, eg, VTG Rail Assets' indirect acquisition of Nacco SAS, whereby VTG Rail Assets agreed to sell upfront approximately 30% of the Nacco business to third parties.

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

5.6 Issuance of Decisions

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

Phase II cases are usually resolved by withdrawal of the FCA's and/or the FCP's Phase II request(s). Such withdrawals are often based on remedies agreed on between the parties and the FCA or FCP. Recently, it seems that in practice the FCA and FCP do not withdraw their request anymore but wait for the expiry of the legal deadline of Phase II. The FCA publishes short summaries of remedies cases, as well as the text of the remedies, on its website.

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

Such decisions are published in an online database.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

Given that merger cases are ultimately decided by the Cartel Court (unless there is an appeal to the Supreme Cartel Court), the authorities challenging a merger (the FCA and/or the FCP) have an incentive to resolve cases with remedies, as this gives them some control over the outcome of the proceedings. This results in a very low number of prohibition decisions in Austria, while remedies are fairly common. Failing an agreement on remedies, transactions are typically abandoned by the parties. For example, in 2022, not a single notified transaction was prohibited by the Cartel Court.

Foreign-to-foreign mergers do not receive any different legal treatment. The authorities do not hesitate to investigate fully foreign-to-foreign transactions that may have a significant impact on Austrian consumers and have also required remedies in foreign-to-foreign transactions; eg, in the above-mentioned foreign-to-foreign acquisitions, VTG Rail Assets/CIT Rail Holdings (see 5.5 Conditions and Timing for Divestitures) and GIPHY/Facebook (see 2.6 Calculations of Jurisdictional Thresholds).

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Merger control clearances also cover ancillary restraints to the extent that they are directly related to, and necessary for, the implementation of the transaction. No separate notification is required (or indeed possible) for such arrange-

ments. As experience in Austria is scarce, the European Commission's Ancillary Restraints Notice provides some guidance on what types of restraints may be considered ancillary and thus covered by the clearance.

For example, in the acquisition of certain assets from the logistics network of DHL Austria (a subsidiary of Deutsche Post) by Austrian Post, the FCA explicitly stated that merger control clearance did not constitute a decision on the permissibility of a co-operation arrangement between ÖPAG and Deutsche Post in connection with the notified acquisition. Concerning a planned joint venture between Miele and Metall Zug, both parent companies would have contributed subsidiaries into the joint venture. The joint venture itself would have focused on manufacturing, distribution and customer support in the field of infection control and contamination prevention. Intended customer groups included hospitals, pharmaceutical companies, laboratories, etc. The FCA assumed that the establishment of the joint venture constitutes an anti-competitive merger. In particular, the FCA feared a considerable reduction in the intensity of horizontal competition based on, among other things, the high market shares of the companies involved, the high market concentration and barriers to entry the market for any new market participants. In March 2024, the FCA (and the FCP) therefore initiated a Phase II proceeding before the Cartel Court.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third parties are entitled to submit their observations to the authorities, both in Phase I and in

Phase II, but they do not have any further procedural rights and do not receive party status. In particular, third parties are not granted access to the file. Also, the seller is considered to be a third party.

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

7.2 Contacting Third Parties

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

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

7.3 Confidentiality

The fact of the notification is published on the FCA's website. While third parties are not granted access to the file, it is common for the notifying parties to submit a non-confidential version

of the notification. This version is not published, but may be used by the FCA; eg, for the purpose of information requests addressed to third parties.

7.4 Co-operation With Other Jurisdictions

Austria is a member of the EU and, as such, the FCA co-operates routinely with its counterparts in other EU and EEA member states. These authorities share with each other basic information on notifications received and may co-operate more closely on a case-by-case basis.

In 2022, the FCA (in accordance with the German *Bundeskartellamt* and the Dutch ACM) submitted one request for referral to the European Commission pursuant to Article 22 of the EC Merger Regulation (Adobe Inc.; Figma, Inc.). As a result of a preliminary assessment, the FCA, inter alia, considered that the planned acquisition of Figma by Adobe is capable of affecting trade between member states, because the affected markets are at least EEA-wide; Adobe and Figma are active in all member states and Figma has subsidiaries in four member states.

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

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

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

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

8.2 Typical Timeline for Appeals

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

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

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

thus the question of which comparative scenario is to be applied in the legal review.

8.3 Ability of Third Parties to Appeal Clearance Decisions

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

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

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

Responsible authority for FDI-screening is the Austrian Federal Minister of Labour and Economy. Following the 2021 Amendment, the FCA must forward each merger control notification to the ministry to enable the latter to check whether the FDI-screening applies.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

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

Additional National Threshold

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

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

Additional Tests of Substance

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

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

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

Competitiveness Defences

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

10.2 Recent Enforcement Record

In 2023, a total of 293 mergers were notified to the FCA and the FPA. Compared to 2022, this is a reduction of more than 10%. Compared to 2021 (when there was a record total of 647 notifications), the number of notified mergers in Austria decreased by more than 55%. While the decrease in substance is a direct effect of the additional national threshold, as introduced by the 2021 Amendment (see 10.1 Recent Changes or Impending Legislation), it also seems that the number of transactions in general is currently limited in Austria.

Concerning these 293 merger notifications, only in two cases was a Phase II proceeding initiated (Strabag/D+B Holding/Wieser Verkehrssicherheit GmbH, swisspor/Creton). While the first merger notification received unconditional clearance in Phase II, the second is still pending before the Cartel Court (due June 2024).

No envisaged merger was prohibited and five notifications were withdrawn, ie, 286 mergers or 98% of all mergers notified received clearance within Phase I.

10.3 Current Competition Concerns

Following the 2021 Amendment, the FCA must forward each merger control notification to the ministry to enable the latter to check whether the FDI-screening applies. Based on changes in the Austrian Investment Control Act (see 9.1 Legislation and Filing Requirements) and a strict approach of the ministry to examine a broad range of transactions, the number of FDI filings has increased substantially in recent years.

CHILE

Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.91

- 1.1 Merger Control Legislation p.91
- 1.2 Legislation Relating to Particular Sectors p.91
- 1.3 Enforcement Authorities p.92

2. Jurisdiction p.93

- 2.1 Notification p.93
- 2.2 Failure to Notify p.93
- 2.3 Types of Transactions p.94
- 2.4 Definition of "Control" p.94
- 2.5 Jurisdictional Thresholds p.94
- 2.6 Calculations of Jurisdictional Thresholds p.95
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.95
- 2.8 Foreign-to-Foreign Transactions p.95
- 2.9 Market Share Jurisdictional Threshold p.96
- 2.10 Joint Ventures p.96
- 2.11 Power of Authorities to Investigate a Transaction p.96
- 2.12 Requirement for Clearance Before Implementation p.97
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.97
- 2.14 Exceptions to Suspensive Effect p.97
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.97

3. Procedure: Notification to Clearance p.97

- 3.1 Deadlines for Notification p.97
- 3.2 Type of Agreement Required Prior to Notification p.98
- 3.3 Filing Fees p.98
- 3.4 Parties Responsible for Filing p.98
- 3.5 Information Included in a Filing p.98
- 3.6 Penalties/Consequences of Incomplete Notification p.99
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.100
- 3.8 Review Process p.100
- 3.9 Pre-notification Discussions With Authorities p.101
- 3.10 Requests for Information During the Review Process p.101
- 3.11 Accelerated Procedure p.101

4. Substance of the Review p.102

- 4.1 Substantive Test p.102
- 4.2 Markets Affected by a Transaction p.102
- 4.3 Reliance on Case Law p.102
- 4.4 Competition Concerns p.102
- 4.5 Economic Efficiencies p.103
- 4.6 Non-competition Issues p.103
- 4.7 Special Consideration for Joint Ventures p.103

5. Decision: Prohibitions and Remedies p.104

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.104
- 5.2 Parties' Ability to Negotiate Remedies p.104
- 5.3 Legal Standard p.105
- 5.4 Negotiating Remedies With Authorities p.105
- 5.5 Conditions and Timing for Divestitures p.105
- 5.6 Issuance of Decisions p.106
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.106

6. Ancillary Restraints and Related Transactions p.106

- 6.1 Clearance Decisions and Separate Notifications p.106

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.107

- 7.1 Third-Party Rights p.107
- 7.2 Contacting Third Parties p.107
- 7.3 Confidentiality p.107
- 7.4 Co-operation With Other Jurisdictions p.107

8. Appeals and Judicial Review p.108

- 8.1 Access to Appeal and Judicial Review p.108
- 8.2 Typical Timeline for Appeals p.108
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.108

9. Foreign Direct Investment/Subsidies Review p.108

- 9.1 Legislation and Filing Requirements p.108

10. Recent Developments p.108

- 10.1 Recent Changes or Impending Legislation p.108
- 10.2 Recent Enforcement Record p.108
- 10.3 Current Competition Concerns p.109

Estudio Lizana is a boutique law firm headquartered in Santiago, Chile, specialising in competition, regulatory and compliance matters, as well as corporate law. The team is made up of three partners, three associates and one paralegal. It has comprehensive expertise in competition law matters, including merger control, investigations by the Fiscalía Nacional Económica (FNE) on cartels, abuses of dominance, and unfair competition, as well as litigation before the Chilean Competition Court (TDLC) and the Supreme Court. Recent relevant work in-

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ESTUDIO LIZANA
A B O G A D O S

1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The following is the relevant merger control legislation in Chile:

- Chapter IV of Law Decree No. 211 of 1973, as amended (“DL 211”), which establishes the mechanism for preventive and mandatory merger control.
- Decree No. 41/2021 of the Ministry of Economy, Development and Tourism, which establishes the Regulation on the Notification of Concentrations (“Regulation”).

Additional Guidance

- Exempt Resolution No. 157 of 2019, through which the National Economic Prosecutor’s Office (“FNE”) set the jurisdictional thresholds effective to this date.
- FNE Guidelines on the Analysis of Horizontal Concentrations (2021).
- FNE Guidelines on Threshold Interpretation (2019).
- FNE Guidelines on Jurisdiction (2017).
- FNE Guidelines on Remedies (2017).
- FNE Notification Form for Concentrations (2019).

1.2 Legislation Relating to Particular Sectors

Relevant Legislation for Foreign Investments

In general, foreign investments are not subject to approval but only to registration formalities (post facto) before the Central Bank of Chile to materialise the investment, according to Chapter XIV of the Compendium of International Exchange Regulations, which establishes the rules applicable to credits, deposits, investments and capital contributions from abroad. In accordance with such regulations, for amounts over USD10,000,

investors have the obligation to enter foreign currency through the formal exchange market and to inform the Central Bank in writing of the transaction. By virtue of this regulation, the Central Bank is not authorised to reject the investments (ie, it is just a notification mechanism, not an approval).

There are no mandatory/suspensory restrictions on foreign ownership over non-regulated Chilean companies.

Legislation Relating to Particular Economic Sectors

Regulated entities: banking and other regulated institutions

In Chile, there are different regulatory authorisations required for changes in the ownership of regulated entities or institutions.

For example, there are several types of transactions in the banking sector that require prior authorisation from the Commission for the Financial Market (“CMF”):

- Article 35 bis of the General Banking Law requires banks or controlling persons or groups, as appropriate, to request special prior authorisation from the CMF when the resulting bank or group of banks may achieve “systemic importance” as a result of some or several of the following acts.
 - (a) Merger of banks.
 - (b) Acquisition of all the assets and liabilities of one bank by another.
 - (c) Acquisition of a substantial part of the assets and liabilities of one bank by another. “Substantial” means equal to or greater than one third of their book value.
 - (d) Takeover of two or more banks by the same person or controlling group. It is understood that this case includes the

takeover of a bank by a person or group that already controls another.

- (e) Substantial increase in the participation of one of the banks controlled by the same person or group. This is understood when the controller acquires the majority or two thirds of the shares, as applicable.

The bank's systemic importance will be determined by the CMF, with the prior favourable agreement of the Council of the Central Bank of Chile, for which it will take into consideration the bank's size, market share, interconnectivity with other financial institutions, the degree of substitution in the provision of financial services, or any other objective criterion considered relevant for such purpose.

- In addition, pursuant to Article 36 of the General Banking Law, no person may acquire, directly or through third parties, shares of a bank that, alone or added to those they already own, represent more than 10% of the bank's capital, without having previously obtained authorisation from the CMF.
- Furthermore, as per Article 49(5) of the General Banking Law, in order for a bank to acquire shares of another bank with the aim of carrying out a merger between both institutions, it must meet a series of requirements, including obtaining prior authorisation from the CMF, which can only be granted when it is demonstrated that the acquiring company has assured control of two thirds of the issued shares with voting rights of the company whose shares it intends to acquire.

Other examples are found in the pension and insurance industries: according to the relevant regulations, the acquisition of shares that represent 10% or more of the ownership of a Pension Fund Administrator (AFP) must be authorised by

the Pension Superintendency, while the transfer of a significant ownership interest (10% or more) in an insurance or reinsurance company must be authorised by the CMF.

Thus, depending on the type of regulated entity in question, there will be various prior approval requirements for ownership changes.

Media

According to Law No. 19,733 on Freedom of Opinion and Information, any significant modification in the ownership of media companies must be reported to the FNE within 30 days of completion.

Nevertheless, in the case of media companies subject to state-granted concessions, the relevant event or act by which the change in the ownership of the company becomes effective must obtain a favourable report from the FNE concerning its impact on competition, prior to closing. The FNE must issue this report within 30 days after receiving all the relevant background.

If the report is unfavourable, the FNE must submit the relevant event or act to a public consultation process before the Chilean Competition Court ("TDLC"), so that the latter can decide whether it has the ability to infringe competition laws and, if applicable, impose the conditions necessary to ensure that the change in the ownership of the company does not restrict competition.

1.3 Enforcement Authorities

The FNE is the authority in charge of reviewing merger notifications and then conducting the corresponding merger control investigation, both in Phase 1 and in Phase 2 (where applicable). Once the merger investigation is concluded, the FNE decides whether to clear or block the concentration.

In the event that the FNE blocks the concentration, the parties have the right to file a special review appeal before the TDLC within ten days from the notification of the FNE's prohibition decision.

In addition, although this is not provided for in DL 211, it is possible to file a 'complaint appeal' (*recurso de queja*) against the TDLC's final ruling before the Supreme Court. The complaint appeal is a very special remedy that is exercised directly before the highest court, whose sole purpose is to correct serious faults or abuses committed by judges in the issuance of judicial decisions and to enforce their disciplinary liability. By accepting this appeal, the Supreme Court may amend the TDLC's ruling. There has only been one case so far in which this type of appeal has been used in a merger control review (Colmena/Nueva Mas-Vida).

The FNE is also the authority in charge of ensuring compliance with the merger control regime, initiating investigations for gun jumping and, when applicable, suing legal entities that engage in this type of conduct before the TDLC. According to the general rules of DL 211, the TDLC's condemnatory or acquittal ruling can be challenged before the Supreme Court, by means of an appeal.

2. Jurisdiction

2.1 Notification

In Chile, the pre-closing notification of a transaction to the FNE is only compulsory when (i) it amounts to a 'concentration' (*operación de concentración*), as per Article 47 of DL 211, and (ii) the sales of the undertakings involved meet the relevant jurisdictional thresholds. Note that

there are no exceptions if the relevant thresholds are met.

If the parties' sales are below the thresholds, they are not obligated to file a merger notification. However, they are allowed voluntarily notify the concentration to the FNE, in which case they will be subject to the same procedural rules as mandatory notifications. Voluntary notifications may be advisable when, for example, the parties' sales are very close to the thresholds; when the parties have high combined shares in the relevant market involved in the transaction; among other cases.

2.2 Failure to Notify

If the parties fail to notify a concentration that falls under the scope of mandatory merger control, they can be subject to a fine of up to 20 Annual Tax Units ("UTA") (today, approximately. USD17,180) for each day of delay counted from the completion of the transaction (without a maximum). In addition, the TDLC may also impose other types of corrective, preventive, or prohibitive measures, including modifying or even terminating the acts, contracts, or agreements that violate the provisions of the law. This means that, if the concentration creates anti-competitive effects, the court can impose remedies or, if these are insufficient, even order the reversal of the transaction.

To date, no fines have yet been imposed for failure to notify in Chile. Nevertheless, the FNE has investigated this type of behaviour. As for recent cases, we can mention three investigations initiated in the last few months:

- In November 2023, the FNE initiated an ex officio investigation regarding the Public Tender Offer through which the Canadian pension fund manager, Public Sector Pen-

sion Investment Board, increased its stake in Hortifrut, a Chilean fruit company considered the world's largest blueberry producer, from 4.88% to 49.56%.

- In March 2024, the FNE started an inquiry regarding the acquisition of 65% of the Chilean company Punto Ticket by a joint venture between CTS Eventim and the American multinational Sony Music.
- Finally, in May 2024, based on a third-party complaint, the FNE initiated an investigation concerning the acquisition of control over Cuenca del Maipo Servicios de Salud S.A. by the Chilean Association of Security ("ACHS").

With respect to all these cases, the FNE pointed out that, based on the available data on the corresponding companies and industries, it was necessary to examine whether the transactions should have been notified prior to their closing pursuant to the mandatory merger control regime, as well as whether they could have significantly reduced competition in their respective markets.

2.3 Types of Transactions

Pursuant to Article 47 of DL 211, only the following transactions amount to 'concentrations' and therefore fall within the scope of merger control, provided that they involve two or more previously independent undertakings (nor part of the same corporate group):

- mergers;
- acquisitions of decisive influence (control) over other undertakings;
- full-function joint ventures; and
- acquisitions of control over the assets of other entities.

Based on the above concept, intra-group restructurings or reorganisations are not subject to merger control.

2.4 Definition of "Control"

The FNE Guidelines on Jurisdiction define the concept of control or decisive influence as "the legal or de facto possibility of determining – or vetoing – the implementation of decisions regarding the competitive behaviour and strategy of an undertaking. Such control implies, among other things, the decisive influence or control over its management's composition, veto rights, strategic or business decisions or, in general, in its competitive performance."

Therefore, acquisitions of minority interests are caught by this concept provided that they allow the exercise of decisive influence (eg, if the minority interest involves veto rights over the target's strategic decisions, such as the entry to a new market, the company's business plans or budget, appointment of managers and key executives, authorisation to carry out certain investments). The FNE Guidelines on Jurisdiction explicitly state that "it is possible for a minority shareholder, based on the existence of acts or agreements in regard of the controlled undertaking, or otherwise as per the faculties it holds under the bylaws, to have the possibility of exercising a decisive influence."

2.5 Jurisdictional Thresholds

Chile's jurisdictional thresholds are calculated in *Unidades de Fomento* ("UF") (a unit of account used in Chile, adjustable according to inflation) and apply to all economic sectors, without distinctions.

Thresholds currently in force are as follows.

- Individual threshold: UF450,000 (USD19,730,350).
- Combined threshold: UF2,500,000 (USD109,613,056).

The currency conversion is based on the value of the UF as of December 31st of the previous year (2023) and the average exchange rate of the same year.

2.6 Calculations of Jurisdictional Thresholds

As mentioned, the thresholds are set in UF, and must be met by the amount of sales in Chile of the undertakings that intend to concentrate.

Sales relevant to the calculation of thresholds are those made in the calendar year prior to the notification. These sales must exclude taxes directly related to sales volume, such as VAT, tariffs, customs charges, specific taxes, etc.

Sales recorded in a foreign currency must be converted into Chilean pesos, in accordance with the average annual exchange rate published by the Central Bank of Chile. Subsequently, sales are converted from Chilean pesos to UF, based on its value as of December 31st of the year preceding the notification.

As mentioned above, there are two types of threshold, both of which must be met to trigger a mandatory filing:

- the combined threshold must be met by the sum of the sales of the undertakings that intend to concentrate; and
- the individual threshold must be met, separately, by the sales of at least two of the undertakings that intend to concentrate.

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

If the concentration is a merger, the combined thresholds calculation shall consider the sum of the sales of the merging parties, as well as those of their respective business groups. The individual threshold, in turn, must be met separately by each of the two merging parties, including in each case their corresponding business group. If there are more than two parties to the merger, it is sufficient for only two to meet the thresholds.

The same rule described above applies to joint ventures, with respect to the parents and their corresponding business groups.

If the concentration is an acquisition of decisive influence or control over another undertaking, the individual threshold must be met, (i) on the one hand, by the sales of the acquiring entity and its entire business group, and (ii) on the other hand, by the sales of the target and all the entities controlled by it. The combined threshold must be met by the sum of the sales of all the above.

Finally, if the transaction refers to the acquisition of assets, the individual threshold must be met, (i) on the one hand, by the sales of the acquiring entity and its entire business group, and (ii) on the other hand, by the sales generated by the target assets. The combined threshold must be met by the sum of the sales of all the above.

2.8 Foreign-to-Foreign Transactions

According to the FNE Guidelines on Jurisdiction, transactions are only subject to merger control when it is likely that the concentration will affect the market and competition in Chile, which requires a geographical link to Chile.

The geographical link is established by the notification thresholds, which consider sales in Chile for their determination. Thus, all concentrations producing effects in Chile and meeting or exceeding the sales thresholds in Chile must be notified to the FNE.

According to the rules described above, if the target asset or undertaking has no sales in Chile, the transaction will not trigger a mandatory notification, because the individual threshold will not be met.

2.9 Market Share Jurisdictional Threshold

Chilean legislation does not establish a market share threshold. Although market share will be considered in the assessment of the concentration levels to determine potential effects on competition, only the thresholds related to the parties' sales are considered to determine whether a concentration must be notified to the FNE.

2.10 Joint Ventures

Only full-function joint ventures are considered as concentrations. Therefore, only this type of joint venture is subject to merger control, as long as it meets the jurisdictional thresholds.

Specifically, Article 47 (c) of DL 211 provides that a concentration shall exist when two or more undertakings (the “parents”) associate with each other through any fact, act or agreement that creates an independent undertaking, separate from its parents, on a lasting basis. This new entity or association is usually referred to as a “joint venture”.

According to the FNE Guidelines on Jurisdiction, to consider a joint venture as a concentration, the FNE will assess: (i) creation of a new

economic entity; and (ii) the full-functionality criterion.

As for the first condition, the FNE explains that “the creation and entry into the market of a new undertaking, different from its parent companies is needed. The created undertaking, though, can be totally new or also arise from previously owned activities or assets, contributed by the parent companies with such purposes.” Importantly, “the parent companies may or may not control the joint venture.”

The full-functionality criterion requires the creation of “an independent undertaking, which carries out all its functions on a lasting basis. That is to say, the joint venture must be completely autonomous from a functional and operational viewpoint and have the possibility of performing full functions in the market.”

The rules for determining whether a joint venture meets the jurisdictional thresholds are described in **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**.

2.11 Power of Authorities to Investigate a Transaction Below-Threshold Concentrations

In the case of concentrations that do not meet the jurisdictional thresholds, the FNE still has the power to open an investigation to assess the transaction within one year of closing, to determine whether it may substantially reduce competition. If the FNE concludes that it does, it can challenge the transaction by filing a lawsuit with the TDLC, requesting the imposition of mitigation measures or even the reversal of the transaction.

Note that the investigation must be formally initiated within one year of closing; however, the

FNE can then challenge the transaction in court at any time as long as the statute of limitations has not expired, which, pursuant to DL 211, is three years from the execution of the corresponding anticompetitive conduct (which, in this case, should be understood as the implementation of the transaction).

2.12 Requirement for Clearance Before Implementation

Standstill Obligation

In Chile, the mandatory merger control regime imposes a strict prohibition on early implementation of concentrations. In other words, the parties may only implement (close) the notified transaction once the FNE (or the court) has issued its clearance decision.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Implementation Before Clearance

If the transaction is implemented before clearance, the FNE may file a lawsuit before the TDLC requesting the imposition of fines and/or other types of corrective, preventive or prohibitive measures. Specifically, violations of the standstill obligation are subject to the general fine regime for antitrust violations established by Article 26(c) of DL 211, which involves fines of up to (i) 30% of the sales of the offender corresponding to the line of products or services associated with the infringement for the period for which it was extended or (ii) up to twice the economic benefit obtained by the offender due to the infringement. If it is not possible to determine the sales and economic benefit obtained by the offender, the TDLC may impose a fine of up to UTA60,000 (today, approximately. USD50 million).

To date, there has only been one case of this type brought to court (FNE vs Minerva and JBS),

in which the FNE accused the parties of closing the deal before obtaining clearance. However, no fines were ultimately imposed, because the case was settled, with the accused companies agreeing to pay a sum of money for tax benefits equivalent to USD1 million.

2.14 Exceptions to Suspensive Effect

There are no exceptions to the suspensive effect of merger notifications. Therefore, the parties are always obliged to wait until clearance to implement the transaction.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

The law does not provide for any circumstance or exception that allows closing the transaction before clearance.

There are no specific rules on carving out the Chilean part of a transaction, but the FNE has generally stated that it does not consider “carve-outs” to be a viable mechanism to avoid merger control and that it is therefore likely to consider it a gun-jumping breach of Chilean merger regulation.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

The parties may file the notification at any time before the closing of the deal, as long as there is a serious intention to carry out the transaction. Therefore, there are no deadlines, provided that the parties do not breach the duty to notify the transaction and comply with the standstill obligation.

3.2 Type of Agreement Required Prior to Notification

The notification can be filed as soon as the parties have a serious intention to carry out the transaction, which may be demonstrated by a letter of intent, a memorandum of understanding, a commitment letter, a public announcement of the transaction, a draft/signed agreement, etc. Therefore, a binding agreement is not required.

3.3 Filing Fees

There are no filing fees.

3.4 Parties Responsible for Filing

Pursuant to the applicable regulation, the notifying parties are “the entities, companies, or people that sign the corresponding act, contract or convention where the transaction is recorded, and the undertakings that carry out the transaction through them.”

Accordingly, as a rule of thumb, all the parties to the transaction must file a joint notification. An exception to this rule exists, however, when one of the entities that are intended to be part of the transaction has not yet given its agreement for it to take effect, as occurs in cases of hostile takeovers and public tenders, in which only the acquiring party “carries out” the transaction and is therefore required to file the merger notification.

3.5 Information Included in a Filing

There are three types of notification forms: ordinary, simplified, or simplified with no overlaps. These forms vary in the amount and type of information that must be included in the notification.

FNE’s Notification Form for Concentrations lists the information and documents required for the

various types of notification. In general, the FNE requires the following information.

- Information about the notifying parties and their business groups.
- Description of the transaction, including its objectives and justifications.
- Description of the economic activities developed in Chile by the parties and their groups.
- Definition of the relevant markets, market shares, sales data and main clients.
- In the case of an ordinary form: a more in-depth description of the markets involved, including demand and offer structures, production capacities, conditions of entry, expansion and entry, among others.

Documents Required to Be Submitted

Regarding documents to be submitted, whether simplified or ordinary, the following should always be included.

- All the documents related to the concentration and/or its effects in Chile, such as minutes of shareholders’ meetings or board meetings, or equivalent bodies, that show discussions, projections or analysis carried out with respect to the transaction.
- All the reports, commercial programmes, business plans, studies, minutes or presentations (either internal or external) that have been prepared or commissioned by the parties to evaluate, analyse or negotiate the transaction.
- All the documentation used by the parties to define the affected market and assess market shares.
- The balance sheets and financial statements of the entities within the party’s group active in the markets affected by the concentration, including (if they exist) their annual reports.

- A group chart showing the corporate structure for each party involved in the merger.
- Powers of attorney.
- A statement from the notifying parties indicating that, in good faith, they intend to carry out the notified concentration (Bona Fide Affidavit).
- A declaration by the notifying parties of the truthfulness, sufficiency and completeness of the information provided, as well as the fact that they are aware of the administrative and criminal sanctions that apply in the event of providing false information or hiding information (Veracity Affidavit).
- copies of studies, reports, analyses, surveys and any comparable documents prepared in the last three years that analyse the relevant affected market, competitive conditions, actual or potential competitors, consumer preferences, brand strength, and potential growth or expansion into new products or geographic areas, among others; and
- identification of the legal representatives and agents of the notifying parties, along with their contact details, the original document confirming the power of attorney under which the agents act, and a simple copy of the documents that support it.

The ordinary notification requires more detailed documents and a longer time range for the above (eg, the last three balance sheets and financial statements). Importantly, along with the ordinary notification, the parties must also provide copies of studies, reports, analyses, surveys and any comparable document prepared in the last three years that analyses the relevant affected market, competitive conditions, actual or potential competitors, consumer preferences, brand strength and potential growth or expansion to new products or geographic areas, among others.

Language

The information to be submitted with a notification must be presented in Spanish, unless there is a special authorisation from the FNE. However, the regulation provides an exception to this rule, allowing certain information to always be submitted in English without prior authorisation.

The exempted documents are:

- existing documentation regarding the merger and other projections and/or its effects in Chile;

Specific Requirements

All digital copies must be submitted in a format that allows for review using search criteria. Qualitative information should be provided in a standard text format compatible with Microsoft Word, Adobe Acrobat, or similar software. Quantitative information should be submitted using standard spreadsheet processors like Microsoft Excel or comparable software.

All attached documents must be originals or true copies of the originals. The Bona Fide and Veracity Affidavits require a simple signature, and a scanned copy can be provided. In the case of the Power of Attorney, if it is issued in Chile, it requires being notarised, and if it is issued abroad, it must be notarised and apostilled (or legalised, in the case of countries without an apostille).

3.6 Penalties/Consequences of Incomplete Notification

Once the FNE receives the notification, it has a period of ten working days to review it. If it considers that the notification is complete, it will begin the investigation. On the other hand, if it is deemed incomplete, the FNE will issue a resolu-

tion of lack of completeness, and the parties will be granted ten working days to add or clarify the information as requested by the FNE. Therefore, no penalties are imposed, but the parties are required to provide the missing information.

However, the authority only accepts the issuance of up to three resolutions of lack of completeness. If, after that, the parties do not adequately amend the notification, the FNE will dismiss the notification and order to have it refiled.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Article 3 bis(e) of DL 211 states that those who notify a concentration by providing false information may also be subject to the sanctions described in Article 26 of DL 211, as well as any necessary preventive, corrective or prohibitive measures.

Therefore, if the parties notify a concentration but provide false information, the FNE may file a lawsuit before the TDLC requesting the imposition of fines, pursuant to the general fine regime for antitrust violations established by Article 26(c) of DL 211 (see **2.13 Penalties for the Implementation of a Transaction Before Clearance**), as well as other measures.

In addition to the aforementioned fines, pursuant to Article 39(h) of DL 211, individuals responsible for providing false information or withholding information from the FNE during the investigation may be subject to a criminal penalty of imprisonment for a period ranging from 61 days to three years.

In recent years, the FNE has filed complaints against TWDC Enterprises 18 Corp (2022) and Cadena Comercial Andina (2023) for providing false information during the notification of

a merger and therefore violating Article 3 bis(e) of DL 211. In the first case, the TDLC imposed a fine of UTA3,000 (approximately. USD2.5 million), plus legal fees. The second case is still ongoing.

By contrast, no case has been made public in which the authority has reported any individual to the criminal prosecutor for the criminal offence provided for in Article 39(h).

3.8 Review Process

Once the notification is filed, the FNE has up to ten working days – ie, excluding Saturdays, Sundays and holidays – for reviewing whether the notification is complete (ie, if it meets all the information requirements of the applicable form).

After that review period, the FNE can open the merger investigation or declare the notification incomplete. If the notification is declared incomplete, the parties have up to ten working days to supplement the notification with the missing information.

The review process is then repeated (in practice, up to three times), until the FNE considers the notification complete and decides to open the merger investigation. Otherwise, the FNE will dismiss the notification and order to have it refiled.

Phase I: After opening an investigation, the FNE has up to 30 working days to carry out its investigative steps. Within this deadline, it can then either: (i) grant conditional or unconditional clearance, or (ii) extend the investigation to Phase II, for up to 90 additional working days.

Phase II: Within the Phase II deadline, the FNE must either (i) grant conditional or unconditional clearance or (ii) prohibit (block) the transaction.

In case of prohibition, the parties can file a special review appeal before the TDLC.

If the parties offer mitigation measures, the above legal deadlines can be suspended for up to ten working days in Phase I, and up to 15 working days in Phase II.

These deadlines can also be suspended by mutual agreement between the FNE and the parties, for up to 30 working days in Phase I and up to 60 working days in Phase II (only once per phase).

Overall Timeline

Regarding the overall timeline, a distinction must be made between approval in Phase I of the investigation or extension to Phase I. If approved in Phase I, the total timeframe should range between two to four months, while if the investigation extends to Phase II, it will usually take between seven to eight months. However, this will all depend on the number of incompleteness decisions, whether a suspension is agreed with the FNE, and whether (and how many times) the parties offer remedies.

3.9 Pre-notification Discussions With Authorities

There is an informal and collaborative pre-notification procedure whereby the parties can ask questions to the FNE and clarify any doubts.

The parties can bring up any procedural or substantive questions that they may have (for example, whether the transaction qualifies as a concentration operation, whether the ordinary or the simplified notification form applies, whether the parties may be exempted from providing certain information required by the regulation, etc).

The FNE encourages pre-notification discussions to prevent any mistakes and thus to expedite the process.

The pre-notification stage is entirely confidential.

3.10 Requests for Information During the Review Process

The FNE typically requests additional information from the parties, as well as third parties (such as competitors and clients), during the course of its investigation. These requests for information do not stop the clock or suspend the review, which is why the deadlines to provide responses are usually very tight.

The FNE's requests for information can be from very simple to quite burdensome, which will depend on the complexity of the concentration, the markets involved and the amount of public information available.

3.11 Accelerated Procedure

As stated above, the sole difference between the ordinary and simplified notifications is the amount and type of information that must be included in the notification. Therefore, all notifications are subject to the same legal deadlines, regardless of the type of form used. In other words, formally speaking, there is no "fast-track" procedure.

However, the FNE's review of a simplified notification with no overlaps will usually take, in practice, a substantially shorter time than an ordinary notification with several complex overlaps.

4. Substance of the Review

4.1 Substantive Test

The legal test to clear a transaction is that it is not able to substantially reduce competition, whether without conditions or subject to the remedies offered by the parties.

4.2 Markets Affected by a Transaction

The parties are only required to notify under the ordinary notification mechanism when the transaction involves an affected relevant market. This is because the existence of affected markets requires a more in-depth analysis of the possible effects on competition, which requires the FNE to have more information from the outset.

A market is considered “affected” by the transaction in the following cases.

- The transaction gives rise to a horizontal overlap, in which the combined market share is equal to or greater than 20%. (Nevertheless, as an exception to the above, the parties are allowed to file a simplified form instead of an ordinary form when their combined market share is below 50% and the HHI delta is below 150. This is because usually such a small increase in market concentration is incapable of raising competitive concerns.)
- The transaction gives rise to a vertical relation, in which the individual or combined share in the upstream or downstream market is equal to or greater than 30%, regardless of whether there is an actual or past customer-supplier relationship between the parties.
- The transaction involves:
 - (a) a market in which one of the parties has a market share of 30% or more, and another party is a potential competitor in the same market;
 - (b) a market in which one of the parties has

a market share of 30% or more, and another party, while not being active in the same market, owns intellectual or industrial property rights important to that market; or

- (c) the situation in which any of the parties is active in a product market that is closely related to one in which another party is active, and their individual or combined market shares are equal to or greater than 30% in any of them.

4.3 Reliance on Case Law

The FNE often relies on case law from the European Commission and the Federal Trade Commission. It also relies in some cases on precedents from other competition authorities in the region, such as CADE or COFECE.

4.4 Competition Concerns

According to the FNE’s Guidelines on the Analysis of Horizontal Concentrations (“Guidelines on Horizontal Mergers”), in a merger control review, the FNE will investigate a wide range of competition concerns, including unilateral effects, coordinated effects, conglomerate effects, vertical concerns, and elimination of potential competition. The FNE will also consider how the transaction may affect dynamic competition and whether it may reduce the parties’ incentives to innovate.

There is also a special chapter in the guidelines regarding digital platforms and markets, where the FNE outlines its distinctive features and elements that make its assessment different from traditional market analysis. In this section, the FNE mentions additional competition concerns, including risks of undermining non-price variables, such as platforms’ terms of use (eg, privacy policies); possible monetisation strategies for non-transactional platforms; as well as the

raising of barriers to entry or expansion that may generate a weakening of competition as a result of the combination of certain information assets of the merging parties (eg, databases of their consumers and their preferences).

4.5 Economic Efficiencies

The parties can describe and submit information evidencing consumer benefits or efficiencies. The FNE will deem them sufficient provided that they are:

- verifiable;
- inherent to the transaction;
- capable of compensating for the increased market power of the resulting entity; and
- transferred to consumers.

The FNE considers both productive and dynamic efficiencies. The Guidelines on Horizontal Mergers provide in this connection that, in markets where the loss of dynamic competition may imply a substantial reduction in competition, dynamic efficiencies will generally have greater importance, given that innovation and continuous improvement of products are fundamental elements in such markets. However, in markets in which the competitive risks associated with concentration are not mostly dynamic, these types of efficiencies generally only counterbalance the risks indirectly. Therefore, in these cases, dynamic efficiencies will be considered by the FNE within the overall analysis of the concentration and both effects will be qualitatively weighted in light of their competitive risks.

4.6 Non-competition Issues

Chilean legislation, in line with the practices suggested by the OECD and the International Competition Network, does not consider the analysis of non-competition issues.

Furthermore, there is a relevant precedent in this connection. In the State Grid/CGE case, the FNE stated that the institutional design of the merger control regime in Chile does not grant the FNE authority to rule on the basis of national or public interest considerations, such as geopolitical strategy, defence or national security, etc, concluding that the FNE can only determine whether a concentration is likely to substantially reduce competition.

Regarding foreign direct investment, Law No. 20,848 establishes that foreign investors shall be treated in the same manner as local investors. Notwithstanding the above, there are two restrictions regarding foreign investment, which are completely separate from merger control rules.

- Prohibition to acquire the domain or any other right, possession or tenancy of real estate bordering a neighbouring country, which only affects the nationals (persons and corporations) of the respective country.
- Ban on private investment in hydrocarbon exploitation. According to the Political Constitution of the Republic of Chile, the State of Chile owns all hydrocarbons, whether liquid or gaseous, existing on the national territory, having the exclusive right to extract or exploit such hydrocarbon deposits. This restriction affects both nationals and foreigners.

There are no filings required for foreign direct investments. In connection with reporting obligations to the Central Bank, please see **1.2 Legislation Relating to Particular Sectors**.

4.7 Special Consideration for Joint Ventures

Pursuant to the Guidelines on Horizontal Mergers, for joint ventures, the FNE focuses on

assessing potential coordinated effects, as these associations create or strengthen structural links between the parent companies. This potentially increases their ability to coordinate competitive behaviour, both within the joint venture's market and in other markets, especially if their activities overlap.

If any party participates in the same market as the joint venture or if the joint venture consolidates the parties' activities in the same market, the FNE will also examine potential unilateral effects. This involves considering how each party's competitive incentives are altered, given that any consumer switching would be partially recaptured through their participation in the joint venture, and assessing the degree of influence each party has over the joint venture's competitive behaviour.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

During the investigation, the FNE may approach the parties in order to discuss potential remedies or for the parties to amend those they already offered.

Furthermore, once the investigation has concluded (and if the remedies offered are considered insufficient, when applicable), the FNE is entitled to block the transaction. For this purpose, the FNE will issue a well-founded resolution supported by a report detailing the elements considered, the findings of the investigations, as well as its conclusions, explaining why the transaction has the ability to significantly reduce competition.

As mentioned above, if the FNE blocks a transaction, the parties have the right to file a special review appeal with the TDLC. In this instance, the TDLC, through a reasoned judgment and after listening to the parties' arguments, will decide whether to clear or block the transaction.

Although DL 211 does not establish appeals against this judgment, there is a precedent in which a prohibition decision was reviewed and reversed by the Supreme Court through the filing of a complaint appeal (see **1.3 Enforcement Authorities**).

5.2 Parties' Ability to Negotiate Remedies

The FNE must communicate to the parties the anticompetitive risks arising from the transaction based on the background of the investigation, before deciding to extend the investigation to Phase II and also before issuing a prohibition decision. The parties will then have the right to offer remedies to mitigate those risks.

The parties may offer structural remedies (divestment), either by the sale of assets to a suitable buyer or by removing links between competitors.

On the other hand, they can also offer behavioural remedies, which, according to the FNE Guidelines on Remedies, can be divided into:

- quasi-structural measures focused on the market structure affected by the concentration (eg, access and licensing obligations);
- pure behavioural measures (eg, prohibitions on exclusivity clauses, conditional discounts, tying, arbitrary discrimination, among other matters);

- obligations to prevent the internal transfer of information within the merging entities and their affiliates (Chinese walls);
- remedies that focus on the regulation of market power; and
- obligations regarding the buyer of the divested package.

Remedies Unrelated to Competition

The FNE is not entitled to request or accept measures that are not directly associated with competition concerns.

5.3 Legal Standard

According to the Guidelines on Remedies, remedies must be effective in preventing the concentration's ability to substantially lessen competition.

Secondly, the FNE will assess whether the proposed commitments, in addition to being effective, are feasible to implement, execute and monitor.

Finally, in addition to eliminating the transaction's ability to substantially lessen competition, the remedies must be proportional to the detected competition concern.

5.4 Negotiating Remedies With Authorities

Parties may offer remedies in Phase I and/or Phase II of the investigation.

The FNE may approach the parties to suggest remedies and discuss those offered by the parties, but it cannot impose remedies against the parties' will. However, if the parties do not accept the remedies that the FNE considers necessary to properly safeguard competition, the FNE may block it.

As for the procedural steps that must be taken, the parties can file their first remedy proposal at any time prior to the FNE's final decision. Once the proposal is submitted, the reviewing period will be suspended up to ten days in Phase I and up to 15 days in Phase II.

During that term, the FNE must assess the proposed remedies to determine whether the transaction, subject to such remedies, is likely to substantially reduce competition. If the FNE does not consider the remedies sufficient, it will communicate this to the parties before issuing the Phase II or the prohibition decision, as applicable. The parties can prevent the FNE from issuing such decision by filing a new improved proposal, in which case the same procedure will be repeated.

If the remedies are sufficient, the FNE must approve the transaction subject to the proposed remedies.

When assessing the remedies, the FNE shall focus on their effectiveness in solving the identified competition concerns, their practicality for implementation, execution and monitoring, and their proportionality.

5.5 Conditions and Timing for Divestitures

In general, the FNE will prefer structural remedies rather than behavioural remedies, since there is no need to monitor such measures. In this connection, the FNE will seek to ensure that the remedies are effective, practical, executable and proportional.

The parties may close the transaction before complying with the remedies depending entirely on the terms agreed with the FNE – especially

considering that some remedies might require the transaction to be completed beforehand.

Specifically in the case of divestitures, the Guidelines on Remedies provide for different possible scenarios.

- Scenario I (preliminary solution): The parties identify the buyer in the remedy proposal and enter into a binding commitment with such buyer during the investigation and before implementing the notified transaction. In this case, the identity of the buyer will be included in the clearance resolution.
- Scenario II (initial buyer solution): The parties identify the buyer and enter into a binding commitment with such buyer after the issuance of the clearance resolution and before the notified transaction is completed. In this case, after the approval of the buyer by the FNE, the parties may close the notified concentration.
- Scenario III (post-closing solution): In this case, the clearance resolution will be issued beforehand, leaving the identification of the appropriate buyer and the approval of the buyer by the FNE for after the closing. However, in this scenario, the FNE will require that the parties obtain approval of the buyer and complete the divestment within a period of nine months from the closing.

Compliance with the remedies shall be monitored by the FNE, which can take place through the appointment of a designated compliance officer, who will be responsible for informing the FNE. The FNE usually initiates compliance investigations shortly after ending the corresponding merger control investigations.

Lastly, if the parties do not comply with the remedies, the FNE may file a lawsuit before the

TDLC, and the parties will be subject to the general fine regime provided by Article 26(c) of DL 211 (see **2.13 Penalties for the Implementation of a Transaction Before Clearance**).

5.6 Issuance of Decisions

In a merger control review, the FNE issues its approval or prohibition decision through a formal resolution, together with a report indicating the reasons for clearing or blocking the transaction.

Both the final resolution and the supporting report are first notified to the parties and shortly thereafter made public on the FNE's website. However, prior to this publication, the parties are granted the opportunity to make confidentiality comments to these documents, requesting that certain passages be redacted, to the extent that their disclosure to third parties may affect their competitive performance.

The law provides that, if the FNE does not issue any resolution within the legal period, the transaction will be deemed approved. However, the FNE's usual practice is to always issue a grounded resolution, even in the simplest cases.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

As stated above, foreign-to-foreign transactions will only be subject to merger control if there is a geographical link, determined by the jurisdictional thresholds.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Clearance decisions will address all aspects of the transaction, including ancillary restraints,

such as non-compete or exclusivity clauses, among others. In its analysis, the FNE will review if these arrangements have the potential to affect competition and, subsequently, include in the clearance decision their conclusions regarding that aspect. The FNE may even request remedies only in connection with ancillary restraints (for example, case *Minerva/Marfrig*).

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third-Party Rights to Make Representations

Third parties can be requested to answer official requests for information from the FNE during the merger review. When answering the requests for information, they provide comments and make representations if the FNE asks them whether, in their opinion, the transaction raises any antitrust concerns.

Furthermore, when the file becomes public in Phase II, any third party with an interest in the investigation can voluntarily provide information and make submissions expressing their concerns.

Document Access

In Phase I investigations, third parties can request access to the investigation file, but the parties can oppose this request, in which case the FNE will deny the access.

In Phase II, the file becomes public, and therefore third parties can access the entire file, including the public versions of all the confidential documents (where all competitively sensitive information has been redacted).

7.2 Contacting Third Parties

The FNE typically contacts third parties to gain a better understanding of the industry and the competitive implications of the merger. Accordingly, the parties are asked to identify in the notification their main competitors and clients, providing their contact details. The FNE may then reach out to these contacts or other relevant third parties through RFIs. It can also require these third parties to give a statement, in the form of questions and answers, which is recorded and incorporated into the investigation file.

7.3 Confidentiality

Merger investigations are kept confidential during the pre-notification contacts. Furthermore, the fact of the notification is kept confidential until the FNE initiates the investigation. At that time, the FNE will publish a short decision including a description of the transaction and its parties, declaring the filing complete, and opening Phase I of the merger review.

The investigation file itself is confidential during Phase I. At the end of Phase I, the FNE's approval report and decision are made public.

If the FNE decides to extend the investigation to Phase II, the file becomes public, and third parties may request access to it. Nevertheless, the parties can request that certain information be kept confidential, in which case they must provide redacted public versions of the corresponding documents.

7.4 Co-operation With Other Jurisdictions

The FNE co-operates with other agencies when reviewing international transactions by exchanging information.

In this connection, according to the regulation, the parties must report in the notification in which jurisdictions they are filing other merger notifications. Based on this, the FNE may request the parties to submit a waiver, allowing them to contact other competition agencies. The parties can also voluntarily submit a waiver along with the notification or at any other time during the merger review.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Only the FNE's decision to block a concentration can be appealed before the TDLC. Furthermore, the TDLC's final ruling can be subject to a complaint appeal before the Supreme Court. See **1.3 Enforcement Authorities**.

8.2 Typical Timeline for Appeals

The parties must file the special review appeal with the TDLC within ten days of the notice of the prohibition resolution. The TDLC will then summon a public hearing in which the appellant, the FNE, and those who have contributed information to the investigation may participate. The TDLC will issue a ruling within 60 days from the hearing, either confirming the prohibition or revoking the FNE's decision.

Since the entry into force of the new legislation on mandatory merger control in 2017, this special review appeal has been filed only in two cases: in the Ideal/Nutrabien case, in which the TDLC accepted the appeal, and in the Colmena/Nueva MasVida case, in which the TDLC rejected the appeal, but then the Supreme Court reversed the ruling, thereby approving the transaction.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties do not have the right to appeal a clearance decision. However, the Colmena/Nueva Mas Vida precedent leaves the door open for a third party who has intervened in a special review appeal before the TDLC to file a complaint appeal before the Supreme Court.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

There is no foreign direct investment or foreign subsidies legislation that may require separate filings for transactions beyond that which is necessary under merger control law.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

There have been no recent modifications to the relevant legislation on merger control. The last regulation issued was Decree No. 41/2021 of the Ministry of Economy, Development and Tourism, which establishes the Regulation, published on 2 November 2021.

Furthermore, there have been no actions or communications from the authorities that suggest the possibility of any changes in this area, at least in the foreseeable future.

10.2 Recent Enforcement Record Fines

Regarding the imposition of fines, on 27 February 2024, the TDLC accepted the complaint filed by the FNE against TWDC Enterprises 18 Corp ("TWDC"), stating that TWDC infringed Article 3

bis(e) of DL 211 by providing false information to the FNE during the notification of the merger between TWDC and Twenty-First Century Fox, Inc. As a result, the TDLC imposed a fine of UTA3,000 (approximately. USD2.5 million), plus legal fees.

In January 2023, the FNE filed a lawsuit against the company Cadena Comercial Andina (“CCA”), parent company of Oxxo Chile and OK Market (two chains of convenience stores), for providing false information during the review process of the merger through which the latter chain was acquired, and for failing to comply with one of the measures adopted during the approval of that transaction. However, in July 2023, the TDLC approved the partial settlement submitted by the parties, which included the payment of UTA500 (approximately. USD420,000), to put an end to the part of the complaint concerning the breach of mitigation measures. The trial is still ongoing for the accusation of providing false information when notifying the merger.

Prohibitions

On the other hand, regarding the prohibition of concentrations, the most recent case took place on 22 February 2022, when the FNE prohibited the acquisition by Nexus Chile SpA (“Nexus”), the parent company of Isapre Nueva MasVida (“Nueva MasVida”), of Colmena Golden Cross S.A. (“Colmena”). The decision was appealed before the TDLC, which ultimately rejected the appeal and confirmed the prohibition.

However, Nexus submitted a complaint appeal before the Supreme Court against the TDLC’s judges who issued the ruling, accusing them of serious misconduct and abuse in the issuance of the decision. In March 2023, the Supreme Court issued its ruling and annulled the TDLC’s resolution, approving the merger between Nue-

va MasVida and Colmena, subject to a series of mitigation measures.

Demand for Remedies

Out of the 43 transactions notified to the FNE between January 2023 and March 2024, 35 were approved with no remedies required, and six were approved subject to mitigation measures.

The implemented remedies included divestiture measures for the acquiring economic agent; reduction of the term of exclusivity, non-compete, non-solicitation, right to first offer and right to match clauses; and limitations on the geographic and material scope of expansion restrictions.

10.3 Current Competition Concerns

The FNE has reported that, between January 2023 and March 2024, there was a 10% increase in notifications of concentrations compared to the same timeframe in the previous year. The operations were 31 acquisitions of decisive influence over other undertakings; seven acquisitions of control over assets; four joint ventures; and one merger.

The notifications reviewed by the FNE during that period referred to relevant and diverse markets (eg, energy, telecommunications, etc).

Regarding the duration of the investigations, the FNE stated that it was reduced in comparison to the previous period, with an average of 25 working days for unconditional approval in Phase I, which means five days below the maximum legal limit. As for investigations carried out through the simplified notification mechanism without overlaps, the average duration was 21 working days when the investigation was not suspended.

During the same period, three investigations concluded in Phase II, and were assessed in greater depth by the FNE. These involved the acquisition of control over the SAAM port concessionaire by the shipping company Hapag-Lloyd, the acquisition of Entel's assets by OnNet Fibra, and the merger between retail companies La Polar and Abcdin. Of these, two were approved unconditionally, and one was subject to mitigation measures regarding the divestiture of network assets in specific areas where the parties held a significant market share with high entry barriers.

The FNE has also stated that the review of ancillary clauses has made their analysis more complex, and that they have paid special attention to non-compete clauses, commonly agreed upon in merger agreements. The same precaution is applied to non-solicitation clauses, which are likely to impact labour markets, an area on which the FNE has focused.

In addition to investigations initiated by requirement of the law and notification from the parties, the FNE has been actively monitoring diverse markets. In this regard, over the past year, the FNE initiated three ex officio investigations after identifying different concentrations that were not notified.

Likewise, the FNE filed two lawsuits before the TDLC for the infringement of Article 3 bis(e) of DL 211, for providing false information when notifying a concentration.

Trends and Developments

Contributed by:

Claudio Lizana, Daniela León, Tomás Appelgren and María Jesús Gaete

Estudio Lizana

Estudio Lizana is a boutique law firm headquartered in Santiago, Chile, specialising in competition, regulatory and compliance matters, as well as corporate law. The team is made up of three partners, three associates and one paralegal. It has comprehensive expertise in competition law matters, including merger control, investigations by the Fiscalía Nacional Económica (FNE) on cartels, abuses of dominance, and unfair competition, as well as litigation before the Chilean Competition Court (TDLC) and the Supreme Court. Recent relevant work in-

cludes advising both Brink's Chile and Indura (Air Products) in their defences in ongoing cartel litigations (historical cases due to the high fines requested); Mastercard in a TDLC proceeding regarding the issuance of regulations for the payment cards industry, and ongoing litigation against several payment facilitators; Minerva Foods in the merger control review of an acquisition of assets from Marfrig; and a large technological company in an ongoing antitrust investigation.

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CHILE TRENDS AND DEVELOPMENTS

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A B O G A D O S

Introduction: General Statistics on Merger Control in Chile

The merger control regime in force in Chile, established by Law 20,945, of 30 August 2016, came into force just over seven years ago, specifically, as of 1 June 2017. Since then, and until 31 March 2024 (the most recent date for which statistics have been published by the authority exist), a total of 279 concentrations have been notified to the Chilean Competition Agency (*Fiscalía Nacional Económica*, FNE).

Only four of these concentrations have been blocked by the FNE. However, two of these prohibition decisions were subsequently reversed by court rulings: one by the Chilean Competition Court (*Tribunal de Defensa de la Libre Competencia*, TDLC), and the other, by the Supreme Court.

Among the transactions approved by the FNE, only 23 have been subject to remedies, which implies that, in the vast majority of cases, the FNE has approved the notified concentrations without conditions. In line with the above, the investigations extended to Phase II (an in-depth analysis of the merger's effects on competition, which requires more time) have reached 18, with all the others being approved in Phase I (which implies a shorter and more expedited review).

It should also be noted that, in March 2019, the FNE raised the thresholds for mandatory notification (thresholds which entered into force in August of the same year). This substantially reduced the number of concentrations under the authority's scrutiny. Since then, only one case (FNE v Navimag) is known in which this authority has challenged a below-threshold merger – ie, a concentration that was not subject to mandatory merger control, but was still investigated by the

FNE post-closing, because it raised competition concerns.

The above allows us to conclude that, so far, the Chilean competition authorities have not had an interventionist approach to merger control. The question remains, however, whether this trend could change in the near future, in the light of the phenomenon observed in other reference jurisdictions, such as the United States, the European Union, and the United Kingdom, where regulators are showing a growing inclination to scrutinise and challenge concentrations.

This article provides an overview of different aspects of the merger control regime in Chile that are of particular importance, so that companies planning to take part in concentrations with effects in Chile take them into account.

The Anomaly of the Appeal to the Supreme Court

As mentioned, one of the few prohibition decisions issued by the FNE so far was finally reversed by the Supreme Court of Chile. This is quite anomalous, as Decree Law No 211 (“DL 211”) – Chile's competition law – does not provide for any appeal to the highest court to reverse decisions related to the merger control regime. On the contrary, pursuant to DL 211, in the event of a prohibition decision by the FNE, the parties may only file a special appeal for review before the TDLC.

The case in question was the merger between two private social security health institutions, Nueva Masvida and Colmena. The FNE had prohibited the merger, for which the parties filed a special appeal for review before the TDLC. The latter agreed with the FNE's analysis, concluding that the transaction would involve unilateral and co-ordinated risks, which would not be suf-

ficiently mitigated by the remedies proposed by the parties. Thus, the TDLC rejected the appeal, and the concentration was therefore blocked (with one of the court's judges voting against).

However, one of the parties challenged the TDLC's ruling through a complaint appeal (*recurso de queja*) filed with the Supreme Court. A complaint appeal is a very special appeal that must be filed directly with the hierarchical higher court, the purpose of which is to correct serious faults or abuses committed by judges in the issuance of judicial decisions and to enforce their disciplinary liability.

On 27 March 2023, the Supreme Court revoked, in a unanimous ruling, the TDLC's blocking decision, and instead approved the concentration, accepting the remedies proposed by the parties and imposing additional ones.

This Supreme Court ruling is certainly a very important precedent for the merger control regime in Chile, since it seems to imply that, through the hearing of complaint appeals, said court will be able to review any merger blocking decision as a sort of "third instance" — a matter not provided for, however, in DL 211.

The Few (Yet Noteworthy) Gun-Jumping Cases

Just like most jurisdictions, Chile has an *ex ante* merger control regime, providing for mandatory pre-closing notification of concentrations above certain thresholds. The regime prohibits implementing the notified concentration until the FNE has approved it, which is known as a "standstill obligation".

Gun-jumping is an infringement of the merger control regime and usually refers to two types of conduct: implementing a concentration in viola-

tion of the duty of notification (known as "failure to notify") or prior to obtaining the authority's clearance (violation of the standstill obligation). In Chile, both behaviours are outlined, respectively, in Article 3 bis(a) and (b) of DL 211.

Pursuant to Article 26(e) of DL 211, failure to notify is subject to a fine of up to 20 "annual tax units" (*Unidades Tributarias Anuales*, UTAs) (approximately USD17,180) for each day of delay counted from the completion of the transaction (without a maximum). In turn, violations of the standstill obligation are subject to the general fine regime for antitrust violations established by Article 26(c) of DL 211, which involves fines of up to (i) 30% of the sales of the offender corresponding to the line of products or services associated with the infringement for the period for which it was extended or (ii) up to twice the economic benefit obtained by the offender due to the infringement. If it is not possible to determine the sales and economic benefit obtained by the offender, the TDLC may impose a fine of up to 60,000 UTAs (today, approximately USD50 million).

In addition, the TDLC may also impose other types of corrective, preventive, or prohibitive measures, including modifying or even terminating the acts, contracts, or agreements that violate the provisions of the law. This means that, if the concentration creates anti-competitive effects, the court can impose remedies or, if these are insufficient, even order the reversal of the transaction.

Since the mandatory merger control regime came into force in 2017, the FNE has conducted a few known gun-jumping investigations, exercising its authority to investigate transactions within one year of their completion, as per Article 48 para. 9 of DL 211.

Minerva/JBS

The first case was the Minerva/JBS merger (2018), in which the FNE claimed that the parties closed the deal prior to approval – ie, they violated the standstill obligation. In the end, no fines were imposed because the FNE and the parties reached a settlement agreement, whereby the latter had to pay approximately USD1 million in total for fiscal benefit. Prior to the settlement, the transaction was unconditionally cleared by the FNE.

GSK/Pfizer

In April 2020, the FNE started an ex officio investigation after learning, based on the parties' own public statements, of the completion of a transaction between GSK and Pfizer to combine their over-the-counter drug portfolios. Since this transaction was not notified in Chile, but was subject to merger control in other jurisdictions, the FNE decided to scrutinise the deal. Ultimately, the FNE determined that, despite what had been reported in the media, the transaction was not a joint venture but rather an acquisition of rights by GSK over Pfizer's "consumer health-care" segment. Consequently, the transaction did not meet the thresholds, since the target assets did not have significant sales in Chile, and the case was closed without further actions. However, the authority took the opportunity to emphasise, in its resolution to close the case, the importance of using the pre-notification system to avoid problems of regulatory interpretation that could eventually lead to a gun-jumping hypothesis.

Equifax/SIIA

In September 2020, the FNE initiated another investigation based on a complaint from a third party, regarding a deal between Equifax and SIIA, to determine whether the parties had breached the duty to notify the concentration.

The FNE concluded that, although Equifax was the main agent in the credit bureau market, SIIA's sales did not exceed the individual threshold required by law, and therefore, parties were not required to notify the transaction. Despite ruling out a failure to notify, the FNE conducted an ex post analysis to determine whether the transaction created actual or potential competition concerns, punishable under the general antitrust rules, but ultimately closed the case without finding any anti-competitive offence.

Carozzi/Unilever

Also in 2020, following another third-party complaint, the FNE initiated a gun-jumping investigation to review Carozzi's acquisition of Unilever's ice cream business. The FNE concluded that Unilever's sales did not exceed the individual threshold required for mandatory notification. The FNE also conducted a substantive competition review, finally ruling out any anti-competitive effects arising from the transaction. Nonetheless, in its resolution to close the case, the FNE noted that, since the sales were very close to the thresholds and involved a significant market player, a voluntary notification would have been advisable, to avoid ex post scrutiny.

Recent investigations

Lastly, the FNE recently initiated three gun-jumping ex officio investigations:

- The first one, initiated in November 2023 (but only made public in March 2024), involves a transaction between Hortifrut and the Public Sector Pension Investment Board, where the latter acquired a 49.56% stake in the former. This acquisition was brought to the FNE's notice through an essential fact submitted by Hortifrut to the Financial Market Commission.
- The second investigation, initiated in March 2024, concerns the acquisition of a 65%

stake in Punto Ticket by a joint venture between CTS Eventim and Sony Music. This transaction, once again, came to the FNE's attention through media reports.

- Finally, the third transaction came to the FNE's attention through a third-party complaint, which was supported by media reports, and refers to the acquisition of control over Cuenca del Maipo Servicios de Salud S.A. by the Chilean Association of Security. The FNE initiated this ex officio investigation in May 2024.

FNE gun-jumping policy

Based on the cases mentioned above, some conclusions relevant to companies considering mergers with market effects in Chile can be drawn. Firstly, the FNE can initiate a gun-jumping investigation based on a wide range of sources, such as media reports, public company statements, third-party complaints, as well as information gathered in the context of an ongoing merger control proceeding. Moreover, in the absence of a gun-jumping infringement, the FNE can still conduct an ex post competitive analysis of the transaction, because DL 211 allows it to initiate an investigation on a non-notifiable transaction within one year of closing. If, as a result, the FNE concludes that the deal raises competition concerns, it may challenge it before the TDLC. Finally, parties to a non-notifiable transaction should always assess whether a voluntary notification or a pre-notification consultation, as the case may be, is advisable to avoid an ex post review of the proposed transaction.

Submission of False Information in the Context of Merger Control

Article 3 bis(e) of DL 211 penalises those who notify a concentration by providing false information. This conduct may be subject to fine (according to the general fine regime for antitrust

violations described above), as well as other corrective, preventive, or prohibitive measures.

In recent years, the FNE has filed lawsuits against two different companies, for allegedly providing false information during a merger investigation, thus enforcing the above provision.

Disney/Fox

In the first case, concerning the Disney/Fox merger, the FNE cleared the transaction, but then filed a lawsuit with the TDLC seeking the imposition of a fine against TWDC Enterprises 18 Corp ("Disney") amounting to approximately USD4.3 million.

The FNE claimed that Disney violated Article 3 bis(e) of DL 211 because it failed to disclose relevant internal documents during the merger investigation. Specifically, the FNE held that the infringement occurred because Disney initially stated that it had no internal documents analysing the affected market – which must be provided as part of the merger filing according to the applicable regulation – and then reported that it had only two of such documents. Later, however, the FNE determined that Disney was in possession of at least thirty studies, analyses, reports, surveys, or comparable documents containing information of the affected market.

The TDLC fined Disney 3,000 UTAs (approximately USD2.5 million). Disney appealed this decision to the Supreme Court, and its final ruling is still pending.

CCA/OK Market

In the second case, the FNE filed a lawsuit against Cadena Comercial Andina (CCA) for providing false information during the merger investigation involving the acquisition of OK Market (a convenience store chain) and requested the

imposition of a fine of 6,500 UTA (approximately USD5.5 million).

According to the FNE, CCA did not submit all the internal background documents analysing the affected market, just like in the Disney case. Initially, CCA stated that only six documents existed, but subsequently, through a supplement to the notification, CCA disclosed another 34 documents, which were not originally submitted. Ultimately, the FNE found that there were at least 60 additional documents that clearly met the criteria and were not submitted in a timely and proper manner. The TDLC has not yet issued a final ruling in this case.

These cases are interesting, because they demonstrate that, in the FNE's view, failure to produce internal documents relevant to its investigation is a serious infraction, and that the authority is prepared to pursue the liabilities associated with this conduct, even if the merger is ultimately cleared. Indeed, this is an infringement that deserves a separate analysis from the substance of the notified concentration. It is also important to note that the TDLC's ruling in the Disney case fully agrees with the FNE's analysis, asserting that the statement by the accused companies that they did not have other documents amounts to the delivery of false information, without it being necessary to have manipulated or adulterated the documents for this purpose. Because of the above, companies must take maximum care and diligence when notifying a concentration to the FNE, without omitting any information or document required by the applicable regulation, because any claim of not having certain background information, without this being effective, may involve sanctions.

Increased severity of penalties under the New Economic Crime Act

To conclude this segment, it is relevant to highlight a legislative change of which companies must be aware in connection with the above-mentioned violation. Specifically, Act No 21,595 (the "Economic Crime Act") was recently enacted in Chile, broadening the categories of conduct for which legal entities may be held criminally liable, including (among many others) concealing information requested by the FNE or providing false information in the context of any type of FNE investigation – therefore, including merger control investigations.

Today, Article 39(h) of DL 211 provides that the individuals responsible for providing false information or withholding information from the FNE during an investigation may be subject to a criminal penalty of imprisonment, for a period ranging from 61 days to three years. However, this provision has never been enforced. The reasons for this are not publicly known, but it is possible to guess that this has to do with the high standard of proof in criminal matters ("beyond any reasonable doubt") and also with the fact that a clear culprit in the case of behaviour such as this is usually not an easy task. Nevertheless, the Economic Crime Act opens the possibility that this provision will begin to be applied, not with respect to individuals, but to the legal entities investigated by the FNE.

In this connection, it should be noted that, pursuant to the Economic Crime Act, criminal liability of the legal person is autonomous with respect to the liability of the individuals who committed the crime. For this reason, the law provides that the lack of identification of the individuals who perpetrated the crime (which may prove difficult in the context of an FNE investigation) will not prevent the criminal liability of the legal person,

provided it can be demonstrated that the conduct could only have been perpetrated by or with the intervention of a person within the company.

This law will come into force in September 2024, authorising the FNE to report the alleged infringement to the Criminal Prosecutor's Office. If a criminal conviction is obtained, the competent criminal court can assess a fine from 11 to 100 "fine-days" for this crime, with each "fine-day" being up to 5,000 "monthly tax units" (*Unidades Tributarias Mensuales*, UTMs), although this depends on the company's income. Therefore, the maximum criminal fine could amount to 500,000 UTMs (approximately USD35 million). In addition, the court may impose penalties of loss of tax benefits, disqualification from contracting with the State, confiscation, and the obligation to publish an extract of the conviction.

Importantly, criminal prosecution does not prevent prosecution before the TDLC, which means that the offending company could be subject to two different fines for the same conduct, if it withholds or provides false information in the context of a merger control investigation: a fine for the crime of concealing information or delivering false information in an FNE investigation, and another for violating the provision of Article 3 bis(e) of DL 211, which penalises the notification of a concentration by providing false information. However, in such a case, the law provides that the administrative fine will be attributed to the criminal fine, or vice versa, which implies that if the company had already paid one of the two fines, it would only have to pay the remainder after the second conviction, if applicable.

CHINA

Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.122

- 1.1 Merger Control Legislation p.122
- 1.2 Legislation Relating to Particular Sectors p.123
- 1.3 Enforcement Authorities p.123

2. Jurisdiction p.123

- 2.1 Notification p.123
- 2.2 Failure to Notify p.124
- 2.3 Types of Transactions p.124
- 2.4 Definition of "Control" p.125
- 2.5 Jurisdictional Thresholds p.125
- 2.6 Calculations of Jurisdictional Thresholds p.126
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.126
- 2.8 Foreign-to-Foreign Transactions p.126
- 2.9 Market Share Jurisdictional Threshold p.127
- 2.10 Joint Ventures p.127
- 2.11 Power of Authorities to Investigate a Transaction p.127
- 2.12 Requirement for Clearance Before Implementation p.127
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.127
- 2.14 Exceptions to Suspensive Effect p.127
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.127

3. Procedure: Notification to Clearance p.127

- 3.1 Deadlines for Notification p.127
- 3.2 Type of Agreement Required Prior to Notification p.128
- 3.3 Filing Fees p.128
- 3.4 Parties Responsible for Filing p.128
- 3.5 Information Included in a Filing p.128
- 3.6 Penalties/Consequences of Incomplete Notification p.128
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.129
- 3.8 Review Process p.129
- 3.9 Pre-notification Discussions With Authorities p.129
- 3.10 Requests for Information During the Review Process p.130
- 3.11 Accelerated Procedure p.130

4. Substance of the Review p.130

- 4.1 Substantive Test p.130
- 4.2 Markets Affected by a Transaction p.131
- 4.3 Reliance on Case Law p.132
- 4.4 Competition Concerns p.132
- 4.5 Economic Efficiencies p.132
- 4.6 Non-competition Issues p.132
- 4.7 Special Consideration for Joint Ventures p.133

5. Decision: Prohibitions and Remedies p.133

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.133
- 5.2 Parties' Ability to Negotiate Remedies p.133
- 5.3 Legal Standard p.135
- 5.4 Negotiating Remedies With Authorities p.135
- 5.5 Conditions and Timing for Divestitures p.136
- 5.6 Issuance of Decisions p.137
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.137

6. Ancillary Restraints and Related Transactions p.137

- 6.1 Clearance Decisions and Separate Notifications p.137

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.137

- 7.1 Third-Party Rights p.137
- 7.2 Contacting Third Parties p.138
- 7.3 Confidentiality p.138
- 7.4 Co-operation With Other Jurisdictions p.139

8. Appeals and Judicial Review p.139

- 8.1 Access to Appeal and Judicial Review p.139
- 8.2 Typical Timeline for Appeals p.139
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.140

9. Foreign Direct Investment/Subsidies Review p.140

- 9.1 Legislation and Filing Requirements p.140

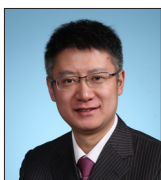
10. Recent Developments p.141

- 10.1 Recent Changes or Impending Legislation p.141
- 10.2 Recent Enforcement Record p.142
- 10.3 Current Competition Concerns p.143

Haiwen & Partners was founded in 1992 and is one of the leading law firms in China. It has six offices (in Beijing, Shanghai, Shenzhen, Hong Kong, Chengdu and Haikou), and more than 500 professionals. With its creativity and professionalism demonstrated in numerous large-scale, complex and cross-border transactions, Haiwen is one of the most sought-after PRC law firms in many areas. Haiwen has been providing antitrust and competition legal services since 2003 and is one of the first PRC law firms to practice in this area. Haiwen's antitrust team

has assisted a wide range of clients with their professional skills, industry knowledge and international perspective, and are highly praised by many clients. Haiwen can provide a full range of professional legal services, including merger control notification and the negotiation, implementation and supervision of remedy cases, antitrust administrative investigation, antitrust litigation, as well as the construction of antitrust compliance systems and the antitrust compliance consulting.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

In PRC (for the purposes of this article, the term “PRC” refers to the mainland of the People’s Republic of China, excluding the Hong Kong Special Administrative Region, the Macao Special Administrative Region and the Taiwan Region of the People’s Republic of China), Chapter IV of the Anti-Monopoly Law ((AML), amended and promulgated on 24 June 24 and effective as of 1 August 2022) serves as the fundamental legislation for the merger control regime. It provides the general rules, including the definition of the concentration of undertakings, the notifications mechanism, notification document requirements, the review procedures, the review criteria, etc.

Several regulations, guidelines and opinions act as indispensable supplements to the AML, including, among others:

- Provisions of the State Council on Thresholds for Notification of Concentrations of Undertakings (“Provisions on Notification Thresh-

olds”, amended and effective as of 22 January 2024);

- Provisions on the Review of Concentration of Undertakings (“Provisions on Concentration Review”, promulgated on 10 March 2023 and effective as of 15 March 2023);
- Anti-monopoly Compliance Guidelines for Concentration of Undertakings, issued on and effective as of 5 September 2023;
- Guidelines on Antitrust Compliance for Undertakings, issued on and effective as of 25 April 2024;
- Guiding Opinions on the Notification of Concentrations of Undertakings, Guiding Opinions on the Notification Documents and Materials for Concentration of Undertakings, and Guiding Opinions on Standardising the Case Titles of Notification of Concentrations of Undertakings, amended on and effective as of 29 September 2018;
- Guiding Opinions on the Notification of Simplified Cases of Concentration of Undertakings, promulgated on and effective as of 29 September 2018; and
- Guidelines for the Definition of Relevant Market, promulgated on and effective as of 24 May 2009.

1.2 Legislation Relating to Particular Sectors

Foreign Investment Regime

The Foreign Investment Law ((FIL), promulgated on 15 March 2019, and effective as of 1 January 2020) aims to regulate foreign investment activities, providing a legal framework for entry, promotion, protection and management of foreign investments. For industry sectors falling outside the “negative list”, the FIL implements the principle of consistency between domestic and foreign investments/investors and attaches no restrictive measure.

Specifically, the negative list identifies industry sectors in which foreign investors are prohibited or restricted. For the prohibited industries, foreign investors are fully prohibited from any form of investment, while they can have limited access to invest in restricted industries after satisfying certain requirements, including specific foreign capital ratios, executive restrictions or controlling shareholder restrictions, etc.

The negative list is updated regularly under the approval of the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) and the latest version came into effect on 1 January 2022.

National Security Review

See 9. Foreign Direct Investment/Subsidies Review.

Other Particular Sectors

Given the special nature of the financial industry, China implemented the Measures for Calculating the Turnover for the Notification of Concentration of Undertakings in the Financial Industry (“Calculating Measures for Financial Industry”).

In addition, several sector-specific antitrust guidelines issued by the State Council also contain issues related to merger control, including:

- Guidelines for Anti-monopoly in the Field of Active Pharmaceutical Ingredients (2021);
- Guidelines for Anti-monopoly in the Field of Platform Economy (2021); and
- Guidelines for Anti-monopoly in the Automotive Industry (2019).

1.3 Enforcement Authorities

Since the institutional reforms in 2018, the State Administration for Market Regulations (SAMR) has replaced MOFCOM as the sole enforcement authority responsible for reviewing the merger control notification. Specifically, the authority for merger control filing reviews rests with the Second Department of Antitrust Enforcement of SAMR.

In addition, the amended AML introduces a “classified and graded review” system. Shortly after, on 15 July 2022, SAMR announced a pilot programme (the Notice on Pilot Programme of Partial Delegation of Review of Concentration of Undertakings), detailing partial delegation of review works for simplified cases to five provincial-level administrations for market regulation (AMR), namely, Beijing AMR, Shanghai AMR, Guangdong AMR, Chongqing AMR, and Shaanxi AMR.

2. Jurisdiction

2.1 Notification

For any transaction that constitutes a “concentration of undertakings” (see 2.3 Types of Transactions) and meets the notification thresholds (see 2.5 Jurisdictional Thresholds), a prior notification must be filed with SAMR.

Nevertheless, the AML also provides certain exemption scenarios for certain notifiable transactions, typically for intra-group transactions, namely where:

- one undertaking to the concentration holds more than 50% of the voting shares or assets of each of the other undertakings; or
- more than 50% of the voting shares or assets of each of the undertakings to the concentration is held by an undertaking not participating in the concentration.

Additionally, where a concentration does not meet the notification thresholds, the undertakings to the concentration can still notify the transaction voluntarily to SAMR. Such voluntary filings may occur when the undertakings believe the transaction could potentially raise competition concerns, as exemplified by the Simcere/Tobishi case (2023) (see **10.2 Recent Enforcement Record**).

In non-notifiable cases, SAMR also has the discretion to require the undertakings to the concentration to submit the notification if it believes there is evidence proving the concentration has or may have the effect of eliminating or restricting competition.

2.2 Failure to Notify

According to Article 58 of the AML, in a failure-to-notify concentration, whereas competition concerns may arise, SAMR may order the undertakings to cease the implementation of concentration, dispose of the shares or assets or transfer the business within a time limit and/or take other necessary measures to restore to the status before the concentration, and impose a fine of up to 10% of the undertaking's sales revenues in the previous fiscal year. Where no competition

concern is found, SAMR may impose a fine of up to CNY5 million.

In PRC antitrust enforcement practice, the most commonly imposed sanction is a fine, as most cases are concluded by SAMR without finding competition concerns. The only case being deemed as having the effect of eliminating or restricting the competition was the Tencent/China Music Corporation (CMC) Case (2021) where SAMR determined that Tencent's acquisition of 61.64% of CMC's shares in 2016 constituted a failure to notify with competition concerns. As a result, Tencent was not only handed down a penalty of CNY500,000 (the maximum fine for failure to notify cases under the pre-amended antitrust law), but also ordered to restore competition in the online music broadcasting platform market by:

- not entering into exclusive agreements over copyrights;
- not requesting upstream copyright holders to provide Tencent with preferential terms over their competitors without justifications; and
- not excluding or restricting competition by pushing up the cost of competitors through high advance payment and other means.

Notably, SAMR has only published one failure-to-notify case since the amended AML took effect on 1 August 2022. It remains to be seen how and to what extent SAMR will apply and interpret the new penalty standard under the amended AML.

2.3 Types of Transactions

The AML and Provisions on Concentration Review have defined "concentration of undertakings" as:

- the merger of undertakings;

- acquiring control over other undertakings by acquiring their equities or assets; or
- acquiring control over other undertakings or the ability to exert a decisive influence on other undertakings by contract or any other means.

Therefore, the key factor in determining whether a transaction is caught by the AML is the change in control over other undertakings. This means that even if the transfer of assets or shares is not involved, any change in control (for example, through amendment of decision-making mechanisms for shareholders and/or the board of directors) may still cause the transaction to fall within the scope of the merger control review.

Internal restructuring or reorganisations under certain scenarios may be exempted (see **2.1 Notification**).

2.4 Definition of “Control”

Under the PRC merger control regime, “control” encompasses the control itself and the ability to exercise decisive influence over an undertaking, which includes both sole control and joint control.

Determining whether control has been obtained usually involves numerous legal and factual factors and is assessed on a case-by-case basis. Typical factors to be considered are as follows:

- the purpose of the transaction and future plans;
- the equity structure and the changes thereof;
- voting matters, voting mechanism, historical attendance and voting of the shareholders’ (general) meeting and other authorities;
- composition and voting mechanism of the board of directors and other decision-making or management bodies as well as the historical attendance and voting;
- appointment and dismissal of the senior executives;
- the relationship among the shareholders and directors of other undertakings, including whether there is any entrusted voting, concerted action, etc; and
- whether there is any material business relationship and co-operation agreement, among others, with other undertakings.

It is important to note that “control” under the AML differs from its definition under corporate law, as acquiring a minority interest may also constitute “control”. An undertaking, even with a minority shareholding, tends to be deemed to have “control” if it can exert decisive influence over the other undertaking on certain “red-flag” issues (eg, annual business plan, financial budget, appointment or dismissal of senior management, etc) through veto rights.

2.5 Jurisdictional Thresholds

The notification thresholds set out in the Provisions on Notification Thresholds are applied uniformly across all sectors. The current jurisdictional thresholds, which were recently increased for the first time since the implementation of the antitrust law, are as follows:

- the total global turnover of all the undertakings to the concentration in the last fiscal year exceeds CNY12 billion (approximately USD1.67 billion), and at least two of these undertakings each have a turnover of more than CNY800 million (approximately USD110.96 million) within PRC in the last fiscal year; or
- the total turnover within PRC of all the undertakings to the concentration in the last fiscal year exceeds CNY4 billion (approx-

mately USD0.55 billion), and at least two of these undertakings each have a turnover of more than CNY800 million (approximately USD110.96 million) within PRC in the last fiscal year.

2.6 Calculations of Jurisdictional Thresholds

For turnover calculation, only the net income from selling products and providing services in the last fiscal year shall be included, deducting relevant taxes and surcharges.

In addition, the Calculating Measures for Financial Industry has set up detailed calculation methods for the financial industry. It usually applies to financial undertakings with licences issued by the People's Bank of China, the China Banking and Insurance Regulatory Commission or the China Securities Regulatory Commission, including financial institutions in the banking industry, security companies, futures companies, fund management companies, insurance companies, etc.

As for the conversion of foreign currency, turnover is usually calculated by applying the China Central Bank's annual average central parity of exchange rate to the corresponding fiscal year.

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

Under the PRC antitrust regime, the threshold of an individual undertaking refers to the aggregate turnovers of all entities that have a direct or indirect relationship with that individual undertaking, including:

- the individual undertaking concerned;

- other undertakings under direct or indirect control of the individual undertaking concerned;
- other undertakings which directly or indirectly control the individual undertaking concerned;
- other undertakings under direct or indirect control of the undertakings specified in the bullet point above; and
- other undertakings under joint control of two or more undertakings under the first to fourth bullet points above.

The turnover of the individual undertaking concerned shall exclude the turnover generated between the undertakings listed above.

When an undertaking acquires parts of another undertaking (including assets or shares), and the seller no longer retains control or decisive influence over those parts, the turnover of the target parts should only encompass the turnover generated by those acquired parts excluding the seller's turnover.

When there is another undertaking jointly controlled by the undertakings to the concentration, or between the undertakings to the concentration and those not involved in the concentration, the turnover of the undertakings to the concentration shall encompass the turnover between the jointly controlled undertaking and a third-party entity. This turnover should be calculated once and evenly distributed among the undertakings to the concentration with joint control.

2.8 Foreign-to-Foreign Transactions

The criteria for notifying a concentration of undertakings applies to all types of transactions that meet the turnover thresholds, regardless of whether or not the transactions are foreign-to-foreign, and it doesn't require a test of local effect or local presence.

Where the target has no sale and/or assets in China, a notification is still required if there are two or more undertakings to the concentration and their turnovers have reached the notification thresholds.

2.9 Market Share Jurisdictional Threshold

There is currently no market share jurisdictional threshold in the PRC.

2.10 Joint Ventures

The establishment of a jointly controlled joint venture by two or more undertakings, which satisfies the notification thresholds, requires a notification, whereas a joint venture being solely controlled by one undertaking does not.

There are no special rules specified for the notification thresholds of the joint ventures.

2.11 Power of Authorities to Investigate a Transaction

In cases where a concentration falls below the notification thresholds but raises competition concerns, SAMR can require the involved undertakings to notify the concentration. If the undertakings fail to submit a notification after being requested, and SAMR believes there is evidence indicating that the concentration may eliminate or restrict competition, an investigation will be launched.

However, it is still unclear as to how SAMR obtains the so-called “evidence”, what are the criteria for review, what is the process of investigation, etc, and no statutory limitation in this regard has been published.

2.12 Requirement for Clearance Before Implementation

Undertakings shall not implement the concentration until clearance.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Implementing a concentration before clearance is treated the same as failure-to-notify cases, and incurs the same penalties (see 2.2 Failure to Notify), regardless of the nationality of undertakings involved.

The penalty decisions are public on SAMR’s official website under the “Administrative Penalty Cases” section.

2.14 Exceptions to Suspensive Effect

The PRC antitrust legislative regime does not explicitly provide any exceptions to the suspensive effect or possible waiver or derogation from the suspensive effect. In practice, undertakings may communicate with SAMR for special circumstances (eg, public bids) and possible acceleration of the review process.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

According to the AML, the undertakings shall not implement the concentration before clearance. Based on the knowledge of the authors, there are no known instances in practice where SAMR has allowed closing before clearance.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

The AML and relevant regulations do not provide an explicit deadline for notification, while it

requires that the undertakings shall not implement the concentration before SAMR's clearance, otherwise penalties may be imposed as mentioned in **2.13 Penalties for the Implementation of a Transaction Before Clearance**. In practice, the undertakings typically submit the notification after signing the transaction agreement.

For concentrations that have already been implemented and are deemed to have or may have competition concerns, the undertakings must submit a supplemental notification within 120 days upon receipt of SAMR's request.

3.2 Type of Agreement Required Prior to Notification

A binding agreement between undertakings for the future implementation of concentration is required, which may include transaction agreements, contracts of the concentration and corresponding supplementary documents, etc.

3.3 Filing Fees

There are no filing fees for the notification of concentration.

3.4 Parties Responsible for Filing

In a merger concentration, all undertakings to the concentration are obliged to file the notification, while in other forms of concentration, the undertaking that obtains control is responsible for filing. When several responsible undertakings are identified, one undertaking can be appointed and entrusted to file the notification. However, this doesn't exempt the other undertakings from the obligation to submit the notification if the appointed undertaking fails to do so.

3.5 Information Included in a Filing

To file a concentration, the responsible undertakings must complete and submit main documents and materials to SAMR as follows:

- the notification form (including the name, domicile and scope of business of the undertakings, the nature of the concentration, the background of the concentration and the scheduled date of implementation, the power of attorney (if any), etc);
- analysis of the concentrations' impact on the competition in the relevant market;
- the executed transaction documents, including agreements, contracts and the supplementary documents thereto;
- the audited financial and accounting reports of each undertaking to the concentration; and
- other documents and materials required by SAMR.

If the original materials were written in foreign languages, preparation of a Chinese translation is necessary. In the case the materials are lengthy, at least a Chinese summary shall be prepared, and SAMR may further require a full version document when deemed necessary. Additionally, foreign undertakings shall also submit notarised and apostilled identity/registration certificates to SAMR. With the Hague Convention coming into force in China in November 2023, SAMR now in practice accepts either Hague-apostilled or foreign consular-apostilled documents.

3.6 Penalties/Consequences of Incomplete Notification

If the initial submission of the notification form and relevant documents is deemed incomplete, it will not automatically lead to any penalties or negative consequences; instead, SAMR will issue a request for supplementary information. In fact, SAMR will accept a case and begin the

formal review process only upon receipt of complete notification documents.

During the review process, SAMR may request additional materials from the undertakings, which usually shall be provided within the specified time limit. Failure to do so may trigger the “stop-the-clock system” mechanism. See **3.10 Requests for Information During the Review Process** for detailed information.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Undertakings that deliberately provide false materials or information will be ordered by SAMR to make corrections and may be fined up to 1% of their sales revenues in the previous year. If the undertaking has no sales revenues in the previous year or it is difficult to calculate a specific number, the fine can be up to CNY5 million. Responsible individuals may also be fined up to CNY500,000. Where the provision of misleading information is severe, the fines may be escalated to between two and five times the initial amounts. In addition, undertakings punished by SAMR for these offences will be recorded in the PRC credit system and disclosed to society.

These penalties have not been applied in practice since the amended AML came into effect in 2022.

3.8 Review Process

Upon the formal acceptance of the notification, theoretically, SAMR’s review may include the following phases (the time period before the formal acceptance has not been counted hereafter).

- Phase I: Maximum 30 days. SAMR will review the materials and documents after its formal acceptance of the case and decide whether to conduct further review.

- Phase II: Maximum 90 days. SAMR will notify the undertakings of its decisions regarding further review of the notification in writing.
- Phase III: Maximum 60 days. SAMR may further extend the review where:
 - (a) the undertakings agree to extend the review period;
 - (b) the documents and materials submitted by the undertakings are inaccurate and need to be further verified; or
 - (c) major change has occurred to the undertakings after the filing of the notification.

That being said, not all cases in practice would involve the aforementioned three phases. Simplified cases are typically cleared before Phase I expires, while normal cases may extend to Phase II or even Phase III (especially for those with potential competition concerns).

It is worth mentioning that with the introduction of the stop-the-clock mechanism, the calculation of review period can be suspended. See **3.10 Requests for Information During the Review Process** for detailed information.

3.9 Pre-notification Discussions With Authorities

Pre-notification discussion is not a mandatory procedure, while it is normally welcomed by SAMR. The application for a pre-notification discussion shall be made in writing, including the basic information of the transaction, specific issues to discuss, proposed time, and contact information. This process is treated as confidential and is more commonly observed in complex cases, where the undertaking would like to seek guidance on issues such as whether a concentration is notifiable or how to define the relevant markets.

3.10 Requests for Information During the Review Process

The rounds and burden of information requests (RFI) vary from case to case. For relatively straightforward concentrations without anti-competitive effects, one to three rounds of RFIs may be involved before clearance. However, for more complex concentrations or those with potential anti-competitive effects, SAMR may issue more RFIs. Addressing RFIs will not suspend the review period.

Having said that, if the undertaking fails to submit the required supplementary information, the stop-the-clock mechanism may be applied and SAMR may decide to suspend the calculation of the review period. Besides this, under the stop-the-clock mechanism, SAMR may also suspend the review period where:

- new circumstances or facts significantly impact the review of the concentration, making it impossible to proceed without verification; or
- the remedy proposal requires further evaluation and the undertakings request a suspension.

3.11 Accelerated Procedure

Concentrations reviewed through the simplified procedure are typically cleared within Phase I, which could be considered a fast-track. To qualify for the simplified procedure, the concentration must meet at least one of the following conditions:

- where, in the same relevant market, the combined market share of the undertakings to the concentration is below 15%;
- where, in upstream and downstream markets, the market share of each undertaking to the concentration is below 25%;

- where the market share of the undertakings to the concentration, not in the same relevant market nor with an upstream or downstream relationship, is below 25% in each market related to the transaction;
- where an undertaking to the concentration establishes a joint venture outside the PRC that does not engage in economic activities in the PRC;
- where an undertaking to the concentration acquires the equity or assets of an overseas enterprise that does not engage in economic activities in the PRC; or
- where a joint venture jointly controlled by two or more undertakings becomes controlled by one or more of these undertakings through the concentration.

Notably, at a press conference held by the State Council Information Office in January 2024, SAMR introduced a “20-20” internal working requirement applied for simplified cases – ie, in general, the period from the undertaking’s filing of the notification to SAMR’s official acceptance should not exceed 20 days, and that from official acceptance to clearance should not exceed 20 days. Therefore, a more efficient review regime for simplified cases can be expected.

4. Substance of the Review

4.1 Substantive Test

Article 33 of the AML generally introduces the factors to be considered in assessing the competition effects, which are detailed in the Provisions on Concentration Review, as follows:

- the market shares and market control power in the relevant market of the undertakings to the concentration;

- the degree of market concentration of the relevant market;
- the impact of the concentration of undertakings on market entry and technological advancement;
- the impact of the concentration of undertakings on consumers and other relevant undertakings;
- the impact of the concentration of undertakings on the development of the national economy; and
- other factors affecting market competition that are necessary to consider.

Article 34 of the AML provides that a concentration shall be prohibited if it has or may have the effect of eliminating or restricting competition. However, if the undertakings can prove that the positive impact of the concentration on competition significantly outweighs the negative impact, or that the concentration aligns with the public interest, SAMR may decide not to prohibit the concentration.

4.2 Markets Affected by a Transaction

Relevant markets under the AML include both product market and geographical market and the scope of a relevant market mainly depends on the extent of substitutability of a product/geographic area.

Relevant Product Market

Defining the relevant product market, SAMR will consider both demand-substitution aspects and supply-substitution aspects factors. Specifically:

- for demand-substitution aspects, factors including consumers' intent to switch from one product to another due to changes in price or other competition factors, overall characteristics of products (such as shape, features, quality and technical features), price

- difference, selling channels and other factors like consumer's preference or dependence of the product will be evaluated; and
- for supply-substitution aspects, factors including evidence that other undertakings' response to changes in product price and other competition factors, other undertakings' production process and technologies, difficulties in switching to other products, time required for such production switch, additional cost and risks for such production switch, market competitiveness of switched products and marketing channels will be considered.

Relevant Geographic Market

Similar to the relevant product market, substitution factors of the geographic markets are also considered from both demand and supply aspects. Specifically:

- for demand-substitution aspects, evidence that consumers switch to the purchase of products in other geographic areas in response to changes in product price or other competition factors, transportation costs and characteristics, main areas from which consumers choose to purchase products and to which undertakings sell products, regional barriers like tariff and local regulations, and other factors like consumers's preference will normally be the major factors; and
- for supply-substitution aspects, the factors to be taken into account generally include evidence of the response of the undertakings in other areas to the changes in product price and other competitive factors, the promptness and feasibility to supply or sell relevant products by the competitors in other geographic areas, for instance, customer's cost for switch orders for the products to the competitors in other areas, etc.

There is no de minimis level used for evaluating the competitive concerns. However, the market share level applied in defining simplified cases might serve as a reference to some extent (see **3.11 Accelerated Procedure**).

4.3 Reliance on Case Law

Though previous cases are not legally binding under the PRC antitrust regime, they may serve as valuable references, particularly on key issues such as relevant market definition and competition analysis, for SAMR when reviewing notifications.

As regards the precedents in foreign jurisdictions, SAMR may refer to them as appropriate and necessary as the review needs. Among these foreign precedents, EU cases normally receive the most attention.

4.4 Competition Concerns

Though the PRC antitrust legislative regime does not explicitly specify the competition concerns, SAMR typically examines and investigates competition concerns mainly from three aspects as follows:

- unilateral effects – to evaluate if the concentration may create or strengthen the ability, incentive or possibility of an individual undertaking to unilaterally exclude or restrict competition in the relevant market;
- co-ordinated effects – to evaluate if the concentration may jointly create or strengthen the ability, incentive or possibility of two or more undertakings to co-ordinate to exclude or restrict competition in the relevant market; and
- foreclosure effects – to evaluate if the concentration may create or strengthen the ability of the undertaking(s) to foreclose competitors' access to inputs or customers.

Generally speaking, SAMR's focus on identifying and examining the competition concerns differs in various types of concentrations. Specifically, co-ordinated effects are examined in almost all types of concentrations, while unilateral effects are more commonly examined in horizontal concentrations and those that are neither horizontal nor vertical. Foreclosure effects are typically only examined in non-horizontal concentrations.

4.5 Economic Efficiencies

It is reasonably believed that SAMR would consider economic efficiency as a crucial factor in its review process, not only because Article 1 of the AML includes the economic efficiency improvement as an objective, but also because Article 34 allows SAMR to approve a concentration with anti-competitive effects if it could be demonstrated that such concentration could yield significant pro-competitive efficiencies outweighing its negative impact on competition.

Having said that, SAMR's approach to assessing and weighing economic efficiencies lacks detailed regulations and established precedents.

4.6 Non-competition Issues

Non-competition issues, including national security, industrial policy and national economic development, etc, will also be considered by SAMR when reviewing the notifications. This is in fact in line with the legislative purpose of the AML, safeguarding the interests of consumers and the public and promoting the sound development of the socialist market economy.

In practice, SAMR sometimes is not the only government department involved in the review of a transaction, and other relevant government agencies may also need to provide their opinions on the transaction during SAMR's solicitation period. Undertakings would need to address the

concerns and comments they may have. (see **7.2 Contacting Third Parties**).

Such circumstances occur more frequently when it comes to high-profile cases. For example, in the Samsung/Seagate Case (2011), the Western Digital/Hitachi Case (2012) and the MaxLinear/Silicon Motion Case (2023), the sector regulators and trade associations were also involved. Undertakings would have to address the concerns and comments regarding the industry development from the stakeholders.

For information related to FDI, see **9. Foreign Direct Investment/Subsidies Review**.

4.7 Special Consideration for Joint Ventures

In the PRC, joint venture concentrations are subject to the same substantive review as other types of concentrations. While there are no explicit rules regarding co-ordination issues between joint venture parents in the notification review, it is indeed one of SAMR's focuses during its review, especially in high-profile transactions, as evidenced by several cases.

For instance, in the P3 Network shipping alliance Case involving Maersk, MSC and CMA CGM in 2014, MOFCOM believed the proposed establishment of a new network alliance would consolidate these top three competitors in the relevant market, potentially harming competition, and subsequently decided to prohibit the case. Furthermore, in the Zhejiang Garden Biochemical High-Tech and Royal DSM's establishment of a joint venture case, which was cleared with remedies, SAMR mentioned in its competition analysis that the concentration may substantially increase concentration in the relevant market, thereby increasing the incentives and ability of the deal parties to co-ordinate prices.

Additionally, unlike the EU, the PRC antitrust legislative regime does not make a distinction between "full-function" and "non-full-function" joint ventures. Even joint ventures that do not independently carry out business activities in the market, or SPV joint ventures, may trigger a notification of a concentration.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

If the concentration has or may have the effect of eliminating or restricting competition, and the proposed remedies are able to mitigate and reduce the adverse effect effectively, SAMR may approve the concentration with restrictive conditions; if the undertakings fail to propose remedies within the prescribed period or the proposed remedies cannot effectively reduce the anti-competitive effect, SAMR shall render a decision prohibiting the concentration.

5.2 Parties' Ability to Negotiate Remedies

SAMR will notify the undertakings when it believes that the concentration has or may have the effect of eliminating or restricting competition. The undertakings to the concentration have the option to propose remedies, including structural remedies, behavioural remedies, or a combination of both, to address and mitigate potential anti-competitive effects of the concentration. If SAMR considers the proposed remedies as insufficient, it may negotiate with the undertakings and require them to submit other commitment proposals within a reasonable time limit.

Typical Remedies in Practice

Structural remedies

Structural remedies include divestiture of tangible assets, intangible assets such as intellectual property and data, or related rights, and are typically used in practice.

Both “upfront buyer” and “fix-it-first” rules have been applied in the precedents involving structural remedies. For example, “upfront buyer” divestiture remedies were observed in the NXP/Freescale Case (2015) and the Dow Chemical/DuPont Case (2017). In these cases, the parties were required to propose a purchaser and were prohibited from completing the main transaction following the conditional approval until they have entered into a binding divestiture agreement with the proposed purchaser which shall be approved by the MOFCOM. “Fix-it-first” divestiture remedies were imposed in the ABI/SABMiller Case (2016) and the Abbott/St Jude Medical Case (2016). In such cases, the parties were required to seek a remedy purchaser and sign a divestiture agreement before obtaining conditional clearance of the main transaction.

However, more recent divestiture conditions in structural remedies have followed “classic” procedure – ie, the parties could close the main transaction first after obtaining the clearance but are required to find a purchaser and divest the relevant business within a fixed time limit after the conditional clearance. Recent examples include the Tobishi/Simcere Pharma Case (2023), the GlobalWafers/Siltronic Case (2022), the Danfoss/Eaton Case (2021), etc.

Behavioural remedies

Behavioural remedies include but are not limited to opening up infrastructure (such as networks or platforms), licensing key technologies (including patents, proprietary technology, or

other intellectual property), terminating exclusive or monopolistic agreements, maintaining independent operations, modifying platform rules or algorithms, committing to compatibility or not lowering the level of interoperability, and are also very common in the remedy cases. Those commonly seen behavioural remedies could be basically divided into two major categories:

- (i) supply commitments (such as ensuring stable and reliable supply – the Linde/Praxair Case (2018); following fair, reasonable, and non-discriminatory principles – the GlobalWafers/Siltronic Case (2022); refraining from tie-in sales or bundling or refusal/restrictions on supply without justification – the Samsung Electronics/HP Case (2017) and the MTS/Illinois Case (2021)); and
- price commitments (such as setting an upper limit price for specific products – the Dow Chemical/DuPont Case (2017); refraining from increasing prices without justification – the Cargotec/TTS Case (2019); decreasing prices – the Life Technologies/Thermo Fisher Case (2014)).

Combination of structural and behavioural remedies and other remedies

A combination of behavioural and structural remedies can also be adopted and imposed under certain circumstances, such as the Novelis/Aleris Case (2019), the Danaher/GE Biopharma Case (2020), the GlobalWafers/Siltronic Case (2022), the Tobishi/Simcere Pharma Case (2023), etc.

The competition authority has in the past imposed “hold-separate” remedies, mandating that undertakings operate independently in various aspects such as management, sales, and R&D for a specified period after closing. This practice was observed in cases such as the

Samsung/Seagate Case (2011) and the Cargotec/TTS Case (2019).

Remedies to Address Non-competition Issues

As mentioned above, SAMR would consider non-competition issues, such as industrial policy, during the review process, aligning with the legislative intent of the AML – ie, protecting consumers and promoting the socialist market economy (see 4.6 Non-competition Issues). In certain cases, remedies may likely be aimed at addressing non-competition issues, for example, in the AMD/Xilinx Case (2022), the undertaking commits to further facilitate co-operation with Chinese companies on the basis of existing co-operation, which can be seen to some extent as addressing industrial policy concerns due to Chinese customers' concerns about supply stability and security.

5.3 Legal Standard

Upon receiving the proposed remedies from the undertakings to the concentration, as prescribed by Article 39 of the Provisions on Concentration Review, SAMR will assess the effectiveness, feasibility, and timeliness of such proposed remedies and promptly inform the undertakings of the assessment results. Although the PRC anti-trust legislation regime does not elaborate on the detailed standards in this regard, fundamentally, SAMR is concerned with whether the remedies can effectively mitigate the anti-competitive impacts caused by the transaction. Thus, if SAMR believes that the proposed remedies are sufficient to realise such intent, the remedies may be deemed acceptable and the concentrations would be conditionally approved; otherwise, SAMR may negotiate the remedies with the undertakings, or request them to propose alternative remedies within a reasonable time-frame. If sufficiently effective remedies cannot

ultimately be realised, the concentration may be prohibited.

5.4 Negotiating Remedies With Authorities

In principle, the undertakings to the concentration can begin negotiating remedies with SAMR at any stage of the review process, as it is the undertakings that own the initiative to propose the remedies. However, in practice, the proposal for remedies and subsequent negotiations typically arise after SAMR identifies the substantial competition concerns and notifies the undertakings, which usually occurs at later stages during the review process, such as Phase II and Phase III.

Negotiating remedies is a relatively interactive process in practice. Initially, the undertakings often submit their proposed remedies along with a corresponding commitment plan. Following this, as mentioned above, SAMR conducts an assessment focused on the effectiveness, feasibility, and timeliness of these proposals. If SAMR finds the initial proposals from the undertakings insufficient to address potential anti-competitive effects, it may suggest modifications or negotiate further on the parameters and scope of the remedies. However, such proposals by SAMR do not directly exert coercive force; instead, all remedies are the results of the mutual agreement between the undertakings and SAMR. Therefore, such negotiations and modifications may involve multiple rounds before the remedies and the commitment plan are finalised and imposed.

It is worth noting that, according to Article 26 of the Provisions on Concentration Review, upon the undertakings' application, the calculation of the review period may be suspended whilst SAMR evaluates the proposed remedies and the commitment plan, if SAMR deems it necessary.

5.5 Conditions and Timing for Divestitures

Conditions and Timing for Divestitures

Conditions for divestitures

The fundamental requirement for divestitures is that they must address or mitigate any actual or potential negative impact on the competition in a feasible, effective and prompt manner. Furthermore, the Provisions on Concentration Review outlines that, prior to the completion of divestitures, the undertakings to the concentration must adhere to the following obligations to ensure the existence, competitiveness, and marketability of the divested business.

- Maintain the independence of the divested business from the undertakings' retained business and manage it in the best interest of the divested entity.
- Refrain from any actions that could negatively affect the divested business, such as hiring key employees from the divested entity or obtaining its confidential information, trade secrets or other confidential information of the divested business.
- Designate a dedicated manager responsible for managing the divested business.
- Provide potential buyers with fair and reasonable access to sufficient information about the divested business to evaluate its commercial value and development potential.
- Offer necessary support as requested by the buyer to facilitate a smooth transition and ensure the stable operation of the divested business.
- Hand over the divested business to the buyer and fulfill any relevant legal procedure.

Timing for divestitures

As per Article 48 of the Provisions on Concentration Review, the undertakings to the concentration are obligated to find a purchaser for the

divested business within a specified period as defined in the conditional clearance decision. If this timeframe is not specified, then the undertakings have six months from the conditional clearance to secure a buyer. SAMR retains the authority to extend this period by up to three months if deemed necessary. In instances where the parties fail to secure a buyer within the designated timeframe, SAMR is empowered to designate a divestiture trustee to oversee this process. The actual divestment must be finalised within three months of executing the divestiture agreement, unless SAMR approves an extension upon request from the undertakings.

Typically, the completion of the primary transaction occurs before the full divestiture process is finalised. However, depending on specific circumstances, such as the "fix-it-first" rule or the "upfront buyer" rule applied by SAMR, the divestment may need to be initiated or concluded prior to the finalisation of the main transaction.

Failure to Comply with Commitments Under the Remedies

According to Articles 58, 63 and 64 of the AML, if the undertakings fail to fulfill the obligations and commitments under the remedies, the following legal liabilities may arise.

- If the failure to comply with the remedies does not have the effect of eliminating or restricting competition, SAMR may impose a fine of up to CNY5 million.
- If the failure to comply with the remedies results in or may result in the elimination or restriction of competition, SAMR may order the termination of the concentration, disposal of shares or assets within a specified period, temporary divestiture of business, and other necessary measures to restore the status quo

ante, and impose a fine of up to 10% of the undertaking's turnover in the previous fiscal year of the previous year.

- In cases of particularly serious circumstances, exceptionally adverse effects, or particularly serious consequences, SAMR may impose a fine of up to 50% of the undertaking's turnover in the previous fiscal year.
- The administrative penalty decision will be announced to the public and recorded in the undertaking's credit record.

5.6 Issuance of Decisions

SAMR will issue a formal decision to the parties, permitting or prohibiting a concentration. It will also publish the results of all merger control reviews on its official website on a regular basis, including unconditional approvals, conditional approvals and prohibitions, although the scope of disclosure varies. For those unconditionally approved cases (including those processed through normal and simplified procedures), SAMR will periodically disclose the case name, the undertakings to the concentration and the date of approval. For conditional approvals and prohibitions, a more detailed decision will be published, and such decision, with certain confidential information being redacted, usually includes the review timetable, basic information about the undertakings, relevant defined market(s) and competition analysis, the remedies imposed (if any), etc.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

SAMR does not treat foreign-to-foreign transactions more strictly and foreign-to-foreign transactions undergo the same merger filing review and competition assessment process as other transactions. For cases that have or may have the effect of eliminating or restricting competition in the PRC market, regardless of whether they

are domestic transactions or foreign-to-foreign transactions, SAMR may impose prohibitions or remedies. Among remedy cases in recent years, there have been both foreign-to-foreign transactions and domestic transactions.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Under the PRC antitrust legislation regime, there is neither specific terminology nor explicit rules for ancillary restraints, at least not in the manner observed in the EU competition law regime.

Having said that, according to the requirements indicated in the Notification Form for Anti-monopoly Review of Concentrations of Undertakings, the undertakings are required to disclose and include in the filing documents any major horizontal or vertical co-operation agreements in the relevant markets or other arrangements between the undertakings. This includes agreements or arrangements related to research and development, licensing, joint production, distribution, long-term supply, and information exchange, among others. Therefore, SAMR may take these relevant agreements or arrangements into account when conducting a competition assessment during the merger control filing review process.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third parties are allowed to participate in the review process in various forms and to varying

extents. For cases under the normal procedure, upon solicitation by SAMR during the review process, third parties, including but not limited to customers, competitors, trade associations, and the sector regulator, are encouraged to provide comments and opinions on the concentration and market and product-related issues (see **7.2 Contacting Third Parties**). For cases under the simplified procedure, during the ten-day public notice period following the date of case acceptance, third parties may submit written comments, such as opinions on the definition of the relevant market, market share or whether the case should apply a simplified procedure.

Furthermore, according to Article 43 of the Provisions on Concentration Reviews, any entity or individual that discovers a concentration, which does not meet the notification thresholds but may have the effect of eliminating or restricting competition, can report to SAMR in writing, along with relevant facts and evidence.

7.2 Contacting Third Parties

SAMR can engage various third parties, including relevant government departments, trade associations, competitors, upstream and downstream undertakings, consumers, experts, and scholars, when deemed necessary in its review process by means of written meeting, questionnaire, entrusted consultation, on-site survey, etc, as mandated by Article 30 of the Provisions on Concentration Review. In practice, such involvement is more common in cases undergoing the normal procedure. Additionally, SAMR may organise hearings during the review process, if deemed necessary.

Moreover, during the negotiation of the proposed remedies, SAMR usually conducts market tests and solicits comments and feedback from third

parties to assess the effectiveness, feasibility, and timeliness of the proposed remedies.

7.3 Confidentiality

SAMR bears a legal obligation of confidentiality for the undertakings' trade secrets, undisclosed information, confidential business information, and personal information known to them during the review process. The undertakings are required to submit a confidential version of the notification documents containing comprehensive information, as well as a non-confidential version (where the undertakings can redact relevant confidential information) which may be circulated to third parties to solicit comments.

The disclosure of the notification and/or description of the concentration varies.

- During the review period, only in respect of cases under the simplified procedure will SAMR publish a notice form on its website for public comments for a period of ten days, upon its formal acceptance of the case. The notice form includes introductions of the undertakings, a summary of the transaction, the basis for the simplified procedure, the defined relevant markets and a range of market shares of the undertakings.
- Upon unconditional approval (including cases under the simplified procedure and normal procedure), SAMR will publish certain basic information of the notification on a weekly basis, including the case name, the undertakings to the concentration and the date of approval, while the full decisions are not publicly available.
- For decisions on prohibition and conditional clearance, SAMR will publish the full decisions on its official website, with certain confidential information being redacted. These decisions usually include the review timeta-

ble, basic information about the undertakings, relevant market and competition analysis, the remedies/prohibition imposed, etc, (see 5.6 Issuance of Decisions).

7.4 Co-operation With Other Jurisdictions

SAMR places high importance on, and actively engages in, communications and co-operation with other jurisdictions concerning general competition policy. For instance, SAMR has signed memoranda of understanding with many enforcement agencies in other jurisdictions, including the EU, the USA, Singapore, South Korea, Japan, Brazil, etc. Additionally, SAMR and authorities from other jurisdictions engage in mutual visits and meetings from time to time. To date, SAMR and the European Commission have successfully hosted 27 sessions of the China-EU Competition Policy Week. Most recently, on 18 March 2024, SAMR hosted the European Commission's delegation in Beijing, where they conducted the China-EU competition policy dialogue and discussed fair competition review and other related issues. Previously, in 2019, SAMR led delegations to Serbia, Morocco, Portugal, South Korea, Japan, and the Philippines, engaging in high-level exchanges on competition policy and antitrust enforcement. Through these activities, SAMR and authorities from other jurisdictions exchange information about their significant policies, legislative updates, and enforcement actions, etc.

In terms of co-operation on specific cases, it is relatively common for PRC competition authorities to collaborate with other jurisdictions since the era when the Ministry of Commerce served as the authority responsible for merger control filing review. Particularly in high-profile, complex cross-border merger cases triggering filing obligations in multiple jurisdictions, SAMR

may co-operate with involved jurisdictions and exchange information on relevant issues such as relevant market definitions, competition landscape, assessment of competition impact, etc. For example, in recent years, SAMR co-operated with the antitrust authorities in Korea, the US and the European Union on cases such as the Korean Air/Asiana Airlines Case (2022), the Ammo/NVIDIA Case (2022), and the Eaton/Danfoss Case (2022). For specific cases, before conducting case co-operation with authorities from other jurisdictions, SAMR usually seeks permission from the undertakings.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

According to Article 65 of the AML, if the undertakings to the concentration are dissatisfied with SAMR's decision on prohibition or conditional clearance, they may first appeal to SAMR for administrative reconsideration. If the undertakings are still not satisfied with the outcome, they can then initiate an administrative action to challenge SAMR's decision before the People's Court.

8.2 Typical Timeline for Appeals

The PRC antitrust legislation regime does not explicitly prescribe the timeline for such appeal and it shall follow the general rules under the Administrative Reconsideration Law. Accordingly, the parties may appeal to SAMR for administrative reconsideration within 60 days upon receiving the clearance decision. If the parties are still not satisfied with the reconsideration outcome, they may bring an administrative litigation within 15 days of receipt of SAMR's administrative reconsideration decision.

Based on the knowledge of the authors, there is no public track record of successful appeals in practice.

8.3 Ability of Third Parties to Appeal Clearance Decisions

The PRC antitrust legislation regime lacks clear regulations on this matter, while general principles in relevant administrative laws provide some guidance. According to Article 2 of the Administrative Reconsideration Law and Article 28 of the Regulations for the Implementation of Administrative Reconsideration Law, individuals, legal entities, or other organisations with an interest in specific administrative actions may apply for administrative reconsideration. Additionally, as per Article 25 of the Administrative Procedure Law, parties directly affected by administrative actions, as well as other individuals, legal entities, or organisations with an interest, have the right to file administrative lawsuits. Given such, theoretically, third parties with an interest in SAMR's decisions can appeal through administrative reconsideration or administrative litigation. Nevertheless, based on the knowledge of the authors, there is no public track record of such successful appeals from third parties in practice.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements Foreign Subsidies Legislation

There isn't a separate filing procedure specifically for foreign subsidies prior to the implementation of the transaction, while the authority to initiate an investigation remains within the Trade Remedy Investigation Bureau under MOFCOM as prescribed in the Anti-subsidy Regulations (amended on 31 March 2004 and effective as of

1 June 2004). These regulations empower the Trade Remedy Investigation Bureau under MOFCOM to investigate instances where foreign subsidies granted by foreign governmental bodies or public institutions cause substantial damage or threat of substantial damage to an established domestic industry or substantial hindrance to the establishment of a domestic industry.

NSR Regime

Another prior approval procedure that may be required in foreign investment is the national security review (NSR) regime. Initially established in 2011 and reiterated in the Foreign Investment Law, this regime was further detailed in the Measures for the Security Review of Foreign Investment (promulgated on 19 December 2020, and effective as of 18 January 2021, (the "NSR Measures")), which outline the scope, procedures, and criteria for conducting national security reviews on foreign investment projects.

The NSR regime applies to two main scenarios:

- investments made by foreign investors in China's military, military-industrial supporting and other fields relating to the security of national defence, and investments in areas surrounding military facilities and military industry facilities; and
- foreign investors' acquisition of control over Chinese domestic businesses engaged in critical sectors such as agriculture, energy and resources, equipment manufacturing, infrastructure, transportation services, cultural products and services, IT-related or internet products and services, financial services, key technologies, and other critical sectors.

For foreign investment under such scenarios, it is notifiable in front of the NSR working mechanism office (the "Office") led by the National

Development and Reform Commission and the MOFCOM. This Office is institutionally situated within the NDRC.

The NSR process unfolds in three phases.

- The preliminary review phase, lasting up to 15 working days, where the Office determines whether the foreign investment triggers a national security review.
- The general review phase, lasting up to 30 working days.
- The special review phase, lasting up to 60 working days and activated if the foreign investment poses or potentially poses a threat to national security. This phase may be extended under exceptional circumstances. Importantly, during the review, the Office can pause the review period while awaiting responses to information requests from the parties.

If the Office identifies national security concerns during its review, undertakings involved may be compelled to either abandon the transaction, unwind it (if already completed), or implement remedial measures to address the identified concerns.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

In the recent PRC antitrust regulatory landscape, the most significant legislative change remains the amendment to the AML, which came into effect on 1 August 2022. Following this, from early 2023 to June 2024, substantial changes were made by introducing supporting merger review regulations and relevant guidelines, which underscore SAMR's efforts to implement

a series of regulatory reforms aiming to foster a more dynamic and practical merger control regime.

Provisions on Concentration Review – the “All-Inclusive” Rules Concerning Merger Control Review

Provisions on Concentration Review, serving as the most comprehensive rules for the merger control review regime, build upon most of the previous merger control review rules found in the Interim Provisions on the Review of Concentrations of Undertakings and other relevant regulations, and introduce several notable changes and amendments, including:

- optimisation of the factors used to determine “control” under the merger control filing requirement;
- clarification of notification and investigation procedures for transactions that do not meet notification thresholds but raise competition concerns, a move often interpreted as aimed at addressing killer acquisitions;
- clarification of the standard of “last fiscal year” in turnover calculation for undertakings involved in the concentration;
- refinement of the “stop-the-clock” mechanism;
- reaffirmation of the grading and classification system for merger control review (ie, delegating some cases to provincial administration for market supervision); and
- optimisation of the whistle-blowing mechanism.

Provisions on Notification Thresholds – The First Amendment Raising the Notification Turnover Thresholds

Provisions on Notification Thresholds, the first amendment to the turnover thresholds since the enactment of the AML in 2008, raise the turnover

thresholds – concentrations meeting the following thresholds must be notified to the competition authorities prior to implementation (see **2.5 Jurisdictional Thresholds**).

Additionally, the Provisions on Notification Thresholds reiterate the authority of competition authorities to investigate transactions falling below the thresholds if there is evidence indicating actual and potential anti-competitive effects.

The Notice of the State Administration for Market Regulation on the Establishment of the Anti-Monopoly “Three Documents and One Letter” System – a “Soft” Administration Approach

This notice, issued in December 2023, marks the official establishment of the “Three Documents and One Letter” system. Under such system, before officially probing into and accepting a failure-to-notify case, the authorities can issue the Reminder Letter to the target undertaking and such undertaking shall report to the authorities in writing of the implementation situations. If the matters being instructed to rectify under the Reminder Letter are overdue or not sufficiently implemented, the authorities can issue the Notice of Regulatory Talk and the undertaking shall report in writing of the rectification measures. If the undertaking still fails to notify the concentration within required time, the authorities shall accept the case and initiate the investigation officially.

Other Relevant Legal Documents That Have Been or to be Published

In pursuit of a more practical, transparent and dynamic merger filing review framework, the authorities have issued other relevant legal documents, including the Anti-monopoly Compliance Guidelines for Concentration of Undertakings (issued on and effective as of 5 September 2023)

and the Guidelines on Antitrust Compliance for Undertakings (issued on and effective as of 25 April 2024). Also, SAMR is currently revising and soliciting comments on the Horizontal Concentration Review Guidelines, the Notification Form and Notice Form for Simplified Cases. Additionally, it is noteworthy that, as confirmed by SAMR, criteria for administrative penalties for illegal concentrations, and the rules for handling cases that do not meet the filing thresholds but may have anti-competitive effects have been included in its upcoming legislative plan.

10.2 Recent Enforcement Record

Failure-to-Notify Cases

SAMR has only published one failure-to-notify case, on 7 June 2024, since the issuance of the revised AML in June 2022. In this case, SAMR imposed a fine of CNY1.5m (approximately USD0.21 million) on each of the two shareholders for establishing a joint venture without notifying a concentration of undertakings.

However, given that the revised AML significantly increases administrative penalties for failure-to-notify cases, the lack of sufficient reference cases makes it unclear whether the penalty level in this case is moderate. Therefore, it remains to be seen what the “median” level of penalties for failure-to-notify cases will be.

Prohibited Cases

As mentioned above, since the implementation of the AML in 2008, only three concentrations have been prohibited by the PRC competition authorities. The latest case that has been prohibited is the Douyu/HUYA Case (2021) relating to the gaming streaming market, with both undertakings being local entities.

Cases Cleared with Remedies

From early 2023 to June 2024, SAMR conditionally cleared five cases, including:

- the Wanhua Chemical/Yantai Juli Case in the chemical industry, conditionally approved on 7 April 2023;
- the MaxLinear/Silicon Motion Case in the semiconductor industry, conditionally approved on 26 July 2023;
- the Simcere/Tobishi Case in the pharmaceutical industry, conditionally approved on 22 September 2023;
- the Broadcom/VMware Case in the semiconductor industry, conditionally approved on 21 November 2023; and
- the JX Nippon/Tatsuta Case in the semiconductor industry, conditionally approved on 11 June 2024.

Among these cases, some commonalities can be observed. Apart from the Wanhua Chemical/Yantai Juli Case, SAMR has stopped the clock in the other three cases, signifying SAMR's active application of the "stop-the-clock" mechanism since its establishment under the revised AML. As regards the remedies, only the Simcere/Tobishi Case was cleared with both structural and behavioural conditions, while the other three cases had only been imposed with behavioural remedies.

Furthermore, it is worth noting that the Simcere/Tobishi Case marks the first instance where the concentration below the notification thresholds was notified voluntarily and was cleared with restrictive conditions.

What's more, the MaxLinear/Silicon Motion Case underscores SAMR's focus on ensuring stable market supply within its merger control review framework. Despite the absence of the identification of horizontal, vertical, or neighbour-

ing relationships between the undertakings to the concentrations, SAMR expressed concerns regarding the target's substantial market share in the NAND flash controller chip sector and the significant reliance of downstream customers on the target's products. To address these concerns, SAMR imposed several remedies aiming at safeguarding the consistent supply of NAND flash controller chips to Chinese consumers. Interestingly, shortly after SAMR's decision, MaxLinear announced the termination of the concentration.

10.3 Current Competition Concerns

Under the purview of PRC merger control review, significant developments have unfolded across various sectors, reflecting the evolving landscape of competition concerns. This includes heightened scrutiny in merger reviews, particularly in semiconductor-related cases, a notable shift in regulatory approaches within the internet industry, and an emphasis on safeguarding livelihoods and bolstering the real economy.

Enhanced Quality and Efficiency in Merger Review

SAMR continues to enhance its efficiency of merger review work, as evidenced by the shortened review period in practice and sustained emphasis on the effectiveness of merger control reviews. In 2023, SAMR concluded a total of 797 merger cases, a slight decrease of approximately 2.02% compared to 2022, with the vast majority receiving clearance. Notably, the average time taken to conclude a case was 25.7 days.

With the raised notification thresholds, it is expected by SAMR that the average number of small and medium-sized merger filings will decrease by over 200 cases annually, constituting more than 30% of all filings. Consequently, it is foreseeable that the efficiency of routine merger review cases will further improve in the future,

which enables competition authorities to concentrate their efforts on scrutinising high-profile and complex cases. What is more, under the “classified and graded review” system, SAMR has actively delegated merger control review cases to provincial AMRs, which handled 352 simplified cases in 2023. This decentralisation also signifies a move towards a more targeted and effective regulatory approach.

Changing Stance on the Internet Industry

SAMR’s regulatory approach towards the internet industry has undergone a notable transformation. Unlike previous years characterised by stringent and aggressive regulatory stances, SAMR now emphasises a balanced approach that promotes both development and regulatory compliance. This shift entails a transition from reactive investigation and penalties to proactive and comprehensive regulation throughout the “entire lifecycle” of internet platforms for merger control activities. The “entire lifecycle” regulatory approach encompasses:

- pre-compliance measures, such as the issuance of the Guidelines on the Anti-Monopoly Compliance for Undertakings and the establishment of regular communication mechanisms with platform enterprises;
- mid-process scrutiny measures, such as the issuance of the Provisions on Concentrations Review, streamlining procedures for simplified cases; and
- post-process scrutiny measures, such as developing criteria for administrative penalties for illegal concentrations and rules for handling cases that fall below filing thresholds but may have anti-competitive effects.

Continued Scrutiny on Semiconductors

Semiconductor-related merger control cases remain a focal point of SAMR’s scrutiny, influ-

enced by geopolitical tensions. From early 2023 to June 2024, out of the five cases with conditional clearance, three were related to the semiconductor industry. SAMR’s conditional clearance of merger cases such as MaxLinear/Silicon Motion underscores the importance of maintaining a stable semiconductor supply to the Chinese market. Additionally, high-profile cases like Intel’s abandoned acquisition of Tower Semiconductor (2023) highlight the challenges posed by prolonged review processes and regulatory conditions, reflecting broader implications of the geopolitical tensions on merger activities.

Prioritising Livelihoods and Real Economy

SAMR’s attention to real economy sectors and livelihood-related industries underscores its commitment to fostering economic stability and social welfare. Notably, SAMR focuses on cases related to industrial reorganisation in sectors vital to the real economy, such as manufacturing industries encompassing chemical materials, automobiles, computers, electronics, and pharmaceuticals. This emphasis is evident in the significant number of concluded cases in the real economy manufacturing sector in 2023, reaching a peak of 291 cases, which accounted for 37% of all cases. Among these, chemical materials and products were the most frequently addressed, followed by automobile manufacturing, computer and electronic equipment manufacturing, and pharmaceutical manufacturing.

Furthermore, SAMR and provincial AMRs have progressed with multiple rounds of specialised anti-monopoly enforcement actions in livelihood-related areas during 2023. SAMR also conveyed a commitment to strengthening regulatory oversight of anti-monopoly issues in livelihood-related sectors through several significant public speeches and meetings.

Trends and Developments

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JunHe LLP

JunHe LLP was founded in Beijing in 1989, and is one of the first private partnership law firms in China. Since its establishment, JunHe has grown to be one of the largest and most recognised Chinese law firms. The firm has 12 offices around the world and a team comprised of more than a thousand professionals. JunHe's antitrust practice team can trace its history back to 2008, and consists of nearly 20 professionals, primarily based in the Beijing and Shanghai offices. Its team members all graduated from renowned

law schools in China and abroad, with excellent educational backgrounds and extensive work experience in competition law. The team has dealt with nearly 600 filing cases, helping clients to obtain conditional approval within a short period of time, assisting clients in dealing with historical gun-jumping transactions and co-ordinating overseas merger control filings. Its team is also experienced in anti-monopoly investigation, litigation and compliance.

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Introduction

2023 witnessed the first complete year since the amended Anti-monopoly Law (AML) came into force in August 2022, as well as the implementation of the local pilot review system and amendments to the supporting regulation on merger review (Provisions on the Merger Filing Review, or the “Provisions”). In the past year, implementation of AML in China has entered into a new stage of development with crucial changes being made, including the revision of turnover filing thresholds for merger filing, development of the local pilot review system, the adoption of stop-the-clock mechanisms in released decisions of conditional approval, the increased penalty amount for gun-jumping, as well as the exposure draft of the guidelines on review of horizontal merger filing. These changes, affecting both procedural and substantive aspects of China’s merger control regime, are pivotal.

Addressing each of the key changes stated above, this article will commence by introducing their execution status, and wrap up by giving a balanced and nuanced analysis of how these changes could potentially impact clients exploring business opportunities in China.

Revision of the Turnover Thresholds of China Merger Filings

The former turnover thresholds of China merger filings have remained unchanged since AML took effect in 2008, despite the rapid growth of China’s economy in the past decade. In 2022, an exposure draft of the increased turnover filing thresholds was released for consultation. On 26 January 2024, Amendment to Provisions of the State Council on the Standard for Notification of Concentration of Undertakings (the “New Standard”) was formally promulgated, representing the first amendment to the turnover filing thresholds since 2008.

The increased turnover thresholds for China merger filings are listed below along with a comparison to the previous thresholds:

- Threshold 1 – (i) combined worldwide turnover of all undertakings concerned exceeding CNY12 billion (approximately USD1.8 billion, increased from CNY10 billion); and (ii) at least two undertakings concerned generated turnover exceeding CNY800 million (approximately USD120 million, increased from CNY400 million) in China in the preceding financial year; or

- Threshold 2 – (i) combined turnover in China of all undertakings concerned exceeding CNY4 billion (approximately USD600 million, increased from CNY2 billion); and (ii) at least two undertakings concerned generated turnover exceeding CNY800 million (approximately USD120 million, increased from CNY400 million) in the preceding financial year.

The New Standard, eventually, did not adopt the proposed set of thresholds in the exposure draft addressing killer acquisitions where targets are below turnover thresholds but have significant market value. Instead of setting a specific set of standards, the New Standard left it vague insofar as for concentrations below the turnover thresholds which may have the effect of excluding or restricting competition, anti-monopoly enforcement agencies have the power to call in a filing.

Observing merger filing practice in the past six months since the New Standard came into effect, the increased turnover thresholds reduce SAMR's merger review workload, allowing for a more focused review of each notifiable filing. Parties to mergers that remain notifiable under the increased turnover thresholds should prepare for a more thorough examination from SAMR. This could involve more extensive discussions on market definitions, increased scrutiny over the authenticity and credibility of submitted market data, and stricter requirements for filing materials.

Implementation Status of the Local Pilot Review System

A local pilot review system was launched in August 2022 to delegate SAMR's part of the simplified merger review workload to selected province-level arms of the SAMR in Beijing, Shanghai, Guangdong, Chongqing and Shaanxi

(collectively referred to as the "local AMRs" and each a "local AMR").

Recent years have witnessed a swift increase of mergers requiring SAMR notification, which has starkly contrasted with SAMR's limited resources for merger review enforcement. The nearly two years' worth of implementing the local pilot review system therefore effectively reduced SAMR's caseload. In 2023, SAMR concluded 707 simple cases, of which 352 simple cases were concluded by the five pilot local AMRs, accounting for nearly half of the total amount of simple cases.

Based on SAMR statistics and the experience of the authors with local AMRs, while the local pilot review system was initially anticipated to expedite the merger clearance process due to its increased manpower and lighter caseload compared to SAMR, it should not be seen as a shortcut to obtaining clearance, particularly for time-sensitive filings. The communication between SAMR and local AMRs can be time-consuming given the limited decision-making power of the local AMRs. However, review efficiency at local AMRs has been continuously growing based on available statistics. Companies can also leverage the local pilot system by fostering closer communication with local AMRs.

Introduction of the Stop-the-Clock Mechanism

The stop-the-clock mechanism for merger review has been introduced since August 2022 in response to the recurring issue of SAMR's review of complex cases often extending beyond the statutory timeline. Without a stop-the-clock mechanism, a complete statutory review period for a merger filing in China is up to 180 calendar days. For high-profile cases with competition concerns, industry sensitivities or national secu-

riety implications, SAMR may have exhausted the 180 calendar days before issuing the final decision and would therefore ask the notifying parties to pull and refile.

With the stop-the-clock mechanism in place, parties to high profile cases will no longer need to withdraw and refile the filing when the statutory review timeline (180 days) is exceeded, enhancing the transparency of the merger review process; but the review timeline remains unpredictable as there is currently no statutory limit on the maximum duration or the number of times the stop-the-clock mechanism can be applied with respect to a single filing.

According to public information, the stop-the-clock mechanism has been applied in four cases, namely the Silicon Motion/MaxLinear, Simcere Pharma/Tobishi, Broadcom/VMware and JX Metals/Tatsuta, in which the clock was stopped during the phase-three review for 189 days, 149 days, 53 days, and 332 days respectively.

Based on the above, it is suggested that parties to high-profile transactions subject to China merger control clearance:

- leave sufficient time for China merger clearance during the transaction negotiation phase, assess the competition landscape and evaluate the clearance difficulties at an early stage;
- keep active communication with SAMR throughout the review process to better understand SAMR's focus and concerns, so that any information requests can be responded to in a timely manner; and
- initiate remedy negotiation at an early stage to avoid any delays caused by the mechanism.

Law Enforcement With Increased Liabilities

Compared to the pre-amended AML, the revised AML has notably increased the liabilities for improper conduct in relation to merger filings such as gun-jumping.

The increased liability for gun jumping is detailed as follows.

• Fines:

- (a) for concentrations without the effect of excluding or restricting competition – not more than CNY5 million (approximately USD0.75 million);
- (b) for concentrations that have or may have the effect of excluding or restricting competition – not more than 10% of its sales revenues of the preceding financial year; and
- (c) for violations with particularly serious circumstances, particularly egregious effects, or particularly serious consequences, the fine could be between two and five times the amount initially calculated according to the aforementioned provisions.

• Other penalties:

- (a) for concentrations that have or may have the effect of excluding or restricting competition – cease implementation of the concentration, dispose of shares or assets, transfer the undertaking within a certain timeframe, or take other necessary measures to revert the situation to its pre-concentration state; and
- (b) records of undertakings violating AML shall be recorded in its credit archive, and disclosed to the public.

Recently, the first penalty against gun-jumping under the new AML was released. On 7 June 2024, SAMR announced its penalties towards

Shanghai Highly (Group) Co. Ltd. and Qingdao Haier Air Conditioning Co. Ltd., each CNY1.5 million (approximately USD200,000) for their gun-jumping, even though the concentration was found not having the effect of restricting or excluding competition. This case may help companies to some extent have a grasp of how the SAMR may gauge the fine in the individual case pursuant to the new rules around increased liabilities.

Other than the heavier fines imposed on both parties, the decision also has some other implications that may help companies better navigate the compliance landscape of merger control.

- Gun-jumping may unnecessarily stagnate the transactions. In the current case, the gun-jumping investigation took approximately eight months (ie, from 25 September 2023 to 28 May 2024), quadrupling the time needed for a simplified review. Companies should be more prudent throughout the merger filing process in China, including the evaluation of notifiability, filing preparation, and closing stages, as well as develop an effective anti-monopoly compliance system.
- In addition to the largely incremental fines, undertakings are also advised to consider the disclosure of penalties and its damaging impact on their reputation. In the current case and pursuant to Article 69 of the Provisions, the administrative penalties incurred from the gun-jumping were kept in the parties' credit record accessible to the public. This would inevitably cause reputational damage to the company, which might add extra costs and difficulties in client maintenance, business operation, bidding, commercial procurement, etc.

Exposure Draft of Guidelines on the Review of Horizontal Mergers

An exposure draft of Guidelines on the Review of Horizontal Concentration of Undertakings (the "Exposure Draft of Horizontal Guidelines") was released by the SAMR for consultation on 17 June 2024. For the first time, the focus of review of merger filings has been made public, marking an important step in China's AML supervision.

Among others, the Exposure Draft of Horizontal Guidelines introduces the quantitative indicators of market share and market concentration to the public, which, to a large extent, will help companies to better grasp the possible direction of the regulatory review through the relevant indicators. Previously, there was no such quantitative presumption in merger control review, but only in market dominance identification. The specific criteria set out in the Exposure Draft of Horizontal Guidelines is detailed as follows.

Exposure Draft of Guidelines (China, 2024) Market share

- Presumed that the concentration has or may have the effect of excluding or restricting competition – combined market share $\geq 50\%$;
- Likely to be deemed that the concentration has or may have the effect of excluding or restricting competition – $35\% \leq$ combined market share $< 50\%$;
- Unlikely to be deemed that the concentration has or may have the effect of excluding or restricting competition – $15\% \leq$ combined market share $< 25\%$; and
- Presumed that the concentration does not have the effect of excluding or restricting competition – combined market share $\leq 15\%$.

HHI index

- Presumed that the concentration has or may have the effect of excluding or restricting competition – $HHI > 1800$ and $\Delta HHI > 200$.
- More likely to be deemed that the concentration has or may have the effect of excluding or restricting competition – $HHI > 1800$ and $100 < \Delta HHI \leq 200$.
- Likely to be deemed that the concentration has or may have the effect of excluding or restricting competition – $1000 \leq HHI \leq 1800$ and $\Delta HHI > 100$.
- Not deemed that the concentration has or may have the effect of excluding or restricting competition – $HHI < 1000$; and $\Delta HHI \leq 100$.

Issuance of the Exposure Draft of Horizontal Guidelines will bring new challenges to M&A in China, but will also provide clearer guidance. Companies seeking merger clearance in China are suggested to adopt a more prudent and professional strategy at all stages of the transaction.

Conclusion

Although certain details may still need further clarification through future guidance and enforcement, the Chinese merger control regime has been refined to feature clear regulatory priorities, streamlined review procedures, and sharper enforcement through increased liabilities. The updated mechanism, along with continued stringent scrutiny, will likely persist in the coming years, necessitating more careful planning for deals subject to Chinese merger clearance.

CYPRUS

Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.154

- 1.1 Merger Control Legislation p.154
- 1.2 Legislation Relating to Particular Sectors p.154
- 1.3 Enforcement Authorities p.154

2. Jurisdiction p.155

- 2.1 Notification p.155
- 2.2 Failure to Notify p.155
- 2.3 Types of Transactions p.155
- 2.4 Definition of "Control" p.156
- 2.5 Jurisdictional Thresholds p.157
- 2.6 Calculations of Jurisdictional Thresholds p.157
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.157
- 2.8 Foreign-to-Foreign Transactions p.158
- 2.9 Market Share Jurisdictional Threshold p.158
- 2.10 Joint Ventures p.158
- 2.11 Power of Authorities to Investigate a Transaction p.159
- 2.12 Requirement for Clearance Before Implementation p.159
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.159
- 2.14 Exceptions to Suspensive Effect p.160
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.160

3. Procedure: Notification to Clearance p.160

- 3.1 Deadlines for Notification p.160
- 3.2 Type of Agreement Required Prior to Notification p.160
- 3.3 Filing Fees p.161
- 3.4 Parties Responsible for Filing p.161
- 3.5 Information Included in a Filing p.161
- 3.6 Penalties/Consequences of Incomplete Notification p.162
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.163
- 3.8 Review Process p.163
- 3.9 Pre-notification Discussions With Authorities p.164
- 3.10 Requests for Information During the Review Process p.164
- 3.11 Accelerated Procedure p.164

4. Substance of the Review p.164

- 4.1 Substantive Test p.164
- 4.2 Markets Affected by a Transaction p.164
- 4.3 Reliance on Case Law p.166
- 4.4 Competition Concerns p.166
- 4.5 Economic Efficiencies p.166
- 4.6 Non-competition Issues p.166
- 4.7 Special Consideration for Joint Ventures p.166

5. Decision: Prohibitions and Remedies p.167

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.167
- 5.2 Parties' Ability to Negotiate Remedies p.167
- 5.3 Legal Standard p.168
- 5.4 Negotiating Remedies With Authorities p.168
- 5.5 Conditions and Timing for Divestitures p.169
- 5.6 Issuance of Decisions p.169
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.169

6. Ancillary Restraints and Related Transactions p.169

- 6.1 Clearance Decisions and Separate Notifications p.169

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.169

- 7.1 Third-Party Rights p.169
- 7.2 Contacting Third Parties p.170
- 7.3 Confidentiality p.170
- 7.4 Co-operation With Other Jurisdictions p.170

8. Appeals and Judicial Review p.170

- 8.1 Access to Appeal and Judicial Review p.170
- 8.2 Typical Timeline for Appeals p.170
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.171

9. Foreign Direct Investment/Subsidies Review p.171

- 9.1 Legislation and Filing Requirements p.171

10. Recent Developments p.172

- 10.1 Recent Changes or Impending Legislation p.172
- 10.2 Recent Enforcement Record p.172
- 10.3 Current Competition Concerns p.172

Georgiades & Pelides is a leading Cypriot law firm with a broad corporate, banking, commercial and litigation practice and a distinct international focus. The firm was formed in 1998 by the merger of Georgiades & Georgiades with Nicos Pelides & Co. and offers a unique blend of dynamism and experience. The firm has extensive experience and expertise in advising across all aspects of competition and merger

control legislation and has helped its clients secure clearances in complex and sensitive Phase I merger control cases. In 2022 and 2023, the firm submitted more than 30 merger control notifications each year, mostly on behalf of international clients. Clients include banks, global institutional investors and multinational investment management corporations. The firm currently has 21 lawyers (including partners).

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The relevant merger control legislation in Cyprus is the Control of Concentrations between Undertakings Law of 2014 (L. 83(I)/2014) (the “Law”).

The Law came into effect on 20 June 2014 and has not been amended since its introduction (other than purely corrective amendments). No subsidiary legislation or guidance has been issued pursuant to the Law, although as Cyprus is a member state of the EU, the European Commission (EC) Merger Regulation is also relevant.

In practice, the Cyprus Commission for the Protection of Competition (CPC), as well as practitioners, also refer to the Commission Consolidated Jurisdictional Notice on Merger Control.

1.2 Legislation Relating to Particular Sectors

There are several areas where specific consents may be required or particular processes must be followed in order to implement a particular transaction (in addition to merger clearance). The following is a non-exhaustive list of examples.

- Acquisitions of significant interests (10% or more) in certain types of institutions regulated by the Central Bank of Cyprus (including banks, credit servicers and credit acquiring companies) require pre-approval from the Central Bank of Cyprus.
- Takeover bids are subject to a specific regulatory regime, in addition to requiring merger clearance, if they meet the applicable thresholds.
- Acquisition of significant interests (10% or more) in insurance or reinsurance undertakings require approval by the Superintendent of Insurance.
- There are restrictions on the acquisition of significant shareholdings in entities active in the press/broadcasting industry by residents of states outside the EU.
- There are also restrictions on the acquisition of immovable property by residents of countries outside the EU.

1.3 Enforcement Authorities

The competent authority responsible for enforcing the merger control legislation in Cyprus is the CPC. The CPC is the entity to which merger control notifications are submitted, and the entity that issues decisions (both Phase I and Phase

II) with respect to these notifications. The CPC is assisted by the CPC's Service (the "Service"). The Service investigates a notification and submits a report to the CPC.

The CPC's decisions may be appealed (by way of administrative recourse) to the Administrative Court. Decisions of the Administrative Court may, in turn, be appealed to the Court of Appeal, with decisions of the Court of Appeal being in turn appealed to the Supreme Administrative Court (on certain grounds and subject to leave).

Additionally, the Minister for Energy, Commerce, Industry and Tourism (the "Minister") has the authority to declare that a particular concentration is of major importance, in which case the provisions of the Law will apply to the concentration even if the concentration in question does not meet the usual thresholds (see **2.5 Jurisdictional Thresholds**). The Minister may also declare that a concentration is "of major public interest", in which case the relevant concentration is referred to the Council of Ministers, which may approve or reject the proposed concentration (overriding whatever decision the CPC may have reached). This power has very rarely been used.

2. Jurisdiction

2.1 Notification

If a transaction is expected to produce a "concentration of major importance" (see **2.3 Types of Transactions**), it must be notified to the Service. There is no deadline within which parties must notify the Service, but the transaction cannot be put into effect before CPC clearance is obtained. There is no exception to the obligation to notify, although the CPC has the discretion to permit implementation of parts or the entirety of

a transaction prior to clearance being obtained (see **2.14 Exceptions to Suspensive Effect** and **2.15 Circumstances Where Implementation Before Clearance Is Permitted**).

2.2 Failure to Notify

The CPC has the power to impose severe penalties for implementation of a concentration without CPC clearance, which would take effect if a concentration is implemented without being notified to the Service. Additionally, the CPC has the power to impose daily fines. These fines and other penalties are discussed in more detail in **2.13 Penalties for the Implementation of a Transaction Before Clearance**.

2.3 Types of Transactions

Transactions that constitute "concentrations of major importance" must be notified to the CPC before they are implemented. There are, therefore, two questions to consider: (i) does the transaction in question amount to a "concentration" and (ii) if it does, is it a concentration "of major importance"?

A "concentration" will occur where a change of control on a lasting basis results from:

- the merger of two or more previously independent undertakings (or parts of undertakings);
- the acquisition, by one or more persons who already control at least one undertaking or by one or more undertakings, and whether by purchase of securities or assets, by contract (eg, conclusion of a shareholders' agreement) or by any other means (eg, by amending an entity's articles of association), of direct or indirect control of the whole or parts of one or more other undertakings; or

- the creation of a joint venture which permanently fulfils all of the functions of an independent economic unit.

The Law provides a specific definition of control, which should be borne in mind when assessing whether a concentration has occurred. Control would also include negative control (see **2.4 Definition of “Control”**).

There are certain exceptions to the definition of concentration. These are:

- temporary holdings acquired by financial or insurance companies whose usual activity includes dealing in securities, provided the holder does not exercise the voting rights attached to the security in question with the aim of determining the undertaking's competitive conduct (or the voting rights are exercised in preparation for a sale of the undertaking, its assets or the securities in question, which takes place within one year of their acquisition);
- control is vested in a liquidator or similar official;
- control is acquired by an investment company, provided that such company only exercises its voting rights to maintain the full value of its investments (and not to determine the undertaking's competitive conduct); or
- the property that forms the subject matter of the concentration is transferred on death.

An exception is also provided where a concentration takes place between an undertaking and one or more of its subsidiaries. An entity will be regarded as a subsidiary of another entity where its business activity is controlled by the second entity.

Concentrations “of Major Importance”

A concentration will be regarded as being “of major importance” where it meets certain threshold tests. These are described in **2.5 Jurisdictional Thresholds**. As noted in **1.3 Enforcement Authorities**, the Minister may also declare a concentration as being of major importance, notwithstanding that it does not meet the applicable thresholds.

2.4 Definition of “Control”

Control may result from rights, contracts or other means, which (either on their own or when combined with other means) provide a person with the ability to decisively influence the activity of an undertaking. The Law makes specific reference to the following examples of means which may produce control (the list is not exhaustive):

- preference rights;
- other rights to use; and
- rights over the composition, meetings or decision-making of an undertaking's board of directors or similar supervisory or executive body.

In practice, control is interpreted broadly and can result from a wide variety of arrangements. Examples of rights that may confer control include share options, rights acquired pursuant to shareholders' agreements (eg, as to the appointment or dismissal of senior management, or approval of the budget or the business plan), amendment of an entity's articles of association, and rights resulting from the taking and crystallisation or enforcement of security.

The Law does not distinguish between majority and minority interests. Minority interests that are capable of producing meaningful control (negative control) may also, therefore, be notifiable (eg, in cases where a minority interest provides

its holder the right to veto an entity's strategic decisions).

2.5 Jurisdictional Thresholds

A concentration will be regarded as being "of major importance" (and will therefore be notifiable to the Service) where it meets the following thresholds:

- at least two of the undertakings participating in the concentration have an aggregate worldwide turnover exceeding EUR3.5 million each;
- at least two of the undertakings generate turnover within Cyprus; and
- at least EUR3.5 million of the combined turnover of all of the participating undertakings is achieved within Cyprus.

The thresholds set out above are applicable to all sectors, although turnover is calculated differently for certain types of enterprise (see **2.6 Calculations of Jurisdictional Thresholds**).

2.6 Calculations of Jurisdictional Thresholds

Basic Position

An entity's turnover includes proceeds from the sale of products and/or provision of services by it as part of its ordinary course of business activity during the preceding financial year. However, turnover does not include:

- sales rebates;
- VAT and other taxes that are directly connected to turnover; or
- internal transactions carried out between parties whose turnover is aggregated with that of the participant (see **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**).

An entity's turnover will also be aggregated with the turnover of certain other entities (see **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**).

All figures included in a notification must be stated in euros and should be converted using the average exchange rate for the period of reference (usually the preceding financial year). In practice, parties may use exchange rates published by the European Central Bank.

Exceptions

Where the concentration concerns the acquisition of parts of an enterprise, only the turnover relating to the parts which are the subject matter of the transaction should be taken into account. This is the case regardless of whether such part(s) are legally distinct entities.

There are also separate rules governing the calculation of turnover for certain kinds of enterprise. These are (i) credit institutions (eg, banks), whose turnover is deemed to be equal to one-tenth of their balance sheet during the preceding financial year; and (ii) insurance companies, where turnover is deemed to be equal to the value of their gross premiums during the preceding financial year. This includes all amounts received and receivable on account of their insurance contracts, but excludes taxes and duties charged on individual premiums or by reference to the total volume of premiums.

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

When calculating an entity's turnover for the purposes of assessing whether it meets the jurisdictional thresholds described in **2.5 Jurisdictional Thresholds**, the turnover of the following entities

must be aggregated with the turnover of the first entity.

(a) Undertakings participating in the concentration.

(b) Any entities in which the participants hold (directly or indirectly) more than half of the capital or voting rights, or otherwise have the power to appoint more than half of the members of the board of directors or similar supervisory or executive body, as well as any entities whose affairs are managed by the participants (or the participants have a direct or indirect right to manage such entities' affairs).

(c) Any entities which have the rights/powers set out in (b) in relation to the participants in the concentration, eg, the participants' holding companies.

(d) Any entities in relation to which an entity in (c) has the powers in (b) (ie, the participants' sister companies and other group entities that may not be direct holding or subsidiary companies vis-à-vis the participants).

(e) Any entities in relation to which two or more entities listed in (a) to (d) jointly hold the rights described in (b).

As noted in **2.6 Calculations of Jurisdictional Thresholds**, where the concentration concerns the acquisition of parts of an enterprise, only the turnover relating to the parts which are the subject matter of the transaction should be taken into account. This is the case regardless of whether such part(s) are legally distinct entities.

When participants in the concentration jointly hold the rights/powers listed in (b), the turnover resulting from the sale of products or the provi-

sion of services between the jointly controlled enterprise and each participant (or any other entity whose turnover is aggregated with a participant) is ignored. Turnover resulting from sales or the provision of services by the jointly controlled enterprise to third parties is apportioned (in equal parts) to the participants.

The participants' turnover should be calculated as at the end of the relevant reference period (so in practice, the end of the previous financial year). To the extent that changes in the business of a participant, such as acquisitions, divestments or business closures, have occurred and are not reflected in the participant's financial statements, these should be included as supporting documents to the notification.

2.8 Foreign-to-Foreign Transactions

Cypriot merger legislation applies equally to foreign-to-foreign transactions, provided that the thresholds set out in **2.5 Jurisdictional Thresholds** are met. Given that at least two of the undertakings must have some turnover in Cyprus, it would be very unusual for a filing to be required if the target does not have any turnover in Cyprus. However, there is no requirement for any entity to have a degree of local presence (eg, an office or similar premises).

2.9 Market Share Jurisdictional Threshold

The only thresholds that are relevant in determining whether a merger control filing is required in Cyprus are those set out in **2.5 Jurisdictional Thresholds**.

2.10 Joint Ventures

Joint ventures may also constitute a concentration of major importance for the purposes of the Law, provided that (i) the joint venture will fulfil, on a lasting basis, the role of a previously inde-

pendent economic entity and (ii) the thresholds described in **2.5 Jurisdictional Thresholds** are met.

As explained in **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**, where control is acquired jointly by participants in a concentration (as would be the case in a joint venture), transactions between the joint venture and each joint venture participant (and entities connected to the participants) are ignored for the purposes of calculating turnover and, therefore, for the purposes of determining whether the jurisdictional thresholds are met.

2.11 Power of Authorities to Investigate a Transaction

The CPC has wide-ranging powers to enable it to perform its duties pursuant to the Law (including where the CPC suspects that a notifiable transaction was not notified to it – for example, because the CPC disagrees that the transaction does not meet the jurisdictional thresholds). In such cases, the CPC may:

- enter any premises (apart from private residences, unless it obtains a court warrant);
- check any books or other records and take copies of them;
- seal any premises or documents pending its investigation; and
- ask questions and request clarifications and/or information from any relevant person.

The CPC does not need to provide advance warning of an exercise of its powers, although it does need to provide details of the objective and scope of the exercise, its start date and the basis upon which it is exercising its powers.

There is no statute of limitations applicable to the exercise of the CPC's powers. Accordingly, the CPC could decide to investigate a transaction several years after its implementation.

2.12 Requirement for Clearance Before Implementation

Transactions (or at least the parts of a transaction that relate to Cyprus and have triggered the obligation to file a notification with the Service) may not be implemented until CPC clearance (including deemed clearance) has been obtained. For notifications that proceed to a Phase II investigation, parties can apply for permission from the CPC to implement the transaction pending clearance. See **2.15 Circumstances Where Implementation Before Clearance Is Permitted** for further details.

2.13 Penalties for the Implementation of a Transaction Before Clearance

If a concentration is put into effect without the prior approval of the CPC, the CPC may impose a fine of up to 10% of the total turnover of the relevant party for the preceding year. Additional fines (up to EUR8,000 per day) may be imposed for each day the breach continues. The CPC also has the power to order that a concentration put into effect without its approval be (wholly or partly) reversed or disbanded, but only to the extent that this is reasonably necessary to restore functional competition on the relevant market.

Very few instances of penalties being imposed in this regard have been reported. The undertakings involved in those instances (which were published on the CPC's website) received fines ranging from EUR5,000 to EUR10,000.

It is worth noting in this regard that the Law (and consequently, the penalties described above)

applies equally to foreign-to-foreign transactions.

2.14 Exceptions to Suspensive Effect

There are no general exceptions to the suspensive effect unless specific clearance is obtained from the CPC to implement (parts of) a transaction pending CPC clearance (see 2.15 **Circumstances Where Implementation Before Clearance Is Permitted**).

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Transactions subject to a Phase I investigation, or at least those parts that relate to Cyprus and have triggered the requirement to file, may not be implemented until CPC clearance (including deemed clearance) is obtained. Parties may implement the parts of the transaction that are not subject to CPC approval pending clearance. The CPC does not technically have to be notified of this; however, it is good practice to be as transparent as possible.

In cases where the CPC has decided to proceed to a Phase II investigation, the CPC may grant permission for a transaction or parts thereof to be implemented pre-clearance on the application of one or more of the parties involved. Permission is granted on a temporary basis (meaning that, if the CPC ultimately decides not to approve the concentration, any implementation steps taken by the parties must be unwound following the CPC's decision) and may be issued subject to any conditions the CPC considers appropriate.

Applicants must demonstrate that they will suffer serious damage if implementation of the transaction is delayed further. In deciding whether to grant permission, the CPC will take into account the consequences of the delay in implementa-

tion on the participants as well as on third parties and will weigh such consequences against the perceived threat to healthy competition posed by the transaction.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

The Law does not prescribe a particular deadline by which notification must be made, subject to the proviso that a concentration (or at least, those parts of a concentration that relate to Cyprus) may not be implemented without CPC clearance. See 3.2 **Type of Agreement Required Prior to Notification** with regard to the timing of submission of a notification.

3.2 Type of Agreement Required Prior to Notification

A notification may only be made once an agreement as to the concentration has been concluded, or in the case of a takeover offer, following publication of the public takeover bid or acquisition of a controlling interest triggering a takeover bid. In practice and given that the concentration may not be implemented before CPC clearance is obtained, parties tend to submit notifications within a few days of signing the transaction documentation.

There is one exception to the above, which is where the parties are able to demonstrate to the Service that they have a good faith intent to reach agreement or (in the case of a takeover offer) where the relevant party has publicly announced its intention to make a takeover bid.

In practice, the Service will require evidence that there is a high degree of certainty that the transaction will proceed (eg, execution versions

of the transaction documentation) as well as an explanation of the urgency involved (eg, that the transaction documents cannot be signed before a separate regulatory clearance is received, but there would be serious financial or other repercussions to delaying implementation for the duration of the CPC's review period).

3.3 Filing Fees

There is a flat filing fee of EUR1,000 for a notification. If the CPC decides to proceed to a Phase II investigation, an additional fee of EUR6,000 is payable.

The filing fee is paid when submitting the notification. The CPC's review period does not begin until the filing fee is paid.

3.4 Parties Responsible for Filing

Where the notifiable transaction involves a merger of two previously independent undertakings, or the acquisition of joint control over one or more undertakings, notifications must be made, either jointly or separately, by each participant. In all other circumstances, the responsibility to notify rests with the person acquiring control (eg, in a share sale which does not involve the creation of a joint venture, the purchaser).

3.5 Information Included in a Filing

Notifications tend to be quite detailed and will typically run to between 20 and 30 pages for most transactions (and will be longer if the transaction is expected to raise meaningful competition concerns). There is no short-form version of the notification; all notifications must, at a minimum, contain the following information:

- names, addresses and contact details of all the participants in the concentration, along with a description of their business activities;
- description of the nature and extent of the concentration, including the circumstances which lead to concentration, whether the whole or only parts of an undertaking are involved in the concentration and, in the case of a public offer, whether the offer is supported by the board of directors of the offeree;
- explanation of the purposes of the concentration;
- whether the concentration has been notified to other competition authorities (and if so, the timing of the notification and whether it has been approved by them);
- description of the financial and structural aspects of the concentration, including the structure and control of the relevant undertaking(s) following implementation of the concentration, the anticipated date the concentration will be implemented, as well as a description of any support received from any (public or private) sources;
- details of the worldwide and Cypriot turnover of each participant;
- details of profits before tax for each participant;
- the number of employees of each participant, both in Cyprus and worldwide;
- details of the group structure of each participant;
- information regarding other entities active in the affected markets, in which a participant (or its group) holds at least 10% of the shares or voting rights, or where there is an overlap between the board members of the entity concerned and a participant (or member of the participant's group);
- description and analysis of all relevant product and geographic markets, and of all reasonable alternative definitions of relevant product and geographic markets;
- description and analysis of all affected markets and other markets likely to be signifi-

cantly affected by the concentration, including information regarding:

- (a) turnovers (of the market generally and the specific participants);
 - (b) details of demand and supply in the market;
 - (c) market shares of the participants and their competitors;
 - (d) barriers to entry, including significant entries in the market in the preceding five years and expected future entries;
 - (e) economies of scale;
 - (f) impact of the concentration on final and intermediate consumers;
 - (g) impact of research and development activities; and
 - (h) distribution and supply networks;
- where a joint venture is being established, confirmation of whether the joint venture participants will continue to participate in the same market(s) or in an adjacent market as the joint venture, and if so, details of their turnover, market share and activities.

The notifying parties must also confirm that all the information and estimates contained in the notification are, to the best of their knowledge, accurate, that any expressions of opinion are genuinely held and that they are aware of the potential penalties that can be imposed.

Parties may nominate a representative to sign the notification and handle queries regarding the notification on their behalf. In this case, details of the representative and evidence of their authorisation (in a prescribed form) must also be submitted.

Supporting Documents

The notification must be accompanied by the following supporting documentation:

- copies of the final (or most recent) transaction documentation;
- copies of the most recent annual returns and audited financial statements of all the participants in the concentration;
- copies of any reports or analyses produced for the purposes of the concentration (if they relate to Cyprus), which form the basis for the information included in the notification;
- an index and summary description of all reports, analyses, etc, that have been prepared for the purposes of assessing the competitive impact of the concentration, the market conditions and potential or actual competitors; and
- in the case of a public offer, a copy of the announcement of the bid and a copy of the offer document (if one exists).

Language

The notification itself must be submitted in one of the official languages of Cyprus (ie, Greek or Turkish), but is usually submitted in Greek. The supporting documentation may be filed in English.

Two hard copies of the notification (along with its supporting documents) must be delivered to the offices of the CPC. They must also be sent to the Service electronically.

Supporting documents may be submitted in either original or copy form. If copies are submitted, the notifying party must certify that the copies are genuine and complete, but there is no formal certification requirement (eg, notarisation or apostille).

3.6 Penalties/Consequences of Incomplete Notification

There are no penalties imposed for the submission of an incomplete notification (but see

3.7 Penalties/Consequences of Inaccurate or Misleading Information for penalties relating to the submission of inaccurate or misleading information). However, the time to the deadline for the CPC to issue a decision on the notification does not begin until the CPC considers that it has received a complete filing.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

If a notifying party has submitted inaccurate or misleading information in the filing, the CPC may impose a fine of up to EUR50,000. The same fine applies where a party fails to supply information otherwise required pursuant to the Law. Fines must be accompanied by a reasoned explanation by the CPC for the imposition of the fine, and parties subject to fines must be given the opportunity to be heard.

Furthermore, where the CPC discovers that it has approved a concentration on the basis of false or misleading information, it may withdraw its approval, modify the terms of its approval, or require the parties to reverse the whole or part of the implementation of the concentration.

Fines for the provision of inaccurate or misleading information are not frequently imposed by the CPC. In a recent case (which involved a failure to provide accurate information regarding a participant's business activities as part of a notification), the CPC imposed an administrative fine of EUR25,000.

3.8 Review Process

All notifications begin their life as Phase I investigations. A Phase I investigation starts when a complete notification is submitted to the Service. The CPC must issue a decision within one calendar month from the date the CPC considers a

complete filing has been received. "Decision", in this case, means a statement by the CPC that:

- the notified concentration does not fall within the ambit of the Law; or
- the notified concentration does fall within the ambit of the Law but does not raise competition concerns (and the concentration is therefore approved); or
- the notified concentration does fall within the ambit of the Law and raises competition concerns, and as a result, the CPC needs to proceed to a Phase II investigation.

The CPC has the power to extend the one-month review deadline by an additional 14 days where it considers that the review deadline might be missed as a result of the complexity or amount of information submitted as part of a notification. Any extension must be notified to the person submitting the notification at least seven days before the expiry of the original one-month review period. The CPC rarely implements extensions in practice.

If the CPC does not issue a decision within the one-month deadline (or extended deadline if applicable), the concentration is deemed to have been approved.

If the CPC decides to proceed to a Phase II investigation, it must issue a decision (either approving or rejecting the proposed concentration) within a further three months from the date it considers it has received all of the information it requires for its investigation. As with Phase I investigations, the CPC has the power to extend the deadline for its review by an additional 14 days (or longer if the CPC considers that the delay is due to a failure or omission by any of the participants, eg, a failure to submit requested information). Clearance is deemed given if

the CPC does not issue its decision within four months of receipt of a complete filing (or within such extended timeframe as may have been notified to participants by the CPC).

In total therefore, a notification that has proceeded to a Phase II investigation may take between four and six months to resolve.

3.9 Pre-notification Discussions With Authorities

There is no official route by which parties may engage in pre-notification discussions with the CPC, and if parties attempt to do so, there is consequently no formal legal basis which would require the CPC to treat such discussions confidentially (although the CPC is subject to a general obligation to avoid disclosing confidential information it receives in the course of exercising its duties – see 7.4 Co-operation with Other Jurisdictions).

3.10 Requests for Information During the Review Process

It is relatively common for the Service to issue requests for information during the review process; however, the Service does not generally go beyond requesting information that is reasonable and proportionate to its task. Parties can minimise the likelihood that the Service will request additional information by taking care to ensure that the filing contains all the details prescribed by the Law (see 3.5 Information Included in a Filing).

If the Service considers that it requires additional information after it has begun its review, the Service may “stop the clock” pending receipt of the information. In the authors’ experience, provided the parties respond to the Service’s requests in a prompt and transparent manner (particularly if it is possible to respond on the same day or the

following day), the Service will not stop the clock for minor information requests.

3.11 Accelerated Procedure

There is no accelerated, short-form or fast-track procedure for merger clearance under Cypriot law, although the CPC rarely chooses to extend its review deadline. The CPC also generally issues a decision by the applicable deadline, although in any event, failure to issue a decision on the part of the CPC within the deadline constitutes deemed clearance of the notified concentration.

4. Substance of the Review

4.1 Substantive Test

The CPC will examine whether (i) the notified transaction qualifies as a “concentration of major importance” within the meaning of the Law (see 2.3 Types of Transactions); and (ii) the concentration would significantly impede effective competition in Cyprus (or in a substantial part of Cyprus), particularly where the concentration is expected to create or strengthen a dominant position. If both questions are answered affirmatively, the concentration will not be approved.

4.2 Markets Affected by a Transaction

Any notification for clearance submitted to the CPC must include:

- a description and analysis of all relevant product and geographic markets and of all reasonable alternative definitions of relevant product and geographic markets; and
- a description and analysis of all affected markets and other markets likely to be significantly affected by the concentration.

The Law contains some guidance designed to enable notifying parties to comply with this obligation, which is summarised below.

Relevant Product Markets

A relevant product market will comprise all products and/or services that a consumer may consider interchangeable (or which can be substituted for one another) on the basis of their price, characteristics (including their physical and technical characteristics) and intended use.

Relevant Geographic Markets

The relevant geographic market will include the area in which there is supply and demand of/for the relevant products and/or services by the undertakings involved in the concentration. Conditions of competition in the relevant geographic market should be sufficiently homogenous, and the relevant geographic market should be distinguishable from neighbouring geographic areas (particularly on the basis that there are different conditions of competition in such neighbouring areas).

In determining the relevant geographic market, parties should particularly take into account the following:

- the nature and characteristics of the relevant products and/or services;
- the existence of barriers to entry;
- consumer preferences;
- differences in the participants' market shares compared to neighbouring geographic areas; and
- price differences.

Affected Markets

Relevant product and/or geographic markets (and plausible alternative product and geographic markets) will be classed as affected

markets where they are within the Republic of Cyprus and either (i) two or more of the parties are engaged in business activities in the same relevant market which afford them a combined market share of at least 15%; or (ii) a party is engaged in business activities in a relevant market which is downstream or upstream to another relevant market on which a different party is engaged in business activities, provided that:

- any party has a market share of at least 25% on any relevant market; or
- the combined market share of both parties comes to at least 25%.

Other Markets Likely to Be Significantly Affected by the Concentration

Markets which may be classed as such include, but are not limited to, the following.

- Markets where any party has a market share exceeding 25% and another party is a potential competitor in the same market. The term "potential competitor" is construed relatively narrowly and will only extend to parties that plan to enter the relevant market or have developed or pursued plans to do so within the last three years.
- Markets where any party has a market share exceeding 25% and another party holds significant intellectual property rights in the same market.
- Any of the parties are engaged in business activities on closely related neighbouring markets, and their individual or combined market share in any of those markets is at least 25%. Product markets will be classed as closely related neighbouring markets where the products concerned are complementary to each other, or where they belong to a range of products that are generally purchased by

the same consumer group(s) for the same final use(s).

4.3 Reliance on Case Law

In examining definitions of relevant product and/or geographic markets, as well as in reaching its decision more generally, the CPC will have regard to (and will, in most cases, attempt to be consistent with) its own past practice. It will also have regard to decisions of the EC and the European Court of Justice, as well as decisions of other member-state competition authorities (notably, Greece).

4.4 Competition Concerns

The CPC examines a variety of competition concerns in reaching a decision. These include:

- the structure of the affected markets and other markets that may be significantly impacted by the concentration;
- potential competition posed by other enterprises;
- the market share of the participants and their connected parties;
- alternative sources of supply for the relevant products and/or services;
- supply and demand trends;
- barriers to entry;
- the interests of final and intermediate consumers; and
- the contribution to technical and economic progress.

Additional concerns are examined with respect to joint ventures in **4.7 Special Consideration for Joint Ventures**.

4.5 Economic Efficiencies

As noted in **4.4 Competition Concerns**, the CPC will take into account certain types of economic efficiencies, insofar as they relate to the interests

of consumers or contribute to technical and/or economic progress.

4.6 Non-competition Issues

The CPC does not generally tend to take any non-competition considerations into account when reaching a decision, and the CPC is not expressly empowered to do so by the Law. However, as noted in **1.3 Enforcement Authorities**, the Minister may declare that a concentration is “of major importance” (and therefore notifiable to the CPC) despite the fact that the transaction may not meet the jurisdictional thresholds described in **2.5 Jurisdictional Thresholds**. The Minister may do so where they consider that a concentration should be regarded as being of major importance on the basis of its expected impact on public safety, on pluralism of the media and/or on the principles of sound administration.

There are currently no general rules restricting foreign direct investment into Cyprus, although draft legislation introducing a foreign direct investment regime is currently before the Cypriot parliament (see **9. Foreign Direct Investment/Subsidies Review**). There are specific rules governing investment into (i) certain specific sectors (eg, banks, insurance companies) and/or (ii) by specific methods (eg, public offers; see **1.2 Legislation Relating to Particular Sectors**). These rules operate entirely independently of the merger control rules, and consequently, both sets of applicable rules should be considered when assessing the steps to implementation of a transaction.

4.7 Special Consideration for Joint Ventures

Where a concentration involves the creation of a joint venture, the CPC will also examine whether the joint venture will result in coordination

between the joint venture parents (or whether such coordination is in fact the objective of the creation of the joint venture). If such coordination exists or will exist, the CPC will consider whether the coordination is compatible with, or will interfere with, the ordinary functioning of competition on the market.

The CPC will in particular consider whether the joint venture parents will continue to undertake significant activities in the same or adjacent markets as the joint venture enterprise, and whether any coordination resulting from the creation of the joint venture will provide the parents with the ability to eliminate competition for a large part of the relevant products or services.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

As noted in **2.12 Requirement for Clearance Before Implementation** and **2.13 Penalties for the Implementation of a Transaction Before Clearance**, notifiable transactions may not be implemented prior to CPC clearance (or in circumstances where the CPC issues a decision denying clearance). If a transaction is implemented without CPC clearance, the CPC may issue fines and/or order that the transaction be unwound.

5.2 Parties' Ability to Negotiate Remedies

Where the CPC decides to proceed to a Phase II investigation, it will inform the parties that they are entitled to modify the transaction or suggest remedies to resolve identified competition concerns. As part of the Phase II investigation, the CPC will examine whether any additional infor-

mation it has obtained from the participants (or from third parties), combined with any remedies and/or amendments to the transaction that may have been proposed by the participants, are sufficient to allay the competition concerns identified by the CPC during the Phase I investigation.

If competition concerns persist, the CPC may (if it has identified any remedies and/or amendments to the transaction which it believes will resolve the competition concerns it has identified) enter into negotiations regarding remedies and/or amendments with the parties.

In practice, both behavioural and structural remedies (eg, divestitures) may be accepted and/or proposed by the CPC. However, very few notifications to the CPC proceed to a Phase II investigation, and as such, there are only a small number of examples where competition clearance has been granted subject to remedies. Examples of remedies which have been used include:

- a condition that the directors of a participant of a joint venture cannot also act as directors of the joint venture itself, and that information will be treated confidentially and not shared between the two boards of directors;
- a requirement that the joint venture entity maintain a competition compliance manual;
- a commitment that any transactions between the target and its shareholders will be carried out on arm's-length terms;
- a commitment that access be provided to new market entrants to infrastructure controlled by the concentration, at cost; and
- a requirement that specific equipment be sold within 12 months.

No remedies have been reported which were imposed for the purposes of addressing non-competition related issues.

5.3 Legal Standard

Any remedies or amendments to the transaction proposed by the parties must follow a form prescribed by the Law and must be submitted to the CPC within the timeframe that may be prescribed by the CPC. The Law does not specify a particular legal standard which must be met by proposed remedies, but in practice, the remedies will need to be sufficient in order to fully eliminate the competition concerns that have been identified.

In particular, a party suggesting one or more remedies should do the following:

- describe in detail the objective of the suggested remedies and the proposed conditions to their implementation;
- explain how the proposed remedies are intended to address the competition concerns identified by the CPC; and
- provide a non-confidential description of the remedies and their expected impact, to enable the CPC to market-test the proposed remedies if it so wishes (see 7.2 **Contacting Third Parties**).

Where a proposed remedy involves the sale of a business, the following additional information should be provided:

- general information regarding the business to be sold, including a description of the legal entities that make up the business, their place(s) of operations and other areas where they undertake activities or provide services, as well as the organisational structure of the business;
- a description of any legal barriers to sale (eg, third-party rights or requirements to obtain regulatory consents);

- a description of the products and/or services offered by the business, including their technical and other characteristics, turnover relating to each product/service, business or trade names, etc;
- a description of any supporting business functions, to the extent these are not performed at the level of the business itself (eg, research and development, sales and marketing, suppliers);
- a detailed description of the relationships between the business to be sold and other enterprises controlled by the participants (eg, common staff or assets, contracts for services concluded between such enterprises, common customers);
- a description of all tangible and intangible assets (including intellectual property rights) of the business to be sold;
- a structure diagram setting out the number of employees of each business function and a list of employees who are necessary for the continuation of each function;
- a description of the customers of the business and apportionment of the turnover of the business to each customer;
- financials of the business, including turnover and EBITDA for the preceding two years, as well as projections for the next two years;
- a description of every change in its organisational structure and the relationships with its group entities during the preceding two years and a summary of upcoming changes planned during the next two years; and
- an analysis of the rationale of the sale, to an appropriate purchaser, within the suggested timeframe.

5.4 Negotiating Remedies With Authorities

Parties may propose remedies once invited to do so by the CPC (in practice when the CPC

decides to proceed to a Phase II investigation). The CPC will enter into negotiations of remedies with the parties if it considers that the remedies proposed by the parties are insufficient to allay the competition concerns identified by the CPC. The CPC can also suggest its own remedies during the negotiation phase and may impose any conditions it considers appropriate in its clearance decisions.

5.5 Conditions and Timing for Divestitures

Where the CPC decides to approve a concentration subject to conditions and/or remedies, it will include details of such conditions and/or remedies in its approval decision.

If a transaction is implemented without full compliance with any remedies or conditions set out in the CPC's approval, the CPC may impose a fine of up to 10% of the total turnover of the relevant party for the preceding year. Additional fines (up to EUR8,000 per day) may be imposed for each day the breach continues. The CPC may also withdraw its approval or modify the terms upon which the approval was issued.

Finally, the CPC also has the power to order that a concentration put into effect without full compliance with applicable remedies or conditions be (wholly or partly) reversed or disbanded, but only to the extent that this is reasonably necessary to restore functional competition on the relevant market.

5.6 Issuance of Decisions

The CPC will typically issue a formal decision permitting or prohibiting a transaction within the applicable deadlines. If the CPC fails to issue a decision within the stated deadline, clearance is deemed given.

Non-confidential versions of decisions are published in the Official Gazette of Cyprus, as well as on the CPC's website.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

Recent remedies imposed by the CPC are outlined in **5.2 Parties' Ability to Negotiate Remedies**, although none of the cases concerned foreign-to-foreign transactions.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

No specific legislative provision is made for related arrangements (ancillary restraints) to be captured in clearance decisions and, in practice, they are not commonly captured.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Where the CPC decides to proceed with a Phase II investigation, a person who is not a party to the concentration but may nevertheless be directly affected by the CPC's decision in relation to the concentration may petition the CPC to submit their views in relation to the concentration. This may be done in writing or as part of an oral hearing. Relevant third parties might include:

- competitors of the undertakings participating in the concentration;
- customers of such undertakings;
- consumer protection organisations; and
- employee representative bodies.

The CPC also has the right, where it decides to proceed to a Phase II investigation, to enter into negotiations or discussions or conduct hearings with any person, where this would (in the CPC's view) assist it in its investigation.

No third-party views are usually invited in the context of a Phase I investigation.

7.2 Contacting Third Parties

The CPC will often invite the views of interested third parties where it has decided to proceed with a Phase II investigation. Typically, the CPC will (i) request that the third parties concerned provide the CPC with a list of their competitors and other relevant parties and (ii) do its own research to determine which third parties might be relevant. While the CPC usually involves third parties via the circulation of written questionnaires or conducting oral hearings, it has on occasion also used more informal means (eg, telephone calls).

Part of the information that must be submitted to the CPC when proposing a remedy is a non-confidential description of the nature and scope of the proposed remedy, including the reasons why it is expected to resolve applicable competition concerns. The CPC has the power to use this non-confidential description to market-test the remedy offered.

7.3 Confidentiality

The CPC publishes both its decisions as well as the fact that it has received a notification in the Official Gazette of Cyprus and on its website. The publications always include the names of the parties involved and a description of the concentration. When decisions are published, the relevant economic sectors are also identified. However, commercial information that has been notified to the CPC as confidential is generally not included.

7.4 Co-operation With Other Jurisdictions

The CPC co-operates with competition authorities in other EU member states, both on general policy matters and with respect to specific transactions.

The Law does, however, provide that the CPC and its members are subject to an obligation to maintain the confidentiality of sensitive information received by them in the conduct of their duties. More particularly, they must keep information confidential and not publish or circulate the information except to the extent required to evidence a breach of the Law or to otherwise ensure application of the provisions of the Law.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

CPC decisions may be appealed (by way of administrative recourse) to the Administrative Court. Decisions of the Administrative Court may be appealed to the Court of Appeal, with decisions of the Court of Appeal being in turn appealed to the Supreme Administrative Court (on certain grounds and subject to leave).

8.2 Typical Timeline for Appeals

Appeals to the Administrative Court must be filed within 75 days of issuance of the CPC's decision (or within 75 days of the date the decision was notified to the appellant). A party wishing to appeal a decision of the Administrative Court to the Court of Appeal must file its appeal within 42 days of issuance of the Administrative Court decision. Likewise, parties wishing to appeal decisions of the Court of Appeal to the Supreme Administrative Court must file their

petition within 42 days of issuance of the decision of the Court of Appeal.

In practice, appeals can take several years to resolve and are very rarely successful. This may change following the introduction of the additional appellate tier described in **8.1 Access to Appeal and Judicial Review**. Final guidelines regarding the applicable timeframes for appeals under the new system are not yet available.

8.3 Ability of Third Parties to Appeal Clearance Decisions

In addition to the parties involved in the concentration that is the subject of a clearance decision, third parties who are affected by the decision may also appeal the decision to the Administrative Court (however, there are no reported cases of third parties ever having done so successfully).

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

There is draft legislation currently being considered by the Cypriot parliament regarding the implementation of a foreign direct investment regime in Cyprus. A summary of the provisions included in the current draft is set out below; however, the legislation may change substantially before it is implemented (if, indeed, it is implemented at all). At the date of writing, there has been no indication of when the legislation might be implemented.

In its current form, the legislation provides that a foreign investor that intends to make a foreign direct investment which has as its purpose (or which will result in) the acquisition of a “special participation” in an “undertaking of strategic

importance” must notify the Ministry of Finance in Cyprus.

“Special participation” is defined to mean the direct or indirect acquisition, alone or jointly with other persons, of an interest corresponding to at least 10% of the share capital and/or voting rights or equivalent power to exercise decisive influence over the activities of the relevant undertaking. It captures both new investments as well as changes to existing investment structures which result in the acquisition of control by a foreign investor.

“Undertaking of strategic importance” is defined as an undertaking that is headquartered in, and carries out activities in, the Republic of Cyprus, whose activities fall within one of the sectors set out in schedule 1 to the draft law. The current draft of schedule 1 refers to activities in “particularly sensitive sectors which concern vital infrastructure”, and specifically includes the following sectors:

- Energy;
- Transport;
- Water supply;
- Health;
- Communications;
- Media;
- Data processing or storage;
- Defence;
- Electoral services;
- Financial services (including systemic credit institutions);
- Investments in “sensitive facilities” as well as land and immovable property which are of key importance in the use of the infrastructure mentioned above.

Upon receiving a notification, the Ministry of Finance must decide (within ten working days

of receiving a complete notification) whether it needs to examine the investment further. If the Ministry decides it does not need to examine the investment, it must notify the foreign investor within five working days from the date of its decision. If the Ministry decides to further examine the investment, it must (a) notify the foreign investor within five working days of its decision and (b) determine, within a further 60 working days, whether the investment may be prejudicial to the safety or public order of the Republic of Cyprus. In making its decision, the Ministry must take into account a variety of factors, including whether:

- the foreign investor is controlled by a third-country government;
- there is a serious risk that the foreign investor will be involved in illegal or criminal activities; and
- following implementation of the investment, the ability of other shareholders to participate in the undertaking (and its decision-making) will be satisfactorily preserved.

If the Ministry concludes that the investment may be prejudicial, it may impose conditions on implementation of the investment or may forbid it entirely (or, to the extent the investment has already been implemented, unwind it).

The Ministry has discretion to “stop the clock” and request further information from the notifying party, such that in practice, the timeframes listed above may be elongated.

If a notifiable investment is not notified to the Ministry in accordance with the law, then the investment is automatically deemed to be in breach of the provisions of the law and the Ministry may take any and all measures at its disposal to forbid and/or terminate and/or unwind

the investment in question. The Ministry also has the power to impose administrative fines and obtain injunctions or other interim measures

10. Recent Developments

10.1 Recent Changes or Impending Legislation

As at the date of writing, the Law has not been amended since its introduction (other than purely corrective amendments), and no subsidiary legislation has been issued pursuant to the Law. No concrete proposals exist for amendment of the Law.

10.2 Recent Enforcement Record

The CPC very rarely issues fines, and although its powers to issue fines are draconian, the limited fines that have been issued have been low. In addition, remedies recently imposed by the CPC have tended to be fairly limited; for instance, the CPC has not yet required the sale of a business or parts thereof as a remedy (although it has required the sale of equipment sufficient to conduct a printing business, in the context of a concentration that was ultimately not put into effect).

10.3 Current Competition Concerns

There has been a notable shift in approach to merger control notification by the EC, which is now encouraging referrals from national competition authorities in certain cases (including cases where the jurisdictional thresholds are not met). As a result, we may see more transactions referred to the EC than was previously the case.

CZECH REPUBLIC



Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.177

- 1.1 Merger Control Legislation p.177
- 1.2 Legislation Relating to Particular Sectors p.177
- 1.3 Enforcement Authorities p.177

2. Jurisdiction p.178

- 2.1 Notification p.178
- 2.2 Failure to Notify p.178
- 2.3 Types of Transactions p.178
- 2.4 Definition of "Control" p.179
- 2.5 Jurisdictional Thresholds p.179
- 2.6 Calculations of Jurisdictional Thresholds p.180
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.180
- 2.8 Foreign-to-Foreign Transactions p.181
- 2.9 Market Share Jurisdictional Threshold p.181
- 2.10 Joint Ventures p.181
- 2.11 Power of Authorities to Investigate a Transaction p.182
- 2.12 Requirement for Clearance Before Implementation p.182
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.182
- 2.14 Exceptions to Suspensive Effect p.182
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.183

3. Procedure: Notification to Clearance p.183

- 3.1 Deadlines for Notification p.183
- 3.2 Type of Agreement Required Prior to Notification p.183
- 3.3 Filing Fees p.183
- 3.4 Parties Responsible for Filing p.183
- 3.5 Information Included in a Filing p.183
- 3.6 Penalties/Consequences of Incomplete Notification p.184
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.184
- 3.8 Review Process p.184
- 3.9 Pre-notification Discussions With Authorities p.185
- 3.10 Requests for Information During the Review Process p.185
- 3.11 Accelerated Procedure p.185

4. Substance of the Review p.186

- 4.1 Substantive Test p.186
- 4.2 Markets Affected by a Transaction p.186
- 4.3 Reliance on Case Law p.186
- 4.4 Competition Concerns p.186
- 4.5 Economic Efficiencies p.187
- 4.6 Non-competition Issues p.187
- 4.7 Special Consideration for Joint Ventures p.187

5. Decision: Prohibitions and Remedies p.187

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.187
- 5.2 Parties' Ability to Negotiate Remedies p.188
- 5.3 Legal Standard p.188
- 5.4 Negotiating Remedies With Authorities p.188
- 5.5 Conditions and Timing for Divestitures p.188
- 5.6 Issuance of Decisions p.188
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.188

6. Ancillary Restraints and Related Transactions p.189

- 6.1 Clearance Decisions and Separate Notifications p.189

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.189

- 7.1 Third-Party Rights p.189
- 7.2 Contacting Third Parties p.189
- 7.3 Confidentiality p.189
- 7.4 Co-operation With Other Jurisdictions p.189

8. Appeals and Judicial Review p.190

- 8.1 Access to Appeal and Judicial Review p.190
- 8.2 Typical Timeline for Appeals p.190
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.190

9. Foreign Direct Investment/Subsidies Review p.190

- 9.1 Legislation and Filing Requirements p.190

10. Recent Developments p.191

- 10.1 Recent Changes or Impending Legislation p.191
- 10.2 Recent Enforcement Record p.191
- 10.3 Current Competition Concerns p.191

HAVEL & PARTNERS is a Czech-Slovak law firm with a strong reputation. It has six offices in the Czech Republic and Slovakia, and 350 lawyers, tax advisers and patent attorneys, making it the largest independent law firm in Central Europe. The firm's practice caters to the healthcare, renewable energy, ESG, retail, consumer, infrastructure, transportation, telecommunication, IT and industrial sectors. Clients include large international companies and leading Czech and Slovak firms. The competition team is the larg-

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The regulatory framework of the Czech merger control regime has its basis in Act No 143/2001 Coll., on the Protection of Competition and Amending Certain Acts (Act on the Protection of Competition) (CCA). The CCA is complemented by the following Notices issued by the Office for the Protection of Competition (OPC – the Czech competition authority):

- Notice on the Requirements for Concentration Notifications;
- Notice on the Pre-notification Contacts with Merging Parties;
- Notice on Calculation of Turnover for the Purpose of the Control of Concentrations between Undertakings;
- Notice on the Concept of Concentration;
- Notice on the Notion of “Undertakings Concerned”;
- Notice on the Prohibition of Implementation of Concentrations prior to the Approval and Exemptions Thereof;
- Notice on the Application of the Failing Firm Defence Concept in the Assessment of Concentrations of Undertakings;
- Notice on Simplified Procedure;
- Notice on the Pre-notification Contacts with Merging Parties;
- Notice on the Calculation of Turnover for the Purpose of the Control of Concentrations between Undertakings;
- Notice on the Application of the Failing Firm Defence Concept in the Assessment of Concentrations of Undertakings; and
- Notice on Prohibition of Implementation of Concentrations prior to the Approval and Exemptions Thereof.

1.2 Legislation Relating to Particular Sectors

The Czech Republic implemented its foreign direct investment (FDI) screening regime in May 2021. Under the Act on Foreign Investment Screening (the “FDI Act”), certain foreign investments in assets in the Czech Republic are subject to prior approval by the Ministry of Industry and Trade. As is the case with notifications of concentrations to the OPC, investors are prohibited from implementing the investment before the Ministry’s approval is obtained (the so-called standstill obligation), in case the investment falls under the mandatory notification regime. The Ministry is also entitled to review any foreign investment up to five years after its completion.

Besides the FDI screening and general merger control regime, a special regime applies to banks and is governed by Act No 21/1992 Coll., on banks, under which mergers, divisions of banks and transfers of assets to a bank as a shareholder are subject to prior consent from the Czech National Bank. The approval of the Czech National Bank does not exempt a transaction from the merger control regime; such transaction still needs to be notified to the OPC, provided the notification conditions are met.

1.3 Enforcement Authorities

Merger regulation enforcement in the Czech Republic falls solely within the competence of the OPC. The process is administered by the OPC’s department for control of concentrations.

First instance decisions of the OPC may be appealed to the chairperson of the OPC. Decisions of the chairperson may be subject to review by the Administrative Court in Brno following an administrative action and by the Supreme Administrative Court respectively.

2. Jurisdiction

2.1 Notification

Transactions constituting a concentration within the meaning of the CCA must be notified to the OPC. There are no exemptions from the obligation to notify, but a concentration has to fulfil the following two general conditions to be notifiable.

- The concentration must be long-lasting. Accordingly, a temporary change of control that cannot result in permanent or long-lasting changes in the structure of the market is exempt from the merger control scrutiny. A period of five years is usually considered as long-lasting, but a case-by-case assessment is necessary to provide a clear answer.
- While the acquisition of control is generally subject to a notification obligation, the CCA provides two exemptions in regard to special industries and types of transactions:
 - (a) control over an undertaking acquired by a bank as a result of the payment of the issue price of the shares by way of a set-off of the bank's receivables from such legal entity, provided this ownership interest is possessed during a rescue operation or financial restructuring of the controlled undertaking; or
 - (b) a provider of investment services acquires control by way of an acquisition of shares of an undertaking, provided the shares are acquired for the purpose of their subsequent sale and the related voting rights are not exercised for the purpose of determining or influencing the market behaviour of the controlled undertaking.

There is no possibility to file voluntarily if thresholds are not exceeded: the scope of merger control is limited solely to the compulsory filings.

2.2 Failure to Notify

The OPC may impose a fine of up to 10% of net turnover achieved by the undertakings in the preceding accounting period for the failure to notify a concentration meeting the notification criteria set by the CCA. The fine calculation follows the OPC's fining guidelines.

There has been an increasing number of decisions imposing fines for failing to notify a transaction under the Czech merger control regime. Most recently, the OPC imposed a fine of CZK18.8 million (approximately EUR752,000) on EP ENERGY TRADING for failing to notify acquisition of a company active in the retail supply of electricity and natural gas. The OPC publishes its decisions on its website, including information on the amount of the fine.

2.3 Types of Transactions

Generally, the following types of transactions are subject to merger control in the Czech Republic.

- Mergers – two or more previously independent undertakings merging into one undertaking.
- Acquisitions of control – one or more persons who already control at least one undertaking, or one or more undertakings, acquire direct or indirect control of the entirety or parts of one or more other undertakings (assets and/or shares deals).
- Joint ventures – a joint venture that will perform all the functions of an independent business entity on a lasting basis is established.

Regardless of its form, there must be a change in the nature of control of an undertaking in order for a transaction to be considered a concentration within the meaning of the CCA. It is irrelevant whether the change in control is brought

about by a purchase of shares or assets or by any other means.

Internal restructurings or reorganisations, as well as transactions not involving the transfer of shares, may be caught if they lead to a change in control of the undertaking (eg, granting veto rights to a minority shareholder leading to the acquisition of control). Certain transactions do not fall within the scope of merger control due to their temporary or specific nature.

2.4 Definition of “Control”

Under the CCA, the notion of control is a possibility to have a decisive influence on the activity of another undertaking or a part thereof on the basis of a matter of law or fact, in particular on the basis of:

- the ownership of a business establishment of the controlled undertaking, or a part thereof; or
- a right that provides decisive influence on the composition, voting and decision-making of the bodies of the controlled undertaking.

“Control” and “change of control” are interpreted in line with EU competition law, including the EU Commission’s Consolidated Jurisdictional Notice.

Control in an undertaking may be sole (only one undertaking having control over the target) or joint (the target being controlled by two or more undertakings). The establishment of joint control constitutes a change of control, as do changes in the group of shareholders with a controlling interest. As a result, there is a change of control when the target goes from 50/50 ownership to being solely controlled by only one of the existing shareholders, and also when one of the existing shareholders sells its share to a third party.

Joint control may be established between a majority and a minority shareholder on the basis of veto rights regarding decisions that are essential for the strategic operation of the business. A concentration occurs both when the joint control is established and again when it is dissolved – in case a minority shareholder gives up certain essential veto rights as a result of which the majority shareholder gains sole control.

Acquisitions of minority shareholdings where such acquisition does not result in the acquirer gaining sole or joint control over the target are not subject to notification to the OPC.

2.5 Jurisdictional Thresholds

Under the CCA, a concentration must be notified to the OPC where the following turnover thresholds are exceeded:

- the total net turnover of all the undertakings concerned in the Czech Republic for the last financial year is more than CZK1.5 billion (approximately EUR60 million) and at least two of the undertakings concerned each had a net turnover of more than CZK250 million (approximately EUR10 million) in the Czech Republic for the last financial year; or
- the total net turnover in the Czech Republic of one of the merging parties (in the case of a merger), the undertaking over which control is being acquired (in the case of an acquisition) or one of the parties establishing a new joint venture exceeds CZK1.5 billion (approximately EUR60 million) and, at the same time, the worldwide net turnover achieved in the last financial year by the other undertaking concerned exceeds CZK1.5 billion.

The above-mentioned thresholds apply to all transactions; there are no sector-specific thresholds applicable to particular sectors.

2.6 Calculations of Jurisdictional Thresholds

Turnover constitutes the net turnover derived from the sale of products and services generated by an undertaking within its ordinary activities after the deduction of:

- value added tax and other directly related taxes; and
- any turnover between associated undertakings.

There are special rules on turnover calculation for particular businesses.

- State-controlled businesses: the turnover does not include all companies that are directly or indirectly controlled by the state, but only those that form part of the same business entity.
- Insurance companies: the value of the gross premiums of all insurance contracts concluded applies – not only those insurance contracts concluded in the particular accounting period, but all ongoing contracts concluded in the past.
- Banks: the turnover is calculated as the sum of revenues, including:
 - (a) income from securities and participating interests;
 - (b) net profit on financial operations;
 - (c) interest income; and
 - (d) fees and commissions.
- Sales of services through other providers: in cases where the services are sold through an intermediary (eg, advertising or tourism), even if the intermediary charges the final customer for the full price for the service, the turnover is made up of commissions received from the primary provider for the mediation of the service.

As for the geographical allocation of turnover, turnover from products and services sold to customers located in the Czech Republic at the time of entering into the respective agreement is regarded as Czech turnover.

As for foreign currencies, all financial data must be converted into Czech crowns using the average exchange rate quoted by the Czech National Bank for the period to which such financial data relates.

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

As stated in **2.6 Calculations of Jurisdictional Thresholds**, the turnover is calculated on the basis of the most recent audited accounts of not only the participating undertaking but also undertakings associated with each participating undertaking.

The turnover of the undertaking on the selling side (in cases of acquisitions) is not taken into account for the purpose of turnover calculation. Accordingly, where an undertaking transfers only some of its subsidiary companies to another, the turnover achieved by the companies whose control is transferred is included, but the selling undertaking's turnover is not.

The basis for turnover calculation is the most recent audited accounts of a financial year of the following entities (in line with EU merger control rules):

- the participating undertakings (undertakings concerned); and
- any undertakings associated with each participating undertaking, including directly and indirectly controlling entities (parent compa-

nies), subsidiaries, joint ventures and subsidiaries of the parent companies.

The turnover needs to be adjusted to take subsequent transactions into account, such as divestments, acquisitions and other business closures, after the end of the respective financial year.

2.8 Foreign-to-Foreign Transactions

All transactions that meet the thresholds are subject to merger control, regardless of where the undertakings are registered. Accordingly, there is no exemption for foreign-to-foreign transactions.

There is no local effects test per se, but the Czech merger control regime requires a local presence since the target must generate a certain level of turnover in the Czech Republic. Nonetheless, with regard to international joint ventures, it is sufficient for the turnover to be achieved by the parent company/whole group, while the target itself does not have to be present in the Czech Republic. Therefore, a filing may be required even though a target has no local sales or assets.

2.9 Market Share Jurisdictional Threshold

There are no market share thresholds for notification. Under the previous merger control regime, only transactions leading to a 30% share on a relevant market(s) were notifiable, but since 2001 the current legislation has applied thresholds based solely on turnovers.

2.10 Joint Ventures

Joint ventures are subject to merger control only if the joint venture is a “full function” joint venture – ie, it operates on a lasting basis and performs all the functions of an autonomous economic

entity. The joint venture must be economically autonomous from the operational point of view to be full function. Conditions for full function joint ventures are in line with the practice of the European Commission. Full function criteria are met when the joint venture:

- has sufficient resources to operate independently in a market;
- engages in activities beyond specific functions for the parent companies;
- is not dependent on commercial relationships with the parents; and
- operates on a lasting basis.

The following transactions concerning full function joint ventures are subject to merger scrutiny:

- the establishment of a joint venture;
- a change from joint to sole control;
- dissolution – if (part of) the business of the joint venture is transferred to one or more undertakings controlling the joint venture or to a third party;
- a change/extension of the activities of a joint venture – if further assets, contracts, know-how, rights, etc, are transferred from parent companies to the joint venture (these activities must be transferred to extend the business activities of the joint venture into other product or geographic markets); and
- a change in participants/owners – for instance, if one of the controlling businesses sells its share in a joint venture to another business, or if one of the controlling businesses is acquired by another business.

Concerning the turnover thresholds, the turnover a joint venture has with third parties must be divided equally between the controlling owners notwithstanding their actual shares and the distribution of profit.

2.11 Power of Authorities to Investigate a Transaction

The OPC may not request a merger notification nor investigate or oppose a transaction where the jurisdictional thresholds are not met. Accordingly, undertakings may not file voluntarily if the required thresholds are not met.

So far, the OPC has not used any of the new tools confirmed by recent CJEU case law (eg, the Dutch clause or the procedure applied in the Towercast case) to investigate under-threshold transactions.

Recently, the OPC introduced a plan of possible amendments to the CCA, including a “call-in” model in merger control. The call-in model would give the OPC the power to request merging entities to notify a transaction that does not meet the turnover criteria, provided that each of the undertakings concerned achieved a turnover of at least CZK100 million (EUR4 million). The OPC’s power to request notification would be limited to six months after the closing of the transaction. The amendment will not enter into force until 1 July 2025 at the earliest.

2.12 Requirement for Clearance Before Implementation

The standstill obligation applies in the Czech merger control regime: undertakings may not implement a transaction meeting the notification criteria before clearance from the OPC is received. The merging undertakings are required to run their businesses separately and independently until the approval decision is issued and enters into force.

2.13 Penalties for the Implementation of a Transaction Before Clearance

So-called gun-jumping – when the parties to a concentration implement a transaction before

receiving approval from the OPC – is subject to a fine of up to 10% of the undertakings’ global turnover. The amount of the fine is calculated according to the guidelines of the OPC and depends on the nature, gravity and duration of the conduct. The OPC has recently published a Notice on its website on imposing fines for gun-jumping.

The latest decisions of the OPC concerning gun-jumping case were both issued in 2024, the authority imposed a sanction of CZK18.8 million (approximately EUR752,000) on EP ENERGY TRADING and CZK1.8 million (approximately EUR72,000) on Auto UH group for exercising control over target companies before filing to the OPC. There are no known cases where the OPC has imposed fines on foreign-to-foreign transactions.

2.14 Exceptions to Suspensive Effect

The prohibition of implementation before clearance does not apply where:

- the concentration occurs on the basis of a public bid to assume equity shares; or
- the concentration occurs on the basis of a sequence of operations, due to which control will be acquired by various entities, provided that the application for the initiation of proceedings was filed immediately and that the voting rights attached to such shares and securities are not exercised.

Furthermore, the Czech merger control regime only allows for individual exemption from the standstill obligation; there are no general exceptions to the suspensive effect.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Under the Competition Act, a transaction may be individually exempted by the OPC from the prohibition on implementation before clearance. Such exemption needs to be applied for by the notifying party, which is obliged to substantiate the request, in particular by providing sufficient and concrete reasoning with evidence that a delay in the implementation would result in major damage or other significant detriment to the parties to the transaction. The applicant must specify to which extent the exemption is sought. In practice, these exemptions are rare as the OPC is reluctant to grant them.

The Competition Act does not provide for the possibility of carve-out.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There are no specific deadlines for the notification of a transaction. In general, a notification should be filed after a binding agreement has been concluded, a takeover bid has been published or a controlling interest has been acquired.

3.2 Type of Agreement Required Prior to Notification

Formally, a binding agreement should be concluded prior to notification to the OPC. However, in practice, the OPC may accept less formal agreements, like a letter of intent, memorandum of understanding or a pre-final draft of the SPA as sufficient evidence demonstrating a good faith intention to conclude an agreement.

3.3 Filing Fees

Filing to the OPC is subject to an administrative fee of CZK100,000 (EUR3,960), regardless of the type of procedure (simplified or full). The fee must be paid on the day of filing at the latest.

3.4 Parties Responsible for Filing

Responsibility for the filing is vested in:

- all merging undertakings in cases of concentration by a way of merger;
- all undertakings acquiring direct or indirect control in the case of acquisitions of control; and
- all undertakings establishing a joint venture.

3.5 Information Included in a Filing

The list of requirements for a merger filing is governed primarily by Decree No 294/2016 Coll., stipulating details of the justification of a concentration notification and documents certifying facts decisive for a concentration, and Decree No 252/2009 Coll., stipulating details of a concentration notification. The requirements include:

- official extracts from the Commercial Register (or any other similar register) for all undertakings concerned (apostille is necessary in the case of non-Czech companies, with some exceptions based on international treaties);
- the notification questionnaire together with its non-confidential version;
- the documents on the basis of which the concentration should be established or documents certifying the transaction;
- annual reports, including audited annual financial statements for the last completed accounting period of all undertakings concerned;
- consolidated financial statements for the last finished accounting period, provided that the

parties are under an obligation to compile consolidated financial statements pursuant to special legal regulations;

- analyses, reports, studies, surveys and any comparable documents prepared for any member(s) of the board of directors, or the supervisory board, or any other person(s) for the purpose of assessing or analysing the transaction with respect to competitive conditions, undertakings (both existing and potential), the rationale of the transaction, potential for sales growth or expansion into other product or geographic markets, and/or general market conditions; and
- a turnover calculation scheme stating the turnover of the parties in the relevant accounting period, proving the notification thresholds are met.

The filing must be submitted in the Czech language. If the documents were not prepared in Czech originally, it is necessary to provide certified translations of the documents to the OPC, along with the original documents. Furthermore, a power of attorney by the notifying party has to be provided if it is represented in the proceedings.

The OPC may also request additional documents.

3.6 Penalties/Consequences of Incomplete Notification

The OPC may reject an incomplete notification. In practice, the OPC first requests the missing information/documents from the notifying parties, allowing them to complete the submission by providing the required information.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

If the notifying party provides the OPC with inaccurate, misleading or incomplete information, the OPC may re-open the proceedings and, in the worst-case scenario, revoke its approval decision. In addition, the OPC may impose a fine of up to 1% for the provision of inaccurate, misleading or incomplete information. There have not been any cases of these sanctions being applied in practice.

3.8 Review Process

The proceedings consist of three phases:

- pre-notification phase (see 3.9 Pre-notification Discussions With Authorities);
- phase I; and
- phase II.

Phase I

The first phase starts with the submission of the filing by the notifying party. It takes up to 30 calendar days (20 if the concentration is notified in the simplified procedure) and may be extended by up to 15 working days if commitments are offered by either of the parties during phase I. The OPC may request additional information or/and documents from the notifying party, which “stops the clock” – the period from the date of delivery of such request to the date of response is not included in the time limit for issuing the decision.

After filing, the OPC assesses the formal prerequisites of the filing (its completeness) and proceeds to send a notice of initiation of the proceedings to the notifying party. The initiation of proceedings is also published on the OPC’s website and in the Commercial Bulletin. The first phase may result in either:

- the concentration being approved (eventually with commitments);
- a decision that the concentration needs to be investigated further in phase II; or
- a decision that the concentration is not subject to the OPC's approval or that it is not a concentration within the meaning of Section 12 of the Competition Act.

Phase II

The second phase takes up to five months from the initiation of the proceedings and may be extended by up to 15 working days under the same conditions as phase I.

Phase II consists of deeper investigation, including detailed market surveys, an economic analysis and eventually the negotiation of commitments in order to eliminate the OPC's concerns about any potential anti-competitive effects of the concentration.

The OPC may decide to approve (eventually with commitments) or prohibit the concentration in the second phase.

3.9 Pre-notification Discussions With Authorities

Prior to the concentration proceedings, the parties may voluntarily engage in pre-notification contacts with the OPC. The OPC has issued a Notice on pre-notification contacts providing guidance on this initial phase of the process.

It is advisable and encouraged by the OPC to inform the OPC of the intended transaction at an early stage and to engage in pre-notification contacts. The pre-notification involves informal consultations where the OPC commits itself to lead the discussions. The pre-notification phase is of a strictly confidential nature: the information submitted by the undertakings is available solely

to the OPC. The OPC usually indicates whether the submission is complete and provides comments on an informal basis.

In the case of "simplified procedure" cases (see **3.11 Accelerated Procedure**), the pre-notification discussions may be relatively brief, usually taking approximately one or two weeks. In more complex cases, the pre-notification discussions can take several months.

3.10 Requests for Information During the Review Process

It is not uncommon for the OPC to send requests for information (RFI) to the parties to the concentration, especially in complex cases. RFIs from the OPC often include dozens of questions and request considerable amounts of data, presenting a non-negligible burden for the parties to the transaction. RFIs may be avoided, at least partially, by engaging in pre-notification discussions with the OPC.

If the OPC sends an RFI to the parties, the "clock stops" – ie, the period from the date of delivery of such request to the date of response is not included in the statutory time limits for issuing a decision in either phase of the proceedings.

3.11 Accelerated Procedure

The Czech merger control regime provides for an accelerated procedure in the form of a simplified procedure that is applicable to cases that are deemed to have a lower risk of negative impact on competition and thus do not require full scrutiny. The simplified procedure is available in the following two cases:

- if the transaction concerns a change in the quality of control – the undertaking acquires sole control over an undertaking, in which it had joint control before the transaction; or

- if the undertakings concerned have low market shares – none of the undertakings concerned operate in the same relevant market, or their combined share in that market does not exceed 15% in the case of horizontal mergers, and at the same time none of the undertakings concerned operates in a market vertically connected to the relevant market in which another undertaking concerned operates, or their share in every such market does not exceed 25% (vertical merger).

The OPC has full discretion in requesting a full notification despite the undertakings fulfilling the criteria for this simplified notification.

4. Substance of the Review

4.1 Substantive Test

The OPC employs the SIEC (significant impediment to effective competition) test, similar to the one employed by the European Commission under the EU Merger Regulation. As a result, a concentration will be considered incompatible with the Czech market where it would significantly impede effective competition in the market, in particular (but not exclusively) as a result of the creation or strengthening of a dominant position.

The OPC takes a range of factors into consideration, including efficiencies that may be gained from the merger (efficiency defence) and/or whether one of the parties is likely to fail as an independent business (failing firm defence).

4.2 Markets Affected by a Transaction

The OPC reviews the market definitions provided by the notifying parties when determining which markets may be affected by the transaction. It also considers alternative markets based

on the OPC's decisional practice, as well as the practice of the European Commission, the EU Courts' decisional practice and the decisional practice of competition authorities in other EU member states. It takes market reports and the parties' own internal documents into account. In cases where the market definition is complex, the OPC may ask competitors and customers their views on the relevant market definition.

Special attention is paid to markets where both parties perform economic activity (horizontal overlaps), but vertically connected markets are also closely examined by the OPC.

There is no de minimis rule. In general, competitive concerns are unlikely to arise where the use of the simplified procedure is possible. An affected market exists if the combined horizontal market share reaches 15% or more, or if one of the parties concerned has a market share of at least 25% in a vertically overlapping market.

4.3 Reliance on Case Law

Besides its own decisions, the OPC generally relies on the European Commission's decisional practice when defining relevant markets. In cases where there are no decisions of the OPC or the Commission, the OPC takes into account decisions of other member states' competition authorities, without clear preference for any jurisdiction.

4.4 Competition Concerns

In its assessment of concentrations, the OPC focuses primarily on the following aspects:

- the necessity of the preservation and further development of effective competition in the affected market(s);
- the structure of all markets affected by the concentration;

- the market shares of the parties to the concentration in such markets, and their economic and financial power;
- legal and other barriers to entering relevant markets;
- alternatives available to suppliers and customers of the parties;
- the development of supply and demand in the affected markets;
- the needs and interests of consumers; and
- research and development.

4.5 Economic Efficiencies

Although the notification questionnaire contains a dedicated section in which evidence of efficiencies may be presented, the OPC considers economic efficiencies that may be gained from the merger only in a limited extent.

In any case, the claimed efficiencies must be directly created by the concentration and not achievable through any other, less anti-competitive means. In addition, they must be quantifiable and verifiable to a reasonable degree of certainty and benefit consumers.

4.6 Non-competition Issues

When assessing a concentration under the Czech merger control regime, the OPC only considers competition-related issues. The decision of whether a merger should be cleared or prohibited is thus based solely on competition-related questions – primarily the SIEC test. The CCA does not allow the OPC to take any non-competition issues into account.

The Czech FDI regime, effective from May 2021, is separate from the merger control rules (see **9. Foreign Direct Investment/Subsidies Review**).

4.7 Special Consideration for Joint Ventures

Joint ventures are primarily assessed in the same way as other types of concentrations captured by the merger control regime, primarily by the SIEC test (see **4.1 Substantive Test**).

In addition, the OPC may also analyse whether the joint venture gives rise to spillover effects, by enhancing the risk of co-ordination between the parent companies. This applies in cases where both parent companies are active in markets outside the joint venture or operate in the upstream or downstream markets of another parent. The OPC assesses the risk of co-ordination between the parent companies under the provision on anti-competitive agreements between undertakings.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The OPC is able to prohibit a transaction that would result in a substantial distortion of competition in the relevant market by creating or strengthening a dominant position of the undertakings concerned. The OPC does not need an approval from the court or any other body/authority to issue a prohibition decision.

The OPC may also revoke an approval of a transaction if the parties do not comply with the remedies set by the approval decision, and may prohibit a concentration and order a divestment where the concentration has been implemented without prior approval from the OPC.

5.2 Parties' Ability to Negotiate Remedies

Parties to a concentration may offer remedies in order to maintain effective competition in cases where the OPC voices its concerns that the transaction may lead to substantial distortion of competition. Remedies may take essentially any form, which means that the remedy may be structural or behavioural in nature, with or without time limitations.

5.3 Legal Standard

Remedies must be proposed by the parties to the transaction. The OPC may approve a concentration if parties provide evidence to prove that implementation remedies are sufficient to restore or maintain effective competition. In the absence of such evidence, the OPC is not obliged to inquire about the impact of the remedies on the market.

5.4 Negotiating Remedies With Authorities

There is no requirement set by law for the parties to the transaction to begin negotiating remedies with the OPC as soon as the first phase of the merger proceeding commences. The distinction between phase I and phase II is diminished in this regard; the parties may negotiate remedies in both phases.

The parties to the transaction under review may offer remedies by submitting commitments to the OPC. The OPC, on the other hand, may lay down the conditions and obligations necessary to fulfil the remedies. Accordingly, the OPC cannot impose remedies that are not agreed by the parties.

The parties may submit commitments at any time during the review process, but no later than 15 days after receiving the OPC's statement of

objections. A proposal submitted later may only be taken into account in special cases. If parties offer remedies either in the first 30 days of the proceedings or in the second phase, the OPC will extend the deadline by 15 working days.

5.5 Conditions and Timing for Divestitures

The parties may complete a transaction when remedies are approved by the OPC and made binding in its final decision. The condition and timing for both structural and behavioural remedies are highly individual and vary case-by-case – the regulatory framework does not set any deadlines.

The implementation of remedies is then subject to ex post review. If the remedies are implemented after a deadline set by the decision or not implemented at all, the OPC may impose a fine of up to 1% of the undertaking's turnover or withdraw the merger approval decision.

5.6 Issuance of Decisions

Parties receive a formal decision permitting or prohibiting a transaction, while the OPC publishes a press release informing about the result of the merger proceedings on its website. Additionally, with some delay caused by confidentiality claims of the parties, the OPC publishes a non-confidential version of the decision on its website. This takes usually approximately one month.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

It is very rare for the OPC to prohibit transactions. Decisions requiring remedies occur but not frequently. No significant disparity can be observed between commitments required in local as opposed to foreign-to-foreign transactions.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

In line with EU competition law, ancillary restraints are considered to be an inherent part of concentrations and, therefore, are not subject to separate scrutiny. However, restrictions that go beyond what may be considered ancillary may fall under the general prohibition on anti-competitive agreements. Ancillary restraints are notified to the OPC as part of the filing of the transaction. Accordingly, separate notifications are not possible.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third parties may get involved in the merger control process in various ways. In particular, competitors may file objections against a concentration, which the OPC is obliged to address in its final decision. Historically, competitors who adopted an active approach in the proceeding through substantiated objections were given grounds to appeal against the OPC's first-instance decision. This practice was later abandoned.

Customers may be involved by the OPC through an RFI or a market survey. The OPC takes these documents into account, particularly when defining relevant markets and assessing demand substitution.

7.2 Contacting Third Parties

The OPC usually contacts third parties in more complex merger proceedings, especially those

assessed in phase II investigations. It is rather uncommon for the OPC to reach out to third parties in simplified proceedings. The OPC does so by a way of written questionnaires – it sends RFIs to the competitors, but it may also contact suppliers, customers or consumer organisations.

7.3 Confidentiality

The OPC only publishes a notice upon receiving a proposal of a merger and information whether a simplified procedure would be used or not. The notice includes the names of the parties and basic information about the area in which they operate, the form of control acquired and an invitation for third parties to submit their comments. More detailed information is available to the public as part of a non-confidential version of the decision, which is made available on the OPC's website after the decision is issued and the parties redact their business secrets.

7.4 Co-operation With Other Jurisdictions

The OPC is a member of the European Competition Network (ECN). The competition authorities co-operate through the ECN and the associated EU Merger Working Group, especially in merger reviews of multi-jurisdictional mergers.

The OPC does not have to seek parties' permission to share information with other jurisdictions after the filing is made. Within the pre-notification procedure, on the other hand, the OPC seeks parties' permission to share information with other jurisdictions in transactions concerning multiple member states.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

If a decision prohibiting a concentration is issued, parties can appeal to the chairperson of the OPC. In second instance, the appeal is reviewed and decided upon by the chairperson of the OPC. If the first instance decision is confirmed by the chairperson, the parties may bring an administrative action against the chairperson's decision before the Regional Court in Brno.

8.2 Typical Timeline for Appeals

Once a decision is issued and delivered, the parties (usually the acquirer) may lodge an appeal against the decision within 15 days. The appeal has a suspensory effect. Following the chairperson's decision, the parties have two months to file an action with the Regional Court in Brno.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Historically, the case law of Czech courts allowed third parties to appeal a first-instance decision if the appellant was active in the proceeding before the OPC through well-founded objections. However, this case law was overturned by a judgment of the Supreme Administrative Court on the grounds of endangering legal certainty of the parties to the concentration.

It follows that, under Czech case law, only parties to the proceedings may appeal a clearance decision.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements Czech FDI Screening Regime

The Czech FDI screening regime was established in 2021 with the adoption of the FDI Act. Foreign investments meeting the criteria set out by the FDI Act must be notified and approved by the Ministry for Industry and Trade (MIT). Similar to merger control, the standstill obligation applies until the investment is approved by the MIT.

Under the FDI Act, a foreign investor is a person who:

- is not a national/does not have a registered seat in the Czech Republic or any other EU member state; or
- is under the indirect control of such a person.

The entry of a foreign investor into a targeted business that enables the investor to exercise effective control over the target's economic activity (eg, 10% of voting rights, influence on appointing decision-making bodies or even appointment of the investor into such body) falls within the scope of the FDI regime.

Notification is mandatory if the target is active in the areas of military material, critical infrastructure, information and communication systems of critical infrastructure and/or dual use items and areas of importance for maintaining the security of the Czech Republic. A consultation is mandatory if the target holds a licence for nationwide radio or television broadcasting, or publishes periodicals with an aggregate minimum average print run of 100,000 copies per day.

Moreover, the FDI Act grants the MIT the power to open an investigation into any foreign invest-

ment (regardless of the sector/activities of the target) within five years after its completion if the MIT has concerns that the investment may pose a risk to national security. The risk of the MIT opening the investigation ex officio may be avoided by approaching the MIT voluntarily via formal consultation. Within the consultation, the investment is notified on a simplified form. If no concerns about the security and/or public order are raised after the review, the MIT issues a comfort letter stating that it will not open an ex officio investigation into the investment in the future.

Foreign Subsidies

As the Czech Republic is an EU member state, the newly adopted Foreign Subsidy Regulation applies.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

The last amendment to the CCA came into force on 27 July 2023, but it did not introduce any significant changes to the merger control regime.

The OPC recently presented its proposal on amendment to the CCA with significant additions to its powers, also impacting the local merger control regime. In particular, the OPC's proposal includes the following two novelties related to merger control.

- The so-called call-in model in merger control would give the OPC the power to request parties to the concentration to notify a transaction that does not meet the turnover criteria. The OPC could request such notification only in case each of the undertakings concerned achieved a turnover of at least CZK100 million (EUR4 million). The OPC's

power to request notification would be limited to six months after the closing of the transaction.

- The amendment should also give the OPC the power to identify, after a sector inquiry, specific markets with competition issues such as high barriers to entry, infrastructure as a dominant role for success and entrenched market positions, but also innovative markets more prone to “killer acquisitions”. In such markets, the OPC would be given the power to introduce different or additional notification criteria. These would for example include value thresholds in the case of dynamic markets with high presence of start-ups.

The Czech government is expected to present the amendment of the CCA to the Czech Parliament in July 2024. With the Parliament's consent, the amendment to the CCA could take legal effect from 1 July 2025.

10.2 Recent Enforcement Record

The prohibition of mergers is a tool of last resort. It is used very rarely by the OPC, which has prohibited only a few mergers in its 30 years of existence. Its recent prohibition of a transaction between Česká pošta and PNS was the first prohibition decision after nearly 20 years. However, slightly more often, the OPC issues decisions imposing fines for gun-jumping and failure to notify.

10.3 Current Competition Concerns

The OPC focuses mainly on cartel agreements (especially bid-rigging cartels) and resale price maintenance. Merger control does not generally present a major area of interest for the OPC, either by declaration or by action, with the exception of the prohibition decision in the Česká pošta/PNS case. However, this may change in the future, as the OPC has announced that it will review the efficiency of the merger control toolbox.

Trends and Developments

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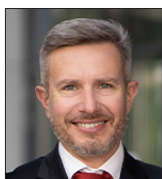
Robert Neruda, Roman Světnický, Martin Rott and Robert Nersesjan

HAVEL & PARTNERS

HAVEL & PARTNERS is a Czech-Slovak law firm with a strong reputation. It has six offices in the Czech Republic and Slovakia, and 320 lawyers, tax advisers and patent attorneys, making it the largest independent law firm in Central Europe. The firm's practice caters to the healthcare, renewable energy, ESG, retail, consumer, infrastructure, transportation, telecommunication, IT and industrial sectors. Clients include large international companies and leading Czech and Slovak firms. The competition team is the larg-

est in the Czech Republic/Slovakia and is led by Robert Neruda, former vice-chairperson of the NCA. The firm is highly praised for its unique combination of competition law and economics, offering innovative solutions with an emphasis on the specifics of clients' business. The team provides complex advice by covering not only legal regulations but also the business background, such as telco, energy, FMCG, retail and automotive.

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CONNECTED THROUGH SUCCESS

Introduction

The rise in food prices on the Czech retail markets following the COVID-19 pandemic, the Russian invasion of Ukraine, and the associated energy crisis have sparked a lively political debate as to whether the Czech Competition Authority (CCA) has done enough to handle the situation. Indeed, a price collusion narrative does not seem that improbable as some of these markets are heavily concentrated, ranging from a duopoly to an oligopoly of three to four major players. Furthermore, the CCA is focusing a significant portion of its resources on easier cases with somewhat dubious theories of harm such as resale price maintenance in the scented candle, sewing machine or pet food sectors, which seems, compared to the retail food market, less significant.

These facts made it easy for politicians to point a finger at the CCA when trying to present the public with a culprit for the “hardships” they are facing. The CCA countered these accusations, claiming, among other things, that it lacked the necessary enforcement tools to tackle the situation properly. It used the political climate, with politicians hell-bent on combatting the high retail prices, to lobby for more powers.

The original initiative introduced by the CCA in January 2024 left many competition lawyers scratching their heads. Some of the powers the CCA wanted for itself, such as the ability to carry out random dawn raids with no suspicion or forced divestitures in an absence of any law violation, seemed at odds with the fundamental constitutional principles. The CCA has since abandoned some of its more controversial propositions and introduced a revised overview of new powers, which it consolidated into a legislative proposal. Therefore, the authors believe this is a good time to present some of the new pow-

ers envisioned by the CCA, especially those that may be relevant to the Czech system of merger control.

The January 2024 Initiative: An Unlimited Power?

The CCA has operated under an assumption that the main obstacle to effective public protection of competition in the Czech Republic is that most of its powers may only be used *ex post* and on a case-by-case basis. It claims to lack any real powers that would allow for structural remedies on markets where competition has been hindered for whatever reason (usually concentrated market structure). While merger control can be used to prevent dangerous market concentration, the CCA cannot review mergers that fly under the radar of the strict notification (turnover) criteria.

Also, the legal threshold for an outright prohibition of a merger is quite high. Apart from one specific case in the postal sector, the CCA has not issued a prohibition decision for many years. The mere concern that a merger might hypothetically lead to a distortion of competition, for example by increasing market concentration, is not sufficient to prohibit it. The CCA must prove that the implementation of a merger would substantially harm competition on a market in order to even consider prohibiting it. This can be quite challenging, especially in cases where the combined market share of merging undertakings will not be significant.

Therefore, the CCA sought (among other things) powers that would allow it to tackle a hindered competition on a concentrated market where undertakings enjoy an entrenched market position. As a first step, the CCA looked to other countries for inspiration. It created a pool of possible powers available to other competition

authorities (the German *Bundeskartellamt* in particular) that could, in its opinion, allow it to better foster competition on problematic markets in the Czech Republic.

Some of the proposed new powers, however, sparked controversy followed by a heated debate on the extent to which the public interest in effective competition should take precedence over constitutionally guaranteed fundamental rights of market actors. The most controversial propositions included the following.

- Forced divestiture without prior infringement – a power under which the CCA could legally force an undertaking to divest its assets on a market where the competition has been constrained for a long time even if there was no infringement of competition law. This idea has since been abandoned because it would, inter alia, seriously infringe the right to own property.
- Rewards for whistleblowers – the idea was to provide an effective incentive for whistleblowers in the form of a financial reward. However, such measure could possibly lead to an increase in false accusations, with people “blowing the whistle” only to obtain the reward. Therefore, this measure was also not included in the legislative proposal.
- Access to GSM operators’ data – the CCA has also considered that it could have access to mobile operators’ location and operational data, which would bolster its investigative capabilities. As such a measure would be at odds with the right to privacy, it was also not included in the legislative proposal.

While the most controversial ideas for enforcement powers have fortunately been abandoned, even their consideration by the CCA demonstrates a certain appetite for (more) power.

The Current State of the Proposal: A New Competition Tool

The CCA is far from being the only competition authority to point out certain limits of the mainly ex-post nature of its enforcement powers. In 2020, the European Commission (the “Commission”) initiated a public consultation on what is known as the New Competition Tool (NCT), which would allow it to intervene without the need for prior findings or infringements. In short, according to the Commission, there are structural competition problems that either cannot be tackled under the existing framework (because they do not result from unlawful behaviour) or cannot be addressed in the most effective manner (because of lengthy proceedings that can take years). Therefore, a new tool to fill the gaps is required to effectively safeguard competition. The idea of a general NCT at EU level has been abandoned, at least for the time being. However, the Commission has incorporated some of the ideas into sectoral regulations such as the Digital Markets Act.

The CCA seems to be coming from the same place as the Commission was in 2020. Although it has identified competition problems on some markets, it claims to lack the right tools to intervene. Therefore, it is preparing a bill that will effectively introduce the NCT into the Czech legal system.

An overview of the NCT as currently proposed

The NCT is to apply only to those markets where the CCA finds a lack of competition. In this context, the CCA explicitly refers to the following market specifications:

- high barriers to entry;
- infrastructure as a dominant role for success;

- undertakings with entrenched market positions; and
- innovation as a main competition factor, ie, there is a high risk of “killer acquisition”.

A prerequisite for using the NCT would be a sector inquiry to determine why the competition on the market in question is stagnant. If the inquiry revealed long-term competition problems with little to no prospect of improvement, the CCA could apply the NCT.

The NCT would be issued in the form of what the Czech legal system calls a measure of general nature. It is a specific type of administrative act which is a hybrid between an individual and a normative administrative act. Measures of general nature are reviewable by administrative courts, so the undertakings concerned can take the CCA to court.

Under the NCT, the CCA could adopt mainly the following measures:

- make mergers subject to prior notification even if they do not meet the turnover notification criteria;
- prohibit price signalling on the market;
- order to make certain information public if there is a significant information asymmetry on the market;
- order to provide access to infrastructure or data sets;
- order to adhere to a transparent and non-discriminatory standard; and
- order to deal with other parties and even to modify business contracts.

The CCA has acknowledged that it does not want to interfere with the authority of sectoral regulators that already have similar powers (eg, in the energy, telecommunications and bank-

ing sectors) so the NCT is unlikely to apply to these markets. For example, in Germany, apparently the main source of the CCA's inspiration, *Bundeskartellamt*, may adopt the NCT on a sector-regulated market only after consulting with the relevant regulator.

While some of the ideas may look good on paper, the authors' main concern with the NCT proposal is that the CCA may effectively transform itself from a protector of competition to its maker. There is a significant difference between being a watchdog, guaranteeing that the rules are followed, and being a hegemon, able to order the rule-abiding undertakings (not) to behave in a certain way on the market.

Furthermore, the CCA is not a sectoral regulator focused on one specific industry only. It does not have the intimate familiarity with all the markets the NCT may be applicable to, which is ipso facto required for the measures to be effective. The authors do not believe that the CCA will be able to acquire all the necessary knowledge to determine the correct form of the NCT through a sectoral inquiry alone.

Finally, the proposed NCT measures may in some cases raise competition concerns on their own. The CCA may effectively mandate collusion between competitors that could otherwise be qualified as a horizontal agreement restricting competition (such as the information exchange or the data set access scenarios). Removing market uncertainty and promoting collusion on a market do not seem like a healthy way to foster competition in all circumstances.

Implementing the call-in model in mergers

One of the measures the CCA wants to include in the bill is a general call-in model in mergers, which will be parallel to the standard notification

model based on fulfilling notification (turnover) criteria. This would effectively allow the CCA to require any transaction potentially affecting a Czech market to be notified even retroactively after its closing. Therefore, it may be wise to start including in the transaction contractual documentation a section dealing with rights and obligations of the parties in case the CCA calls in the transaction.

The CCA has stated that it would only apply the call-in to the markets that have become concentrated as a result of multiple mergers having flown under the radar of the merger control system due to low turnovers. This was historically the case, eg, in the Czech food processing industry where a major player acquired a lot of minor competitors over the years, which together accounted for a significant portion of the market.

Furthermore, there will be a general restriction that the call-in model will not apply to mergers of undertakings with a turnover of less than CZK100 million (approximately EUR4 million). For mergers above the threshold, the CCA could request notification for up to six months after implementation.

To increase the legal certainty of transactions there should be an option for undertakings to request a “letter of comfort” that the CCA does not consider a transaction to raise competition concerns. By doing so, undertakings can make sure that the CCA will not invoke the call-in after the transaction is closed.

Such a system will effectively bring the merger control closer to FDI control, which also features two notification regimes: (i) mandatory, if certain conditions are met, and (ii) voluntary, if the parties want to make sure that the transaction will

not be subject to FDI screening after it is implemented. Compared to the up to five years post-closing call-in option in the Czech FDI regime, the six months envisioned by the CCA in merger control seems reasonable.

More (thorough) sectoral inquiries

Although the CCA has abandoned the idea of preventive dawn raids with no prior probable cause or suspicion, it “at least” wants to make it easier to launch a sectoral investigation. The CCA has been quite vague on this – it would like to be able to launch a sector inquiry on markets where it will “suspect that the market competition is not working”. However, the currently applicable legislation already technically allows the CCA to launch an inquiry in such situations. The Competition Act explicitly stipulates that the CCA can initiate a sector inquiry “where the situation on individual markets indicates that competition is distorted”. The standard of proof for launching a sector inquiry seems low enough already, so the authors are not sure what exactly the CCA intends to change.

Furthermore, the CCA wants to introduce an obligation to publish the results of its sector inquiries on its website and inform the government about its findings. The overall quality and thoroughness of sector inquiries may increase as a result.

“Honourable mentions”

The CCA also plans to introduce other changes that can be considered potentially relevant to parties interested in merger control or, more generally, in antitrust law in the Czech Republic. In the authors’ view, the following changes are worth mentioning.

- Removal of a presumption of a lack of dominant position – the current applicable legisla-

tion contains a rebuttable presumption that, subject to proof to the contrary, undertakings with less than a 40% market share do not hold a dominant position. The CCA intends to remove this presumption, which will likely make it easier for the CCA to conclude that an undertaking is dominant in a certain market.

- Access to information held by other authorities – the CCA would like to foster better information exchange with other authorities that may, in their formal capacity, hold important information for the CCA proceedings. Undertakings will need to keep this in mind when drafting notifications to provide accurate data, especially where the data may be available to other authorities.
- Criminal liability of natural persons for competition infringements – to increase the attractiveness of leniency applications, the CCA wants to double down on criminal sanctions for antitrust violations. Furthermore, even attempted competition infringements as well as aiding and abetting will be punishable under criminal law. It is therefore expected that “antitrust crimes” will become more common.
- Excessive pricing as an expressly listed example of an abuse of dominance – based on the political pressure the CCA is facing in connection with the steep rise mainly in the food retail prices, excessive pricing will be explicitly listed in the Competition Protection Act as an abuse of dominance (as opposed to the current wording “enforcement of unfair conditions”). This might indicate that the CCA will focus more on this practice. Although the CCA is aware that it is quite challenging in practice to successfully prosecute it, excessive pricing may undergo a “renaissance” in the future.

- Fewer discounts for compliance programmes and settlements – as part of the CCA's initiative to make leniency applications more attractive, it will provide fewer discounts for other mitigating factors such as compliance programmes or settlements. On the other hand, the CCA plans to make better use of prioritisation and competition advocacy to avoid proceedings with smaller undertakings or less serious infringements.

Conclusion: Looking Ahead

From a merger control perspective, the most relevant novelty will be the introduction of a call-in model in Czech merger control. Caution is advised especially in transactions that:

- may appear to be “killer acquisitions”;
- take place on markets where innovation is an important competitive factor; or
- include an undertaking with significant market share acquiring a minor competitor.

In the authors' experience, the CCA mergers department is generally reasonable, so an excessive use of the call-in option is not expected. This was, after all, confirmed by the CCA mergers director at last year's CCA conference where the introduction of a potential call-in model was discussed. The authors perceive the new option as a last resort measure for transactions which at first glance raise competition concerns but do not meet the turnover criteria.

On a more general “antitrust note”, there has been a recent trend of the CCA asking the legislators for more powers in response to their criticism. Although the CCA has abandoned some of its more ambitious and controversial ideas, it appears, if the NCT is adopted as proposed, that its role will shift from a protector of competition to its maker. The authors are somewhat sceptical

about the prospect of ad hoc state interventions in a market that, in its opinion, “is not working properly”.

In this context, a quote from Spider-Man, which one of the CCA’s vice-chairpersons often cites, comes to mind: “With great power comes great responsibility.” If the current proposals pass, it can only be hoped that the CCA officials will exercise enough restraint and responsibility in using their new (super)powers.

ECUADOR



Trends and Developments

Contributed by:

Luis Marin-Tobar, Ricardo Peñaherrera and Kevin Damián Ortiz Arias

Lexvalor Abogados

Lexvalor Abogados is a full-service firm with over 19 years' experience, shortlisted for the 2024 Ecuador Law Firm of the Year award. The firm advises and defends national and multi-national companies in all economic sectors in all antitrust/competition matters, from preventive advice and merger control to representation and defence in administrative and judicial proceedings before the competition authorities and jurisdictional bodies. Lexvalor Abogados has a team of specialized lawyers dedicated

exclusively to competition law, with an extensive knowledge of regulations and robust experience in advising clients in the development of their business strategy, applying one of the most sophisticated knowledge bases of Ecuador's retail market. It offers maximum technical know-how and a service guarantee in a rapidly evolving environment in the traditional strategic sectors as well as within the new framework of the digital economy.

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The Ecuadorian competition regime, contained in the Organic Law for the Regulation and Control of Market Power (“the Law”) was enacted on October 2011, implementing the first domestic regime of its kind in the country. In turn, the Regulation to the Law (the “Regulation”) was enacted on 7 May 2012, and was recently reformed on 18 October 2022 with some changes of very significant importance for the merger control regime that will be evaluated later in this document.

The current Superintendent has remained in office on an interim basis since November 2023, when the five-year term prescribed by law for holding the position expired, and a replacement has yet to be appointed. The next step in this political transition is for the Council for Citizen Participation and Social Control (an Ecuadorian government body responsible for regulatory appointments) to select from a list of three candidates proposed by the President, from which the new Superintendent will be appointed. Based on a reasonable analysis of the country’s current situation, it is anticipated that this process will be reactivated in the coming weeks.

In general, the Superintendence of Economic Competition (SCE, or “the Authority”) acts through two bodies when assessing a merger transaction.

First, the investigation authority known as the National Intendancy for the Control of Economic Concentrations (“the Intendancy”), which oversees the investigative phase and has the power to issue a preliminary report and recommendation from the results obtained during the investigation phase with respect to the impact of a possible merger operation in the Ecuadorian market.

Second, the First Instance Resolution Commission (FIRC), which is the body of the SCE in charge of accepting, subordinating, denying or inhibiting merger control operations based on the findings of the investigative phase by the Intendancy.

Introduction

In general, competition law is built on the basis of two scenarios of control. First, the *ex ante* merger control regime; and second, the detection and sanction, *ex post*, of operations that, being deemed notifiable concentrations by the terms of the Law, have not been notified to the Authority, representing a gun-jumping scenario.

Of course, in the middle of these poles there is a wide spectrum of situations that make up the merger control regime, such as the concept of change or taking of control, the thresholds that trigger the obligation to notify and obtain approval prior to closing, the deadline to do so, and so on.

Throughout this contribution, the most relevant elements of the Ecuadorian competition regime will be reviewed. In addition, some relevant considerations that have been observed in the recent practice of the Authority will be covered to provide an overview of the functioning of the merger control system in the country.

Definition and Form of an Economic Concentration

Article 14 of the Law provides that an economic concentration constitutes the “change or takeover of control” of one or several companies or economic operators through the performance of acts such as:

- mergers;
- assignment of all effects of a trader;

- direct or indirect acquisition of the ownership or any right on shares, equity shares or debt securities that give any rights of being converted into shares or equity shares or have any influence on the decisions of the issuing person when such acquisition gives the acquirer the control of or substantial influence over that person;
- interlocking joint administrations; and
- any other agreement or deed that may transfer factually or legally to a person or economic group the assets of an economic operator or give it control or influence on the adoption of ordinary or special management.

In Ecuador, the merger control regime is exercised ex ante by the SCE. This prior notification system is designed for the Authority to identify those operations that could generate anticompetitive effects in the affected relevant market. Depending on the results of its analysis, the Authority may (i) approve the concentration without conditions; (ii) approve the transaction with behavioural or structural remedies; or, (iii) deny the transaction.

During 2023, the Ecuadorian competition Authority published 17 decisions on merger control operations that were notified. Based on the above, 11 unconditional clearance decisions were issued, five inhibitory resolutions, and one transaction was subordinated to remedies.

It is positive that the Authority has made efforts to ensure that its decisions are more widely publicised, and that all participants in the merger control ecosystem can have access to non-confidential versions of the decisions taken and even of the analyses carried out by the Intendancy when access to or copies of its reports are requested.

Operations Not Deemed Economic Concentrations, Based on the Law

Article 13 of the Regulation states that the following cases shall not be considered economic concentrations:

- the holding, on a temporary basis, of shares, participations or fiduciary rights by entities whose normal activity includes the transaction and negotiation of securities for their own account or for the account of third parties, which have been acquired for resale, provided that the voting rights attached to such shares and fiduciary rights are not exercised for the purpose of determining the competitive behaviour of the economic operator but for the purpose of preparing the realisation of its assets or of the shares, units or fiduciary rights, and provided that this realisation occurs within one year from the date of acquisition;
- when control is acquired by a person by virtue of a mandate conferred by the public authority in accordance with the regulations relating to liquidation, bankruptcy, insolvency, suspension of payments, arrangement with creditors or other similar procedures; and
- when control is acquired by a person by virtue of the application of seizure or other administrative procedures, in accordance with the law.

Exemptions

Article 19 of the Law provides an exhaustive list of those transactions that are exempt from the obligation to be notified to the competition Authority, as follows:

- the acquisition of shares without voting rights;
- the acquisition of bonds, obligations, or any other securities convertible into shares without voting rights;

- the acquisition of liquidated economic operators; or
- the acquisition of economic operators that have not had any local activity for the past three years.

In addition, in 2022, in case No SCPMCR-PI.006.2022, the FIRC made important clarifications regarding conglomerate concentrations. It defined them as those that occur “between companies that do not exercise the same economic activity and where, therefore, no vertical or horizontal relationship is established between them”, considering article 16 of the Law.

The decisions of the FIRC are not binding – ie, it is not mandatory that the criteria used in one case are necessarily repeated in another. However, it is positive that the Authority issues decisions in accordance with international criteria behind which the reasoning, without being mandatory, can be replicated in analogous cases.

Concept of Conclusion of the Agreement

The moment to consider that the conclusion of one of the forms of “agreement” exemplified by the Law has occurred varies from case to case, and is fundamental in determining the moment from which the eight calendar-day filing deadline applies. In general, the Regulation prescribes the following scenarios.

- In the case of a merger, as soon as the general shareholders’ meeting of the economic operators involved, or their competent bodies in accordance with the relevant bylaws, have agreed to carry out the merger operation.
- In the case of assignment of all the effects of a trader, from the moment at which the intervening economic operators consent to carry out the operation, and determine the form, term and the conditions under which it

is to be executed. When the participants are companies, the agreement shall be deemed to exist when the execution of the act in question is authorised by the general meeting of shareholders or partners, or the competent body, of the economic operators involved, in accordance with the corresponding bylaws.

- In the case of the acquisition, directly or indirectly, of ownership or any right over shares or equity interests or debt securities giving any kind of right to be converted into shares or equity interests, or to have any kind of influence on the decisions of the person issuing them, when such acquisition gives the acquirer control of, or substantial influence over, the person issuing them, an agreement exists from the moment the participants consent to perform the act giving rise to the economic concentration, and determine the form, term and conditions under which it is to be executed. When the participants are companies, the agreement shall be deemed to exist when the execution of the act in question is authorised by the general meeting of shareholders or partners, or the competent body, of the economic operators involved, in accordance with the corresponding bylaws.
- In the case of interlocking joint administrations, an agreement exists from the moment the administrators have been appointed by the general meeting of shareholders or partners, or the competent body, in accordance with the corresponding bylaws, of the economic operator in respect of which the change or taking of control is to take place.
- In the case of any other agreement or act that transfers in a factual or legal manner to a person or economic group the assets of an economic operator or grants it control or determining influence in the adoption of ordinary or extraordinary management decisions of an economic operator, an agreement exists

from the moment the participants consent to carry out the act that originates the economic concentration operation, and determine the form, term and conditions under which it is to be executed. When the participants are companies, the agreement will be deemed to exist when the execution of the act in question is authorised by the general meeting of shareholders or partners, or the competent body, of the economic operators involved, in accordance with the corresponding bylaws. The existence of clauses that in any way condition the future formalisation or execution of such agreements does not provide exemption from compliance with the duty to notify.

Thresholds

According to the Law, the economic operators involved in horizontal or vertical concentration transactions in any area of economic activity are obliged to comply with this procedure, provided that one of the following thresholds is met:

- turnover threshold; or
- market share threshold.

Turnover threshold

The last and most fundamental legal reform to Ecuador's merger control regime was on 18 October 2022 through Executive Decree 570, which amended Article 5 of the Regulation on how to interpret the "total turnover" of an economic operator.

Although the reform does not specifically refer to the merger control regime, but to a general definition of how the concept is interpreted, in practice, its greatest implications will be seen when analysing the turnover threshold in merger operations.

This will also be relevant for the purposes of calculating the amount of fines that may eventually be imposed in application of the Law. It would be appropriate that, considering this reform, the competition Authority issues an update of the form for mandatory filing to maintain uniformity in the criteria required therein, since the current templates still refer to the concept of total volume of business, without considering the relevant market in which the income is produced.

Based on the above, a merger must be notified when the total aggregate turnover in Ecuador in the relevant market affected by the transaction of all participants exceed – during the fiscal year prior to the transaction – the amount of Basic Unified Salaries (RBU) in force established by the Regulation Board. RBU is a measure of value linked to the regime of salaries in Ecuador and are expressed in US dollars. The current RBU is set at USD460 for 2024. On that basis, the turnover threshold operates as follows:

- concentrations that involve institutions in the national financial system and the stock market, RBU3.2 million (USD1.472 billion);
- concentrations involving insurance and reinsurance companies, RBU 214,000 (USD98.440 million); or
- concentrations that involve any other operator other than those mentioned in the first two points above, RBU200,000 (USD92 million).

The relevant markets affected by the transaction are those in which the target is active. If the acquirer is not active in these markets (ie, there is no overlap), only the turnover of the target is considered.

Market share threshold

This affects concentrations involving economic operators undertaking the same economic

activity, and where the operation will result in a market share equal to or greater than 30% being acquired or increased at national level or in a narrower defined geographic market within Ecuador.

Market share increment is not required for a filing to be triggered in circumstances where the acquisition involves an acquirer with no local market share but where the target has a local market share equal to or exceeding 30%. Therefore, it shall be understood to include those independent participants acquiring a company or business unit which already has said percentage of market share in the relevant market.

However, when that is the case (acquirer with no local market share), a first-landing exception can be alleged to benefit from a faster clearance proceeding (Phase I).

Request by the Superintendency

The Superintendency can still request that economic operators involved in a transaction not meeting the above conditions make a notification for informational purposes. In such cases, the economic operators will have fifteen days to file the notification.

Failure to Notify/Gun-jumping

The Law provides a number of scenarios for fines for failure to notify, or late notification, of an economic concentration.

First, the following are considered minor infractions: (i) late notification of the concentration (outside the eight calendar-day term starting from the date of conclusion of the agreement); and (ii) failure to notify a concentration required ex officio by the SCE. Minor infringements are subject to a fine of up to 8% of the total turnover of the offending undertakings in the year imme-

diately preceding the year in which the fine is imposed.

Second, it is considered a serious infringement to implement a concentration before it has been notified to the Authority; or before it has been authorised. Serious infringements are subject to a fine of up to 10% corresponding to the annual turnover.

Third, it is considered a very serious infringement to execute acts or contracts resulting from a concentration before it has been notified. Very serious infringements are subject to a fine of up to 12% corresponding to the annual turnover.

In addition to the aforementioned fines, the Authority may also order a divestiture of the transaction when this is the only way to restore competition. This sanction has not been imposed in practice.

In the case of very serious infringements, the Authority may impose personal fines of up to USD230,000, on each of the legal representatives or directors of the infringing company. This sanction has not been imposed in practice.

Procedure

There is a two-phase 60-day investigation process. Phase I investigation takes place during the first 25 business days and Phase II from business days 26 to 60 (or 120 if the proceeding is extended). Transactions will be cleared at the end of Phase I if the Superintendency concludes they do not present any anti-competitive risk.

If further analysis is indeed required, the investigation will then continue to Phase II. It is customary for the Authority to issue several requests for information prior to officially starting the clock to obtain additional time. Additionally, the Superin-

tendency can “stop the clock” for up to 45 business days.

On average, clearance in Ecuador is taking anywhere from three to five months from the date of filing for non-problematic transactions and approximately six to eight months where remedies may be required.

Form for Mandatory Filing

A form for mandatory filing designed by the competition Authority must be completed at the time of entering the notification of a merger operation:

The following documents must be attached to this form:

- a copy of the documents related to the draft legal act that will give rise to the merger, with their translation;
- documents that support the date of conclusion of the agreement that will give rise to the change or acquisition of control;
- financial statements for the last fiscal year of each of the economic operators involved in the merger;
- a confidentiality request regarding the information provided or part of it;
- non-confidential extracts of the information that has been requested to be classified as confidential;
- a sworn statement that the information provided in the notification and its attached documents are true, and that the opinions, calculations and estimates have been made in good faith; and
- analyses, reports and studies considered relevant (if applicable).

Proof of payment of the fee for the analysis and study of the economic concentration operation.

These and other documents, such as certificate of legal existence of the economic operators, powers of attorney and translations will need to be filed with the corresponding apostille.

Filing Fee

All merger control operations that are notified to the SCE are subject to the payment of a fee for the analysis and study of the transaction. This value changes annually depending on the costs and expenses incurred by the Authority, and depending on whether the notifications are mandatory or informative.

For 2024, the fees are as follows:

- mandatory pre-notification of a merger transaction: USD26,241.02;
- notification for informative purposes in a merger transaction: USD13,120.51.

Meetings With Officials of the Superintendency During a Merger Process

The Superintendency will not accept parties' requests for a meeting when the subject matter to be discussed relates to a notification of economic concentration that is being processed, or at the stage of filing or resolution of an administrative appeal. (Limitation introduced through Resolution No SCPM-DS-2023-07 from 31 January 2023).

The Intendency may, however, summon parties to work meetings during the investigation and resolution phases if it requires this.

Strengthening Control and Monitoring of Non-notified Economic Operations

One of the objectives of the Ecuadorian competition Authority is to constantly monitor economic concentration operations that have not been notified. For this purpose, different mech-

anisms are used, for example, the permanent review of national and international news, the cross-checking of information with other control authorities and attention to economic operators' own information.

In this sense, the most recent gun-jumping investigation began on 26 April 2022, resulting in a decision on 20 April 2023. The offending entity was Ecuadorian company Unión de Concreteras, UNICON UCUE, which received a very serious sanction in the form of a fine of USD159,397.73 from the Authority for acquiring the assets of Mezcladora y Distribuidora de Hormigón, MEZCLALISTA S.A. without prior notification.

The gun-jumping investigation, which has resulted in the highest sanction by the Ecuadorian competition Authority, started on 1 September 2020 and concluded on 11 June 2021 with foreign conglomerate Sia Products being fined roughly USD2.7 million for failing to notify the establishment of a new trust that gave it majority control over a paper products maker.

Recent Relevant Decisions

In its recent practice, the Authority has issued two decisions, in cases No SCE-CRPI-12-2023 and No SCE-CRPI-1-2024, which are complex and relevant examples for study. Both decisions announce a certain tendency of the FIRC to look at the effects of foreign-to-foreign transactions in isolation when reviewing whether or not they should be notified.

In the view of the Authority in these cases, the fact that the imports of products have not been carried out directly by one of the notifying parties but by an intermediary means that the trader's transactions have not been carried out in Ecuador.

This is not a trivial matter. It is relevant because, even if, in certain cases, there are no direct effects or a nexus of transactions with Ecuador, these may be present even indirectly, and have implications on competition and markets in the country.

EGYPT

Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.213

- 1.1 Merger Control Legislation p.213
- 1.2 Legislation Relating to Particular Sectors p.213
- 1.3 Enforcement Authorities p.214

2. Jurisdiction p.214

- 2.1 Notification p.214
- 2.2 Failure to Notify p.215
- 2.3 Types of Transactions p.215
- 2.4 Definition of "Control" p.215
- 2.5 Jurisdictional Thresholds p.216
- 2.6 Calculations of Jurisdictional Thresholds p.217
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.217
- 2.8 Foreign-to-Foreign Transactions p.217
- 2.9 Market Share Jurisdictional Threshold p.218
- 2.10 Joint Ventures p.218
- 2.11 Power of Authorities to Investigate a Transaction p.219
- 2.12 Requirement for Clearance Before Implementation p.220
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.220
- 2.14 Exceptions to Suspensive Effect p.220
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.221

3. Procedure: Notification to Clearance p.221

- 3.1 Deadlines for Notification p.221
- 3.2 Type of Agreement Required Prior to Notification p.221
- 3.3 Filing Fees p.221
- 3.4 Parties Responsible for Filing p.222
- 3.5 Information Included in a Filing p.222
- 3.6 Penalties/Consequences of Incomplete Notification p.223
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.223
- 3.8 Review Process p.223
- 3.9 Pre-notification Discussions With Authorities p.224
- 3.10 Requests for Information During the Review Process p.224
- 3.11 Accelerated Procedure p.225

4. Substance of the Review p.225

- 4.1 Substantive Test p.225
- 4.2 Markets Affected by a Transaction p.225
- 4.3 Reliance on Case Law p.226
- 4.4 Competition Concerns p.226
- 4.5 Economic Efficiencies p.226
- 4.6 Non-competition Issues p.226
- 4.7 Special Consideration for Joint Ventures p.226

5. Decision: Prohibitions and Remedies p.227

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.227
- 5.2 Parties' Ability to Negotiate Remedies p.227
- 5.3 Legal Standard p.227
- 5.4 Negotiating Remedies With Authorities p.227
- 5.5 Conditions and Timing for Divestitures p.228
- 5.6 Issuance of Decisions p.228
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.228

6. Ancillary Restraints and Related Transactions p.228

- 6.1 Clearance Decisions and Separate Notifications p.228

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.228

- 7.1 Third-Party Rights p.228
- 7.2 Contacting Third Parties p.228
- 7.3 Confidentiality p.228
- 7.4 Co-operation With Other Jurisdictions p.229

8. Appeals and Judicial Review p.229

- 8.1 Access to Appeal and Judicial Review p.229
- 8.2 Typical Timeline for Appeals p.229
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.229

9. Foreign Direct Investment/Subsidies Review p.230

- 9.1 Legislation and Filing Requirements p.230

10. Recent Developments p.230

- 10.1 Recent Changes or Impending Legislation p.230
- 10.2 Recent Enforcement Record p.230
- 10.3 Current Competition Concerns p.231

GLA & Company provides strategic, cost-effective and forward-thinking legal representation for companies seeking to do business in the Middle East. The firm's practice encompasses all legal issues companies will likely encounter in the global business environment. With extensive experience advising clients in the Gulf Cooperation Council (GCC) states of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE, it offers unique insights for companies seeking to establish or expand business operations in

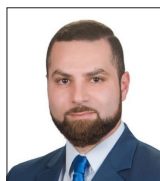
these nations. The firm's emphasis on deals is to get them cleared with the local competition authority and it has excellent relationships with regulators in the GCC. GLA has been successful in securing no objections from these bodies to clear deals. The firm's lawyers are intimately familiar with the governing sources of authority and routinely work with the relevant agencies, departments and committees on behalf of clients.

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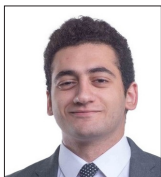
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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The Arab Republic of Egypt aims to guarantee a good economic environment that does not restrict, prevent, or damage the freedom of competition, and therefore issued Law No 3 of 2005 on Protection of Competition and Prohibition of Monopolistic Practice (“Egyptian Competition Law” or ECL). The Egyptian Competition Law has since been amended four times, first in 2008, then in 2010, 2014, and, most recently, with the introduction of the ex ante merger control regime through Law No 175 of 2022 (“Amendments”).

On 4 April 2024, the Egyptian Prime Minister issued Decree No 1120 of 2024, which made significant revisions to the executive regulations of the Egyptian Competition Law (“Executive Regulations”), introducing the long-awaited regulations that enact Egypt’s ex ante merger control regime, aiming to modernise and strengthen the existing provisions of the ECL – notably, “Chapter Nine: Examining Economic Concentration” was established.

The Egyptian Competition Authority has also published guidelines and FAQs (the “Guidelines”) to assist parties in navigating the newly established (ex ante) merger control regime.

1.2 Legislation Relating to Particular Sectors

Other specific local legislation should be taken into consideration with respect to certain sectors, as follows.

- The National Telecommunications Regulatory Authority (NTRA) applies Articles 4 and 24 of the Telecommunications Law No 10 of 2003 to regulate competition and to ensure

economic freedom in the sector. The NTRA examines and detects mergers indirectly through reviewing the licence requirements of any given operator. The NTRA would assess and evaluate any merger on the basis of its impact on competition. In the event that the NTRA foresees or detects a violation of law, they would threaten or directly block any merger by revoking the merging entities’ licences.

- The Central Bank of Egypt (CBE) acts as the regulator of the banking system. The Banking Law No 194 of 2020, provides in Article 74 that the CBE shall approve the applications to own more than 10% stake (and any increase thereof) in a bank or any other percentage that would enable any natural or corporate person or their related parties to have control over the management or decision-making in the bank. Failing to abide by the aforementioned, the voting rights and the distribution of dividends correspondent to shares exceeding the authorised percentage shall be suspended. In this event, the individual or entity in breach shall dispose of the shares exceeding the percentage within six months from the date of their transfer, the Central Bank may request from the Financial Regulatory Authority (FRA) the appointment of a brokerage firm to conduct the procedures for selling the shares. The proceeds of the sale of shares shall be apportioned to the shareholder after deducting the correspondent expenses.
- Economic concentrations related to activities that are regulated by the FRA are subject to a special clearance process. According to Article (19 bis e) of the Egyptian Competition Law and Article (62) of Executive Regulations, the concerned parties are obliged to notify FRA before signing the contract, if the target operates in activities supervised and controlled by FRA. The FRA shall seek the opinion of Egypt

Competition Authority before clearing the economic concentration. In case the target person engages in more than one activity, including activities subject to the supervision and control of FRA, the person in this case must notify Egypt Competition Authority of all activities according to Article (19 bis a) of the Egyptian Competition Law, in addition to notifying FRA of the activity or activities subject to its supervision and control according to Article (19 bis e) of the Egyptian Competition Law.

- Additional regulatory agencies in the Egyptian market, including but not limited to the Egyptian Electric Utility and Gas Regulatory Authority, may also require prior approval before the conclusion of a transaction which would result in the acquisition of control over a specific company which operates in the relevant sector. The Egyptian Competition Authority's relationship with all these agencies is a complementary relationship where the primary goal is to protect consumer rights and the public interest.

It is worth noting that the Egyptian Competition Law provides that one of the functions of the Egyptian Competition Authority is to co-ordinate with the sectoral regulatory agencies in matters of common interest, without prejudice to the functions of the various agencies.

In the same vein, despite the overlapping scope of the various regulators in respect of competition matters, the merger control notification regime prescribed under Article 19 of the Egyptian Competition Law remains applicable to all sectors making any economic concentration subject to the jurisdiction of the Egyptian Competition Authority.

1.3 Enforcement Authorities

The Egyptian Competition Authority (ECA) is responsible for the enforcement of the ECL and Executive Regulations. The ECA was established by virtue of the Egyptian Competition Law as an independent body affiliated directly with the Egyptian Prime Minister. The ECA is mandated to act as the administrative body responsible for safeguarding a climate in which competitors have equal opportunities to compete in all economic sectors.

The Egyptian Competition Law grants the ECA the power to issue the following decisions after completing the review process: dismissal of a request, non-jurisdiction, clearance, conditional clearance, or block decisions.

In order for the ECA to perform its duties, it may request the assistance, and further clarifications in certain sectors, from the relevant regulatory authorities governing such sectors, whereby such regulatory authorities would be considered experts in the field without having a vote on the matter.

2. Jurisdiction

2.1 Notification

In the event a transaction falls under the scope of an "economic concentration" as defined under the ECL, notification is compulsory.

Pursuant to the second paragraph of Article (2/g) of the Egyptian Competition Law, the following transactions shall not be considered an economic concentration.

- Temporary acquisition, by any securities company, of securities in a party for the purpose of resale within one year from the date

of the acquisition, provided that they do not exercise any voting right nor take any measures that would affect the strategic decisions or commercial objectives of the acquired party. The ECA may extend this period, upon request, if the acquirer proves that the resale of the securities was not possible within one year as determined by the Executive Regulations.

- An acquisition or merger between related parties – this is considered as internal restructuring, and does not trigger an obligation to notify unless there is a change in control or material influence either directly or indirectly.

2.2 Failure to Notify

Failure to abide by the notification requirement set forth in Articles (19 bis a) and (19 bis e) of the Egyptian Competition Law shall be sanctioned by a fine ranging between 1% and 10% of the total annual turnover, asset value, or transaction value (whichever is higher according to the final audited consolidated financial statements).

The Egyptian Competition Law and Amendments also set forth penalties in the event a calculation of the said percentages is impossible. A fine of no less than EGP30 million shall be imposed and not exceeding EGP500 million.

In this respect, it is worth highlighting that the application of such penalties has not been tested as the merger control regime has just come into force on 1 June 2024.

2.3 Types of Transactions

The Egyptian Competition Law uses a general principle of economic concentration to identify merger control issues. The Egypt Competition Law define an “Economic Concentration” as any change of control or material influence over one or more persons. The ECL expressly identifies

the following transactions as Economic Concentrations.

- Merger – one person ceases to exist as a separate legal entity as per its absorption by another person, which retains its legal personality after the merger (merger by absorption), or two or more persons cease to exist as separate legal entities as they are integrated into a newly created legal entity (merger by integration).
- Acquisition – acquisition by one or more persons, directly or indirectly, of control or material influence over the whole or part of another person whether by contract, purchase of securities or assets, or by any other means, and the acquisition can be individual or collective.
- Joint venture – establishment of a joint venture or the acquisition of an existing person by two or more persons for the purpose of establishing of a joint venture that conducts economic activity independently and permanently.

By way of exception, if the acquisition of the non-controlling minority shareholdings leads to a change in material influence over another person, it will be subject to the jurisdiction and review of ECA, provided that the financial thresholds specified under the Egyptian Competition Law are met. Refer to **2.1 Notification** with respect to the express exceptions under the ECL.

2.4 Definition of “Control”

Article (2/h) of the Egyptian Competition Law defines “Control” as the ability of one or more controlling persons to exercise decisive influence, directly or indirectly, by directing the economic decisions of another person or persons, either through acquiring the majority of voting

rights, or the ability of the controlling person to block economic decisions by the person or other persons, or by any other means. This includes any situation, agreement, stocks or shares ownership, regardless of their portion, provided that it leads to a decisive influence on the management or decision-making.

Under the ECL, Control can be exercised, in particular, through:

- an act that leads to the ownership of 50% or more of the total voting rights or total shares or stocks of the capital of another person;
- an act that leads to the ownership or the right to use and exploit all or the majority of the assets of another person;
- an act that leads 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 control the decisions of the board of directors or the general assembly meetings; and
- an act that leads to more than half of the members of the board of directors or the members of the general assembly meetings being the same persons in the acquiring person and the acquired person.

Under Article (2/i) of the Egyptian Competition Law, “Decisive Influence” is defined as the ability to influence, directly or indirectly, the policy of another person, including its strategic decisions and/or commercial objectives.

Material Influence is established by presence of any of the following.

- An act that leads to the ownership of 25% or more of the total voting rights or total shares or stocks of the capital of another person.

- An act that leads to the ownership of less than 25% of the total voting rights or total shares or stocks of the capital of another person, if it is associated with additional factors that may suggest that the acquirer exercises an influence disproportionate to its shareholding, in particular by:

- (a) the percentage of voting rights owned by the person compared to the remaining voting rights, which enables the holder to influence the policy of another person, including its strategic decisions or commercial objectives;
- (b) the presence of any provisions in the articles of association, the shareholders’ agreement or any other document that grant the acquirer special rights or veto rights;
- (c) the existence of common shareholders between the acquirer and the acquired person; and
- (d) the presence of one or more representatives of the acquirer in the board of directors of the acquired person.

In any case, material influence is not established by owning less than 10% of the total voting rights, shares or stocks in the capital in another person, unless the acquirer is ranked among the top three shareholders or stakeholders in the acquired person.

2.5 Jurisdictional Thresholds

According to Article (19 bis) of the Egyptian Competition Law, an Economic Concentration is subject to notification if any of the following thresholds are met (“Financial Thresholds”).

- The combined annual turnover or assets of all the concerned persons in Egypt for the latest year of the last audited consolidated financial statements exceeds EGP900 million (approx-

mately USD18.5 million), provided that the annual turnover in Egypt for at least two of the concerned parties individually exceeds EGP200 million (approximately USD4 million) for the last year according to the last audited consolidated financial statement.

- The combined annual turnover or assets of the concerned persons worldwide for the latest year of the last audited consolidated financial statements exceeds EGP7.5 billion (approximately USD155 million), provided that the annual turnover in Egypt for at least one of the concerned parties in the last audited consolidated financial statements exceeds EGP200 million (approximately USD4 million).

For the purpose of applying the worldwide notification thresholds set forth in Article (19 bis) (b) of the Egyptian Competition Law, the annual turnover of the target in Egypt must exceed EGP200 million for the last year according to the last audited consolidated financial statement.

The Egyptian Competition Law and its Executive Regulations did not specify any exceptional rules for specific sectors regarding the notification Financial Thresholds and their calculation methods.

2.6 Calculations of Jurisdictional Thresholds

Pursuant to Article (53) of the Executive Regulations, the annual turnover or the value of assets is calculated by summing the generated annual turnover or value of assets for the last year in the last audited consolidated financial statements for each of the concerned persons, excluding the sellers, conditional upon their exit from the target after the implementation of the economic concentration.

In event the seller(s) remain among the related parties of the target after the implementation of the transaction, the seller(s) annual turnover and that of its related parties are included in the annual turnover of the concerned persons with the economic concentration.

If the generated annual turnover or value of assets in the last year are in a foreign currency, they are converted into EGP according to the average official exchange rate for the purchase and sale of foreign currencies announced by the CBE on the last day of the financial year for the concerned persons with the Economic Concentration.

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

See 2.6 Calculations of Jurisdictional Thresholds.

Pursuant to Article (55) of Executive Regulations, the obligation to notify falls on the following persons, according to each case.

- The acquiring person(s), in the case of an acquisition that leads to sole or joint control or material influence over one or more persons.
- The merged persons in the case of a merger.
- The acquiring persons in the case of an acquisition for the purpose of establishing a joint venture.
- The persons establishing a joint venture.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to the ECL, Amendments and Executive Regulations. In the event foreign-to-foreign transactions fall under the definition of an Economic Concentrations and meet any of the Financial Thresholds

set forth in Article (19 bis) of the Egyptian Competition Law then it is compulsory for parties to file a notification prior to closing.

See 2.5 Jurisdictional Thresholds.

2.9 Market Share Jurisdictional Threshold

There is no market share jurisdictional thresholds provided under the merger control regime.

The Amendments and the Executive Regulations currently provide that national and international, combined and individual annual turnover of the parties involved in the transaction are applicable.

2.10 Joint Ventures

The Egypt Competition Law does not expressly use the term “full-function joint venture” in its provisions. However, it does expressly apply the same principles to distinguish between a full-function joint venture and a non-full-function joint venture, wherein a full-function joint venture would be notifiable to the ECA. Further, the ECA does expressly use the term “full-function” joint venture in its Guidelines.

Under the Egypt Competition Law and Executive Regulations, joint ventures are notifiable to the ECA, if they meet following conditions.

- Two or more persons must jointly control the joint venture, either as a result of establishment or acquisition.
- The joint venture must be intended to permanently operate.
- The joint venture must be intended to perform all functions carried out by independent persons operating in the same market, particularly through the presence of an independent management dedicated to handling the daily operations of the joint venture and having

separate resources specific to the person, including financing, employees and assets.

In this context, independence means that the joint venture must be autonomous from an operational perspective. In order to consider the operational autonomy of a joint venture, the following factors should be fulfilled.

- The joint venture must engage in an economic activity beyond performing one specific function of its controlling persons – the joint venture must be prepared to perform all functions carried out by independent persons operating in the relevant market. For example, if the controlling persons are active in production, the joint venture’s activity should be the production of a new product different from those produced by the controlling persons. If the joint venture is set up to perform R&D activities solely for the interest of its controlling persons, without involvement of other persons operating in the market, then the joint venture is not considered independent according to the Egyptian Competition Law.
- The joint venture must have independent resources, including financing, employees and assets – the joint venture must have an independent management dedicated to handling the daily operations of the joint venture. Additionally, the joint venture must have sufficient separate resources, such as financing, employees and assets enabling the joint venture to perform its activities independently.
- The joint venture’s sales and purchases operations must not be limited to the controlling persons – if the joint venture’s sales and purchases operations depend solely on the controlling persons, meaning that the joint venture has no or limited operations with other market players operating on the market, then the joint venture is not deemed to

be independent. The following must be taken into consideration:

(a) Concerning sales:

- (i) If the joint venture achieves 50% or more of its total sales with third parties, this will typically be an indication of the joint venture's independence.
- (ii) If the joint venture's sales with third parties do not exceed 50% of its total sales, meaning that the majority of its sales are consistently with the controlling persons, an evaluation is needed to determine if the joint venture is engaging with the controlling persons on a commercial basis, that is, under the same mechanisms and contractual terms as it does with other market players. Consequently, the joint venture must deal with third parties if they offer better prices, or conditions than the controlling persons.
- (iii) If the joint venture achieves less than 50% of its total sales with third parties, the market structure should be assessed. For instance, if the controlling persons of the joint venture hold more than 50% of the market share in the relevant market, the joint venture's dependence on the controlling persons for sales does not affect its independence, due to the market structure.

(b) Concerning purchasing:

- (i) If the joint venture relies on the controlling persons for the majority of its purchases, it is considered independent if it adds value to these purchases. For example, if the joint venture uses the raw materials that it purchases from its par-

ents as production inputs for other products, the joint venture will be considered independent. However, if the joint venture purchases raw materials from its parents with the sole purpose of reselling them, the joint venture will not be considered independent. Except for the case where the joint venture distributes products of the controlling persons along with those of other market players through its own distribution channels and mechanisms, such as outlets, warehouses, transport fleets and sales personnel.

In all cases, the independence of the joint venture is not affected if all or the majority of its sales and purchases in the initial years or stages of its economic activity are with the controlling persons.

Moreover, the joint venture must be prepared to operate on a lasting basis. For example, if the duration of the joint venture's operation is not determined in the articles of association or any other agreements, the joint venture will be assumed to perform on a lasting basis. However, if the duration of the joint venture's operation has been determined, it must be assessed whether that duration is sufficient to consider the joint venture as set up to operate on a lasting basis according to the nature of the market.

2.11 Power of Authorities to Investigate a Transaction

The ECA, with the approval of the Cabinet of Ministers, reserves the right to commence the examination of an Economic Concentration that does not exceed the Financial Thresholds if it possesses evidence or indications that could restrict or harm competition within a period not

exceeding one year from the date of implementing the economic concentration.

The circumstantial evidence that can be considered is as follows.

- Restriction of the technological development and innovation.
- Controlling the market by any act that may lead to an increase or decrease in prices.
- Reducing the quality of products.
- Creating barriers to entry or expansion in the market.

2.12 Requirement for Clearance Before Implementation

Under Article (22 bis d) of the Egyptian Competition Law, a notifiable transaction cannot be implemented unless the ECA's clearance is granted. Failing to comply with the obligation to notify pursuant to Article (19 bis a) and Article (19 bis e) of Egyptian competition Law is sanctioned with fine of no less than 1% and not more than 10% of the total annual turnover, or value of assets of the parties to the notifiable economic concentration, or value of the transaction, whichever is higher, according to the latest audited consolidated financial statements of each concerned person. Such a fine should not be less than EGP30 million and not exceeding EGP500 million.

There is no mention under the Egyptian Competition Law or the Executive Regulations of a regularisation mechanisms for notifiable economic concentrations implemented without a proper notification to the ECA.

Note that if the ECA has concerns about implementing an economic concentration, its parties may submit a commitments offer to make it comply with the Egyptian Competition Law dur-

ing phase I or phase II of the review, in accordance with Articles (19 bis c) and (19 bis d) and Article (57) of the Executive Regulations. This offer consists of one or more behavioural or structural remedies such as structural remedies and behavioural cures. The ECA then evaluates whether the commitments submitted should suffice to mitigate the harmful effects on competition that may result from the implementation of the economic concentration. If the commitments are approved, the ECA issues a conditional clearance decision that contains the terms of the agreement, the length of any applicable validity periods, and a method for tracking the compliance of the parties involved.

In cases of conditional clearances, the ECA may require the parties to the economic concentration to appoint a monitoring trustee, responsible for monitoring the compliance of the parties with the commitments/conditions set in ECA's decision, subject to ECA's approval.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Gun jumping is prohibited under the Egyptian Competition Law.

Refer to **2.12 Requirement for Clearance Before Implementation** and **2.2 Failure to Notify** with respect to the penalties.

2.14 Exceptions to Suspensive Effect

The ECA may authorise the implementation of the Economic Concentrations despite its anti-competitive effect via the approval of the Cabinet of Ministers in any of the following cases.

- If the non-implementation of the economic concentration would result in the exit of one of them from the market (failing firm).

- If the implementation of the economic concentration would lead to economic efficiency that outweighs its anti-competitive effects.
- If the economic concentration is related to the protection of national security.

Failing Firm

The required conditions to benefit from the failing firm exception as follows.

- One of the concerned persons has financial difficulties in a way that leads to the exit of that person and their assets from the market.
- There is no less anti-competitive alternative than the economic concentration.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

This circumstance is addressed under the Egyptian Competition Law. However, based on the authors' experience, the ECA may, on a case-by-case basis, be approached to grant the stakeholders its clearance of a hold a separate agreement.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

The ECA must be notified of any Economic Concentration that meets the conditions set forth in Article (19 bis) of the Egyptian Competition Law before its implementation. The notifying person must submit a written request, whether electronically or on paper, to the ECA to schedule a date for the submission of the notification file, the ECA shall set a date within a maximum of two working days from the date of submitting the request.

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.

3.2 Type of Agreement Required Prior to Notification

The concerned parties may submit a copy of the letter of intent, memorandum of understanding, sale/purchase agreement, purchase offer, due diligence report, shareholders' agreement, or any other agreements that confer the person Control or Material Influence.

3.3 Filing Fees

The filing fees shall not exceed EGP100,000 (approximately USD2,000) in addition to publication expenses.

The Executive Regulations specify the applicable fees categories:

- A fee of EGP80,000 (approximately USD1,500) if the combined annual turnover or value of assets in Egypt of all the concerned parties range between EGP900 million and EGP1 billion (approximately USD18.5 million and USD20.5 million).
- A fee of EGP90,000 (approximately USD1,800) if the combined annual turnover or value of assets in Egypt of all the concerned parties range between EGP1 billion and EGP1.5 billion (approximately USD20.5 million and USD31 million).

- A fee of EGP100,000 (approximately USD2,000) if the combined annual turnover or value of assets in Egypt of all the concerned persons exceeds EGP1.5 billion (approximately USD31 million).
- A fee of EGP100,000 (approximately USD2,000) if the combined annual turnover or the value of the combined assets worldwide for the concerned persons exceeds EGP7.5 billion (approximately USD155 million) for the latest year of the last audited consolidated financial statements, provided that at least one of the concerned persons had an annual turnover or value of assets in Egypt exceeding EGP200 million (approximately USD4 million).

In all cases, the highest fee is paid if more than one category applies. The notifying person shall bear the publication costs.

3.4 Parties Responsible for Filing

All parties directly involved in the Economic Concentration are responsible for filing before the ECA.

Refer to **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**.

3.5 Information Included in a Filing

A complete notification file should be submitted to the ECA. The notification file shall not be considered complete nor have any legal implications unless the notification form prepared by the ECA is filled out and the following data and documents are submitted.

- A scanned copy of the personal identification (national ID or Passport) of the notifying person, with the original available for review upon request.
- A scanned copy of the Power of Attorney (POA) issued to the notifying person, with the original available for review upon request. POA must be authenticated by the Ministry of Foreign Affairs if issued outside Egypt.
- A scanned copy from the commercial register, not more than three months old since its issuance date, for each concerned person, excluding the related parties, or its equivalence in the country of origin of the concerned person.
- A scanned copy of the articles of association, including all its amendments, for each concerned person, excluding their related parties, or its equivalence in the country of origin of the concerned person.
- A scanned copy of the audited consolidated financial statements or the audited individual financial statements if consolidated statements are not available, for the last year for the person(s) controlling the concerned persons, along with the supplementary explanations, including the auditor's report.
- A scanned copy of the annual report of each of the concerned persons, excluding their related parties.
- A scanned copy of the letter of intent, memorandum of understanding, sale/purchase agreement, purchase offer, due diligence report, shareholders' agreement, or any other agreements that confer the person Control or Material Influence.
- A scanned copy of the minutes of the board of directors and general assembly (ordinary/extraordinary) meetings approved and related to the Economic Concentration for each of the concerned persons.
- A scanned copy of the available permits and approvals obtained for the Economic Concentration subject of the notification file, whether inside or outside Egypt.

- Signed declaration by the notifying person or their legal representative confirming the validity of the information and documents provided.
- Receipt of payment of the prescribed fees for reviewing the notification file.
- Declaration to pay all publication expenses according to the decision of ECA's Board of Directors.

The notifying person may also submit any other relevant documents or data related to the review of the Economic Concentration, such as any studies prepared by the concerned persons or a third party regarding the products used by these persons, or for the purpose of evaluating and analysing the effects of the transaction on the markets (market structure, market shares, actual or potential level of competition, economic and financial status of the concerned persons).

3.6 Penalties/Consequences of Incomplete Notification

Typically, the ECA assesses whether or not the notification file is complete and will notify the notifying party of any requested information. Otherwise, failure to provide a complete application may result in the ECA rejecting the application, or other corrective action the ECA deems appropriate.

3.7 Penalties/Consequences of Inaccurate or Misleading Information ECA

Article (22 bis d) of the Egyptian Competition Law states that the any person who obtains a clearance decision to implement the Economic Concentration pursuant to either Article (19 bis c) or Article (19 bis d) of the Egyptian Competition Law by deliberately submitting incorrect data, information or documents is sanctioned with a fine of no less than 1% and not exceeding 10%

of the total annual turnover, or value of assets, or value of the transaction of the concerned persons, whichever is higher, according to the latest audited consolidated financial statements. If it is not possible to calculate this percentage, the fine shall not be less than EGP30 million and not exceeding EGP500 million.

FRA

Article (22 bis d) of ECL states that the any person who obtains a clearance decision from FRA pursuant to Article (19 bis e) of ECL by deliberately submitting incorrect data, information or documents is sanctioned with a fine of no less than 1% and not exceeding 10% of the total annual turnover, or value of assets, or value of the transaction of the concerned persons, whichever is higher, according to the latest audited consolidated financial statements. If it is not possible to calculate this percentage, the fine shall not be less than EGP30 million and not exceeding EGP500 million.

3.8 Review Process

The ECA shall review the Economic Concentration in Phase One within 30 working days, starting from the following working day of the date of submitting the complete notification file. This period may be extended by 15 working days in case the concerned persons submit a commitments offer. If the legal time limit for the review lapses without issuing a decision, this will be considered as clearance of the Economic Concentration.

The ECA shall continue to review the notification file for 60 working days, starting from the date of issuance of a decision by one of the review committees referring the notification file to Phase Two. This period may be extended by 15 working days in case the concerned persons submit a commitments offer.

Regarding Economic Concentrations where the target person operates in any of the activities subject to the supervision and control of FRA, the ECA shall review the Economic Concentration within 30 days starting from the day following the receipt of the complete notification file and its attachments from FRA.

Decisions Regarding Phase One

The ECA may issue any of the following decisions.

- Non-jurisdiction of the ECA to review the notification file.
- Dismissal of the request – in case the concerned persons abandoned the Economic Concentration.
- Clearance – if the notified Economic Concentration is in conformity with Article (19 bis b) of the Egyptian Competition Law.
- Conditional clearance – if the Economic Concentration is in conformity with Article (19 bis b) of the Egyptian Competition Law, upon approval of the commitments offer submitted by the concerned persons.
- Referral to Phase Two of the review process – if the Economic Concentration raises suspicion of lessening, restricting or harming the freedom of competition.

Decisions Regarding Phase Two

- Dismissal of the request – in case the concerned persons abandoned the Economic Concentration.
- Clearance – if the notified Economic Concentration is in conformity with Article (19 bis b) of the Egyptian Competition Law.
- Conditional clearance – if the Economic Concentration is in conformity with Article (19 bis b) of the Egyptian Competition Law, upon approval of the commitments offer submitted by the concerned persons.

- Block – if the Economic Concentration may restrict, lessen or harm competition.

The concerned persons may lodge grievance against the block decision within 30 days from the date of notification to the concerned persons.

3.9 Pre-notification Discussions With Authorities

The concerned persons can discuss the Economic Concentration prior to its implementation with the competent persons at the ECA before officially submitting the notification file in case they have any inquiries. These discussions shall not have any legal implications.

It is worth noting that any inquiries concerning the impact of the Economic Concentration on the market will not be discussed in the pre-notification discussions.

3.10 Requests for Information During the Review Process

Requests for information are common and expected, depending on the application submitted. Requests will effectively suspend the time otherwise imposed by ECA to process an application.

Note that the ECA will initially review the provided notification file and will notify the submitting party within five days of receiving the submission of whether it is complete. However, there is no indication of a specific timeline for completing the notification form before the ECA. Note that the review period shall not commence unless the ECA provides the submitting party with a receipt confirming the completion of the notification file.

3.11 Accelerated Procedure

Simplified procedures are applied to Economic Concentrations that are unlikely to restrict the freedom of competition in the market(s).

The Economic Concentrations that are subject to the simplified procedures are exclusively as follows.

- In case the persons concerned with the Economic Concentration meet the domestic notification thresholds stated in Article (19 bis) (a) of the Egyptian Competition Law, if the annual turnover or the value of assets in Egypt of the persons concerned with the economic concentration combined do not exceed EGP2 billion for the latest year in the last audited consolidated financial statements.
- In case the persons concerned with Economic Concentration meet the worldwide notification thresholds stated in Article (19 bis) (b) of the Egyptian Competition Law, if the annual turnover in Egypt of the target does not exceed EGP500 million for the latest year in the last audited consolidated financial statements.
- Establishing or acquiring a joint venture that carries out an independent and permanent economic activity outside of Egypt.
- 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.
- Conglomerate economic concentrations between persons operating in markets that are not horizontally or vertically related or otherwise related to each other.
- Acquisition of sole control over one or more persons after the acquiring person or persons exercised joint control over the same person.

4. Substance of the Review

4.1 Substantive Test

When considering an application, the Egyptian Competition Authority considers the following standards, which will soon be supported by the Executive Regulations:

- maintaining and encouraging effective competition amongst competitors in the market;
- examining whether or not the economic concentration will result in certain negative effects on economic growth and efficiency, and whether or not it will impact the considerations connected to the protection of national security;
- maintaining diversity of operators providing products or distributing products in a certain market;
- maintaining price, product, and services diversity;
- enhancing technological development and innovation;
- avoiding market control and market concentration by increasing or decreasing prices; and
- maintaining high-quality products and/or avoiding any market-entry obstacles or blocks, or any market expansion obstacles.

4.2 Markets Affected by a Transaction

Regarding the definition of market, the relevant market under the Egyptian Competition Law is composed of two elements.

- The relevant product (good or service) and the relevant geographical area. Relevant products are those that are effective substitutes from the consumer's point of view. The main illustrative criteria to consider one product as a substitute for another are the similarity in the specifications or usages of those

products and the likelihood that consumers would switch from one product to another for changes in price or any other competitive factors.

- A secondary criterion is whether the sellers make their business decisions based on the switching of consumers from the product due to price changes or any other competitive factors.

The geographical scope is the area where competitive conditions are homogenous, taking into consideration potential competitive opportunities. Under Article 6 of the Executive Regulations, two criteria are taken into consideration:

- the ability of the buyer to move from the relevant geographical area to another in Egypt or abroad as a result of changes in pricing or other competitive circumstances; and
- the ability of the seller in Egypt or abroad to move to the relevant geographical area as a result of price changes or other competitive circumstances.

Certain factors must be taken into consideration to evaluate the ability of the buyers and sellers:

- transportation costs (including consumed time and insurance fees); and
- customs and other non-customs restraints.

Per the most recent revision of the Executive Regulations, the authors note that the competition concerns remain rather unaddressed.

4.3 Reliance on Case Law

The Egyptian Competition Authority is proactive when it comes to references to precedents and case law. The authors anticipate a reliance on case law weighting in important and strategic sectors.

4.4 Competition Concerns

Many competition concerns are connected to vertical and horizontal arrangements and abuse of dominance, particularly if the market share is high and the struggle faced by local operators in the Egyptian economic scene, especially with the rise of many economic challenges whether in the local or global arena. The Egyptian Competition Authority focuses its efforts on providing a more equally efficient platform for the existing operators and allowing a space for other operators to penetrate the relevant markets in the future. The main concern would be addressing sustainable competition in strategic sectors such as healthcare, food, and products of national security.

4.5 Economic Efficiencies

The Egyptian Competition Authority considers the possible influence on economic efficiencies; however, the extent of such consideration is not apparent.

4.6 Non-competition Issues

The industrial policy, the user/consumer interest, the public interest, national security, economic efficiencies, and the protection of minority shareholders are all factors considered when clearance and pre-approval are needed in specific sectors such as telecommunications and banking. The firm anticipates that the same would apply from a strict Egyptian Competition Law perspective since the approval and clearance of the Egyptian Competition Authority is required as a combined condition to closing transactions.

4.7 Special Consideration for Joint Ventures

See 2.10 Joint Ventures.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The Egyptian Competition Authority can take corrective actions for violations of the Competition Law. Such corrective actions may include divestment undertakings and behavioural actions.

In the event that the execution of the transaction requires written authorisation from the NTRA or the CBE and falls under the category triggering both authorities' necessary consent and the said written approval has neither been requested nor granted, the NTRA or the CBE in terms of practice may be entitled to block the execution of the transaction or suspend it. The special regulators, the NTRA and CBE, may intervene in such circumstance and the concerned parties must undertake the required procedure or else their operational licences might be revoked.

5.2 Parties' Ability to Negotiate Remedies

This would be further examined in practice with the implementation of the new Amendments and examination of the Egyptian Competition Authority's treatment on a case-by-case basis.

5.3 Legal Standard

The legal standard for remedies is not enshrined in the Egyptian Competition Law. In this respect, it is presumed that the precedents that will be made will be deemed the standard practice once the Amendments are fully in force.

5.4 Negotiating Remedies With Authorities

Based on the firm's understanding of the Egyptian Competition Law, and informal discussion

with Egyptian Competition Authority officials, it is possible to remedy competition issues; eg, by giving divestment undertakings or behavioural remedies.

Violations of the Egyptian Competition Law can be settled upon the approval by the ECA's board. If the settlement was concluded before filing the criminal lawsuit or taking any procedures in this respect, the minimum stipulated fine shall be the maximum of the settlement amount. If the settlement was made after filing the criminal lawsuit or taking any procedures in it, but before issuance of the final court judgment, an amount of no less than three times the minimum stipulated fine and no more than half of its maximum shall be paid. Settlement shall terminate the criminal lawsuit. Agreements that violate the Egyptian Competition Law are considered null and void for having a criminal purpose.

Private enforcement of the Egyptian Competition Law in Egypt is still at an early stage. However, as per the general rules of Egyptian civil law, persons that are harmed by the violations of the Egyptian Competition Law can claim compensation from the competent court for the actions of the person committing the violation, in case specific performance was not feasible. This does not have to be related to the criminal court action, and the plaintiff can request compensation before the competent civil court even if the Egyptian Competition Authority did not refer the matter to the court. The Amendments remain silent on this point. The firm anticipates witnessing more information regarding the implementation of negotiation remedies with the Egyptian Competition Authority, upon further application of the Amendments.

5.5 Conditions and Timing for Divestitures

The conditions and timing for divestitures are not enshrined in the Egyptian Competition Law or the Executive Regulations that are yet to be published. It is anticipated that the Egyptian Competition Authority will issue a guideline related to the remedies. If not, it will be considered on a case-by-case basis.

5.6 Issuance of Decisions

Formal decisions permitting or prohibiting transactions are made publicly available by the Egyptian Competition Authority and are generally published on the authority's website and, per Article (56) of the Executive Regulations, a statement and summary of the transaction in a widely circulated daily newspaper.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

In the event that the Egyptian Competition Authority concludes that a foreign-to-foreign transaction would fundamentally affect the strategic ownership and management of the locally based entities subject to the Egyptian jurisdiction, no action may directly be taken against the foreign entity but following the international precedents and in co-ordination with the relevant regulatory bodies, the operating licences of the local entities might be subject to revocation or suspension for reasons related to transparency, public interest or national security. The authors note that the Executive Regulations do not further elaborate on this matter.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Till date, the scope of the Amendments and the Executive Regulations do not clearly indicate that related arrangements (ancillary restraints) are covered in an ECA clearance. Further guidance on the same is expected to be developed by the ECA in the upcoming months.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

The Egyptian Competition Law provides that the Egyptian Competition Authority may seek experts' opinions. However, such experts shall not have any powers in the decision-making process.

7.2 Contacting Third Parties

This is a part of the upcoming Egyptian Competition Authority scheme. However, there are no provisions under the Executive Regulations or the Egyptian Competition Law addressing this. It is yet to be examined under a new batch of ECA guidelines, if any.

7.3 Confidentiality

The employees of the Egyptian Competition Authority have a duty to keep information and sources confidential. This information and data, as well as the relevant sources, shall not be used for any purposes other than those for which they were submitted.

Furthermore, commercially sensitive information is not usually required for the purpose of the

notification. Generally, any Egyptian Competition Authority employee having access to commercial information of any entity is prohibited from working for a competitor of the concerned party for a period of two years from the date the said employee gained access to the confidential information.

7.4 Co-operation With Other Jurisdictions

The Egyptian Competition Authority has recently been implementing several protocols with different jurisdictions, such as the Kingdom of Saudi Arabia and many Arab states, for the establishment of a co-operative ecosystem.

In 2019, the Egyptian Competition Authority signed a bilateral institutional partnership with the German Federal Ministry for Economic Affairs and Energy, and the Federal German Competition Authority, which has contributed to strengthening the institutional and enforcement capacity of the Egyptian Competition Authority through knowledge sharing and internal capacity building. The valuable and successful co-operation incentivised both sides to renew the Joint Declaration of Intent in 2020 to establish a more extensive level of co-operation with hands-on case-handling experience sharing, policy review and guidelines development, as well as a more practical on-the-job work co-ordination and knowledge sharing.

The Egyptian Competition Authority also co-operates with the Common Market for Eastern and Southern Africa (COMESA) Competition Commission regarding merger notifications. Article 25(6) of the 2004 COMESA Competition Regulations states that the Commission may notify member states subject to a merger, and request their written opinions. Regarding the requests from the COMESA Competition Commission,

the Egyptian Competition Authority reviewed 21 notifications and examined the potential impact of the mergers on the Egyptian market.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

As a general rule, the decisions of the Egyptian Competition Authority are administrative in nature and can be appealed before the administrative court, unless the matter is referred to the prosecutor, the competence of the criminal court or, more particularly, the criminal courts which are specialised in considering economic crimes. Specifically, if the decision of the Egyptian Competition Authority entails a rejection of the economic concentration, the decision could be appealed.

8.2 Typical Timeline for Appeals

Appealing a rejection of an economic concentration shall take place within 30 days from being notified of such decision. From a practical standpoint and in general, litigation in Egypt is a lengthy process. Given that the pre-merger control has been newly introduced by virtue of the Amendments, there are no successful appeals in relation.

8.3 Ability of Third Parties to Appeal Clearance Decisions

As a general rule under Egyptian law, if a third-party appeals a decision, the appeal is highly likely to be rejected as it was filed by a person without a proper legal capacity.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

The filing requirements for foreign subsidies follow the same filing requirements and provisions enshrined in the Egyptian Competition Law and its Amendments related to merger control.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

There are no recent developments worth noting, save for the ex ante merger control regime coming into effect as of 1 June 2024.

10.2 Recent Enforcement Record

While the statistics of enforcement records are not generally disclosed and published on the Egyptian Competition Authority's website, major decisions of the Authority may be released. Below, the firm has set out an example of a major decision which affected the merger control regime in the recent years.

Typically, mergers/acquisitions between competitors are not regarded by the Egyptian Competition Law as horizontal agreements which are prohibited by the Egyptian Competition Law, unless approved by the Egyptian Competition Authority.

In 2018, the Egyptian Competition Authority adopted a different approach regarding mergers/acquisitions between competitors (in this case both have a significant share covering almost the whole market). The Egyptian Competition Authority regarded the potential acquisition between Uber and Careem (two of the biggest transportation companies using ride-hailing

apps) to be a horizontal agreement and, as such, violating Article 6 (a) and (d) of the Competition Law. As a result, the Egyptian Competition Authority issued Decision No 26 on 23 October 2018, whereby it obliged said companies and their related parties, including the companies participating in their shareholdings, to obtain its approval prior to concluding any agreement related to a merger, establishing joint ventures, and the purchase or sale of shares or assets of either company directly or indirectly.

By virtue of the Amendments, the ECA will have a wider discretion to investigate transactions once the filing takes place. However, given the lack of elaboration by the Executive Regulations, the enforceability of the Amendments remains unclear as it has not been tested yet.

Sources other than the official site of the Egyptian Competition Authority reveal that the Authority took decisions for more than 344 matters in different sectors and markets during 2022.

- The healthcare sector constituted the biggest record, with 283 matters having been studied, representing 82% of the total.
- The real estate sector came second for the enforcement record, comprising 16 matters.
- The food and beverage sector came third in line with 12 matters.
- Seven matters were examined for cars and automobiles.
- Four matters were studied for electricity, power, infrastructure elements, and education.
- Two matters were considered for each of the areas of telecommunication, media, and agriculture.

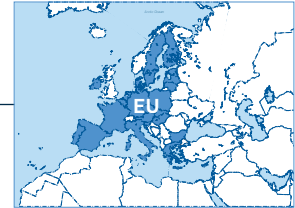
The Egyptian Competition Authority approved 267 economic concentrations, detected 16 violations, started criminal procedures in seven

cases, rejected three requests for exemption and approved two, and issued settlements for 15 cases. Similar numbers could not be found for the year 2023.

10.3 Current Competition Concerns

The Egyptian Competition Authority currently faces great challenges regarding economic concentrations taking place in the country. One of the main goals of the Egyptian Competition Authority is to set safe grounds for local and domestic economic operators to compete in the Egyptian market. We will see the implementation and effects of the merger control notifications and the merger control system once the Executive Regulations are issued.

The Egyptian Competition Authority's official statement assured that those Amendments are drawn for the purposes of alignment with Egypt's vision towards 2030 which mainly focuses on sustainable economic growth and compliance with the state strategic policies for a more prosperous environment in all sectors and the economy as a whole.



Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.236

- 1.1 Merger Control Legislation p.236
- 1.2 Legislation Relating to Particular Sectors p.236
- 1.3 Enforcement Authorities p.236

2. Jurisdiction p.237

- 2.1 Notification p.237
- 2.2 Failure to Notify p.238
- 2.3 Types of Transactions p.238
- 2.4 Definition of "Control" p.239
- 2.5 Jurisdictional Thresholds p.239
- 2.6 Calculations of Jurisdictional Thresholds p.240
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.241
- 2.8 Foreign-to-Foreign Transactions p.241
- 2.9 Market Share Jurisdictional Threshold p.241
- 2.10 Joint Ventures p.241
- 2.11 Power of Authorities to Investigate a Transaction p.242
- 2.12 Requirement for Clearance Before Implementation p.242
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.242
- 2.14 Exceptions to Suspensive Effect p.242
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.243

3. Procedure: Notification to Clearance p.243

- 3.1 Deadlines for Notification p.243
- 3.2 Type of Agreement Required Prior to Notification p.243
- 3.3 Filing Fees p.243
- 3.4 Parties Responsible for Filing p.243
- 3.5 Information Included in a Filing p.243
- 3.6 Penalties/Consequences of Incomplete Notification p.244
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.244
- 3.8 Review Process p.245
- 3.9 Pre-notification Discussions With Authorities p.246
- 3.10 Requests for Information During the Review Process p.246
- 3.11 Accelerated Procedure p.247

4. Substance of the Review p.247

- 4.1 Substantive Test p.247
- 4.2 Markets Affected by a Transaction p.248
- 4.3 Reliance on Case Law p.248
- 4.4 Competition Concerns p.248
- 4.5 Economic Efficiencies p.249
- 4.6 Non-competition Issues p.249
- 4.7 Special Consideration for Joint Ventures p.250

5. Decision: Prohibitions and Remedies p.250

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.250
- 5.2 Parties' Ability to Negotiate Remedies p.250
- 5.3 Legal Standard p.251
- 5.4 Negotiating Remedies With Authorities p.251
- 5.5 Conditions and Timing for Divestitures p.252
- 5.6 Issuance of Decisions p.253
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.253

6. Ancillary Restraints and Related Transactions p.253

- 6.1 Clearance Decisions and Separate Notifications p.253

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.253

- 7.1 Third-Party Rights p.253
- 7.2 Contacting Third Parties p.253
- 7.3 Confidentiality p.254
- 7.4 Co-operation With Other Jurisdictions p.254

8. Appeals and Judicial Review p.255

- 8.1 Access to Appeal and Judicial Review p.255
- 8.2 Typical Timeline for Appeals p.255
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.255

9. Foreign Direct Investment/Subsidies Review p.256

- 9.1 Legislation and Filing Requirements p.256

10. Recent Developments p.257

- 10.1 Recent Changes or Impending Legislation p.257
- 10.2 Recent Enforcement Record p.257
- 10.3 Current Competition Concerns p.258

Van Bael & Bellis is widely acknowledged as having one of the leading practices in EU and UK competition law, including merger control. From its main office in Brussels and its newest office in London, the competition team at Van Bael & Bellis has assisted clients at both the EU and national levels, notably appearing before the European Commission, the UK Competition and Markets Authority (CMA) and the EU and UK courts, where the firm has acted as counsel in many landmark cases. Within the field of merger control, Van Bael & Bellis has a

dedicated team of EU and UK specialists who regularly represent merging parties as well as complainants in cases involving key issues of jurisdiction, procedure and substantive law. The firm has succeeded in obtaining clearance for numerous complex transactions before the European Commission and the CMA. The team also routinely helps clients to obtain merger clearance from member state authorities for transactions that do not meet EU thresholds. The firm is frequently called on to co-ordinate merger control filing efforts across the world.

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VAN BAEL & BELLIS

1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Council Regulation 139/2004 on the control of concentrations between undertakings (the “EU Merger Regulation” or EUMR) provides the regulatory framework for the assessment of all “concentrations” (including mergers, acquisitions and certain joint ventures) that have an “EU dimension” (ie, that meet the turnover-based thresholds of the EUMR – see **2.5 Jurisdictional Thresholds**).

Commission Implementing Regulation 2023/914 (the “Implementing Regulation”), lays out the deadlines and other procedural aspects of the review process and provides the notification forms. The Implementing Regulation entered into force on 1 September 2023, and repealed the previous implementing regulation, Commission Regulation 802/2004 (see **10.1 Recent Changes or Impending Legislation**).

The European Commission (the “Commission”) has published additional notices, guidelines and best practices documents, available on its website, examples of which are listed below.

Additional jurisdictional and procedural guidance includes:

- the Consolidated Jurisdictional Notice;
- the Notice on Simplified Procedure (the Commission adopted a new notice on 20 April 2023 which entered into force on 1 September 2023);
- the Notice on Case Referrals and Guidance on the Application of Article 22 EUMR (see **2.1 Notification**); and
- the Notice on Access to File.

Additional substantive guidance includes:

- the Notice on the Definition of the Relevant Market (a new version of this notice was issued on 22 February 2024);
- the Horizontal Merger Guidelines;
- the Non-Horizontal Merger Guidelines; and
- the Remedies Notice.

1.2 Legislation Relating to Particular Sectors

There is no separate legislation for foreign transactions, nor sector-specific legislation.

1.3 Enforcement Authorities

The Commission has exclusive jurisdiction within the European Economic Area (EEA) to review concentrations with an EU dimension (ie, those satisfying the EU thresholds). The EEA consists of the 27 EU member states plus three European Free Trade Association (EFTA) countries: Iceland, Liechtenstein and Norway.

The Directorate General for Competition (“DG Comp”), under the leadership of the current Competition Commissioner Margrethe Vestager, administers the merger control process.

The Commission operates according to a “one-stop shop” principle. Concentrations with an EU dimension must be notified to the Commission and need not be notified to any of the EEA national competition authorities (NCAs), even if national notification thresholds are met. NCAs cannot review or apply their competition rules to a concentration that has been notified to the Commission.

Under certain circumstances, the Commission will accept exclusive jurisdiction over cases that do not meet the EU thresholds, upon referral by one or more EU member state or upon request

of the parties, or it will agree to transfer its jurisdiction back to one or more member states (see **2.1 Notification**).

Exceptions

The Commission's exclusive jurisdiction over concentrations with an EU dimension is subject to several limited exceptions regarding:

- the “legitimate interests” of member states in public security, media plurality, prudential rules or other exceptional interests under Article 21(4) EUMR;
- the national security interests of member states relating to the production and/or trade in certain goods intended for exclusively military purposes under Article 346 of the Treaty on the Functioning of the European Union (TFEU); and
- certain products for which jurisdiction does not extend over the European Free Trade Association (EFTA) states per Protocol 2 of the EEA Agreement.

2. Jurisdiction

2.1 Notification

Parties must notify any concentration with an EU dimension (see **2.5 Jurisdictional Thresholds**) to the Commission and receive clearance before it can be implemented.

The EUMR contains several referral mechanisms that allow transactions that do not meet the EU thresholds to be referred to the Commission for review and that allow deals meeting the EU thresholds to be referred to the member state NCAs.

Referral to the Commission

By the parties (Article 4(5) EUMR)

Where a transaction does not meet the EUMR thresholds but requires notification in at least three member states, the notifying parties may make a “reasoned submission” to the Commission, requesting that it review the transaction, rather than the member state NCAs. If the NCAs do not object, this reduces the notification burden by allowing the transaction to benefit from the EU's one-stop shop. Historically, fewer than 2% of such referral requests have been rejected.

By the member states (Article 22 EUMR)

One or more member state NCAs may request that the Commission take jurisdiction over a transaction that does not meet the EUMR thresholds if it:

- affects trade between member states; and
- threatens to significantly affect competition within the territory of the requesting member state(s).

In practice, fewer than 10% of such referral requests have been rejected. In early 2021, the Commission clarified that a member state NCA need not have jurisdiction over the transaction in order to refer it to the Commission (see **10.1 Recent Changes or Impending Legislation**). This opens the door for deals that do not meet the notification thresholds in any member state to be referred to the Commission for review.

Referral to the Member States

By the parties (Article 4(4) EUMR)

Before notifying a transaction with an EU dimension to the Commission, the parties may make a “reasoned submission” to the Commission requesting a full or partial referral of the transaction to a member state NCA. The parties' submission must demonstrate that the concen-

tration may significantly affect competition in a market within a member state that presents all the characteristics of a distinct market and should therefore be examined by that member state's NCA. Only one Article 4(4) request has ever been rejected.

By the member states (Article 9 EUMR)

A member state may request a full or partial referral from the Commission. To do so, the member state must inform the Commission within 15 days of receipt of a copy of the EU notification that the transaction threatens to significantly affect competition in a market within that member state that has all the characteristics of a distinct market (in which case the Commission will decide whether to refer the case) or that the transaction affects competition in a market within that member state which moreover does not constitute a substantial part of the internal market (in which case, the Commission must refer the case). Historically, the Commission has rejected just over 11% of Article 9 requests.

2.2 Failure to Notify

The EUMR imposes both a notification and a standstill obligation:

- notification obligation – Article 4(1) EUMR requires that parties notify any concentration with an EU dimension before implementation; and
- standstill obligation – Article 7 EUMR requires parties to wait to implement any concentration with an EU dimension until the transaction is notified to and cleared by the Commission (see **2.12 Requirement for Clearance Before Implementation**).

Fines for Failure to Notify or Suspend

Under Article 14(2) EUMR, the Commission may fine parties up to 10% of aggregate worldwide

turnover for “gun-jumping” if they fail to notify a transaction or implement a transaction before receiving clearance.

The Commission has become increasingly willing to impose large fines for gun-jumping and other procedural violations:

- in July 2023, it imposed the largest fine to date (EUR432 million, corresponding to 10% of aggregate worldwide turnover) on Illumina for an especially blatant violation of the standstill obligation in relation to its acquisition of GRAIL;
- previously, the largest gun-jumping fine was EUR124.5 million, imposed on Altice for implementing its acquisition of PT Portugal before notifying the transaction (this fine was reduced by the Court of Justice to EUR115.5 million on appeal); and
- other recent gun-jumping fines range between EUR20million and EUR30 million and include: EUR28 million on Canon/Toshiba Medical Systems Corporation in 2019; EUR20 million on Marine Harvest/Marpol in 2014; and EUR20 million on Electrabel/Compagnie Nationale du Rhône in 2009.

2.3 Types of Transactions

The EUMR only applies to “concentrations”, ie, mergers, acquisitions of control and certain “full-function” joint ventures. As a rule of thumb, in order for a transaction to be considered a concentration, there should be a change in the nature of control of an undertaking (see **2.4 Definition of “Control”**). How this change in control is brought about (whether through a purchase of assets or shares, or by other means) is immaterial. Purely internal restructurings or reorganisations that do not lead to a change of control do not qualify as concentrations within the meaning of the EUMR.

2.4 Definition of “Control”

The EUMR defines “control” as rights, contracts or other means which, together or separately, confer the possibility of exercising decisive influence over an undertaking. Such control may be held solely (ie, by one undertaking) or jointly (by two or more undertakings). The acquisition of control, including through changes in the nature of control (eg, from sole to joint, or vice versa), will generally constitute a concentration under the EUMR.

Sole Control

The classic example of an acquisition of sole control is where Company A acquires 100% of Company C. However, sole control can also arise where Company A acquires less than 100% of Company C, provided that A’s stake in C allows A to determine, on its own, the key strategic commercial decisions of C. This might be the case, for example, where all such decisions are to be taken by a simple majority vote of C’s board of directors and A is entitled to appoint the majority of the directors of C’s board.

The above are examples of “positive” sole control (where A is able to take strategic commercial decisions relating to C on its own). Sole control can also be “negative”. This is where A does not have the power to take strategic commercial decisions relating to C on its own but is the only shareholder of C with the power to veto such decisions.

Joint Control

Joint control exists where two or more undertakings have the possibility of exercising decisive influence over another undertaking. In this context, decisive influence normally means the power to block decisions.

A typical example of joint control would be a 50:50 joint venture (“C”), with both shareholders (“A” and “B”) having veto rights over key strategic decisions of C, such as the approval of C’s business plan or budget, or the appointment of C’s senior management. In such a situation, as A and B must reach a consensus in determining the commercial policy of C, they are considered to jointly control C. Veto rights that are of the kind typically granted to minority shareholders for the preservation of their basic shareholder interests, such as a veto over changes to C’s corporate statute or the liquidation of C, would not normally confer control in the absence of other factors.

Both sole control and joint control may be *de jure* (eg, based on contractual rights set out in a shareholders’ agreement) or *de facto* (eg, as a result of strong economic links or other factors that confer the possibility to exercise decisive influence over an undertaking). An assessment of control must therefore consider the full factual circumstances of a transaction, including the contractual and non-contractual rights of the parties involved.

Minority Shareholdings

The acquisition of a minority shareholding that does not grant sole or joint control over an undertaking is not a concentration under the EUMR. However, such transactions may be notifiable in certain EU member states.

2.5 Jurisdictional Thresholds

Concentrations that meet either of the turnover thresholds below have an “EU dimension” and must be notified to the Commission, provided that they do not fulfil the “two thirds” exception. These thresholds, which are based on the parties’ turnover in the last financial year for which audited figures are available, apply to all concen-

trations. There are no additional sector-specific thresholds.

Primary Thresholds

- The combined aggregate worldwide turnover of all the undertakings concerned exceeds EUR5 billion; and
- the aggregate EU-wide turnover of each of at least two of the undertakings concerned exceeds EUR250 million.

Alternative Thresholds

- The combined aggregate worldwide turnover of all the undertakings concerned exceeds EUR2.5 billion; and
- in each of at least three EU member states, the combined aggregate turnover of all the undertakings concerned exceeds EUR100 million; and
- in each of at least three member states included above, the aggregate turnover of each of at least two of the undertakings concerned exceeds EUR25 million; and
- the aggregate EU-wide turnover of at least two of the undertakings concerned exceeds EUR100 million.

Two-Thirds Exception

The primary or alternative thresholds will not be met if each of the undertakings concerned achieves more than two thirds of its aggregate EU-wide turnover in one and the same member state.

2.6 Calculations of Jurisdictional Thresholds

Article 5 EUMR outlines how turnover should be calculated for the purposes of the EU jurisdictional thresholds.

Calculation of Turnover

The term “aggregate turnover” refers to revenue derived from the sale of products and/or services by the undertakings concerned in the most recent financial year for which audited accounts are available.

Turnover for each undertaking concerned normally includes all group-wide turnover, excluding intra-group turnover. If only part of an undertaking is being acquired (eg, a subsidiary or a division), only the turnover relating to that part counts as the target’s turnover, and the seller’s turnover is ignored.

Revenues are calculated only on the basis of net turnover (ie, after the deduction of sales rebates, value added tax and any other taxes directly related to turnover). The calculation of aggregate turnover generally excludes any extraordinary revenues that do not correspond to the ordinary activities of the undertakings concerned, such as income from the sale of businesses or assets.

Geographical Allocation of Turnover

Turnover is generally allocated based on where the customer is located, as this is normally where competition with alternative suppliers takes place. The Commission’s Consolidated Jurisdictional Notice provides additional detail on where turnover should be allocated for specific types of sales, including internet sales.

Revenues registered in a foreign currency must be converted to euros using the average exchange rate for the 12-month period in question, as published by the European Central Bank.

Financial Institutions

The EUMR and the Consolidated Jurisdictional Notice provide specific rules that apply to the

calculation and allocation of turnover in the case of credit and other financial institutions.

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

Undertakings Concerned

The EUMR jurisdictional thresholds refer to the aggregate turnover of “undertakings concerned”. In the case of mergers, the merging parties are both undertakings concerned. In the case of acquisitions, the undertakings concerned are the acquirer(s) and the target(s) but not the seller. If the transaction involves the acquisition of joint control over a pre-existing undertaking, then that undertaking is also an undertaking concerned.

Control Group of the Undertakings Concerned

EU turnover thresholds concern the aggregate turnover of all entities belonging to the control group of the undertaking concerned. For turnover purposes, the concept of control group includes:

- the undertaking concerned;
- any undertakings directly or indirectly controlled by the undertaking concerned;
- any undertakings that directly or indirectly control the undertaking concerned (ie, its parent companies); and
- any undertakings other than the undertaking concerned that these controlling undertakings also control.

The turnover of a target undertaking is limited to that of the target itself and its subsidiaries, but not the turnover of the target’s parent companies (the sellers) or any other subsidiaries of those parent companies.

2.8 Foreign-to-Foreign Transactions

The EUMR applies to all concentrations with an EU dimension, regardless of the nationality of the parties involved. There are no special rules for foreign-to-foreign transactions or a local effects/presence test beyond the turnover thresholds.

2.9 Market Share Jurisdictional Threshold

The EU notification thresholds are based solely on turnover. There are no market share-based thresholds.

2.10 Joint Ventures

The EUMR applies only to “full-function” joint ventures (JVs). Non “full-function” JVs are not caught by the EUMR, but are subject to the EU antitrust rules, specifically Article 101 TFEU. They may also require notification in certain member states that take a different approach to what constitutes a notifiable transaction.

A JV is considered “full-function” if it performs, on a lasting basis, all the functions of an autonomous economic entity. It must therefore have sufficient staff, assets and capital to function on the market independently of its parent companies. It must also have its own market presence, and not merely perform a single function on behalf of its parent companies (such as customer service or R&D) or be overly reliant on its parent companies as either suppliers or customers.

Concentrations involving full-function JVs may arise from the creation of a new greenfield operation or through a change in control over an existing business (eg, a change from sole to joint control or the addition of a parent company to an existing full-function JV).

2.11 Power of Authorities to Investigate a Transaction

The Commission has no power to investigate or review on its own initiative transactions that do not meet the EU jurisdictional thresholds.

However, the Commission can acquire jurisdiction to review such transactions as a result of a referral request lodged by either the parties or a member state (see **2.1 Notification**).

2.12 Requirement for Clearance Before Implementation

Article 7 EUMR imposes a standstill obligation, requiring parties to a concentration with an EU dimension to suspend implementation until they have received clearance.

Definition of Implementation

The Court of Justice clarified the meaning of implementation in *Ernst & Young/KPMG Denmark* (2018). Actions taken in anticipation of a merger (eg, the target severing legal ties with its parent company) do not constitute implementation of the transaction, even if they would not have occurred had it not been for the merger, and they are irreversible and have an effect on the market. Rather, implementation in the sense of Article 7 EUMR concerns steps that contribute to a lasting change in control of an undertaking.

Multi-step Transactions

Transactions achieved through multiple steps can constitute part of the same notifiable concentration, where these steps are interdependent (ie, legally or de facto linked by condition) and control is ultimately acquired by the same undertaking(s). Under Article 5(2) EUMR, two or more transactions between the same two parties within a two-year period will be considered part of the same concentration for turnover calculation purposes (preventing parties from evad-

ing merger control by splitting transactions into smaller deals). Any multi-step concentrations must receive clearance before the first step is implemented.

2.13 Penalties for the Implementation of a Transaction Before Clearance

The Commission may impose fines of up to 10% of aggregate worldwide turnover for implementing a concentration with an EU dimension before receiving clearance (see **2.2 Failure to Notify**).

If the Commission determines that a concentration with an EU dimension was implemented without receiving clearance, it can order interim measures under Article 8(5) EUMR to restore or maintain conditions of effective competition pending a review of the transaction. If the Commission then issues a decision prohibiting the transaction (see **4.1 Substantive Test**), the Commission may order the parties to dissolve the concentration or take other restorative measures to remedy the competitive situation.

2.14 Exceptions to Suspensive Effect

Parties may only implement a transaction with an EU dimension before it has received clearance if one of two limited exceptions is met.

Exception for Public Bids

Under Article 7(2) EUMR, transactions involving a public bid or a series of transactions in publicly traded securities, in which control is acquired from various sellers, are exempted from the standstill requirement provided that:

- the concentration is notified to the Commission without delay; and
- the acquirer does not exercise the voting rights attached to the securities in question (or does so only to preserve the full value

of its investments pursuant to a derogation granted by the Commission).

Exception by Reasoned Request

Under Article 7(3) EUMR, parties may obtain a derogation from the standstill requirement by submitting a reasoned request to the Commission. In practice, the Commission grants such derogations only exceptionally, where the transaction clearly does not threaten competition and where one of the parties (typically the target) would suffer serious economic harm (eg, bankruptcy) if the transaction were not allowed to proceed.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Other than the exceptions noted in 2.14 **Exceptions to Suspensive Effect**, there are no circumstances in which implementation is permitted before clearance has been received.

In particular, the Commission does not permit a transaction to close in other jurisdictions pending EU clearance, regardless of whether the EU business could be ring-fenced or held separately.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is no deadline to notify a transaction to the Commission. However, notification must be made (and clearance granted) before a transaction with an EU dimension can be implemented (see 2.12 **Requirement for Clearance Before Implementation**).

3.2 Type of Agreement Required Prior to Notification

A notification may be made following the conclusion of a binding agreement. However, the EUMR also allows parties to notify a transaction if they can demonstrate a good faith intention to conclude a binding agreement, for example, through a letter of intent or memorandum of understanding. Public bids may be notified once the parties have publicly announced an intention to make a bid.

3.3 Filing Fees

There are no filing fees to notify a concentration to the Commission.

3.4 Parties Responsible for Filing

In the case of an acquisition, the acquirer is solely responsible for notifying the transaction.

Where the transaction involves the acquisition of joint control, all parties acquiring control are responsible for making the notification.

In the case of a merger, both merging parties are responsible for filing the notification.

3.5 Information Included in a Filing Information Required

The notification must be made by completing the official notification form, “Form CO”, which is annexed to the Implementing Regulation.

It is generally recognised that the amount of time and detail required to complete Form CO is unparalleled by any other merger control regime worldwide. Completed Form COs are frequently longer than 100 pages and can easily eclipse 1,000 pages – excluding annexes – in complex cases involving numerous markets. The process is front-loaded, requiring parties to submit detailed information regarding, for example:

- the transaction and its rationale (including extensive internal documentation of the deal);
- the corporate structure, turnover and activities of the parties;
- the definitions of the relevant markets;
- competitive overlaps and vertical relationships, including details of any affected markets (see **4.2 Markets Affected by a Transaction**);
- contact details for market participants;
- any merger-specific efficiencies; and
- any co-operative effects resulting from a JV (where applicable).

Increasingly, even in Phase I cases (see **3.8 Review Process**), the Commission requires parties to turn over huge volumes of internal documents – from board presentations and minutes to emails of key individuals – concerning either the transaction or the markets at issue.

Certain transactions may be notified under a simplified procedure using “Short Form CO” (see **3.11 Accelerated Procedure**), which is less burdensome to complete than the standard Form CO, although still hefty compared to the standard forms in many other jurisdictions.

Submission

While Commission notifications previously needed to be made in hard copy form, the Commission started to accept electronic notifications during the COVID-19 pandemic. Since late 2023, the Commission’s default mechanism to accept notifications is electronically, through its “EU Send” platform (previously, “eTrustEx”). The Commission’s [website](#) provides further guidance on the required specifications for submissions.

Notifications may be submitted in any of the EU official languages, although the overwhelming majority of notifications are in English. Any sup-

porting documents not in an official language must be translated.

3.6 Penalties/Consequences of Incomplete Notification

The Commission has the discretion to reject a notification as incomplete. In this case, Phase I of the Commission’s review will begin only once the parties have submitted a notification that the Commission considers complete.

For this reason, it is standard practice for parties to submit a draft of Form CO during pre-notification and to wait until the Commission has indicated that the notification appears complete (see **3.9 Pre-notification Discussions With Authorities**) before formally filing.

3.7 Penalties/Consequences of Inaccurate or Misleading Information Fines and Penalties

The Commission can impose fines of up to 1% of aggregate annual turnover on a party that intentionally or negligently supplies incorrect or misleading information, whether in the notification form or in response to a request for information.

The Commission can also impose periodic penalty payments of up to 5% of a party’s average daily aggregate turnover for non-compliance with certain Commission decisions, including failing to provide complete and correct information in response to a formal request for information.

The Commission has become more active in imposing fines on merging parties that supply incorrect or misleading information. In 2017, the Commission imposed a EUR110 million fine on Facebook relating to its acquisition of WhatsApp. The Commission also imposed a fine of EUR52

million on General Electric in 2018 and a fine of EUR7.5 million on Sigma-Aldrich in 2021. Each of these fines related to failure to fully disclose products or capabilities still in development.

Revoking Clearance

The Commission has the power to revoke a previously granted clearance decision if it discovers that its decision was based on incorrect information for which one of the parties was responsible, or where the clearance was obtained by deceit. In practice, the Commission has only revoked one clearance decision on this basis (Sanofi/Synthelabo in 1999, although this merger was ultimately conditionally cleared following a new notification and review process).

3.8 Review Process

The Commission's review process consists of two phases: a standard Phase I review and, if necessary, an in-depth Phase II investigation.

Phase I

The Phase I review process begins once a complete notification is formally submitted to the Commission. As the length of the statutory period is fixed regardless of the complexity of the case, the Commission tends to front-load the review process in pre-notification (see **3.9 Pre-notification Discussions With Authorities**) to avoid running out of time in Phase I.

Phase I lasts 25 working days, running from the working day following notification. This timeline may be extended by an additional ten working days if either:

- the Commission receives a referral request from a member state; or
- the parties offer remedies to address a competition concern.

During Phase I, the Commission will normally solicit views from the market (see **7.2 Contacting Third Parties**) and may also receive spontaneous feedback in response to its public announcement of the notification.

At the end of Phase I, the Commission must issue one of the following decisions:

- finding that the transaction does not fall within the scope of the EUMR;
- clearing the transaction (with or without conditions); or
- opening a Phase II investigation.

The majority of cases are cleared – conditionally or unconditionally – after Phase I. Fewer than 4% of all notified transactions go to Phase II, and 2% are withdrawn before the initiation of Phase II.

Phase II

Phase II is an exceedingly burdensome process, requiring the notifying parties to reply to detailed requests for information and to produce large volumes of internal documents and data.

Phase II runs for 90 working days from the Commission's decision to open the in-depth investigation. This timeline can be extended:

- to 105 working days if the parties offer remedies (provided these are submitted between working days 55 and 65);
- by 20 working days at the request of the parties (made by working day 15) or at the initiative of the Commission with the parties' agreement; and
- for a variable period of time, as a result of the "stop the clock" mechanism following a formal Commission decision to request infor-

mation (see **3.10 Requests for Information During the Review Process**).

Engagement with the case team in Phase II follows several major milestones:

- a 6(1)(c) Decision – at the end of Phase I, the Commission issues a detailed decision outlining its reasons to open a Phase II investigation, to which the parties respond in writing;
- a Statement of Objections (SO) – if the Commission’s initial doubts are not resolved in the course of its review, it will issue an SO outlining its concerns, typically around working day 40 of Phase II, to which the parties respond in writing (the Commission must issue an SO if it intends to prohibit a transaction);
- access to file – if an SO is issued, the Commission must provide the parties with access to the evidence on which the SO relies; and
- an oral hearing – once an SO is issued, the parties may request an oral hearing (however, as complainants are also invited to participate, in practice, notifying parties often choose not to have a hearing).

Throughout Phase II, the parties also interact regularly with the case team and usually the Commission’s Chief Economist’s team.

At the end of Phase II, the Commission must issue a decision either:

- clearing the transaction (with or without conditions); or
- prohibiting the transaction.

3.9 Pre-notification Discussions With Authorities

While parties are not legally obliged to engage in confidential pre-notification discussions with the Commission, doing so has become standard

practice in nearly all cases. This reduces the risk of a notification being declared incomplete after submission (see **3.6 Penalties/Consequences of Incomplete Notification**). An extended pre-notification may also reduce the risk of a Phase II investigation (see **3.8 Review Process**).

The notifying parties begin by requesting the allocation of a case team using a standard request form available on the Commission’s website. Once a case team is assigned, the parties will often submit a briefing paper on the transaction and may have one or more calls and meetings with the case team. This would typically be followed by the submission of one or more drafts of Form CO and responses to any comments or requests for information from the case team.

As pre-notification is not part of the formal process, it has no fixed timeline. The case team will often wish to ensure that they have a thorough understanding of the markets and competitive issues involved in a transaction before the clock officially starts. Once the case team deems the draft to be complete, it will signal to the parties that they may file the formal notification.

In “simplified procedure” cases (see **3.11 Accelerated Procedure**), the pre-notification period may be brief, perhaps a week or two. In more complex cases, the pre-notification process can last many months.

3.10 Requests for Information During the Review Process

The Commission normally first issues requests for information to parties involved in the transaction and to third parties by “simple request”.

Where necessary, the Commission can also issue information requests “by decision”. In such cases, if the addressee is a party and it fails to

provide the information requested within the time limit specified in the request, the review clock is stopped until that information is provided. The Commission may also issue a decision imposing periodic penalty payments on the addressee until the information is provided.

The Commission may impose fines if incorrect or misleading information is supplied in response to either type of request (see **3.7 Penalties/Consequences of Inaccurate or Misleading Information**).

3.11 Accelerated Procedure

A “simplified procedure” may apply for transactions that are unlikely to give rise to any competitive concerns. The criteria are outlined in the Commission’s Notice on Simplified Procedure (a new version came into effect on 1 September 2023) and include:

- JVs with no, or negligible, actual or foreseen activities in the EEA (ie, the JV generates turnover or has assets in the EEA of under EUR100 million);
- transactions in which the parties are not active on the same product and geographic market or in markets upstream/downstream from one another, or if they are, their market shares are too low for these to be considered “affected” markets (see **4.2 Markets Affected by a Transaction**);
- acquisitions of sole control of an undertaking by a party already having joint control over that same undertaking;
- on request of the notifying parties and at the Commission’s discretion, transactions where the parties’ combined market shares do not exceed 25% on any markets where both are active; and the parties’ market shares do not exceed 35% on markets that are upstream/downstream from one another (or are less

than 50% on one market and less than 10% on all markets that are upstream/downstream from that market); or

- on request of the notifying parties and at the Commission’s discretion, two or more parties acquire joint control over a JV with annual turnover/assets in the EEA of less than EUR150 million.

Concentrations that qualify for the simplified procedure may be notified using Short Form CO, which requires less detailed information than the standard Form CO. The Implementing Regulation provides a template to be used in completing Short Form CO.

The length of the review period is the same for both a standard case and a simplified procedure case. In practice, however, transactions notified under the simplified procedure are sometimes cleared in advance of the 25-working day deadline.

4. Substance of the Review

4.1 Substantive Test

The Commission will assess whether a transaction would “significantly impede effective competition in the internal market, or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position”. This is known as the “significant impediment to effective competition” or “SIEC” test. The Commission must:

- clear any transaction that does not give rise to an SIEC;
- open a Phase II investigation if it has “serious doubts” that the concentration is compatible with the internal market at the end of Phase I; or

- prohibit any transaction that gives rise to an SIEC (after a Phase II investigation).

The Commission provides guidance on how this test is applied in its Horizontal and Non-Horizontal Merger Guidelines (see **4.4 Competition Concerns**).

4.2 Markets Affected by a Transaction

Markets can be:

- horizontally affected – if the parties are both active in the same market and hold a combined market share of 20% or more; or
- vertically affected – if one party is active in a market that is upstream or downstream from a market in which the other is active and in which the parties' individual or combined market share on either market is 30% or more.

In determining whether a concentration gives rise to any affected markets, the Commission considers the market definitions proposed by the notifying parties, as well as any plausible alternative market definitions based on the Commission's or the EU Courts' prior decisional practice, market reports, feedback from competitors and customers, or the parties' own internal documents. The Commission enjoys considerable discretion in determining the scope of the relevant markets and will often define markets more narrowly than the parties may do internally.

The Horizontal Merger Guidelines indicate that competitive concerns are unlikely where the parties hold a combined market share of 25% or less, or have a post-merger HHI below 1,000 (or in certain other situations, have a higher HHI but a low delta).

4.3 Reliance on Case Law

The Commission consistently relies on a substantial body of case law built up from its own decisional practice and the judgments of the EU Courts. The notifying parties are expected to refer to this record as a point of departure when defining the relevant markets or submitting other arguments.

The Commission or the notifying parties may occasionally rely on case law from other jurisdictions, particularly if a transaction relates to markets that the Commission has not previously examined in detail. Analysis provided by member state NCAs may be particularly persuasive. However, the Commission's body of decisions is so extensive (more than 9,000 cases decided over the past 30-plus years) that reliance on the decisions of other jurisdictions is very rare.

4.4 Competition Concerns

The Commission will investigate whether the concentration gives rise to an SIEC (see **4.1 Substantive Test**). In making this determination, the Commission will assess the impact of the transaction on various parameters of competition, including prices, output, quality and innovation. The Commission's Horizontal Merger Guidelines and Non-Horizontal Merger Guidelines outline specific theories of harm that the Commission is likely to consider.

Horizontal Concerns

Where the parties to a concentration are active in the same markets, the Commission will typically consider whether an SIEC may arise from:

- non-coordinated (unilateral) effects, notably (but not only) if the transaction creates or strengthens a dominant position; or
- co-ordinated effects, if the remaining market players are better able to tacitly co-ordinate

their market activities as a result of the transaction, including due to the creation or strengthening of a position of collective dominance.

In practice, the vast majority of the Commission's concerns relate to unilateral effects arising from the parties having high market shares in markets where they compete.

Non-Horizontal Concerns

If parties are active on vertically or closely related markets, the Commission will normally consider whether an SIEC may be created through:

- incentives for the merged entity to foreclose competitors' access to inputs or customers; or
- anti-competitive conglomerate effects due to the merged entity being able to engage in bundling of products or services.

It is rare for the Commission to object to a transaction based on vertical or conglomerate effects alone (in the absence of any horizontal effects), although the Commission did so recently in *Illumina/GRAIL*.

Innovation Concerns

The Commission is increasingly scrutinising transactions' potential impact on innovation and future competition. In particular, the Commission has considered that a merger may problematically hinder competition at the general level of the "innovation space", by decreasing incentives for the merged entity to compete actively in the development of new products and services.

4.5 Economic Efficiencies

The Commission will take efficiencies generated by a concentration into account under certain circumstances. Form CO contains a dedicated

section in which notifying parties may present any evidence of efficiencies.

Any efficiencies claimed must:

- be merger-specific, in that they are directly created by the transaction and are not achievable through any other, less anti-competitive means;
- be quantifiable and verifiable to a reasonable degree of certainty; and
- benefit consumers.

In practice, this is a difficult standard to meet. The Commission rarely accepts efficiencies put forward by parties to a concentration as sufficiently persuasive and has not yet cleared an otherwise problematic transaction based purely on efficiencies.

4.6 Non-competition Issues

The Commission is generally lauded for adhering to competition law principles in its assessments of transactions and eschewing non-competition considerations. The Commission has repeatedly emphasised the independence of its review process from political considerations and has resisted calls from certain member states to adopt a more protectionist view in order to allow for the creation of "European champions" (see **10.3 Current Competition Concerns**).

Nonetheless, in particularly sensitive or high-profile cases, the Commission will often receive lobbying pressure from national governments and third parties, which may have an impact on the overall context in which the Commission views a particular transaction. In a Phase II investigation, the Commission's decision to clear or prohibit the concentration will be taken by the full College of European Commissioners. As a result, other broad considerations (eg, employment,

environment, energy and growth) may have a limited influence in some merger reviews.

The EUMR provides the limited possibility for member states to take action to protect their national security or other legitimate interests, but such exceptional actions do not form part of the merger control process (see **1.3 Enforcement Authorities**). The Commission has also implemented legislation to establish separate mechanisms to monitor and control foreign investment and subsidies in concentrations (see **9. Foreign Direct Investment/Subsidies Review**).

4.7 Special Consideration for Joint Ventures

Full-function JVs are assessed using the same substantive test as all other concentrations – the SIEC test (see **4.1 Substantive Test**).

In addition, the Commission may also assess whether the JV gives rise to so-called “spill-over effects” – namely a risk of co-ordination between the parents in markets where they are both active outside the JV or operate upstream or downstream from one another. The Commission will assess any risk of co-ordination between the parent companies under Article 101 TFEU, which prohibits anti-competitive agreements between undertakings.

5. Decision: Prohibitions and Remedies

5.1 Authorities’ Ability to Prohibit or Interfere With Transactions

If the Commission determines that a notified concentration will lead to an SIEC, it must prohibit the transaction (see **4.1 Substantive Test**), unless remedies are offered that eliminate the Commission’s concerns. The Commission can

prohibit transactions without prior approval from the EU Courts or any other EU or member state body. Prohibition decisions may be appealed to the General Court (see **8.1 Access to Appeal and Judicial Review**).

In practice, prohibition decisions are rare. To date, the Commission has prohibited only 33 transactions since 1990, out of over 9,000 notified (although over 240 notifications have been withdrawn, often as a result of the Commission’s objections). Most problematic transactions are cleared, subject to remedies designed to eliminate the competition concerns.

5.2 Parties’ Ability to Negotiate Remedies

The parties may propose remedies to address competition concerns raised by the Commission (see **5.4 Negotiating Remedies With Authorities**).

The Commission’s 2008 Remedies Notice contains extensive guidance on the legal requirements that remedies must meet (see **5.3 Legal Standard**).

Structural Remedies

The Commission has expressed a clear preference for structural remedies, especially divestments, as these bring about a lasting change on the market and do not require ongoing oversight.

To be acceptable, a divestment must consist of a viable business that is operated by a suitable purchaser and can compete effectively with the merged entity going forward. While the Commission prefers the divestment of an existing, standalone business, it may accept the carve-out of a particular business activity where the parties can demonstrate, to the Commission’s satisfaction, that the divestiture has sufficient resources,

assets, personnel, R&D capacity and any other capabilities needed to compete.

The Notice on Remedies requires that purchasers of divestment businesses must:

- be independent of, and unconnected to, the parties;
- have the financial resources, relevant expertise, incentives and ability to maintain the business as a competitive force; and
- not give rise to new competition concerns by acquiring the divestment business.

Behavioural Remedies

The Commission is generally more sceptical of behavioural remedies (ie, commitments by the parties to act in a certain way on the market) as these tend to be more complex to implement and monitor. As such, they will only be accepted “exceptionally in specific circumstances”. In particular, the Notice on Remedies states that commitments not to raise prices, reduce quality or output are generally not workable. The Commission has been more open to accepting behavioural remedies to resolve concerns relating to access to key infrastructure, networks and interoperability, or concerns relating to exclusive long-term contracts or product bundling.

5.3 Legal Standard

The Remedies Notice notes that:

- any remedies must entirely eliminate the SIEC – the remedies offered by the parties must be sufficient to restore the conditions of competition that would have existed in the absence of the transaction; and
- it must be possible to implement the remedies effectively within a short period of time.

In particular, the remedies must offer the Commission a sufficient degree of certainty that the commercial structures or relationships resulting from the remedies can be maintained.

In assessing the likely effectiveness of remedies, the Commission will consider the nature of the market, any risks inherent in implementing the remedies and the likelihood of the remedies being maintained over time. The Commission is sceptical of remedies that are too complex or require significant ongoing monitoring to ensure compliance (see 5.2 Parties’ Ability to Negotiate Remedies).

5.4 Negotiating Remedies With Authorities

The parties are responsible for offering remedies – the Commission will neither impose nor propose remedies on its own initiative. In practice, the case team will work with the parties to further refine the parameters of remedies offered by the parties so that they sufficiently address the case team’s concerns.

Process

Remedies are offered by submitting commitments, which become the operative terms of the remedy, accompanied by “Form RM”. The Commission’s “Best Practice Guidelines for Divestiture Commitments” provide a model text for divestment commitments. Form RM is an annex to the Implementing Regulation. Both the commitments and Form RM require considerable time and effort to complete.

Remedies may be offered:

- during pre-notification (in draft form);
- in Phase I – before working day 20 (as Phase I is very short, the Notice on Remedies specifies that in order to be accepted, remedies

offered in Phase I must provide “a clear-cut answer to a readily identifiable competition concern”, and most Phase I remedies therefore take the form of divestitures); and

- in Phase II – before working day 65 (the Commission will only accept remedies submitted later in exceptional circumstances).

Market Testing and Consultation

The Commission will “market-test” proposed remedies with market participants to ensure that they will resolve the competitive concerns at issue (see 7.2 Contacting Third Parties).

The Commission will also consult with member state NCAs and (where relevant) the EFTA Surveillance Authority. If the competitive concern at issue affects markets broader than the EEA or requires a global remedy (such as the divestment of a worldwide business), the Commission will typically also co-ordinate with other competition authorities. The Commission may be reluctant to accept global remedies that may not be accepted by other authorities.

5.5 Conditions and Timing for Divestitures

According to the Remedies Notice, the parties may be allowed to close their transaction immediately after receiving the Commission’s conditional clearance decision. In such cases, the parties would typically have a set deadline (eg, six months from the Commission’s approval decision) to conclude a binding agreement to sell the divestment business to a suitable purchaser. If no such purchaser is found, a divestiture trustee will have a mandate to sell the business to a suitable purchaser at no minimum cost. The parties would then have a further period (eg, three months) after the Commission approves the purchaser to complete the sale of the divestment business.

In cases where it may be more difficult to identify a suitable purchaser, the Commission may require the parties not to close the main transaction until they have entered into an agreement with a suitable purchaser approved by the Commission (an “upfront buyer” remedy). Less commonly, the parties may name a specific purchaser, with whom they have already entered into an agreement, in their original commitment proposal (a “fix-it-first” remedy). In that case, the buyer is approved in the Commission’s decision clearing the main transaction (without the need for a separate approval process) and the Commission will take its assets/capabilities into account when evaluating the sufficiency of the remedy.

In any case, between the time that the Commission accepts a divestment commitment and the close of the sale to the approved purchaser, the divestment must be held separate and ring-fenced from the parties’ other operations. The parties must appoint a monitoring trustee, who monitors the parties’ compliance with the commitments, evaluates the suitability of any potential purchasers and advises the Commission accordingly.

Failure to Comply With Commitments

If the parties fail to comply with a condition of clearance (eg, by failing to divest or by re-acquiring the divestment business), the Commission’s clearance decision automatically becomes void. If the parties breach an obligation (ie, a step implementing the remedy, such as appointing a trustee), the Commission has the discretion to revoke its clearance decision.

The Commission may also fine the parties up to 10% of annual turnover and/or issue periodic penalty payments for failing to comply with commitments.

5.6 Issuance of Decisions

The Commission will notify its decision to the parties and to the member states and may also issue a press release providing a basic summary of its conclusions.

The Commission will publish a non-confidential version of any Phase II decision in the EU's Official Journal and on its website, often after a delay of several months. The Commission provides non-confidential copies of all its merger decisions on its website.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The Commission adopts the same review process, including with regard to prohibitions and remedies, regardless of the nationality of the parties to a transaction. The Commission has required remedies in numerous transactions involving non-European parties and has also blocked such transactions.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

The Commission's clearance decision covers restrictions that are "directly related and necessary to the implementation of the concentration" (otherwise known as "ancillary restraints"). The Commission's Notice on Ancillary Restraints provides guidance on the types of restrictions that commonly arise (eg, licensing arrangements, non-compete clauses, and purchase or supply obligations). Any restrictions that do not qualify as ancillary restraints are reviewable under Article 101 TFEU.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third parties play an important role in the Commission's review process, and the Commission will actively solicit their feedback (see 7.2 **Contacting Third Parties**).

Third parties able to show "sufficient interest" in the proceedings (eg, competitors, customers, suppliers, or recognised workers' representatives of the undertakings concerned) may be granted specific participation rights, including:

- the right to be heard – interested third parties may give oral or written evidence, including in an oral hearing, if one is held in Phase II;
- access to documents – interested third parties may be given access to a non-confidential copy of the SO (under the Best Practices Merger Guidelines, such access is only granted at the Commission's discretion in "appropriate cases"); and
- the right to appeal – interested third parties can appeal Commission clearance decisions to the General Court.

In order to have standing, third parties must normally have actively participated in the Commission's investigation.

7.2 Contacting Third Parties

The Commission actively seeks input from third parties, which can decisively affect the outcome of its review.

Investigation

Form CO requires parties to supply contact details for their top customers, competitors and suppliers, and any relevant trade associations.

The Commission will begin its market investigation early in Phase I (or even during pre-notification with the agreement of the notifying parties) by sending detailed electronic questionnaires to these third parties (especially customers and competitors). Answering these questionnaires can be extremely burdensome, especially for smaller companies or those with little or no interest in the transaction. The Commission will also publish the announcement of the notification on its website, inviting any interested parties to provide their views on the concentration.

The Commission will continue to solicit views from third parties throughout its investigation, including through the use of additional questionnaires. Third parties may engage with the Commission in writing, through meetings, or at the oral hearing (see **7.1 Third-Party Rights**).

In practice, it will be very difficult for a transaction to be approved if it faces strong opposition from the market (particularly from customers). Likewise, the Commission is unlikely to challenge a transaction if third parties have not voiced significant opposition.

Remedies

The Commission will market-test proposed remedies in order to ensure that they will resolve the competition concerns at issue and can be implemented effectively. The Commission will send third parties a questionnaire and a non-confidential version of the proposed commitments. If the market response is strongly negative, the Commission may not accept the remedies offered (see **5.4 Negotiating Remedies With Authorities**).

7.3 Confidentiality

Form CO requires the parties to supply a non-confidential summary of the transaction, which

the Commission will publish in the Official Journal and on its website when the notification is filed.

The Commission has a legal obligation not to disclose any confidential information obtained during the course of the merger review process, including during pre-notification. The Commission takes this duty very seriously.

7.4 Co-operation With Other Jurisdictions

The Commission routinely co-operates with member state NCAs and other national competition authorities worldwide.

Within the EU/EEA

The Commission co-operates with member states through the European Competition Network (ECN). It provides the NCAs with copies of notifications, proposed remedies and any other major documents submitted by the parties. The Commission must consult an Advisory Committee made up of NCA representatives before it takes a decision following a Phase II review, or any decision imposing fines, but is not bound by the Committee's opinion. The Commission and NCAs also participate in an EU Merger Working Group with the aim of increasing consistency and co-operation in the merger control process.

The Commission will also consult the EFTA Surveillance Authority where a transaction is likely to have significant effects in the EFTA states.

Other Authorities

The Commission routinely co-operates with other competition authorities. The Commission must obtain a confidentiality waiver from the parties in order to share information with a non-EEA competition authority.

Bilateral co-operation

The Commission has entered into a number of co-operation agreements and memorandums of understanding with various competition authorities including those of the USA, Canada, Japan, China, South Korea and Brazil. The EU and UK were expected to conclude a co-operation agreement following Brexit, but negotiations for this bilateral instrument have only started recently. The degree of co-operation these arrangements envisage varies. The Commission has a very close relationship with the US competition authorities (the Federal Trade Commission and the Department of Justice's Antitrust Division), and in practice the authorities try to align their positions where possible, although divergence does occur.

Multilateral co-operation

The Commission also plays an active role in the International Competition Network's (ICN) Merger Working Group.

- the date of notification of the decision (if filed by an addressee of the decision); or
- the date the party is made aware of the decision (if filed by a third party).

It normally takes two to three years for the General Court to issue a judgment. An expedited procedure is however available, which can shorten the timeline to less than a year. The court has discretion about whether to use the expedited process and will tend to do so where the parties can show urgency and where the case revolves around a small number of clear legal issues.

The General Court is willing to engage in a rigorous review of Commission decisions, although the Commission enjoys a considerable margin of deference, particularly in matters involving complex economic analyses. Ultimately, only a dozen Commission merger decisions have ever been annulled. As the appeals process is lengthy, costly, and rarely successful, few merger decisions are appealed. Nevertheless, the Commission carefully considers the likelihood of an appeal when issuing its decisions.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Commission merger decisions can be appealed to the General Court for annulment on procedural or substantive grounds under Article 263 TFEU. The General Court's rulings may be further appealed to the Court of Justice on points of law.

8.2 Typical Timeline for Appeals

An application for annulment may be lodged by the notifying parties or any other sufficiently interested third party (see 7.1 Third-Party Rights). Such actions must be filed within two months and ten days of:

If a Commission decision is annulled, the case reverts to the Commission, which is obliged to reassess the concentration. An annulment of a prohibition decision does not automatically result in the clearance of the transaction, nor does the Commission have the discretion to avoid undertaking a second review.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Sufficiently interested third parties may appeal a clearance decision (see 7.1 Third-Party Rights and 8.2 Typical Timeline for Appeals).

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements Foreign Subsidies

On 12 January 2023, Regulation 2022/2560 on Foreign Subsidies (“FSR”) came into effect. The FSR includes notification requirements in certain concentrations and public procurement processes and also allows the Commission to investigate ex officio potentially distortive foreign subsidies.

As of 12 October 2023, the FSR requires mandatory, ex ante notification to the Commission of any concentration in which:

- the target, JV or at least one of the merging parties is established in the EU and generates an aggregate turnover in the EU of at least EUR500 million; and
- all undertakings involved (ie, the merging parties, acquirer and target, or the JV and its parents) received from third countries combined aggregate financial contributions of more than EUR50 million in the three financial years prior to notification.

“Financial contributions” is a term that is very broadly defined under the FSR to include a wide range of interactions with state-controlled entities that extend far beyond the traditional notion of subsidies (contributions include, among other things, the transfer of funds or liabilities, the foregoing of revenue that is otherwise due, and even the provision/purchase of goods or services). It is therefore advisable that any party engaging in a transaction that meets the EU turnover threshold above should conduct a thorough assessment to determine whether an FSR filing is required.

As under the EUMR, merging parties are required to wait to receive Commission clearance under the FSR before implementing the concentration. Penalties for failing to observe the FSR notification and standstill obligations are the same as under the EUMR (see 2.2. **Failure to Notify**). The Commission published the Foreign Subsidies Implementing Regulation in July 2023, which provides further detail on the required format and contents of the FSR notification.

As a result of the above thresholds, there may be cases in which a concentration requires an FSR notification and no EUMR notification (or vice versa). The EUMR and FSR notifications are made to the Commission separately. The FSR notification timeline is statutorily similar to the EUMR (involving a first phase review and a second phase in-depth investigation in complex cases). However, as different Commission case teams will review FSR and EUMR notifications under different standards, the two clearance processes can proceed at different speeds and reach different substantive outcomes.

Foreign Direct Investment

Unlike foreign subsidies, foreign direct investment (FDI) is a competence of the individual EU member states. There is no notification or assessment of FDI at EU level. In 2020, the EU established a mechanism to harmonise member state approaches to FDI screening through Regulation 2019/452, which enables the Commission to provide its opinions on particular investments. However, decisions on FDI are ultimately at the discretion of the member states affected.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

The current EUMR has remained in force and unamended since 2004.

The Commission adopted a new Implementing Regulation, Notice on Simplified Procedure, and Communication on the Transmission of Documents, which all became effective as of 1 September 2023. The new Implementing Regulation provides updated versions of the notification forms. The most significant changes have been made to Short Form CO, which places a greater emphasis on market data and eliminates the need to provide as much narrative explanation. This is consistent with the revised Notice on Simplified Procedure, which identifies a few new instances in which the shorter process may be used and gives the Commission greater flexibility to allow parties to use Short Form CO, particularly where their horizontal or vertical market shares are slightly above the prescribed limits.

Referral of Small but Competitively Significant Transactions

In 2021, the Commission announced that it would be encouraging the use of the Article 22 referral process to ensure that transactions that did not meet relevant EU or member state notification thresholds but that presented significant threats to competition could nonetheless be reviewed at EU level (see **2.1 Notification**). While such referrals were technically allowed in the past, it has not been Commission policy to accept referrals from member states where the transaction did not meet the notification thresholds. This change in policy will likely open many smaller transactions to possible review that would have previously escaped scrutiny (notably in the pharmaceutical and digital sec-

tors where targets may lack the turnover needed to meet any jurisdictional thresholds). The Commission's first decision to accept a referral under this new policy, in the Illumina/GRAIL transaction (which the Commission prohibited on 6 September 2022), was upheld on appeal to the General Court on 13 July 2022, although it remains under further appeal to the Court of Justice. On 21 March 2024, Advocate General Nicholas Emiliou proposed to set aside the General Court's judgment, but it remains to be seen whether the Court of Justice will follow the advocate general's opinion.

Assessment of Foreign Funds in EU Transactions

On 12 January 2023, the FSR came into effect (see **9. Foreign Direct Investment/Subsidies Review**). Through the FSR, the Commission aims to address the potentially distortive role of foreign subsidies on EU competition, particularly in the areas of deal-making and public procurement. The FSR requires prior notification and clearance of concentrations that meet certain turnover and foreign contribution thresholds. The FSR does not alter the standard EU merger control process as laid down in the EUMR. However, early experience has shown that it considerably increases the time and effort needed to notify, clear and close a transaction in the EU.

10.2 Recent Enforcement Record

According to the Commission's website, in 2023 and the first four months of 2024, 473 transactions were notified to the Commission. During that period, 443 transactions were cleared unconditionally in Phase I, either through the normal or simplified procedure. Six cases were withdrawn in Phase I (although some of these may have subsequently been re-filed) and seven cases were referred to Phase II. During the period, seven Phase II cases were cleared with rem-

edies, one was prohibited (Booking Holdings/eTraveli Group), two were cleared unconditionally and two were withdrawn. The Commission does not keep separate statistics for, nor does it draw any distinction with regard to, foreign-to-foreign transactions.

10.3 Current Competition Concerns Protectionism and the Creation of European Champions

The Commission has been engaged in a debate – especially since it prohibited the Siemens/Alstom merger in 2019 – over what role merger control should play in allowing the emergence of “European champions” to combat competition from non-EU state-subsidised (notably Chinese) companies. Commissioner Vestager has remained firm that the role of DG Comp should remain solely focused on reviewing potential harm to competition, without regard to European industrial policy concerns. This debate is certain to reignite in future transactions.

Protecting Innovation

The Commission has expressed increased interest in assessing the competitive effects of mergers on innovation (see 4.4 **Competition Concerns**).

Reliance on Internal Documents

The EU process increasingly relies on the production and review of large volumes of internal documents requested from the parties (see 3.5 **Information Included in a Filing**). Notifying parties should take care that information contained in Form CO and other submissions to the Commission is consistent with and supported by any internal records or communications.

Enforcing Procedural Compliance

In recent years, the Commission has increased its enforcement efforts against parties that commit procedural violations under the EUMR, in particular by gun-jumping (see 2.2 **Failure to Notify**) or by supplying incorrect or misleading information (see 3.7 **Penalties/Consequences of Inaccurate or Misleading Information**).

GERMANY

Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.263

- 1.1 Merger Control Legislation p.263
- 1.2 Legislation Relating to Particular Sectors p.263
- 1.3 Enforcement Authorities p.264

2. Jurisdiction p.264

- 2.1 Notification p.264
- 2.2 Failure to Notify p.264
- 2.3 Types of Transactions p.264
- 2.4 Definition of "Control" p.265
- 2.5 Jurisdictional Thresholds p.265
- 2.6 Calculations of Jurisdictional Thresholds p.266
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.267
- 2.8 Foreign-to-Foreign Transactions p.268
- 2.9 Market Share Jurisdictional Threshold p.268
- 2.10 Joint Ventures p.268
- 2.11 Power of Authorities to Investigate a Transaction p.268
- 2.12 Requirement for Clearance Before Implementation p.269
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.269
- 2.14 Exceptions to Suspensive Effect p.270
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.270

3. Procedure: Notification to Clearance p.270

- 3.1 Deadlines for Notification p.270
- 3.2 Type of Agreement Required Prior to Notification p.270
- 3.3 Filing Fees p.270
- 3.4 Parties Responsible for Filing p.271
- 3.5 Information Included in a Filing p.271
- 3.6 Penalties/Consequences of Incomplete Notification p.271
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.272
- 3.8 Review Process p.272
- 3.9 Pre-notification Discussions With Authorities p.272
- 3.10 Requests for Information During the Review Process p.272
- 3.11 Accelerated Procedure p.273

4. Substance of the Review p.273

- 4.1 Substantive Test p.273
- 4.2 Markets Affected by a Transaction p.273
- 4.3 Reliance on Case Law p.274
- 4.4 Competition Concerns p.274
- 4.5 Economic Efficiencies p.275
- 4.6 Non-competition Issues p.275
- 4.7 Special Consideration for Joint Ventures p.275

5. Decision: Prohibitions and Remedies p.276

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.276
- 5.2 Parties' Ability to Negotiate Remedies p.276
- 5.3 Legal Standard p.276
- 5.4 Negotiating Remedies With Authorities p.276
- 5.5 Conditions and Timing for Divestitures p.277
- 5.6 Issuance of Decisions p.277
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.278

6. Ancillary Restraints and Related Transactions p.278

- 6.1 Clearance Decisions and Separate Notifications p.278

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.278

- 7.1 Third-Party Rights p.278
- 7.2 Contacting Third Parties p.279
- 7.3 Confidentiality p.279
- 7.4 Co-operation With Other Jurisdictions p.279

8. Appeals and Judicial Review p.279

- 8.1 Access to Appeal and Judicial Review p.279
- 8.2 Typical Timeline for Appeals p.280
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.280

9. Foreign Direct Investment/Subsidies Review p.280

- 9.1 Legislation and Filing Requirements p.280

10. Recent Developments p.281

- 10.1 Recent Changes or Impending Legislation p.281
- 10.2 Recent Enforcement Record p.282
- 10.3 Current Competition Concerns p.282

Linklaters has a team of over 150 dedicated competition lawyers led by 27 partners who work in key antitrust centres across Europe, the USA and Asia, including China and Hong Kong. The team works seamlessly across all the firm's offices to deliver the highest-quality advice to clients and has excellent access to decision-makers where it matters. The global team is further strengthened by strategic alliances with top firms in India, Africa, South-East Asia and

Australia. Clients go to the firm for expert, commercial advice on their most complex and strategic national, EU and global antitrust matters, where a deep understanding of their businesses and strategies is essential. The German competition team is based in Düsseldorf and consists of four partners, four (of) counsels and more than 20 associates. The team has a strong record in all types of German and European competition matters.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

German merger control rules are contained in Section 35 et seq of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* (GWB) or ARC). Furthermore, the German Federal Cartel Office (*Bundeskartellamt* or FCO) has issued several guidance papers on its website – eg, in relation to domestic effects, market dominance and the size-of-transaction threshold.

1.2 Legislation Relating to Particular Sectors

Germany has one of the most established and active foreign investment control regimes in Europe. If a transaction raises concerns, the transaction may be subject to remedies or, in severe cases, even prohibited.

The regime essentially has two prongs:

- a screening process for non-EU/EFTA investors, which applies a 25% filing threshold for all sectors and a reduced 10% filing threshold for transactions in sensitive industries (such as critical infrastructures, cloud computing services or media companies), and a reduced 20% filing threshold for specific high-tech and future technologies as well as certain healthcare target companies; and
- a screening process for non-German investors, which applies a 10% filing threshold for transactions in the wider military sector.

In addition, asset deals are also in scope of the foreign investment regime.

Transactions triggering a mandatory filing requirement are subject to a comprehensive pro-

hibition on gun jumping, which carries severe criminal penalties for non-compliance. Since the regime has generally become significantly stricter in recent years and the co-ordination of regulators on an EU level has increased, companies engaged in M&A activities should consider the potential applicability of any foreign regime early on and allow for a lengthier approval process.

The foreign investment regime has been subject to numerous changes in the past years. The 20th and most recent amendment to the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*) entered into force on 27 September 2023. Previous changes related to the implementation of the sanctions package adopted by the EU in response to Russia's invasion of Ukraine, which led to a further change in fine provisions for the financial sector. While this amendment continues these developments, it mainly seeks to digitise and simplify the administrative procedure by introducing a portal which allows submission of all relevant documents online. It is important to note that the commencement of Phase 1 proceedings under Section 14a of the Foreign Trade Act (*Außenwirtschaftsgesetz*) is no longer marked by uploading a filing to the portal, but its successful import to the IT system of the Federal Ministry for Economic Affairs and Climate Action (*Bundesministerium für Wirtschaft und Klimaschutz*).

Furthermore, key points for a potentially major legislative project, a new "Investment Screening Act" (*Investitionsprüfungsgesetz*), are currently being discussed within the federal government. It will extract the regulations applicable to investment screening from the Foreign Trade and Payments Act and the Foreign Trade and Payments Ordinance, restructuring them into a separate law. The legislative process is scheduled to be underway from the second half of 2024 onwards.

While the bill will likely cut some red tape and hopefully do away with filing requirements for some cases and specify sectoral definitions, conversely, it is predicted to add new filing requirements for certain types of transactions, such as licence agreements, greenfield joint ventures, R&D co-operations along with applying a mandatory filing requirement in certain sensitive sectors even for acquisition of atypical control. All in all, the number of reviews is predicted to further increase.

1.3 Enforcement Authorities

The German merger control regime is enforced by the FCO, which has its seat in Bonn. The FCO is headed by a president, currently Andreas Mundt.

If a merger has been prohibited by the FCO, the parties may apply to the Federal Ministry for Economic Affairs and Climate Action under Section 42 of the ARC and ask for a ministerial authorisation of the transaction.

2. Jurisdiction

2.1 Notification

Notification is mandatory.

2.2 Failure to Notify

The ARC does not sanction a failure to notify but does impose sanctions for the implementation of a notifiable transaction prior to clearance (see 2.13 Penalties for the Implementation of a Transaction Before Clearance).

2.3 Types of Transactions

For merger control purposes, the ARC exhaustively defines concentrations as any of the following transactions:

- an acquisition of assets constituting the whole or a substantial part of an undertaking;
- a transaction conferring direct or indirect control of the whole or parts of an undertaking;
- the acquisition of shares in another undertaking if such shares alone, or together with shares already held, amount to or exceed 25% or 50% of the undertaking's share capital or voting rights; or
- any other combination of undertakings where one or several undertakings can exercise, directly or indirectly, competitively significant influence over another undertaking.

The latter covers acquisitions of minority stakes of less than 25% in another company. Such transactions have to be notified if they confer upon the acquirer the ability to exercise influence on commercial policy and, thus, affect the competitive behaviour of the target company.

As in the EU merger control regime, the acquisition of shares for resale by credit institutions, financial institutions or insurance undertakings is not considered a concentration as long as the acquirer does not exercise the voting rights attached to the shares and resells the shares within one year.

Exemptions

Internal restructurings or reorganisations within the same economic entity are not subject to merger control.

Further, concentrations of public institutions in the framework of municipal reforms (situations where municipalities decide to merge their institutions or where municipalities merge themselves) are explicitly not subject to merger control review. In practice, this rule particularly affects hospitals and savings banks.

Also, concentrations between hospitals are exempted from merger control, provided that such hospitals qualify for government subsidies from the hospital structure fund (*Krankenhausstrukturfonds*) and that the Federal State responsible for handling the application for such subsidy confirms that the merger otherwise complies with competition law. Such transactions will need to be closed by 31 December 2027 in order to benefit from the exemption. However, parties will have to file a short post-completion notice to the FCO.

In contrast, the merger control provisions are applicable (analogously) to voluntary mergers of statutory health insurers. Prior to a prohibition in this sector, the FCO has to consult with the relevant supervisory authorities and, partly, different time limits and further specific rules apply.

2.4 Definition of “Control”

The concept of control follows the EU merger control system and is regularly interpreted within this framework by the FCO. Control means the effective possibility of exercising decisive influence on an undertaking on a lasting basis. The actual exercise of control is not required. Control may be conferred through rights, agreements or other means (legal or factual) that individually or jointly enable the acquirer(s) to determine the target company’s strategic business decisions.

In terms of acquisition of minority interests, or other interests less than control, a transaction must be notified if the acquirer, following the transaction, holds 25% (or more) of the capital or the voting rights in another undertaking, or gains a competitively significant influence on another undertaking.

The latter scenario covers acquisitions of minority stakes of less than 25% in another company.

Competitively significant influence arises where the acquired interest confers upon the acquirer the ability to influence the commercial policy and, thus, to affect the competitive behaviour of the target company. The FCO determines on a case-by-case basis whether this has occurred. In doing so, it considers the rights resulting from the amount of acquired shares as well as so-called plus factors as identified in FCO case law. These plus factors are, for example, voting and veto rights, and board representation rights of the acquirer; other personal links between the parties; options and pre-emptive rights, and information rights of the acquirer; and separate agreements with the target company.

Plus factors do not necessarily have to be ensured by binding agreements; it is sufficient if they provide the acquirer with a factual and lasting influence.

2.5 Jurisdictional Thresholds

German merger control law provides for a turnover thresholds test and, since 2017, for a subsidiary transaction value test. In the course of the passage of the Competition Enforcement Act, which constitutes the 11th amendment of the ARC, a new filing obligation following sector inquiry was introduced in November 2023.

Turnover Thresholds Test

Pursuant to Section 35(1) of the ARC, a transaction falls within the scope of German merger control law if in the last financial business year:

- the combined worldwide turnover of all participating undertakings exceeded EUR500 million;
- one participating undertaking achieved a German turnover of more than EUR50 million;

- another participating undertaking achieved a German turnover of more than EUR17.5 million; and
- the merger has an effect on the German market.

Size-of-Transaction Test

There is a size-of-transaction test that alternatively applies if the second domestic turnover threshold of EUR17.5 million is not met. A concentration has to be notified if in the last financial business year:

- the combined worldwide turnover of all participating undertakings exceeded EUR500 million;
- one participating undertaking achieved a German turnover of more than EUR50 million;
- neither the target nor another participating undertaking achieved a German turnover of more than EUR17.5 million;
- the value of the transaction (the financial compensation) exceeds EUR400 million; and
- the target has significant activities in Germany.

An exemption to both threshold tests can apply to the credit and banking sector if companies do not provide end consumer services.

The FCO Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (published together with the Austrian Competition Authority in July 2018 and updated in January 2022) contains additional information on the interpretation of the new Section 35(1a) of the ARC.

Filing Obligation Following Sector Inquiry

The FCO is entitled to impose a filing obligation by decision on a company to notify all transactions in designated sectors pursuant to Sec-

tion 32f (2) ARC. The decision will be valid for three years but can be extended repeatedly up to three times for further periods of three years.

Requirements are:

- the acquirer's domestic turnover exceeds EUR50 million;
- the target has achieved a domestic turnover of more than EUR1 million; and
- there are indications that future concentrations may restrict competition in the inquired sector.

However, the FCO must have conducted a sector inquiry examining and analysing the structures and competitive conditions and determined that one or more economic sectors exhibit deficiencies before imposing a filing obligation. The FCO shall only be able to impose this obligation within 18 months following sector inquiry.

2.6 Calculations of Jurisdictional Thresholds

Calculations of Jurisdictional Thresholds – General Rules

For the assessment of the turnover thresholds, the group turnover of the participating undertakings in the last financial business year has to be considered. This includes the consolidated revenues of all companies belonging to the same group, controlled by the same ultimate parent company, to which the respective participating undertaking belongs. If a participating undertaking is jointly controlled by several undertakings, the full group turnover of all parent companies has to be taken into account.

If parts of one or more undertakings are acquired, only the turnover relating to those parts is considered when calculating the turnover on the seller's side. This does not, however, apply if

the seller keeps control of 25% or more of the shares.

The internal turnover generated within a group of undertakings as well as sales or turnover taxes are excluded from turnover calculations.

As in the European Merger Control Law, several acts of acquisition between the same undertakings (and with the same acquirer) conducted within a period of two years are calculated together for the purpose of the turnover thresholds, provided that they are subject to separate agreement acts and completion, and they meet the turnover thresholds. The entire transaction history within that period is then relevant for the turnover calculation, from the time of the last transaction.

Turnover can be calculated in accordance with Section 270(1) of the German Commercial Code (*Handelsgesetzbuch*) or based on internationally recognised accounting standards such as IFRS. Thresholds are related to turnovers and thus are not asset-based.

Special Turnover Calculation Rules

Special turnover calculation rules apply to:

- banks, credit institutions, building societies and insurance companies (premium income – the same rules as in the European Merger Control Law);
- undertakings wholly or partly engaged in the distribution of goods (only three-quarters of the turnover resulting from distribution is taken into consideration); and
- undertakings wholly or partly engaged in the publication, production or distribution of newspapers or periodicals and broadcasting companies (the turnover must be multiplied by four).

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

For the assessment of turnover thresholds, the group turnover of the participating undertakings in the last financial business year must be considered.

Acquirer and Target

Participating undertakings are usually the acquirer (including its parent companies and its subsidiaries) and the target (either the legal entity and its subsidiaries or the business/assets to be acquired). Thus, on the acquirer's side, all undertakings controlling the acquirer and all undertakings controlled by the acquirer form a group and have to be considered for the calculation of turnover.

On the target's side, only turnover achieved by the entities controlled by the target and the target's turnover are taken into account.

If parts of one or more undertakings are acquired, only the turnover relating to those parts is considered when calculating the turnover on the seller's side. This does not, however, apply if the seller keeps control of 25% or more of the shares.

Joint Venture Company

In the case of a joint venture company, the turnover of all parent companies that, following the concentration, will either jointly control the joint venture or have a shareholding of at least 25% is relevant with a view to the turnover thresholds.

Seller

The turnover of the seller is generally not taken into account. However, this does not apply if the seller keeps control of 25% or more of the shares in the target. In these cases, the seller is

a participating undertaking within the meaning of German merger control. This is, in particular, relevant for the setting up of a joint venture with no previous business activities.

Scope of Turnover Information

Turnover information has to be provided for the last business year. However, with respect to subsequent acquisitions and divestments, the date of the notification is relevant for the basis of consolidation. All acquisitions, divestments or business closures that were implemented up until the date of notification of the intended transaction have to be considered. When calculating the relevant turnover, it has to be determined what the turnover of the group (as it stands at the notification date) would have been in the last completed business year.

2.8 Foreign-to-Foreign Transactions

Generally, German merger control rules also apply to mergers taking place outside Germany, as long as the relevant turnover thresholds are met and the proposed merger has a domestic effect.

The FCO's Guidance on domestic effects in merger control (2014) deals with domestic effects of foreign-to-foreign mergers and joint ventures. According to these guidelines, a transaction has domestic effects if it is likely to influence competition on the German market directly (appreciable effect). Different factors are taken into account – eg, the involved parties' business activities in Germany or parties' domestic subsidiaries/branches.

However, it is not explicitly required that the target company has a presence or assets in Germany for establishing these effects.

2.9 Market Share Jurisdictional Threshold

There are no market share thresholds under German merger control law.

2.10 Joint Ventures

The following joint ventures are subject to merger control legislation:

- the acquisition of joint control of another undertaking;
- the acquisition of shares reaching 25% or 50% of the capital or the voting rights in a situation in which at least one other undertaking holds 25% or more of the shares; and
- the acquisition of a competitively significant influence in an undertaking controlled by a third party.

In Germany, joint ventures generally have to be notified if two or more acquirers gain joint control, or if each of them acquires at least 25% of the shares, or if they acquire a competitively significant influence on the target. Contrary to the EU merger control regime, this also includes non-full-function joint ventures.

If a participating undertaking is jointly controlled by several undertakings, the full turnover of all parent companies is considered when the turnover thresholds are calculated. Likewise, in cases where a parent company is a participating undertaking in a transaction, the full turnover of the joint venture has to be considered for the turnover calculation, not only in the amount of the interest held.

2.11 Power of Authorities to Investigate a Transaction

If a transaction does not meet the jurisdictional thresholds, the FCO does not have any competence to make further investigations under the

merger control rules. However, in view of the ECJ's Towercast judgment, it cannot be ruled out that certain transactions, albeit falling below the merger control thresholds, could be scrutinised under the rules regarding the abuse of a dominant position.

2.12 Requirement for Clearance Before Implementation

The participating undertakings are prohibited from implementing the transaction prior to clearance.

2.13 Penalties for the Implementation of a Transaction Before Clearance

If the participating undertakings infringe this suspension obligation, they are subject to fines of up to 10% of the undertaking's total group turnover in the preceding business year. Individuals (eg, board members) who violate the suspension obligation are subject to fines of up to EUR1 million.

Fines

In the past, the FCO has issued fines in several cases where a concentration has been implemented prior to clearance and is certainly willing to continue this practice. The highest fines imposed on an undertaking at the time of writing amounted to EUR4.5 million in 2008 and EUR4.1 million in 2009 (which in the latter case, however, was revoked). Fines for undertakings usually range between EUR200,000 and EUR400,000. In most cases, the FCO issues a press release indicating the penalty for gun jumping and the undertakings concerned.

Based on publicly available information, the FCO has already imposed a fine of EUR40,000 on a board member for breaching the suspension obligation (however, this was later revoked by

the courts). In practice, individual fines for gun jumping seem to be rare.

Demerger Proceedings

Legal acts (eg, the transfer of shares) that infringe the suspension obligation are void. However, legal invalidity resulting from gun jumping may be remedied. Remedying such actions requires notification of the implementation of the transaction to the FCO. The FCO then opens demerger proceedings, in the course of which it applies the same substantive test as in a standard merger control review. Demerger proceedings are not subject to any deadlines.

Should the FCO be satisfied that the transaction does not meet the requirements for a prohibition (as it is or after removal of the relevant competition concerns through obligations and conditions) or if the Federal Minister of Economic Affairs and Climate Action grants permission to implement the transaction (as discussed below), the FCO will close the demerger proceedings. This has an effect tantamount to a clearance decision, so the legal acts carried out in relation to the transaction will retroactively become valid. Otherwise, if the FCO does not approve the transaction, it may dissolve it.

Furthermore, under the ARC, the invalidity of specific transactions caused by gun jumping may be cured by way of registration. This applies to real estate agreements once they have become legally valid by entry into the land register; to certain agreements on the conversion, integration or formation of an undertaking; and to enterprise agreements once they have become legally valid by entry into the appropriate register.

2.14 Exceptions to Suspensive Effect

The suspension obligation does not apply to public takeover bids or to the acquisition of shares in a series of transactions via stock exchanges as long as those concentrations have been notified to the FCO and the acquirer does not exercise the voting rights related to the shares, or exercises them only to maintain the full value of its investment on the basis of an exemption granted by the FCO.

The FCO may, upon application, grant derogations from the suspension obligation if the parties can justify such exemptions; however, in practice, derogations are rarely granted. In clear-cut Phase I cases, it is normally faster to obtain a clearance decision than derogation from the suspension obligation.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Apart from exceptions in relation to public takeovers or a specific authorisation by the FCO, parties are prohibited from closing the transaction before clearance, which usually includes carve-out solutions. Only in very exceptional circumstances may such scenarios be conceivable, and only then if separation and completion will, beyond any doubt, have no impact on the German market.

In any case, all carve-out solutions should be carefully prepared, analysed and discussed, together with the FCO, prior to implementation.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is no formal deadline for filing a notification.

3.2 Type of Agreement Required Prior to Notification

A binding agreement is not a prerequisite for filing. Parties only have to demonstrate a good faith intention to implement the transaction.

3.3 Filing Fees

The FCO charges an administrative fee on the basis of a general fee regulation act. The FCO has discretion in determining the amount, and various criteria are considered in this regard.

The main factors that are considered are:

- the parties' German turnover;
- the FCO's (personnel) expenses (if the transaction required a detailed or simple investigation); and
- the economic relevance of the case, including the parties' shares in the relevant markets.

The maximum statutory amount is EUR50,000 or, in exceptionally complex cases, EUR100,000. In practice, fees usually vary between EUR5,000 and EUR15,000 (simple Phase I clearances), or between EUR10,000 and EUR25,000 (complex Phase I cases), or exceed EUR20,000 (Phase II investigations).

Usually, the administrative fee is payable within one month following clearance of the transaction.

3.4 Parties Responsible for Filing

In theory, the acquirer and the target are obliged to notify in the event of an acquisition. If shares or assets are being acquired, the seller is also subject to a notification obligation.

In practice, however, the FCO is usually satisfied if one of the parties (normally the acquirer) submits a notification (ideally but not necessarily in co-ordination with the other parties that are obliged to notify). The other parties may also “join” the acquirer’s notification by submitting a one-line letter.

It is also possible (but not common) to notify jointly.

3.5 Information Included in a Filing

The FCO publishes as guidance a filing form on its website; however, this form is not mandatory and is rarely used in practice. Notifications are usually filed in the form of a letter to the FCO. The following information is mandatory for a complete filing, which triggers the deadlines.

- A description of the transaction, including, in the case of an acquisition of shares, the size of the interest acquired and of the total interest held.
- Information on the participating undertakings – ie, worldwide, European and German group turnover information, and a list of subsidiaries, including, for both the participating undertakings and the subsidiaries, information on registered seat and business activities; if the size-of-transaction test applies (Section 35(1)(a) ARC), parties have to submit information on the transaction value and the relevant calculation methods.
- Information on market shares reaching at least 20% within Germany (national or regional markets) and underlying sources; although

not explicitly required, it is best practice to submit general market share information for the relevant market affected by the transaction (which can be defined wider than Germany) and to provide names of the parties’ main competitors and their market share estimates.

- Indication of a person authorised to accept services in Germany if the registered seat of a participating undertaking is not located in Germany.

Submitting a Filing

The filing has to be submitted in German. Parties are not obliged to submit further documents – eg, sale and purchase agreements. However, the FCO may ask for underlying agreements; in particular, in joint venture transactions.

It may also ask for other documents, such as market reports or case studies. Any accompanying documents, such as annual reports (which are usually enclosed), may be submitted in English.

3.6 Penalties/Consequences of Incomplete Notification

If the notification is deemed incomplete, the FCO’s review period to clear or prohibit the transaction does not start to run. The FCO can also issue a fine of up to 1% of the undertaking’s total turnover for incomplete filings. In January 2013, the FCO imposed a personal fine of EUR90,000 on the principal shareholder of a German meat manufacturer for submitting incomplete information in the merger control proceedings regarding a planned acquisition of an abattoir.

The review process may take longer than one month if the FCO declares the filing incomplete (in which case the one-month period only starts from the submission of the missing information).

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The FCO can impose fines for (negligently or deliberately) providing incorrect information in merger control filings. Fines can reach up to 1% of the undertaking's total turnover.

In October 2015, the FCO initiated divestiture proceedings against Andechser and Söbbeke, which had submitted incorrect information in merger control proceedings, and finally also imposed a fine of EUR90,000 on the parent company Bongrain Europe SAS (now Savencia SA) in 2016.

3.8 Review Process

The German merger control regime provides for a two-stage review process, with an annual average of more than 95% of cases receiving clearance after the first stage (Phase I). Very few cases are analysed in in-depth proceedings during the second stage (*Hauptprüfverfahren* – Phase II), discussed further below.

Phase I

A Phase I review formally takes one calendar month following the filing of a complete notification. In practice, clearance may be granted earlier (eg, two/three weeks following submission of the notification), but this essentially depends on the case handler (workload, availability, etc).

In Phase I, the FCO will focus particularly on testing the market definition and market share information submitted by the parties using existing information on the relevant industry sector or by contacting market players and other stakeholders, such as trade associations.

Should the FCO not be satisfied, during the Phase I period, that the proposed transaction does not significantly impede effective compe-

tition, it may enter into in-depth investigations. The parties are informed accordingly, usually by a formal letter.

Phase II

A review resulting in a Phase II investigation may take up to five months following the filing of a complete notification (up to six months if the parties submit a first proposal for conditions and obligations). The review process may also be extended subject to the parties' consent and it is not uncommon for the FCO to express that it would strongly prefer an extension.

3.9 Pre-notification Discussions With Authorities

There is no formal pre-notification process and informal pre-filing contact with the FCO is still not that typical. They are, however, commonly seen in very complex cases or cases where confidentiality is a crucial issue.

For informal pre-filing contact, the FCO usually wants to receive at least the minimum information concerning the parties, the transaction and the market before entering into pre-notification discussions.

3.10 Requests for Information During the Review Process

It is not uncommon that the FCO asks for additional information after receiving the filing documents. Detailed questionnaires can be burdensome, and providing answers may be subject to tight deadlines.

The timetable would only “(re)start” if the parties had filed an incomplete notification and subsequently submit the additional information. Further, the five-month examination period is put on hold if the undertakings concerned do not

provide the information requested by the FCO completely or in due time.

3.11 Accelerated Procedure

There is no formal fast-track review process.

4. Substance of the Review

4.1 Substantive Test

The FCO prohibits concentrations that would lead to a significant impediment to effective competition (the “SIEC test”). As with European merger control law, the main example of the SIEC test is the creation or strengthening of a dominant position. The test allows, among others, the prohibition of anti-competitive concentrations in oligopolistic markets, even if undertakings are not or will not become dominant.

4.2 Markets Affected by a Transaction FCO Analysis

The FCO determines post-merger effects on the basis of a forecast detailing how the relevant market will develop within an average period of three to five years. This period may be shorter or, in exceptional cases, longer, depending on the specific characteristic of the market structure. Such post-merger effects have to be likely to occur.

In cases where the post-merger effects result in a significant impediment to effective competition, the FCO has to demonstrate that they are caused by the transaction. By contrast, the parties have to show that the transaction has pro-competitive effects that outweigh the relevant anti-competitive effects.

Market Dominance

Market dominance continues to play an important part in the analysis of a transaction. The

ARC provides for presumptions of market dominance. A company is presumed to be dominant if it has a market share of at least 40%.

A group of undertakings is presumed to be dominant if it consists of three undertakings or fewer that account for a combined market share of 50%, or if it consists of five undertakings or fewer that account for a combined market share of 66%.

Presumptions can also be rebutted. To do so, the parties have to show either that competition conditions allow for the assumption of continuous substantial competition between the respective undertakings or that the (group of) undertaking(s) has no paramount market position over the remaining competitors.

Presumptions do not keep the FCO from assuming a dominant market position in cases where market shares are lower than those discussed. In March 2012, the FCO published on its website extensive guidance on substantive merger control and the test of market dominance that details its approach and shows a sharper focus on economic findings and concepts in the decision-making process in line with the criteria of the SIEC test.

Special Rules

Special rules apply to concentrations in so-called de minimis markets. These are markets where goods or commercial services have been offered for at least five years and where sales of less than EUR20 million were generated in Germany in the last calendar year, unless the market is characterised by the offer of products or services free of charge. This assessment is carried out on a combined-market basis. While these concentrations have to be notified, the FCO cannot prohibit the transaction on the basis

of a significant impediment to effective competition in such markets. The de minimis rule does not apply to notifications filed on the basis of the size-of-transaction threshold.

4.3 Reliance on Case Law

The FCO is an independent body performing its own assessment of the case. However, in practice, it also includes the decisional practice of the Commission and courts in its assessment.

4.4 Competition Concerns

The FCO broadly distinguishes between horizontal mergers, vertical mergers and conglomerate mergers. Generally, it will investigate in each case the creation or strengthening of single or collective dominance (or, on the demand side, of buyer power in cases of horizontal mergers) and consider both co-ordinated and non-coordinated effects.

Horizontal Mergers

In the case of horizontal mergers, in order to establish single dominance, the FCO investigates which factors determine the parties' market positions in the relevant market and whether, and if so how, these positions change as a result of the transaction. In addition to market share and concentration levels in the relevant market, various market and company-related factors may be relevant for the assessment: capacities and capacity constraints, customer preferences and switching costs, IP rights and know-how, market phase, access to suppliers and customers, corporate and personal links with other companies, financial resources, barriers to entry and countervailing buyer power.

In cases of collective dominance, the FCO analyses whether the transaction enables the parties to co-ordinate their behaviour in the market or if

the transaction facilitates existing co-ordination or makes it more stable.

Vertical Mergers

In the opinion of the FCO, vertical mergers are considered to have more indirect competitive effects. Still, the FCO is also increasingly assessing these mergers in detail.

The FCO assesses in detail any foreclosure effects (input and customer foreclosure) on upstream and/or downstream markets taking into account pre-existing links between the merging companies, alternative supply sources for competitors and the degree of vertical integration of other market players, etc. However, such effects may create competition concerns only if the parties additionally have the ability and the incentive to foreclose.

A further concern may be that the vertically integrated company might gain access to the competitively sensitive information of its competitors.

In the case of collective dominance, the FCO assesses whether the vertical merger enhances co-ordination between the dominant companies.

Conglomerate Mergers

Conglomerate mergers are generally less likely to raise competition concerns than horizontal mergers because they do not entail the loss of direct competition between the merging firms. However, competition concerns may arise if the parties are active in economically related markets; ie, their products are complementary or close to substitution. Typically, this requires that at least one of the parties already has a sufficiently strong market position in one of the relevant markets.

As with vertical mergers, in the case of collective dominance, the FCO will assess whether the conglomerate merger facilitates co-ordination between the dominant companies.

4.5 Economic Efficiencies

The FCO will consider the countervailing benefits of a transaction. A concentration that would significantly impede effective competition may not be prohibited if the parties prove that the concentration will also have pro-competitive effects that outweigh the significant impediment to effective competition.

4.6 Non-competition Issues

The FCO does not consider factors other than competition issues in its decisions.

The situation is different with regard to the procedure for obtaining a ministerial authorisation (*Ministererlaubnis*) from the Federal Minister of Economic Affairs and Climate Action. The Minister can overrule the FCO on the basis of social or political considerations (if the concentration's benefits for the economy as a whole outweigh the disadvantages for competition); however, this is rare in practice. Public interest factors that have been accepted in the past are – eg, safeguarding the technical know-how of companies that are in financial or industrial difficulties, the potential for reductions of subsidies, the long-term security of energy supply, research in the health sector, the protection of employees through collective agreements and operational co-determination and, most recently, know-how and potential for innovation for energy turnaround and sustainability.

4.7 Special Consideration for Joint Ventures

In principle, joint ventures may be subject to a twofold assessment, under both the merger con-

trol provisions and the antitrust rules. Under the merger control regime, the SIEC test also applies to joint ventures.

The antitrust rules will additionally come into play in the case of co-operative effects, which particularly applies if the parent companies remain active in the joint venture's fields of activity, or if they are competing in upstream or downstream markets. Only the extent to which the concentration, as such, creates anti-competitive concerns has to be assessed exclusively within the merger control process, which takes priority over the antitrust rules.

Contrary to the EU merger control regime, merger clearance does not automatically entail an exemption for ancillary restraints. Moreover, the deadlines that are applicable with regard to the merger control procedure do not apply to proceedings relating to Section 1 of the ARC/ Article 101 of the Treaty on the Functioning of the European Union (TFEU). Therefore, the FCO usually gives priority to the merger control review of the joint venture. In addition, it aims to analyse the joint venture under the antitrust rules and to form at least an opinion on potential infringements and possible exemptions in the course of the merger control proceedings. However, it is also not unusual for the FCO to postpone this assessment until a later stage, usually after the merger control process.

Should the FCO conclude that co-operation in the joint venture violates Section 1 or the ARC/ Article 101 of the TFEU and that the conditions for an exemption are not fulfilled, the FCO may issue a prohibition decision, pursuant to Section 32 of the ARC. This is possible even after merger control clearance. Divergent decisions with regard to merger control and antitrust proceedings have, in fact, already occurred in practice.

Following the introduction of the SIEC test, there have been discussions about whether such a twofold assessment is still possible. Clearance of a joint venture would imply that it does not significantly impede effective competition. Accordingly, it would be difficult to argue later, under Section 1 of the ARC/Article 101 TFEU, that the joint venture impedes competition and therefore should be dissolved.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The FCO does have the power to prohibit or interfere with a transaction. It may do so in the course of the regular merger control process or in the course of demerger proceedings after the completion of the transaction.

5.2 Parties' Ability to Negotiate Remedies

The FCO is legally obliged to consider whether an authorisation with remedies would alleviate the competition concerns. However, this does not create an obligation to accept any offer of remedies. The FCO only has to accept remedies that will remove the significant impediment to effective competition.

In turn, the FCO must not impose remedies that the parties have not offered. It may propose remedies that it considers suitable, but it is not obliged to do so – it is ultimately up to the parties to develop and offer remedies.

Typical Remedies

Standard remedies are the divestiture of part(s) of the undertakings' business or the granting of licences to third parties. However, the removal of

structural or contractual links with competitors may be appropriate in certain situations – eg, in oligopolistic markets. In the past, the FCO has, among others, allowed the decommissioning of production plants as a suitable (behavioural) remedy, but has not accepted remedy proposals aiming at organisational obligations or investment controls.

Further, it has already imposed a prohibition to co-operate in the area of purchasing on parents that were parties to a joint venture transaction as part of a remedy package. Behavioural remedies, such as granting licences for important technologies or granting customers special termination rights for long-term contracts of the parties, may also be appropriate. The mere closure of capacities or the use of “Chinese walls” within merged entities, however, is not generally considered an effective behavioural remedy.

5.3 Legal Standard

There is no binding legal standard for remedies. However, the FCO published a Guidance on Remedies in Merger Control in May 2017 that describes the most important types of remedies and explains the requirements that they must fulfil.

5.4 Negotiating Remedies With Authorities

Commitments in general can be submitted at any stage of the procedure, during or even before the first phase of merger control. In order to achieve a successful solution, it is highly recommended to co-operate with the FCO fully and at an early stage.

Remedy negotiations usually start as a result of competition concerns that are expressed by the FCO, informally or formally. Procedurally, before prohibiting a transaction, the FCO informs the

notifying parties of its competitive concerns and related objections to the transaction. It does this by sending a so-called statement of objections, usually in the form of a draft prohibition decision. The statement of objections may be issued at any time during Phase II.

If remedy discussions start early and are successful, the statement of objections may never be formally issued. However, typically the FCO will send it out towards the end of Phase II. The parties can respond to the statement of objections. In order to prepare this response, they can have access to the FCO file.

Since the FCO is under a legal obligation to consider whether an authorisation with remedies (conditions and obligations) would alleviate the competition concerns, the statement of objections will also deal with possible remedies – even if the parties have not submitted a related proposal. However, as discussed above, the FCO cannot impose specific remedies on its own. It can only issue a clearance decision subject to conditions and obligations that have been offered by the parties.

If the parties agree with the FCO on suitable remedies, the FCO will lay down the conditions and obligations in its final clearance decision, which will also be published in a non-confidential version.

5.5 Conditions and Timing for Divestitures

In the case of a divestiture remedy, the parties must generally provide evidence that the divestiture has been completed. It can, however, be sufficient for companies to take all necessary steps to initiate the transfer of ownership at a time when only the entry into the commercial register remains to be submitted, provided that

an application for the entry has been lodged with the register.

In appropriate cases, it may be sufficient for the fulfilment of the remedy to provide evidence that all contracts necessary for the divestment have been concluded in a legally binding way. In cases where this appears to be a suitable approach, this will normally be explicitly mentioned in the text of the remedy decision. Any merger control proceedings that may be required with regard to the acquisition of the divestment business by the buyer have to be concluded within the time limit for the implementation of the divestment.

In so far as the remedies include other commitments in the form of a condition precedent, the parties have to prove that they have been implemented as well before they are allowed to complete the transaction.

If the divestiture commitment is a condition precedent (which is the common form) for the clearance decision, a period of six months should be sufficient to meet the requirements. The divestiture period should be as short as possible. However, this will vary from case to case and will usually be set in the text of the remedy decision. An extension of the time limits provided by the remedies is only possible in exceptional cases.

5.6 Issuance of Decisions

Phase I

In Phase I cases, the FCO informs the parties by informal letter that the transaction does not fulfil the criteria for prohibition and therefore can be implemented. It does not issue a formal decision.

If the FCO does not inform the parties, within the one-month period of Phase I, that it has authorised the transaction or entered into Phase II

proceedings, the transaction is deemed to have been cleared.

Phase II

In Phase II proceedings, the FCO issues a formal decision prohibiting or authorising the transaction (unconditional or subject to conditions and obligations). If the FCO does not issue a decision within the relevant deadline, the transaction is deemed to have been cleared.

The FCO publishes on its website that a concentration has been cleared or prohibited. Clearance/prohibition decisions may only be published in Phase II proceedings. The parties will be asked to review the decision and to mark any business secrets. The FCO usually accepts that turnover and market information is confidential. Market share information, however, may be replaced by ranges.

Since 2009, the FCO has also published short summaries (*Fallberichte*) of important Phase I and Phase II cases on its website.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

There is no recent case law on the imposition of remedies or prohibitions of concentrations in foreign-to-foreign transactions.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

A clearance decision does not automatically entail an exemption for ancillary restraints. There is also no separate notification procedure for ancillary restraints. The parties themselves have

to assess any competition concerns in horizontal or vertical agreements.

As is the case with joint ventures, the FCO may analyse ancillary restraints at a later stage, independent of the merger control process. In practice, separate assessments during the merger control process appear to be more common.

Generally, the FCO applies more or less the same principles that apply under EU competition law, namely that ancillary restraints should be permitted if they are necessary and indispensable to the successful implementation of the transaction.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third parties may apply to be admitted as interveners in the merger control proceedings at any stage of the process. They have to demonstrate that their economic interests will be substantially affected (directly or indirectly) by the decision. However, an application does not automatically result in an admission. The FCO has considerable discretion in this regard.

Although there are no legal provisions related to this issue, competitors, suppliers and customers will usually be deemed to have an economic interest. Associations and trade unions will have to prove that their own interests, or at least the interests of their members, will be affected by the decision.

Third parties that have been admitted as interveners have the right to be heard and to access the file. In practice, this applies mainly to Phase II

investigations. However, prior to granting access to the file, any business secrets will be removed.

7.2 Contacting Third Parties

The FCO usually contacts third parties and competitors during its review process to “market test” the transaction as well as the remedies. In most of the cases the FCO sends out questionnaires.

7.3 Confidentiality

The fact that a notification has been submitted is published on the FCO’s website. In general, this happens a few days after the filing. Only in very rare cases has the FCO been willing to postpone the publication and only then under very special circumstances.

Besides file number and responsible decision division, the FCO publishes the names of the parties, the date of the filing and the relevant industry sector. The fact of an initiation of Phase II proceedings is published as well. At the end of the proceedings, the FCO will also publish the result of its analysis – ie, clearance (unconditional or subject to conditions and obligations) or prohibition.

Generally, the FCO is obliged to ensure that confidential commercial information, including business secrets, that is obtained during the merger control process remains so. Interveners may have limited access to the file, but not to the business secrets of the parties. Phase II decisions are published in a non-confidential version that has been agreed with the parties.

7.4 Co-operation With Other Jurisdictions

The FCO is, among others, part of the International Competition Network (currently chaired by FCO president Andreas Mundt), the European

Competition Network (ECN) and the network of the European Competition Authorities (ECA). The ECA is a forum for discussion of all competition law-related matters between the NCAs within the EEA as well as the Commission and the European Free Trade Association (EFTA) supervisory authority. This discussion includes the exchange of information on all merger cases that are notifiable in more than one ECA country (multiple filings).

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Phase II Appeals

The parties may file an appeal against Phase II decisions of the FCO to the Higher Regional Court of Düsseldorf within one month following the service of the decision. The appeal can be made on both legal and factual grounds, including new facts and evidence. The period of the appeal proceedings may vary significantly depending on the case, but an average duration of one to three years should be expected.

The decision of the Higher Regional Court may be appealed to the Federal Supreme Court within one month following the service of that decision. This appeal can only be made on legal grounds, and the Higher Regional Court has to have permitted such appeal. The decision not to permit a legal appeal may be appealed to the Federal Supreme Court as well.

The proceedings of the Federal Supreme Court may vary in terms of duration, but again it might take one to three years before a final decision is reached.

In the event of mergers between statutory health insurers, the same rules for an appeal apply, with the exception that the Social Courts have competence.

Applications to the Federal Minister for Economic Affairs and Climate Action

In the event that the FCO prohibits a concentration or orders the unwinding of a non-notified concentration, the parties may also apply to the Federal Minister for Economic Affairs and Climate Action to request permission to implement the transaction. The deadline for such application is one month following the service of the decision of the FCO. The regular review period for the Federal Minister amounts to four months.

If the Federal Minister goes beyond the regular four-month period for authorising a concentration that had been prohibited by the Federal Cartel Office, they have to decide on the submission within six months. Additionally, another prolongation of the six-month period for a further two months is possible.

While under previous rules, third parties were admitted to appeal proceedings if their interests were substantially affected by the decision, they now have to claim the violation of individual rights.

The ministerial decision may also be fully appealed to the Higher Regional Court of Düsseldorf.

The proceedings for an application for ministerial permission do not preclude the appeal against the original decision of the FCO, the deadline for which starts to run only after service of the ministerial decision.

8.2 Typical Timeline for Appeals

Regarding the typical timeline for an appeal, see the explanations in 8.1 Access to Appeal and Judicial Review. Although it is not uncommon to challenge an FCO prohibition decision, in practice, successful appeals are rather rare. One example is the Phonak (now Sonova)/GN Resound transaction that was prohibited by the FCO in April 2007. The Düsseldorf Higher Regional Court confirmed the FCO prohibition in November 2008, but it was finally overruled by the Federal Supreme Court in April 2010.

As an example of an unsuccessful case, in the EDEKA/Tengelmann case, EDEKA and Tengelmann appealed in parallel the FCO's decision (which only comprises judicial aspects) and applied for a *Ministererlaubnis*. The Düsseldorf Higher Regional Court rejected the appeal and confirmed the FCO's prohibition of the merger (which did not have a practical effect because of the *Ministererlaubnis*).

8.3 Ability of Third Parties to Appeal Clearance Decisions

The right of appeal is also granted to third parties if the FCO decision directly and individually affects their competition interests. A further prerequisite is that such third parties must have been party to the FCO proceedings. This requires that they at least applied to the FCO to be admitted as interveners and complied with all procedural requirements in this regard.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

Germany has a separate foreign direct investment control regime consisting of a mandatory sector investment review, a mandatory cross-

sector notification review and a voluntary investment review. Filings to the Federal Ministry for Economic Affairs and Climate Action have to be made in separate proceedings (see **1.2 Legislation Relating to Particular Sectors**). Since 2017, the German legislature has substantially strengthened and extended the rules in Germany and there has been a significant increase in the number of filings. More than ever, it is imperative for deal-makers to consider foreign investment issues upfront in order to mitigate potential risks and/or delays.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

The latest reform of the ARC, the German Competition Enforcement Act (*Wettbewerbsdurchsetzungsgesetz*), entered into force on 7 November 2023. Following heated debates, this reform introduces significant amendments in the following areas:

- facilitating skimming of excess profits from companies involved in competition law infringements including rebuttable presumptions;
- supportive FCO powers for the enforcement of the EU Digital Markets Act as well as introducing the possibility for private enforcement of the DMA in Germany; and
- unprecedented FCO intervention powers following a sector inquiry.

The FCO is now entitled to take behavioural and structural measures if it has previously established that competition in the relevant sector is significantly and continuously disrupted. Furthermore, the FCO is also entitled to order considerably stricter merger control filing obliga-

tions for companies which are affected by a sector inquiry indicating that future concentrations may restrict competition in the relevant sector (see **2.5 Jurisdictional Thresholds**). Under the repealed provision of Section 39a ARC, undertakings were previously obligated to register all relevant mergers only when meeting a worldwide turnover threshold of EUR500 million on the acquirer's side. This worldwide turnover threshold was abolished in the new provision of Section 32f ARC. Additionally, the acquirer is no longer required to command a share of 15% of the supply or demand in the relevant economic sector in Germany. Furthermore, the domestic turnover threshold was reduced from EUR500 million to EUR50 million. The target's turnover threshold was also reduced from a worldwide turnover of EUR2 million to a domestic turnover of EUR1 million. Moreover, since the de minimis market clause in the general provisions of the ARC is not applicable to Section 32f ARC, a merger can also be prohibited upon notification even if it affects markets generating less than a total of EUR20 million domestically.

The reform provides the FCO with unprecedented ultima ratio divestment powers if competition in the relevant sector is significantly and continually disrupted. However, divestments have been limited to dominant undertakings and undertakings of paramount significance across markets under Section 19(a) ARC. To provide for more legal certainty and address concerns regarding the bill's compatibility with EU law, the FCO will not be entitled to order divestments of (parts of) undertakings which were subject to merger control clearance during the last ten years.

The German government has already lined up the next competition law reform to be enacted before the end of the current legislative term in 2025. This reform will mainly deal with the inter-

play of ESG (Environmental, Social and Governance) and sustainability with competition law. In March 2023, the Federal Ministry for Economic Affairs and Climate Action published a comprehensive study, which inter alia investigated filing requirements and the substantive assessment under merger control law (eg, discussing additional filing thresholds for “dirty deals” or a broader scope of the SIEC test). Kicking off the start of the reform, the Federal Government conducted a consultation open to all stakeholders to further modernise competition law from the beginning of November to the beginning of December 2023. This identified opportunities inter alia in merger control to alleviate bureaucratic burdens on companies, especially small and medium-sized companies and discussed an adjustment of transaction value and turnover threshold. The stakeholder’s statements were published on the website of the Federal Ministry for Economic Affairs and Climate Action in February 2024.

10.2 Recent Enforcement Record

Based on the FCO’s end-of-year review 2023, it examined nearly 800 transactions in 2023. Of these, seven notifications were assessed in Phase II proceedings. One case, the acquisition of parts of the dairy business of Royal Friesland Campina (especially the brands “Landliebe” and “Tuffi”) by the Theo Müller group, was only cleared following commitments of the parties involved. Likewise, an acquisition in the waste management sector (Veolia/Friedrich Hoffmann) was cleared under certain conditions. While four of the cases subject to in-depth review were cleared, one case is still pending.

10.3 Current Competition Concerns

In November 2023, Andreas Mundt, Head of the FCO, delivered his annual year-end review during the conference of the German Study Asso-

ciation for Antitrust Law (*Studienvereinigung Kartellrecht*), focusing on key topics including merger control proceedings, thresholds and digital markets.

Mundt highlighted certain challenges in the practical enforcement of the 11th amendment of the ARC, notably the complexity and duration of the administrative and judicial processes. Regarding future changes, Mundt is doubtful that an increase in threshold values in merger control would be advisable, since the FCO would then have to conduct more sector inquiries to order merger control for certain companies in sectors such as transport, food delivery and groceries, events and press.

He also focused on the recent global trend away from revenue-based notification criteria for mergers expedited by developments in the digital economy and criticised diverging regional strategies. While the European Commission tries to address this issue through Article 22 EUMR, the FCO believes that a transaction value threshold is better suited and awaits the decision of the CJEU in the Illumina/Grail case. Interestingly, relating to co-operations in the digital sector, the FCO concluded that Microsoft’s investment in and co-operation with OpenAI in 2023 was not subject to German merger control rules. This is not self-evident since Section 35 (1a) ARC specifically introduced a transaction value threshold for considerable investments in the digital sector. Initially, Microsoft had gained a material competitive influence over OpenAI in 2021 at the latest but was not subject to a notification obligation due to lacking substantial activities in Germany. From 2023 onwards, OpenAI’s activities were substantial. However, the second investment – albeit meeting the transaction-value threshold – did not significantly strengthen the existent competitively significant influence and thus did

not give rise to a notification obligation. Mundt clearly stated that the FCO would closely monitor Microsoft's future investments into OpenAI.

Concerning enforcement on digital markets, the German Federal Court of Justice delivered its first ruling regarding Section 19a ARC at the end of March, affirming the FCO's decision of July 2022, that had designated Amazon as an undertaking with "paramount significance for competition across markets". FCO president Mundt welcomed the designation since it facilitates the prohibition of certain anticompetitive practices under Section 19a (2) ARC and gives the FCO "tailwind" for ongoing proceedings against Amazon. The decision also strengthens the position of regulators vis-à-vis other digital market players, especially those designated as gatekeepers (ie, Apple, Alphabet/Google, Meta/Facebook).

Lastly, energy and sustainability remain major concerns for regulators, spanning various topics such as co-operations on LNG terminals, the establishment of an infrastructure for hydrogen and investigations into fuels and electric charging stations. At the same time, the authority is preparing for the effects of artificial intelligence on competition and sees a risk that digital markets will become even more concentrated, having an impact on different stages of the value chain.

Trends and Developments

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Redeker Sellner Dahs

Redeker Sellner Dahs is a leading German law firm. It was founded in 1929 and operates nationally and internationally with around 150 lawyers in six offices. The practice ranges across all areas of business-related legal counsel and advice. The firm's attorneys advise and represent clients out of court and before public authorities, and act as counsel for them before

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Overview

In Germany, following an adjustment of the turnover thresholds in January 2021, the number of merger notifications remains significantly below the numbers seen in the years before. At the same time, there is an ongoing trend to extend merger control below the jurisdictional thresholds. In addition, the legislature intends to adopt a 12th amendment to the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen* or “GCA”) focusing on sustainable competition. The amendment is not expected to enter into force before 2025.

Merger Review by the FCO

In 2023, 804 transactions were notified to the German Federal Cartel Office (*Bundeskartellamt* or “FCO”). This is almost the same level as in 2022, but significantly lower than in previous years before the German legislature adjusted the turnover thresholds for merger notifications in January 2021 to decrease the number of notifications. By means of the adjustment, both domestic turnover thresholds were increased significantly from EUR25 million to EUR50 million and from EUR5 million to EUR17.5 million (the worldwide turnover threshold of EUR500 million of all the undertakings concerned remained unchanged). As a consequence, the total number of notifications to the FCO declined signifi-

cantly. Whereas the average number of notifications per year amounted to 1,300 notifications in the period 2019–2020, it dropped to an average of 867 in the period 2021–2023, which corresponds to a decrease of approximately 33%. According to the FCO, the decline cannot be attributed solely to the statutory increase of the merger control thresholds, but there are also other reasons for the downward trend (eg, the pandemic and the war in Ukraine). In addition, there is a global slowdown in M&A transactions. However, the FCO expects an increase in merger notifications again in the long run. Regardless of the annual fluctuations, the number of merger notifications in Germany is still considerably high. Merger control remains the key instrument for the FCO to take preventive action to protect competitive market structures.

In 2023, the number of Phase II investigations increased from five to six compared to 2022. In the years 2019 until 2021, the average number of Phase II investigations was ten. As in the previous years, less than 1% of the transactions notified in Germany were subject to an in-depth Phase II investigation.

All Phase II investigations concluded in 2023 resulted in a clearance. Two of the six cases or 33% of the Phase II investigations resulted in

a clearance with remedies. The remaining four cases were unconditionally cleared. However, in two of these cases, the parties decided to withdraw the notifications in Phase II and obtained an unconditional clearance in Phase I, after having refiled the transactions. In 2022, three of the five cases or 60% of the Phase II proceedings did not result in a clearance of the transaction by the FCO. One merger in the surface drainage sector was prohibited in order to avoid a dominant market position. Two notifications were withdrawn by the participating undertakings during Phase II review.

The average duration of Phase II investigations decreased from the 7.8 months peak in 2022 to 5.3 months, which is still slightly longer than the statutory review period of five months. The longest investigation (7.3 months) concerned the acquisition of the operating subsidiaries of Friedrich Hofmann GmbH by Veolia Umweltservice GmbH, which was cleared on the condition that Veolia sell a disposal site to an independent competitor. The investigation of the acquisition of parts of the dairy business from Royal Friesland Campina by Theo Müller Group lasted 6.3 months. It was cleared subject to commitments including selling the “Tuffi” business of Theo Müller Group to an independent third-party manufacturer and granting exclusive brand licences for the “Landliebe” brand.

The remaining four transactions with Phase II investigations were cleared unconditionally within an average of 4.6 months. In two of these cases the parties decided to withdraw the notification in Phase II and obtained the clearance following the refiling in Phase I. In the first pull and refile case the FCO cleared the acquisition of va-Q-tec AG, a provider of thermal insulation and cold chain logistics solutions, by EQT Fund Management S.à.r.l. despite initial con-

cerns about the strengthened market position of Envirotainer AB, an EQT-controlled company that develops, manufactures, and rents temperature-controlled containers. The FCO referred to the market’s innovative and growing nature, the successful entry of new competitors in the past as well as the presence of strong demand-side players. The second pull and refile case involved the merger between Schrott- und Metallhandel Kaatsch GmbH, a scrap and metal trading company, and Prometall GmbH. The merger was cleared after an investigation of the market conditions for ferrous scrap and non-ferrous metals in the Stuttgart region showed that the merged company would hold a 25–30% market share and that sufficient alternative buyers would remain in the market.

In the first half of 2024, four mergers were subject to Phase II investigations, one of which was cleared after five months (the EUR2.8 billion acquisition of Olink Holding AB (publ), Uppsala/Sweden, by Thermo Fisher Scientific Inc., Waltham/MA/USA). The other three cases concerned a television merger (Bertelsmann/Paramount Global Corporation), a hospital merger and a merger concerning hardware and software solutions for developing and testing human safety applications.

Merger Review by German Courts

On 27 June 2023, the German Federal Court of Justice decided that the definition of the relevant market is not open for a full review by an appellate court, because it essentially depends on the actual circumstances of the market to be determined. As a consequence, the Federal Court of Justice rejected an appeal by the FCO concerning a decision of the Düsseldorf Higher Regional Court. In the case at hand, one furniture retailer with several distribution channels intended to acquire a 50% stake in another furniture retailer,

which also operates several furniture retail distribution channels. The European Commission had cleared the transaction for the procurement market and had referred the transaction for the sales market to the FCO. The latter cleared the transaction for the sales market under certain conditions including the obligation to sell several furniture retail locations, which was found unlawful by the Düsseldorf Higher Regional Court.

In a transaction concerning a joint venture between two major publishers, Funke Medien-gruppe and Burda Verlag, the Düsseldorf Higher Regional Court had to decide on a third-party challenge by Heinrich Bauer Verlag to the merger control clearance. In line with previous case law, the court ruled on 6 December 2023, that third parties have no right to an intervention by the competition authority nor to the adoption of a specific decision, since it is in the discretion of the authority whether it takes action or not.

Merger Review Below Jurisdictional Thresholds

Based on recent EU case law in particular in the cases Towercast und Illumina/Grail, there is a trend in Germany to extend merger control below the regular turnover thresholds and to introduce additional merger control obligations.

In Towercast, the ECJ decided that a merger, although not caught by (ex ante) merger control, can be prohibited (ex post) as an abuse of a dominant position (Case C-449/21). The ECJ ruled that the EU Merger Regulation as secondary legislation cannot exclude the applicability of Article 102 TFEU. Moreover, the enumeration of conduct in Article 102 TFEU is not exhaustive and may also include mergers. This much-noted judgment follows the Continental Can ruling of 1973 that an acquisition of a company could in principle also be classified as an abuse of a

dominant position (Case C-6/72). However, this decision was issued at a time when the EU Merger Regulation did not yet exist. With Towercast, the ECJ has clarified the relationship between Article 102 TFEU and EU Merger Regulation. The same applies for the relationship between Article 102 TFEU and national merger control. The Towercast ruling is especially important for markets where smaller competitors are subject to takeovers by the market leader as well as for killer acquisitions. In case of a killer acquisition, the control of an abuse of dominance serves to protect competition from large companies that acquire smaller (potential) competitors in order to stop their innovation activities or remove already existing products from the market. In such scenarios, in addition to the scrutiny of merger control provisions, companies will also have to assess a potential abuse of a dominant position under Article 102 TFEU. In the absence of a time limit, legal certainty for companies is now significantly restricted. The FCO initiated a model proceeding based on the Towercast judgment concerning the waste disposal sector in 2023. However, the outcome of the proceeding has not been published, yet. In Belgium, the National Competition Authority initiated a model proceeding based on the Towercast judgment resulting in the divestment of EDPnet Belgium by the largest Belgian telecommunications provider Proximus to an independent third-party acquirer.

In Illumina/Grail, the EU General Court handed down in July 2022 another important judgment concerning merger control below the relevant jurisdictional thresholds (Case T-227/21 – Illumina Grail). The General Court endorsed the Commission's ability to exert jurisdiction over transactions that do not trigger either EU or national merger control thresholds by virtue of the so-called Article 22 ECMR referral mechanism. With this ruling, the General Court has effectively

established an EU merger control regime based on referral. On 21 March 2024, Advocate General Emiliou delivered an opinion criticising the decision of the General Court. He argues that this interpretation undermines the objectives, principles and coherence of the EU system of merger control, as well as merging parties' right to legal certainty. If the ECJ confirms the General Court's judgment, this would allow an extended examination of mergers by the Commission on the basis of Article 22 ECMR, avoiding the need for an abuse of dominance proceeding as required pursuant to Towercast.

Merger Control Following a Sector Inquiry

Following the crisis in the energy sector with gas price peaks in Germany, the Federal Minister for Economic Affairs and Climate Action announced in summer 2022 an 11th amendment to the GCA to expand the FCO's scope for action (so-called "Competition Enforcement Act"). On 6 July 2023, the German Parliament passed the act for the 11th amendment to the GCA which came into force on 7 November 2023.

According to the new Section 32f(2) of the GCA, the FCO is empowered to take far-reaching measures to improve the conditions of competition directly after a sector inquiry and irrespective of any concrete competition law infringements having been identified (so-called "New Competition Tool"). Part of the New Competition Tool is a new merger control mechanism which was introduced by the 10th amendment in Section 39a GCA ("Remondis clause", now integrated into Section 32f(2) GCA). This new mechanism enables the FCO to require companies to notify all transactions regardless of the general thresholds for a period of three years following a sector inquiry in the relevant economic sector.

Under Section 39a GCA, the acquirer had to achieve a worldwide turnover of more than EUR500 million and had to have market shares of at least 15% within the sectors concerned, and the target company had to achieve a turnover of more than EUR2 million in Germany. The provision was primarily introduced to allow merger control vis-à-vis step-by-step acquisitions of, for example, family-owned businesses with investment backlogs that led to widespread market concentration.

According to the new Section 32f(2) GCA, the preconditions for the FCO to oblige undertakings to notify mergers following a sector inquiry have been softened. Under the new rules, the acquirer must achieve sales of EUR50 million and the target company must achieve sales of EUR1 million in Germany; a market share requirement will no longer apply. The FCO can enforce the merger control mechanism only if there are objective indications that future mergers could significantly impede domestic competition in the economic sector concerned. The obligation of an undertaking to notify mergers can be extended to a total of 12 years.

In 2024, the FCO could make use of its new powers in the online advertising sector and the hollow glass processing sector where it recently conducted sector inquiries (final reports published on 15 May 2023 respectively 28 December 2023). In the electronic vehicles charging infrastructure sector and the refineries and wholesale fuel trade sector, the sector inquiries conducted by the FCO are still ongoing.

Surely, any application of Section 32f GCA by the FCO will be tested by the companies concerned.

Foreign Subsidies Regulation as New Merger Review Regime

On 12 July 2023, the EU's Foreign Subsidies Regulation (Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market or FSR) entered into force. The FSR empowers the Commission to investigate and remedy subsidies received from non-EU countries that distort the EU internal market. For M&A transactions, the FSR introduces a new merger review regime. The FSR regime applies separate from, and in addition to, existing merger control and foreign direct investment (FDI) control regimes. It requires prior notification to and approval from the Commission of transactions involving companies that have received financial support from non-EU governments. It also includes a new screening procedure for public tenders involving foreign-subsidised entities, and a broad investigation tool enabling the Commission to investigate any commercial activity in the EU (deal-related or not) where foreign subsidies may have a distortive effect in the EU internal market. Initial experience shows that the impact of the FSR will be significant, in particular for M&A transactions and also for transactions which are subject to merger control in Germany.

Merger Control and Sustainability

In Germany, sustainability aspects are playing an increasing role in the merger control debate. The Monopolies Commission recently emphasised that with increasing case practice, the introduction of an efficiency defence in the area of sustainability in merger control should be considered. So far, the FCO is following a wait-and-see approach rather than introducing working papers or guidelines on sustainability aspects. The so-called "balancing clause" in Section 36(1) GCA allows an examination of efficien-

cies and other advantages. Under the balancing clause, a merger can be cleared if it results in improvements in competitive conditions and these improvements outweigh the impediments to competition. Efficiencies could be regarded as improvements in competitive conditions in the broadest sense. Sustainability aspects can also be taken into account in case of a ministerial approval of a merger (Section 42 GCA).

For example, in the Miba/Zollern case in 2019, the Federal Minister of Economics – contrary to the recommendations of the Monopolies Commission – had already recognised efficiency gains and cleared the launch of a joint venture between Miba and Zollern, which had initially been prohibited by the FCO. The companies had planned to pool their hydrodynamic plain bearing production activities in a joint venture. The efficiencies presented by the company, such as the achievement of environmental protection and sustainability goals, were considered to be a public interest objective that could be taken into account.

The 12th amendment to the German Competition Act, which is expected to enter into force in early 2025, will have a focus on sustainable competition. The impact on merger control is not yet clear.

12th Amendment to the GCA

At the end of 2023, the Federal Ministry for Economic Affairs and Climate Action held a public consultation regarding the 12th amendment to the GCA. The government draft for the amendment is expected in summer 2024 and will be discussed extensively by the competition community in Germany. The amendment is expected to enter into force in early 2025.

The 12th amendment shall focus on sustainable competition. The goals of the amendment are, in particular, more legal certainty for co-operation between companies for greater sustainability and stronger consumer protection. Whether the amendment will also bring changes to merger control, such as provisions regarding efficiency pleas for sustainability in merger control, is not yet clear. Most likely, the amendment will address “killer acquisitions”. In this respect, Germany and France recently advocated in their “agenda to boost competitiveness and growth in the European Union”, presented on 28 June 2024, to adjust the current merger control rules in order to address strategic acquisitions of potential competitors impeding innovation.

Conclusion

In 2023, the number of both merger notifications and Phase II investigations in Germany mirrored that of 2022. The average length of Phase II investigations decreased after a peak of 7.8 months in 2022 to 5.3 months in 2023, which is more in line with those observed in prior years. Nevertheless, parties involved in Phase II investigations should be prepared for an in-depth scrutiny of their transactions which can last significantly longer than the statutory review period of five months.

Although the jurisdictional thresholds were lifted in 2021 to decrease the number of notifications, there is – similar to the EU-level – an ongoing trend to extend merger control below the regular turnover thresholds and to introduce additional merger control measures. This concerns the new powers of the FCO according to Section 32f(2) GCA following a sector inquiry. Moreover, the Towercast judgment of the ECJ allows the ex-post prohibition of a merger that did not meet the thresholds for prior merger control of EU or national law, under abuse of dominance provisions. This creates additional legal uncertainty, at least for companies with a dominant market position.

The proposal for a 12th amendment to the GCA is expected in summer 2024. Mostly likely, merger control will face another adjustment by the legislature.

GREECE

Law and Practice

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Karatzas & Partners



Contents

1. Legislation and Enforcing Authorities p.295

- 1.1 Merger Control Legislation p.295
- 1.2 Legislation Relating to Particular Sectors p.295
- 1.3 Enforcement Authorities p.295

2. Jurisdiction p.295

- 2.1 Notification p.295
- 2.2 Failure to Notify p.296
- 2.3 Types of Transactions p.296
- 2.4 Definition of "Control" p.296
- 2.5 Jurisdictional Thresholds p.297
- 2.6 Calculations of Jurisdictional Thresholds p.297
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.298
- 2.8 Foreign-to-Foreign Transactions p.298
- 2.9 Market Share Jurisdictional Threshold p.299
- 2.10 Joint Ventures p.299
- 2.11 Power of Authorities to Investigate a Transaction p.299
- 2.12 Requirement for Clearance Before Implementation p.299
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.299
- 2.14 Exceptions to Suspensive Effect p.300
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.301

3. Procedure: Notification to Clearance p.301

- 3.1 Deadlines for Notification p.301
- 3.2 Type of Agreement Required Prior to Notification p.301
- 3.3 Filing Fees p.301
- 3.4 Parties Responsible for Filing p.301
- 3.5 Information Included in a Filing p.302
- 3.6 Penalties/Consequences of Incomplete Notification p.302
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.303
- 3.8 Review Process p.303
- 3.9 Pre-notification Discussions With Authorities p.303
- 3.10 Requests for Information During the Review Process p.303
- 3.11 Accelerated Procedure p.304

4. Substance of the Review p.304

- 4.1 Substantive Test p.304
- 4.2 Markets Affected by a Transaction p.305
- 4.3 Reliance on Case Law p.305
- 4.4 Competition Concerns p.305
- 4.5 Economic Efficiencies p.305
- 4.6 Non-competition Issues p.305
- 4.7 Special Consideration for Joint Ventures p.306

5. Decision: Prohibitions and Remedies p.306

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.306
- 5.2 Parties' Ability to Negotiate Remedies p.307
- 5.3 Legal Standard p.308
- 5.4 Negotiating Remedies With Authorities p.308
- 5.5 Conditions and Timing for Divestitures p.308
- 5.6 Issuance of Decisions p.309
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.309

6. Ancillary Restraints and Related Transactions p.309

- 6.1 Clearance Decisions and Separate Notifications p.309

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.309

- 7.1 Third-Party Rights p.309
- 7.2 Contacting Third Parties p.310
- 7.3 Confidentiality p.310
- 7.4 Co-operation With Other Jurisdictions p.310

8. Appeals and Judicial Review p.310

- 8.1 Access to Appeal and Judicial Review p.310
- 8.2 Typical Timeline for Appeals p.311
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.311

9. Foreign Direct Investment/Subsidies Review p.311

- 9.1 Legislation and Filing Requirements p.311

10. Recent Developments p.311

- 10.1 Recent Changes or Impending Legislation p.311
- 10.2 Recent Enforcement Record p.311
- 10.3 Current Competition Concerns p.312

Karatzas & Partners was recently recognised by Chambers Europe as the Greece Law Firm of the Year for 2022. In the area of competition law and, in particular, merger control, Karatzas & Partners has a well-established practice handling a steady stream of merger control advice and clearances relating to significant M&A transactions undertaken by the firm. It is renowned for its business-oriented approach, which is critical to advising clients on the competition aspects of M&A transactions and

achieving merger clearance even in particularly complex and novel concentrations that lead to Phase II investigations. Karatzas & Partners routinely advises clients on the most innovative transactions in Greece with novel competition law elements, such as the creation of complex joint ventures in high technology sectors, the creation of new relevant product markets and complex (geographical/product) market definitions, thus being at the forefront of competition law developments in Greece.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The relevant Greek merger control provisions are enshrined in Law 3959/2011 (the “Greek Competition Act”), as amended. In addition to these provisions, the Hellenic Competition Commission (HCC) has issued Decision No 780/2022, which clarifies the requirements of the long and short notification forms (“HCC Guidelines”), as well as Decision 779/2022, which determines the content of the remedies form. In 2023, the HCC amended its procedural and operational regulation.

In interpreting and applying the Greek merger control legislation, the HCC takes also into account all the relevant EU legislation, notices and guidelines, as well as the EU case law.

1.2 Legislation Relating to Particular Sectors

The Greek Competition Act applies in principle to all transactions (including foreign-to-foreign transactions) and to all sectors, and the HCC is the competent authority to implement the Greek competition rules, apart from the transactions relating to electronic communications, and postal services, for the review of which the Hellenic Telecommunications and Post Commission (EETT) is the competent authority.

Mass Media Sector

Concentrations relating to informative media (eg, television, radio, papers and magazines) are governed by both the Greek Competition Act and Law 3592/2007, as amended by Law 4279/2014. On the other hand, as regards concentrations relating to entertainment (ie, non-informative) media, only the Greek Competition Act applies.

With respect to FDI filing requirements see **9.1 Legislation and Filing Requirements**.

1.3 Enforcement Authorities

The HCC is the competent authority for the enforcement of the relevant legislation applicable to merger control, as well as for the review of the notified concentrations. The HCC is an independent authority with administrative and economic autonomy, which is supervised by the Minister of Development.

For the review of mergers involving undertakings active in the markets of electronic communications and postal services, the EETT is the relevant competent authority.

Decisions issued by the HCC and EETT are subject to judicial review by the Greek administrative courts.

2. Jurisdiction

2.1 Notification

In case the respective thresholds described in **2.5 Jurisdictional Thresholds** are met, a notification to the HCC, prior to the implementation of the transaction, is compulsory (see also response to **2.14 Exceptions to Suspensive Effect** on derogations from the suspensive effect of the implementation of a notifiable concentration). There is no exception as to the mandatory nature of the filing requirement. The notification shall be submitted within 30 calendar days after the signing of the relevant binding agreement, the acquisition of controlling interest, or the announcement of a public bid that confers control on a lasting basis.

2.2 Failure to Notify

The HCC can impose administrative fines of at least EUR30,000 and up to 10% of the aggregate national turnover of the undertakings responsible for the filing, for failure to notify. The Greek Competition Act explicitly states that the fine imposed must be calculated on the basis of the economic power of the undertakings involved, the number of the affected markets, the competitive conditions therein and the potential effect of the contemplated concentration on competition.

The executives of the undertakings concerned are personally and jointly liable for the payment of all fines imposed against the undertakings by the HCC. In addition, the HCC may also impose administrative fines on the executives themselves for failure to comply with the merger control rules, which range from EUR200,000 to EUR2 million.

Finally, the executives of the undertakings concerned are subject to criminal sanctions, the fines of which range between EUR15,000 and EUR150,000.

As regards fines and penalties that have been imposed recently for failure to notify or gun-jumping see **2.13 Penalties for the Implementation of a Transaction Before Clearance**.

2.3 Types of Transactions

All transactions meeting the turnover thresholds described in **2.5 Jurisdictional Thresholds**, are caught by the Greek Competition Act, as long as there is an acquisition of control on a lasting basis. An acquisition of control is deemed to arise in any merger between two or more previously independent undertakings or parts thereof, in an acquisition of direct or indirect control over the whole or part of one or more undertakings, by one or more persons already controlling at

least one undertaking (or by one or more undertakings), and in a creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

Therefore, internal restructurings and reorganisations do not qualify as concentrations under the Greek merger control regime. Operations not involving the transfer of shares or assets may qualify as concentrations, as long as the nature of control changes and there is an acquisition of control as a result of the operation (eg, through veto rights): see also **2.4 Definition of “Control”**.

2.4 Definition of “Control”

The definition of “control” under the Greek Competition Act is identical to the one under the European Union Merger Regulation (EUMR).

Control derives from rights, contracts or other means which, either separate or in combination, and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

- rights of ownership or rights to use all or part of the assets of an undertaking; or
- rights or contracts that confer the possibility of exercising decisive influence on the composition, voting or decisions of the bodies of an undertaking.

In light of the above, control is acquired by the person(s) or undertakings that (i) are holders of the rights or entitled to rights under the contracts concerned; or (ii) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

Control may be acquired in the form of (i) sole or (ii) joint control and in both cases, control may be acquired on a de jure or a de facto basis.

Sole Control

Sole control is acquired when a person or an undertaking is capable of exercising decisive influence on another undertaking. This is normally accomplished by the acquisition of the majority of the voting rights or when a minority shareholder is vested with “special” rights allowing it to define the business strategy of the acquiring entity by – eg, blocking decisions of strategic commercial matters.

Joint Control

Joint control exists where two or more undertakings have the possibility to exercise, directly or indirectly, decisive influence over another undertaking. This is the case, for example, where two undertakings have equal voting rights. Furthermore, the acquisition of a minority shareholding may also confer joint control, where it allows the minority shareholder to block strategically important decisions through – eg, veto rights. Joint control may also be the result of an agreement between minority shareholders to exercise their voting rights in the same way or where there is a commonality of interests between minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the undertaking concerned.

2.5 Jurisdictional Thresholds

Pursuant to Article 6(1) of the Greek Competition Act, a concentration shall be notified to the HCC, provided that the following turnover thresholds are satisfied, and the concentration does not have an EU dimension. In particular, the turnover threshold is met when:

- the combined aggregate worldwide turnover of all the undertakings concerned is at least EUR150 million; and
- the aggregate turnover of each of at least two of the undertakings concerned in the Greek market exceeds EUR15 million.

Special turnover thresholds apply to concentrations in the informative media sector. In particular, according to Article 3(7) of Law 3592/2007, as amended by Law 4279/2014, concentrations of informative media must be notified to the HCC where:

- the combined aggregate worldwide turnover of all the undertakings concerned is at least EUR50 million; and
- the aggregate turnover of each of at least two of the undertakings concerned in the Greek market exceeds EUR5 million.

The acquisition of informative media is not allowed when it triggers the market share thresholds referred in Article 3 of Law 3592/2007 (see also **4.1 Substantive Test**).

2.6 Calculations of Jurisdictional Thresholds

In calculating the turnover to assess whether the jurisdictional thresholds are met, the Greek Competition Act mirrors the EUMR. Turnover must correspond to the “ordinary activities” of the undertakings concerned, which is the turnover generated from the sale of all products and services in the normal course of their business.

Moreover, sales rebates, VAT, other turnover-related taxes and intra-group sales figures, shall be excluded from the calculation.

In case of an acquisition of a part or parts of an undertaking, irrespective of the legal personality

and status of those parts, only the turnover of the part or parts is calculated.

Furthermore, in case of a group of undertakings, the turnover must reflect the turnover of the entire group of each of the undertakings concerned, as explained in **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**.

Where a currency conversion is necessary, the HCC will use the average annual exchange rates provided by the European Central Bank.

The relevant period for calculating the turnover is the last audited financial year (adjustments must be made for any acquisitions or disposals of businesses subsequent to the date of the audited accounts, in order to reflect the true value of group turnover).

Lastly, specific rules also apply for the calculation of the turnover with respect to credit institutions, insurance companies and other financial companies, which mirror the equivalent EUMR provisions.

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

As already stated in **2.6 Calculations of Jurisdictional Thresholds**, turnover must reflect the turnover of the entire group of each of the undertakings concerned. In order to calculate the aggregate turnover of the undertakings concerned, it is necessary to add together the respective turnovers of:

- the relevant undertaking;
- all subsidiaries that are controlled directly or indirectly by the relevant undertaking;

- the turnover of any person/company that control(s) the relevant undertaking;
- if there are any persons/companies that control the relevant undertaking, the turnover of any persons that control those persons/companies; and
- the turnover of any joint ventures, allocated on a proportionate basis to the number of undertakings that control the joint venture.

Control for these purposes means that a person/company, either directly or indirectly:

- owns more than half of the capital or business assets;
- has the power to exercise more than half the voting rights;
- has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the company; or
- has the right to manage the company's affairs.

However, where a transaction concerns the acquisition of a part of one or more undertakings, only the turnover of the transferred part is taken into account, in addition to the aggregated turnover of the acquirer's group.

In summary, in case of an acquisition of control, one takes into account the turnover of the acquiring entity's group (as explained above), and the turnover of the target and its subsidiaries that fall within the scope of the transaction.

2.8 Foreign-to-Foreign Transactions

As explained in **1.2 Legislation Relating to Particular Sectors**, the Greek Competition Act also applies to foreign-to-foreign transactions. As long as the foreign entities meet the worldwide and national turnover thresholds (ie, the com-

bined aggregate worldwide turnover of all the undertakings concerned is at least EUR150 million and each of at least two of the undertakings concerned has generated turnover in the Greek market that exceeds EUR15 million), and no EU one-stop shop notification is necessary, a notification to the HCC is compulsory. If no turnover is generated in Greece by one of at least two undertakings, then no filing in Greece will be required.

2.9 Market Share Jurisdictional Threshold

There is no market share jurisdictional threshold under the Greek Competition Act. See also **4.1 Substantive Test** for the market share thresholds in relation to the acquisition of informative media.

2.10 Joint Ventures

Only full-function joint ventures fall under the ambit of the Greek Competition Act. Specifically, in order for a joint venture to be caught by the Greek merger control provisions, such joint venture must be able to perform on a lasting basis all the functions of an autonomous economic entity, as per the provisions of the European Commission's Consolidated Jurisdictional Notice (Jurisdictional Notice). In cases where such a joint venture does not constitute an independent undertaking under the meaning of the Jurisdictional Notice – eg, where a joint venture takes over only a specific function within the parent companies' activities without its own access or presence in the market, that joint venture would not be subject to the Greek merger control provisions.

For calculating the turnover, the HCC applies the relevant paragraphs of the Jurisdictional Notice (ie, paragraphs 169-194 of the Jurisdictional Notice).

2.11 Power of Authorities to Investigate a Transaction

The HCC (and the EETT where applicable) does not have the power to investigate transactions that do not meet the minimum jurisdictional thresholds.

Nonetheless, in accordance with Article 6(7) of the Greek Competition Act (as amended by L. 4886/2022), the Minister of Finance and the Minister of Development may jointly amend the notification thresholds, as well as impose separate/ad hoc thresholds for different sectors of the economy. See also **4.1 Substantive Test** for the market share thresholds in relation to the acquisition of informative media.

2.12 Requirement for Clearance Before Implementation

The Greek Competition Act (Article 9) requires the automatic suspension of a notifiable concentration, until the latter is cleared by the HCC. This inter alia means that the implementation of a notifiable transaction should be suspended until it has been cleared by the HCC (or the relevant timeframe for the HCC to issue a decision has lapsed without the HCC having reached a decision). See also the derogations to the suspensory effect in **2.14 Exceptions to Suspensive Effect**.

2.13 Penalties for the Implementation of a Transaction Before Clearance

If a notifiable transaction is implemented prior to the HCC clearance decision, the HCC may impose administrative fines to the undertakings having an obligation to notify. The fine will be at least EUR30,000 and up to 10% of the aggregate turnover of the undertakings concerned. In calculating the fine, the HCC will take into account the economic power of the undertakings concerned, the number of affected mar-

kets and the competitive conditions prevailing in these markets, as well as the estimated impact of the concentration on competition.

In addition, criminal sanctions ranging between EUR15,000 and EUR150,000 may be also imposed on the undertaking's executives for violation of the merger control provisions.

In 2023, the HCC imposed a fine of EUR30,000 on an undertaking for failure to notify (HCC Decision 823/2023 – ANEDIK KRITIKOS SA/SYNERGAZOMENOI PANTOPOLES SA). In 2022, the HCC imposed a fine of EUR500,000 for gun-jumping (HCC Decision 752/2021 – OPAP/STOIXIMAN BUSINESS). Lastly, in 2018, the HCC also imposed a fine of EUR50,000 on an undertaking for failure to notify and in the same decision an additional fine of EUR30,000 for gun-jumping (HCC Decision 659/2018 – ALTER EGO MEDIA/DOL SA).

To the best of the authors' knowledge, no penalties have been imposed in the case of foreign-to-foreign transactions.

2.14 Exceptions to Suspensive Effect

Notwithstanding the suspensive effect of the implementation of a notifiable concentration, the Greek Competition Act provides for two derogations.

- First, the implementation of a public bid or the acquisition of a controlling interest in the context of stock exchange transactions shall not be prevented provided that (i) the concentration is notified to the HCC within the 30-day deadline; and (ii) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on the grant of a special derogation by

the HCC. Hence, in case of non-clearance of the transaction, the risk shifts to the acquirer, since the acquirer would need to dispose of the shares.

- Second, the HCC may, upon request, grant a derogation from the obligation to suspend the completion of a transaction that is notifiable, in order to prevent serious effects to the detriment of one or more of the undertakings concerned or to the detriment of a third party. The HCC decision to grant a derogation may be issued subject to conditions and obligations aimed to safeguarding effective competition and preventing situations that could jeopardise the enforcement of an eventual HCC decision prohibiting the concentration. A derogation granted by the HCC may be revoked where: (i) the derogation is based on incorrect or misleading information; or (ii) the undertakings concerned violate the conditions attached to the derogation. In 2022, the HCC granted a derogation from the suspensive effect of the implementation of a notifiable concentration between two companies active in the market for the supply of natural gas (HCC Decision 804/2022 – PYRSOS/PROMETHEUS GAS). The HCC permitted the implementation of the concentration – ie, the acquisition by Pysros Holding Company SA of sole control over Prometheus Gas SA, prior to the issuance of its final clearance decision in order to prevent serious financial effects to the detriment of the target company caused by the EU sanctions imposed against Russia. The derogation granted was subject to specific prohibitions until clearance, such as the transformation of the target's group, the conclusion of long-term supply agreements, etc. Apart from the aforementioned case, the HCC is generally hesitant to grant such derogations.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

There are no other derogations to the suspensory effect for the implementation of a notifiable concentration, apart from the two described in **2.14 Exceptions to Suspensive Effect**. With respect to a potential carve-out, the HCC will follow the relevant case law of the EU Courts and the EC, especially in relation to interim implementation measures, such as warehousing, etc.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

As analysed in **2.1 Notification**, a concentration that satisfies the relevant turnover thresholds (see **2.5 Jurisdictional Thresholds**), shall be notified to the HCC within 30 calendar days after the signing of the relevant binding agreement, the acquisition of controlling interest or the announcement of a public bid that confers control on a lasting basis. For the penalties imposed in the event that the deadline for notification is not met or for a failure to notify, please refer to **2.2 Failure to Notify**. All penalties are made public.

3.2 Type of Agreement Required Prior to Notification

The 30 calendar-day timeframe may be triggered when there is a binding agreement, an acquisition of controlling interest, or an announcement of a public bid that confers control on a lasting basis. According to the HCC case law, the aforementioned deadline could be deemed to commence upon the execution of any sort of binding preliminary document, which could be deemed to trigger the concentration process (eg, pre-agreement, binding memorandum of under-

standing). The HCC will assess ad hoc whether a preliminary agreement could trigger the notification obligation on the basis of whether it creates binding obligations on the parties to proceed with the consummation of the transaction.

As such, and pursuant to the HCC Guidelines, a notification may be submitted to the HCC prior to the conclusion of a binding agreement, as long as the notifying parties demonstrate to the HCC their firm intention to enter into a conclusive agreement or, in the event of a public bid, as long as the parties have publicly announced their intention to make such bid.

In case of mergers, the HCC will review the notification at the pre-binding stage, as soon as the board of directors of the two entities have initiated the merger procedures, but will only issue a decision once it has received the resolutions of the general shareholders' meetings approving the merger, since the latter are considered as binding acts for the purposes of the notification.

3.3 Filing Fees

The notification form must be accompanied by the proof of payment of a filing fee of EUR1,100. Absent the proof of payment of the filing fee, the notification will be rejected on the grounds of inadmissibility.

3.4 Parties Responsible for Filing

Where the concentration arises from a merger agreement, all parties involved are responsible for the filing.

In case of an acquisition of sole control, the party acquiring control is responsible for the filing, whereas in case of an acquisition of joint control, the notification must be made by all parties acquiring control.

3.5 Information Included in a Filing

The information required for a notification (long or short form) under an HCC filing is similar to what is required for the submission of the Form CO before the European Commission (EC). In general, the information typically required to complete a filing includes, inter alia, the following:

- description of the transaction;
- information about the participating parties and their activities;
- the ownership and control structure of the participating parties;
- definition of the relevant product and geographical markets and any affected markets;
- turnover and market share information on the affected markets;
- information on the structure of supply and demand in the affected markets; and
- efficiencies expected to result from the transaction.

The filing shall be accompanied by the following documents:

- a copy of the binding agreement or of the tender document in case of a public bid;
- copies of the most recent annual reports/financial statements of the undertakings concerned;
- copies of all relevant market studies providing information of the structure of the affected markets (such as market shares, competition conditions, existing and potential competitors, structure of supply, etc);
- a copy of the notification announcement as published in the newspaper;
- a power of attorney for representation by a legal counsel (PoA), which should be duly notarised (and apostilled where necessary);

- presentations made from/to the Board of Directors or presented to the Board of Directors or the general assembly, which include competitive assessments; and
- proof of payment of the filing fee.

The notification itself and the accompanying documents should be submitted in Greek. If the accompanying documents are drafted in a language other than Greek, an official (ie, certified by an attorney) translation in Greek should be also submitted.

3.6 Penalties/Consequences of Incomplete Notification

The HCC officially commences the review process of the notified concentration as soon as the filing is deemed to be complete. In case the filing is found to be incomplete, further clarifications are requested by the HCC through RFIs. Only when the HCC considers that the filing is complete, the Phase I review period commences.

In cases where the information requested by the HCC is being refused, obstructed, delayed, the HCC may impose on the undertakings concerned fines of up to 3% of their aggregate worldwide turnover on a daily basis (and for as long as the infringement takes place). In addition, the HCC may also impose fines on the undertakings' executives ranging from EUR15,000 to EUR30,000 per day of non-compliance.

Lastly, those that refuse or obstruct the requested information may be also subject to imprisonment for at least six months.

In 2011, the HCC imposed fines of EUR20,000 and EUR15,000 respectively on two gas-providing companies for inter alia delaying to provide the information requested (HCC Decision 516/VI/2011 – EPA Thessalias/EPA Thessalonikis).

3.7 Penalties/Consequences of Inaccurate or Misleading Information

In the event that the parties provide inaccurate, incomplete or misleading information, the same penalties described in **3.6 Penalties/Consequences of Incomplete Notification** apply.

3.8 Review Process

After the HCC deems the notification to be complete, it will follow the below review and decision process.

- In case the HCC concludes that the notified concentration does not fall within the jurisdictional thresholds, the President of the HCC will issue a decision within 30 calendar days from the receipt of a complete notification.
- In case the HCC considers that the notified concentration does not raise any adverse effects on the relevant markets, the HCC will issue a decision approving the concentration within 30 calendar days from the receipt of a complete notification (Phase I process).
- In case the HCC considers that the concentration raises serious doubts as to its compatibility with competition law in the relevant markets, the President of the HCC will issue a decision within 30 calendar days from the date of the notification and will initiate the procedure of full investigation of the notified concentration (Phase II process). The participating parties should be immediately informed of this decision. The case is subsequently introduced before the HCC within 45 days from the date on which the in-depth assessment is initiated (the “hearing”). Prior to the hearing, the HCC will issue a report summarising its findings, similar to the statement of objections (SO) of the EC under the EUMR, on which the parties will be invited to comment. The parties can offer remedies either during the Phase I investigation within

20 calendar days from the date of the notification or during the Phase II investigation within 20 days of the HCC SO. Under the Phase II process, the HCC must issue its decision within 90 calendar days following the initiation of the Phase II review process. In case the deadline of 90 days lapses unused, it is assumed that the HCC has approved the concentration.

The timeframe within which the HCC shall issue its decision under the Phase I and Phase II review process may be extended subject to the parties’ consent.

In terms of an overall estimated timeline, it is estimated that the HCC would issue its decision approximately 75 days after the submission of the notification in Phase I proceedings, and approximately 165 days after the submission of the notification in Phase II proceedings.

3.9 Pre-notification Discussions With Authorities

The Greek Competition Act does not provide for pre-notification discussions with the HCC. Nonetheless, there may be informal discussions with the HCC and the parties may also submit formal questions, as long as the 30-day filing deadline is observed.

3.10 Requests for Information During the Review Process

It is fairly common for the HCC to request additional information from the parties. In particular, once the notification is filed, the HCC has seven working days in order to assess whether the data provided by the parties is sufficient. If the HCC finds that further data is needed, it shall notify the parties and the “clock will stop ticking”. Namely, the deadline within which the HCC must reach a decision in Phase I or Phase II will

not start running until the HCC has deemed that it has at its disposal all the data that it requires.

3.11 Accelerated Procedure

A short notification form may be submitted, if one the following conditions is met:

- none of the parties to the concentration is engaged in business activities in the same relevant product and geographic market (no horizontal overlap), or in a market that is upstream or downstream of a market in which another party to the concentration is engaged (no vertical relationship);
- two or more of the parties to the concentration are engaged in business activities in the same product and geographical market (horizontal relationships), provided that their combined market shares shall not exceed 15%;
- one or more of the parties to the concentration are engaged in business activities in a product market, which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships), provided that their individual or combined market shares at either level shall not exceed 25%; or
- when a party to the concentration is to acquire sole control of an undertaking over which it already has joint control.

When following the receipt of the short notification form, the HCC considers that the long notification form is required, the filing will be deemed incomplete, and the HCC will request all or part of the long form notification information through RFIs.

4. Substance of the Review

4.1 Substantive Test

The key substantive test employed by the HCC in its assessment of a concentration is that a concentration should not significantly impede effective competition, similarly to what is applied under the EUMR (“SIEC test”). Pursuant to the SIEC test, the HCC will examine whether the concentration may significantly impede effective competition in the Greek market or in a substantial part thereof, in particular through the creation or reinforcement of a dominant position.

In its assessment, the HCC will take into account, inter alia, the structure of all the relevant markets, actual and potential competition, barriers to entry, the market position and economic strength of the participating undertakings, any alternatives available to suppliers and users, supply and demand trends for the products and services involved, and the bargaining power of suppliers and customers.

With respect to horizontal mergers, the HCC will assess whether a concentration may lead to a significant impediment to effective competition, by creating or by enhancing a dominant position, either by eliminating substantial competitive constraints (unilateral or non-coordinated effects), or by altering the nature of competition and thus facilitating the co-ordination between previously competitive/non-coordinating undertakings (co-ordinated effects).

With respect to vertical mergers, the HCC will assess whether the concentration may result in co-ordinated or non-coordinated effects on the vertically affected markets or lead to input or customer foreclosure.

Concerning conglomerate mergers, the HCC will assess whether the concentration would result in foreclosure through tying or bundling.

Regarding full-function joint ventures, please refer to **4.7 Special Consideration for Joint Ventures**.

As regards concentrations in the (informative) media sector, Law 3592/2007 expressly provides that a concentration is not permitted where it involves undertakings that hold a dominant position in this sector or where the concentration would result in the creation of such dominant position. Dominance is thereby defined by reference to specific market share thresholds, which range from 25% to 35%.

4.2 Markets Affected by a Transaction

The HCC closely follows the EC practice and the relevant EU case law when determining which markets may be affected by the transaction.

In particular, an affected market is deemed to arise when:

- two or more of the participating undertakings are engaged in business activities in the same product and geographic market (horizontal relationships), and the concentration would result in a combined market share of at least 15% in the relevant market (for horizontal mergers); or
- one or more of the participating undertakings are engaged in business activities in a product market that is upstream or downstream from a product market in which any other participating undertaking is engaged (vertical relationships), and either their individual or combined market shares in either level is at least 25%.

In the event that the aforementioned thresholds are not satisfied, no affected markets are deemed to exist, and the competitive concerns are generally deemed unlikely. The same applies where there is no incremental market share increase.

4.3 Reliance on Case Law

The HCC heavily relies on EU case law and takes into account all relevant notices and guidelines issued by the EC in relation to the EUMR, including also the revised Market Definition Notice adopted by the EC in 2024, which the HCC interprets and implements having regard to the Greek regulatory regime applying to specific sectors – eg, banking and financial services and other regulated activities, such as energy, which may differ in certain aspects from other EU countries.

4.4 Competition Concerns

The HCC will examine all potential competition concerns (see also **4.1 Substantive Test**).

4.5 Economic Efficiencies

When assessing a concentration, the HCC will consider efficiency considerations that could offset its possible anti-competitive effects, including the development of technical and economic progress. Nonetheless, these efficiency considerations are taken into account only if:

- they produce benefits to consumers;
- they constitute a direct consequence of the concentration;
- they cannot be achieved to a similar extent by less anti-competitive methods; and
- they are verifiable.

4.6 Non-competition Issues

Under the Greek Competition Act, non-competition issues, such as industrial policy and national security, are not expressly prescribed and are

generally not taken into account as part of the HCC review process.

Nevertheless, the HCC has expressed its strong interest in the relationship between sustainable development and competition law and in particular, the extent to which sustainability and environmental considerations may be taken into account when assessing a concentration. In this respect, in October 2022, the HCC launched the Sandbox Platform for sustainability (see also **10.3 Current Competition Concerns**). However, the HCC has not relied upon such sustainability arguments in any merger case to date.

The HCC has also considered the potential effects of a concentration on the national economy. More specifically, public interest objectives, such as the liquidity in the banking sector and the stability of the financial system, have been taken into account by the HCC in its decisions regarding concentrations in the banking sector during the financial crisis (HCC Decision 574/2013 – Piraeus Bank/Bank of Cyprus-Cyprus Popular Bank, HCC Decision 568/2013 – National Bank of Greece/FBB, HCC Decision 566/2013 – Piraeus Bank/Millennium Bank, HCC Decision 562/2013 – National Bank of Greece/Eurobank Ergasias Bank).

As regards FDI filing requirements see **9.1 Legislation and Filing Requirements**.

4.7 Special Consideration for Joint Ventures

The Greek Competition Act reserves special consideration for the effect that full-function joint ventures may have on competition. In particular, apart from examining whether the full-function joint venture will significantly restrict effective competition, the HCC will also examine possible co-operative effects between the previously

independent undertakings. Such co-ordination will be examined by the HCC under the principles set out in Articles 1(1) and 1(3) of the Greek Competition Act (equivalents of Articles 101(1) and 101(3) of the Treaty on the Functioning of the EU). In particular, the HCC will consider:

- whether two or more parent undertakings retain, to a significant extent, activities on the same market as the joint venture, or in an upstream or downstream or closely-related neighbouring market; and
- whether the co-ordination that results directly from the creation of the full-function joint venture enables the participating undertakings to eliminate competition in a substantial part of the markets where they are active.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The HCC has the power to prohibit a concentration, provided that the latter leads to a significant restriction of effective competition. A prohibition decision shall be issued within 90 calendar days following the initiation of the Phase II review process.

In addition, in the event that a concentration has been implemented in breach of the Greek Competition Act, or in breach of a prohibition decision, the HCC may require the undertakings concerned to dissolve the concentration, so as to restore the situation prevailing before the implementation of the concentration.

5.2 Parties' Ability to Negotiate Remedies

The parties can offer remedies during Phase II within 20 calendar days from the issuance of the SO. The HCC may exceptionally accept remedies even after the expiry of the aforementioned 20-day period. In such cases, the HCC may increase the 90-day time limit for the issuance of its decision to 105 calendar days.

In addition, under the recent amendments of the Greek Competition Act, the parties may also offer remedies during the Phase I investigation within 20 calendar days from the date of the notification of the concentration.

Typical Remedies

HCC Decision 779/2022 determines the content of the notification form on remedies and its accompanying documents. The HC decision also includes a model text for divestiture commitments and a model text for trustee mandates.

In general, the HCC follows the EC's Notice on Remedies and the relevant EU case law in assessing remedies.

In this respect, it is considered that structural commitments are generally preferable since they are deemed to avert the competition concerns over the longer term. Nonetheless, the HCC has accepted behavioural remedies in a number of cases thus far. For instance, in Case 682/2019 (Mytilineos/EPALME), the HCC accepted behavioural remedies that aimed at addressing vertical foreclosure concerns. Moreover, the HCC, in Case 775/2022 (Delivery Hero/ALPHA-INKAT-E-TABLE), accepted a series of behavioural remedies. The concentration concerned the acquisition by an online delivery platform, Delivery Hero, of the sole control over companies that are active in the wholesale supply of goods to super-

markets and run online platforms that provide intermediation services for orders and reservations in restaurants. The HCC was concerned that the combination of end user data collected from these online platforms would allow the merged entity to implement personalised promotion strategies, thereby having a competitive advantage to such an extent that the combined entity's competitors would no longer be able to compete effectively. The HCC eventually cleared the concentration with behavioural remedies, which included, inter alia, the obligation by Delivery Hero (i) not to tie the online intermediation services for food ordering with the online reservation services in restaurants when offered to business users; (ii) not to provide special discounts to business users; and (iii) not to use end user data collected from its platform in order to implement personalised promotion strategies.

It is also often the case that the HCC accepts both structural and behavioural remedies. For example, in 2017, the HCC accepted both structural and behavioural measures when granting clearance to the acquisition by supermarket Sklavenitis of sole control over the Marinopoulos supermarket chain. With respect to the structural measures, the acquiring company undertook to divest 22 supermarket stores within nine months from the publication of HCC decision (HCC Decision 637/2017). With respect to behavioural remedies, the acquiring company undertook to continue the commercial co-operation with Marinopoulos' local suppliers and other mutual suppliers for a period of three years commencing from the publication of the HCC decision. Likewise, in 2018, the HCC cleared the acquisition of Hellenic Seaways by Attica Group (HCC Decision 658/2018 – Hellenic Seaways/Attica Group), subject to both behavioural and structural commitments. As per the commitments undertaken, the Attica Group was bound not

to increase ticket prices in certain itineraries, to proceed with the divestiture of certain boats, add routes to certain island connections, and to facilitate the entry of competitors in the relevant markets.

5.3 Legal Standard

Similar to the EC's practice, the HCC deems the proposed remedies to be acceptable when these are:

- appropriate;
- comprehensive;
- of a lasting character; and
- capable of being implemented effectively without requiring further medium- or long-term monitoring mechanisms and heavy HCC involvement.

The purpose of the remedies would be to ensure that the competition concerns arising from the concentration are being removed. Thus, there is often pushback for behavioural remedies.

5.4 Negotiating Remedies With Authorities

Until the modification of the Greek Competition Act (see **1.1 Merger Control Legislation**), remedies could only be proposed by the parties during the Phase II review process. However, under the current Greek merger control regime, remedies can be proposed and submitted both under the Phase I and the Phase II review process. In particular, remedies should be submitted within:

- 20 calendar days from the notification date, when remedies are proposed in Phase I; or
- 20 calendar days from the date on which the case is introduced before the HCC with the submission of the SO by the Rapporteur allotted to the case, when remedies are proposed in Phase II. Exceptionally, the HCC may

accept remedies proposed after the aforementioned deadline. In this case, the 90-day time limit for the completion of Phase II may be extended to 105 calendar days.

Under the Greek Competition Act, there is no “earliest” point in the procedure when the parties can begin negotiating remedies with the HCC. In practice, the parties would seek to start negotiating the proposed remedies with the HCC as early as possible in the process, and even before the Rapporteur issues its SO in the Phase II review.

The HCC can only impose the remedies proposed by the parties and does not have the power to impose remedies not agreed by them. In practice, however, the remedies proposed by the parties often result from unofficial discussions with the HCC, during which the HCC often guides the parties as to the type of remedies that could address the competition concerns.

5.5 Conditions and Timing for Divestitures

As analysed in **5.4 Negotiating Remedies With Authorities**, HCC Decision 779/2022 determines the content of the notification form on remedies and its accompanying documents. The latter decision sets out the information that should be included in the submission of remedies, and also includes a standard notification form for divestment remedies.

Remedies have to be implemented in accordance with the relevant merger clearance decision of the HCC, normally within a prescribed period post-completion of the transaction. To date, the HCC has issued only one decision where the divestment was imposed as a condition for clearance (HCC Decision 515/2011 – Vivartia/MEVGAL).

A divestment remedy would normally require keeping the business/asset to be divested separate until the completion of its sale. The parties will be also required to report to the HCC regarding the actions taken in order to implement the agreed remedies. If necessary, the HCC may also appoint a trustee to monitor the implementation of the agreed remedies.

If the parties do not comply with any of the agreed remedies, the HCC may revoke its clearance decision. In addition, the HCC may also impose a fine of up to 10% of the combined aggregate turnover of the participating undertakings. The relevant undertakings may also request for the modification of the agreed remedies, in the event that the circumstances significantly change. In HCC Decision 713/2020 – DIAMANTIS MASOUTIS SA/PROMITHEFTIKI SA, the HCC accepted the modification-replacement of the agreed remedies (as imposed in HCC Decision 665/2018) due to exceptional financial market conditions emerging from the COVID-19 outbreak.

5.6 Issuance of Decisions

HCC decisions that either clear (without remedies), clear with remedies or prohibit a concentration, are notified to the parties within the prescribed time limits (ie, 30 calendar days for Phase I and 90 or 105 calendar days for Phase II). A non-confidential version of the HCC decision is also published on HCC website and on the Greek Government Gazette.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The HCC has not, to date, required remedies or prohibited transactions as regards foreign-to-foreign transactions.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

An HCC clearance decision covers any ancillary restraints that are directly related to, and necessary for, the implementation of the concentration, such as long-term service agreements, non-compete clauses, etc. The HCC examines such restrictions on the basis of the EC's Notice on ancillary restrictions.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Under the Greek Competition Act, third parties, including inter alia customers, and competitors can play an important role in the assessment of a notified concentration.

First, when the HCC conducts its market testing in order to assess the competitive conditions in the relevant markets, it sends requests for information to third parties, the opinion of which may be critical for the assessment of the transaction.

Moreover, a summary of the notified concentration, including the undertakings concerned, the form of control acquired, and the relevant markets, is published in a national daily financial newspaper, as well as on the HCC website, within five working days of the submission of the notification to the HCC. Within 15 calendar days from the publication of the announcement of the proposed concentration in the newspaper, any interested third party may submit comments or provide information regarding the notified concentration to the HCC.

Furthermore, any third party establishing a legitimate interest may intervene during the HCC proceedings by submitting written pleadings at least 30 calendar days prior to the HCC hearing.

In addition, third parties may be invited by the HCC to the hearing before it during the Phase II investigation, provided that the HCC considers that their participation will be essential for the examination of the case and contribute to ascertaining the truth.

Finally, third parties are also entitled to appeal against HCC decisions before the Administrative Court of Appeal of Athens within a period of 60 calendar days from the publication of the HCC decision, provided that they establish a legitimate interest.

7.2 Contacting Third Parties

Third parties are a source of information and evidence for the HCC in relation to the assessment of a proposed concentration. In particular, the HCC may, when considered necessary, contact third parties as part of its review process by sending written questionnaires to third parties, such as competitors, customers and consumer organisations. These questionnaires should be replied to within at least five calendar days and there are fines in case of non-compliance and for providing inaccurate or misleading information (see also 3.6 Penalties/Consequences of Incomplete Notification and 3.7 Penalties/Consequences of Inaccurate or Misleading Information). In the same manner, the HCC also typically sends written questionnaires to third parties regarding the sufficiency of the proposed commitments and their ability to eliminate the competition concerns raised by the concentration.

7.3 Confidentiality

HCC decisions are published both on the HCC website and the Greek Government Gazette. The HCC publishes the non-confidential versions of its decisions, meaning that the parties' commercially sensitive information, including business secrets, are protected from disclosure.

7.4 Co-operation With Other Jurisdictions

As a member of the European Competition Network, the HCC co-operates closely both with the EC and the national competition authorities in other EU member states regarding the enforcement of EU competition law. The HCC also participates in the International Competition Network.

Over the past year, the HCC further enhanced its co-operation with other national competition authorities inside or outside the EU, by signing several memoranda of co-operation with the national competition authorities of North Macedonia, Albania, Italy, Serbia, Morocco, South Africa, Israel, Egypt and Armenia.

In order to share information with other jurisdictions, the HCC should seek relevant permission.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

HCC decisions may be appealed before the Administrative Court of Appeal of Athens. Neither the timeframe for filing the appeal nor its filing may suspend the enforcement of the HCC decision.

The judgment of the Administrative Court of Appeal of Athens may in turn be appealed before

the Council of State (ie, the Supreme Administrative Court of Greece).

8.2 Typical Timeline for Appeals

The timeline for filing an appeal against an HCC decision is 60 calendar days from its publication or, in the absence thereof, of its notification to the parties. To the best of the authors' knowledge, there are not any examples of successful appeals against HCC decisions to date.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Any third party that establishes a direct, personal and present legitimate interest regarding the clearance decision may appeal against the HCC decision before the Administrative Court of Appeal of Athens. The relevant timeframe for the appeal (60 calendar days) starts to run from the publication of the HCC decision in the Greek Government Gazette. To the best of the authors' knowledge, there has not been any successful appeal against an HCC clearance decision.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

Currently, there are no foreign direct investment (FDI) filing requirements under the Greek legal regime and therefore no filing is required. However, there is an ongoing consultative process which is expected to result in the adoption of an FDI mechanism. There are no further details available regarding the timing of the potential adoption of such a mechanism.

In addition, apart from the notification requirements under the Foreign Subsidies Regulation, which entered into force within 2023, the Greek

legal regime does not provide for any further filing requirements in relation to foreign subsidies.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

As described in **1.1 Merger Control Legislation**, in January 2022, the Greek Competition Act was modified by Law 4886/2022. Among the most important amendments is the envisaged possibility for the parties to submit remedies during the Phase I investigation (see also **5.4 Negotiating Remedies With Authorities**). Lastly, changes in the HCC's approach with respect to the definition of markets, especially in relation to digital and innovation-intensive markets, are also anticipated taking into consideration the revised market definition notice adopted by the EC in 2024.

10.2 Recent Enforcement Record

Among the 27 concentrations notified to the HCC in 2023 and 2024 (as of 22 May 2024), only two were cleared in Phase II, whereas all of them were cleared unconditionally. Hence, the HCC has not prohibited any concentration recently.

In a nutshell, from the 27 notified concentrations brought before the HCC:

- 25 were cleared in Phase I without remedies; and
- two were cleared in Phase II without remedies (HCC Decision 830/2023 – INTRAKAT SA/ AKTOR SA, HCC Decision 827/2023 – ATTICA HOLDINGS SA/ ANEK LINES SA). In HCC Decision 827/2023 – ATTICA HOLDINGS SA/ ANEK LINES SA, the HCC concluded that the conditions of the failing firm defence were fulfilled and cleared the concentration on that basis although the merger could significantly

restrict the operation of competition, in particular by creating or strengthening a dominant position, in the relevant markets for the provision of maritime transport services for passengers, cars and trucks in certain pairs of ports (Origin-Destination) in Crete and the Adriatic.

Out of the 27 notified transactions, none of them concerned a foreign-to-foreign transaction.

As regards fines and penalties that have been imposed recently for failure to notify or gun-jumping, see **2.13 Penalties for the Implementation of a Transaction Before Clearance**.

10.3 Current Competition Concerns

As described in **5.2 Parties' Ability to Negotiate Remedies**, which includes a discussion on typical remedies, the HCC has recently expressed its interest in the relationship between sustainable development and competition law and, in particular, the extent to which sustainability and environmental considerations may be taken into

account when assessing a concentration. By virtue of the above, in October 2022, the HCC launched the HCC Sustainability Sandbox platform, a supervised environment for experimentation for sustainable development (sustainability) and competition in the Greek market. Such mechanism will enable the submission (to the HCC) of business proposals aimed at enhancing the conditions for sustainability and which, in order to materialise, will require greater legal certainty in relation to competition law enforcement.

In addition, the HCC has also acknowledged as one of its policy priorities to adapt its enforcement on the basis of the developments in the digital markets space.

The HCC has also appeared to demonstrate privacy concerns and to be particularly sensitive regarding the protection of consumers' personal data (see also **5.2 Parties' Ability to Negotiate Remedies**, which includes a discussion on typical remedies).

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Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.316

- 1.1 Merger Control Legislation p.316
- 1.2 Legislation Relating to Particular Sectors p.316
- 1.3 Enforcement Authorities p.316

2. Jurisdiction p.316

- 2.1 Notification p.316
- 2.2 Failure to Notify p.317
- 2.3 Types of Transactions p.317
- 2.4 Definition of "Control" p.317
- 2.5 Jurisdictional Thresholds p.318
- 2.6 Calculations of Jurisdictional Thresholds p.318
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.318
- 2.8 Foreign-to-Foreign Transactions p.319
- 2.9 Market Share Jurisdictional Threshold p.319
- 2.10 Joint Ventures p.319
- 2.11 Power of Authorities to Investigate a Transaction p.319
- 2.12 Requirement for Clearance Before Implementation p.319
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.319
- 2.14 Exceptions to Suspensive Effect p.320
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.320

3. Procedure: Notification to Clearance p.320

- 3.1 Deadlines for Notification p.320
- 3.2 Type of Agreement Required Prior to Notification p.320
- 3.3 Filing Fees p.320
- 3.4 Parties Responsible for Filing p.320
- 3.5 Information Included in a Filing p.321
- 3.6 Penalties/Consequences of Incomplete Notification p.321
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.321
- 3.8 Review Process p.322
- 3.9 Pre-notification Discussions With Authorities p.322
- 3.10 Requests for Information During the Review Process p.322
- 3.11 Accelerated Procedure p.322

4. Substance of the Review p.323

- 4.1 Substantive Test p.323
- 4.2 Markets Affected by a Transaction p.323
- 4.3 Reliance on Case Law p.323
- 4.4 Competition Concerns p.324
- 4.5 Economic Efficiencies p.324
- 4.6 Non-competition Issues p.324
- 4.7 Special Consideration for Joint Ventures p.324

5. Decision: Prohibitions and Remedies p.325

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.325
- 5.2 Parties' Ability to Negotiate Remedies p.325
- 5.3 Legal Standard p.325
- 5.4 Negotiating Remedies With Authorities p.325
- 5.5 Conditions and Timing for Divestitures p.326
- 5.6 Issuance of Decisions p.326
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.326

6. Ancillary Restraints and Related Transactions p.326

- 6.1 Clearance Decisions and Separate Notifications p.326

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.326

- 7.1 Third-Party Rights p.326
- 7.2 Contacting Third Parties p.327
- 7.3 Confidentiality p.327
- 7.4 Co-operation With Other Jurisdictions p.327

8. Appeals and Judicial Review p.327

- 8.1 Access to Appeal and Judicial Review p.327
- 8.2 Typical Timeline for Appeals p.327
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.327

9. Foreign Direct Investment/Subsidies Review p.328

- 9.1 Legislation and Filing Requirements p.328

10. Recent Developments p.328

- 10.1 Recent Changes or Impending Legislation p.328
- 10.2 Recent Enforcement Record p.328
- 10.3 Current Competition Concerns p.328

Bán, S. Szabó, Rausch & Partners is an independent full-service Hungarian law firm whose clientele primarily consists of Hungarian and foreign/international companies. Its practice includes mergers and acquisitions (M&A), advice in regulatory matters, competition law, real estate, banking and financing and energy law, as well as a general corporate law practice. The firm's office was established in 1997 following the reorganisation of the Budapest office of Shearman & Sterling. Between 2004 and 2014,

the office operated "in co-operation with" Gleiss Lutz, a German-based reputable international law firm. Currently, Bán, S. Szabó, Rausch & Partners is entirely independent, working with multiple international law firms (with some of them on a best-friend basis). Its office is a member of IBLC, an international alliance of boutique law firms. The firm has eight partners, several qualified Hungarian associated attorneys, and trainee lawyers.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition as modified several times since its enactment (the “Act”) regulates merger control issues, among other things. The Act applies to all mergers which do not meet the EU notification thresholds under the EU merger control regulations.

The president of the Hungarian Competition Office and the chairman of the Competition Office regularly issue joint interpretations of the Act, the most relevant to merger issues being guidance No 8/2017 (as modified), No 2/2023, No 3/2023 and No 4/2023.

1.2 Legislation Relating to Particular Sectors

There are several laws regulating foreign investments in Hungary, though discussion thereof would be beyond the scope of this article. These laws regulate other aspects of a transaction and do not relate to questions of merger control.

1.3 Enforcement Authorities

The authority in charge of merger control and other competition and antitrust issues is the Office of Economic Competition (the “Competition Office”).

2. Jurisdiction

2.1 Notification

Notification is compulsory if the planned transaction involves at least two unrelated parties with aggregate net sales revenue over HUF20 billion, in such a way that each has a separate net sales revenue of more than HUF1.5 billion. There are a few exemptions from the basic rule of obligatory clearance, such as:

- where the government may exempt certain transactions from public interest due to national strategy, especially in order to maintain workplaces or supply sources;
- for acquisitions carried out by insurance companies, financial institutions or holding companies, etc, for a temporary period of maximum one year with the goal of organising the resale of the acquired shares or assets;

- for acquisition by state-owned companies within the scope of state subsidies approved by the EU; and
- for acquisitions executed by state-owned or privately held capital funds in connection with financial transactions which became necessary due to the COVID-19 pandemic.

Notification is possible on a voluntary basis in the event that the HUF20 billion threshold is not met, but where the planned transaction involves parties with aggregate net turnover over HUF5 billion, and where it cannot be concluded with certainty that the merger will not significantly impede competition on the relevant market. This is especially the case where the merger is capable of establishing or strengthening a dominant position on the relevant market.

2.2 Failure to Notify

Failure to notify a merger whose notification was compulsory may result in the imposition of a fine – currently a maximum daily HUF300,000, calculated from the date of the transaction having closed without merger clearance. These penalties are applied by the Competition Office in one to three cases per year. The fine amount may not exceed 13% of the combined net revenue reached in the previous business year by the group companies in which the relevant company is a member.

Furthermore, if the Competition Office concludes that the transaction could not have been approved in the case of proper filing, it may order the controlling entity or the parties to reverse the illegally executed transaction – for example, by selling the business shares or business assets acquired without clearance, or by terminating the agreement establishing control or joint control, etc. The resolutions of the Competition Office are made publicly available on its website.

2.3 Types of Transactions

Transactions resulting in the concentration of companies fall under merger control regulations. Relevant transactions include the following:

- where one company merges into another previously independent company, or two previously independent companies merge with each other, establishing a new entity;
- where one or more companies jointly, directly or indirectly acquire a controlling interest in another company by purchasing its shares (or by purchasing business parts or assets of an independent company); and
- where several independent companies jointly set up a jointly controlled company, and where the new company will be capable of functioning in all respects as an independent company.

Shareholders' agreements or articles of associations establishing de facto control or joint control for one or more parties also fall within the scope of the merger regulations. Only those transactions or agreements which are executed between unrelated parties are relevant for merger control purposes. Internal reorganisations within a company group are not affected.

2.4 Definition of "Control"

Direct and indirect controls are distinguished by the Act. Direct control is established when the company:

- holds over 50% of the shares or voting rights in the company under control;
- is in the position of appointing or dismissing the majority of the executive officers; and
- based on a contract or otherwise, is authorised or is in the position to exercise major influence over the other company's decisions.

A company has indirect control over another company when the latter is controlled, independently or jointly, by one or more companies under the control of the former. Minority position in itself does not qualify as control unless other aspects as previously described establish controlling influence – eg, on a contractual basis.

2.5 Jurisdictional Thresholds

Filing of the planned transaction is required where the combined net sales revenue of all groups of companies involved in the previous business year (based on legally closed financial records) in aggregate exceeded HUF20 billion, provided that there are at least two groups of companies, whose net sales revenue in each case exceeds HUF1.5 billion.

When calculating the HUF1.5 billion net sales revenue, previously unreported acquisitions of control or other mergers between the same two company groups executed during the last two years before the current transaction also need to be taken into account. Where the above thresholds are not met, but it is not apparent that the concentration does not significantly reduce competition in the relevant market, there is a possibility for voluntary reporting, provided that the combined net sales revenue of the company groups involved exceeds HUF5 billion.

The jurisdictional threshold is the same in each sector. Nevertheless, the basis of the calculation differs in certain sectors – for example, the following shall be taken into account:

- for insurance companies, the amount of the gross insurance premium;
- for investment service providers, the revenue from investment services; and
- for stock exchanges, the annual fee paid by the traders to the exchange.

In the event of a merger of financial institutions, and depending on the type of the financial activity, the following must be calculated:

- interest or similar income;
- income from securities;
- commissions received;
- net profit on financial operations; or
- other operating income.

When calculating the net revenue, the revenue deriving from sales on the Hungarian market needs to be considered.

2.6 Calculations of Jurisdictional Thresholds

Jurisdictional threshold is calculated in Hungarian forints, the Hungarian currency. Sales and assets booked in foreign currency have to be transformed into Hungarian forints on the official exchange rate of the National Bank of Hungary on the last business day of the last business year legally closed by the company. In the event of acquiring control over assets or business parts, the net revenue deriving from the use of the assets or generated by the business part in question needs to be taken into account.

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

When calculating the jurisdictional threshold, the combined net sales revenue in the last business year for each relevant company needs to be calculated. A company is relevant if it qualifies as a direct participant or as an indirect participant, including those companies which are under joint control by a direct or indirect participant (calculating only 50% of the net revenue of these jointly controlled companies).

The revenue of the company which, as a result of the transaction, will lose control over the target company, as well as of the companies controlled by this company (except the target company), will not need to be taken into account when calculating the threshold figure. Changes in the business during the reference period (such as other acquisitions, divestments or business closures that take place after the notification) are not relevant for the calculation of the jurisdictional threshold, but their economic effects in the ongoing clearance proceedings are investigated and reflected in the final decision of the Competition Office.

2.8 Foreign-to-Foreign Transactions

Foreign companies are not exempted from filing in Hungary based merely on the fact that they do not have a registered seat or assets in Hungary. For foreign-to-foreign transactions, filing has to be made in Hungary only if the relevant companies' aggregate net sales revenue deriving from sales on the Hungarian market exceeds the jurisdictional threshold, regardless of whether they have a company registered or assets held in Hungary.

2.9 Market Share Jurisdictional Threshold

The Hungarian jurisdictional threshold is not market share-based.

2.10 Joint Ventures

Joint ventures become relevant for merger clearance if two or more companies, due to a contractual arrangement or otherwise, exercise joint control over another company. This may be the case for a voting agreement, according to which, the companies, regardless of their ownership ratio, can pass resolutions or appoint or dismiss officers of the company together only, or can assert major influence over the decisions of

the other company. Furthermore, joint ventures involve merger laws if two or more independent companies establish a new company that will be capable of fully functioning.

2.11 Power of Authorities to Investigate a Transaction

The Competition Office may initiate an administrative procedure for investigating the circumstances of an unreported merger to establish whether the merger qualifies as a concentration that should have been notified mandatorily. In this case, the statute of limitations is five years calculated from the closing of the unreported transaction.

For concentrations that might have been reported voluntarily, the Competition Office may initiate an investigation within six months of the closing of the transaction.

2.12 Requirement for Clearance Before Implementation

For concentrations that must be reported mandatorily, the implementation of the transaction must be suspended until clearance of the Competition Office is passed. No suspension requirement applies for concentrations that may have been reported voluntarily.

2.13 Penalties for the Implementation of a Transaction Before Clearance

For concentrations that must be reported mandatorily, the Competition Office may impose a fine in the event of an early closing, the maximum amount of which may be HUF300,000 per each day of delay. These penalties are applied by the Competition Office in one to three cases per year.

For concentrations that may have been reported voluntarily, the Competition Office may not

impose any fine if the transaction is closed without clearance. However, in both cases, if the transaction could not have been approved, the Competition Office may order the parties to reverse the transaction – for example, by obliging the purchasing party to sell shares or assets of the target company or the parties to terminate the joint control established illegally. Decisions of the Competition Office, including these types of decisions, are made public.

2.14 Exceptions to Suspensive Effect

For mandatory notifications, there are no general exceptions for early closing. However, the Competition Office, upon the well-reasoned request of the filing party and taking into account all relevant factors of the planned transaction and the effect of the transaction on the market circumstances, may allow the requesting party to exercise its control before the clearance is made available, especially in those cases when the exercise of control is necessary for protecting the investment value of the petitioner. This may not result in the implementation of the transaction before the clearance is made, with the parties having to find another method of arrangement for the exercise of controlling interest.

The applicant must file for this request in writing within five days from the resolution of the Competition Office on commencing the merger clearance procedure, and must describe in detail to the authority the circumstances which make the exercise of such early control necessary, as well as describe the method by which such exercise of control is planned. The petition also has to include plans for reversing the situation in the future in case no clearance is provided.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

See 2.14 Exceptions to Suspensive Effect.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

The notification must be filed following the earliest date of the following events:

- entering into the transaction agreement;
- publication of the public bid; or
- acquiring control.

3.2 Type of Agreement Required Prior to Notification

Typically, filing for clearance is made based on a binding written agreement of the parties. Nonetheless, filing is also possible based on a good faith decision of the parties. Such intention must be proved to the authority – for example, by presenting a signed letter of intent or pre-contract.

3.3 Filing Fees

The filing fee for a simplified clearance is HUF1 million. If the clearance is issued in a “phase-one” investigation, the fee is in aggregate HUF4 million (in which case, HUF3 million has to be paid in addition to the HUF1 million already paid).

Finally, if the clearance is issued as a result of “phase-two” proceedings, the fee is HUF19 million (in which case, HUF18 million has to be paid in addition to the HUF1 million already paid).

3.4 Parties Responsible for Filing

For mergers, joinders and public bids, the direct participant of the transaction has the obligation to file for merger clearance. In all other cases

(eg, acquisition of shares or assets) the party acquiring control or its controlling company is under the filing obligation.

3.5 Information Included in a Filing

In cases of a merger that does not give rise to any competitive concerns (the parties are not active on overlapping and vertically affected markets, etc), the filing must be performed by filling out a simplified notification made available on the Competition Office's website. The questions relate to:

- the introduction of the parties and their group companies;
- a description of the planned transaction and the market situation;
- a definition of the relevant market, and presenting market share data of the participants and the competitors;
- a description of the market situation following the accomplishment of the transaction; and
- a listing of the most important contractual partners of the petitioner and the target company, on both the supply and the sale side, etc.

In all other cases, the parties are required to complete a more complicated notification form where, if it cannot be concluded with certainty that the merger will not significantly impede competition on the relevant market, complex market analyses are to be provided, and the petitioner must describe the benefits and the potential disadvantages of the merger.

The agreement relevant to the transaction (eg, the purchase agreement) needs to be filed. The language for the proceedings is Hungarian. Documents in English may be filed in the English language; nevertheless, the case examiner of the Competition Office may order filing of a Hungar-

ian translation or a summary of the document(s) in Hungarian.

3.6 Penalties/Consequences of Incomplete Notification

If the filing is incomplete, the simplified procedure does not apply, and the case examiner opens a formal investigation and may request further documents, additional information and the answering of questions regarding the parties, the transaction and the market situation. The examiner sets a timeframe for the provision of the additional information. In practice, it is likely that for a full investigation, the examiner will request further documents and data from the petitioner.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The examiner, in agreement with the Competition Office, commences an investigation procedure when it is likely that the petitioner presented an important fact in a misleading manner to the authority in the simplified proceedings, and as a result of which the simplified clearance certificate was issued without opening investigation proceedings.

If the Competition Office already issued a clearance resolution following a full investigation, and later it becomes likely that such resolution was based on misleading information, the examiner, in agreement with the Competition Office, commences new investigation proceedings for the reinvestigation of the case – in these proceedings, the Competition Office may withdraw the previously issued clearance resolution.

Furthermore, the Competition Office may impose a fine on the petitioner or another person who negligently (or deliberately) provided misleading

data or information in the clearance proceedings.

3.8 Review Process

Within eight days following the filing and payment of the procedural fee of HUF1 million, the case examiner will order the commencement of the clearance proceedings if the filing is incomplete or if it cannot be concluded with certainty that the merger will not significantly impede competition on the relevant market. When no further investigation procedure is necessary, within this eight-day period, the case examiner, in agreement with the Competition Office, closes the case and issues a certificate showing that the clearance procedure is not necessary (simplified clearance).

If the clearance proceeding is initiated within the foregoing eight-day period, the case examiner may request additional documents and data from the parties and third persons affected by the merger and, based on its findings, prepares the investigation report for the Competition Office. The Competition Office may request a further investigation from the examiners' team or may proceed to prepare the written document summarising its preliminary findings, which will be sent to the parties. This has to include the facts, the basic interpretation of the situation, and the planned actions or resolution of the Competition Office.

The parties must be provided with sufficient time to respond to the document. The Competition Office, ex officio or upon the request of the parties, may hold a hearing, and then passes its resolution. No preliminary findings document or hearing are necessary if the Competition Office allows the merger unconditionally.

The clearance procedure's timeframe depends on the case's complexity. If the clearance proceeding was initiated because the filing was incomplete, but the investigation does not prove any significant impediment of the competition on the relevant market due to the concentration, the Competition Office issues its clearance within 30 days (this term may be extended for an additional 20 days). In all other cases, the timeframe for the clearance proceedings is four months, but this term may be extended for an additional two months.

3.9 Pre-notification Discussions With Authorities

The petitioner(s) may request a pre-notification discussion from the Competition Office in order to clarify the scope of data, information and documents required to be filed in the given case. Any document, information and data provided by the parties in this phase to the Competition Office shall be treated as confidential and may be used exclusively for the purposes of the pre-notification discussion.

3.10 Requests for Information During the Review Process

The examiner or the Competition Office may request further information, data or provision of documents throughout the proceedings. For smaller companies which do not have up-to-date market information available on hand, provision of information on market share of competitors and other market-related information might prove especially difficult. In each case, when the examiner requests the provision of additional information from the parties or third persons, the lapse of procedural deadlines is suspended.

3.11 Accelerated Procedure

There are no regulations available to expedite the investigation and the clearance proceed-

ings. If the planned transaction does not raise any concentration concerns and the examiner is of the view that not even an investigation of the merger is necessary, the examiner, in agreement with the Competition Office, may issue a clearance certificate within eight days from the date of the filing.

Consequently, the only quick clearance possibility available is in those cases where, based on the market data, there are absolutely no concentration concerns in connection with the transaction and not even the commencement of an investigation proceeding is necessary.

4. Substance of the Review

4.1 Substantive Test

The substantive test is basically the “SIEC test”, according to which concentrations that would lead to a significant impediment of effective competition in the relevant market, especially where the merger is capable of establishing or strengthening a dominant position, are to be prohibited.

4.2 Markets Affected by a Transaction

The Competition Office investigates the horizontal, vertical and portfolio (or conglomerate) effects of the concentration. In addition, the Competition Office examines whether the merger can establish or strengthen a dominant position on any relevant market or a part of it.

A merger has horizontal effects if at least one market exists in which both parties are active.

A merger has vertical effects if at least one market exists in which one of the merging parties is active as a seller while the other is a buyer.

The portfolio effect arises from the increase in the range of goods produced (distributed) by the merged entity. This may lead to adverse competitive effects when the producers (distributors) of complementary goods (purchased by the same customers) merge.

A market is considered horizontally affected if the combined market share of the merging parties exceeds 20%.

A market is considered vertically affected if one of the merging parties is active as a seller while the other is a buyer, and either the buyer or the seller has a market share in excess of 30%.

Finally, a market is affected by portfolio (conglomerate) effects if the combined market share of the merging parties exceeds 30%.

In the case of post-merger market shares below the above-mentioned thresholds, competitive concerns are deemed unlikely, precluding the significant impediment of effective competition in the relevant market.

The concept of economic dominance is complex, and assessing its existence or a significant reduction of competition requires a comprehensive analysis of the market situation and operating conditions of the undertaking concerned. In any case, the Competition Office considers a market share of less than 25–30% to be the threshold below which a single dominant position is unlikely.

4.3 Reliance on Case Law

The Competition Office regularly relies on the decisions of the European Commission, especially in connection with market definitions.

4.4 Competition Concerns

The Competition Office examines:

- the structure of the affected markets;
- the existence of potential competition in the affected markets;
- the supply and sales opportunities;
- the costs, risks, technical, economic and legal conditions of entry and exit;
- the market position and strategy, economic and financial capabilities, business behaviour, and internal and external competitiveness of the merging parties; and
- the impact of the concentration on suppliers and business partners.

In addition, the Competition Office investigates the concentration's horizontal, vertical and portfolio (or conglomerate) effects and whether the merger can establish or strengthen a dominant position on any relevant market or a part of it.

In a horizontally affected market, the Competition Office carefully examines unilateral, co-ordinated, conglomerate or portfolio effects and the existence of directorate interlockings.

In a vertically affected market, the Competition Office investigates vertical concerns that result from internalising formerly external seller-buyer relations (such as price discrimination and refusal to supply) and eliminating potential competition.

In the field of portfolio (conglomerate) effects, the Competition Office analyses the potential for product tying, possible incentives for market foreclosure, and the possible lessening of the competition resulting from the accumulation of important sources or inputs (such as intellectual property, customer or other databases, etc).

4.5 Economic Efficiencies

If the merger is likely to have adverse effects, the Competition Office carefully considers the merger-related economic efficiencies or benefits. The Competition Office may, in support of the clearance, take into consideration whether the parties' post-merger production costs will decrease, provided that this cost reduction is a merger-specific result, is verifiable, and a fair share of the resulting benefits are sufficiently passed on to the consumers.

In addition, the Competition Office may also take into consideration the failing firm doctrine, provided that the parties prove that the target undertaking would go out of the market in the absence of the merger.

4.6 Non-competition Issues

The Competition Office does not take into consideration any non-competition-related issues. Mergers justified by public interest and other public policy objectives may be exempted by the government from the mandatory clearance obligation (see 2.1 Notification).

As mentioned in 1.2 Legislation Relating to Particular Sectors, several laws regulate foreign investments in Hungary. These are separate from the merger control rules.

4.7 Special Consideration for Joint Ventures

A very important technical difference from the EU rules is that if a joint venture acquires control over another undertaking, the net sales revenues of the joint venture and its parents must be considered separately.

Regarding the substantive review, the Competition Office examines the possible co-ordination between the parents as part of the qualification

of the joint venture's full functionality. Where the full functionality is established, the creation or acquisition of a joint venture is to be reviewed under the merger control substantive test, and the joint venture is presumed to be unlikely to raise any competition issues if the net sales revenue of the joint venture is under (or, in the case of a newly created joint venture, is likely to fall below) HUF150 million per year. If, however, the joint venture aims for or has the effect of the co-ordination of its parents, it is to be analysed by the Competition Office as a restrictive agreement and be permitted only if the conditions for individual exemption rules equivalent to Section (3) of Article 101 of the TFEU are met.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The Competition Office forbids the completion of the transaction if the concentration would significantly impede competition in the relevant market, especially if it would create or strengthen a dominant position. The authority issues such a decision in written form, in which it must provide detailed reasoning of its conclusion.

The resolution must contain the description of the relevant market, the market participants and an analysis of the effect of the planned transaction to the competition on the market. The reasoning of the resolution must support the argument that the concentration would significantly impede the effective competition.

5.2 Parties' Ability to Negotiate Remedies

The parties are entitled, during the investigation phase or later (before the issuance of the final

resolution), to offer remedies in order to reduce the negative effects of the transaction on the market. The petitioner may offer to sell certain entities held prior to the acquisition or certain entities purchased as a result of the transaction, or may offer to undertake certain behaviour or obligations for the future in order to mitigate the negative effects of the transaction.

The Competition Office may also initiate such undertakings during the proceedings in those cases where clearance of the transaction without remedial actions would raise competition concerns.

5.3 Legal Standard

Remedial actions are applied in those cases where the planned concentration is capable of impeding competition on the relevant market, and the Competition Office may not issue a clearance resolution unless the situation can be cured by remedial actions.

The remedial actions must be able to maintain competition following the completion of the planned transaction. The goal is to mitigate the adverse effects of the transaction on the market and protect the interests of the market participants and the consumers. Only those remedial actions and/or obligations that have been discussed with the parties and to which the relevant party agreed may be ordered by the Competition Office.

5.4 Negotiating Remedies With Authorities

The parties may already offer remedies in the filing documents, or may offer such remedial actions during negotiation with the authority. The Competition Office may also recommend the imposition of certain remedies, but in prac-

tice such remedies will be discussed with the parties during the proceedings.

5.5 Conditions and Timing for Divestitures

In most cases, the remedies have to be fulfilled before the closing of the planned transaction. In exceptional cases, the Competition Office may allow post-closing remedies in its resolution by setting a certain deadline for the fulfilment of the obligations. The parties have to keep the authorities informed about the progress and results of compliance. Where the obligations are not fulfilled by the obligor, the Competition Office may withdraw its resolution permitting the merger. In this case, the already completed transaction must be reversed.

5.6 Issuance of Decisions

Resolutions of the Competition Office are issued in writing to the parties, and are also published on the Competition Office's website. The published versions do not include data and information that the parties requested be treated as business secrets.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

No such resolutions have been issued by the Competition Office in the last three years.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Clearance decisions typically do not address ancillary agreements or restraints. However, the practice of the Competition Office in respect of ancillary restraints is substantially identical to that of the European Commission, and the Hun-

garian Competition Act specifically includes that any restraint which is ancillary to the concentration does not constitute a prohibited restriction of competition.

The parties themselves must evaluate the situation and decide whether a given ancillary arrangement can legally be undertaken based on all aspects of competition regulations. Under Hungarian law, no separate clearance procedure is available for the parties to request the official opinion of the Competition Office in a case of restraints, shareholders' agreement, etc.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third parties who might be interested in the outcome of the merger clearance (eg, competitors, suppliers and purchasers) may be invited by the Competition Office for a consultation during the merger clearance procedure. In such case, the interested third parties will be informed – without sharing any confidential information with them – on the planned merger and will be invited to express their opinion and potential concerns in connection with the planned transaction.

The interested third parties have 20 days to file with the Competition Office a written document summarising their views, concerns and recommendations in connection with the planned transaction and obligations. Third parties invited for this consultation do not qualify as parties in the proceedings, do not have access to the files (other than for answering questions and expressing their opinions and recommendations) and do not have other rights in the proceedings.

7.2 Contacting Third Parties

The interested third parties are contacted in writing by the Competition Office. They may receive a written questionnaire and are expected to respond in writing within 20 days.

7.3 Confidentiality

The Competition Office makes the fact of the notification for clearance publicly available on its website, unless the filing party requests keeping the fact of the planned transaction a business secret. Description of the transaction and other details shall not be made available to the public by the Competition Office during the clearance proceedings.

7.4 Co-operation With Other Jurisdictions

On a general level (policy matters, enforcement priorities, etc), the Competition Office participates in:

- the European Competition Network (ECN) to ensure effective and consistent enforcement of European competition law in the investigation of restrictive agreements (Article 101 TFEU), abuse of dominant position (Article 102 TFEU) and merger cases;
- the European Competition Authorities (ECA), which consists of the competition authorities in the European Economic Area (EEA); and
- the International Competition Network (ICN), which is an informal network of 141 competition authorities from 129 jurisdictions worldwide.

Regarding practical co-operation related to specific transactions, a complex case referral system operates between the Competition Office and the European Commission pursuant to Council Regulation No 139/2004. For these merger case referrals, all information of the spe-

cific transaction may be exchanged between the Competition Office and the European Commission without the prior approval of the party to whom the information relates. However, the confidentiality of information exchanged in the network (and with the competent authorities of third countries) should be safeguarded.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

In merger clearance cases, no appeal against the decision of the Competition Office to another administrative authority is possible under Hungarian law. A decision of the Competition Office might be challenged in court by filing a claim for judicial review with the Administrative Court.

8.2 Typical Timeline for Appeals

There is no deadline fixed by law for the court review process. The judgment of the Administrative Court is final and is only subject to extraordinary review by the Supreme Court of Hungary in exceptional cases. Typically, it takes a number of years to obtain a final judgment. In the case of mergers, the authors are unaware of any decision of the Competition Office successfully being brought before the court.

8.3 Ability of Third Parties to Appeal Clearance Decisions

The procedural code of the administrative courts, in principle, allows for any third party to file a petition if it proves that the challenged decision of the Competition Office “directly affects its rights or its legally protected interests”. However, the Supreme Court of Hungary has applied the rule restrictively, and in a precedent case refused the standing for a third party from initiating a court review of a merger decision based

on the sole reason that it was a competitor of the parties that the clearance decision addressed.

In any case, should any third party successfully challenge a merger clearance, the court would overturn the clearance with retroactive effect (ie, the court has no right to amend the clearance decision) and would require the Competition Office to re-examine the transaction.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

In certain segments of the industry, for the acquisition of control by a foreign company, the approval of the Minister for National Economy, and/or the Minister of the Interior is required prior to the completion of the transaction.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

Due to a modification of the Act effective since 2023, the jurisdictional thresholds have been increased to the amounts previously discussed in this article (see 2. **Jurisdiction** in particular). This was necessary due to inflation in Hungary and the devaluation of the local currency (the Hungarian forint) compared to other major currencies. In addition, a recent amendment of the Act made it clear that if only the lower threshold (aggregate net revenue above HUF5 billion) is satisfied, filing is not mandatory.

10.2 Recent Enforcement Record

Over recent years, there has been a clear tendency by the Competition Office to impose fines for implementing acquisitions without mandatory merger clearance. Depending on the individual circumstances, the fine in these cases varies between HUF50,000 and HUF300,000 for each day of delay. The Competition Office imposes the minimum fine if the parties voluntarily report the infringement and waive the right to challenge the decision of the Competition Office before the court. Most of these cases involve Hungarian firms, and no transaction has been prohibited in the last five years.

The Competition Office has applied remedies (typically pre-closing divestitures) only in some cases over the last five years – none of which involved purely foreign-to-foreign transactions.

10.3 Current Competition Concerns

Access to “Big Data” has become a growing concern in merger control review. The Act was recently amended to the effect that the Competition Office, in the review of mergers in digital markets, should specifically assess how innovation and competition are affected due to the merging parties’ increased access to competitively relevant data and their ability to aggregate large data sets.

Another notable trend in Hungarian merger control review shows the Competition Office making significant efforts towards further reducing the duration of clearance proceedings and easing administrative burdens. In line with these objectives, in 2023 the Competition Office introduced a new simplified merger notification form applicable to mergers that do not raise any competition concerns.

INDIA

Law and Practice

Contributed by:

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Contents

1. Legislation and Enforcing Authorities p.333

- 1.1 Merger Control Legislation p.333
- 1.2 Legislation Relating to Particular Sectors p.333
- 1.3 Enforcement Authorities p.333

2. Jurisdiction p.333

- 2.1 Notification p.333
- 2.2 Failure to Notify p.335
- 2.3 Types of Transactions p.335
- 2.4 Definition of "Control" p.336
- 2.5 Jurisdictional Thresholds p.336
- 2.6 Calculations of Jurisdictional Thresholds p.337
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.337
- 2.8 Foreign-to-Foreign Transactions p.338
- 2.9 Market Share Jurisdictional Threshold p.338
- 2.10 Joint Ventures p.338
- 2.11 Power of Authorities to Investigate a Transaction p.339
- 2.12 Requirement for Clearance Before Implementation p.339
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.339
- 2.14 Exceptions to Suspensive Effect p.339
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.340

3. Procedure: Notification to Clearance p.340

- 3.1 Deadlines for Notification p.340
- 3.2 Type of Agreement Required Prior to Notification p.340
- 3.3 Filing Fees p.340
- 3.4 Parties Responsible for Filing p.341
- 3.5 Information Included in a Filing p.341
- 3.6 Penalties/Consequences of Incomplete Notification p.342
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.342
- 3.8 Review Process p.342
- 3.9 Pre-notification Discussions With Authorities p.343
- 3.10 Requests for Information During the Review Process p.343
- 3.11 Accelerated Procedure p.343

4. Substance of the Review p.344

- 4.1 Substantive Test p.344
- 4.2 Markets Affected by a Transaction p.344
- 4.3 Reliance on Case Law p.345
- 4.4 Competition Concerns p.345
- 4.5 Economic Efficiencies p.346
- 4.6 Non-competition Issues p.346
- 4.7 Special Consideration for Joint Ventures p.346

5. Decision: Prohibitions and Remedies p.347

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.347
- 5.2 Parties' Ability to Negotiate Remedies p.347
- 5.3 Legal Standard p.348
- 5.4 Negotiating Remedies With Authorities p.348
- 5.5 Conditions and Timing for Divestitures p.348
- 5.6 Issuance of Decisions p.349
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.349

6. Ancillary Restraints and Related Transactions p.349

- 6.1 Clearance Decisions and Separate Notifications p.349

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.350

- 7.1 Third-Party Rights p.350
- 7.2 Contacting Third Parties p.350
- 7.3 Confidentiality p.350
- 7.4 Co-operation With Other Jurisdictions p.351

8. Appeals and Judicial Review p.351

- 8.1 Access to Appeal and Judicial Review p.351
- 8.2 Typical Timeline for Appeals p.352
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.352

9. Foreign Direct Investment/Subsidies Review p.352

- 9.1 Legislation and Filing Requirements p.352

10. Recent Developments p.352

- 10.1 Recent Changes or Impending Legislation p.352
- 10.2 Recent Enforcement Record p.353
- 10.3 Current Competition Concerns p.353

AZB & Partners offers unparalleled expertise across the spectrum of antitrust enforcement in India. The firm has been closely associated with the development and practice of competition law in India and is an acknowledged leader in the field. Its lawyers regularly interact with the Competition Commission of India (CCI) and the Ministry of Corporate Affairs. The firm was a key participant in the consultation process leading up to the framing of merger control regulations under the Competition Act, 2002, and its lawyers also acted as the counsel to the CCI in

its early litigation to overcome the initial roadblocks to its functioning. **AZB & Partners** has been involved in several landmark cases and merger filings, including the first cartel case and the first merger filing in India. The firm was invited to provide comments on the Competition (Amendment) Bill, 2022, which has now been passed; and as a special invitee to the Committee on Digital Competition Law – a committee deliberating upon the need for an ex-ante regulation in India.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The [Competition Act 2002](#) (the “Competition Act”), read with the [Competition Commission of India \(Procedure in Regard to the Transaction of the business relating to Combinations\), 2011](#) (the “Combination Regulations”), governs the merger control regime in India, which falls within the regulatory jurisdiction of the Competition Commission of India (CCI).

The CCI has published guidance notes to explain the information requirements for different types of filing, and also issued a list of FAQs that explains its position on the interpretation of the legal framework governing merger control, enabling the parties to assess notification requirements.

In addition to the CCI, the Ministry of Corporate Affairs (MCA), an important administrative arm of the government of India, is empowered to issue notifications to regulate the merger control framework in India. Last year, the CCI also published a draft of the revised Combination Regulations for public consultation, which once implemented would replace the existing Combination Regulations and would also incorporate some of the changes brought by the Competition Amendment Act, 2023 (the “2023 Amendment”).

1.2 Legislation Relating to Particular Sectors

There is no separate legislation relating to foreign transactions or any sector-specific merger control regimes in India. All such transactions are required to be assessed and notified to the CCI, based on the merger control framework prescribed under the Competition Act in India.

Other than the merger control framework, which falls within the exclusive domain of the CCI, there are other foreign investment laws (such as the Foreign Direct Investment (FDI) Policy of the Department for Promotion of Industry and Internal Trade (DPIIT) and the Securities and Exchange Board of India’s (Foreign Portfolio Investors) Regulations) and sector-specific statutory bodies that regulate foreign investment and/or govern sector-specific issues.

1.3 Enforcement Authorities

The CCI is the exclusive statutory authority empowered to enforce the provisions of the Competition Act and regulate the merger control regime in India. The CCI’s orders may be appealed before the National Company Law Appellate Tribunal (NCLAT), which is the relevant appellate authority under the Competition Act. The final appellate authority for all decisions passed by the NCLAT is the Supreme Court of India (SC).

2. Jurisdiction

2.1 Notification

Mandatory Suspensory Regime

The Indian merger control framework follows a mandatory and suspensory regime – ie, if a transaction is notifiable, the relevant parties cannot implement the transaction, or any part of it, until receipt of the CCI approval.

Any merger, amalgamation, or acquisition (of shares, voting rights, control, or assets) must be notified to the CCI if the parties (i) breach certain asset value and turnover-based thresholds (“jurisdictional thresholds”); and (ii) do not benefit from any exemptions under the Competition Act, relevant government notifications, or the Combination Regulations. The Competition

Act and the MCA prescribe exemptions to certain transactions from notification, even if they breach the Jurisdictional Thresholds.

Exemptions

Target-based/de minimis exemptions

Any transaction where the target enterprise (ie, the enterprise whose shares, voting rights, assets or control are being acquired) has either (i) assets not exceeding INR4.5 billion in India; or (ii) turnover not exceeding INR12.5 billion in India (“de minimis thresholds”), is currently exempt from the mandatory pre-notification requirement (“de minimis exemption”).

Other exemptions

The Combination Regulations exempt certain categories of transactions from the mandatory notification requirement. These exemptions are set out below.

- Minority (below 25% shares or voting rights), non-controlling investments made in the acquirer’s ordinary course of business (OCB) or solely for investment purposes (SIP):
 - (a) OCB – combinations are considered to be in the ordinary course of business if the purchase and sale of securities is done solely with the intent to benefit from the price movement of securities ([TPG Growth V SF Markets Pte. Limited](#)); and
 - (b) SIP – an acquisition below 10% of shares or voting rights where the acquirer (i) does not have a right or intention to nominate a director on the board of directors of the target, (ii) does not intend to participate in the affairs or management of the target and (iii) has the ability to exercise only such rights as are exercisable by the ordinary shareholders, is deemed to be considered as “solely for investment purposes” and is therefore exempt from noti-

fication (further, an acquisition above 10% and below 25% (that does not benefit from the “deemed” explanation) can also be considered as “solely for investment purposes”, if such an acquisition does not lead to any control being acquired (including through acquiring a director/observer right) and if such acquisition is not strategic in nature).

- Creeping acquisitions of between a 25% and 50% shareholding of the target, provided there is no change of control.
- Acquisition of shares/voting rights pursuant to a bonus issue, stock split, consolidation, buy-back or rights issue (not leading to the acquisition of control).
- Certain intra-group transactions (except in cases where the transaction results in transfer from joint to sole control).

The Draft Exemption Rules

Notably, the MCA has recently published the Draft Competition Commission of India (Exempted Combination) Rules, 2024 (the “Draft Exemption Rules”), inviting public comments and outlining 12 categories of transactions that will be exempt from the CCI-approval requirement. Some notable changes under the Draft Exemption Rules include the following.

- Providing clarity on the scope of OCB, which is to be restricted to acquisitions:
 - (a) when made by an underwriter or a stock-broker, below 25% shares or voting rights in a target; and
 - (b) when made by a mutual fund company, below 10% shares or voting rights of a target.
- Modifying the explanation of SIP to limit it to be applicable to transactions where:
 - (a) the acquirer does not get the right to appoint a director/observer on a target;

- (b) the acquirer does not get the right to access commercially sensitive information; and
- (c) there are no overlaps between the business activities of the acquirer group (including its affiliates) and the target (including its affiliates), except where acquisition is below 10%; and
- Codifying CCI's existing practice for exempting demergers where the resulting company issues proportionate shares to the demerged company.

These provisions are only in their draft form, subject to change based on the inputs received from public consultation.

2.2 Failure to Notify Gun-Jumping

The Competition Act empowers the CCI to penalise parties that are (i) obliged to notify a combination to the CCI and fail to notify such a combination, and/or (ii) implement or partly implement a combination before the CCI clearance (“gun-jumping”).

The CCI may impose a penalty of up to 1% of the combined turnover or value of assets of the parties to a transaction (whichever is higher) for gun-jumping.

Practical implications

To date, the CCI has imposed gun-jumping penalties on parties in 59 cases. Typically, the gun-jumping penalties have ranged between INR500,000 and INR50 million. The highest penalty imposed for gun-jumping so far is INR2 billion, in a case which also involved an allegation of material non-disclosure ([Amazon/Future](#)). Since the CCI uploads the public version of all gun-jumping penalty decisions on its website (after giving due consideration to the confiden-

tiality claims by the parties), all penalties are publicly available.

2.3 Types of Transactions

All combinations – ie, acquisitions (of shares, voting rights, control or assets), mergers, and amalgamations – whether domestic or international, that meet the jurisdictional thresholds and are not otherwise exempt from notification are required to be notified to the CCI. That said, transactions involving internal restructuring or reorganisation within the same group are exempt from the notifiability requirements provided that they meet the relevant tests prescribed under the intragroup exemption.

The Combination Regulations exempt the following intragroup transactions:

- an acquisition 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% of the shares or voting rights of the other enterprise, and/or a merger or amalgamation of enterprises in which more than 50% of the shares or voting rights in each of such enterprises are held by enterprise(s) within the same group, provided that the transaction does not result in transfer from joint control to sole control.

Separately, transactions not involving shares or assets may also be notifiable if they relate to the acquisition of “control”. Any commercial agreement between parties (not limited to the shareholders’ agreement) that in effect confers “control” is considered as a reportable acquisition to the CCI, provided that it meets the jurisdictional threshold and is not otherwise exempt.

2.4 Definition of “Control”

Transactions involving an acquisition or change in control are required to be notified to the CCI. Under the Competition Act (as amended), “control” has been defined as the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions by:

- one or more enterprises, either jointly or singly, controlling the affairs or management of another enterprise or group; or
- one or more groups, either jointly or singly, controlling the affairs or management of another group or enterprise.

Even prior to the 2023 Amendment, the CCI interpreted “material influence” in its decisional practice, to be the lowest level of control, and which can be exercised through special rights/ veto rights, status and expertise of an enterprise or person, board representation, structural/ financial arrangements, etc. In fact, per the CCI, material influence can also be exercised by even a single investor being present on the board of an enterprise – eg, as a result of the investor’s industry expertise, which may lead to its advice being followed by the remaining board members ([Ultratech Cement](#)) – or by simply having a board observer right.

Additionally, in its decisional practice, acquisition of affirmative voting rights over matters including the (i) approval of the business plan, (ii) commencement of new line of business, (iii) discontinuing any existing line of business, (iv) change in capital structure, (v) appointment or termination of key managerial personnel, (vi) amendment to charter documents (articles of association and memorandum of association), (vii) approval of annual budget, (viii) appointment or change of auditors, and (ix) change in divi-

dend policy, have been considered (on a bundled basis) by the CCI to be control conferring.

2.5 Jurisdictional Thresholds

If the parties to an acquisition, merger or amalgamation meet the jurisdictional thresholds (see **2.1 Notification**), then such a transaction becomes notifiable to the CCI. The jurisdictional thresholds take into account the combined asset value or the turnover of:

- the acquirer(s) and the target(s) (the “parties test”); or
- the acquirer’s group and the target(s) (the “group test”).

The jurisdictional thresholds currently applicable in India are as set out below:

- for the Indian parties test, either the acquirer, the target or both have INR25 billion (around USD240 million) in assets or INR75 billion (around USD900 million) in turnover in India;
- for the Indian group test, the group to which the target will belong will have INR100 billion (around USD1.2 billion) in assets or INR300 billion (around USD3.6 billion) in turnover in India;
- for the worldwide enterprise test, either the acquirer, the target or both have USD1.25 billion in worldwide assets, with INR12.5 billion in India (around USD150 million), or USD3.75 billion in worldwide turnover, with INR37.5 billion (around USD450 million) in India; and
- for the worldwide group test, the group to which the target will belong will have USD5 billion in worldwide assets, with INR12.5 billion (around USD150 million) in India, or USD15 billion in worldwide turnover, with INR37.5 billion (around USD450 million) in India.

These jurisdictional thresholds are sector-agnostic.

Deal Value Threshold

The 2023 Amendment introduces a “deal value” test as an alternative jurisdiction threshold. Under this threshold, a transaction will be notifiable to the Authority where its value exceeds INR20 billion (around USD240 million) and the target has “substantial business operations” in India. While assessing the value of the transaction, the authority will include every valuable consideration, whether direct or indirect, or deferred.

Further, the manner of determination of “substantial business operations” will be introduced by way of subsequent regulations by the CCI. The provisions pertaining to the Deal Value Threshold are yet to be enforced.

2.6 Calculations of Jurisdictional Thresholds

The Competition Act lays down the methodology to calculate asset value as well as turnover.

Assets

Asset value is determined on the basis of the book value of the assets of the relevant party, as shown provided in its audited financial statements of the financial year immediately preceding the financial year in which the notified transaction falls. The value of assets includes (i) brand value; (ii) value of goodwill; and/or (iii) value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout-design or other similar commercial rights (as reduced by depreciation).

Turnover

The value of turnover includes the value of sale of goods or services (ie, only revenue from operations, excluding intra-group sales, indirect taxes, and trade discounts), as provided in a party’s audited financial statements of the financial year immediately preceding the financial year in which the notified transaction falls. The Amendment Act excludes all amounts generated through assets or business from customers outside India from the ambit of turnover. As such, it includes a customer location test in the calculation of turnover. This new definition of turnover is yet to come into force.

For calculating group assets and turnover, the value of entire assets and turnover of a jointly controlled enterprise are included. The CCI has rejected the principle of apportionment when computing turnover in the [Investcorp case](#) observing that even if an enterprise acquires material influence over another entity, the whole of the financials of the target enterprise would be taken into consideration.

Methodology of Conversions

To convert turnover or asset value booked in a foreign currency, the relevant exchange rate is the average exchange rate, as published by Financial Benchmarks India Pvt. Ltd., over the preceding six months.

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

The combined value of assets and turnover of the parties to the transaction (ie, the acquirer and the target, or the merging parties) is required to calculate the jurisdictional thresholds. If the combined asset value or turnover of the parties does not meet the parties test, then the combined asset value or turnover of the acquirer

group and the target is required to be considered. The asset value and turnover of the seller entity is not required to determine jurisdictional thresholds. See **2.5 Jurisdictional Thresholds** for further detail.

The Competition Act defines “group” to mean two or more enterprises where one enterprise is, directly or indirectly, in a position to:

- exercise 26% or more of the voting rights in the other enterprise;
- appoint more than 50% of the members of the board of directors in the other enterprise; or
- control the management or affairs of the other enterprise.

If the parties to a transaction have completed a separate acquisition or divestment during the reference period, in practice, the parties make appropriate adjustments in their asset and turnover values to conduct a notification assessment, although there is no formal guideline issued by the CCI on this matter.

2.8 Foreign-to-Foreign Transactions

All foreign-to-foreign transactions are subject to merger control rules in India provided they meet the jurisdictional thresholds. The jurisdictional thresholds are calculated in a way to test the effects of foreign transactions in India before terming it notifiable. For example, a foreign-to-foreign transaction where the combined turnover of the parties was more than USD3 billion worldwide, but less than INR30 billion (around USD360 million) in India, may not be notifiable.

Since foreign-to-foreign transactions are notified only if they breach the jurisdictional thresholds (which are supplemented by an India-specific threshold), the parties must have a business

presence in India (not limited to physical presence). Without business presence in India, the India-specific jurisdictional threshold will not be met and the transaction will not be notifiable.

Separately, it is also essential for the target to have a business presence in India for a transaction to be notifiable. If the target has less than prescribed (or no) sales or less than prescribed (or no) assets in India, the transaction will be exempt from notification under the de minimis exemption.

2.9 Market Share Jurisdictional Threshold

The Competition Act does not prescribe a market share-based jurisdictional threshold for filing merger notifications in India.

However, if the transaction is reportable, the Combination Regulations allow the parties to file a notification before the CCI either under a short form (Form I) or a long-form (Form II). The post-transaction combined market shares of the parties is a relevant matrix to determine the type of form that a party files before the CCI. A notification is usually filed through a Form II if:

- the parties share horizontal overlaps, and the post-transaction market share of the parties is more than 15% in the relevant market; or
- the parties share vertical overlaps, and their individual/combined market share is more than 25% in the relevant market.

2.10 Joint Ventures

The Competition Act does not create any specific rule or exception to govern joint ventures (JVs). Setting up a greenfield JV may typically benefit from the target-based exemption, unless the JV partners contribute assets to the JV. On the other hand, entry of a new partner in a brownfield JV

needs to be evaluated on the basis of standard merger control rules, as described throughout this article, as such a transaction would typically involve the acquisition of shares, voting rights, control, or assets.

2.11 Power of Authorities to Investigate a Transaction

The CCI is empowered to investigate and impose sanctions on notifiable transactions (ie, transactions that meet the jurisdiction thresholds and are not otherwise exempt) that are not notified before the CCI. However, the CCI can neither investigate nor sanction transactions that are non-notifiable. Mere apprehension that a non-notifiable transaction may cause appreciable adverse effect on competition (AAEC) in the market is not a sufficient threshold for the CCI to investigate a transaction ([PVR/INOX](#)).

However, post-facto, if the transaction leads to any entity engaging in any anti-competitive conduct, the CCI is empowered to examine the conduct under the relevant provisions sanctioning anti-competitive (horizontal and vertical) agreements and abuse of dominance.

If reportable transactions are not notified to the CCI, the Competition Act empowers the CCI to investigate such combinations within a period of one year from the date of closing of such transaction, in addition to initiating gun-jumping proceedings.

2.12 Requirement for Clearance Before Implementation

The Indian merger control regime is a suspensory one. The parties cannot put the transaction, or any part of it, into effect before the earlier of (i) receiving a clearance from the CCI or (ii) the expiry of 210 calendar days (excluding clock stops, if any) from the date of notification. The

standstill period commences from the date of execution until the CCI's approval is received. If a transaction or any of its part is implemented during the standstill period, the CCI may initiate an investigation for gun-jumping and impose sanctions on the notifying party(ies).

Notably, the 2023 Amendment has shortened this statutory deadline for the CCI to grant approval for a filing to 150 calendar days; however, the relevant provision of the 2023 Amendment is yet to be notified.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Please refer to 2.2 **Failure to Notify** which is equally applicable to this query. The Competition Act prescribes the same rules on penalty for implementation (or partial implementation) of a combination before the CCI clearance, as it does for failure to notify a reportable transaction.

This legal framework applies to foreign-to-foreign transactions as well. For instance, in [SABIC/Clariant](#), the CCI imposed a penalty of INR4 million on SABIC International Holdings B.V. for implementing the transaction before the CCI clearance. Similarly, in [Veolia/Suez](#), the CCI imposed a penalty of INR10 million on Veolia Environment S.A for not notifying a hostile takeover of a French company.

2.14 Exceptions to Suspensive Effect

At present, the Competition Act does not provide for any exception to the mandatory and suspensory merger notification regime in India, either with respect to on-market purchases or acquisition of a failing firm. However, the 2023 Amendment proposes to exempt certain combinations from the standstill obligations and allows post-facto filing, if the combination involves:

- an open offer; or
- an acquisition of shares or securities convertible into other securities from various sellers, through a series of transactions on a regulated stock exchange.

The acquirer, in either of the above cases, would:

- have to file the notification form within such time from the date of such acquisition as the CCI may prescribe through regulations; and
- be allowed to acquire shares but cannot exercise any ownership or beneficial rights or voting rights, till the CCI approves such acquisition.

That said, this provision of the Amendment Act has not been effected into law yet.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

The Competition Act does not prescribe any exceptions to any type of transaction permitting closing before the CCI clearance.

With respect to reportable foreign transactions, the parties are obliged to notify and secure CCI's approval before implementation of the global transaction.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There are no deadlines for notifying a combination. However, in the case of a reportable transaction, the parties cannot consummate any step of the transaction before the CCI's approval.

3.2 Type of Agreement Required Prior to Notification

A notifiable transaction must be notified after any of the following:

- In the case of a merger: the board of directors' approval of the proposed merger or amalgamation.
- In the case of an acquisition: the execution of any binding agreement conveying an agreement or decision to acquire control, shares, voting rights or assets.
- In the case of a hostile takeover:
 - (a) any document executed by the acquiring enterprise conveying a decision to acquire control, shares or voting rights; or
 - (b) a public announcement for the acquisition of shares, voting rights or control under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

There is no prescribed format of the binding document set out under the Indian merger control laws. It can be in the form of agreement or a binding memorandum of understanding (MoU). The MoU must comprise all the key terms of the transaction – ie, the terms of the transaction, the consideration, governance rights, etc. Further, in the case of a binding MoU, the terms set out in the subsequent definitive documents should not deviate from the terms mentioned in the MoU. A filing cannot be made on the basis of an oral agreement based on good-faith intention.

3.3 Filing Fees

Filing fees of INR2 million and INR6.5 million are applicable for filing Form I and Form II respectively. The payment of fees must be made at the time of filing and the proof of payment has to be attached with the form being filed.

The Draft Combination Regulations propose to increase the filing fees of INR3 million and INR9 million are applicable for filing Form I and Form II, respectively. These provisions are only in their draft form, subject to change based on the inputs received during public consultation.

3.4 Parties Responsible for Filing

The merging parties are jointly responsible for filing the notification form in case of a merger or amalgamation. However, in the case of an acquisition, the responsibility to notify the CCI lies with the acquirer.

3.5 Information Included in a Filing

Form I as well as the Form II prescribe a comprehensive set of details required to be included by the parties in a filing.

Information to be provided in the Form I and II includes the following:

- description of the parties to the combination;
- details of assets and turnover of the parties;
- scope of the proposed combination, including details of any inter-connected transaction and the rights arising out of such transaction;
- steps to give effect to the transaction and the economic/strategic purpose;
- value of the proposed combination;
- details of the products/services provided by the parties;
- details of horizontal overlaps (if any) – in the case of horizontal overlaps, details of the overlapping products as well as relevant products and relevant geographic markets;
- details of vertical and complementary activities of the parties;
- brief overview of the sector where the parties operate;

- market share data in terms of percentage as well as revenue generated in the overlapping segments;
- details of top five customers as well as suppliers in the overlapping segments; and
- submissions on competitive assessment of the proposed combination in the overlapping segments.

In addition to the above, Form II further requires more detailed description from the parties regarding the relevant markets. For instance, a Form II requires, in addition to a detailed competitive assessment of the combination, five years of market share information and multiple data points on market dynamics, such as barriers to entry and details of market concentration in the form of a Herfindahl-Hirschman Index (HHI), an economic tool that measures concentration levels in a market, as well as concentration ratios.

The documents to be attached while filing include letters of authorisation, copies of executed documents in support of approval of the proposed combination, financial statements, transaction documents, board presentations considered for the transaction, structure chart of the parties, pre and post-combination shareholding information, proof of payment of filing fee, declaration by the notifying parties confirming that all the requisite details and documents have been furnished in a bona fide manner, market reports, summary of the combination, and other details as necessary depending upon the nature of the filing. Additionally, the parties also need to attach an affidavit to claim confidentiality over the submissions made.

The filing must be made in the English language. The documents need to be translated into English by an approved translator before being sub-

mitted. However, no notarising or apostilling of documents is required.

3.6 Penalties/Consequences of Incomplete Notification

In the case of a materially incomplete notification, the form is invalidated; however no penalty is applicable in such cases. The parties are then required to resubmit the form in a fresh process with all the remaining details and the filing fee is accordingly adjusted.

Further, if any information or documents provided in the notice or response during the review process of a combination is found to be incomplete, the parties involved may be requested to rectify or provide the necessary information or documents in the form of a “request for information” (RFI) issued by the CCI to address the identified deficiencies. Thus, parties may amend the form if the information is not materially incomplete.

Under the Draft Combination Regulation, if a filing has been made without all the requisite information, the CCI is likely to issue a defects letter within ten business days of receipt of the filing, and parties would be given time to clear the defects. It further proposes that CCI’s statutory time frame for review (sometimes known as “the clock”) will start only once the “defects” are cleared by the parties.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Parties can face penalties of up to INR10 million if they provide inaccurate or misleading information or omit to state any material fact. The 2023 Amendment has increased this maximum penalty amount to INR50 million.

The CCI has applied penalties for supplying inaccurate or misleading penalties in practice,

and has recently levied a penalty of INR20 million (ie, INR10 million each) under two separate provisions of the Competition Act on [Amazon.com NV Investment Holdings LLC](#) for suppressing the actual scope and purpose of the combination.

3.8 Review Process

The review process takes place in two phases, namely, Phase I and Phase II. The Phase I process begins with the filing of formal notification until the CCI forms an initial view on whether a combination is likely to cause an AAEC within the relevant market in India, thereby initiating a Phase II investigation, or is of the view that the combination presents no competition concerns and thus provides for its clearance.

Under the 2023 Amendment, the timeline for the CCI to make a prima facie determination on Phase II (or approve the transaction) is 30 calendar days (as opposed to the current 30-working-day review period under the present law). Further, if the clearance is not issued or an initial order to conduct Phase II is not issued within the 30-calendar-day period, the transaction would be deemed approved under the 2023 Amendment.

If the CCI is of the initial view that a combination is likely to adversely affect competition in India, the CCI issues a show-cause notice (SCN) to the parties directing them to respond within 30 calendar days of the receipt of such notice, furnishing reasons as to why the detailed investigation in respect of such combination should not be conducted. If the parties offer upfront remedies in responding to the SCN, then the above mentioned Phase I period of 30 days is extended by another 15 days for the CCI to evaluate such remedies. If the CCI is not satisfied with the response, it initiates a detailed Phase II investigation.

Under the present law, the CCI is required to pass an order or issue clearance within 210 calendar days from the date of notification. This overall approval timeline has now been reduced to 150 calendar days under the Amendment Act; however, the said provision has not been effected into law yet.

3.9 Pre-notification Discussions With Authorities

The parties can engage in a pre-filing consultation (PFC) with the CCI to seek clarity in relation to the notification requirement or the manner in which they seek to approach disclosures in the form. The PFC process is informal and the views reflected by the CCI are non-binding.

A PFC is typically done to (i) assess whether the parties can take advantage of the benefit of a “green channel filing”; (ii) determine the nature of the Form (I or II) that must be filed if the CCI's approach on the definition of relevant market is unclear; and (iii) consider the applicability of exemptions, definition of relevant markets, interpretational issues relating to provisions of the Competition Act and the Combination Regulations, as well as any other issue depending upon the nature of the transaction.

The parties are encouraged to engage in a PFC as it serves as a tool to expedite the process of review once the ambiguities surrounding various substantive and procedural issues have been resolved before the filing.

Since the PFC is an informal process, there is no statutory mandate that specifically requires the CCI to treat the entire process as confidential. However, the general confidentiality regime prescribed under the Competition Act, read with the regulations, is extended to all PFCs in practice

and the CCI typically treats such PFC discussions as confidential.

3.10 Requests for Information During the Review Process

RFIs are a common phenomenon during the review process across both the types of notification (ie, Form I or II). The substance of an RFI depends on the competition concerns presented by the transaction, or the completeness of information provided by the parties in the notice. Such RFIs stop the review clock and the time taken by the parties to furnish the information is excluded from the review timeline.

As mentioned in 3.6 **Penalties/Consequences of Incomplete Notification**, the Draft Combination Regulation proposes that the CCI's review clock will start only once the “defects” are cleared by the parties.

3.11 Accelerated Procedure

The CCI has introduced a mechanism for fast-track approval of transactions which is called the “Green Channel filing” route. It is an automatic system of approval for transactions where there are no horizontal, vertical, or complementary overlaps between the businesses of parties to the combination. Under this route, the transactions are deemed approved upon the day of filing itself. There is no separate form for a green channel filing as the details have to be furnished under the Form I itself, without providing any market facing data or assessment.

The review process cannot be expedited under any other circumstances.

4. Substance of the Review

4.1 Substantive Test

The Competition Act requires the CCI to assess if a combination is likely to cause an AAEC within the relevant market in India. To determine if a transaction is likely to cause an AAEC, the CCI is required to assess any or all of the following factors:

- actual and potential level of competition through imports in the market;
- extent of barriers to entry into the market;
- level of concentration/combination in the market;
- degree of countervailing power in the market;
- likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- extent of effective competition that the market can likely sustain;
- extent to which substitutes are available or are likely to be available in the market;
- market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- nature and extent of vertical integration in the market;
- possibility of a failing business;
- nature and extent of innovation;
- relative advantage, by way of the contribution to the economic development, by any combination having or likely to have an AAEC; and/or
- whether the benefits of the combination outweigh the adverse impact of the combination, if any.

4.2 Markets Affected by a Transaction

The CCI considers whether the parties to the transaction are competitors or share a vertical or complementary relationship. The transaction may affect all markets in which the parties compete, are vertically linked, and/or are complementarily linked. As such, in order to assist the CCI in its assessment, the parties are required to identify all plausible alternative definition(s) of relevant product and geographic market, including the narrowest possible definition, with appropriate reasoning. Based on the parties' submissions, and the overlaps exhibited, the CCI determines the relevant markets. The CCI also relies on its own precedents in the same sector, to delineate the relevant market.

While determining the relevant product market, the CCI may consider any or all of the following factors:

- physical characteristics or end-use of goods;
- price of goods or service;
- consumer preferences;
- exclusion of in-house production;
- existence of specialised producers;
- classification of industrial products;
- costs associated with switching demand or supply to other goods or services; and/or
- categories of customers.

Additionally, while determining the relevant geographic market, the CCI may consider any or all of the following factors:

- regulatory trade barriers;
- local specification requirements;
- national procurement policies;
- adequate distribution facilities;
- transport costs;
- language;
- consumer preferences;

- need for secure or regular supplies, or rapid after-sales services;
- characteristics of goods or nature of services; and/or
- costs associated with switching supply or demand to other areas.

Separately, in all cases where the activities of the parties exhibit an overlap, the CCI conducts an analysis to foresee if the transaction will cause an AAEC in the relevant market. There is no de minimis level prescribed by the CCI, below which, competitive concerns are deemed unlikely.

4.3 Reliance on Case Law

The CCI considers the decisional practice and market definitions of other antitrust authorities, especially the European Commission (EC) and US Department of Justice (DoJ), while reviewing transactions. However, these decisions only hold a persuasive value and do not necessarily bind the CCI to the competitive analysis or the market definitions provided.

For instance, in [Jet/Etihad](#), the CCI relied on EC's "point of origin or point of destination" approach to market definition as a starting point for the competition analysis in air transport cases. Further, in [Umang/AM](#), the CCI relied on the Elzinga-Hogarty test for delineation of the relevant geographic market, which has been often relied upon by the DoJ.

4.4 Competition Concerns

The CCI adopts a holistic approach to assessment of the harm associated with a combination – ie, unilateral effects, portfolio effects, as well as foreclosure concerns arising out of vertical integration. The unilateral effects are assessed when the parties are engaged in the same business with high combined market shares (typi-

cally, more than 40%). While assessing such effects, the CCI takes into consideration factors such as barriers to entry, the bargaining power of consumers, and the lack of competitive constraints from competitors.

In [PVR Cinemas/DT](#), the CCI observed that there was a highly concentrated market in the market for exhibition of films in multiplex theatres. With a significant increase in the level of concentration, competitive constraint from competitors was inadequate, there was an absence of economic efficiencies specific to the combination and limited incentive for the acquirer to innovate. Accordingly, the CCI ordered appropriate structural remedies involving divestiture of specific target assets to address the associated risks. A similar remedy was ordered by the CCI in [Holcim/Lafarge](#), to address the risk arising out of the unilateral effects in the market for grey cement.

Co-ordinated effects have not been specifically assessed by the CCI in merger control proceedings. The CCI assesses the unilateral effects of common ownership, typically in cases involving private equity enterprises, where the enterprise has multiple investments in entities within the same sector or industry. In [ChrysCapital/Intas](#), the CCI addressed the risks arising out of common ownership by requiring ChrysCapital to cancel certain control-conferring rights in a competing portfolio entity.

Further, conglomerate or portfolio effects arise where the merging entities have complementary or overlapping products or services that may incentivise bundling as well as creating an enhanced market position for the merged entity. Such effects have also been considered by the CCI while granting remedies. In [L&T/Schneider](#), the CCI ordered a set of behavioural remedies to address the risk arising out of the consolidation

of two prominent competitors in the market. The CCI observed that there was a prima facie risk of portfolio effects and bundled offerings as the consolidation would enable the combined entity to push its portfolio to the distributors by way of bundled offerings, rebates, value discounts, etc, thus giving rise to an AAEC.

While assessing vertical integration in the market, the CCI evaluates factors such as input foreclosure and customer foreclosure as starting points of the assessment. In [ChemChina/Syn-genta](#), the CCI assessed various risks including bundling of products and observed that such risks could result in furthering the market power of the combined entity.

Elimination of potential competition is also an essential factor considered by the CCI while assessing the risks associated with a combination. The introduction of deal value thresholds under the 2023 Amendment is a significant step towards assessing such risks.

4.5 Economic Efficiencies

The CCI considers economic efficiencies arising out of a combination. The factors include:

- nature and extent of innovation;
- relative advantage, by way of the contribution to overall economic development, by any combination having or likely to have appreciable adverse effect on competition; and
- whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Such economic efficiencies should be demonstrable to the CCI and must arise from the combination. For instance, in [Holcim/Lafarge](#), the parties claimed the defence of efficiencies; however, the CCI observed that the efficiencies were

not combination specific and the submissions of the parties lacked quantification and verifiability. Thus, in the absence of any evidence to suggest that the gains from efficiency are combination specific, the CCI rejected the submissions put forth by the parties.

4.6 Non-competition Issues

The Competition Act does not specify any non-competition issues that may be considered by the CCI. In any case, there are facilitative provisions under the Competition Act for the CCI to consult the sector-specific regulators, which applies to the merger control review process as well. For instance, the CCI has recently consulted other regulators before approving a transaction ([Billdesk/PayU](#)).

FDI is governed under separate laws which are implemented by the DPIIT.

4.7 Special Consideration for Joint Ventures

There are no special considerations for reviewing joint venture transactions. However, for transactions where a joint venture parent transfers a product to the joint venture, the CCI would consider mapping overlaps between the product transferred to the joint venture and the presence of the other joint venture parents in the same market. Similarly, if both joint venture parents are present in the market in which the product transferred to the joint venture competes, the CCI considers the combined market shares of the joint venture parents as well as the transferred product for its assessment [GSK/Pfizer](#).

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

Upon notification of a combination, the CCI may either:

- clear the combination;
- clear the combination with modifications/remedies; or
- prohibit the combination.

In its 11 years of reviewing combinations, to date, the CCI has not passed any order prohibiting a combination and has directed modifications in 26 combination cases. In terms of modifications, the CCI may impose:

- a behavioural remedy; or
- a structural remedy; or
- both.

If, based on its assessment of the AAEC factors, the CCI is of the opinion that the proposed combination will cause or will likely cause an AAEC in the market, but such adverse effect can be eliminated by suitable modifications to the proposed combination, it may propose appropriate modifications to the combination, to ensure that its AAEC concerns are addressed. Typically, the CCI has considered a holistic assessment of:

- high combined market shares;
- a high post-combination market concentration;
- HHI; and
- the factors set out in section 4.1 **Substantive Test** – such as absence of competitors, barriers to entry and bargaining power – to assess if a proposed combination is likely to cause

an AAEC and had then imposed appropriate modifications ([Holcim/Lafarge](#)).

5.2 Parties' Ability to Negotiate Remedies

The parties have the ability to negotiate remedies with the CCI. Please refer to **5.4 Negotiating Remedies With Authorities** for a detailed process of negotiation.

Typical Remedies

The kinds of remedies required are based on fact specific assessment and depend on the competition concerns presented by each combination. In the past, remedies accepted or directed by the CCI have included:

- divestiture of overlapping businesses;
- commitment not to re-enter into the divested business market;
- commitment to license IP on a fair, reasonable and non-discriminatory (FRAND) basis;
- commitment to not bundle products in a manner that could have the effect of excluding competitors;
- commitment to maintaining non-exclusive distribution channels for supply of products;
- commitment to not discontinue certain products;
- commitment to not increase a product's average selling price; and
- commitment not to expand market presence in the concerned relevant markets, etc.

The CCI may direct any other remedy, to address AAEC concerns, and the above list is only indicative of the CCI's precedent. Please note that the CCI is not empowered to direct remedies unrelated to competition concerns.

5.3 Legal Standard

There is no prescribed legal standard that a remedy must meet in order to be acceptable. Typically, the CCI specifies the competition concerns arising out of the transaction by issuing an SCN, and remedies are negotiated between the regulator and the parties, or upfront remedies are provided by the parties to address the competition concerns.

There is no threshold that deems a remedy to have been accepted. All remedies have to be accepted by the CCI, via an affirmative action.

5.4 Negotiating Remedies With Authorities

The Combination Regulations allow the parties to voluntarily propose modifications during the Phase I review (ie, even before the CCI forms a prima facie opinion that the proposed combination may cause an AAEC). The CCI has, in multiple cases, accepted the voluntary modifications offered by the parties during the Phase I review and has approved the combination with modifications without initiating a Phase II review ([Canary/Link Investment](#); [Hyundai/Kia](#)).

The parties may also, upon the issuance of an SCN by the CCI for initiating Phase II review, voluntarily propose modifications to address the CCI's concerns in the SCN. The CCI has, in multiple cases, accepted the voluntary modifications offered by the parties and has approved the combination with modifications ([Air India/Vistara](#); [Sony/Zee](#); [Outotec/Metso](#)).

Currently, in cases where the parties do not offer voluntary modifications, the Competition Act prescribes that upon initiation of a Phase II review, if the CCI believes that the potential AAEC may be eliminated by suitable modifications, it will propose these modifications to the

parties. The parties are free to accept the CCI's modifications or to make a counter-proposal to the CCI. The CCI may either accept the counter-proposal of the parties or reject it and direct the parties to undertake the modifications initially proposed by the CCI. As such, the Competition Act provides for an opportunity to the parties to negotiate remedies with the CCI.

The 2023 Amendment allows the CCI to propose remedies even at the Phase I review stage. It also prescribes that upon the initiation of the Phase II review process, the CCI must issue a statement of objections to the parties identifying the AAEC that may be caused by the proposed combination. The parties can then offer modifications to the CCI. The CCI may accept these modifications or reject them. If the CCI rejects these modifications, it has to provide reasons as to why the modifications are not sufficient. Based on this, the parties can offer revised modifications. As such, the 2023 Amendment also allows sufficient room to the parties to negotiate with the CCI. However, please note that the 2023 Amendment has not been effected into law, as of June 2023.

Ultimately, if the CCI is of the view that only a particular remedy or modification can address the AAEC concerns, then the parties are free to not consummate the proposed combination if they do not wish to accept the remedies, or implement the modifications ordered by the CCI.

5.5 Conditions and Timing for Divestitures

The approach of the CCI in terms of conditions and timings depends upon the facts and circumstances of each case. Typically, the parties implement the remedies ordered by the CCI, in parallel, along with closing of the transaction.

Behavioural remedies typically come into force after the consummation of the transaction. Similarly for structural remedies, since the divestment procedure is a lengthy one, parties may complete the transaction (with the exception of the acquisition/merger of the business being divested) and then later complete the divestment procedure.

If, after closing the transaction, the parties do not comply with the remedies ordered by the CCI, the CCI will deem that the combination has caused an AAEC. The CCI may declare the transaction as void, in such cases. Separately, the CCI may also initiate non-compliance proceedings against the parties and levy a fine of up to INR100,000 for each day of non-compliance, up to a maximum of INR100 million. Continued non-compliance may lead to imprisonment for up to three years or a fine up to INR250 million.

5.6 Issuance of Decisions

The CCI issues the final decision permitting (with or without remedies) or prohibiting a combination, to the parties. Typically, the CCI approves the combination and formally communicates such approval to the parties. A detailed order is issued later (after seeking necessary waivers on confidentiality from the parties). A non-confidential version of the detailed order is made publicly available on the CCI's website.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

To date, the CCI has not prohibited any transaction. However, the CCI has directed modifications in a few foreign-to-foreign transactions. For instance, in [Outotec/Metso](#), the CCI approved an integration of two close competitors in the market for iron ore pelletisation (IOP) equipment in India after a commitment from the parties to divest Metso Minerals' Indian Straight Grate IOP

capital equipment business to a suitable buyer, to prevent concentration.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

The Combination Regulations prescribe that where the ultimate intended effect of a transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected, one or more of which may breach the Jurisdictional Threshold, a single notification form covering all inter-connected transactions is to be filed by the parties to the combination (the "inter-connection rule"). Further, no step of an inter-connected transaction that triggers a CCI notification may be consummated unless CCI approval is received. Steps or transactions undertaken to achieve a common ultimate effect are typically deemed "inter-connected".

To determine whether two transactions are inter-connected, the CCI typically considers the following factors:

- commonality of the business and entities involved;
- simultaneity in negotiation, execution and consummation of the transactions;
- commercial feasibility of isolating the two transactions – ie, whether one would happen without the other; and
- cross-conditionalities in transaction documents or public announcement of the parties to the two transactions.

Since the parties file one single notification form for all related transactions, the CCI clearance

decision also covers clearance to consummate all related transactions.

Separately, the CCI previously required the parties to specifically provide details, detailed explanation, and justification of non-compete clauses (ancillary restraints) agreed to in the transaction documents. However, the CCI has done away with this requirement. The CCI retains the power to review such clauses under the rules governing anti-competitive agreements/abuse of dominance.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

The Competition Act and the Combination Regulations prescribe that when the CCI initiates a Phase II review process, the parties must publicly publish the details of the combination. This publication also invites comments/objections/suggestions in writing, from any person(s) adversely affected or likely to be affected by the combination.

As such, in all Phase II review processes, an affected third party has a right to file a representation before the CCI. However, the right of third parties is limited to filing a written representation before the CCI in Phase II reviews and does not extend to being involved in the review process in any other way.

Separately, even at a Phase I review stage, the CCI also has the power, if it deems it necessary, to call for information from any other enterprise (including third parties) while inquiring as to whether a combination has caused or is likely to cause an AAEC in India. While there is no legal

provision allowing third parties to file a representation in the Phase I review process, without an invitation from the CCI, third parties may still file representations. However, it is discretionary for the CCI to consider these submissions.

Typically the CCI considers the representations filed by third parties while deciding on whether a combination will cause or is likely to cause an AAEC in the market ([Walmart/Flipkart](#)).

7.2 Contacting Third Parties

Upon initiation of Phase II review, the CCI calls for written comments/objections/suggestions from any person(s) adversely affected or likely to be affected by the combination. While this is a general call for objections which does not entail the CCI “contacting” third parties directly, the CCI has the power to contact a third party and seek their written response while inquiring as to whether a combination has caused or is likely to cause an AAEC in India. In fact, the CCI has, in the past, exercised this power to contact third parties to seek their responses ([Bayer/Monsanto](#)). Typically, the CCI will reach out to the third parties (if required) after the initiation of the Phase II review, with a written questionnaire and direct the relevant third party to file a written response.

While the CCI does not typically market test all remedies offered by the parties, it has, in multiple instances, reached out to third parties (competitors of the parties, public and private research institutions, institutional investors, and other experts) while allowing combinations with modifications ([Bayer/Monsanto](#)).

7.3 Confidentiality

The parties are required to file a 1,000-word, non-confidential summary of the proposed combination with the CCI, at the time of submitting

the formal filing. The CCI publishes this non-confidential summary on its website. As such, the fact that the parties have filed a notification and a brief description of the combination is made public as soon as the notification form is filed. The summary typically contains:

- the names of the parties to the transaction;
- the nature and purpose of the transaction;
- the products, services, and business(es) of the parties to the transaction;
- the respective markets in which the parties to the combination operate; and
- whether the combination is being filed under green channel route.

Subsequently, upon approving the combination, the CCI also uploads a non-confidential version of the detailed order approving the combination. The non-confidential version of the order does not contain any commercially sensitive information.

The parties can claim automatic confidentiality over all information that may be termed as commercially sensitive (such as trade secrets, pipeline products, market shares and sales volumes) upon submission of an undertaking self-certifying that:

- the information over which the parties have claimed confidentiality is confidential and not available in the public domain;
- the information over which the parties have claimed confidentiality is known only to limited employees, suppliers, distributors and others involved in the parties' business;
- the parties have taken adequate measures to guard the secrecy of the information over which they have claimed confidentiality; and

- the information over which the parties have claimed confidentiality could not be acquired or duplicated by others.

7.4 Co-operation With Other Jurisdictions

For discharging its duties or performing its functions, the CCI enters into arrangements with agencies of other jurisdictions to co-operate and share information. The CCI has entered into multiple memorandums of understanding with its counterparts in other jurisdictions, even for exchanging information involving mergers or acquisitions (see [MoU with Competition Bureau Canada](#)).

As such, the CCI may discuss specific transactions with foreign competition agencies especially in the case of global transactions. However, legally, the CCI may not discuss/share confidential information of the parties unless the parties providing a specific waiver to the CCI. Once the CCI gets a limited waiver of confidentiality from the parties, it may even discuss and share confidential data of the parties with foreign regulators.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

All decisions of the CCI are appealable, except certain administrative decisions. The party(ies) or any other aggrieved third party may prefer an appeal from the CCI's decision to the NCLAT. The decision of the NCLAT may further be appealed before the SC. Notably, as per the recent amendments, the appellants are required to deposit 25% of the amount of penalty imposed with the NCLAT for preferring an appeal.

8.2 Typical Timeline for Appeals

An appeal to the NCLAT may be preferred within 60 days from receipt of the CCI's order by the party(ies). Further, an appeal to the SC may be preferred within 60 days from the date of communication of the NCLAT decision to the party(ies).

Since the CCI has not blocked any combination to date, and has directed remedies in 29 cases, there are only a few instances of appeal from the CCI's order to the NCLAT. To the best of the authors' knowledge, there have only been four appeals (three of which were filed by a third party against approval orders and one by the notifying parties themselves) against the CCI's order before the appellate authority in the merger control regime. However, to date, no appeal has been successful before the appellate authority.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Any person (including any third party) who can demonstrate that they have been "aggrieved" by any direction, decision, or order of the CCI may file an appeal before the appellate authority ([Samir Agrawal](#)). That said, to date, no appeal by any third party, against a clearance decision of the CCI has been successful before the appellate authority.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

There are no separate antitrust filing requirements for foreign transactions and investments apart from the merger control regulations under the Competition Act.

Apart from merger control, the FDI transactions are regulated by the DPIIT under the Foreign Exchange Management Act (FEMA) 1999, and the accompanying regulations issued by the government. There are two different routes for approval of FDI transactions; namely, the automatic route and the government route. The routes have been classified on the basis of the sector to which the transaction belongs. FDI in most sectors is automatically approved, but may require a separate approval from the government or the Reserve Bank of India (RBI) in certain specific sectors such as defence, mining, satellite, and print media, as determined by the [FDI policy](#) in India.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

The 2023 Amendment, which was recently enacted by the Parliament, proposes significant changes to the existing provisions under the Competition Act. The amended provisions have been partially enforced and the remaining provisions shall come into force in a staggered manner when the accompanying regulations are notified by the CCI.

The following key changes have been introduced to the merger control provisions under the 2023 Amendment:

- Introduction of deal value thresholds – the proposed bill introduces a new requirement for notification of transactions that exceed a global deal value of INR20 billion, provided that the target company has substantial business operations in India.
- Shortening of review timelines – the proposed bill suggests reducing the review timeline for transactions from the current 210 days (from

- the date of notification) to 150 days. Additionally, the CCI is now obliged to form its prima facie opinion within 30 calendar days as opposed to the previous timeline of 30 working days. The transaction shall be deemed approved if the CCI does not form its preliminary opinion within the prescribed time limit.
- Enhanced penalty for making false statements/omission of material facts – the maximum penalty for making false statements or omitting to disclose material facts has been increased from INR10 million to INR50 million.
 - Exemption from standstill obligations – the combinations involving an open offer or an acquisition of shares or securities, through a series of transactions on a regulated stock exchange shall be exempted from standstill obligations as per the amended act. However, the acquirer in such transactions cannot acquire any voting rights before getting approval from the CCI.

Further, as mentioned in **2.1 Notification**, the Draft Combination Regulations and Draft Exemption were also published by the MCA for public consultation, and are expected to be introduced soon in their final form, based on the input of/ comments from the public.

10.2 Recent Enforcement Record

In the past year (2023–24), the CCI has issued seven orders imposing penalties upon parties for gun-jumping as well as three decisions imposing remedies to address the anti-competitive risks associated with transactions causing an AAEC in the market.

Typically, the penalties imposed by the CCI for gun-jumping in transactions in the past years (2023–24) have ranged from INR500,000 to INR10 million. In [Bharti Airtel](#), a penalty of INR10 million was imposed by the CCI for consum-

mating the acquisition of an additional degree of control in Bharti Telemedia Limited without seeking approval.

The CCI has not prohibited any transaction to this date, however it has approved several transactions with remedies. In the past year, transactions where the CCI accepted the voluntary modifications offered by the parties before granting an approval were [ICPA/Unichem](#), [Air India/Vistara](#) as well as [General Atlantic/Acko Tech](#).

10.3 Current Competition Concerns

The CCI has consistently displayed concerns over minority acquisitions/investments, especially with regards to PE enterprises acquiring significant rights in a target entity and has accordingly lowered the threshold of control under the 2023 Amendment. The 2023 Amendment also expedites the overall process for reviewing transactions by shortening the statutory review timelines.

Further, the [introduction of deal value threshold](#) (DVT) has been made with a view to assessing transactions in the digital space that may have otherwise been exempt from scrutiny owing to the parties not meeting the jurisdictional thresholds for notification. This points towards the CCI's concern over elimination of potential competition by bigger players in the digital market.

The CCI has also increased its focus towards handling gun-jumping in transactions and has been actively imposing penalties on parties failing to notify any notifiable transaction.

Furthermore, the competitive assessment of transactions has become more layered with the CCI taking into account a wide range of risks associated with the transactions, resulting in a greater number of modifications/remedies being imposed.

INDONESIA



Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.358

- 1.1 Merger Control Legislation p.358
- 1.2 Legislation Relating to Particular Sectors p.358
- 1.3 Enforcement Authorities p.359

2. Jurisdiction p.359

- 2.1 Notification p.359
- 2.2 Failure to Notify p.359
- 2.3 Types of Transactions p.359
- 2.4 Definition of "Control" p.360
- 2.5 Jurisdictional Thresholds p.360
- 2.6 Calculations of Jurisdictional Thresholds p.361
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.361
- 2.8 Foreign-to-Foreign Transactions p.362
- 2.9 Market Share Jurisdictional Threshold p.362
- 2.10 Joint Ventures p.362
- 2.11 Power of Authorities to Investigate a Transaction p.362
- 2.12 Requirement for Clearance Before Implementation p.362
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.363
- 2.14 Exceptions to Suspensive Effect p.363
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.363

3. Procedure: Notification to Clearance p.363

- 3.1 Deadlines for Notification p.363
- 3.2 Type of Agreement Required Prior to Notification p.364
- 3.3 Filing Fees p.364
- 3.4 Parties Responsible for Filing p.365
- 3.5 Information Included in a Filing p.365
- 3.6 Penalties/Consequences of Incomplete Notification p.366
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.366
- 3.8 Review Process p.366
- 3.9 Pre-notification Discussions With Authorities p.366
- 3.10 Requests for Information During the Review Process p.366
- 3.11 Accelerated Procedure p.367

4. Substance of the Review p.367

- 4.1 Substantive Test p.367
- 4.2 Markets Affected by a Transaction p.367
- 4.3 Reliance on Case Law p.367
- 4.4 Competition Concerns p.368
- 4.5 Economic Efficiencies p.368
- 4.6 Non-competition Issues p.368
- 4.7 Special Consideration for Joint Ventures p.368

5. Decision: Prohibitions and Remedies p.368

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.368
- 5.2 Parties' Ability to Negotiate Remedies p.369
- 5.3 Legal Standard p.369
- 5.4 Negotiating Remedies With Authorities p.369
- 5.5 Conditions and Timing for Divestitures p.369
- 5.6 Issuance of Decisions p.370
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.370

6. Ancillary Restraints and Related Transactions p.370

- 6.1 Clearance Decisions and Separate Notifications p.370

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.370

- 7.1 Third-Party Rights p.370
- 7.2 Contacting Third Parties p.371
- 7.3 Confidentiality p.371
- 7.4 Co-operation With Other Jurisdictions p.371

8. Appeals and Judicial Review p.371

- 8.1 Access to Appeal and Judicial Review p.371
- 8.2 Typical Timeline for Appeals p.371
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.371

9. Foreign Direct Investment/Subsidies Review p.372

- 9.1 Legislation and Filing Requirements p.372

10. Recent Developments p.372

- 10.1 Recent Changes or Impending Legislation p.372
- 10.2 Recent Enforcement Record p.372
- 10.3 Current Competition Concerns p.372

ABNR Counsellors at Law is Indonesia's longest-established law firm (founded 1967) and pioneered the development of international commercial law in the country following the reopening of its economy to foreign investment after a period of isolationism in the early 1960s. With more than 100 partners and lawyers (including two foreign counsel), ABNR is the largest independent full-service law firm in Indonesia and one of the country's top three law firms by number of fee earners, giving it the scale

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COUNSELLORS AT LAW

1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

In Indonesia, the relevant merger control regime is primarily 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 (“Regulation 57/2010”);
- Government Regulation No 44 of 2021 on the Implementation of Prohibition of Monopolistic Practices and Unfair Business Competition (“Regulation 44/2021”);
- Government Regulation No 20 of 2023 on the Type and Rates of Non-Tax State Revenues at the KPPU (“Regulation 20/2023”);
- KPPU Regulation No 3 of 2023 on the Assessment of Mergers or Consolidation of Undertakings or Acquisition of Shares in a Company that May Result in Monopolistic Practices or Unfair Competition (“Regulation 3/2023”);
- KPPU Guidelines for the Assessment of Mergers, Consolidation or Acquisition issued on 6 October 2020, to the extent that they do not conflict with KPPU Regulation No 3 of 2023 (the “Merger Control Guidelines”); 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 Indonesian Competition Commission (*Komisi Pengawas Persaingan Usaha*, or KPPU) regulations are also relevant:

- KPPU Chair Regulation No 4 of 2022 on the Definition of Relevant Markets (the “Relevant Market Guidelines”); and
- KPPU Regulation No 2 of 2023 on the Case-Handling Procedure.

1.2 Legislation Relating to Particular Sectors

Indonesia has a general foreign investment regime as set out in Law No 25/2007 on Investment, as amended by the Job Creation Law (the “Investment Law”), and implementing legislation, including Presidential Regulation No 10/2021 on Investment Sectors, which was revised by Presidential Regulation No 49/2021 on Investment Sectors (the “2021 Investment List”).

Under the Investment Law, all business fields are open to foreign investment, unless declared otherwise. Foreign investment must be carried out through a foreign investment company in the form of a limited liability company under Indonesian Law (*Perseroan Terbatas Penanaman Modal Asing*, or PT PMA) and domiciled within the territory of the state of the Republic of Indonesia, unless provided otherwise by the law. Foreign investors who make investment through a PT PMA should:

- subscribe to shares at the time the PT PMA is established;
- purchase shares; or
- invest through another method in accordance with laws and regulations.

The 2021 Investment List indicates:

- six business fields are completely prohibited from FDI under the Job Creation Law (narcotics, gambling/casinos, harvesting of fish listed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), utilisation or harvesting of coral, chemical weapons, and chemicals that might damage the ozone layer);
- 60 business fields are reserved for co-operatives (co-ops) and SMEs;
- 46 business fields are open to FDI if in partnership with co-ops and SMEs; and
- 37 business fields are subject to specific requirements, which may be classified as:
 - (a) open to FDI but subject to maximum foreign shareholding limit;
 - (b) open to FDI but subject to special approval from the relevant ministry;
 - (c) there is no longer any investment regulated by the provincial government such as in the alcohol/malt beverage industry; and
 - (d) 100% reserved for domestic investors.

Several sectoral laws (eg, in banking, non-banking financial services (venture capital, multi-finance, securities companies), insurance, mining, oil and gas, shipping) introduce foreign investment rules and restrictions. It goes beyond the scope of this overview to discuss these sectoral laws in detail.

1.3 Enforcement Authorities

Merger control in Indonesia is enforced by the KPPU.

2. Jurisdiction

2.1 Notification

A post-merger notification is compulsory if all criteria are met. Parties involved in the transaction may carry out a voluntary pre-merger notification.

However, even if parties carry out a voluntary pre-merger notification, the post-merger notification will still be mandatory once the closing of transaction occurs. No exceptions exist.

2.2 Failure to Notify

There are penalties for failing to notify the KPPU within 30 business days as of the closing date of transaction.

Under the Competition Law and Regulation 57/2010, a late notification penalty of IDR1 billion (approximately USD61,000) per day, with a maximum of IDR25 billion (approximately USD1.526 million) applies. However, there have been several occasions where the KPPU indicated that it is considering implementing a new approach for calculating administrative fines, taking into account the profit/turnover-based fines calculating method introduced by Regulation 44/2021. The regulation does not specify the maximum fine for late merger filing and thus this new method could potentially lead to fines that exceed the nominal limit of IDR25 billion (although such an amount has never been imposed in practice). In 2022, there was a KPPU decision on late submission where the tribunal referenced Regulation 44. However, the penalties imposed were less than IDR25 billion.

The KPPU's decisions on violations of the Competition Law, including late merger filings, are published on the KPPU's official website. Information on penalties can also be found in the KPPU's news articles and reports, which are also available on their website.

2.3 Types of Transactions

Several types of transactions are caught by Indonesian merger control rules – ie, mergers, consolidations, and acquisitions (both for share and asset transactions). However, only transac-

tions that fulfil the following criteria are caught by Indonesian merger control rules:

- results in a change of control;
- meets the jurisdictional thresholds;
- meets the dual nexus requirements;
- is carried out between non-affiliated companies; and
- is not carried out to implement prevailing laws and regulations.

In line with the criterion that the transaction must be carried out between non-affiliated companies, internal restructuring or reorganisation are in principle not caught by Indonesian merger control rules, if they concern transactions between affiliated parties.

The KPPU has considered transactions involving sales and purchase of units in a trust as notifiable transactions, although they neither fall under the category of share nor asset transactions from an Indonesian law perspective.

Shareholders' agreements and changes to articles of association could be caught by the Indonesian merger control rules if such agreements and changes to articles of association would ultimately result in a change of control.

2.4 Definition of "Control"

Under Indonesian competition law, a change of control occurs when the acquiring party obtains more than 50% of the shares and voting rights or obtains less than 50% of the shares and voting rights but holds factual control (allowing them to influence or direct the company's policies and management). Normally, the KPPU would look into reserved matters, veto rights, and the power to nominate the majority of the directors as indications of change of control, when the acquired share capital is less than 50%. Although the law

is unclear on this matter, one conservative interpretation suggests that a change from sole to joint control could also constitute a change of control.

Further, a transfer of assets – with or without shares – can be deemed the equivalent of an acquisition of shares and should be reported to the KPPU. This is the case if the following conditions are met:

- results in a transfer of management control and/or physical control over the assets; and/or
- increases the acquiring party's ability to control a relevant market.

An asset is defined as any movable or immovable object owned by an undertaking – both tangible and intangible – that has economic value (eg, bonds or stock). Additionally, in the authors' experience, a participating interest in a joint operation in Indonesia may also be considered an Indonesian asset.

In a foreign-to-foreign transaction, the question of change of control is determined by the applicable law in the jurisdiction where the share or asset transaction occurs.

Acquisitions of minority or other interests less than control are not subject to these rules.

2.5 Jurisdictional Thresholds

The jurisdictional thresholds for notification are:

- combined value of assets in Indonesia exceeds IDR2.5 trillion (approximately USD153.6 million or EUR142 million) or, if all undertakings involved in the transaction are active in the banking sector, IDR20 trillion

(approximately USD1.22 billion or EUR1.13 billion); and/or

- combined turnover in Indonesia exceeds IDR5 trillion (approximately USD307.2 million or EUR284.1 million) – Indonesian turnover includes sales of products produced domestically and imported products (exported products should be excluded from the calculation).

The jurisdictional threshold is one of the major changes introduced by the Regulation 3/2023. Previously, the assets threshold was calculated on a worldwide basis, rather than an Indonesian basis – although the threshold amount remains the same.

If there is a 30% or greater change in the value of assets and/or sales from one year to the previous year, the calculation of these values will be based on the average of the values over the past three years.

Special jurisdictional thresholds are only available for the banking sector, as mentioned.

2.6 Calculations of Jurisdictional Thresholds

Jurisdictional thresholds are calculated based on assets and turnover that are exclusively in Indonesia (see 2.5 Jurisdictional Thresholds).

If the sales or assets are booked in a foreign currency, the figures need to be converted using Bank Indonesia's middle exchange rate on the closing date or the business day in Indonesia closest to the closing date.

The thresholds should be based on book value (ie, audited financial statements of the relevant undertakings). However, if the undertakings do not record the assets and turnover that are

exclusively in Indonesia in their audited financial statements, they need to submit a statement letter that includes the Indonesian sales and turnover figures and is signed by the authorised representative of the relevant undertaking.

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

The jurisdictional threshold is calculated based on the combined Indonesian sales and assets of the previous fiscal year for:

- each undertaking that carries out the merger, consolidation or acquisition (of shares and/or assets); and
- all entities, including the target and its controlled subsidiaries (if any), that directly or indirectly control (or are controlled by) the ultimate parent of the undertaking(s) carrying out the merger, consolidation or acquisition – this includes the ultimate parent entity, which is the highest controller of a group of undertakings that is not controlled by any other undertaking.

Therefore, the calculation of the jurisdictional threshold is on a group-wide basis – given that it does not only concern the transacting parties, but also includes the affiliates or subsidiaries of the transacting parties. For the avoidance of doubt, a seller's turnover and assets do not need to be included in the calculation of the threshold.

The jurisdictional thresholds are also met if only one party involved in the transaction meets the threshold.

The merger control regulations do not specify how changes in business should be reflected in the threshold calculation. In practice, with regard to other acquisitions, the KPPU usually

requires the notifying party to include the sales and assets of the newly acquired entities in the threshold calculation as though they had been part of the group for the entire reference period. As regards business closures or divestments during the reference period, in practice, the figures of the closed or divested entities usually do not need to be included in the threshold calculation.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control if the transaction fulfils the criteria that are caught by Indonesian merger control rules. Further, it should be assessed whether both the transacting parties have nexus in the Indonesian market. A transaction has nexus if at least two parties engaged in the transaction carry out business activities in or sales to Indonesia or have assets in Indonesia.

The term “business activities in Indonesia” can be broadly interpreted and includes:

- direct and indirect (portfolio) equity investments in Indonesian limited liability companies;
- investments in financial instruments other than shares, such as loans or assets;
- contractual rights;
- participation in units or trusts, whether direct or indirect; or
- establishing a representative office.

The dual nexus requirement for foreign-to-foreign transactions is another major change introduced by Regulation 3/2023. Under the previous regime, foreign-to-foreign transactions could be notifiable if either party (or its affiliate/subsidiary) had nexus in Indonesia (single nexus).

2.9 Market Share Jurisdictional Threshold

Indonesia does not have a market share jurisdictional threshold.

2.10 Joint Ventures

Joint ventures are subject to merger control regulations, except for “Greenfield” joint ventures. However, any share or asset transactions carried out following the establishment of the “Greenfield” joint venture are considered notifiable transactions, if all notifiability requirements are met.

2.11 Power of Authorities to Investigate a Transaction

The KPPU has no authority to investigate transactions that do not meet the jurisdictional thresholds under merger control regulations. However, it can initiate an investigation into the parties involved in the transaction with regard to cartel rules or abuse of dominance rules, or other potential violations under the Competition Law.

There is no specified statute of limitations on the KPPU’s ability to investigate a transaction. This means that the KPPU is allowed to investigate and impose fines on companies for transactions that have been completed in number of years. The KPPU has investigated transactions that became legally effective as many as five years before.

2.12 Requirement for Clearance Before Implementation

There is no requirement for clearance before implementing a transaction, as Indonesia has a post-merger notification regime.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Since the Indonesian merger control rules implement a post-merger notification system, there are no penalties imposed if the parties implement the transaction before receiving clearance.

2.14 Exceptions to Suspensive Effect

This is not applicable in Indonesia.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Indonesia has a post-merger notification regime, so closing a transaction before clearance is permitted.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

A notifiable transaction must be notified within 30 business days following the date the transaction becomes legally effective. Notifications must be submitted through the KPPU's online portal, which is only accessible between 9am and 2pm on business days (excluding Saturdays and Sundays, official national holidays and communal leave).

If the target is an Indonesian limited liability company, a transaction becomes legally effective on the following dates:

- for a merger – the date of approval by the Minister of Law and Human Rights of Indonesia (the “MoLHR”) of the amendment of the articles of association;
- for consolidation – the date of approval by the MoLHR of the deed of establishment;

- for share acquisition – the date of notification to the MoLHR; and
- for asset acquisition – the date of the asset transfer.

If the transaction involves an Indonesian public company, it becomes legally effective on the following dates:

- for a merger, consolidation or acquisition carried out by a public company in connection with a public company – the date on which the public disclosure letter for the transaction is submitted to the Financial Services Authority; or
- for a merger, consolidation or acquisition carried out by a private company in connection with a public company – the final date of payment of shares and/or other equity securities in the exercise of a rights issuance.

If a merger or consolidation is carried out by an Indonesian entity in a form other than a limited liability company, the transaction becomes legally effective on the date of signing the agreement.

For foreign-to-foreign transactions, the legally effective date of the transaction will be determined by the law of the respective jurisdictions. The date may be based on the closing date in the agreement between the parties or the date of the government approval in the jurisdiction in which the transaction is taking place.

For late notification, the KPPU can impose a penalty of IDR1 billion per day up to a maximum of IDR25 billion. Please also see **2.2. Failure to Notify**.

The KPPU has issued penalties for late notifications in at least 54 cases – 39 of which occurred

in the past four years, indicating an increase in enforcement activity. To the best of the authors' knowledge, five cases involved foreign-to-foreign transactions.

Recently imposed penalties ranged from IDR1 billion and IDR10.33 billion per transaction. A company was fined a total of IDR20.66 billion for delay in submitting notifications for acquisitions of three entities. The highest penalty for a single transaction (IDR12.6 billion) was imposed in October 2019 for a 240-day delay.

3.2 Type of Agreement Required Prior to Notification

A binding agreement and legally effective transaction are required prior to notification.

If the transaction is not yet legally effective but the parties have signed a contract, agreement, memorandum of understanding/letter of intent, or any other written documentation confirming their intention to engage in a merger, consolidation or acquisition, the parties can submit a consultation to the KPPU – even if the aforementioned documents are not legally binding.

If the parties have not entered into anything in writing, they cannot submit a consultation, but they can engage in a verbal consultation with the KPPU. However, in the case of a verbal consultation, the information provided by the KPPU may be very limited – in view of the absence of written materials.

3.3 Filing Fees

Filing fees were introduced last year by Regulation 20/2023.

The fee is calculated based on the following formula: $0.004\% \times \text{the value of assets or sales in}$

excess of the notification threshold (whichever is lower).

The value of assets or sales is calculated based on the total asset or sales value of:

- the surviving entity, or 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 and acquired undertakings.

If both the asset and sales values meet the threshold, the filing fee will be calculated using whichever value is lower and will only be payable if the KPPU finds the transaction is notifiable.

However, the regulation pegs the maximum fee at IDR150 million (approximately USD10,000).

The notification fee can be reduced to as little as 0% or fully waived based on one or more of the following considerations:

- the transaction supports the development of micro, small, and medium enterprises;
- inability to pay or force majeure; or
- pursuant to a specific government policy.

These considerations are to be further elaborated in a KPPU regulation, subject to prior approval from the Minister of Finance.

The KPPU requires the notifying party to pay the maximum notification fee of IDR150 million before filing. The KPPU will refund excess payment after the notification is deemed properly submitted by the KPPU.

3.4 Parties Responsible for Filing

The responsibility for the notification filing lies with the following parties:

- in a merger – the surviving undertaking of the merger transaction;
- in a consolidation – the newly formed undertaking resulting from the consolidation transaction;
- in a share acquisition – the undertaking that acquires the shares; and
- in an asset acquisition – the undertaking that acquires the assets.

3.5 Information Included in a Filing

A filing would involve filling out an online notification form and submitting supporting documentation. A high level of detail is required. The notification form requires information on:

- the corporate details of the transacting parties, including the shareholders and management composition before and after the transaction;
- the Indonesian sales and assets value of the transacting parties and their relevant affiliates or subsidiaries;
- the product details of the parties, including descriptions and market share in Indonesia; and
- a list of competitors, customers and suppliers of the parties involved in the transaction, as well as their respective market, purchase, and supply shares.

All required information (including the list of competitors, customers and suppliers) must be filled out, even if the parties have no overlapping market share.

As for the supporting documents, the KPPU requires the following:

- transaction documents and government approval evidencing the transaction is legally effective;
- corporate documents of the transacting parties;
- audited financial statements of the parties involved in the transaction;
- a company profile of the transacting parties, including their shareholders and management composition, product description and marketing coverage;
- a business plan prepared by the management of the notifying party, containing an industry analysis and the management strategy for the next three to five years;
- an economic impact analysis, including the market share of the parties involved in the transaction, the affected market, and benefits of the transaction;
- a summary of the transaction, including the description of the transaction, the legal effective date, the transaction value and list of relevant transaction documents; and
- a pre- and post-transaction group scheme.

The notifying party will also need to grant a power of attorney (notarised and apostilled or, if signed outside Indonesia, consularised depending on the jurisdiction) to the legal representatives making the filing to the KPPU. The notification form and all supporting documents must, in principle, be in Bahasa Indonesia. Any documents prepared in a foreign language must be translated into Bahasa Indonesia. However, for practical reasons, the KPPU normally allows submission of a translated summary of each submitted document.

If the parties do not record the Indonesian assets and turnover value in their audited financial statements, they would also need to submit a

signed statement letter that includes these Indonesian figures.

The KPPU may ask the parties to submit supplementary documentation in addition to the foregoing.

3.6 Penalties/Consequences of Incomplete Notification

An incomplete notification will not be accepted by the KPPU and the authority will not issue a receipt of submission. If a receipt is not issued within the 30-day deadline, the notification will be considered late, and the KPPU may start a formal investigation for late submission and impose penalties.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

If the submitted information or documents are found to be false, the KPPU may cancel registration of the notification, the findings of its review, or both. This cancellation may be treated as a late notification and be subject to penalties. To the best of the authors' knowledge, to date, the KPPU has not imposed penalties for false information or documents.

3.8 Review Process

The review process involves two phases:

- an initial check of the completeness of the documents; and
- a review, which includes both initial and comprehensive review sub-phases (with the latter sub-phase being only applicable for transactions that may raise competition concerns in Indonesia).

The first phase, which is applicable to all notifications, also includes checking whether the transaction is notifiable. This initial check should

be completed within three business days of submission. If the notification documents are complete, the KPPU will issue a statement that contains a registration number and confirmation of whether the transaction is notifiable. If the transaction is notifiable, it will continue to the review phase. If the documents are incomplete, the KPPU will request additional information or documentation as deemed necessary.

The KPPU has 90 business days to review the notification until the issuance of the opinion on the transaction. Therefore, for the overall timeline, the KPPU has three plus 90 business days in total to issue an opinion.

3.9 Pre-notification Discussions With Authorities

Parties can engage in informal, anonymous pre-notification discussions with KPPU officials. This may be advisable before notifying a merger, but it will not be binding on the KPPU.

A party may also choose to participate in a voluntary pre-closing consultation. The procedure will be similar to the post-closing notification. This process will be entirely confidential and the KPPU's opinion on the consultation will not be published.

3.10 Requests for Information During the Review Process

Requests for information during the review process are common within the first 30 business days following the submission of the notification. Normally, within two to four weeks of submission, the KPPU will invite the notifying party to attend a clarification meeting for a question-and-answer session, which is usually followed by a request for additional information.

Information requests normally are ancillary in nature. However, requests may be more complex if the transaction raises competition concerns in Indonesia. Information requests do not suspend the review.

3.11 Accelerated Procedure

Under the Merger Control Guidelines, the review process can be expedited if the KPPU determines that a notification qualifies for a simplified assessment, as the transaction is not expected to raise competition concerns. A transaction may qualify for a simplified assessment if it has the following characteristics:

- absence of overlapping business activities;
- absence of 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 (HHI) below the required threshold for each of those activities;
- lack of 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 gaining sole control (from joint control with another undertaking).

A simplified assessment may be initiated either by the KPPU or at the request of the notifying party. If the KPPU approves the request for a simplified assessment, it should provide its opinion on the transaction within 14 business days. However, the authors have never seen this procedure implemented in practice.

4. Substance of the Review

4.1 Substantive Test

The KPPU uses the HHI or concentration ratio. The KPPU will carry out a comprehensive assessment and examines other factors if:

- the HHI falls between 1,500 and 2,500 and the change in the HHI exceeds 250; or
- the HHI exceeds 2,500 and the change in the HHI exceeds 150.

4.2 Markets Affected by a Transaction

The KPPU identifies which markets might be impacted by the transaction by determining the relevant products and geographical market. For relevant product markets, the KPPU identifies similar or substitute products based on demand and supply aspects. For relevant geographical markets, the KPPU assesses the distribution, selling, marketing coverage, and the location where the products can be located.

In cases where parties' activities overlap, there is no de minimis level below which competitive concerns are automatically deemed unlikely.

4.3 Reliance on Case Law

The notifying party may submit other jurisdiction filings that contain case law or market definition for the KPPU's consideration in performing its review. In the authors' experience, the KPPU also allows the parties to submit an economic analysis based on market definitions used by competition authorities in other jurisdictions where the transaction was also notified. However, it is not entirely clear how the KPPU arrives at certain market definitions, as this is not explained in the current format of opinions.

4.4 Competition Concerns

The KPPU will assess the following competition concerns (ie, entry barriers and potential for anti-competitive behaviour).

Entry Barriers

If the market concentration test is positive, the KPPU will assess entry barriers. This assessment normally includes factors such as the ease of entry for new market players, the strength of new entrants, the time required to enter the market, switching costs, the similarity of products, and brand loyalty.

Potential for Anti-competitive Behaviour

In addition to entry barriers, the KPPU will evaluate the potential for anti-competitive behaviour by the relevant parties. This includes examining potential unilateral effects, co-ordinated effects, and market foreclosure.

4.5 Economic Efficiencies

The KPPU takes economic efficiencies into account. It will evaluate a transaction more favourably if it offers potential efficiency benefits to customers. These efficiency gains should be balanced against any anti-competitive effects of the transaction. The KPPU will prioritise healthy competition over efficiency.

4.6 Non-competition Issues

Under the Merger Control Guidelines and Regulation 3/2023, the KPPU will review a transaction more positively if it can prevent a party from bankruptcy. The decrease in market players due to bankruptcy would be considered more harmful than a scenario where a market player becomes dominant as a result of the transaction.

The KPPU may also consider other non-competition factors during its review, including:

- policies to augment the competitiveness and strength of national industries;
- development of technology and innovation;
- protection of SMEs;
- impact on the labour force; and
- implementation of the relevant laws or regulations.

In Indonesia, rules for foreign direct investment are primarily governed and enforced by the Ministry of Investment/Investment Co-ordinating Board (*Badan Koordinasi Penanaman Modal*, or BKPM) and are separate from the merger control rules enforced by the KPPU. Foreign entities may be required to submit certain filings, such as regular investment reports. Although the BKPM predominantly governs and enforces FDI regulations, other ministries may also have sector-specific rules concerning FDI.

4.7 Special Consideration for Joint Ventures

There are no special substantive tests for joint ventures. The KPPU does not specifically examine potential co-ordination issues between joint venture parents within the context of merger control.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The KPPU does not have the authority to prohibit or interfere in transactions within the framework of merger control. However, the authority can always initiate a formal investigation within the framework of cartel rules or abuse of dominance rules or other potential violations under the Competition Law.

5.2 Parties' Ability to Negotiate Remedies

If the KPPU has concerns about a transaction, the parties can negotiate structural remedies or behavioural remedies. However, to the best of the authors' knowledge, the KPPU has so far only agreed to or imposed behavioural remedies, rather than structural remedies.

The remedies may consist of structural remedies (ie, share or asset divestment) or behavioural remedies, such as:

- access to IP rights related to essential facilities; or
- elimination of competition barriers, such as exclusive contracts, consumer switching costs, tying or bundling, and supply or purchase barriers.

The KPPU has so far imposed behavioural remedies in at least five cases, usually consisting of reporting requirements. To the best of the authors' knowledge, no remedies have so far been required to address non-competition issues.

5.3 Legal Standard

There is no legal standard that remedies must meet in order to be deemed acceptable.

The KPPU's opinion must contain a description and timeline for:

- structural remedies actions by the undertaking;
- behavioural remedies by the undertaking; and/or
- implementation of fair pricing strategies.

5.4 Negotiating Remedies With Authorities

When the result of the KPPU's comprehensive review indicates that the transaction could lead to monopolistic practices or unfair competition, the KPPU will convene a commission panel that will decide on the results of the review.

The panel will then summon the notifying party to an initial hearing, where the KPPU investigator will explain the results of the comprehensive review and the proposed remedies, along with the timeline for their implementation. The notifying party will be given the opportunity to respond.

If the notifying party accepts the proposed remedies, the panel will issue a conditional approval that imposes the remedies. If the notifying party rejects the proposed remedies, it must submit a legal, economic and/or technical basis for the rejection and the case will continue to a further hearing, where the notifying party is expected to submit its counter-proposal for the remedies.

Subsequently, taking into account the counter-proposal, the panel will issue a conditional approval that requires the notifying party to accept the remedies. Although the notifying party can submit a counter-proposal, the authority to decide on the type of remedies and the timeline for the implementation rests with the KPPU panel.

5.5 Conditions and Timing for Divestitures

As Indonesia has a post-merger notification regime, a transaction will be legally effective by the time any remedies for divestitures are imposed. The KPPU will specify the timeline for complying with the remedies. For behavioural remedies, compliance is required for three years.

If an undertaking fails to comply with a conditional approval that imposes remedies, the KPPU can initiate an investigation for alleged violation of the Competition Law, which may result in penalties of IDR1 billion (approximately USD61,000) per day, with a maximum of IDR25 billion (approximately USD1.526 million). However, to the authors' knowledge, the KPPU has never imposed penalties or sanctions due to a party's failure to comply with its remedies.

5.6 Issuance of Decisions

Unlike in other jurisdictions, in Indonesia a merger notification does not result in the KPPU issuing a formal decision to permit or prohibit a transaction. Instead, the KPPU will issue a non-binding opinion, which can be:

- 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.

As mentioned in **5.4 Negotiating Remedies with Authorities**, if the KPPU's review indicates that the transaction could result in monopolistic practices or unhealthy business competition, it may issue conditional approval, which requires the undertaking to accept certain remedies.

Before 2019, the KPPU published its opinion on certain notifications. However, since 2019, the published information has been limited to the registration number, the date of the notification, the identity of the acquirer and the target, and the status of the notification (completed or under review).

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

To the best of our knowledge, the KPPU has never implemented structural remedies or prohibited transactions. The KPPU has imposed behavioural remedies, usually involving reporting obligations, in at least five cases – none of which involved foreign-to foreign transactions.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

The KPPU's opinion does not extend to related arrangements (ancillary restraints).

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Competitors, customers, suppliers, industry associations and government agencies may be involved in the review process. The notifying party is required to provide contact details of the relevant third parties in the notification form and the KPPU may invite these parties for interview to gather their opinions on the transaction's impact.

There is no formal procedure for third parties to submit a complaint during the merger review process. However, any party that suffers losses due to the transaction can file a complaint with the KPPU, citing an alleged violation of Article 28 or other relevant provisions of the Competition Law. This complaint will be examined and adjudicated separately by the KPPU within the framework of a formal investigation.

7.2 Contacting Third Parties

The KPPU may reach out to third parties during its review process. The notifying party is required to include contact details of these third parties in the notification form. The KPPU may contact them via phone or email to verify the information provided and seek their views about the potential competitive impact of the transaction.

It is uncommon for the KPPU to send written questionnaires to third parties or conduct a “market test” on remedies proposed by the parties.

7.3 Confidentiality

The fact of the notification and description of the transaction are no longer made public, as of 2019. See 5.6. **Issuance of Decisions.**

7.4 Co-operation With Other Jurisdictions

The KPPU co-operates with competition authorities in other jurisdictions on general policy matters and the exchange of general information. As far as the authors are aware, the co-operation does not extend to specific transactions.

The KPPU is under an obligation to maintain the confidentiality of business secrets obtained from the notifying party.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Parties cannot appeal the KPPU opinion on merger control, which is also not binding. There is no avenue for judicial review of a KPPU opinion.

However, the KPPU’s decisions on violations of the Competition Law can be appealed. Although it is rare, companies that have been subject to penalties for late notification can file an appeal to the KPPU’s decision to the Commercial Court and subsequently file for cassation with the Supreme Court.

8.2 Typical Timeline for Appeals

The authority to review competition law cases was transferred from the District Court to the Commercial Court in 2021. The timeframe for the objection phase is between three and 12 months.

After receiving the Commercial Court’s decision, the parties may file for cassation with the Supreme Court. The amendment to the Competition Law revoked the requirement for the Supreme Court to issue a decision within 30 days following receipt of the appeal application. Therefore, it could now take up to 250 days to receive a decision from the Supreme Court at cassation level. The Supreme Court’s decision is final and binding and no further appeal can be made.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Typically, third parties have no right to appeal a KPPU opinion on merger control.

Theoretically, they can challenge the KPPU opinion indirectly by filing an administrative lawsuit in the Administrative Court because the KPPU opinion could be deemed as an administrative decision. However, the authors have never seen this approach being tested in court.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

There is a separate “filing”, which must be carried out by the surviving undertaking in the merger transaction to the Ministry of Investment/BKPM through the so-called Online Single Submission (OSS) system. The surviving undertaking must update/adjust its investment data and licensing to reflect the merger. The OSS would verify the updated/adjusted investment data and finally the OSS System would issue the adjusted investment data and licensing of the surviving undertaking, covering the data of both the surviving undertaking and the non-surviving (merged) undertaking.

The regulation is silent on the timeframe for the merger filing to the OSS System. However, in practice, this filing should be carried out once the deed of merger and merger filing to the MoL-HR is completed.

See also 4.6. **Non-competition Issues.**

10. Recent Developments

10.1 Recent Changes or Impending Legislation

According to the Indonesian Parliament’s website, the bill on Competition Law is part of the national legislative programme for 2020–24, initiated by both the People’s Representative Council (*Dewan Perwakilan Rakyat*, or DPR) and the Regional Representative Council (*Dewan Perwakilan Daerah*, or DPD). However, it is included in a comprehensive list of 260 draft bills and not in the priority list, which consists of 47 draft bills. Consequently, it is unlikely to be enacted in 2024 as it is not part of the 2024 priority national leg-

islation programme, despite being proposed in December 2019.

10.2 Recent Enforcement Record

In the past five years, the KPPU has issued decisions on 105 cases and made determinations on six cases with behaviour changes. Most of these decisions (42.8%) are related to the late notification of M&A (45 cases). This is followed by tender collusion cases (40 cases or 38.1%), non-tender cases (13 cases or 12.4%), and SME partnership cases (seven cases or 6.7%). This shows the KPPU’s main enforcement activity focuses on merger filings. In total, the KPPU has imposed penalties for delayed notification in relation to five foreign-to-foreign transactions.

The KPPU has so far imposed behavioural remedies in at least five cases, usually consisting of reporting requirements. None of these cases related to a foreign-to-foreign transactions. To date, the KPPU has never imposed any structural remedies. The number of cases may not be fully accurate – given that, from 2019, KPPU opinions (under which remedies are imposed) are no longer made public.

10.3 Current Competition Concerns

The current Indonesian merger control regime is based on a streamlined merger control regulation – ie, Regulation 3/2023, which was issued on 30 March 2023 and became effective on 31 March 2023. Regulation 3/2023 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.

One of the notable trends is that the KPPU has implemented the Quick Examination procedure in Case No 12/KPPU-M/2023. This case origi-

nated from the acquisition of shares in Dorel Finance US, Inc by Pon Holdings BV in 2021. Pon Holdings BV is a financial holding company with business interests in automotive, bicycles, equipment and power systems, industrial mobility, services, agricultural products, and venture capital. Dorel Finance US, Inc serves as the parent company for various Dorel Sports subsidiaries in Europe and the USA. The acquisition transaction became legally effective on 4 January 2022. As this acquisition met the criteria for a mandatory notification transaction, Pon Holdings BV was required to notify the KPPU within 30 days of the date the transaction became legally effective.

In handling this case, the Commission Panel applied a relaxation of law enforcement by extending the notification obligation period to 60 days based on KPPU Regulation No 3 of 2020. Therefore, the deadline for notifying the share acquisition of Dorel Finance US, Inc by Pon Holdings BV to the KPPU – which was initially supposed to be no later than 15 February 2022 – was extended to 31 March 2022.

Pon Holdings BV was found to have notified the share acquisition to the KPPU only on 1 April 2022. Therefore, Pon Holdings BV was late in notifying by 31 working days, based on Article 29(1) of the Competition Law. However, in view of the extension of the notification obligation period due to the application of law enforcement relaxation based on KPPU Regulation No 3 of 2020, the delay in notification by Pon Holdings BV in this case was counted as one working day.

As part of the Quick Examination procedure, the KPPU can conduct a Commission Council Deliberation and issue a decision after the Preliminary Examination stage, without proceeding to the Further Examination stage or its extension as happened in the previous case-handling regime. The Quick Examination is applied because the reported party has been co-operative throughout the trial process and admitted to all alleged violations presented.

The key takeaway from this case is that the KPPU can expedite proceedings when the party involved admits guilt. This makes case handling more efficient and provides the undertaking with legal certainty. Moreover, this case shows that a one-day delay in notification does not always result in a fixed IDR1 billion fine; the penalty can vary.

Separately, the Indonesian government issued Regulation 20/2023 on 9 April 2023, which became effective on 9 May 2023 and makes merger notifications to the KPPU subject to a notification fee. For further details, please refer to **3.3 Filing Fees**.



Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.377

- 1.1 Merger Control Legislation p.377
- 1.2 Legislation Relating to Particular Sectors p.377
- 1.3 Enforcement Authorities p.378

2. Jurisdiction p.379

- 2.1 Notification p.379
- 2.2 Failure to Notify p.379
- 2.3 Types of Transactions p.380
- 2.4 Definition of "Control" p.380
- 2.5 Jurisdictional Thresholds p.381
- 2.6 Calculations of Jurisdictional Thresholds p.381
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.382
- 2.8 Foreign-to-Foreign Transactions p.383
- 2.9 Market Share Jurisdictional Threshold p.383
- 2.10 Joint Ventures p.383
- 2.11 Power of Authorities to Investigate a Transaction p.383
- 2.12 Requirement for Clearance Before Implementation p.384
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.385
- 2.14 Exceptions to Suspensive Effect p.385
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.385

3. Procedure: Notification to Clearance p.385

- 3.1 Deadlines for Notification p.385
- 3.2 Type of Agreement Required Prior to Notification p.385
- 3.3 Filing Fees p.385
- 3.4 Parties Responsible for Filing p.386
- 3.5 Information Included in a Filing p.386
- 3.6 Penalties/Consequences of Incomplete Notification p.387
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.387
- 3.8 Review Process p.387
- 3.9 Pre-notification Discussions With Authorities p.388
- 3.10 Requests for Information During the Review Process p.389
- 3.11 Accelerated Procedure p.389

4. Substance of the Review p.389

- 4.1 Substantive Test p.389
- 4.2 Markets Affected by a Transaction p.390
- 4.3 Reliance on Case Law p.390
- 4.4 Competition Concerns p.390
- 4.5 Economic Efficiencies p.391
- 4.6 Non-competition Issues p.391
- 4.7 Special Consideration for Joint Ventures p.392

5. Decision: Prohibitions and Remedies p.392

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.392
- 5.2 Parties' Ability to Negotiate Remedies p.392
- 5.3 Legal Standard p.393
- 5.4 Negotiating Remedies With Authorities p.393
- 5.5 Conditions and Timing for Divestitures p.393
- 5.6 Issuance of Decisions p.394
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.394

6. Ancillary Restraints and Related Transactions p.394

- 6.1 Clearance Decisions and Separate Notifications p.394

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.394

- 7.1 Third-Party Rights p.394
- 7.2 Contacting Third Parties p.394
- 7.3 Confidentiality p.395
- 7.4 Co-operation With Other Jurisdictions p.395

8. Appeals and Judicial Review p.395

- 8.1 Access to Appeal and Judicial Review p.395
- 8.2 Typical Timeline for Appeals p.395
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.396

9. Foreign Direct Investment/Subsidies Review p.396

- 9.1 Legislation and Filing Requirements p.396

10. Recent Developments p.396

- 10.1 Recent Changes or Impending Legislation p.396
- 10.2 Recent Enforcement Record p.396
- 10.3 Current Competition Concerns p.398

Rucellai & Raffaelli was founded in 1979 and is an independent law firm with offices in Milan, Rome and Bologna. The antitrust department, consisting of ten lawyers, has gained considerable expertise with antitrust issues in various sectors, including banking, pharmaceutical, healthcare, medical devices, chemicals, cosmetics, the automotive industry, IT and telecommunications, air transport, mass retail and superstores. The antitrust department provides general assistance on pre-notifications and notifications of concentrations at EU and Italian

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STUDIO LEGALE

1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The rules governing merger control in Italy are set out by the Italian Antitrust Law, No 287/1990 of 10 October 1990 (the “Law”). The procedural concerns, including those relating to merger control, are defined by Presidential Decree 217 of 30 April 1998 (the “Procedural Regulation”).

The Italian Antitrust Authority (IAA or the “Authority”) provides specific guidance on merger control in the form of the “Merger Instructions”. This has recently been replaced (from 1 May 2024) with a new version that considers the legislative amendments introduced by Law No 118 of 5 August 2022 and Law No 214 of 30 December 2023 and the principles contained in the Commission Consolidated Jurisdictional Notice. The new version of the Merger Instructions contains the new form for the notification of transactions (the “Form”).

The document offers some clarification regarding the types of transactions that do not need to be notified, according to Article 5 of the Law, the definition of the market/s affected by the transactions and the calculation of turnover. Unlike

the previous version of the Merger Instructions, the new version does not contain the notification form.

The Italian rules on merger control are significantly similar to the corresponding EU merger control rules and must be interpreted in light of the EU principles developed by the European Commission and EU courts. These principles are automatically integrated into the Italian system (Section 1(4) of the Law). The rules are interpreted and applied in light of the Commission Consolidated Jurisdictional Notice adopted under the EU Merger Regulation (the “Commission Jurisdictional Notice”).

The IAA also provides guidelines on pre-notification discussions and the calculation of turnover thresholds, and criteria for the determination of the filing fees, which are defined annually. In the application of fines, the IAA refers to the general rules contained in Law No 689 of November 1981 (*Legge di depenalizzazione*).

1.2 Legislation Relating to Particular Sectors

Law Decree No 21 of 21 March 2022 (converted into Law No 51 of 20 May 2022) strengthened amending Law No 56 of 11 May 2012, the leg-

isolation granting the Italian government special powers to protect national interests in strategic sectors. This regulation provides for the obligation to notify the Presidency of the Council of Ministers of certain operations that are likely to affect the ownership of tangible and intangible assets and resources considered to be of strategic importance – traditionally, essential national interests have been identified in defence and national security. Over time, these have been extended to include the energy, transport, communications and 5G broadband electronic telecommunications networks sectors. As a result of regulatory interventions during the pandemic, they were further expanded to include the financial sector; infrastructure and critical technologies, including water and health; food security; access to sensitive information, including personal data; artificial intelligence; robotics; semiconductors; and cybersecurity; as well as nanotechnology and biotechnology.

For special rules for banks, insurance companies, communications industries, see **1.3 Enforcement Authorities**.

1.3 Enforcement Authorities

The Main Regulatory Authorities

The IAA is the enforcement authority for merger control and has both investigative and decision-making powers.

The IAA normally co-operates with the following main regulatory authorities:

- the Bank of Italy in the banking sector;
- the Institute for the Supervision of Insurance (“IVASS”) in the insurance sector;
- the Communications Regulatory Authority (“AGCOM”) in the communications sector;

- the Regulatory Authority for Energy, Networks and Environment (“ARERA”) in the fields of energy and gas; and
- the Italian Police Force with general competence in economic and financial matters (“*Guardia di Finanza*”).

In this regard, the IAA and IVASS signed two memorandums of understanding (MOUs) in 2013 and 2014, intended to strengthen their collaboration in their respective fields (other MOUs with IVASS were signed or supplemented in 2018, 2019 and 2021). Moreover, according to Article 20 of the Law, the IAA has to ask the IVASS to give a mandatory but non-binding opinion on the operation.

The IAA also signed two MOUs with AGCOM in 2013 and 2016.

The banking sector

With reference to the banking sector, the operations of concentration are evaluated – independently – by the IAA and the Bank of Italy, which applies its powers in relation to the rules on sound and prudent management. At the same time, Article 20 of the Law provides for some exceptions – the Bank of Italy can ask the IAA to approve an operation that leads to a dominant position if the banks concerned have particular stability problems. This authorisation, however, cannot go further than what is strictly necessary.

The communications sector

As regards the communications sector, reference should be made to Law No 249 of 31 July 1997, which requires the IAA to ask for a compulsory but non-binding opinion from AGCOM. Moreover, when at least one of the parties involved in a concentration operates in the “integrated communications system” (which includes, among others, newspapers, internet, radio and televi-

sion broadcasting), the operation must be notified not only to the IAA but also to AGCOM. Both authorities will conduct the necessary analysis as per their respective powers.

Economic matters

In addition, Article 25 of the Law confers a wide margin of discretion on the IAA where interests relevant to the national economy arise. More specifically, upon a proposal of the Ministry of Economic Development, the Council of Ministers may set forth some general criteria to allow the IAA to clear concentrations that would otherwise be forbidden, provided that the operations do not eliminate competition in the market.

The prime minister can also – following a proposal from the Ministry of Economic Development – prohibit a concentration involving undertakings or entities from countries that do not protect the independence of undertakings or entities under provisions that are equivalent to those provided by the Law, or countries that apply discriminatory provisions or impose clauses that have a similar effect in relation to acquisitions by Italian undertakings or entities.

The police force

The IAA renewed MOUs with the Italian Police Force in April 2024. The Italian Police Force cooperates with the IAA to ascertain antitrust violations by means of the collection and elaboration of data, facts and information useful for the investigations falling within the competence of the IAA. It also carries out studies and investigations in the sector and submits to the IAA any element, also autonomously acquired, which it deems relevant to the application of the Antitrust Law.

2. Jurisdiction

2.1 Notification

Notification to the IAA is compulsory if the transaction meets the jurisdictional thresholds (see 2.5 Jurisdictional Thresholds) or falls within the conditions for below-thresholds concentrations (see 2.11 Power of Authorities to Investigate a Transaction). In these terms, even transactions with little significant – or even no – effect on the Italian market must be notified to the IAA, which will assess the impact on competition.

2.2 Failure to Notify

According to Article 19.2 of the Law, the IAA may impose an administrative fine on undertakings that fail to notify a transaction that reaches the Italian thresholds. This fine may be equal to up to 1% of their turnover in the financial year preceding that in which the failure to notify is challenged.

In order to determine the amount of the fine, the IAA's evaluation has to take into account the subjective elements of the infringement – ie, the behaviour of the undertakings (both wilful and negligent behaviour are relevant), the existence of excusable error, spontaneous notifications, etc – and the objective elements (the competitive impact).

The IAA has the power to impose fines pursuant to Article 31 of the Italian Antitrust Law (see cases C12430B/2022 – Dea Capital Alternative Funds Sgr/Calvi Holding; C12352B/2021 – Doreca-Abruzzo Distribuzione/Ad Beverage; C12295B/2020 – ACEA-Mediterranea-Alma CIS/Pescara Distribuzione Gas; in this latter case, the IAA applied fines of approximately EUR154,000 on the three companies involved). According to Article 28 of Law No 689/81, this power is subject to a limitation period of five years.

The decisions are published on the IAA's website and in the official bulletin.

2.3 Types of Transactions

The Law classifies the following transactions as concentrations:

- a merger between two or more undertakings;
- an acquisition by one or more subjects controlling at least one undertaking or one or more undertakings, of the direct or indirect control of the whole or parts of one or more undertakings, whether through the acquisition of shares or assets, or by contract, or by any other means; and
- the creation between two or more undertakings of a joint venture by setting up a new company (see 2.10 Joint Ventures).

In general, a concentration arises whenever a transaction involves a change in control on a lasting basis (see 2.4 Definition of "Control").

Article 5 of the Law expressly provides for some transactions that do not give rise to a concentration, as follows:

- the acquisition by banks or financial entities of shares in companies newly set up or through a capital increase, when such purchase is made only for resale (provided that the shares are resold within a period of 24 months, during which time, the relevant voting rights are not exercised); and
- transactions that have as their main object or effect the co-ordination of the actions of independent undertakings (in this case, the operations may be evaluated under Article 2 of the Law and/or Article 101 TFEU).

The following transactions also do not give rise to a concentration:

- internal restructurings or reorganisations;
- transactions between undertakings that are part of the same group (except in specific circumstances indicated in paragraph 2 letter c) of the Merger Instructions – ie, the absence of interdependence between the subjects involved); and
- the acquisition or incorporation of a company that does not carry out economic activities and does not hold, either directly or indirectly, any other undertaking (however, an operation of this kind qualifies as a concentration when the target company holds – or controls another company that holds – licences, permits, grants or other titles by which a business activity may be carried out; although paragraph 2 letter d of the Merger Instructions specifies that the mere acquisition of a licence does not constitute a concentration if it is necessary to enable the transferee to undertake its activity).

When the operation arises out of the acquisition of part of one or more undertakings (where "part of an undertaking" means any asset or set of assets to which a turnover is clearly attributable), two or more operations that individually do not meet the jurisdictional thresholds and that were concluded between the same companies in the last two years will be considered as a single operation completed on the day of the last transaction.

Shareholders' agreements or changes to articles of association are not included when they do not involve a change in the structure of control of an undertaking.

2.4 Definition of "Control"

Article 7 of the Law provides a broad definition of control, which includes both direct and indirect

control as well as sole and joint control. More specifically, control is acquired:

- in the cases provided for by Article 2359 of the Italian Civil Code, according to which, controlled companies are –
 - (a) companies where another company holds the majority of voting rights exercised in ordinary shareholders' meetings; or
 - (b) companies where another company holds sufficient voting rights to exercise a significant influence in ordinary shareholders' meetings; or
 - (c) companies that are under the significant influence of another company pursuant to particular contractual relationships entered into with the latter; and
- by the holding of rights, contracts or other legal relations which, separately or in combination, and having regard for the considerations of fact and law involved, confer the possibility of exercising a decisive influence on an undertaking – these cases include, for example: property rights or rights of use of all or part of the assets of an undertaking; or rights, arrangements or other legal relations that confer a decisive influence over the composition or the decisions of the corporate governance bodies (eg, commercial licences, see case C12354/2021 – Telecom Italia/Rami di azienda BT Italia; licence agreements, see case C12207/2019-Sky Italia/R2; maintenance contracts, see case C11528/2012 – Otis Servizi/Ramo di Azienda di Adm Ascensori).

In any case, the IAA generally refers to the definition of control provided by the Commission Consolidated Jurisdictional Notice (2008/C 95/01). Acquisitions of minority shareholdings are caught only when such operations lead to a change in the structure of control (eg, when

the minority shareholder holds veto rights over strategic decisions of the given undertaking).

2.5 Jurisdictional Thresholds

Pursuant to Article 16 of the Law, a concentration must be notified in advance to the Authority:

- if the combined aggregate national turnover of all the undertakings concerned exceeds EUR567 million; and
- if the aggregate domestic turnover of each of at least two of the undertakings concerned exceeds EUR35 million.

The above-mentioned thresholds (subject to annual review – see the IAA's Decision No 31088 of 5 March 2024) have been cumulative since the Law was amended in 2012. Indeed, the previous regime provided for notification of an operation only if either one of the two thresholds was exceeded (alternative thresholds). In the following years, the amendment predictably reduced the number of operations notified to the IAA.

2.6 Calculations of Jurisdictional Thresholds

These thresholds are based on nationwide revenues realised by the parties involved in a transaction.

In particular:

- in the case of a merger, the relevant turnover is the consolidated turnover realised by the group to which each merging party belongs;
- in the case of a joint venture, the relevant turnover is the consolidated turnover realised by the group to which each parent company belongs;
- in the case of the acquisition of sole control –
 - (a) as regards the acquiring party, the relevant turnover is the consolidated turnover

- realised by the group to which it belongs;
and
- (b) as regards the acquired party, the relevant turnover is the turnover realised by it; and
- in the case of the acquisition of joint control –
 - (a) as regards the acquiring parties, the relevant turnover is the consolidated turnover realised by the group to which each acquiring party belongs; and
 - (b) as regards the acquired party, the relevant turnover is the turnover realised by it.

Consolidated Turnover

The group's consolidated turnover includes that realised by the undertaking concerned, that realised by its subsidiaries and their subsidiaries, and that realised by its parent companies and their parent companies. In the acquisition of control, the target's turnover includes that realised by the target and that realised by its subsidiaries and their subsidiaries. Should the target be a branch of a business, the relevant turnover is generally estimated having regard to the costs required for the branch to perform its activities.

Aggregate Nationwide Turnover

According to the Merger Instructions, aggregate nationwide turnover means the turnover derived from the sale of products and/or the provision of services during the previous financial year on the Italian market after deducting returned products, discounts, and taxes directly related to the sale of products and the provision of services. The national allocation of turnover depends on direct sales in Italy and is hence determined by the location of the customer to whom the products have been sold and/or the services that have been provided at the time of the transaction. According to the Merger Instructions, for foreign-registered undertakings, the amounts in foreign currency must be converted into euros at

the average exchange rate of the relevant financial year.

Turnover for Banks and Insurance Companies

The Law provides special rules for the method of calculation of turnover for banks (turnover is equal to the value of one tenth of their total assets, memorandum accounts excluded) and insurance companies (turnover is equal to the value of premiums collected) (Article 16(2), the Law).

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

The first threshold (aggregate Italian turnover of all the undertakings concerned) requires consideration of the following data:

- in the case of a merger, the relevant turnover is the sum of the turnovers of all the merging entities (on a group-wide basis); and
- in the case of the acquisition of joint control, the turnover of the undertaking to be considered must be divided equally between all entities acquiring control.

Intra-group sales must not be considered part of the group's turnover. Moreover, the turnover of the seller does not have to be taken into account unless the seller retains joint control (it is thus an entity acquiring joint control).

Note that, after Law No 124/2017, the national turnover of each of at least two of the undertakings concerned has to be considered as a second threshold.

With regard to changes in the business during the reference period, the IAA follows the principles set out at European level due to the lack of any specific national provision (particularly para-

graphs 172 and 173 of the Commission Consolidated Jurisdictional Notice No C 95/01 of 2008).

2.8 Foreign-to-Foreign Transactions

The Merger Instructions do not provide for exemption from the obligation to notify foreign-to-foreign transactions.

This derives from the circumstance that a foreign-to-foreign transaction is not able, presumably, to cumulatively exceed the jurisdictional thresholds.

2.9 Market Share Jurisdictional Threshold

Italian merger control rules do not consider market share jurisdictional thresholds.

Market shares held by the companies involved in the concentration are considered in the assessment of the impact of the transaction on the market (see 3.5 Information Included in a Filing and 4.2 Markets Affected by a Transaction).

2.10 Joint Ventures

A joint venture constitutes a concentration if the following cumulative conditions are met:

- two or more undertakings set up a new company;
- these parent companies acquire joint control over the new company;
- the new company will operate on the market as an autonomous economic entity (full-function joint venture); and
- the new company's main object or effect is not the co-ordination of the competitive behaviour of the parent companies.

To evaluate whether a joint venture is a full-function joint venture, the criteria set forth in the

Commission Consolidated Jurisdictional Notice apply.

Should a joint venture not operate as an autonomous economic entity, so that the co-ordination effects prevail over the structural effects, the transaction constituting a joint venture will be evaluated under the rules on restrictive agreements and practices (Article 2 of the Law).

2.11 Power of Authorities to Investigate a Transaction

If the transaction does not meet the jurisdictional thresholds, the IAA does not have the power to open an investigation.

In some cases, however, there is a notification obligation even for transactions that do not meet the jurisdictional thresholds. The so-called “below-thresholds” transactions were in fact recently introduced into the Law in Article 16(1-bis) by Law No 188/2022. In light of updates to European legislation, the new provision provides the power for the IAA to call in below-thresholds mergers under three cumulative conditions:

- no more than six months have elapsed since completion of the transaction;
- one of the two turnover thresholds provided for in Article 16 of the Law is exceeded or the total worldwide turnover generated by all the undertakings concerned exceeds EUR5 billion; and
- the Authority finds, on the basis of available evidence, that there are concrete risks for competition in the national market or in a part thereof, also taking into account the detrimental effects on the development and diffusion of small enterprises characterised by innovative strategies.

The IAA, considering the amendment made to Law No 287/90, and following the public consultation that was launched, has also adopted an ad hoc Notice (IAA Decision No 30407, 13 December 2022) in which the procedural rules for the application of the new Article as well as clarifications on the temporal and substantive scope of application of the Notice were defined.

The above-mentioned Notice was amended by Decision No 31090 of 27 February 2024 considering the IAA's practical experience. In the new Notice, the Authority provides further clarifications, in particular regarding the scope of application of the notion of "existence of concrete risks for competition".

If the responsible entities fail to notify a concentration that meets the turnover thresholds or that falls within the scope of Article 16(1-bis) of the Law, the IAA may impose fines. In this regard, it is necessary for the Authority to start its investigation within five years of the transaction (see **2.2 Failure to Notify**). Additionally, where the parties fail to notify and the IAA is informed of the concentration by any other means, the IAA must commence investigations within 30 days. If an investigation is opened, the Authority must communicate its conclusions on the merits within the mandatory term of 90 days from the opening of the investigation (before the amendment of paragraph 8 of Article 16, Law No 287/90, the term was 45 days under Law No 214/2023).

2.12 Requirement for Clearance Before Implementation

There is no standstill obligation under the Italian merger control regime, so sanctions will apply for failure to notify and/or implementation of the transaction in spite of a prohibition decision by the IAA.

However, pursuant to Article 17(1) of the Law, when opening a phase two investigation (see **3.8 Review Process** and **5.1 Authorities' Ability to Prohibit or Interfere With Transactions**), the IAA may order the undertakings not to implement the transaction until its final decision.

For example, in the case C12625/2024 – Frozen Investments-Sammontana Finanziaria/Sammontana-Forno d'Asolo, the IAA set the suspension of the merger, and of any other preparatory measure, with the decision to initiate the investigation, given that the preliminary assessment found certain competition concerns. In public takeover bids, Article 17(2) provides that, notwithstanding the provision of paragraph 1, the acquisition of the target's shares can be completed, provided that the acquiring entity does not exercise the relevant voting rights until the IAA issues its decision.

Pursuant to Article 19 of the Law, in the implementation of a prohibited transaction or a transaction in breach of obligations imposed by a conditional clearance decision, the IAA may do the following:

- impose a fine ranging from 1% to 10% of the turnover of the business forming the object of the concentration; and
- require the parties to take measures to restore effective competition and remove any anti-competitive effects of the transaction (for this reason, it is advisable not to implement a transaction during the review process, when competition concerns are likely to be raised by the IAA).

For the quantification of fines, the IAA takes into account the same criteria for failure to notify (ie, remedial action, the personality and economic

conditions of the perpetrator, and the duration of the infringement – see **2.2 Failure to Notify**).

2.13 Penalties for the Implementation of a Transaction Before Clearance

The Italian framework does not provide for a standstill period, so there are no specific penalties if the parties implement the transaction before the clearance.

In any case, as defined under **2.12 Requirement for Clearance Before Implementation**, the IAA may impose the suspension of the concentration, with any breach of the suspension leading to sanctions.

2.14 Exceptions to Suspensive Effect

See **2.12 Requirement for Clearance Before Implementation**.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

See **2.13 Penalties for the Implementation of a Transaction Before Clearance**.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

A transaction must be notified prior to its implementation – that is, before the ability to exercise a decisive influence over the behaviour of the target has been acquired – but after the parties have agreed on the essential aspects of the transaction.

Indeed, the IAA must be aware of the essential elements of the operation in order to make its assessment. More specifically, the Merger Instructions distinguish between:

- mergers where notification has to take place before the drafting of the merger deed;
- acquisitions of direct/indirect control under Article 5 (b) of the Law, namely through the purchase of shares/quotas of a company, where the prior notification requirement is fulfilled if the full effectiveness of the acquisition agreement is suspended until the IAA has cleared the operation;
- joint ventures where notification to the IAA must be made before the incorporation deed is filed with the Register of Companies; and
- in the case of Article 16(1-bis) of the Law (below-threshold transaction), the notification of the concentration must be made within 30 days of receipt by the addressee of the Authority's request, without prejudice to the possibility for the Authority to extend the aforesaid deadline by up to a further 30 days, in exceptional cases, on the basis of a reasoned and timely request by the undertakings concerned.

Pursuant to Article 19(2) of the Law, where the responsible company fails to notify the operation, the IAA may impose an administrative fine of up to 1% of the undertaking's turnover in the financial year preceding that of the omission of notification or late notification.

3.2 Type of Agreement Required Prior to Notification

A notification can be made prior to signing a definitive agreement, provided that the parties have agreed on the essential aspects of the transaction – for instance, in the context of a signed framework agreement or a signed letter of intent.

3.3 Filing Fees

The payment of a filing fee is not required.

3.4 Parties Responsible for Filing

Generally, all undertakings acquiring control are responsible for filing, which can also be undertaken by the company that directly or indirectly controls the acquirer.

More specifically, according to the Merger Instructions:

- in the acquisition of control or the creation of a joint venture, all the companies acquiring control are responsible; and
- for mergers, all merging entities are considered responsible.

In these cases, the filing should be executed jointly by the parties.

Lastly, in the case of a public takeover bid, the responsibility is attributed to the bidder.

In the case of Article 16(1-bis) of the Law (below-threshold transaction), the merger must be notified by the undertaking from which the Authority has requested notification; in cases of acquisition of control, where the addressee of the Authority's request does not coincide with the undertaking acquiring control, the notification of the transaction may also be made by that undertaking.

3.5 Information Included in a Filing

As of 1 May 2024, notifications are required to be made according to the Merger Instructions (a platform with a specific form has been implemented).

The information to be notified concerns:

- background information and data on the companies involved in the transaction;

- a detailed description of the transaction (aims of the merger; proposed structure of ownership and control after the operation; ancillary restrictions directly related and necessary to the implementation of the merger);
- information on the ownership and control of the parties (specifying which entities exercise control over the parties involved);
- a description of the economic activities of the entities;
- the turnover generated by the entities over the last three years;
- information on each of the parties' financial and personal links with other entities active in the affected markets; and
- information on the affected markets relating to market shares, competitors, sales and further clarification.

If the transaction does not give rise to any affected markets, the Form may be submitted as a Short Form.

Submitting a Short Form means omitting Section VI.1 of the Form relating to "Affected Markets". This section requires more detailed information, such as on the structure of supply and demand, relations with suppliers, market entry and exit, co-operation agreements, and research and development agreements.

The Form must be sent with other documents that are relevant to the concentration, including:

- a definitive draft or the most recent version of the documents concerning the operation;
- the balance sheets and annual accounts for the last three financial years; and
- in the case of a public bid, a copy of the offer document.

In addition to the fundamental information, parties may attach an evaluation of the affected markets, reports, analyses, studies and surveys prepared for the shareholders or the directors, to provide assistance to the IAA.

The IAA's instructions for the notification form do not provide specific rules about language, but the notification forms are usually drafted and submitted in Italian. As regards the relevant documents attached to the notification, the Authority usually accepts the English version; there are no specific rules about the use of other languages.

The notification form must be undersigned by the legal representatives of the notifying parties, who expressly certify that the information submitted is complete and accurate. The Form and attached documentation must be submitted to the IAA by certified electronic mail.

3.6 Penalties/Consequences of Incomplete Notification

If the IAA deems the information reported in the notification and related documents or annexes to be seriously inaccurate, incomplete or untruthful, it will require the parties to integrate the filing.

According to Article 16(7) of the Law, the IAA may commence the investigation beyond the time limits provided by this section when the information notified by the undertakings is seriously inaccurate, incomplete or untrue.

In these terms, the period of time provided for the opening of an investigation starts from the date when the IAA receives the complete notification, with all the necessary elements. When the operation requires the long-form notification, the completion of a short-form one may be viewed as incomplete.

Although no specific penalties are provided for incomplete notification, the IAA considers the administrative fine provided by Article 19(2) of the Law for failure to notify to be applicable where the information notified by the undertakings is seriously inaccurate, incomplete or untrue.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The Authority will inform the undertakings pursuant to Article 5(3) of the Procedural Regulation and the 30-day time limit will start from the moment the complete notice is received by the IAA (eg, C12579/2024 - FSI SGR/Bancomat; C12419/2022 – New FDM/Docici punti vendita di coop alleanza 3.0).

3.8 Review Process

The review process is divided into two phases that could be pre-empted by pre-notification discussions with the IAA.

In this preliminary and informal dialogue, the parties may submit an informal document, which will be treated as strictly confidential, at least 15 days before the date of the formal notification (see 3.9 **Pre-notification Discussions With Authorities**). The document must include the following information:

- the identity of the parties to the acquisition or merger;
- a short description of the operation;
- indications of the relevant and affected markets;
- the market shares of the parties; and
- other foreign antitrust authorities involved by notification.

Phase I

In Phase I (the period of 30 days from the notification of the transaction), the IAA may adopt different decisions (it is relevant to know that, for public takeover bids, the term is reduced to 15 days, while for concentrations concerning the acquisition of control of a bank the term is increased to 60 days, pursuant to Article 20(5) of the Law).

First, the IAA can decide on the inapplicability of the Law. This happens, for example, when the operation has an EU dimension, when the transaction does not constitute a concentration, or when the thresholds are not met (eg, case C12613/2024 – Latteria Soresina Società Cooperativa Agricola-Zanetti/Saviola in which the IAA ruled that the merger was not subject to the obligation of prior notification pursuant to Article 16(1) of the Law).

The IAA could decide to clear the transaction without opening an in-depth investigation if the operation evaluation does not identify competition issues. In these terms, the operation can proceed because there are no serious doubts about compliance with merger rules.

The IAA may decide not to open an investigation if corrective measures are taken.

The IAA could refer a concentration to the Commission that does not have a European dimension but that affects trade between the member states and threatens to significantly affect competition within its territory (eg, case C5819/2003 – General Electric/Agfa Ndt – Rami di azienda di Agfa Gevaert).

Otherwise, the Authority can decide to open an in-depth investigation when it deems it possible that the concentration may lead to a prohibition

decision. This last decision opens Phase II of the review process.

Phase II

Once the IAA has started Phase II, it may adopt the final decision within 90 days. The IAA can decide on clearance, on clearance with necessary measures to avoid anti-competitive outcomes, or on the prohibition of the transaction. Moreover, this period may be extended during the investigation for a further period of no more than 30 days where the undertakings fail to supply the information and the data in their possession upon request.

When the IAA proceeds with the second phase of the investigation, the overall time for clearance is normally 75 days from the notification of the operation. However, the Authority often extends this period, uses its power to stop the time limit of the first phase, or takes advantage of the 30 extra days of Phase II.

When the concentration involves undertakings that are active in the communications or insurance sectors, the Law provides for co-ordination with the competent authorities, AGCOM and IVASS, respectively. In this case, time limits are suspended until the Authorities return their opinion. The suspension also ends if the opinion is not returned within the period provided by the Law (30 days).

3.9 Pre-notification Discussions With Authorities

The phase prior to the formal notification of mergers is regulated by Procedural Notice, 20 June 2005, which was adopted in response to the IAA's experience that showed the need for the parties to consult an Authority before formally notifying a merger or acquisition, provided

that the second turnover threshold referred to in Article 16(1) of the Law is exceeded.

This informal procedure is seemingly encouraged by the IAA, but it is not commonly applied.

It takes the form of an informal dialogue, which is strictly confidential, and which aims to streamline the procedure and enable the Authority to issue its determinations more promptly.

3.10 Requests for Information During the Review Process

The 30-day time limit is interrupted when the information supplied by the undertakings is seriously inaccurate, incomplete or untrue, and it applies from the date the IAA receives the notification, with all the necessary elements.

3.11 Accelerated Procedure

Transactions may be notified in Short Form. The Short Form can be adopted where a transaction does not require long-form notification (for differences in short-form and long-form notification, see **3.5 Information Included in a Filing**). There are no differences in the timing for clearance with respect to the Short and Long Forms.

There are no cases in which clearance can otherwise be expedited.

4. Substance of the Review

4.1 Substantive Test

The Dominance and SIEC Tests

While until recently the IAA based its assessment of operations entirely on the so-called dominance test – based on which, a transaction is prohibited if it creates or strengthens a dominant position in the domestic market with the effect of eliminating or appreciably restricting

competition on a lasting basis, the recent Law No 118/2022 updated Article 6(1) of the Law by introducing the substantial impediment of effective competition (SIEC) test, while maintaining the previous dominance test, which continues to represent the first indicator of situations in which effective competition may be significantly impeded.

The SIEC test has already been introduced and used by the European legislator. According to this approach, the existence of a dominant position is not necessary to prohibit a concentration; the assessment must be based on a more general evaluation of the effects on the affected market (the increase of prices).

The introduction of the SIEC test is thus intended to fill a gap in the national competition protection instruments available in the context of merger review, allowing the Authority to align with the European Commission's practice and to impose remedies or prohibit merger operations which, while not leading to the creation of a dominant position, may lead to a weakening of competitive conditions due to, for example, the oligopolistic but non-collusive nature of the markets concerned or the presence of particularly complex vertical relationships.

The Assessment Process

In the assessment process, the IAA first has to identify the relevant product and geographic market(s). Considering that this is an ex-ante evaluation, the IAA will try to provide the competition constraints to which the undertakings concerned would be subject after the implementation of the transaction. In this analysis, the IAA essentially follows the European Commission's practice.

Secondly, the IAA proceeds with the evaluation of the effects of the notified transaction on the previously defined market(s). Pursuant to Article 6(1) of the Law, the Authority takes into account: the structure of all the markets concerned and actual or potential competition, as well as the market position of the undertakings concerned, their economic and financial power, the choices available to suppliers and users, their access to sources of supply or market outlets, the existence in law or in fact of obstacles to entry, supply and demand trends for the products and services in question, the interests of intermediate and ultimate consumers, and technical and economic progress, provided that it is to the consumer's advantage and does not form an obstacle to competition.

4.2 Markets Affected by a Transaction

The Merger Instructions define the “affected” markets as the relevant product and geographic markets in which:

- two or more undertakings involved in the concentration are active and will, following the operation, hold a combined market share of 20% with delta HHI > 150, or a share of more than 50%;
- one of the undertakings involved in the concentration will have a market share of at least 30% after the operation, provided that at least one other participant is active in an upstream or downstream market (which will also be considered to be an affected market);
- one of the undertakings involved in the concentration has a market share of not less than 20% and any other undertaking is either a potential competitor or is a new entrant (having entered the market within the last five years);
- one of the undertakings involved in the concentration has a market share of not less than

30% and any other undertaking has assets (eg, raw materials, infrastructure, data or intellectual property rights) that are important to that market or a closely related contiguous market;

- one of the undertakings involved in the concentration is present in a product market that is a closely related and contiguous market to a product market in which another undertaking is active, and the individual or combined market share of the undertakings in either market is not less than 30%;
- a target company is an important innovator or is conducting potentially important research activity; 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).

Market shares represent a prominent element in the evaluation of the concentration. More specifically, if the operation determined a final market share below 30%, it will be presumed that there are no effects on effective competition in the affected market. It is also clear that high market shares will determine a stringent assessment by the IAA.

4.3 Reliance on Case Law

The IAA usually relies on the case law of the European Commission and its own previous decisions, especially with reference to the definition of the relevant market.

4.4 Competition Concerns

In its assessment of transactions, the IAA abides by the general rule to adhere to the competition law principles elaborated by the EU legal order. In particular, the IAA has followed the EU principles on collective dominance, adapting them

to the specific circumstances of the case. The IAA takes into account both horizontal and non-horizontal effects on competition.

Horizontal Operations

With regard to horizontal operations, it has to be noted that the IAA considers the market share that the resulting entity will have in the relevant market involved in the operation and analyses such markets by comparing the market shares of the main competitors. Even if it is not a mandatory rule, a dominant position is generally recognised by the IAA when the companies have a market share that exceeds 40%. Furthermore, special attention is given to the increase in market power that derives from the operation. The IAA generally also considers the presence of entry barriers, market transparency and market dynamism in its analysis, and the existence of buying power capable of countervailing a significant market power from the supply side.

The IAA usually makes a distinction between unilateral and co-ordinated effects; the former lead to the elimination of a direct competitor and, in general, occur when the resulting undertaking significantly increases its individual market share as a result of the operation, while the latter lead to a situation where there is a high risk of collusion between different competitors.

Vertical Operations

In assessing vertical operations (which are generally considered to be less problematic than horizontal ones), the IAA pays particular attention to three potential risks:

- the foreclosure effects on the market;
- a possible increase in entry barriers; and
- the probability of tacit collusion between vertically integrated competitors.

Conglomerate Concentrations

Sporadically, the IAA evaluates the so-called “portfolio effects” in conglomerate concentrations – ie, operations not involving competitors or undertakings that are active at different levels of the same supply chain. Such operations do not generally give rise to competition concerns, unless they occur in complementary markets.

The “Failing Firm Defence”

Finally, it should be noted that the Law does not make any reference to the so-called “failing firm defence”. However, in following the European Commission’s principles, the IAA has shown its willingness to accept this defence if the undertakings involved can demonstrate that:

- without the acquisition, the failing firm would have been forced to exit the market;
- even without the acquisition, the market share of the failing firm would have been obtained by the acquiring undertaking; and
- there are no less restrictive solutions.

4.5 Economic Efficiencies

Although the IAA does not usually take efficiencies into account in its assessment of merger control transactions, in some cases it has referred to efficiency gains such as cost savings (case C8699/2007 – London Stock Exchange Group/Borsa Italiana).

Within the new Form it is possible (not mandatory) to indicate economic efficiencies that could result from the operation.

4.6 Non-competition Issues

Non-competition issues such as industrial policy, national security, foreign investment, employment, or other public interest issues are generally not taken into account during the review process. Therefore, it is relevant to consider that,

pursuant to Article 25 of the Law, it is possible for the IAA to clear an operation that is otherwise forbidden, in an exceptional case of relevant national economic interest.

In the banking field, the IAA may derogate from the rules concerning merger control and, more specifically, may authorise a merger transaction that creates or strengthens a dominant position, to grant stability for one or more of the parties involved.

Regarding foreign direct investments, see **1.2 Legislation Relating to Particular Sectors**.

4.7 Special Consideration for Joint Ventures

A joint venture constitutes a concentration if the following cumulative conditions are met:

- two or more undertakings set up a new company;
- these parent companies acquire joint control over the new company;
- the new company will operate on the market as an autonomous economic entity (full-function joint venture); and
- the new company's main object or effect is not the co-ordination of the competitive behaviour of the parent companies.

Unlike EU rules, the joint acquisition of an existing company does not fall within the meaning of joint venture provided by the Law, and it will be treated as an acquisition of control.

To evaluate whether or not a joint venture is a full-function joint venture, the criteria set forth by the Commission Consolidated Jurisdictional Notice apply.

Should a joint venture not operate as an autonomous economic entity, so that the co-ordination effects prevail over the structural effects, the transaction constituting a joint venture will be evaluated under the rules on restrictive agreements and practices (Article 2 of the Law).

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The IAA has the power to adopt a prohibition decision if, following the second phase, it assesses that the transaction significantly impedes effective competition in the national market or in a relevant part thereof, in particular as a result of the creation or strengthening of the dominant position of an undertaking.

The Authority may also clear the transaction, imposing the measures that it deems necessary to prevent the negative consequences referred to above.

Moreover, when opening a phase two investigation, the IAA may also interfere with the transaction by ordering the undertakings concerned to suspend it until the end of that investigation. In addition, when the transaction has already been implemented and the final decision finds it to be prohibited, the IAA has the power to impose all the necessary remedies to restore conditions of effective competition in the market.

5.2 Parties' Ability to Negotiate Remedies

The parties to a transaction that could give rise to competition concerns may propose both behavioural and structural remedies.

Structural remedies are generally preferred by the IAA and may include, for instance, the divestiture of intellectual property rights, the divestiture of assets or activities (eg, slots in the airline sector), and the divestiture of shareholdings.

Despite its preference for structural remedies, the IAA may also accept behavioural remedies, such as commitments to reduce the presence of the same individuals in the managing bodies of competing banks in the banking sector, or commitments aimed at granting competitors access to an essential resource/infrastructure, for instance, in the telecommunications sector.

5.3 Legal Standard

According to the European framework, the European Commission may only impose remedies that are offered by the undertakings involved. On the contrary, pursuant to Article 6(2) of the Law, the IAA may unilaterally impose any further measures considered necessary.

Although the application of remedies is done on a case-by-case basis, it is useful to consider the Commission's notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/C 267/01), which defines the content and procedural aspects to propose and evaluate remedies.

5.4 Negotiating Remedies With Authorities

The parties to a transaction that could give rise to competition concerns may propose measures that are deemed appropriate to address such concerns, during the first phase of the merger control proceeding and even during the pre-notification discussion, if it has commenced. During the second phase of the merger control proceedings, and if the IAA considers that the proposed

transaction could be prohibited, the parties may propose remedies deemed appropriate to eliminate those elements of the transaction that could distort competition. Likewise, during the pre-notification discussion or the first phase, with regard to transactions that could give rise to competition concerns, the IAA may propose certain measures, and may impose remedies if, during the second phase, it considers that the transaction could significantly impede effective competition in the national market or in a relevant part thereof, in particular as a result of the creation or strengthening of a dominant position.

It must be noted that, after the imposition of remedies by the IAA, the parties may request the removal of one or more remedies if there are any changes in the market. In this regard, because such a decision must be taken by the IAA jointly with the parties to the concentration, the IAA must open a proceeding. For example, in the recent cases C3818/2023 – Edizione Holding/Autostrade-Concessioni e Costruzioni Autostrade in which one of the measures imposed in a decision of 2000 was revoked; C12247B/2023 – BDC Italia-Conad/Auchan in which one of the measures imposed by a decision of 2020 was partially revoked; C11205B/2020 Elettronica Industriale/Digital Multimedia Technologies and C12207B/2022 SKY Italia/R2, in which the IAA revoked certain measures adopted with its Decisions No 23117/2011 and No 27784/2019 respectively, due to a change in the factual and legal situation, and also with reference to the configuration of the Italian market.

5.5 Conditions and Timing for Divestitures

Measures accepted by the IAA during the pre-notification discussion or the first phase are not binding. If the parties implement the transaction without the prescribed measures, the IAA cannot

impose fines upon these parties, and it may only consider that the transaction has been implemented within a changed factual scenario.

However, remedies accepted by the IAA during the second phase are binding upon the parties, and the IAA may impose fines ranging from 1% to 10% of the turnover of the business forming the object of the transaction if the parties implement the transaction in the absence of the aforesaid remedies.

5.6 Issuance of Decisions

All decisions permitting or prohibiting a transaction are formally notified to the parties involved and published on the IAA's website and in the official bulletin.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

There is no recent case law on the imposition of remedies or prohibitions of concentrations in foreign-to-foreign transactions.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Due to the lack of provisions concerning ancillary restraints in Italian law, the IAA evaluates the restrictions – which have to be indicated by the undertakings in the specific section of the Form – in light of the EU principles.

The IAA must consider explanations of the parties as to why the ancillary restraints need to be considered as strictly necessary for the implementation of the operation, and the result of this assessment is indicated in the final decision of the Authority.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third parties may intervene in merger control proceedings if they are directly, immediately or presently damaged by the infringements under investigation or by the measures consequently adopted.

These third parties may intervene as follows:

- with regard to the first phase, the IAA publishes a short advice of the transaction notified, inviting third parties to submit observations on the proposed concentration within the next five working days from the date of publication; and
- with regard to the second phase, once the decision declaring the opening of the investigation has been published in the official bulletin, third parties may intervene with respect to all transactions, by submitting written representations, being heard by the case team, and also attending hearings, especially if this has been requested by the notifying parties (third parties may submit the request to intervene within ten days of publication in the official bulletin).

Third parties may also lodge complaints before the IAA against undertakings that have failed to notify a transaction.

7.2 Contacting Third Parties

Third parties may be contacted by the IAA to provide certain information or exhibit particular documents that could help the Authority to assess the operation. The IAA usually contacts the third parties in writing.

7.3 Confidentiality

All IAA decisions (prohibition/approval decisions and decisions to open an investigation) are published in its bulletin and on the website, with a notice that indicates the main features of the proposed concentrations. For major decisions, the IAA typically also issues press releases on its website.

Business secrets are removed from the IAA's decisions only if the parties make an express reasoned request to the IAA to this effect, and the IAA accepts it. Therefore, decisions published by the Authority will not contain the information included in the notification and the attached documents if the parties have expressly indicated that these constitute business secrets.

7.4 Co-operation With Other Jurisdictions

Pursuant to Regulation 1/2003, the IAA is part of the European Competition Network (ECN) and co-operates closely with the European Commission and national competition authorities of all other EU member states.

Upon express authorisation being given by the parties to the transaction, the IAA may also exchange information with foreign competent authorities, even those of third countries, provided that these authorities guarantee the same degree of confidentiality with regard to the transaction as granted by the IAA.

The IAA is also part of the EU Merger Working Group, whose aim is to increase convergence and co-operation among EU merger jurisdictions. It is also part of the International Competition Network (ICN), with 136 other competition authorities in the world, the main purpose of which is the exchange of information or documents in relation to ongoing investigative pro-

ceedings, as well as the evaluation of initiatives aimed at the dissemination of competition culture in the respective countries.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

The IAA's decisions approving or prohibiting transactions may be appealed by the addressees or other interested third parties, before the Administrative Court of Lazio ("TAR Lazio").

The TAR Lazio may annul the IAA's decision, totally or partially, on points of law, for lack of jurisdiction or competence, violation of laws or abuse of power.

8.2 Typical Timeline for Appeals

The term for filing an appeal before the TAR Lazio is 60 days from the notification of the IAA's decision. The TAR Lazio's judgment may subsequently be appealed before the Supreme Administrative Court (*Consiglio di Stato*) either within 30 days of the notification of the TAR Lazio's judgment, or within three months of the publication of the judgment in the TAR Lazio's registry.

The rulings of the Supreme Administrative Court can be challenged before the Court of Cassation only on jurisdictional grounds, within 60 calendar days from the notification or within six months from the publication of the judgment; the rulings may also be subject to revocation under specific and extraordinary conditions provided in Articles 395 et seq of the Italian Civil Procedural Code.

Each phase of the judicial review lasts around one year, so a complete judicial review of an IAA decision takes around two or three years.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties that have a qualified interest can bring an appeal before the TAR Lazio.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

The Italian FDI regime, also known as the “Golden Power Law”, gives the Italian government special powers to approve or veto FDIs. According to the regime, the Italian government has the power to review all transactions relating to Italian companies that carry out “strategic activities” or hold “assets with strategic relevance” in certain sectors deemed pivotal for Italy, and against potentially predatory transactions.

During 2022, new amendments provided for both substantial and procedural changes to the Italian FDI screening regime.

On one hand, a new pre-notification procedure has been adopted, pursuant to which any company is entitled to file a voluntary pre-notification to the Italian government based on the information available as of the date of the pre-filing. Within 30 days of the pre-filing, the government must complete the related assessment.

On the other hand, the sectors and assets under which the Golden Power regime must be followed have been progressively expanded and include, but are not limited to: defence and national security; energy; the financial, insurance and credit sectors; media; infrastructure, transportation and telecommunications; strategic technologies; health and pharma.

Regarding foreign subsidies legislation, the EU’s Foreign Subsidies Regulation (FSR), which is directly applicable in Italy, came into force on 12 January 2023. The new set of rules for addressing distortions caused by foreign subsidies should allow the EU to remain open to trade and investment, while ensuring a level playing field for all companies operating in the European single market.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

The IAA’s Decision No 31088 of 5 March 2024 modified the thresholds (see **2.5 Jurisdictional Thresholds**).

In February 2024, the IAA published a new version of the Merger Instructions (see **1.1 Merger Control Legislation**) and an updated version of the Notice on the Application of Article 16(1-bis) of the Law (see **2.11 Power of Authorities to Investigate a Transaction**).

Regarding the newly introduced below-threshold operations, also see **2.11 Power of Authorities to Investigate a Transaction**.

10.2 Recent Enforcement Record Suspension of a Notified Merger

Recently, the IAA in case C12625/2024 – Frozen Investments-Sammontana Finanziaria/Sammontana-Forno d’Asolo ordered the immediate suspension of the merger until the conclusion of the investigation in order to avoid effects on the market that would be difficult to reverse. The IAA considered that the operation could raise anti-competitive concerns due to the creation or enhancement of a dominant position in the markets for the production and marketing of frozen

bakery products for breakfast, as well as the risk of significantly impeding effective competition in the markets for other frozen bakery products (salted snacks, pastries, etc) for the food service channel as well as in the markets for packaged and unpackaged ice cream.

The above-mentioned case represents one of the few cases in which the IAA has ordered the suspension of a notified, but not yet implemented, merger. For this reason, it will be interesting to observe what measures the undertakings involved intend to consider in order to reduce the alleged competitive concerns.

Prohibition of a Transaction

The IAA prohibited a transaction in case C12461/2022 – Enel Produzione/ERG Power, pursuant to Article 6(1) and (2) of the Law. In detail, the Authority stated that the operation appeared to give rise to the creation and strengthening of a dominant position in the relevant markets for the production and wholesale supply of electricity and electricity dispatching services, respectively, such as to eliminate or substantially and reduce competition in the long term.

Inapplicability of the Law; Failure to Notify

Among the transactions assessed in 2024, the IAA assessed the inapplicability of the Law in two operations (C12613/2024 – Latteria Soresina Società Cooperativa Agricola-Zanetti/Saviola as the IAA ruled that the merger was not subject to the obligation of prior notification pursuant to Article 16(1) of the Law, and C12594 – Latteria Soresina Società Cooperativa Agricola-Zanetti/Saviola as the notification had been withdrawn). In the three years 2019–2022, the IAA imposed the following fines for failing to notify: EUR285,000 in the case C12414B/2022 – Project Informatica/Centro Computer; EUR6,460.33

in the case C12430B/2022 – Dea Capital Alternative Funds SGR/Calvi Holding; approximately EUR12,000 in the case C12352B/2021 – Doreca-Abruzzo Distribuzione/Ad Beverage; and approximately EUR154,000 in the case C12295B/2020 – ACEA-Mediterranea-Alma CIS/Pescara Distribuzione Gas.

Conditional Authorisation

Moreover, between 2019 and 2023 the IAA often authorised mergers by ordering the measures necessary to prevent the creation or strengthening of a dominant position in the national market within the meaning of Article 6(2) of the Law (eg, recent IAA cases C12535/2023 – IP Italiana Petroli/Esso Italiana; C12488/2022 – Bubbles Bidco/Quattro; C12422B/2022 – Mondadori Media-Artoni Group-SRH/Press-Di Distribuzione Stampa e Multimedia; C12410B/2022 – Cinven Capital Management-Fressnapf Beteiligungs/Agrifarma-Maxi Zoo Italia; and C12373/2021 – NEXI/SIA).

Revoking of Imposed Measures

There have also been cases in which the IAA has subsequently revoked the measures imposed pursuant to Article 6(2) of the Law, after assessing that the reasons in fact and in law which had motivated the imposition of the measures previously ordered no longer existed (eg, IAA cases C3818/2023 – Edizione Holding/Autostrade-Concessioni e Costruzioni Autostrade in which one of the measures imposed in a decision in 2000 was revoked; C12247B/2023 – BDC Italia-Conad/Auchan in which one of the measures imposed by a decision in 2020 was partially revoked; C12207B/2022 – SKY Italia/R2 Revision of Measures; C11205B/2020 – Industrial Electronics/Digital Multimedia Technologies-Revision of Measures).

Failure to Comply

In one case the Authority examined whether there had been a failure to comply with its decision authorising the operation with measures, pursuant to Article 19(1) of the Law, concluding that there had been no failure to comply (IAA case C12246B/2022 – Fratelli Arena/Rami di Azienda di SMA-Distribuzione Cambria-Roberto Abate).

Failure to Provide Information

Finally, in 2023, the Authority established a violation of Article 16bis of the Law in two cases by finding a failure to respond to the IAA's requests for information (RFIs) made to the companies involved (C12476B/2023 – Marbles/Irideos – AGSM AIM Omessa Risposta a RFI; and C12476C/2023 – Marbles/Irideos – Stack EMEA Omessa Risposta a RFI).

10.3 Current Competition Concerns

Recently, the monitoring of below-threshold transactions has been an area of concern for the authorities.

Since the beginning of 2024, the IAA has assessed seven merger transactions pursuant to Article 16(1-bis) of the Law (C12583/2024 – IGPDecaux/Clear Channel Italia; C12586/2024 – Ignazio Messina & C/Terminal San Giorgio; C12608/2024 – Sage/Del Curto; C12609/2024 – Sage/Morandi-Bortot; C12610/2024 – Sage/Re Sergio Recycling; C12607/2024 – Servizi Italia/Branch of Steris; C12615/2024 – Alpacem Cementi Italia/Branch of Buzzi Unicem). In three cases, the IAA found the existence of potential anti-competitive concerns and opened an investigation (C12586/2024 – Ignazio Messina & C/Terminal San Giorgio; C12607/2024 – Servizi Italia/Branch of Steris; C12615/2024 – Alpacem Cementi Italia/Branch of Buzzi Unicem). In all the cases mentioned, the IAA intervened in traditional economic sectors, distant from those for which the 2022 legislative amendments were first envisaged (eg, digital markets).

Trends and Developments

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Rucellai & Raffaelli was founded in 1979 and is an independent law firm with offices in Milan, Rome and Bologna. The antitrust department, consisting of ten lawyers, has gained considerable expertise with antitrust issues in various sectors, including banking, pharmaceutical, healthcare, medical devices, chemicals, cosmetics, the automotive industry, IT and telecommunications, air transport, mass retail and superstores. The antitrust department provides general assistance on pre-notifications and notifications of concentrations at EU and Italian

level. The firm represents its clients in antitrust proceedings before national and EU competent authorities and courts. Self-assessment of agreements and practices, organisation of antitrust compliance programmes, training and audits are also covered by the firm, together with assistance on EU law-related matters and state aid. The firm also has wide experience in standalone and follow-on actions, representing clients in lawsuits for damages pending before the three competent courts of Milan, Rome and Bologna.

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STUDIO LEGALE

The New Discipline of Below-Threshold Transactions

Law No 118/2022 (the “Annual Market and Competition Law 2021”) introduced paragraph 1-bis to Article 16 of Law No 287/90 (the “Italian Antitrust Law”).

This amendment has given the Italian Antitrust Authority (IAA) a new power to assess merger transactions that do not meet the two turnover thresholds set forth in Article 16, paragraph 1 of the Italian Antitrust Law, but which may potentially present anti-competitive issues (so-called “below-threshold transactions”).

In other words, this is an exception to the traditional principle of turnover thresholds and, as an exception to the rule, the provision in question should be strictly interpreted in order to avoid excessively discretionary application of the discipline.

Conditions

The below-threshold transaction discipline applies to concentrations completed after 27 August 2022 and subject to the following conditions:

- no more than six months have elapsed since the transaction was finalised;
- only one of the two turnover thresholds is exceeded or the aggregate worldwide turnover of all the undertakings concerned is more than EUR5 billion; and
- the IAA, on the basis of the facts in its possession, considers that there are concrete competition risks in the national market (or in a substantial part thereof), also taking into account the negative effects on the development and diffusion of small undertakings characterised by innovative strategies.

With regard to the condition referred to in the third bullet point above, the IAA has clarified that for the purposes of assessing the “existence of concrete competitive risks”, it will take into account elements such as: the structure of the markets; the characteristics of the players involved; the nature of the activity carried out by the undertakings concerned and its relevance for consumers and/or other undertakings; the relevance of the innovative activity carried out; the competitive constraint exercised by one or more undertakings beyond the market share (IAA Communication No 31090 of 27 February 2024).

The IAA also considers market shares and the degree of concentration measured by the Herfindahl-Hirschman Index (HHI).

Where turnover is not indicative of competitive constraint, it may take into account additional elements, such as the fact that an undertaking:

- is a start-up or new entrant with significant competitive potential that it has yet to develop, or that it has adopted 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 conducting potentially important research;
- is an important current or potential competitive force;
- has access to competitively significant assets (such as raw materials, infrastructure, data or intellectual property rights); and/or
- provides products or services that are key inputs/components for other industries.

Another element relevant to this assessment may be whether the value of the consideration received by the seller is particularly high compared to the current turnover of the acquired undertaking.

Finally, it has been clarified that the IAA takes into account whether the undertakings achieve turnover in Italy, but may also take into account cases where none of the undertakings achieve turnover in Italy in the presence of certain circumstances (eg, the presence of production facilities in Italy or where the results of scientific research are commercialised in Italy).

Notification of the transaction

The discipline of below-threshold transactions provides alternatively for:

- a call-in mechanism, under which, following a reasoned request by the IAA, the undertakings concerned must proceed with notification within 30 days, with the possibility of an extension in the case of reasoned requests sent sufficiently in advance before the deadline (in the event of delays or omissions, undertakings may be subject to a fine of up to 1% of the turnover achieved in the previous year); or
- the possibility for the companies concerned to inform the IAA voluntarily by means of a so-called “voluntary notification”, which may be sent when an agreement on the essential elements of the operation has been reached (prior to completion of the operation), or within two months of closing.

Within 60 days of receiving the completed voluntary notification, the IAA will inform the entities concerned whether it intends to require notification (where the notification is incomplete, the time limit starts to run once all the information is received).

Providing for a voluntary notification mechanism is an effective way of mitigating legal uncertainty and all the possible consequences that it may have on the transaction, taking into account that the IAA has a period of six months from the date of closing to request a notification.

Procedural aspects

In both alternatives referred to in the section above, the IAA will, if it deems it necessary, open the investigation within 30 days from the date of the notification or otherwise, from the time when it became aware of it.

The IAA may open the investigation after the expiry of the 30-day period, in the event that the information provided by the undertakings with

the notification is found to be seriously inaccurate, incomplete or untrue.

If the IAA decides not to open the investigation, it will notify the undertakings concerned of its conclusions on the merits, within 30 days of receipt of the notification.

In the event of the opening of an investigation, the IAA must – within the peremptory term of 90 days from the beginning of the investigation (this term was recently modified from 45 to 90 days by the Annual Law for the Market and Competition 2022) – notify the undertakings concerned of its conclusions on the merits. This deadline may be extended during the investigation for a period not exceeding 30 days, if the undertakings do not provide the information and data requested.

Analysis of the IAA's Application Practice

Analysing the IAA's practice since the beginning of 2024, it can be observed that the IAA has assessed seven merger transactions pursuant to Article 16(1-bis) of the Italian Antitrust Law (C12583/2024 – IGPDecaux/Clear Channel Italia; C12586/2024 – Ignazio Messina & C/Terminal San Giorgio; C12608/2024 – Sage/Del Curto; C12609/2024 – Sage/Morandi-Bortot; C12610/2024 – Sage/Re Sergio Recycling; C12607/2024 – Servizi Italia/Branch of Steris; C12615/2024 – Alpacem Cementi Italia/Branch of Buzzi Unicem).

In most cases, the undertakings concerned submitted a voluntary notification, after which, the IAA decided not to open an investigation.

For example, in the case of the acquisition of exclusive control of a company operating as a concessionaire for outdoor advertising by another company active in the same sector, the

IAA decided not to open an investigation as, although the resulting share was not marginal (26.6%), it was not considered likely to restrict competition in the market concerned because:

- the buyer's client advertisers were able to exert pressure during negotiations; and
- the other advertising communication channels (online, television and radio channels), although not belonging to the relevant product market, were able to exert an external competitive constraint (C12583/2024 – IGP-Decaux/Clear Channel Italia).

It is also interesting to point out that the markets affected by the below-threshold transactions voluntarily notified by undertakings are all traditional sectors, and differ from those for which the below-threshold transaction discipline was originally designed (ie, digital and pharmaceutical markets). In this instance, the markets affected are:

- the sale of outdoor advertising space (C12583/2024 – IGPDecaux/Clear Channel Italia); and
- the procurement of wood waste for the production and commercialisation of secondary raw material for wood particle board, and the markets for the production of raw particle board and refinished particle board (C12608 – Sage/Del Curto).

However, in three of the seven mentioned cases, the IAA found the existence of potential competition concerns and opened an investigation (C12586/2024 – Ignazio Messina & C/Terminal San Giorgio; C12607/2024 – Servizi Italia/Branch of Steris; C12615/2024 – Alpacem Cementi Italia/Branch of Buzzi Unicem).

In two of the three above-mentioned cases, the IAA exercised its call-in power by requiring the undertakings concerned to notify the transaction (C12586/2024 – Ignazio Messina & C/Terminal San Giorgio, and C12615/2024 – Alpacem Cementi Italia/Branch of Buzzi Unicem). It follows, therefore, that in only one case, which subsequently evolved into a decision by the IAA to open an investigation, was the transaction voluntarily notified by the undertakings concerned (C12607/2024 – Servizi Italia/Branch of Steris).

As already highlighted, the cases mentioned above concern traditional economic sectors. In particular, these are the markets for:

- break bulk cargo terminal services;
- container terminal services;
- rolling stock cargo terminal services, as well as the upstream markets for the transport of goods by container ships and the transport of goods by Ro-Ro and Ro-Ro/Pax ships (C12586/2024 – Ignazio Messina & C/Terminal San Giorgio);
- the market for sterilisation services of medical devices, instruments and surgical equipment for healthcare facilities and related services (C12607/2024 – Servizi Italia/Branch of Steris); and
- the market for the production and marketing of cement and the markets placed both upstream and downstream of the cement production process, respectively of clinker and concrete (C12615/2024 – Alpacem Cementi Italia/Branch of Buzzi Unicem).

In the aforementioned cases, the IAA considered that there were real risks for competition in the national market or in a relevant part of it. For example, in the case concerning the acquisition of a branch of a business active in the supply of sterilisation services of surgical instruments by

a company active in the offer of rental, washing and sterilisation services of textile articles and surgical instruments in favour of social assistance and hospital structures, both public and private, the IAA opened the investigation taking into account the following elements.

The market share of the buyer

The buyer is the main player, with approximately 40–45% of the market share by value and approximately 40% of the tenders awarded in the relevant market (among those taken into consideration by the IAA). As a result of the transaction, the buyer will hold approximately 50–55% of the entire market for sterilisation of surgical kits.

The position of competitors

The IAA found a strong asymmetry with respect to competitors, which are significantly smaller in size and market share.

Market concentration

The IAA measured the level of market concentration using the HHI (C12607 – Servizi Italia/Branch of Steris).

Recently, the IAA concluded proceeding C12586 – Ignazio Messina & C/Terminal San Giorgio by authorising the transaction, conditional upon measures pursuant to Article 6(2) of the Italian Antitrust Law.

The transaction consists of the acquisition of 100% of the share capital of a “multipurpose third party” terminal company by a company active in the maritime transport of goods by container and rolling stock, in the management of a multipurpose terminal, in intermodal logistics and in repair and maintenance services ancillary to logistics and transport activities.

The IAA identified the relevant markets affected by the operation in the markets for:

- break bulk cargo terminal services;
- container terminal services; and
- rolling stock cargo terminal services.

Since cargo terminal services can be considered as an input to the maritime cargo service, the operation vertically affects the upstream markets for container ship cargo transport and Ro-Ro and Ro-Ro/Pax cargo transport. The IAA opened the investigation in this case on the basis of potential competition risks, both horizontal and vertical, in the market for terminal services for rolling stock cargo.

The IAA concluded that the transaction appears likely to restrict effective competition significantly, in particular, due to the ability and incentive of the parent companies of the buyer to implement foreclosure strategies in the market for rolling stock terminal services and the weakening of downstream competition in the rolling stock market resulting from the access of one of the buyer's parent companies to competitive sensitive information.

In particular, with regard to the sensitive information, the IAA assessed that the weakening of competition in the market for maritime transport services for rolling stock could occur as a result of the presence of the parent company in the governance of the buyer, where such presence would allow the buyer to have access to sensitive information about the business activities of the main competitor in the downstream market (eg, aggregated information on traffic handled).

The IAA authorised the operation, subject to the implementation of the measures proposed by the buyer concerning mainly non-discrimination obligations and guarantees of access to the terminal services for rolling stock provided by the company acquired as a result of the operation. That is, for the two years following notification of the decision, the same number of ship berths/year and frequency equal to the average of the three previous years must be guaranteed, and it must be ensured that tariffs will not be increased unless there are actual increases in costs related to personnel, labour supplier tariffs, port concession fees and energy costs.

Conclusions

It is likely that the new discipline on below-threshold transactions will lead to a significant increase in the number of concentrations that will be examined in preliminary investigations, thus increasing the IAA's enforcement activity on the subject of merger control.

The findings reported here appear significant with respect to the new trend and focus by the IAA on below-threshold transactions, especially if we consider that they refer only to the first months of 2024 and that, in the whole of 2023, the IAA concluded only one investigation under Article 16 of the Italian Antitrust Law (transactions above the threshold; see C12535 – IP Italiana Petroli/Esso Italiana).

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Contents

1. Legislation and Enforcing Authorities p.408

- 1.1 Merger Control Legislation p.408
- 1.2 Legislation Relating to Particular Sectors p.408
- 1.3 Enforcement Authorities p.408

2. Jurisdiction p.409

- 2.1 Notification p.409
- 2.2 Failure to Notify p.409
- 2.3 Types of Transactions p.409
- 2.4 Definition of "Control" p.410
- 2.5 Jurisdictional Thresholds p.410
- 2.6 Calculations of Jurisdictional Thresholds p.411
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.412
- 2.8 Foreign-to-Foreign Transactions p.412
- 2.9 Market Share Jurisdictional Threshold p.413
- 2.10 Joint Ventures p.413
- 2.11 Power of Authorities to Investigate a Transaction p.413
- 2.12 Requirement for Clearance Before Implementation p.413
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.413
- 2.14 Exceptions to Suspensive Effect p.414
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.414

3. Procedure: Notification to Clearance p.414

- 3.1 Deadlines for Notification p.414
- 3.2 Type of Agreement Required Prior to Notification p.414
- 3.3 Filing Fees p.414
- 3.4 Parties Responsible for Filing p.414
- 3.5 Information Included in a Filing p.414
- 3.6 Penalties/Consequences of Incomplete Notification p.415
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.415
- 3.8 Review Process p.416
- 3.9 Pre-notification Discussions With Authorities p.416
- 3.10 Requests for Information During the Review Process p.417
- 3.11 Accelerated Procedure p.417

4. Substance of the Review p.417

- 4.1 Substantive Test p.417
- 4.2 Markets Affected by a Transaction p.418
- 4.3 Reliance on Case Law p.419
- 4.4 Competition Concerns p.419
- 4.5 Economic Efficiencies p.419
- 4.6 Non-competition Issues p.420
- 4.7 Special Consideration for Joint Ventures p.420

5. Decision: Prohibitions and Remedies p.420

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.420
- 5.2 Parties' Ability to Negotiate Remedies p.421
- 5.3 Legal Standard p.422
- 5.4 Negotiating Remedies With Authorities p.422
- 5.5 Conditions and Timing for Divestitures p.422
- 5.6 Issuance of Decisions p.422
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.422

6. Ancillary Restraints and Related Transactions p.422

- 6.1 Clearance Decisions and Separate Notifications p.422

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.423

- 7.1 Third-Party Rights p.423
- 7.2 Contacting Third Parties p.423
- 7.3 Confidentiality p.423
- 7.4 Co-operation With Other Jurisdictions p.424

8. Appeals and Judicial Review p.424

- 8.1 Access to Appeal and Judicial Review p.424
- 8.2 Typical Timeline for Appeals p.424
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.425

9. Foreign Direct Investment/Subsidies Review p.425

- 9.1 Legislation and Filing Requirements p.425

10. Recent Developments p.425

- 10.1 Recent Changes or Impending Legislation p.425
- 10.2 Recent Enforcement Record p.425
- 10.3 Current Competition Concerns p.426

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Ikeda & Someya was founded in Tokyo in October 2018 by two lawyers, Tsuyoshi Ikeda and Takaaki Someya. The founding partners previously worked at the Japan Fair Trade Commission (Tsuyoshi Ikeda) and the Consumer Affairs Agency (Takaaki Someya), and used this experience to form a cutting-edge antitrust law practice, handling a number of large-scale cases in-

volving business alliances, on-site inspections by the Japan Fair Trade Commission and consumer law. Ikeda & Someya also has 16 other lawyers with experience at regulatory agencies or in-house at major companies. The two founding partners' comments have been cited in various newspapers, magazines and media, including the Nikkei.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Chapter 4 of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No 54 of 1947 – the “Anti-Monopoly Act” or AMA) prohibits transactions that will substantially restrict competition in any relevant market.

The Japan Fair Trade Commission (JFTC) is the competent Japanese authority for the AMA and prepares and publishes the Guidelines to Application of the AMA Concerning Review of Business Combination (established in May 2004 and most recently amended in December 2019) (the “Merger Guidelines”) to clarify details of how it analyses a proposed merger. The Merger Guidelines are also applied to cases below the filing threshold.

The JFTC has also published the Policies Concerning Review of Business Combination (established in June 2011 and most recently amended in December 2019) (the “Merger Review Policies”), containing detailed merger control review procedures.

1.2 Legislation Relating to Particular Sectors

The Foreign Exchange and Foreign Trade Act (FEFTA) regulates foreign transactions or inward investments as foreign direct investments or specified acquisitions. For example, the FEFTA requires the filing of a notification prior to transactions in certain areas, such as weapons, aircraft, space, nuclear facilities, dual-use technologies (which could be used for military purposes), cybersecurity, electricity, gas, telecommunications, water supply, railways and oil.

In some industries, restrictions on inward investment under the industry-specific legislation will also apply, including under the following:

- the Civil Aeronautics Act;
- the Radio Act;
- the Broadcasting Act;
- the Mining Act;
- the Ships Act; and
- the Financial Instruments and Exchange Act.

1.3 Enforcement Authorities

Merger control rules under the AMA are enforced by the JFTC as the sole regulatory authority in Japan. The JFTC is an external agency of the

Cabinet Office, and the AMA expressly specifies that the JFTC must exercise its authority independently from any other governmental bodies.

2. Jurisdiction

2.1 Notification

Notification is compulsory if the transaction meets a certain threshold under Chapter 4 of the AMA and relevant regulations. A transaction within the same company group is generally exempt from the obligation of notification.

Meanwhile, the JFTC can review any merger below the notification threshold, either on its own initiative or through a voluntary consultation by the merging party or parties. Specifically, in the Merger Review Policies revised in 2019, the JFTC recommends parties whose domestic sales amounts fall under the thresholds of the notification to make a consultation voluntarily prior to the notification process when the total consideration for the acquisition (transaction value) will exceed JPY40 billion and the scheduled transaction is deemed to affect domestic consumers, such as by satisfying one of the following:

- the business base or research and development base of the acquired company is located in Japan;
- the acquired company conducts sales activities targeting domestic consumers, such as creating a Japanese website or using a brochure in Japanese; or
- the total domestic sales of the acquired company exceed JPY100 million.

In practice, the targeted parties conventionally consult with the JFTC voluntarily prior to filing a notification, as described in **3.9 Pre-notifi-**

cation Discussions With Authorities. Without the voluntary consultation, the parties could be requested to provide further related information.

2.2 Failure to Notify

If a party obliged to notify fails to make/file a notification, it is subject to a criminal fine of up to JPY2 million. No such penalty has yet been imposed on any party, but in June 2016 the JFTC issued a warning on a “warehousing” case; see **2.13 Penalties for the Implementation of a Transaction Before Clearance** for further details.

2.3 Types of Transactions

The thresholds for notification vary in accordance with the following types of transactions:

- share acquisitions;
- mergers;
- joint incorporation-type or absorption-type company splits (demergers);
- joint share transfers (as defined by the Companies Act); and
- acquisitions of businesses or assets.

Interlocking directorships (one type of business combination) are subject to merger review by the JFTC but are not subject to mandatory notification obligation.

More specifically, the above-mentioned acquisitions of businesses or assets include:

- accepting assignment of the whole or a substantial part of the business of another company;
- accepting assignment of the whole or a substantial part of the fixed assets used for the business of another company;
- taking on a lease of the whole or a substantial part of the business of another company;

- undertaking the management of the whole or a substantial part of the business of another company; and
- entering into a contract that provides for a joint profit and loss account for business with another company.

Internal restructurings or reorganisations within the same company group are not subject to notifications in general. The AMA does not technically require notification regarding operations that do not involve the transfer of shares or assets (eg, shareholders' agreements or changes to articles of association), although the JFTC does investigate such operations in some cases – for instance, if challenged by relevant parties as a violation of other provisions of the AMA.

2.4 Definition of “Control”

The AMA does not define or use the concept of “control”. Even if they do not raise any issues of “control”, transactions are subject to notifications once they meet the thresholds described in 2.5 Jurisdictional Thresholds.

2.5 Jurisdictional Thresholds

The AMA determines different notification thresholds for each type of transaction described in 2.3 Types of Transactions. It should be noted that the thresholds described in this section are the thresholds for a mandatory notification requirement; the JFTC has the authority to review any merger case below the notification thresholds. In fact, the JFTC announced that it had completed merger review of 15 cases below the threshold during the 2022 fiscal year.

Share Acquisitions

The thresholds in a share acquisition are as follows:

- the total domestic sales amount of the acquiring company group, composed of the acquiring company, its subsidiaries, its ultimate parent company and subsidiaries of the ultimate parent company (“Total Domestic Sales Amount”), exceeds JPY20 billion;
- the total domestic sales amount of the target company and its subsidiaries exceeds JPY5 billion; and
- the voting rights in the target company held by the acquiring company group will exceed 20% or 50% as a result of the acquisition.

Mergers and Joint Share Transfers

The thresholds in a merger are as follows:

- the Total Domestic Sales Amount of any of the merging parties or the parties involved in the joint share transfer exceeds JPY20 billion; and
- the Total Domestic Sales Amount of any of the other parties exceeds JPY5 billion.

Absorption-Type Company Split (Demerger)

If a part of the business of the transferred company (not its entirety) is acquired by a succeeding company, a notification is required when either of the following applies.

- Case 1:
 - (a) the Total Domestic Sales Amount of the transferred part of the business of the transferring company subject to the company split exceeds JPY10 billion; and
 - (b) the Total Domestic Sales Amount of the succeeding company exceeds JPY5 billion.
- Case 2:
 - (a) the Total Domestic Sales Amount of the transferred part of the business of the transferring company exceeds JPY3 billion; and

- (b) the Total Domestic Sales Amount of the succeeding company exceeds JPY20 billion.

When the entire business of the transferring company is transferred to a succeeding company, different (higher) thresholds will apply (see the JFTC website at www.jftc.go.jp).

Joint Incorporation-Type Company Split

In the case of a joint incorporation-type company split (where two or more companies jointly establish a new company), when all the parties to the transaction transfer only a part of their business, a notification is required if:

- the total domestic turnover of one of the company groups splitting all of its businesses exceeds JPY20 billion and the total domestic turnover of another exceeds JPY5 billion;
- the total domestic turnover of one of the company groups splitting all of its businesses exceeds JPY20 billion and the total domestic turnover generated by the target business of another of the company groups splitting a substantial part of its businesses exceeds JPY3 billion;
- the total domestic turnover of one of the company groups splitting all of its businesses exceeds JPY5 billion and the total domestic turnover generated by the target business of another of the company groups splitting a substantial part of its businesses exceeds JPY10 billion; or
- the total domestic turnover generated by the target business of one of the company groups splitting a substantial part of its businesses exceeds JPY10 billion and the total domestic turnover generated by the target business of another of the company groups exceeds JPY3 billion.

When any of the parties to the transaction transfers its entire business to a new company, different (higher) thresholds will apply (see the JFTC website at www.jftc.go.jp).

All sectors are necessarily subject to these jurisdictional thresholds. Nevertheless, it is worth noting that the AMA prohibits a bank and an insurance company from acquiring or possessing more than 5% or 10%, respectively, of voting rights in another domestic company (except for an acquisition of a bank by another bank or an acquisition of an insurance company by another insurance company), in principle. The acquisition or possession will be permitted when one of the exemptions under the AMA applies, or if the party obtains prior approval from the JFTC.

2.6 Calculations of Jurisdictional Thresholds

The total amount of the price of goods and services supplied in Japan during the latest fiscal year is regarded as domestic turnover, from which the thresholds are calculated. In addition to direct sales within and into the country, indirect sales in Japan will be included in domestic turnover if the party recognises that the goods and services will be shipped to Japan by the direct purchaser at the time of entering into the contract without changing their nature and characteristics. The intra-group company sales amount within the same group is to be excluded from the domestic sales.

Sales booked in a foreign currency should be converted into Japanese yen using the conversion rate applied for the account settlement. If such an exchange rate is not available, the average telegraphic transfer middle rate is used.

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

In a share acquisition, the Total Domestic Sales Amount of the acquiring company for the purpose of the notification thresholds includes the domestic sales amount of the acquiring company, its subsidiaries, and its ultimate parent company and (direct and indirect) subsidiaries thereof. The ultimate parent company must be included in the relevant entities only if it is in the form of a “company”.

On the other hand, the Total Domestic Sales Amount of the target company group includes the domestic sales amount of the target company and its subsidiaries but does NOT include the sales amounts of the seller (ie, a parent company of the target company) and its affiliates.

It should be noted that not all the subsidiaries need to be in the form of a “company”, which means a partnership can be considered as a subsidiary.

A company is deemed to be a subsidiary if another company holds the majority of the voting rights of that company. In addition, when 40–50% of the voting rights of a company are held directly or indirectly by another company, the former company can be considered as a subsidiary of the latter company, by taking into account factors such as board representation and loans provided from the latter company.

The scope of the group companies (a parent company, ultimate parent company and subsidiaries) is defined at the time of the closing of the proposed transaction. Changes in the business during the reference period have to be reflected in general. For instance, for calculation of the Total Domestic Sales Amount of an acquiring

company that consummated a separate share acquisition transaction that results in obtaining more than 50% of the voting rights in another company (Company A) after the settlement of the last fiscal year, the domestic sales of Company A for the last fiscal year must be included in the calculation of the Total Domestic Sales Amount of the acquiring company group.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to pre-notification and merger control examination under the AMA, as long as the thresholds – which apply equally to foreign-to-foreign transactions and domestic transactions – are met.

There is no local effect test; a local presence does not always trigger the notification requirement. However, any transaction that meets any of the notification thresholds is considered by the JFTC to have a local effect.

A party without any sales exceeding the thresholds within or into Japan is not required to file a notification. Nevertheless, the JFTC may recommend that a party to the transaction makes a consultation voluntarily prior to the notification process if the amount of the transaction exceeds JPY40 billion and the attempted business combination is found to affect domestic customers. That is to say, even without sales in Japan, according to the Merger Review Policies referred to in **2.1 Notification**, the business combination could affect domestic customers if:

- the party has its business or research base in Japan;
- the acquired company conducts sales activities targeting domestic consumers; or
- the total domestic sales of the acquired company exceed JPY100 million.

2.9 Market Share Jurisdictional Threshold

The AMA does not define any market share jurisdictional thresholds.

2.10 Joint Ventures

Due to the absence of the concept of “joint control”, the JFTC does not apply any special rules to joint ventures regarding filing requirements under the AMA; instead, joint ventures are regulated by the same principle as the jurisdictional thresholds mentioned in **2.5 Jurisdictional Thresholds**.

2.11 Power of Authorities to Investigate a Transaction

The JFTC can investigate any transaction, even when it does not meet the notification thresholds. The authority is able to require the targets of the investigation to provide a reasonable explanation as to why the transaction in question would not substantially restrain competition in a relevant market, and can request further detailed information if competitors or customers of the parties raise concerns about the transaction. In fact, the JFTC is becoming more proactive in reviewing such business combinations that do not meet the thresholds.

There is no statute of limitations on the JFTC’s authority to investigate.

2.12 Requirement for Clearance Before Implementation

The completion of transactions that are subject to a notification requirement must be suspended for 30 calendar days of the statutory waiting period (corresponding to the end of the “Phase I review period”) from the date of acceptance of said notification. Nevertheless, the JFTC can shorten the waiting period in response to a

paper-based request from the notifying party, if it is deemed appropriate to do so.

The related parties can theoretically implement transactions after the waiting period ends, even if the succeeding review process (the “Phase II review period”) has been commenced by the JFTC. In practice, however, they tend not to complete transactions before the Phase II review is completed. If a transaction that has a possibility of restraining competition substantially is to be closed during the Phase II review period, the JFTC can request the Tokyo District Court to issue an urgent injunction order to restrain the related parties from completing the transaction.

2.13 Penalties for the Implementation of a Transaction Before Clearance

If the related parties fail to meet the waiting period requirement noted in **2.12 Requirement for Clearance Before Implementation**, they will risk a criminal fine of up to JPY2 million, which can be imposed both on the notifying company(ies) and on any representative(s) or employee(s) responsible for the failure.

Although the JFTC has never imposed such penalties in practice, it did issue a warning in the case of Canon Inc.’s acquisition of Toshiba Medical Systems Corporation (TMSC) in 2016, for being possibly inconsistent with the notification system. To be more specific, before filing the notification to the JFTC, Canon acquired a share warrant of TMSC, paying an amount equal to the value of the underlying common shares to Toshiba Corporation, the parent company of TMSC. In addition, a third party other than Canon and Toshiba was designated to own voting shares of TMSC until Canon exercised the share warrant. The JFTC cautioned that a company that plans to acquire shares of a target company in

this way is required to file a notification prior to implementation.

2.14 Exceptions to Suspensive Effect

There is no exception to the suspensive effect; it is not permitted to seek a waiver or derogate from the regulation. Meanwhile, because a notification can be filed before a definitive agreement is executed, the related company will be able to consummate a tender offer bid, for instance, by filing a notification 30 days prior to the consummation of the bidding process.

Furthermore, the JFTC can shorten the period of suspensive effect in response to a paper-based request from the notifying party, when it is appropriate to do so.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Although the related parties can theoretically implement transactions after the statutory 30-day waiting period, they tend not to implement the transactions in practice before the subsequent review (if any) is completed.

Even under a pressing schedule in the case of foreign-to-foreign mergers, the JFTC would not permit the implementation of a transaction before a clearance by implying a possibility of filing an urgent injunction order. It seems to be possible technically for the parties to propose a carved-out agreement; nevertheless, as far as is known, there has been no case in which the JFTC agreed to such a proposal.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is no deadline for notification. However, taking into account the 30-day statutory waiting period, a notification must be filed with the JFTC at least 30 days prior to the completion of the transaction (see **3.11 Accelerated Procedure**). The notification can be submitted even before a binding agreement between the parties is made.

3.2 Type of Agreement Required Prior to Notification

No definitive agreement binding the parties is required prior to the notification. The parties can notify the JFTC on the basis of an agreement at an earlier stage, such as by a letter of intent or memorandum of understanding. The JFTC even regularly accepts filings with less formal agreements; however, in such cases, it requests a notifying party to submit a draft or other documents indicating that the parties have a good-faith intention to consummate the transaction. In such cases, the notifying party needs to provide a signed binding agreement to the JFTC as soon as said agreement is executed.

3.3 Filing Fees

No filing fees are required.

3.4 Parties Responsible for Filing

In share acquisitions and business/asset transfers, the acquiring party is responsible for filing. In other types of transactions as noted in **2.3 Types of Transactions**, all the parties are obliged to jointly file a notification.

3.5 Information Included in a Filing

To file a notification with the JFTC, a company must comply with the prescribed format, which can be downloaded from the JFTC's website.

It should be noted that different forms are set out for different types of transactions. The notification form and the materials required to be attached must be completed in Japanese, while summary translations are accepted in general regarding additional information requested from the JFTC on a voluntary basis.

The information to be included in the notification is as follows:

- a brief explanation of the purpose, background and method of the transaction;
- descriptions of the notifying company group, such as domestic sales, assets and the major business of each company involved;
- high-level market information, including types of products or services subject to horizontal overlap or vertical relationships between the parties; and
- the market ranking and market share of the major players with which the parties have a horizontal or vertical relationship.

Certain documents must be attached, depending on the type of transaction, such as a copy of the definitive agreement, financial statements and annual reports of the notifying party, a list of major shareholders, or the minutes of the shareholder meeting or board meeting that approves the transaction. If the filing is made by an attorney on behalf of the notifying party, a power of attorney is required.

In addition to the required information, the JFTC often requests – usually on a voluntary basis – additional materials in order to review the transactions substantially, such as:

- definitions of the product and geographic markets;

- the degree of competition between the parties;
- competitive pressures, including those from competitors, import products, new entries or customers; and
- efficiencies.

Furthermore, the parties' internal documents can be requested by the JFTC, including presentation materials, the minutes of meetings such as board of directors' meetings, materials used in analysis and decision-making processes, and emails of the persons concerned, which may refer to synergies, effects or competitive concerns, typically at a later stage of the review.

Although the documents to be submitted are not required to be certified, notarised or apostilled, certifications by the company representative are required for copies of certain documents.

3.6 Penalties/Consequences of Incomplete Notification

The JFTC will not accept a notification if it is deemed to be incomplete, in which case it may recommend the parties to withdraw and refile the notification once amended.

Nevertheless, prior to said formal notification, parties can engage in a pre-notification consultation, in which a draft notification is submitted to the JFTC for review (a so-called draft check). This draft check process usually takes between a few days and a couple of weeks. If a submitted draft notification is deemed incomplete, the JFTC can request the parties to amend the draft further.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Filing inaccurate or misleading information is subject to a criminal penalty of up to JPY2 mil-

lion, although no such penalty has yet been imposed, as far as is known.

In addition, the JFTC can issue a cease-and-desist order at any time if it finds significant false or misleading information in a notification, regardless of the time limit of its ability to issue an order. In other words, the JFTC can overturn its clearance decision at any time if there is significant false or misleading information in a notification.

3.8 Review Process

It should be noted that the parties concerned can consult voluntarily with the JFTC in advance through the pre-notification process. When the JFTC accepts a formal notification, the statutory waiting period will commence (Phase I review).

Phase I

The JFTC has 30 calendar days from the date of a formal acceptance to review the transaction. The party/parties can request the authority to shorten the waiting period on a discretionary basis; in practice, the period is shortened in a large number of cases. Please note that a request for information from the JFTC does not suspend nor reset the 30-day review period.

If the JFTC comes to the conclusion that the transaction in question will not substantially restrain competition, the clearance will be granted through a written decision stating that the JFTC will not issue a cease-and-desist order (a “Clearance Letter”).

If the JFTC determines that it is necessary to conduct a more detailed review, the Phase II review will be triggered by officially requiring the filing party/parties to submit the necessary information or materials, which is called a “Request for Report, etc”.

Phase II

At the initiation of Phase II, the JFTC discloses the facts of its review and seeks public comments on its website. The authority must conclude the Phase II review within either 120 calendar days from the date of the JFTC’s acceptance of the notification or 90 calendar days from the date of acceptance of all the responses to the Request for Report, etc, whichever is later. In practice, it usually takes several months or even more than a year for the JFTC to formally accept all the responses to the Request for Report, etc.

While the suspensive effect is not applicable for the Phase II review period, in practice the parties are recommended to refrain from completing the transaction until the clearance is granted.

If, following a Phase II review, the JFTC finds that the transaction will not substantially restrain competition, it will grant the clearance by issuing a confirmation letter stating that the JFTC will not issue a cease-and-desist order on the transaction. When finding that the transaction could substantially restrain competition, the JFTC will afford the filing party an opportunity to express their opinions (including a proposal of remedies) and submit evidence before the JFTC’s final decision on whether to issue a cease-and-desist order. In any case, the results of the review will be made public.

3.9 Pre-notification Discussions With Authorities

Parties can discuss issues on a voluntary basis with the JFTC by means of a pre-notification consultation. During the consultation, the parties can submit written explanations concerning an overview of transactions and (potential) competitive issues, and can discuss substantive issues including market definition and any other competitive concerns (such as high market shares or

lack of strong competitive pressure from current or potential competitors).

The period of pre-notification depends mainly on the intention of the notifying parties. For instance, if the parties ask the JFTC just to review the draft of the formal notification, it will take only a few days, while in the case of complicated transactions, it is expected to take several months or more.

The JFTC and the notifying parties regularly communicate confidentially in this process. If the parties have already publicly disclosed the transaction, the JFTC may contact their competitors and customers in order to obtain their opinions about the transaction.

3.10 Requests for Information During the Review Process

The JFTC can request the parties to provide further information at any time during the review process. The amount and content of the information requested depend on the transaction in question.

It should be noted that the review process will not be suspended or restarted by requests for information. Regarding the Phase II review, the 90-day statutory review period will start to run only when the JFTC accepts all the necessary information requested in the forms of the Request for Reports, etc.

3.11 Accelerated Procedure

The AMA does not technically provide a short-form or fast-track procedure in terms of the review process. Although the party/parties can ask for the 30-day waiting period to be shortened, the JFTC has sole discretion on whether to agree to such a request.

4. Substance of the Review

4.1 Substantive Test

The JFTC examines whether a business combination is likely to result in a “substantial restriction of competition in a certain market”, which means that competition itself is significantly reduced to such an extent that a particular business operator or group of business operators can control a market by determining prices, quality, quantity and other competitive parameter(s) at their own volition.

The Merger Guidelines, mentioned in **1.1 Merger Control Legislation**, classify business combinations into horizontal, vertical and conglomerate business combinations, and clarify the factors to be taken into account and the framework of determining whether they may substantially restrain competition for each type of business combination. According to the Merger Guidelines, the JFTC takes the following factors into account in assessing the (pro-/anti-) competitive effect of the transaction:

- competition in the relevant market: number of competitors, market share, competitive landscape, supply capacity of competitors, competition in R&D, characteristics of the market (whether so-called direct or indirect network effects are at work or multifaceted markets through platforms), etc;
- imports: barriers for importing, problems in distribution, substitutability with imports, etc;
- new entry to the market: barriers for entry, degree of entry possibility;
- competitive pressures from adjacent markets: competing products, geographically adjacent markets;
- competitive pressure from customers: competition among users, ease of switching suppliers;

- comprehensive business capabilities of the parties in question;
- economic efficiencies;
- financial conditions of the parties in question; and
- scale of the relevant market.

The Merger Guidelines set forth the safe harbour based on the Herfindahl-Hirschman Index (HHI). In principle, the JFTC does not conduct a substantive examination of a business combination that falls below the thresholds of the safe harbour.

4.2 Markets Affected by a Transaction

The JFTC defines relevant markets that are affected by the business combination from the perspective of the scope of the product and the geography by considering the substitutability for customers and, if necessary, suppliers.

The JFTC will use the factors described in the Merger Guidelines to define a relevant market. The Merger Guidelines clearly state that the geographic market may extend beyond the borders of Japan, depending on the international nature of the relevant business. In fact, in some cases, the JFTC has defined the global market as the relevant market.

The Merger Guidelines also establish safe harbours for three categories of business combinations, each of which is subject to a specific safe harbour:

- horizontal;
- vertical; and
- conglomerate.

The JFTC believes that there is usually little or no likelihood of competition being substantially restricted when a business combination meets

the requirements of a safe harbour, so there is no need to conduct a detailed examination. In such a case, the JFTC does not generally conduct the examination described in **4.1 Substantive Test**.

Horizontal Combinations

The safe harbour standards for horizontal business combinations are as follows:

- the HHI after the business combination is not more than 1,500;
- the HHI after the business combination is more than 1,500 but not more than 2,500, while the increment of HHI is not more than 250; or
- the HHI after the business combination is more than 2,500, while the increment of HHI is not more than 150.

If a horizontal business combination exceeds the safe harbour standards, the JFTC will examine whether it would substantially restrict competition in a relevant market through the test described in **4.1 Substantive Test**.

In addition, the Merger Guidelines clarify that, in light of past cases, if the HHI after the business combination is 2,500 or less and the market share of the business group after the business combination is 35% or less, the risk of substantially restricting competition is generally considered to be small.

Vertical and Conglomerate Combinations

The safe harbour standards for vertical or conglomerate business combinations are as follows:

- the market share of the parties after the combination is not more than 10% in all the relevant markets in which the parties are active; or

- the HHI is not more than 2,500 and the market share of the parties after the business combination is not more than 25% in all the relevant markets in which the parties are active.

As with the horizontal business combination described above, even if a vertical or conglomerate business combination does not fall within the safe harbour standards described above, it does not immediately mean that said business combination would likely substantially restrain competition.

In addition, if the HHI after the business combination is 2,500 or less and the market share of the parties' group after the business combination is 35% or less, the possibility that a business combination may substantially restrain competition is generally considered to be small.

It should be noted that the latest version of the Merger Guidelines states that the JFTC will conduct a further review on the matter if one of the parties has a potentially strong competitive power due to its assets (including important data and intellectual property rights) or any other reason, even if the business combination satisfies the safe harbour standards.

4.3 Reliance on Case Law

Regarding merger review, the JFTC basically defines the relevant market in accordance with its previous review cases, some of which are not disclosed to the public. However, if there are significant changes to the premise of the definition of the relevant market (such as innovation or development of an adjacent product market), the JFTC may take them into consideration.

The JFTC basically does not depend on the decisions of competition authorities in other

jurisdictions, such as the EU Commission, US Federal Trade Commission or US Department of Justice. Nevertheless, if the JFTC has no previous case in the field of the transaction, it may use such decisions as references to define the relevant market.

4.4 Competition Concerns

The JFTC examines any kinds of competition concerns that may cause substantial restriction on competition in the relevant market, including:

- unilateral effects;
- co-ordinated effects;
- conglomerate or portfolio effects;
- vertical concerns; and
- the elimination of potential competition.

Traditionally, unilateral and co-ordinated conduct possibly arising from horizontal business combinations has occupied a large portion of the JFTC's concern, since a horizontal business combination would basically reduce the number of competitors in the relevant market and thus potentially have a direct negative impact on competition.

However, this does not mean that the JFTC has competition concerns only in horizontal business combinations. Actually, the JFTC has also conducted numerous investigations on other competition concern matters, and there are some cases in which it has conditionally approved vertical business combinations as long as the parties undertook remedies. Furthermore, in some cases, the JFTC has assessed conglomerate or portfolio effects and other kinds of anti-competitive effects.

4.5 Economic Efficiencies

In examining competition concerns, the JFTC takes economic efficiencies into consideration.

However, as stated by the Merger Guidelines, the JFTC considers that the improvement of efficiency must be an inherent outcome of the business combination and must be passed on to consumers through lower product prices, improved quality, and so on. Therefore, the JFTC tends to consider that the improvement of efficiency alone is not likely to justify the transaction.

4.6 Non-competition Issues

In principle, the JFTC considers only competition issues in the process of examination. Although it may consider non-competition issues in some cases, such as industrial policy and other issues of public interest, the JFTC is not bound by these kinds of concerns.

When a foreign investor (non-resident individual, corporation established under foreign laws and regulations, etc) makes inward direct investments, etc (eg, the acquisition of shares or voting rights of a domestic listed company resulting in an investment ratio or voting right ratio of 1% or more), or specified acquisitions (ie, the acquisition by a foreign investor of shares or equity of a domestic unlisted company from another foreign investor), and the business operated by the investee falls within a designated industry involving national security, etc, in principle, prior notification must be submitted to the Minister of Finance, etc, via the Bank of Japan within the six months before the intended transaction or activity.

These rules are set forth in the FEFTA and are separate from the merger control rules.

4.7 Special Consideration for Joint Ventures

Generally speaking, there is no special consideration for joint ventures under the AMA and

the Merger Guidelines. However, the Merger Guidelines state that when joint venture partners establish a joint venture to integrate only a part of their business, the JFTC will analyse the co-ordinated effects between the remaining businesses of joint venture partners (“spillover effect”).

With respect to a notification requirement, if the transaction involves multiple kinds of business combinations, each stage of the business combination may constitute a separate business combination subject to a pre-notification (in triangular merger cases, for instance, parties will likely have to file separate notifications for share acquisition and for merger). Likewise, if a joint venture transaction comprises multiple business combinations subject to pre-notification, parties have to file notifications separately on the basis of each business combination.

5. Decision: Prohibitions and Remedies

5.1 Authorities’ Ability to Prohibit or Interfere With Transactions

Under the AMA, the JFTC can file a motion for an urgent injunction order (ie, an injunction against the consummation of the transaction prior to the completion of examination) and issue a cease-and-desist order (prohibition against the consummation of the transaction after the completion of examination).

Regarding an urgent injunction order, the JFTC must show that the business combination would likely substantially restrain competition, and that the consummation of a business combination would provoke irreversible damage to competition. The JFTC must file a petition for an urgent injunction order with the Tokyo District Court and

prove the existence of a suspected violation of the AMA and the urgent need for such an order. The hearing will be held privately and expeditiously; if the court approves the JFTC's request, it will issue the order.

A cease-and-desist order is an administrative action to prohibit a business combination transaction or to order a party to take measures to eliminate the likelihood that the transaction would substantially restrict competition after the JFTC completes its review. The order includes business divestitures, stock transfers and business transfers to eliminate substantial restraints on competition. The JFTC can issue a cease-and-desist order on its own (without any prior review or approval by a court), either before or after the consummation of a planned business combination.

The recipient of a cease-and-desist order issued by the JFTC can file an action seeking cancellation of said order with the Tokyo District Court within six months from the order being issued.

In fact, the JFTC has not issued a cease-and-desist order for more than 40 years. In practice, if the JFTC informally indicates its competition concern to parties, the parties often propose a remedy, seeking the JFTC's clearance, or voluntarily withdraw their notifications. Therefore, the JFTC has not faced the need to issue a cease-and-desist order on business combinations.

5.2 Parties' Ability to Negotiate Remedies

The parties in question may discuss remedies with the JFTC at any stage, including during pre-notification, the Phase I review process and the Phase II review process. If the parties propose a remedy, the JFTC will review the business com-

bination on the premise that the proposed remedy will be implemented.

During the pre-notification stage, the JFTC and the parties basically discuss the form and content of notification and the competition issues of the proposed transaction, but there are a few cases in which the parties and the JFTC negotiate a remedy in response to the JFTC's competition concerns.

Typical Remedies

The Merger Guidelines state that structural remedies are the most effective remedies, but behavioural remedies can also be accepted.

Structural remedies include the transfer of all or part of the business units of either party, the withdrawal of a certain relationship with a company belonging to the parties' group (eg, suspension of the holding of voting rights, reduction of the ratio of voting rights, or suspension of the concurrent holding of executive positions), and the withdrawal of the business alliance with a third party.

On the other hand, behavioural remedies include the elimination of discriminative terms and conditions or refusal of supply, cost-based trading, a Chinese wall on the exchange of secret information, etc.

The parties may discuss with the JFTC what remedies are appropriate to eliminate the JFTC's concerns. Upon the request of the party/parties after the consummation of the transaction, the JFTC may approve a change of content of the remedies or even a termination of the remedies as a result of assessing the necessity of continuing the remedies in light of changes in competitive conditions after the business combination.

5.3 Legal Standard

The legal standard for a prohibition (ie, cease-and-desist order) is whether a planned business combination is likely to substantially restrict competition in a relevant market. Therefore, any remedy should alleviate a competition concern to the extent that substantial restraint of competition is eliminated so that the transaction can be approved by the JFTC. The Merger Guidelines supplement this point.

The Merger Guidelines also state that the JFTC considers and examines what measures are appropriate for solving the likelihood of substantially restraining competition on a case-by-case basis for each business combination. The Merger Guidelines also clearly state that a structural remedy is the most effective remedy and thus should be taken in principle, such as business transfers. However, in practice, a behavioural remedy could be acceptable in many cases, if it is appropriate to resolve the JFTC's competition concern.

5.4 Negotiating Remedies With Authorities

Please see 5.2 Parties' Ability to Negotiate Remedies.

5.5 Conditions and Timing for Divestitures

The Merger Guidelines state that remedies should, in principle, be fully carried out prior to the implementation of the business combination. However, as an exception, remedies can be carried out after the clearance if the proposed remedy properly and clearly defines the deadline and the JFTC approves it.

If the parties fail to carry out the remedies, the JFTC may issue cease-and-desist orders to prohibit the parties from implementing the busi-

ness combination, or it may take measures to eliminate the substantial restraint of competition caused by the business combination.

5.6 Issuance of Decisions

When the JFTC concludes that the business combination will not substantially restrict competition, it will issue a notice to the parties that it will not issue a cease-and-desist order. This notice itself is not available to the public.

Regarding confidentiality, please see 7.3 Confidentiality.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The JFTC may issue a clearance subject to remedies for foreign-to-foreign transactions. It has issued conditional clearance for the following foreign-to-foreign transactions:

- Korean Air Co., Ltd./Asiana Airlines Inc. (FY2023);
- Google LLC/Fitbit, Inc. (FY2020);
- JX Metals Deutschland GmbH/H.C. Starck Tantalum and Niobium GmbH (FY2018);
- Qualcomm/NXP Semiconductors (FY2017);
- Dow Chemical/DuPont (FY2016); and
- Abbott Laboratories/St Jude Medical (FY2016).

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Neither the AMA nor the Merger Guidelines give express guidance regarding ancillary restraints or related arrangements. However, the JFTC may carry out an in-depth assessment regarding ancillary restraints in its substantive review.

If, in the course of the review process, the party reports ancillary restraints and the JFTC still issues clearance without raising any competition issue, it would be unlikely that the JFTC would challenge the transaction after the issuance of clearance in a practical sense. However, ancillary restraints are still subject to challenges by the JFTC in theory, even after the clearance.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

As a general rule, the AMA provides that any person who believes there is an act in violation of the AMA may make a report to the JFTC and ask for appropriate measures to be taken. While there is no formal or statutory procedure, any third party may informally submit any report or complaint to the JFTC at any time, including customers and competitors.

As a part of the formal procedure of a merger review, the Merger Review Policies provide that, at the beginning of a Phase II review, the JFTC invites the public to offer their written comments on the contemplated transaction within 30 days of the announcement on the JFTC's website.

The JFTC is not obliged to respond to a third party's comment but will normally take information provided by a third party into account in the substantive review. Furthermore, if the report made by any person under the AMA meets the requirements and qualifies as notice as provided in the AMA and the Rules on Investigations by the Fair Trade Commission (established in October 2005, and most recently amended in March 2021), the JFTC shall notify such a person about its decision as to whether it will take appropriate

measures for the case reported in accordance with the AMA.

7.2 Contacting Third Parties

The JFTC typically contacts third parties such as competitors or customers by sending written questionnaires or requesting oral interviews as a part of its review process if the planned transaction is publicly announced or the investigation proceeds to the Phase II review. Also, as stated in **7.1 Third-Party Rights**, a third party will be invited to submit comments in writing at the beginning of a Phase II review.

The JFTC tends to make these inquiries proactively when it sees issues in the substantive review. In addition, the JFTC sometimes conducts a kind of "market test", in which it asks for the opinions of third parties for the purpose of assessing the feasibility of proposed remedies.

7.3 Confidentiality

During the Period of the JFTC's Review

The JFTC does not make information available to the public until the initiation of the Phase II review. Therefore, in the course of a merger review, the existence of a fact of filing and any confidential information or business secrets that consist of filing documents, supporting documents or oral guidance to the JFTC will not be publicly disclosed if the case is cleared before going to a Phase II review.

If the case is subject to a Phase II review, the JFTC invites the public to offer their written comments on the contemplated transaction, at the beginning of Phase II (see **7.1 Third-Party Rights**). The description of the transaction will be made public in such cases.

Disclosure for Statistical Purposes or as a Precedent Case

Aside from the slight chance of the JFTC issuing a cease-and-desist order, which will fully disclose the transaction, the JFTC announces the outcome of its review on cases subject to the Phase II review.

In addition, the JFTC annually publishes a report of the major business combination cases on its website around June, which provides a summary of merger review cases and serves as a useful reference. These cases are selected from those cleared in Phase I as well as Phase II, and the parties will be contacted by the JFTC before the publication, to confirm whether the publication contains any confidential information.

Since 2017, the JFTC also announces a list of the cases it has cleared each quarter. The list shows each filing date, the parties' names, the date of clearance and whether it was short-track (ie, whether the statutory waiting period was shortened).

7.4 Co-operation With Other Jurisdictions

The JFTC has entered into agreements for co-operation with various overseas authorities, including the European Commission and the US Federal Trade Commission and Department of Justice. Article 43-2 of the AMA expressly provides that the JFTC may exchange information with authorities in other jurisdictions for specific transactions if doing so is not against the national interest, and if the authorities of other jurisdictions can maintain the confidentiality of such information.

In practice, if the JFTC wishes to disclose the information of a specific transaction to any

foreign authority, it obtains the parties' written waiver in advance.

While the JFTC believes that co-operation with other jurisdictions will be beneficial in multi-jurisdiction filing cases, as a practical matter, whether the JFTC works closely with other jurisdictions depends on the specific case and regulators.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Pursuant to the provisions of the AMA, if a party is unsatisfied with a cease-and-desist order, it may bring an action against the JFTC, seeking the cancellation of such order, before the Tokyo District Court. Practically speaking, however, it is unlikely that a cease-and-desist order will be issued in merger cases, which results in the unavailability of judicial review in merger review cases.

8.2 Typical Timeline for Appeals

An action seeking cancellation of a cease-and-desist order must be filed with the Tokyo District Court within six months.

Since there is no precedent of appeal against a cease-and-desist order on a business combination after the amendment of the AMA that provides for the current system, the timeline is difficult to predict. However, it could take several years if the non-prevailing party appeals the cease-and-desist order, from the first instance until a court judgment is finalised. Considering this, a party that plans to bring an action needs to consider petitioning for a stay of execution of the order in accordance with the Administrative Case Litigation Act.

8.3 Ability of Third Parties to Appeal Clearance Decisions

There is no precedent in which a third party has successfully appealed against a clearance decision or a cease-and-desist order. However, any third party may bring an action against a cease-and-desist order as long as it has standing to sue.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

Article 27 of the FEFTA regulates that a foreign investor intending to make an inward direct investment specified by Cabinet Order shall notify the Minister of Finance and the pertinent minister for the business in advance of the business purpose, the amount and time of making the investment, and other items regulated in the Order. The Cabinet Order determines the list of business sectors for which prior notification is mandatory.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

In December 2019, the JFTC revised the Merger Guidelines and the Merger Review Policies. This revision focuses on business combinations in digital markets, which can be outlined as follows.

- Definition of product and geographical market in a platform service: the JFTC may define a relevant market consisting of multiple segments of customers (eg, users and shops in the case of a credit card) as one or multiple markets. In doing so, the JFTC may take

into account various elements, including the degree of scope of products or region for users' replacement in competition of quality of the service, and other elements specific to digital service, such as type of service or functions available.

- Substantial restraint of trade: in a horizontal business combination, the JFTC will take network effects into account where they are significant, and the difficulty of switching due to network effects and/or a high switching cost, among other things. In vertical or conglomerate business combinations, the JFTC will consider – in a combination of upstream and downstream players that both deal with data – whether the transaction may lead to a refusal to supply data to other companies. In a purchase of start-ups, the transaction would hinder new entry to the market (“killer acquisition”). The JFTC has also explained how to assess the importance of data from the competition perspective.
- In a 2019 revision, the JFTC announced that it will proactively review cases that do not meet the threshold for notification if the consideration for the acquisition is large and it is expected to have an impact on the Japanese market. Thus, the JFTC explains that voluntary consultation will be encouraged for such cases, as outlined in **2.1 Notification**.

10.2 Recent Enforcement Record

According to the JFTC's announcement in June 2023, 306 notifications for merger control were filed in FY2022, with no cases going to Phase II review, no cases leading to the JFTC imposing a fine (for failing to file), and seven cases being withdrawn in the Phase I review period. With respect to the number of foreign transactions, 28 transactions between foreign businesses were notified to the JFTC in FY2022.

10.3 Current Competition Concerns

In April 2024, the JFTC revised the “Guidelines Concerning the Activities of Enterprises, etc, Toward the Realisation of a Green Society Under the Antimonopoly Act” compiled in 2023, in order to prevent anti-competitive conduct that deters the realisation of a Green Society and to raise transparency and the predictability of the application and enforcement of the Act for businesses working toward a Green Society.

According to these guidelines, a large number of business combinations aimed at strengthening R&D capabilities and streamlining business activities, among other purposes, in their efforts toward the realisation of a Green Society have

pro-competitive effects. However, if a business combination is to substantially restrain competition in a market despite its purpose being the strengthening of R&D capabilities that can contribute to a reduction of greenhouse gases, it may not only reduce users’ choices and thereby impose a disadvantage on them, such as a price increase, but it may also cause the parties to the business combination to lose their incentives to appropriately deal with demand and consequently lose opportunities to grow further. From these perspectives, the JFTC clarified that the AMA prohibits any business combination that may substantially restrain competition in a market.

Trends and Developments

Contributed by:

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Ikeda & Someya

Ikeda & Someya was founded in Tokyo in October 2018 by two lawyers, Tsuyoshi Ikeda and Takaaki Someya. The founding partners previously worked at the Japan Fair Trade Commission (Tsuyoshi Ikeda) and the Consumer Affairs Agency (Takaaki Someya), and used this experience to form a cutting-edge antitrust law practice, handling a number of large-scale cases in-

volving business alliances, on-site inspections by the Japan Fair Trade Commission and consumer law. Ikeda & Someya also has 16 other lawyers with experience at regulatory agencies or in-house at major companies. The two founding partners' comments have been cited in various newspapers, magazines and media, including the Nikkei.

Authors



Tsuyoshi Ikeda is a partner at Ikeda & Someya. He previously served as an investigator at the Japan Fair Trade Commission, where he participated in around 20 dawn raids, prepared the

implementation of the leniency system, and investigated a case involving standard essential patents. He is noted for his success in the most cutting-edge cartel, merger review and other antitrust/competition cases. Tsuyoshi is registered as an attorney in New York and California.



Aya Yasui is experienced in international transactions and legal consultations for businesses, with a particular focus on antitrust. She previously worked at a US law

firm and a major Japanese law firm, and has also been seconded to major global companies, in addition to serving as a member of the Environmental Committee of the Tokyo Bar Association for more than ten years. She also has legal experience as in-house counsel at an automobile manufacturer as General Manager in charge of global compliance. Aya can provide advice on legal risks in cutting-edge fields by utilising her extensive business experience and language skills.

JAPAN TRENDS AND DEVELOPMENTS

Contributed by: Tsuyoshi Ikeda, Aya Yasui, Muneharu Yamamoto and Myongwon Lee, **Ikeda & Someya**



Muneharu Yamamoto gained extensive experience at a major international law firm in a wide range of corporate legal matters, with a focus on representing domestic and foreign companies

in litigation and disputes. He also gained familiarity with the US legal system while attending law school in the US. Making use of such experience, Muneharu provides practical advice that is tailored to business in the fields of antitrust law, competition law and consumer law, while keeping in mind subsequent legal developments that may be anticipated from the circumstances of each case.



Myongwon Lee is committed to assisting clients to the best of her ability in both domestic and international matters. In college, she was a member of a seminar specialising in antitrust law and

has since further deepened her knowledge in this field. She spent her high school years in Switzerland, where she was exposed to diverse cultures. While in law school, she was actively involved in international activities, including participating in a law school programme in the US. Myongwon has also been involved in the development of AI contract review services and is knowledgeable about the legal technology field.

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Exploring the Merger Review Policy of the Japan Fair Trade Commission

In Japan, the Anti-Monopoly Act (AMA) governs merger control matters, including the merger review process conducted by the Japan Fair Trade Commission (JFTC), which is the competition authority in Japan. In addition, the JFTC publishes the Guidelines to Application of the AMA Concerning Review of Business Combination (the “Merger Guidelines”) and the Policies Concerning Review of Business Combination (the “Merger Review Policies”).

To grasp the recent trends of the merger review process conducted by the JFTC, it is important to understand the latest versions of the Merger Guidelines and the Merger Review Policies, which reflect the JFTC’s recent attitude regarding merger review. It is worth noting that the revised Merger Review Policies explicitly recommend a party to a merger to make a voluntary consultation with the JFTC, even if the proposed merger transaction does not meet the thresholds set out under the AMA, in cases where the total consideration for an acquisition exceeds a certain amount and would likely affect domestic consumers in Japan – see *Google/Fitbit (Merger review process)*, below.

This revision indicates that the JFTC would likely examine a merger transaction that does not meet the jurisdictional threshold; in fact, the JFTC conducted merger reviews on at least two cases in 2019 and 2020 (see *Google/Fitbit* and *M3/Nihon Utlmarc*, below). Also, when a corporation plans a business combination that does not require notification because the domestic sales, etc, do not meet the standards, and said corporation consults with the JFTC concerning said business combination plan by showing the specific contents thereof, the JFTC may exam-

ine a merger transaction (see *Furukawa Battery/Sanyo*, below).

Furthermore, in understanding the framework of merger review in Japan, it is important to understand the merger review flow in a practical sense, rather than the formal process stipulated under the law. Although the AMA literally stipulates a merger review process comprising two review steps (Phase I and Phase II), the JFTC has rarely initiated the Phase II review process. According to a JFTC publication in June 2023, no case proceeded to Phase II review from 1 April 2022 to 31 March 2023 (FY 2022), while the JFTC received 306 notifications (a 9.2% decrease from FY 2021) from parties during the same period (see the official website of the JFTC for details: www.jftc.go.jp, available in Japanese only).

There are two reasons why so few cases have proceeded to the Phase II process:

- first, a party to a merger has the right to withdraw a notification at its discretion, and thus can withdraw the notification and refile a notification later if it hopes not to proceed to the Phase II process; and
- second, in almost all cases, the parties and the JFTC discuss potential competitive concerns regarding the proposed transaction during the pre-notification consultation, and the parties file notifications as a mere formality after they resolve the JFTC’s competition concerns.

In some cases, the parties and the JFTC even substantially discuss potential remedies proposed by the parties during the pre-notification consultation period (see *Z Holdings/Line*, below).

Google/Fitbit

Overview

The JFTC published the following facts on its official website:

- on 1 November 2019, Google LLC announced that it planned to acquire all shares in Fitbit, Inc., the manufacturer of a watch-type wearable device, by the method of triangular merger;
- although this transaction did not meet the thresholds under the AMA, the JFTC decided to conduct a merger review on the grounds that the transaction was significantly large and would likely affect consumers in Japan;
- the JFTC investigated this “below threshold” transaction in the same way as it reviews cases that meet notification thresholds – its review included interviews with the parties’ competitors and information exchange with foreign authorities (including the European Commission); and
- on 14 January 2021, the JFTC cleared the transaction by concluding that it would not substantially restrain competition based on the behavioural remedy proposed by the parties.

Merger review process

Under the revised Merger Review Policies, a party to a merger that does not meet the relevant jurisdictional threshold under the AMA is “recommended” to have a voluntary consultation with the JFTC if the merger meets the following conditions:

- the total consideration for the acquisition (transactional value) will exceed JPY40 billion; and
- the scheduled transaction is deemed to affect domestic consumers, including if:

- (a) the business base or research and development base of the acquired company is located in Japan;
- (b) the acquired company conducts sales activities targeting domestic consumers in Japan, such as creating a Japanese website or using Japanese brochures; or
- (c) the total domestic sales of the acquired company exceed JPY100 million.

In this transaction, based on the information published by the JFTC, it is likely that the total consideration for the acquisition of Fitbit exceeded the threshold of JPY40 billion. However, it is not clear from the JFTC’s announcement whether Google and/or Fitbit voluntarily contacted the JFTC prior to their announcement of this transaction.

One of the takeaways from this case is that a merger transaction that is not subject to notification thresholds would still likely be subject to a merger review by the JFTC, which could have an impact on the schedule of a global filing project. Therefore, it should be noted that a party to a merger needs to analyse whether its proposed transaction will meet the threshold for a recommended voluntary consultation in addition to the threshold for a formal notification.

Vertical relationship and conglomerate effect

As Google and Fitbit had no significant competitive issues in their horizontal relationship, the JFTC focused its examination on three types of vertical relationships, such as the relationship between the operation system for a smartphone provider (as an upstream service) and the watch-type wearable device manufacturer (as a downstream product). The JFTC also raised the issue of whether a health-related database to be possessed by the parties would substantially dimin-

ish competition in the digital advertising market as a conglomerate effect.

Google and Fitbit proposed behavioural remedies to address the JFTC's concerns regarding both the vertical and conglomerate effects. Regarding the vertical relationships, for instance, the parties promised not to refuse to provide an operation system for smartphones to watch-type wearable device manufacturers other than Fitbit for at least ten years. Concerning the conglomerate effect, the parties promised not to use the health-related database for digital advertising services for at least ten years.

Takeaways

This is the first public case in which the JFTC investigated a merger on a consolidation that fell below the notification thresholds since the Merger Review Policies were amended in 2019. It would be sensible to assume that the JFTC will investigate future merger cases involving Big Tech companies, regardless of whether or not the transaction meets the notification thresholds. This case is a good example of the JFTC's active attitude towards enforcement in vertical and conglomerate mergers.

M3/Nihon Ultmarc

Overview

The JFTC published the following facts on its official website:

- on 1 April 2019, M3, Inc., which operates platforms that provide information on drugs, announced that it had closed a transaction to acquire all of the voting rights in Nihon Ultmarc Inc., which provides a medical information database;
- although this transaction did not meet the jurisdictional threshold under the AMA and was already consummated, the JFTC had a

certain concern regarding restraint of competition, and therefore opened a merger review process on its own, including oral interviews with the parties' competitors; and

- on 24 October 2019, the JFTC determined that this transaction would not substantially restrain competition based on the behavioural remedies proposed by the parties.

Merger review process

Despite the facts that this transaction did not meet the jurisdictional threshold and was not subject to a notification requirement, and that the parties had already consummated the transaction, the JFTC still started a merger review on whether it would likely substantially restrain competition in certain relevant markets.

The AMA does not literally prohibit the JFTC from conducting a merger review on a transaction that does not meet the threshold under the AMA but, in practice, there was no precedent in which the JFTC examined such a transaction before this case. In this context, this case would be considered the leading case ruling on the JFTC's power or authority (Google/Fitbit is considered to be consistent with this precedent). It is also worth noting that the JFTC started a merger review and imposed the behavioural remedy proposed by the parties even though the parties had already consummated the transaction several months previously.

Vertical relationship

In this case, the JFTC intensively examined whether the vertical relationship between the business conducted by M3 (as an upstream service) and the business conducted by Nihon Ultmarc (as a downstream service) might cause a substantial limitation on competition. Since M3 had a high share of 75% in the upstream market as of 2019, the JFTC determined that M3 had

sufficient capacity to implement input foreclosure against Nihon Ultmarc's competitors, and thus this transaction would likely harm competition in the downstream market. The JFTC also examined the conglomerate effect of the bundling supply of the parties' services (see the JFTC's official website for details).

To resolve these concerns, the parties proposed a behavioural remedy that included but was not limited to the following:

- the parties promised to continue providing drug information to competitors in the downstream market; and
- the parties promised not to discriminate against downstream competitors in the terms and conditions of the provision of drug information.

Takeaways

This was the first case in which the JFTC made it public that it had challenged a consummated merger. It is worth noting that the JFTC opened an investigation for a consummated transaction just to investigate vertical and conglomerate concerns. In addition, this case shows the JFTC's interest in platform and data business even aside from the Big Tech companies.

It is also important to note that the proposed remedies are supposed to remain in place for an indefinite period of time. The duration of behavioural remedies will be an important issue in remedy discussion in future cases as well, because the JFTC cannot extend the remedy period after the clearance decision.

Furukawa Battery/Sanyo

Overview

The JFTC published the following facts on its official website:

- the JFTC examined this case in response to the party's voluntary consultation, although the case did not meet the statutory threshold of filing requirement; and
- in this case, the JFTC conducted an economic analysis based on actual sales results and other data the parties submitted to the JFTC.

Pre-notification consultation

The AMA prohibits merger transactions that substantially restrain competition in a particular field of trade, regardless of whether or not they are subject to notification. As noted above, merger transactions that meet the notification criteria based on domestic sales, etc, must file a notification before implementation. Even for merger transactions not subject to notification, if a company consults with the JFTC, the JFTC may review the transaction based on the policy for handling merger transaction reviews. If there is a concern about substantial restraint of competition in a particular field of trade in notified cases or those consulted on despite being outside the notification criteria, the case may need remedial measures for clearance. The JFTC may also conduct a review *ex officio*.

In this case, although the notification requirements were not met, the JFTC conducted a merger review following the procedures applicable to notifiable merger transactions because the party presented the specific plans related to this case and consulted the JFTC.

Horizontal relationship

The JFTC explains in the announcement that there were many product areas in which the parties compete or transact, identifying and reviewing three markets of horizontal relationship among such products, which may have an impact on competition:

- the production and sales of cylindrical NiCd unit cells;
- the production and sales of cylindrical NiCd assembled batteries for emergency broadcasting systems; and
- the production and sales of cylindrical NiCd assembled batteries for interlocking repeaters of fire shutters.

In the assessment of substantial restraint of competition, the JFTC found that there is competitive pressure from an “indirect” neighbouring market because customers are gradually changing from NiCd batteries to nickel hydride batteries, which puts a brake on the price increase of NiCd unit cells, cylindrical NiCd assembled batteries for emergency broadcasting systems, and cylindrical NiCd assembled batteries for interlocking repeaters of fire shutters.

Takeaways

In this case, the JFTC conducted an economic analysis based on actual sales results and other data the parties submitted to the JFTC. The JFTC assessed that the degree of competition between the parties was limited and that there was competitive pressure from a neighbouring market. As a result, the JFTC concluded that the merger in this case was not problematic.

Z Holdings/Line

Overview

The JFTC published the following facts on its official website:

- on 18 November 2019, Z Holdings Corporation (ZHD – a subsidiary of Japanese IT giant SoftBank) announced that it planned to acquire all shares in Line Corporation, the most well-known messenger application provider in Japan;

- on the same date, ZHD and Line voluntarily submitted a written explanation stating that there was no competition issue on the share acquisition and other relevant materials to the JFTC, and started a pre-notification consultation;
- on 14 July 2020, ZHD and Line filed a notification with the JFTC; and
- on 4 August 2021, the JFTC granted a clearance conditional on behavioural remedies in certain markets.

Pre-notification consultation

ZHD and Line consulted with the JFTC between 18 November 2019 and 14 July 2020, with the purpose of resolving the JFTC’s competition concerns. While the parties spent eight months in pre-notification consultation with the JFTC, the JFTC took just 21 calendar days (12 business days in Japan) to review the transaction in the Phase I process. Based on these facts, it is reasonable to state that the JFTC investigated the case substantially during the pre-notification phase, including evaluating the proposed remedy. It would be fair to assume that the parties filed the notification with a reasonable anticipation that the remaining procedure would be completed within 30 days.

In almost all cases, the JFTC addresses and resolves its competition concerns during the pre-notification consultation process, and therefore rarely opens a Phase II process.

Digital platform market

The JFTC’s examination focused on news distribution services, advertisement-related businesses and code-based payment businesses due to the competitive pressure of competitors, customers or new entries, while there are many other markets in which the parties have overlaps or vertical relationships.

It is worth noting that the JFTC evaluated the magnitude of competitive pressure from competitors in the code-based payment business by taking the “indirect network effect” into consideration, since said business was considered one of the multiple digital platform businesses in which the parties and competitors operated.

Although the aggregate market shares of the parties in the code-based payment business was approximately 60%, the JFTC concluded that this transaction would not substantially restrain competition in the code-based payment business, based on the following behavioural remedy proposed by the parties:

- the parties promised to annually report the competition situation of the code-based payment business to the JFTC; and
- the parties promised to remove exclusive dealing conditions in the code-based payment business.

Takeaways

This case is an excellent example of a horizontal merger with a significant combined market share that was cleared by the JFTC without any condition (for the free news supply business) or with relatively lenient behavioural remedies (for the code-based payment business). Even though the parties’ consumers are general smartphone users, the JFTC did not have an opportunity to collect comments from the general public as the parties successfully avoided the Phase II review.

Significant developments

On 16 June 2022, the JFTC released a statement titled “Proactive promotion of competition policy in response to socioeconomic changes such as digitalisation: Co-operation and strengthening of advocacy and enforcement” (the “Position Paper”). The JFTC aims to enhance its response

to changes in social economics, such as digitalisation, by considering enforcement and advocacy as the fundamental tools for creating and preserving competitive environments.

The JFTC has outlined its plans to enhance the effectiveness of advocacy. Instead of primarily relying on voluntary surveys and hearings, the JFTC will exercise its investigative authority under Article 40 of the AMA, which grants compulsory powers, when information gathering becomes challenging.

On the other hand, the JFTC has outlined several measures for the strengthening of enforcement effectiveness.

- Firstly, in cases involving digital platform operators, the JFTC recognises the need for efficient and effective information gathering. Even at the initial stages of individual investigations, the JFTC intends to widely publicise the overview of cases and solicit information and opinions from third parties, while carefully considering the potential impact of such publicity on the review process.
- Secondly, for merger cases, especially those related to digital markets, the JFTC will now publicly disclose and invite opinions, regardless of whether the Phase II review process has commenced or not. In 2022, the JFTC solicited opinions in the case of Google LLC and Mandiant, Inc and in the case of Microsoft Corporation and Activision Blizzard Inc.
- Thirdly, in the assessment of whether to initiate an investigation in both antitrust and merger cases, where information collection has traditionally been conducted on a voluntary basis, the JFTC will exercise its investigative authority under Article 40 of the AMA as needed.

- Fourthly, to gain insights into the intentions, objectives, effects on stakeholders and future market prospects of companies involved in merger cases, particularly in digital market contexts, the JFTC will request the submission of internal documents from the companies at the early stages of the examination. In June 2022, the JFTC published a document that explains its practice regarding the scope, timing and manner of submission of such internal documents.
- Lastly, the JFTC emphasises the utilisation of economic appraisal not only in merger cases but also in investigations of suspected violations. In 2021, regarding a merger case of stock acquisition in the silicon wafer market, the JFTC found it appropriate to focus on a model based on the Cournot competition model. On 31 May 2022, the JFTC published a document on the points to heed in submitting the reports and data for economic appraisal.

In summary, the JFTC aims to strengthen the effectiveness of advocacy by exercising investigative powers when voluntary information collection becomes challenging. The JFTC also intends to enhance enforcement effectiveness by increasing transparency in the examination process, soliciting public input, requesting internal documents from companies, and utilising economic analysis in both merger and violation cases, particularly in the digital market context.

Law and Practice

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Alex Saleh, Asad Ahmad, Khaled Al Makhezeem and Liana Rashid

GLA & Company



Contents

1. Legislation and Enforcing Authorities p.440

- 1.1 Merger Control Legislation p.440
- 1.2 Legislation Relating to Particular Sectors p.440
- 1.3 Enforcement Authorities p.440

2. Jurisdiction p.440

- 2.1 Notification p.440
- 2.2 Failure to Notify p.441
- 2.3 Types of Transactions p.442
- 2.4 Definition of "Control" p.442
- 2.5 Jurisdictional Thresholds p.442
- 2.6 Calculations of Jurisdictional Thresholds p.443
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.443
- 2.8 Foreign-to-Foreign Transactions p.443
- 2.9 Market Share Jurisdictional Threshold p.443
- 2.10 Joint Ventures p.443
- 2.11 Power of Authorities to Investigate a Transaction p.443
- 2.12 Requirement for Clearance Before Implementation p.443
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.443
- 2.14 Exceptions to Suspensive Effect p.444
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.444

3. Procedure: Notification to Clearance p.444

- 3.1 Deadlines for Notification p.444
- 3.2 Type of Agreement Required Prior to Notification p.444
- 3.3 Filing Fees p.444
- 3.4 Parties Responsible for Filing p.444
- 3.5 Information Included in a Filing p.444
- 3.6 Penalties/Consequences of Incomplete Notification p.446
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.446
- 3.8 Review Process p.446
- 3.9 Pre-notification Discussions With Authorities p.447
- 3.10 Requests for Information During the Review Process p.447
- 3.11 Accelerated Procedure p.447

4. Substance of the Review p.447

- 4.1 Substantive Test p.447
- 4.2 Markets Affected by a Transaction p.448
- 4.3 Reliance on Case Law p.448
- 4.4 Competition Concerns p.448
- 4.5 Economic Efficiencies p.448
- 4.6 Non-competition Issues p.448
- 4.7 Special Consideration for Joint Ventures p.448

5. Decision: Prohibitions and Remedies p.449

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.449
- 5.2 Parties' Ability to Negotiate Remedies p.449
- 5.3 Legal Standard p.449
- 5.4 Negotiating Remedies With Authorities p.449
- 5.5 Conditions and Timing for Divestitures p.449
- 5.6 Issuance of Decisions p.449
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.449

6. Ancillary Restraints and Related Transactions p.449

- 6.1 Clearance Decisions and Separate Notifications p.449

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.450

- 7.1 Third-Party Rights p.450
- 7.2 Contacting Third Parties p.450
- 7.3 Confidentiality p.450
- 7.4 Co-operation With Other Jurisdictions p.450

8. Appeals and Judicial Review p.450

- 8.1 Access to Appeal and Judicial Review p.450
- 8.2 Typical Timeline for Appeals p.450
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.451

9. Foreign Direct Investment/Subsidies Review p.451

- 9.1 Legislation and Filing Requirements p.451

10. Recent Developments p.451

- 10.1 Recent Changes or Impending Legislation p.451
- 10.2 Recent Enforcement Record p.451
- 10.3 Current Competition Concerns p.451

GLA & Company provides strategic, cost-effective and forward-thinking legal representation for companies seeking to do business in the Middle East. The firm's practice encompasses all legal issues companies will likely encounter in the global business environment. With extensive experience advising clients in the Gulf Cooperation Council (GCC) states of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE, it offers unique insights for companies seeking to establish or expand business operations in

these nations. The firm's emphasis on deals is to get them cleared with the local competition authority and it has excellent relationships with regulators in the GCC. GLA has been successful in securing no objections from these bodies to clear deals. The firm's lawyers are intimately familiar with the governing sources of authority and routinely work with the relevant agencies, departments and committees on behalf of clients.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

In Kuwait, issues of merger control are governed by Law No 72 of 2020, which came into force on 1 November 2020, and its regulations, ratified by the Kuwait Competition Protection Agency (“Kuwait CPA”) under Resolutions No 14 of 2021, No 26 of 2021, and No 25 of 2022 (Law No 72 of 2020 and its regulations are together referred to as the “Kuwait Competition Law”).

The Kuwait Competition Law repealed its predecessor, Law No 10 of 2007, expanding on the governing rules that impact competition in the State of Kuwait. The Kuwait Competition Law is without prejudice to the international treaties and agreements in force in the State of Kuwait, meaning that such treaties and agreements with the Kuwaiti government supersede any provisions that would otherwise apply pursuant to the Kuwait Competition Law.

1.2 Legislation Relating to Particular Sectors

Other than the Kuwait Competition Law, the following apply.

- The executive by-laws of the Kuwait Capital Markets Authority (“Kuwait CMA”) include certain disclosure requirements and other restrictions impacting transactions that are also subject to the Kuwait Competition Law. The Kuwait CMA governs companies that:
 - (a) are listed on the Kuwait stock exchange, the Boursa; or
 - (b) carry licences, such as investing, governed by the Kuwait CMA.
- The Central Bank of Kuwait (CBK) governs certain activities of financial institutions in Kuwait and carries its own set of regulations

that must be complied with where the transaction concerns a bank or other financial institution governed by the CBK.

1.3 Enforcement Authorities

The Kuwait CPA is an independent body established pursuant to the Kuwait Competition Law and is supervised by the Kuwait Minister of Commerce and Industry. The Kuwait CPA is the sole body charged with reviewing and determining applications to approve economic concentrations or some anti-competitive practices, and with enforcing the Kuwait Competition Law.

2. Jurisdiction

2.1 Notification

The Kuwait Competition Law requires submission of an application to the Kuwait CPA by persons involved in economic concentrations within at least 60 days from the date of the contract or agreement regarding the transaction, where the economic concentration meets certain thresholds established by the Kuwait CPA. The application must be submitted to the Kuwait CPA in accordance with the required form and the requirements under the Kuwait Competition Law, and must be approved by the Kuwait CPA before the economic concentration may be lawfully implemented. The Kuwait Competition Law provides relatively conservative thresholds for determining whether an application is required, as follows:

- where one of the parties to the concentration achieve annual sales in Kuwait exceeding KWD500,000, according to the audited financial statements of the last fiscal year before the concentration;
- where the parties to the concentration collectively achieve aggregate annual sales exceed-

ing KWD750,000, according to the audited financial statements of the last fiscal year before the concentration; and

- where the value of the registered assets of the parties to the concentration in Kuwait exceeds the value of KWD2.5 million, according to the audited financial statements of the last fiscal year before the concentration.

The Kuwait Competition Law exempts certain activities from being deemed economic concentrations, as follows:

banks, insurance companies, and financial institutions whose activities include trading in securities are exempt, provided they do not exercise the substantive voting rights conferred by such securities – in order to be exempt, the security must generally be disposed of within one year from the date of acquisition:

- acquisitions resulting from insolvencies, defaults, debt restructuring, compositions with creditors, or similar transactions are exempt; and
- restructuring within the same group of companies is exempt.

Furthermore, the following cases shall not be deemed economic concentrations.

- In cases of acquisition of control as a result of insolvency, default, debt rescheduling, settlements with creditors, or analogous proceedings.
- In cases where the persons that form one economic group perform restructuring procedures within the same group.

Based on the authors' practical experience, they successfully obtained an exemption for a client

on the basis of restructuring procedures taking place within the same group.

It is important to note that the persons desiring to perform an economic concentration, where an application is required, are forbidden under the Kuwait Competition Law from performing any actions or procedures to complete the concentration operations prior to the issuance of the Kuwait CPA's determination.

If the Kuwait CPA becomes aware of any steps taken toward completing a transaction before obtaining the necessary clearance from the Kuwait CPA, penalties may be imposed.

2.2 Failure to Notify

The Kuwait CPA has the authority to independently initiate research, investigations, evidence collection, and inquiries in accordance with the provisions of the Kuwait Competition Law. Moreover, any person may report any agreements, acts, or actions that violate the Kuwait Competition Law.

The Kuwait Competition Law established a disciplinary board, tasked with deciding disciplinary actions referred to it by the Kuwait CPA in relation to violations of the Kuwait Competition Law, and complaints filed by various stakeholders. The disciplinary board may impose financial penalties of no more than 10% of the total revenues earned by the parties to the economic concentration during the previous fiscal year in the event of failure to submit the application for concentration, or for providing misleading or incorrect information on an application.

Since the issuance of the Kuwait Competition Law, the Kuwait CPA has consistently increased its level of investigative activity, including, in one case, penalising a steel distribution company by

the amount of KWD250,000, which is equivalent to 1% of the company's total revenues achieved during the fiscal year 2020/2021, for the company's non-compliance with the Kuwait CPA's requests and refrainment from providing the requested data and information for a duration exceeding one month. Additionally, there was also a recent sanction by the Kuwait CPA published on 30 March 2023 where various food associations were fined by the Kuwait CPA due to abuse of their dominant position.

The authors are aware of a local company that submitted their filing with inaccurate information, and that, as a result, the Kuwait CPA overseeing the matter appropriately disregarded the erroneous submission and directed the company to resubmit their filing with accurate information which resulted in a major delay in obtaining clearance from the Kuwait CPA. GLA & Company was engaged following the misfiling by another law firm in Kuwait, and assisted the non-compliant company with making an appropriate filing with the Kuwait CPA.

It is worth highlighting that while the mentioned sanctions are not specifically related to merger control, they serve as evidence of the Kuwait CPA's proactive approach to identifying violations and imposing penalties.

2.3 Types of Transactions

The following types of transaction are deemed an economic concentration subject to the Kuwait Competition Law:

- the merger of two or more persons by amalgamation or by combination, or merger of parts of persons, resulting in acquiring control or acquiring more control (see **2.4 Definition of "Control"**);

- the acquisition, by one or more persons, or direct or indirect control over the entire, or parts of another, person or persons, whether by acquisition of any assets, property rights or usufructs, by purchase of shares or liabilities, or by any other means; or
- the joint venture of two or more persons, resulting in performing, on a lasting basis, an autonomous economic or commercial activity, regardless of its legal form or the activity to be practised.

2.4 Definition of "Control"

Article 1 of the Kuwait Competition Law defines "control" as "the legal or contractual relationship which, either separately or in combination, results in exercising decisive influence."

2.5 Jurisdictional Thresholds

The Kuwait Competition Law, pursuant to Article 3 thereof, applies to acts committed inside or outside the State of Kuwait whenever such acts prevent, restrict, or distort free competition in the State of Kuwait.

The current jurisdictional thresholds are as follows, in accordance with Resolution No 26 of 2021:

- where one of the parties to the concentration achieve annual sales in Kuwait exceeding KWD500,000, according to the audited financial statements of the last fiscal year before the concentration;
- where the parties to the concentration collectively achieve aggregate annual sales exceeding KWD750,000, according to the audited financial statements of the last fiscal year before the concentration; and
- where the value of the registered assets of the parties to the concentration in Kuwait exceeds the value of KWD2.5 million, accord-

ing to the audited financial statements of the last fiscal year before the concentration.

2.6 Calculations of Jurisdictional Thresholds

The calculation of the thresholds appears to be based on the audited financial statements of the persons involved in the economic concentration, which would generally be the transacting participants of the transaction. The Kuwait Competition Law does not specifically address the issue of currency conversion, or whether to rely on the book or fair market value of the assets being appraised. In the authors' experience, clients have provided the value of assets as presented in the audited financial statements submitted to the Kuwait CPA.

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

Based on the authors' experience, the Kuwait CPA primarily requires audited financial statements of the entities involved in a transaction to ensure the accuracy of the provided amounts. As a result, the authors recommend their clients provide precise audited financial statements, as the Kuwait CPA has zero tolerance for misleading or false information, which can result in penalties.

2.8 Foreign-to-Foreign Transactions

In short, foreign-to-foreign transactions are subject to merger control and other measures – as previously mentioned, the Kuwait Competition Law applies to acts committed inside or outside the State of Kuwait whenever such acts prevent, restrict, or distort free competition in the State of Kuwait.

2.9 Market Share Jurisdictional Threshold

The Kuwait Competition Law does not have a market share threshold; however, disclosure of estimated market share is part of the notice application to the Kuwait CPA.

2.10 Joint Ventures

Joint ventures are subject to merger control. A joint venture of two or more persons, resulting in performing, on a lasting basis, an autonomous economic or commercial activity, regardless of its legal form or the activity to be practised, is considered an economic concentration. There are no other special rules provided for in the Kuwait Competition Law pertaining to joint ventures.

2.11 Power of Authorities to Investigate a Transaction

The Kuwait Competition Law confers the capacity of law enforcement officers upon the Kuwait CPA's employees. These officers are entitled to enter persons' premises and workplaces to investigate violations of the Kuwait Competition Law. They are entitled to access records, books, and documents, to obtain information, data, documents, access to files (physical or electronic) held by a government or non-governmental body, and may seek the assistance of police officers when needed.

2.12 Requirement for Clearance Before Implementation

Implementation may not lawfully proceed before an approval is issued by the Kuwait CPA.

2.13 Penalties for the Implementation of a Transaction Before Clearance

The Kuwait CPA is entitled to take corrective action for violations of the Kuwait Competition Law. Unfortunately, specific consequences for

implementing a concentration before an approval from the Kuwait CPA, where an application is required, are not provided for in the Kuwait Competition Law. It is possible that the Kuwait CPA would order the unwinding of a transaction for failing to comply with the procedures stipulated in the Kuwait Competition Law.

The authors witnessed a situation in which a company that should have filed an application nonetheless proceeded to fulfill the completion obligations outlined in the Share Purchase Agreement, specifically regarding the transfer of shares, without filing with the Kuwait CPA. The Kuwait CPA became aware of this, and, as a consequence, that company is likely to face penalties which range from 1% to 10% of annual turnover. The matter is being referred to the Kuwait CPA Disciplinary Board for their judgment.

2.14 Exceptions to Suspensive Effect

Unfortunately, there are no reliable sources of publicly available information on this issue.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

While possible, these circumstances are not specifically provided for in the Kuwait Competition Law.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

An application must be filed at least 60 days from the date of the contract or agreement regarding the transaction.

3.2 Type of Agreement Required Prior to Notification

No binding agreement is required prior to notification; it is sufficient for parties to file on the basis of a less formal agreement such as a letter of intent, memorandum of understanding, or good faith intent by the parties to reach an agreement.

3.3 Filing Fees

There are filing fees, and applications must be accompanied by a receipt for payment of a fee equal to the lesser of (i) one tenth (0.1%) of the paid-up capital of both parties of the economic concentration, or (ii) of the combined assets of both parties in Kuwait, whichever is less and not exceeding KWD100,000. Moreover, the filing fees cannot be zero.

3.4 Parties Responsible for Filing

Persons directly involved in the economic concentration are required to submit the application to the Kuwait CPA. Typically, these are the parties to the transaction agreement, while legal counsels usually handle the filing procedures on behalf of their clients through the use of powers of attorney.

3.5 Information Included in a Filing

The application requires a considerable amount of information and detail on the entities involved in the transaction and the economics resulting therefrom. An application requires the following to be included to the extent available and appropriate.

- Asset appraiser report provided that it shall belong to one of the auditing offices approved by the CMA, with the payable fee mentioned in 3.3 Filing Fees. (Please note that this would be required only if the parties

chose to submit filing fees based on their combined assets in Kuwait).

- Memorandum of association, articles of association, commercial register, and commercial licences of the parties to the economic concentration.
- Names of the board members of each of the parties to the concentration or their legal representatives.
- Financial statements for the last two fiscal years for all relevant persons in the economic concentration's operation and their branches.
- Copy of the contract executed or in draft form, and any other documents of a public or private offering, and information on the number of shares or assets that will be acquired.
- A report containing the economic aspects of the proposed transaction.
- Fully completing the economic concentration application which must include the following:
 - (a) Information about the concentration parties:
 - (i) names of the parties of the concentration operation, memorandum of association, articles of association (if any), commercial licences, and the commercial register;
 - (ii) activity of the parties of the concentration operation;
 - (iii) addresses, phone numbers, and email addresses of the parties of the concentration operation;
 - (iv) name, title, copy of ID, phone number, and email address of the liaison officer for the parties of the concentration;
 - (v) capital;
 - (vi) the most important customers and their percentages in the market;
 - (vii) volume, value and percentage of sales in the market; and
 - (viii) a description of competitors and

their shares in the market.

(b) Data of the concentration operation:

- (i) type of transaction (ie, merger, acquisition, or joint venture);
- (ii) description of whether the transaction relates to all or some parties of the economic concentration;
- (iii) a brief explanation for the economic and financial structure of the economic concentration;
- (iv) the dates, proposed or estimated, of any important procedures aimed at the completion of the concentration operation;
- (v) the proposed ownership structure and the decisive influence post-completion;
- (vi) relevant products of the economic concentration, its volume, and percentage of sale;
- (vii) relevant market and its volume;
- (viii) products in which the applicants deal;
- (ix) positive impacts of the transaction on the economy;
- (x) negative impacts of the transaction and the proposed procedures to mitigate such impacts;
- (xi) markets affected by the transaction;
- (xii) factors influencing access to the market;
- (xiii) nature of the distribution channels;
- (xiv) factors affecting price fixation during the past five years;
- (xv) volume of available productive capacity and percentage of usage;
- (xvi) volume of demand for products, and its structure;
- (xvii) alternative products; and
- (xviii) concentration value in Kuwaiti dinars, provided that it shall include the purchase rate and the value of all

relevant assets.

(c) Ownership and decisive influence:

- (i) all persons who have a decisive influence on participants in the economic concentration, whether directly or indirectly, shall be determined and the nature of such influence and its methods shall be described; and
- (ii) all persons dealing in any affected market where participants in the concentration operation, or any other person, enjoy a decisive influence on that market, whether directly or indirectly – the nature and methods of such influence shall be described.

3.6 Penalties/Consequences of Incomplete Notification

Typically, the Kuwait CPA will notify the applicants of additional information requested. Otherwise, failure to provide a complete application may result in a denial by the Kuwait CPA, or other corrective action the Kuwait CPA deems appropriate.

It is important to note that when the Kuwait CPA requests additional information, the duration of the review process of the concentration application pauses, and resumes once the information is received and accepted by the Kuwait CPA.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The disciplinary board may impose financial penalties of no more than 10% of the total revenues earned by the parties to the concentration during the previous fiscal year in the event that the application contains misleading or incorrect information.

3.8 Review Process

Once an application is submitted, the chairman of the Kuwait CPA must refer the application to the executive director of the Kuwait CPA within five days, plus any additional time in the event additional information is requested from the applicants.

The executive director then has 90 days to study the application and prepare a report to the board of the Kuwait CPA. The board of the Kuwait CPA may extend this 90-day limitation upon request from the executive director of the Kuwait CPA. During this phase, the executive director:

- ensures that the fees paid are consistent with the requirements;
- may require additional documents, information, or data deemed necessary for studying the application;
- notifies persons the executive director considers to be affected by the approval of the economic concentration application in order for them to submit any objections or documents they may have;
- publishes a summary of the economic concentration application on the website of the Kuwait CPA, and in the official gazette and two local daily Arabic newspapers for any potential third-party objections;
- holds hearings with the applicants, and others as appropriate; and
- seeks the help of any expert, and local or international companies that are specialised in examination of the application, or obtains any information from third parties as appropriate.

In the event of any objection by a third party, the time to consider and decide on this does not count towards the 90-day limitation otherwise

imposed on the executive director of the Kuwait CPA during his phase of review.

Following completion of the executive director's review, a report will be issued to the chairman of the Kuwait CPA containing details of the application, a description of all facts and procedures taken with respect to the application, an evaluation of the application from both a legal and economic standpoint, and a recommendation. The chairman of the Kuwait CPA presents the application to the Kuwait CPA's board, who will in turn decide on the application within 30 days from the date of the chairman's presentation. The board's decision will be as follows:

- approving the economic concentration application;
- conditionally approving the economic concentration application; or
- rejecting the economic concentration application, provided that such a decision is justified.

Once a decision is rendered, the executive director must inform the stakeholders within 15 days of the date of the board's decision.

The total timeline for a decision to be rendered from the time an application is properly submitted is an estimated four months. The actual time, however, may vary depending on follow-up requests for additional information, requests for additional time by the executive director, or objections raised by third parties.

3.9 Pre-notification Discussions With Authorities

Pre-notification discussions with authorities can be engaged in. Any person who desires to enter into an economic concentration may apply for a meeting prior to submission of an application. There is no particular obligation of confidential-

ity provided for in the Kuwait Competition Law. According to Resolution No 24 of 2021, the pre-notification fee is KWD250.

3.10 Requests for Information During the Review Process

Requests for information are common and expected, depending on the extent of the application submitted. Requests will effectively suspend the time otherwise imposed on the Kuwait CPA to process an application.

3.11 Accelerated Procedure

There is no formal method for expediting or accelerating the procedure of review of an economic concentration application.

4. Substance of the Review

4.1 Substantive Test

When considering an application, the Kuwait CPA considers the following standards:

- maintaining and encouraging effective competition amongst competitors in the market;
- enhancing the interests of consumers with respect to quality and price of the relevant products; and
- encouraging, through competition, the reduction of costs, developing new products, and facilitating the access of new competitors to the market.

The executive director, during his review, takes the following elements into consideration.

- Studying the products according to the following:
 - (a) comparing the products subject to the transaction with other similar products in the market; and

- (b) the availability of substitute products to consumers.
- Determining the possibility of competition within a relevant geographic area with the following standards in mind:
 - (a) the ability of the consumer to move from one geographic area to another;
 - (b) the ability of vendors to make changes based on the moving of purchasers between various geographic areas due to the relative change in the prices or other competitive factors;
 - (c) barriers to entering the relevant market;
 - (d) costs of moving between geographic areas; and
 - (e) customs and administrative restrictions at the local and foreign levels.
- The market share of the relevant persons.
- Revenues and assets of relevant persons.
- Actual or possible competitiveness in the relevant market.
- The extent of ease of entry into the relevant market.
- The possible influence on prices of relevant commodities or services.
- The barriers to entry affecting new or potential competitors.
- The possibility that a dominant position in the relevant market is created.
- The possible influence on creativity, innovation and technological efficiency.
- The extent of the impact on investment or export encouragement.
- The impact on consumers' interests.

4.2 Markets Affected by a Transaction

Unfortunately, at this stage the regulations do not provide much guidance on this issue. The Kuwait Competition Law provides that the relevant geographic area is the area where the products regarded as interchangeable are substituted. It further provides that the relevant

products are all the products which are regarded as interchangeable or substitutable in terms of meeting the needs of the recipient of the service or the commodity.

4.3 Reliance on Case Law

Unfortunately, at this stage the regulations do not provide guidance on this issue. However, it is likely that case law would play a relatively small role in influencing the enforcement of the Kuwait Competition Law.

4.4 Competition Concerns

See the factors taken into consideration by the executive director, detailed in 4.1 **Substantive Test**.

4.5 Economic Efficiencies

The Kuwait CPA considers the possible influence on economic efficiencies; however, the extent of such consideration is not apparent.

4.6 Non-competition Issues

There are no formally approved additional considerations that the Kuwait CPA may take into account where such considerations fall outside the scope of application of the Kuwait Competition Law.

4.7 Special Consideration for Joint Ventures

There are no other special rules provided for in the Kuwait Competition Law pertaining to joint ventures in particular.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The Kuwait CPA has the authority to take corrective actions for violations of the Kuwait Competition Law.

5.2 Parties' Ability to Negotiate Remedies

The Kuwait CPA may, at any stage of the procedures taken against the violator and until a decision is issued by the disciplinary board or a final judgment, offer settlement or accept it according to the template prepared for this purpose with any person who committed one of the violations stipulated in the law, for the payment of an amount that is not less than the dedicated minimum fine and shall not exceed the maximum fine.

The Kuwait CPA would determine the period during which the violator should fulfil the settlement conditions. Where the settlement is completed, the procedures taken against the violator expire.

A settlement request may also be submitted by the violator or their legal representative to the Kuwait CPA. The Kuwait CPA would examine the request and assess its value without affecting the rights of the one who is affected by the violation.

5.3 Legal Standard

In order to offer or accept a settlement, the following conditions must be met:

- no decision must have been issued for the violation, unless a final judgment is issued for the violation where the violator appeals (in a

timely manner) the decision of the disciplinary board; and

- the value of the settlement must not be less than half of, or greater than, the maximum penalty.

5.4 Negotiating Remedies With Authorities

There is no formal initiation point for when parties may begin negotiating remedies with the authorities. As previously mentioned, the Kuwait CPA may propose its own remedy, but may impose remedies not agreed between the parties that it otherwise has the authority to impose.

5.5 Conditions and Timing for Divestitures

Unfortunately, there are no reliable sources of publicly available information on this issue.

5.6 Issuance of Decisions

Formal decisions permitting or prohibiting transactions are made publicly available – the decisions of the Kuwait CPA are generally published on the authority's website.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

Unfortunately, there are no reliable sources of publicly available information on this issue.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Unfortunately, there are no reliable sources of publicly available information on this issue. The Kuwait CPA, in the event it issues a conditional approval, will outline the conditions regarding this.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

During the process of review by the Kuwait CPA, a summary of the application is published on the website of the Kuwait CPA, and in the official gazette and two local daily Arabic newspapers.

Every interested person is entitled to submit a justified objection to the Kuwait CPA against the economic concentration application within 15 days from the date of notice or publication. If an objection is filed, the applicant has 15 days from the date of notice of the objection, to provide its statements and documents in reply to the objection. The review process and timeline are effectively paused from the time an objection is filed to the time a decision is reached by the Kuwait CPA on the matter.

7.2 Contacting Third Parties

During the process of review by the Kuwait CPA, a summary of the application is published on the website of the Kuwait CPA, and in the official gazette and two local daily Arabic newspapers.

The Kuwait CPA is also permitted to notify persons it considers to be affected by the approval of the economic concentration application. Those persons will have 15 days from the date of being notified, or the date of publication of the summary of the application, whichever is earlier, to lodge any objections they may have.

7.3 Confidentiality

The applicant for economic concentration, desiring that data included in the application and the attached documents be treated as confidential, may mark the application as “Confidential”, and attach a statement in support of holding

the application or its contents as confidential. In these circumstances, the applicant should provide non-confidential summaries that provide a sufficient understanding of the content of the confidential data, provided that these are marked as “Not Confidential”.

The Kuwait CPA ultimately determines whether, or to what extent, to hold information contained in an application as confidential in accordance with controls set by its board of directors.

7.4 Co-operation With Other Jurisdictions

There is no clear indication of the level or extent of co-operation between the Kuwait CPA and other jurisdictions; however, as mentioned in **1.1 Merger Control Legislation**, the Kuwait Competition Law is subject to international treaties or agreements entered into by the State of Kuwait. Thus, to the extent a treaty provides for the co-operation by the State of Kuwait with other jurisdictions and to the extent relevant to the Kuwait Competition Law, those conditions will apply.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

A final decision by the Kuwait CPA may be appealed to the judicial system in Kuwait by way of a formal writ of summons against the authority. There is a dedicated department within the judicial court system devoted to complaints filed involving governmental authorities.

8.2 Typical Timeline for Appeals

The timeline of a case filed against a governmental authority varies on a case-by-case basis, and may last over one year in the court system.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Assuming that a third party made a proper objection during the reviewing phase of an application, the decision made by the Kuwait CPA to such an objection may be appealed by that third party. However, it is highly unlikely that such an appeal would pause the review process.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

There are no other special rules provided for in the Kuwait Competition Law pertaining to foreign direct investment or foreign subsidies legislation with respect to economic concentration filing.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

Law No 72 of 2020, Resolution No 14 of 2021, Resolution No 26 of 2021, and Resolution No 25 of 2022 which make up the Kuwait Competition Law, have all been enacted in the last couple of years. The authors expect the Kuwait CPA to issue additional amendments and regulations as it continues to grow and develop.

10.2 Recent Enforcement Record

The Kuwait CPA has actively been publishing numerous announcements on its website during the years 2022, 2023 and 2024. These announcements pertain to various parties submitting applications for economic concentration, as well as cases in which the Kuwait CPA declares its approval for specific transactions. These publications serve as a means of transparent communication and keeping the public

informed about the ongoing activities and decisions of the Kuwait CPA in relation to economic concentration matters.

To date, the Kuwait CPA has not published any official announcements regarding the denial or rejection of any economic concentration applications.

10.3 Current Competition Concerns

The Kuwait CPA has historically remained dormant and relatively inactive in the market compared with some of its sister jurisdictions in the GCC. However, the enactment of the recent Kuwait Competition Law demonstrates Kuwait's dedication to the enforcement of the principle of freedom of competition in the State.

The level of involvement of the Kuwait CPA is very high and has increased every year since its inception in 2021. Its conservative financial thresholds for determining when an application is required for approval of an economic concentration – which is broadly defined to include any merger, any acquisition resulting in direct or indirect control of another, and any joint venture resulting in a lasting co-operation of an economic or commercial activity – make it necessary for many cross-border deals to pay attention to the Kuwait CPA's requirements and comply with the Kuwait Competition Law, regardless of whether or not the directly transacting entities are based outside the state.

It is highly probable that the Kuwait CPA will make revisions to the regulations, specifically by raising the existing thresholds. This is due to the fact that the current thresholds are regarded as relatively low, leading to a significant number of economic concentration filings being submitted to the Kuwait CPA. The purpose of these potential amendments would be to address the

overwhelming volume of filings and streamline the process, ensuring that only transactions of greater significance are subject to scrutiny and evaluation by the Kuwait CPA. Such adjustments would aim to strike a balance between efficient regulation and appropriate oversight of economic concentration activities.

MEXICO



Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.457

- 1.1 Merger Control Legislation p.457
- 1.2 Legislation Relating to Particular Sectors p.457
- 1.3 Enforcement Authorities p.457

2. Jurisdiction p.457

- 2.1 Notification p.457
- 2.2 Failure to Notify p.458
- 2.3 Types of Transactions p.458
- 2.4 Definition of "Control" p.458
- 2.5 Jurisdictional Thresholds p.459
- 2.6 Calculations of Jurisdictional Thresholds p.459
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.460
- 2.8 Foreign-to-Foreign Transactions p.460
- 2.9 Market Share Jurisdictional Threshold p.460
- 2.10 Joint Ventures p.461
- 2.11 Power of Authorities to Investigate a Transaction p.461
- 2.12 Requirement for Clearance Before Implementation p.461
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.461
- 2.14 Exceptions to Suspensive Effect p.461
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.461

3. Procedure: Notification to Clearance p.462

- 3.1 Deadlines for Notification p.462
- 3.2 Type of Agreement Required Prior to Notification p.462
- 3.3 Filing Fees p.462
- 3.4 Parties Responsible for Filing p.463
- 3.5 Information Included in a Filing p.463
- 3.6 Penalties/Consequences of Incomplete Notification p.463
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.463
- 3.8 Review Process p.463
- 3.9 Pre-notification Discussions With Authorities p.464
- 3.10 Requests for Information During the Review Process p.465
- 3.11 Accelerated Procedure p.465

4. Substance of the Review p.466

- 4.1 Substantive Test p.466
- 4.2 Markets Affected by a Transaction p.466
- 4.3 Reliance on Case Law p.466
- 4.4 Competition Concerns p.466
- 4.5 Economic Efficiencies p.466
- 4.6 Non-competition Issues p.467
- 4.7 Special Consideration for Joint Ventures p.467

5. Decision: Prohibitions and Remedies p.467

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.467
- 5.2 Parties' Ability to Negotiate Remedies p.467
- 5.3 Legal Standard p.468
- 5.4 Negotiating Remedies With Authorities p.468
- 5.5 Conditions and Timing for Divestitures p.468
- 5.6 Issuance of Decisions p.468
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.468

6. Ancillary Restraints and Related Transactions p.468

- 6.1 Clearance Decisions and Separate Notifications p.468

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.469

- 7.1 Third-Party Rights p.469
- 7.2 Contacting Third Parties p.469
- 7.3 Confidentiality p.469
- 7.4 Co-operation With Other Jurisdictions p.469

8. Appeals and Judicial Review p.470

- 8.1 Access to Appeal and Judicial Review p.470
- 8.2 Typical Timeline for Appeals p.470
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.470

9. Foreign Direct Investment/Subsidies Review p.470

- 9.1 Legislation and Filing Requirements p.470

10. Recent Developments p.471

- 10.1 Recent Changes or Impending Legislation p.471
- 10.2 Recent Enforcement Record p.471
- 10.3 Current Competition Concerns p.471

Von Wobeser y Sierra is a top-tier and full-practice Mexican firm, which was established in 1986 and counts integrity, excellence, commitment, agility and diversity among its core values. The firm has 17 practice areas, six industry groups, and a strong and diverse team of world-class talent comprising more than 150 lawyers, including 23 partners, six of counsel, and ten

counsel. In recent years, Von Wobeser y Sierra has grown strategically in a steady and sustainable fashion at a pace that is hardly matched by any other leading-tier Mexican law firm. The firm has earned international recognition from the most prestigious legal researchers, including Chambers and Partners Global Guide and Chambers and Partners Latin America Guide.

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VON WOBESER

1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Main Legislation

In Mexico, the relevant merger control legislation is the Federal Economic Competition Law (FECL) and its regulatory provisions.

Secondary Legislation

The Federal Economic Competition Commission (*Comisión Federal de Competencia Económica*, or COFECE) and the Federal Telecommunications Institute (*Instituto Federal de Telecomunicaciones*, or IFT) have issued Guidelines for Notification of Concentrations and the Technical Criteria for the Calculation and Application of a Quantitative Index to Measure Market Concentration.

1.2 Legislation Relating to Particular Sectors

There is no additional legislation specifically applicable to merger control in Mexico. However, in the oil and gas industry, there are certain additional regulatory requirements when an economic agent owns or acquires a shareholding interest in companies active in different portions of the downstream segment.

Also, the Foreign Investments Law requires that transactions related to certain restricted sectors or that meet the monetary thresholds must initiate an authorisation process. The law is very lax, however – only a few sectors are restricted and the monetary thresholds are high.

1.3 Enforcement Authorities

In terms of merger review, there are two enforcers in Mexico. The IFT is in charge of all the transactions related to the broadcast and telecommunications sectors, whereas COFECE is in

charge of reviewing all other markets. However, depending on the relevant markets and whether there are government concessions concerning the broadcast and telecommunications sectors, it is possible that a single transaction might need to be notified to both COFECE and the IFT.

Additionally, there are specialised tribunals in case the transactions or investigations end up in litigation before the Mexican judicial branch.

2. Jurisdiction

2.1 Notification

Compulsory Notification

If a transaction meets any of the monetary thresholds set forth in the FECL (see **2.5 Jurisdictional Thresholds**), the transaction must be notified to the corresponding authority (ie, the IFT, COFECE, or both).

Voluntary Notification

The FECL includes the option to submit a voluntary pre-merger filing, which is normally used in transactions in which it is not clear if the thresholds are met and also to ensure that the enforcers will not investigate the transaction later.

Exemptions from Compulsory Notification

The FECL includes the following seven exceptions to compulsory notification:

- internal corporate restructuring with no third parties involved;
- a controlling entity (that has had control since the incorporation of the target or since the antitrust authorities authorised such acquisition) increases its participation in the controlled entity;
- the incorporation of management, guarantee or any other kind of trusts to which an

economic agent contributes assets, shares or interest without the purpose or necessary consequence being the transfer of said assets, shares or interest to a company other than both the settlor and the corresponding fiduciary institution;

- the transaction involves shares or partnership interests of foreign entities, as long as the participating economic agents neither acquire control over Mexican entities nor accumulate in Mexico shares, partnership interests, participation in trusts or assets in general in addition to those already owned (directly or indirectly);
- the acquirer is an investment company (*sociedad de inversion de renta variable*) and the purpose of the transaction is the acquisition of securities in the stock markets, unless the outcome of the transaction allows the acquirer to acquire decisive influence over the target; and
- the concentration involves transactions in the stock exchange not exceeding 10% of the capital stock of the issuer and the acquirer is not entitled to:
 - (a) appoint or revoke managers, directors, or board members;
 - (b) directly or indirectly impose decisions in the shareholders' meetings or other equivalent corporate bodies;
 - (c) directly or indirectly maintain any interest that would allow it to exercise 10% or more of the voting rights; or
 - (d) directly or indirectly influence the administration, operations, strategy or principal policies of the target.

2.2 Failure to Notify

In Mexico, there is a penalty for failing to notify when the transaction triggers any of the Mexican thresholds. The penalties for failing to notify range from MXN542,850 (approximately

USD31,753) (all figures in US dollars hereinafter consider an exchange rate of MXN17.0958 per US dollar) up to 5% of the total income in Mexico for the previous fiscal year. It is worth noting that the fines are imposed on each of the economic agents that carried out the transaction. Additionally, Mexican law contemplates recidivism, which can double any future sanctions within ten years of the first sanction.

These penalties are applied frequently in Mexico. A list of recent fines imposed by COFECE for failure to notify can be found in **2.13 Penalties for the Implementation of a Transaction Before Clearance**.

2.3 Types of Transactions

A transaction must trigger any of the three Mexican economic thresholds (see **2.5 Jurisdictional Thresholds**) in order for COFECE or the IFT to have the authority to review said transaction. However, internal restructurings or reorganisations in which no third party is involved are exempt from the obligation to notify.

In Mexico, a transaction would not be notifiable where there is no acquisition of Mexican assets or shares or no price allocation for the Mexican portion – given that all the thresholds are monetary-based and not specifically related to control. However, COFECE has recommended adopting a conservative standpoint and notifying any transaction in which there are doubts concerning the thresholds, as well as other joint ventures (particularly among competitors).

2.4 Definition of “Control”

In Mexico, the obligation to notify a transaction is purely based on monetary thresholds, regardless of whether or not the acquirer gains control. Thus, minority acquisitions can trigger a Mexi-

can pre-merger control filing as long as one of the monetary thresholds is met.

The Mexican law and its regulatory provisions do not contemplate a definition of control. Nonetheless, the Supreme Court has defined control as the capacity to exert a decisive influence or control over other economic agents when it comes to acting in the markets, either as a result of legal acts or based on facts.

2.5 Jurisdictional Thresholds

In Mexico, there are no specific thresholds applicable to a particular sector. In this respect, the Mexican thresholds are as follows.

- Price allocation – if there is a specific price allocation for the Mexican portion (including for tax purposes), the amount of such price is equal to or higher than MXN11,954,260,000 (approximately USD114,312,287).
- Size of the target – a transaction must involve (i) the acquisition of 35% or more of the assets or shares of an entity (ii) whose sales or assets in Mexico are valued at more than MXN1,954,260,000 (approximately USD114,312,287). Both parts of the second threshold must be met in order for a transaction to be notifiable in Mexico.
- Size of the parties – a transaction must involve the acquisition of:
 - (a) assets or capital stock with a value greater than MXN911,988,000 (approximately USD53,345,734); and
 - (b) the undertakings involved in the transaction must have assets or sales in Mexico that (jointly or separately) amount to more than MXN5,211,360,000 (approximately USD304,832,766).

Please note that both parts of the third threshold must be met in order for a transaction to be notifi-

able. As regards the first part of this threshold, if the transaction only implies the acquisition of a certain percentage of the target, this percentage must be applied to the total Mexican assets or capital stock (eg, 20% of the total Mexican assets or capital stock should be greater than MXN911,988,000).

2.6 Calculations of Jurisdictional Thresholds

General Assessment of Jurisdictional Thresholds in Mexico

In terms of the price allocation threshold, the value of the Mexican portion must be included in the transaction documents or determined in any tax documents related to the transaction. If there is no price allocation for the Mexican portion, this threshold will not apply and the other two must be assessed instead.

For the size of the target threshold, the transaction must imply the acquisition of 35% of the assets or shares of an entity and its direct or indirect Mexican sales or assets must have a value above the second part of the threshold.

For the size of the parties' threshold, the first part of the threshold refers to the assets or capital stock actually being acquired in Mexico. Thus, if the transaction only implies the acquisition of a certain percentage, such percentage should be applied to the total assets or capital stock in order to determine if the first limb of the threshold is met. As regards the second part, the Mexican sales or assets of all parties involved – namely, seller, target and buyer – must be considered.

Assets Considerations

In terms of assets, the value to be considered is either the asset value expressed in the bal-

ance sheet or the fair market value (whichever is higher).

Sales Considerations

The sales to be considered in the threshold analysis are Mexican sales, which can be carried out by a Mexican or foreign entity. In this respect, for a sale to qualify as a Mexican sale, the sale should be invoiced in Mexico, to a Mexican customer, or made by a Mexican entity to national or foreign customers. Also, the sales of third-party distributors that are not part of the distribution network of the entities involved in the transaction should not be considered in the thresholds analysis.

Exchange Rates for Assets and Sales Expressed in Other Currencies

For the conversion of US dollars to Mexican pesos, the exchange rate that should be used is the lowest exchange rate published by the Mexican Central Bank in the preceding five days counted from the date on which the transaction will be notified. The exchange rate can be reviewed here under the column titled “Para pagos”. Where the sales or assets are shown a currency other than US dollars, any exchange rate indicator that reflects the value of the Mexican currency with regard to the foreign currency in question can be used.

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

The entities to be considered in the Mexican thresholds will depend on the specific threshold that is being analysed. When it comes to the size of the target threshold, the parties will only have to consider the Mexican sales or assets of the target.

In terms of the size of the parties’ threshold, the parties involved need only take into account the Mexican capital stock or assets value of the target for the first part. However, the second part of the analysis contemplates the Mexican assets or sales of all parties involved in the transaction – ie, seller, buyer and target (as applicable).

As regards changes in the business, it is worth noting that these should not affect the assessment, as Mexican law requires that only the financial information contained in the audited financial statements for the past complete year is analysed – therefore, if any business was divested or acquired, the relevant financial values should be excluded or included from the threshold analysis (as applicable).

2.8 Foreign-to-Foreign Transactions

In Mexico, there is no explicit local effects test for foreign-to-foreign transactions. However, the Mexican thresholds imply the necessity of a certain local presence through either the acquisition of Mexican assets/capital stock or the existence of Mexican sales. Hence, a foreign-to-foreign transaction could trigger a Mexican filing if it implies the acquisition of Mexican capital stock/assets or where the parties’ Mexican sales exceed the threshold.

Based on the foregoing and the Mexican thresholds, a filing would not be triggered if the target has neither Mexican sales nor assets/capital stock.

2.9 Market Share Jurisdictional Threshold

It should be noted that in Mexico all thresholds are monetary-based. As such, there are no market share thresholds.

2.10 Joint Ventures

Joint ventures are subject to merger control and the general thresholds apply. Joint ventures can qualify as a transaction subject to merger control as long as they involve the union of two or more economic agents to jointly carry out economic activities either contractually or through a vehicle with legal personality – in the latter case, through which said agents will make contributions and participate jointly in the profits and losses.

2.11 Power of Authorities to Investigate a Transaction

Mexican antitrust enforcers have a limitation period of one year within which to investigate transactions that were below the thresholds. However, in cases in which a transaction met any of the Mexican thresholds and the parties to the transaction failed to notify it, the enforcers have up to ten years to investigate the transaction.

2.12 Requirement for Clearance Before Implementation

In Mexico, all transactions that trigger a Mexican filing must not be closed until COFECE or the IFT authorise the transaction. In fact, Mexican competition law requires the parties to include a clause in the transaction documents suspending the closing until clearance is obtained.

2.13 Penalties for the Implementation of a Transaction Before Clearance

As mentioned in 2.2 Failure to Notify, Mexican competition law sets forth a fine ranging from MXN542,850 (approximately USD31,753) up to 5% of the income generated in Mexico for the previous fiscal year for failing to notify or implementing the transaction before obtaining the clearance. This fine is applied to each of the economic agents involved in the transaction.

It should be noted COFECE has been very active in sanctioning this kind of conduct recently. In the past five years (2020–24), COFECE has imposed penalties on 14 occasions, with a total fined amount of MXN163,273,585 (approximately USD9,550,509).

These penalties are frequently applied in Mexico and, in many cases, are related to foreign-to-foreign transactions. For reference, here are some of the recent fines imposed by COFECE for failing to notify.

- In 2023, Engie, Sonate Bidco and Veolia Environment were sanctioned with fines totalling MXN11,029,331 (approximately USD645,149).
- In 2023, HP, Inc (HP) and Plantronics, Inc (POLY) were sanctioned with fines totalling MXN61,580,800 (approximately USD3,602,101).
- In 2022, AT&T, Inc (AT&T) and Warner Bros Discovery, Inc (Warner Bros Discovery) were sanctioned with fines totalling MXN51,573,920 (approximately USD3,016,760).
- In 2022, IAC Holdco, GCM and Franklin were sanctioned with fines totalling MXN9,098,000 (approximately USD532,177).
- In 2022, Cemex, ABC Capital and ABC Holding were sanctioned with fines totalling MXN9,748,587 (approximately USD570,233).

2.14 Exceptions to Suspensive Effect

No exceptions to the suspensive effect are set forth in Mexican law.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

The general rule is that there are no circumstances in which the parties are permitted to close the transaction before obtaining clearance. None-

theless, it is possible to execute carve-outs of the business, assets or entities in order to close the general transaction and continue with the pre-merger filing in Mexico.

However, it should be noted that COFECE is not fond of these alternatives and, in one case, even ordered the parties to refrain from closing the transaction until Mexican clearance had been obtained. In any case, if a transaction must be closed and the parties desire to execute a carve-out for Mexico, it is highly advisable to inform COFECE about the carve-out before it is implemented in order to mitigate against the possibility of penalties for closing before clearance.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

Pursuant to the FECL, where a mandatory filing is required, a transaction must be notified and cleared by the authority before any of the following takes place:

- the legal act by which the transaction is carried out is perfected in accordance with the applicable legislation or, if the case may be, fulfils the condition precedent to which said act is subject;
- the direct or indirect acquisition or exercise of factual or legal control of another entity (or the factual or legal acquisition of another entity's assets, trust participation, partnership interest, or stock);
- the execution of a concentration agreement among the involved economic agents (unless it is conditional upon clearance by the authority); or

- the culmination of the last in a sequence of acts, owing to which any of the Mexican thresholds are met.

If the parties to a transaction carry out any of the above-mentioned acts before notifying and obtaining clearance, they will be subject to a fine ranging from MXN542,850 (approximately USD31,753) up to 5% of their income.

3.2 Type of Agreement Required Prior to Notification

Pursuant to the law, the parties should submit the executed agreement or at least the draft of the agreement by means of which the transaction is going to be executed. However, the merger guidelines establish that the authority could accept a draft of the transaction agreement or a Letter of Intent or Memorandum of Understanding – and even a description of the transaction – as long as the structure and the main terms and conditions of the transaction (including any non-compete and non-solicitation covenants) are not modified later.

In view of the foregoing, the parties are permitted to notify their transaction even with a description of the transaction instead of a formal agreement. However, it is advisable to submit at least the draft of the agreement, letter of intent or memorandum of understanding and to keep in mind that there should be no substantial changes to the structure and/or the main terms and conditions of the transaction – given that, if the authority believes the transaction carried out differs from the authorised transaction, the parties could be subject to the fines described in **3.1 Deadlines for Notification**.

3.3 Filing Fees

There is a joint-filing fee of MXN237,058 (approximately USD13,866), which is updated annually

in the law. The filing fee receipt must be submitted with the initial notice.

3.4 Parties Responsible for Filing

At the outset, the parties responsible for filing are those directly involved in the transaction – namely, those that are signing parties to the transaction agreements. If it is not possible for any of these parties to appear in the filing and such situation is evidenced before the authority, the appearance of the acquirer will suffice.

It is also relevant to mention that, where there are multiple signing parties that are all controlled by a single entity, the controlling entity can submit the filing on behalf of all the others.

3.5 Information Included in a Filing

Simple copies of the following information/documents pertaining to the involved parties must be submitted along with the concentration notice in Mexico:

- business plan;
- detailed description and structure of the transaction;
- transaction agreements;
- organisational documents;
- audited financial statements for the preceding fiscal year;
- detailed direct and indirect capital structures;
- confirmation of direct and/or indirect participation in the capital structure and/or management of entities with activities in Mexico in the same markets and/or related markets by the parties (as well as their shareholders and subsidiaries);
- competitive assessment and market shares in the national territory and any other relevant geographic market;
- facilities and plants in Mexico;
- filing fee receipt; and

- list of jurisdictions in which the transaction will be notified.

For Mexican entities, original or certified copies of the powers of attorney for each of the notifying parties, which should be granted in favour of their legal representatives. When the powers of attorney are granted abroad or by foreign entities, these powers of attorney shall be apostilled/legalised and notarised.

All the information/documents must be submitted in Spanish. If the documents are in another language, a certified Spanish translation of the main terms of the document must be submitted along with the original document.

3.6 Penalties/Consequences of Incomplete Notification

If the notification does not include all the information/documents referred to in 3.5 **Information Included in a Filing**, the authority will request the outstanding documents within the first request for information (RFI). If these are not submitted within the legal term for answering the first RFI (ie, ten business days, which can be extended by another ten business days), the filing is dismissed.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

A fine of up to MXN18,999,750 (approximately USD1,111,369) may be imposed for submitting false information to the authority and an investigation into the transaction could be launched. Additionally, such conduct might carry criminal consequences.

3.8 Review Process Standard Review Process

The authority has, in principle, 60 business days to review the transaction and issue its decision.

This term is counted from the date on which the authority receives all the information that was requested for the analysis. If the authority does not issue a decision within this term, the transaction will be considered authorised. The merger review process is suspensive in all cases; therefore, the parties cannot close a transaction prior to receiving clearance by the authority.

The authority is empowered to request additional information (to complete the file) within the following terms.

- The authority has ten business days following the date of filing to request basic information that should have been included in the initial filing. The notifying parties will have a period of ten business days to satisfy the request and this term can be extended in justified cases.
- The authority has 15 business days from either the date of filing (or the date on which the request for the above-mentioned information is satisfied) to request additional information that it considers necessary for the analysis of the transaction. The notifying parties will have a term of 15 business days to answer the request and this term can be extended by another 15 business days in justified cases.

Additionally, the authority may further request additional information that they deem relevant for their analysis from any person – including the notifying parties, authorities or economic agents – that is related to the concentration. Whoever receives such requests for information will have a period of ten business days to satisfy such request and this term can be extended in justified cases. Such requests will not restart the clock in terms of the time period in which the authority must issue their resolution.

If the authority issues a request for additional information pursuant to the above-mentioned terms, the 60 business days for review and resolution will start running from the date on which the authority has received all the requested information. In complex cases, the authority can extend the review period for up to 40 additional business days in order to request additional information and/or issue a decision.

It should be noted that, pursuant to the FECL, the clock will be restarted and the antitrust authorities will have 60 business days to analyse the remedies and to issue a decision if – following the submission of the pre-merger filing – the parties offer remedies or conditions in order to dissipate any possible concerns.

The decision issued by the antitrust authorities will be valid for a term of six months. Upon request from the parties involved in the transaction, the term can be extended only once for an six additional months. If a transaction is not closed within the above-mentioned timeframe, the parties will need to re-submit a pre-merger filing in order to obtain a new authorisation to close the transaction. This also applies to decisions obtained through the expedited review process (see **3.11 Accelerated Procedure**).

3.9 Pre-notification Discussions With Authorities

The parties can engage in pre-notification discussions with the authority, especially in cases where an expedited clearance is essential. Even though it is not very common for these communications to occur, the authority is open to engaging in these on a confidential basis.

3.10 Requests for Information During the Review Process

When the transaction does not imply substantive horizontal overlaps or vertical links, the authority usually only issues a basic request for information such as:

- documents and/or information not initially included in the concentration notice;
- clarifications on the structure of the transaction; and
- certain statements related to the absence of the involved undertakings in certain markets.

If the transaction implies substantive horizontal or vertical overlaps, the authority usually issues a burdensome second request for additional information, which mainly concerns detailed procurement, production and marketing information – as well as market data that allows the authority to carry out an in-depth analysis on the involved markets.

The deadline for the authority to resolve the transaction starts again once the issued RFIs are deemed as fully answered.

3.11 Accelerated Procedure

The law also contemplates a simplified pre-merger review process if the parties demonstrate to the authority that it is evident that the transaction does not have the aim or effect of diminishing, damaging or impeding competition.

When the parties request this simplified review, which must be within five business days following the date of the filing, the authority has 15 business days from the date on which the filing was received to issue a resolution on the transaction. Pursuant to the law, it is considered evident that – provided the purchaser does not participate in any related market and it is not an

actual or potential competitor of the target – a transaction does not have the aim or effect of diminishing, damaging or impeding competition if:

- the transaction implies the first participation of the purchaser in the relevant market (the structure of the relevant market should not be modified as a consequence of the transaction and should only involve the substitution of the undertaking);
- the purchaser holds no control of the acquired agent before the transaction and, through the transaction, it increases its relative participation in the acquired agent without having additional power to influence the operation, management (including the appointment of managers and board members), strategy and main policies of the company; or
- the purchaser has the control of a company and increases its relative participation in the capital stock of the company.

If the authority determines that a transaction submitted via this process does not meet the legal requirements or if the filing is not submitted together with all the information legally required, then the authority will issue an official communication denying the expedited review process and initiating a standard review process.

It should be noted that this simplified procedure is not commonly used because, in many cases, it is more complicated to prove that the transaction does not have the aim or effect of diminishing, damaging or impeding competition and the authority is highly likely to consider that the legally required documents and information are incomplete. Thus, the undertakings are reluctant to follow this procedure and instead prefer to file their transactions through the standard process.

4. Substance of the Review

4.1 Substantive Test

The initial test employed by the authorities to analyse a transaction is the Herfindahl-Hirschman Index (HHI). Pursuant to the authority's technical criteria, the transaction has a low probability of harming the market if:

- the post-transaction HHI is below 2,000 points; and/or
- delta is below 100 points as a consequence of the transaction.

Additionally, when the transaction requires a more complex analysis, the authority is able to use other tools such as the SSNIP (Small but Significant Non-transitory Increase in Price) test.

4.2 Markets Affected by a Transaction

Pursuant to the law, the following factors should be taken into account when analysing a transaction:

- the definition of the relevant market;
- the identification of the main undertakings that supply the market, an analysis of their power in the relevant market, and the degree of concentration in said market;
- the effects of the transaction on other competitors or consumers of the goods or service in the relevant market, as well as with regard to other related markets and undertakings;
- the equity participation of the involved parties in other economic agents and the equity participation of other economic agents in the parties involved in the transaction – provided these undertakings engage, directly or indirectly, in the relevant market or its related markets (when it is not possible to identify such participation, this circumstance must be fully justified); and

- the information provided by the undertakings in order to demonstrate greater market efficiency as a result of the transaction and which will impact favourably on the process of competition and free market access.

Although there is no de minimis criteria for analysing a transaction, when the increase in market shares as a consequence of the transaction is low and the HHI criteria referred to in **4.1 Substantive Test** is met, the authority may not carry out an in-depth competition analysis.

4.3 Reliance on Case Law

It is common practice for COFECE and the IFT to refer to their own case law and that of other relevant jurisdictions (mainly the USA and the EU), as long as the assessment used to identify the relevant market is applicable to Mexico. The main competition authorities usually relied upon by the Mexican authorities are the EC, the US Federal Trade Commission and the US Department of Justice.

4.4 Competition Concerns

The competition concerns investigated by the authorities includes unilateral effects, co-ordinated effects, conglomerate or portfolio effects, vertical concerns and the elimination of potential competition. However, their main assessments concern unilateral and vertical effects, as well as the elimination of potential competition.

4.5 Economic Efficiencies

Pursuant to the competition law, economic efficiencies can be argued by the parties and studied by the authorities. Ultimately, the authority can rule whether the economic efficiencies derived from a transaction compensate for the potential competition risks – although there are no clear criteria according to which the Mexican authorities should carry out their assessment.

In any case, it is up to the parties to demonstrate that such economic efficiencies exceed the competition risks.

4.6 Non-competition Issues

The review process carried out by the Mexican authorities must be related only to competition issues and the criteria outlined in the law for such assessments. However, lately the COFECE has started making a deeper and thorough analysis of the non-compete provisions in the transaction documents. COFECE has adopted a stricter point of view in analysing this kind of provisions.

There are rules for foreign direct investment; however, these are separate from the competition regulations and the merger control rules. There are specific filings required for foreign direct investments in certain scenarios, but this is a different procedure before a different authority – namely, the Ministry of Economy.

4.7 Special Consideration for Joint Ventures

The legal thresholds established to determine whether a transaction must be notified and cleared by the competition authorities are not structured in a fashion that applies directly to joint ventures. The competition authorities have nonetheless issued guidelines on how to determine whether joint ventures require a pre-merger filing. When joint ventures are analysed by the competition authorities, one of the main priorities is to examine the possible co-ordination between the joint venture partners.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The authorities can prohibit the execution of a transaction; however, they must first evidence that the transaction presents a risk to the competition process in the market(s). When issuing a resolution on the parties' proposed transaction, the authorities may either clear the transaction, clear the transaction subject to remedies, or prohibit the transaction.

5.2 Parties' Ability to Negotiate Remedies

When the authorities have concerns about a transaction, the parties are allowed to offer and negotiate both structural and behavioural remedies, as well as amendments to the initial terms of the proposed transaction.

Typically, the Mexican authorities prefer structural remedies, rather than behavioural – particularly in transactions with horizontal overlaps. The authorities are usually reluctant to accept behavioural remedies, as these require periodical review. In Mexico, the authorities consider behavioural remedies to be more effective for transactions involving vertical link – although they are not usually accepted, even in these circumstances, as their surveillance takes more time, is more expensive and difficult.

In practice and when required, the authorities issue an official announcement – in which the possible risks to competition are identified – rather than directly requesting remedies from the parties. Afterwards, the parties usually offer remedies to address the identified risks, whereby they specifically address the authorities' concerns.

Finally, all remedies imposed or accepted shall be directly related to correcting the competition concerns derived from the transaction.

5.3 Legal Standard

For remedies to be deemed acceptable, they must meet the following legal standard:

- COFECE or the IFT may only impose or accept conditions that are directly related to correcting a concentration's effects; and
- the conditions that are imposed or accepted must be proportionate to the intended correction.

5.4 Negotiating Remedies With Authorities

The parties can offer remedies from the initial notification of the proposed transaction until one day after the transaction is listed in the agenda for the board of commissioners to review. If the remedies are proposed after the initial notification of the transaction, the term for the authority to resolve the transaction is restarted.

The authority can propose the remedies on their own motion. However, it is standard practice for the authority to defer to the parties in this respect – given that the parties are knowledgeable when it comes to their own business and, ultimately, can suggest remedies that will best address the competition concerns raised by the authorities.

If the transaction is cleared subject to remedies, the parties must accept said remedies or the transaction will be blocked by the authority.

5.5 Conditions and Timing for Divestitures

The parties have a period of six months (which can be extended for other six months) to evidence the closing of the transaction on the terms

authorised in the decision. Where the remedies contemplate the divestment of certain assets and/or entities (ie, structural remedies), they can include a request for the divestment business to operate as a “hold separate” during the closing of the main transaction.

If remedies are not complied with, the parties can be fined up to 10% of their total income and ultimately be forced to dissolve the transaction.

5.6 Issuance of Decisions

The authorities issue a decision by which the transaction is either cleared, cleared subject to remedies, or blocked. A non-confidential version of the decision is published by the authority on its website.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

In recent years, the only foreign-to-foreign transaction to be prohibited was the acquisition of Cornershop proposed by Walmart. Even though the parties offered behavioural remedies in order to address the competition concerns raised by the authority, the latter considered that these were not enough to solve the concerns. Other foreign-to-foreign transactions – for example, Bayer-Monsanto (2018) – have been conditioned on remedies by the authority.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

When a transaction is notified, the parties must provide the authority with the transaction documents and specify whether the transaction contemplates any ancillary restraints (eg, non-solic-

itation or non-compete provisions) or related transactions.

The authority takes ancillary restraints very seriously and conducts a deep analysis. It is worth noting that, if any of the restraints are amended after the authority authorises the transaction, the authority is highly likely to open a gun-jumping procedure for closing the transaction on terms other than those authorised. The ancillary restraints have to be notified and cleared within the same analysis of the whole transaction.

As regards related transactions, the parties can include them within the description of the main transaction and seek authorisation of both the main and ancillary transactions. It is highly recommended that the parties provide clear and straightforward descriptions of all the transactions involved. However, in order to contemplate these other transactions within a single decision, it is also possible that the authority will request that other entities related to the ancillary transactions adhere to filing requirements and provide information and documents.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

There is no process foreseen in the law through which third parties can be involved in the pre-merger review procedure. However, aside from information requested by the authority (if any), third parties can submit White Papers containing evidence/arguments on why the merger should be assessed in a specific fashion or ultimately rejected.

7.2 Contacting Third Parties

The authority contacts third parties (competitors, clients, suppliers or other authorities) only in complex transactions or when the transaction raises competition concerns. Usually, the authority notifies written RFIs; however, in some transactions, telephone calls will suffice.

When remedies are offered by the parties, the authority analyses whether these remedies actually address the competition concerns identified. When the remedy completely resolves the competition concern (eg, divestment of a business unit or eliminating the overlap among the parties), the further assessment carried out by the authority is easier; otherwise, an in-depth analysis is required.

7.3 Confidentiality

Both COFECE and the IFT publish a redacted version of the decision by means of which the transaction is authorised. These public versions of the decisions omit information identified by the parties as confidential. Commercial information and business secrets are completely redacted in the public versions of the decisions and, in some cases, part of the description of the transaction can also be redacted if the parties involved justify why such parts should be classified as confidential.

7.4 Co-operation With Other Jurisdictions

In specific cases where the transaction involves a complex antitrust assessment that requires the clearance of competition agencies in several countries, the latter might co-operate with each other. In Mexico, both COFECE and the IFT have to request a waiver from the parties in order to disclose the information contained within the file to foreign competition agencies. It is more common for COFECE or the IFT to

request such a waiver when remedies are being offered or negotiated.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

The decision can only be appealed when it is final and this is done before courts that specialise in antitrust, telecommunications and broadcasting cases (“specialised courts”). The appeal is carried out by means of a constitutional appeal called *juicio de amparo indirecto*.

8.2 Typical Timeline for Appeals

The typical timeline for appeals ranges from one to three years (depending on whether the initial decision of the courts is challenged by the parties). In the past ten years, no appeal has succeeded in overruling the main decision by the IFT or COFECE on a merger – although there is a precedent whereby the parties appealed one of the remedies imposed by COFECE and the specialised courts eliminated this remedy.

8.3 Ability of Third Parties to Appeal Clearance Decisions

It is not clear whether a third party can appeal a clearance decision. This has never been done and the applicable law does not grant third parties the right to challenge clearance decisions if they were not involved. However, if a third party is able to argue and evidence its legal interest before the specialised courts pursuant to the required standards, the appeal might be admitted.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

The authors are not aware of any legislation or regulatory provisions in respect of foreign subsidies. However, Mexico has foreign direct investment regulations that are contemplated in the Foreign Investment Law (*Ley de Inversión Extranjera*, or LIE), as well as mechanisms to compensate the effects of foreign subsidies in terms of foreign trade.

The LIE establishes certain thresholds for the notification of foreign direct investment in Mexico. These thresholds are based on the value of the assets of the company being invested in and the type of commercial activity it carries out. The National Foreign Investments Commission (*Comisión Nacional de Inversiones Extranjeras*, or CNIE) must approve the investment in advance if the following thresholds are met:

- direct or indirect investments of more than 49% interest in the capital stock of a Mexican entity with assets valued at more than MXN22,647,201,250.50 (approximately USD1,34,723,105) (please note that this authorisation is only required when it is the first participation by the corresponding foreign investor in a Mexican entity); and
- direct or indirect investments of more than 49% interest in companies engaged in any of the following commercial activities in Mexico:
 - (a) port services in order to allow ships to conduct inland navigation operations (eg, towing, mooring and barging);
 - (b) the exploitation of ships solely for high-seas traffic;
 - (c) licensed use of air fields for public service;
 - (d) private education services at pre-school,

- elementary, secondary, middle school, high school, college and higher education level (or any combination thereof);
- (e) provision of legal services; and
- (f) construction, operation and exploitation of general railways and provision of public railway transportation services.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

There have not been any recent changes to Mexican merger control legislation or its implementing regulations. There are no publicly available proposals to amend the existing legislation or implementing regulations in this area either.

10.2 Recent Enforcement Record

Based on public information provided by COFECE for the past five years (ie, 2020-24), Mexico's recent enforcement record includes:

- 14 fines for gun-jumping (ie, failing to notify a compulsory notification), each averaging approximately MXN11,662,399 (approximately USD682,179);
- two transactions that were rejected – none of which was a foreign-to-foreign transactions; and
- two transactions that were authorised subject to remedies.

10.3 Current Competition Concerns

Investigations related to digital markets have been very relevant, both for COFECE and the IFT in the past three years. Both authorities have begun investigations related to those markets and several judicial controversies have emerged concerning the jurisdictions of both agencies with regard to these markets.

COFECE has been working to establish internal criteria for the analysis of private equity funds (PEFs) in order to adapt to controlling and shareholding structures that do not necessarily resemble the traditional structures of Mexican legal entities. In recent years, however, there has been a trend to analyse potential overlaps among all the portfolio companies of a co-investing PEF in a particular transaction – regardless of whether or not they are involved in or related to the transaction.

Finally, during the course of the past year, there has been a trend by COFECE to intensify the scrutiny of non-competition and non-solicitation provisions. In those cases in which these types of restrictive agreements do not meet COFECE's standard parameters, the parties must fully prove the need for the provision.

Trends and Developments

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Galicia Abogados, S.C.

Galicia Abogados, S.C. has a comprehensive and sophisticated competition and antitrust practice whose services range from ordinary merger control filings to critical and complex antitrust matters, including challenged M&A transactions, cartel and other antitrust investigations, leniency applications, complaints before competition authorities seeking relief for anti-competitive behaviour and general advice on day-to-day antitrust and competition law issues. The practice is active across all industries and has a natural focus on heavily regulated industries, such as financial services, transport,

energy, infrastructure, life sciences and telecommunications, among others. The competition and antitrust group is composed of highly experienced and talented practitioners and former competition officers with a legal background in other disciplines and sectors. The team has a close connection with the litigation department, and the specialisation of some members in judicial proceedings involving competition cases has been of particular importance in ensuring a full-fledged, comprehensive and strategic provision of services to clients.

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MEXICO TRENDS AND DEVELOPMENTS

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The logo for Galicia, featuring the word "Galicia" in a bold, black, serif font, centered within a solid yellow rectangular background.

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These are interesting times for antitrust all over the world as agencies rethink their mandates and propose new paradigms of enforcement. Mexico is not exempt from these global trends and we have seen developments in areas such as non-competes and non-poaching agreements and identification and scrutiny of private equity investments, among others. At the same time, the Mexican merger control space continues to be influenced by purely domestic political and institutional factors. Below we touch briefly on these global and local trends, hoping that this document helps the reader to better understand and navigate the Mexican merger control process.

Survival and Independence of Enforcers

The mere proposal that Mexico is questioning the need for independent antitrust enforcers and regulators in 2024 is hard to understand, but is nevertheless real. Last February the Executive submitted to Congress several bills each seeking to amend the Federal Constitution. One of these initiatives proposes to abolish the Federal Economic Competition Commission (“COFECE”) and the Federal Telecommunications Institute (“IFT”), the other antitrust enforcer, and transfer their authority under the Competition Act (and the Telecommunications and Broadcast Act in the case of IFT) to offices within the federal government.

It is unclear whether this proposal will become law, as to be approved a qualified majority is required in each of the two chambers of Congress. Although it is currently unlikely that such majority is achievable under the existing legislature, all that could change depending on the outcome of the June general election in Mexico (in which we will elect a new President, 128 senators and 500 representatives).

Even if this proposal does not move forward, the mere fact that the Executive has made public his desire to get rid of these agencies and even presented a bill to Congress to that effect has dramatically impacted the agencies and their day-to-day functioning, including merger control. For instance, it is now common that if a concentration that has some relevance to the Executive is notified to the agencies (or any of them), the administration publicly states its opinion and the way in which the agencies should proceed in their view. Among others, concentrations dealing with lithium and power plants have caused friction between COFECE and the Executive, in the latter case even resulting in direct confrontation.

This charge against the existence of independent enforcers could recede or continue under the new administration which will take office towards the end of this year and is definitively something to keep an eye on.

Overall Timing for Clearance in Merger Review

One of the more frequent questions for counsel once a filing obligation in Mexico is confirmed is how long it will take to get clearance. This has become increasingly confusing because COFECE periodically releases reports that show that matters are being cleared in 15 days on average. The reality is that this is the number of days that it takes COFECE to clear a matter after it issues a confirmation that the filing has been admitted (ie, perfected) and that there are no outstanding questions or issues in the case file.

The practice of the agencies in Mexico, however, is that an admission of a filing does not occur once an application is submitted, but rather when the notified agency confirms that all requests for information that it has issued have been satisfied

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by the applicants. Because the Federal Competition Act only allows the agencies to make two requests for information, in practice these requests usually extend to market information and information of investors. It is also customary that even after all formal questions and requests have been answered, the agencies come back with requests for clarifications and additional questions. This back and forth takes weeks or, depending on the complexity of the filing, months, but definitely not days.

A more realistic estimate is that filings where no overlaps exist are usually cleared within 8-12 weeks after an application is filed; de minimis to moderate overlaps can expect a 3-6 month review period (after filing); and complicated matters (meaningful overlaps, potential vertical effects or other concerns) can take anywhere from 6 months to more than a year to be decided.

Disclosure of Ownership and Investors

Another hot topic in Mexico is the level of scrutiny that the agencies apply to the control structures and minority (and even passive) interests in the acquiring parties. While this is an issue across all filings, it is significantly more problematic in the context of private equity structures because both COFECE and IFT usually require that private equity firms evidence that the vehicles through which they are making the investment are owned and/or controlled by them. This becomes even more problematic in the case of structures where the different vehicles are advised by the private equity firm but not owned by it, especially if such vehicles have independent boards, management or investment committees.

Along the same lines, investments in such vehicles, even in the form of limited partnership interests, can become problematic where an investor

owns 20% or more of any such vehicle, as this would result in a requirement to fully disclose that investor, including any holdings it may have in Mexico. The agencies will often go even further and require that the applicants disclose any overlaps in Mexico between such 20% or larger investors and the target and between any such investors (even if two or more limited partners have overlapping investments in markets not related to the transaction).

We do not expect that these disclosure requirements will be eased in the near future, especially after the US enforcement agencies signalled increased interest in private equity disclosure in merger control filings and specifically a desire to collect information about minority holders and certain limited partners.

As a consequence of these requirements, we are seeing that preparing a merger control filing for Mexico now takes longer.

Non-compete and Non-solicitation Agreements

It is clear that non-compete agreements are a priority in the agenda of federal and local enforcers in the US. We therefore expect that the after-shocks of this trend will continue to be felt in Mexico. The first reaction from COFECE to the non-poach cases in the US was to review these arrangements under the same framework that COFECE uses to analyse non-compete agreements (no more than three years, clearly identified obligors and restricted business and territory not to exceed the narrower between Mexico and the demonstrable footprint of target).

The main problem of this approach, though, is that an agreement not to compete in a certain territory or with respect to certain products or customers is, in principle, a per se violation,

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which is only permissible per COFECE criteria and guidance when negotiated in the context of an M&A transaction or a joint venture and for a short time after the closing of the former or the termination of the latter. Along these lines, a non-compete as part of a non-disclosure agreement, for instance, would raise significant concerns under Mexican law. Non-poaches, however, are usually an essential requirement to allow for diligence or even discussions in certain M&A and joint venture transactions; they are usually tied to know-how, business and trade secrets and other plausible reasons under commercial and intellectual property laws. Thus, subjecting these agreements to the same standards of non-competes will likely create risks and result in the need for careful review by counsel.

It is unclear if COFECE will revise its existing framework for non-competes in reportable transactions, although it is evident that the attention that the agency is placing on these agreements has increased. As to non-competes with employees, it has been long debated in Mexico if such arrangements are even possible in light of the basic constitutional right to work. Along these lines, the global trend to focus on non-competes with employees should have little or no consequence in Mexico (non-competes subject to merger control review are those entered into between the parties to a reportable M&A transaction or joint venture).

Requests for Information

Requests for information continue to be a hot topic for filings in Mexico. As noted above, under the statute, the agencies only have two bites at the apple (that is, that they can formally only issue two requests for information in any merger control case). This has led the agencies to take the position that they must make omni-comprehensive requests to ensure that they do not

miss anything. The problem with this approach is that the first request for information has to be issued within ten business days following the submission of the application (as it is supposed to cover only information required in the statute that the applicants failed to provide) and, given the limited time available to staff, the applicants usually receive a “shotgun” request, in which all kinds of information is included. Given the limited time that staff have had to review the filing at the time of issuing this request, it is often the case that burdensome and extensive requests are made to the applicants including information that is not clearly relevant for the analysis of the transaction.

The main problem with requests for information is that the agencies, and especially COFECE, take the position that the same are not satisfied until they are signed off on all their questions, while the consequence of not fulfilling such a request timely is that the filing is rejected. This places significant pressure on the applicants to scramble to provide information and clarifications to the agencies, usually within a very short timeframe.

As with other matters discussed above, we do not expect that this practice will be revisited; if anything, we are seeing and expect even lengthier requests for information.

Evidence of Closing

Another trend, especially with COFECE, is that evidencing that a matter has closed within the terms authorised by the agency has become increasingly challenging.

A few years ago, this was a clerical process where the parties needed only to produce a press release or an extract of the share registrar evidencing that the buyer had acquired a target.

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Nowadays the issue is far more complicated, as COFECE demands that final agreements be submitted and that the terms of reviews conform to what the applicants said in the filing (recently COFECE has fined the applicants to a merger control filing for closing with a non-competition agreement that was not reported to the agency). Along the same lines, COFECE requires that the parties evidence that the percentages acquired by each of the disclosed purchasers conform to the filing, having fined applicants in cases where it found that the acquiring vehicles, notwithstanding being controlled by such applicant, were not wholly owned by it (for instance, asset managers that said they would close with certain funds and ultimately allocated the acquired shares into different funds or in percentages slightly different to those reported).

This places significant burdens on applicants as sometimes trading occurs between filing and closing, sometimes clients require that funds be closed or re-allocated, among many other unforeseen circumstances that can change the exact terms originally disclosed in a filing.

Developments on Conditional Approvals

Recently COFECE conditionally cleared the acquisition by a fund in which the Mexican government is an investor, of 13 generation plants which, according to the federal government, contribute an additional 8,500 MW to the then existing generation capacity of 44,073 MW of the Federal Electricity Commission ("CFE"), the state-owned power utility, which already had 49.7% of the national generation capacity. The Mexican government pushed heavily to make the deal and to have it cleared by COFECE, thus placing the agency under enormous pressure and in the difficult position of entering into a direct conflict with the administration (and,

more specifically, the President) should it block the transaction.

Notwithstanding that the federal government considers that the transaction allows it to now generate approximately 59% of the power in Mexico, COFECE took the position that because the acquisition was made through a trust managed by a professional third-party asset manager, no increase in market share resulted from the deal and thus conditionally cleared the transaction subject to, among other things, commitments from the parties (ie, the federal government) that: (i) the acquired power plants would be run by independent management; (ii) the participation of the federal government in the acquiring trust come down to 51% within 24 months and will not increase thereafter; and (iii) appropriate firewalls will be put in place to avoid the exchange of sensitive information.

Leaving aside substantive considerations (ie, if the transaction should have been allowed to close in the first place), there are a few features that we believe are unique to this case and which will probably not set a precedent for other filings: (i) COFECE considered that the acquisition was made by an independent third party notwithstanding that the majority of the interests in the acquiring vehicle are owned by a competitor (ie, the federal government); (ii) the matter was cleared less than five months after an application was filed (including a two-week winter break), which is a significantly shorter review period than the year-plus that it takes to clear a matter where meaningful overlaps exist; and (iii) COFECE accepted that structural remedies (ie, bringing the federal government's interest down to 51%) be implemented within 24 months (that is, post-closing).

MEXICO TRENDS AND DEVELOPMENTS

Contributed by: Christian Lippert Helguera, Carlos Chávez Alanís, Juan Carlos Burgos Carbajal and Gerardo Rodríguez Aguilar, **Galicía Abogados, S.C.**

Other filings in Mexico with similar post-closing potential overlaps have resulted in the need to fix the concern first, evidence it to COFECE and only then get clearance. We have no reason to believe that the decision in the above-mentioned case is an indication that COFECE will deviate from this course and start accepting post-closing remedies.

NIGERIA

Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.483

- 1.1 Merger Control Legislation p.483
- 1.2 Legislation Relating to Particular Sectors p.483
- 1.3 Enforcement Authorities p.483

2. Jurisdiction p.483

- 2.1 Notification p.483
- 2.2 Failure to Notify p.484
- 2.3 Types of Transactions p.485
- 2.4 Definition of "Control" p.485
- 2.5 Jurisdictional Thresholds p.486
- 2.6 Calculations of Jurisdictional Thresholds p.486
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.486
- 2.8 Foreign-to-Foreign Transactions p.486
- 2.9 Market Share Jurisdictional Threshold p.487
- 2.10 Joint Ventures p.487
- 2.11 Power of Authorities to Investigate a Transaction p.487
- 2.12 Requirement for Clearance Before Implementation p.487
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.488
- 2.14 Exceptions to Suspensive Effect p.488
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.488

3. Procedure: Notification to Clearance p.488

- 3.1 Deadlines for Notification p.488
- 3.2 Type of Agreement Required Prior to Notification p.488
- 3.3 Filing Fees p.488
- 3.4 Parties Responsible for Filing p.489
- 3.5 Information Included in a Filing p.489
- 3.6 Penalties/Consequences of Incomplete Notification p.489
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.489
- 3.8 Review Process p.490
- 3.9 Pre-notification Discussions With Authorities p.490
- 3.10 Requests for Information During the Review Process p.490
- 3.11 Accelerated Procedure p.490

4. Substance of the Review p.491

- 4.1 Substantive Test p.491
- 4.2 Markets Affected by a Transaction p.491
- 4.3 Reliance on Case Law p.492
- 4.4 Competition Concerns p.492
- 4.5 Economic Efficiencies p.492
- 4.6 Non-competition Issues p.492
- 4.7 Special Consideration for Joint Ventures p.493

5. Decision: Prohibitions and Remedies p.493

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.493
- 5.2 Parties' Ability to Negotiate Remedies p.494
- 5.3 Legal Standard p.494
- 5.4 Negotiating Remedies With Authorities p.494
- 5.5 Conditions and Timing for Divestitures p.495
- 5.6 Issuance of Decisions p.495
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.495

6. Ancillary Restraints and Related Transactions p.495

- 6.1 Clearance Decisions and Separate Notifications p.495

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.496

- 7.1 Third-Party Rights p.496
- 7.2 Contacting Third Parties p.496
- 7.3 Confidentiality p.497
- 7.4 Co-operation With Other Jurisdictions p.497

8. Appeals and Judicial Review p.497

- 8.1 Access to Appeal and Judicial Review p.497
- 8.2 Typical Timeline for Appeals p.497
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.497

9. Foreign Direct Investment/Subsidies Review p.498

- 9.1 Legislation and Filing Requirements p.498

10. Recent Developments p.498

- 10.1 Recent Changes or Impending Legislation p.498
- 10.2 Recent Enforcement Record p.498
- 10.3 Current Competition Concerns p.498

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Streamsowers & Köhn is a full-service law firm in Nigeria, with offices in Lagos, Abuja and Port Harcourt. Its team comprises six partners, including a Senior Advocate of Nigeria (equivalent to a King's Counsel in the UK), an of counsel and more than 20 associates. Since the enactment of the Federal Competition and Consumer Protection Act 2018, its lawyers have advised a diverse range of clients from different industries in all areas of competition law. Work includes advising an oil and gas industry group on the

anti-competitive effect or otherwise of a proposed technical standard; advising a satellite telecommunications services provider on notifying a merger to the Federal Competition and Consumer Protection Commission (FCCPC) and the Nigerian Communications Commission; and successfully filing a merger notification to the FCCPC in respect of the global acquisition of an edutech company and its Nigerian subsidiary, in a merger valued at USD450 million.

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BARRISTERS, SOLICITORS & ARBITRATORS

1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The Federal Competition and Consumer Protection Act 2018 (FCCPA) was enacted in 2019 and governs merger review and approval in Nigeria.

The Banks and Other Financial Institutions Act 2020 (BOFIA) was enacted in 2020. Section 65 (1) stripped the Federal Competition and Consumer Protection Commission (FCCPC) of its competition powers with regard to the financial services sector, which is under the regulatory supervision of the Central Bank of Nigeria (CBN), the financial services regulator. Section 65 (3) further ascribed the competition regulation powers of the FCCPC to the CBN, thus subjecting mergers occurring in the financial services sector to the regulatory scrutiny of the CBN.

In the communications sector, Section 90 of the Nigerian Communications Act 2003 authorises the Nigerian Communications Commission (NCC – the communications sector regulator) to determine, pronounce upon, administer, monitor and enforce compliance of all persons with competition laws and regulations, whether of a general or specific nature, as they relate to the Nigerian communications market. Pursuant to this authority, through administrative rule-making the NCC issued the Competition Practices Regulation 2007, Regulation 26 of which provides that the NCC may review all mergers, acquisitions and takeovers occurring in the communications sector. This merger review power of the NCC is exercised concurrently with the FCCPC.

1.2 Legislation Relating to Particular Sectors

In exercising its rule-making power under the FCCPA, the FCCPC issued the Guidelines on

Simplified Process for Foreign-to-Foreign Mergers with Nigerian Component (the “Foreign-to-Foreign Merger Guidelines”). Among other things, these guidelines prescribe the manner in which a foreign-to-foreign merger with a Nigerian component may be notified to the FCCPC and how the applicable fees for notification may be calculated.

In terms of foreign investment, the Nigerian Investment Promotion Commission Act provides that a foreign national can own up to 100% of a business or invest in any business except those on the negative list. Prohibited activities include:

- the production of arms, ammunition, etc;
- the production of and dealing in narcotic drugs and psychotropic substances;
- the production of military and paramilitary wear and accoutrements, including those of the police and the customs, immigration and prison services; and
- such other activities as the Federal Executive Council may determine from time to time.

1.3 Enforcement Authorities

The FCCPC enforces the FCCPA. When reviewing mergers in which one of the merger parties is also subject to the regulatory supervision of another regulator, the FCCPC requires a letter of no objection from that sector regulator before it will issue an unconditional approval for the merger.

2. Jurisdiction

2.1 Notification

Notification to the FCCPC is only required if the merger meets the jurisdictional threshold for notification. Under the FCCPA, a merger becomes notifiable to the FCCPC if it meets the criteria

specified as constituting a relevant merger situation. According to paragraph 2.3 of the Merger Review Guidelines (MRG) issued by the FCCPC, a relevant merger situation is created where the following cumulative criteria are met:

- two or more undertakings must come under common control, or there must be arrangements in progress or in contemplation which, if carried into effect, will lead to the undertakings coming under a common control to be distinct; and
- either the Nigerian turnover in the preceding year of the undertaking that is being acquired exceeds the prescribed threshold or the combined value of the Nigerian element of the merging undertakings in the preceding year exceeds the prescribed threshold (known as the “turnover test”), as stipulated in the Notice of Threshold for Merger Notification 2019 (Threshold Regulations) issued by the FCCPC.

If the FCCPC believes that the first criterion has not been met, it will not consider the second criterion, as a relevant merger situation is not created. In addition, where an undertaking in Nigeria comes under the control of a foreign undertaking, the merger may be subject to notification if the turnover test under the Threshold Regulations is met or if the acquisition of the Nigerian undertaking affects the market structure by preventing or lessening competition in Nigeria.

The standard for assessing the jurisdictional threshold applied by the FCCPC for mergers in the financial services sector would most likely be the standard that will be applied by the CBN when assessing whether a relevant merger situation has been created. In the communications

sector, the following types of qualifying merger transactions are notifiable to NCC:

- the acquisition of more than 10% of the shares of a communications licensee;
- a transaction that results in a change of control of a communications licensee; and
- a direct or indirect transfer or acquisition of an individual communications licence.

2.2 Failure to Notify

Failure to notify a qualifying merger transaction is an offence under Section 96 (7) of the FCCPA and would expose the merger parties to a fine not exceeding 10% of their turnover in the business year preceding the date of commission of the offence or any other percentage as the court may determine, having regard to the circumstances of the case.

In the communications sector, a failure to obtain the written consent of the NCC when transferring or assigning a communications licence is an offence under the Nigerian Communications (Enforcement Processes, etc) Regulations 2019. Convicted offenders are liable to a fine of NGN10 million and a further NGN500,000 per day, calculated from the effective date of the transfer or assignment as determined by the NCC, and payable for as long as the contravention persists. The NCC may impose a maximum lump sum fee of NGN2 million on licensees with a turnover of less than NGN1 billion. Where a joint venture or change in shareholding structure in a communications licensee is implemented without first obtaining the consent of the NCC, the offending licensees are liable to a fine of NGN5 million and a further NGN500,000 per day, calculated from the effective date of the joint venture arrangement or change in shareholding structure, as determined by the NCC, and payable for as long as the contravention persists.

However, the NCC normally publishes details of its enforcement activities regarding a failure to notify a qualifying merger occurring in the communications sector. As far as is known, there have been no cases where such a penalty has been applied in practice by the FCCPC or made public.

2.3 Types of Transactions

According to paragraph 2.6 of the MRG, the following transactions are subject to a merger review.

- Acquisitions of property within Nigeria are covered by virtue of Section 92 (1) of the FCCPA, including (but not limited to):
 - (a) shares in Nigerian companies, wherever the transaction is entered into, as the shares are domestically situated;
 - (b) domestic businesses;
 - (c) local intellectual property such as trade marks, patents and copyright; and
 - (d) local plant and equipment.
- Acquisitions of property, wherever situated, are covered by virtue of Sections 92(1) and 2 (1)-(3) of the FCCPA if the acquirer:
 - (a) is incorporated in Nigeria;
 - (b) carries on business in Nigeria;
 - (c) is a Nigerian citizen; or
 - (d) is ordinarily resident in Nigeria.
- if the above points do not apply, acquisitions of a controlling interest (presumably shares in almost all cases) in a body corporate where that body corporate has a controlling interest in a corporation are covered by virtue of Section 92 (1) of the FCCPA.

According to the FCCPC, an internal restructuring within a group of companies does not constitute a relevant merger situation and is thus exempt from notification because it does not lead to control by an external party.

In the communications sector, the following transactions are caught:

- the acquisition of more than 10% of the shares of a communications licensee;
- a transaction that results in a change of control of a communications licensee; and
- a direct or indirect transfer or acquisition of an individual communications licence.

2.4 Definition of “Control”

Neither the FCCPA nor the FCCPC defines what constitutes control for merger notification purposes. However, Section 92 (2) of the FCCPA provides a list of situations where an undertaking may be determined to exercise control over the business of another undertaking. These situations are where an undertaking:

- beneficially owns more than one-half of the issued share capital or assets of another undertaking;
- is entitled to cast the majority of votes that may be cast at a general meeting of the company or has the ability to control the voting of the majority of those votes;
- is able to appoint or veto the appointment of a majority of the directors of the undertaking;
- is a holding company, and the company is a subsidiary of that company as contemplated under the Companies and Allied Matters Act;
- in the case of an undertaking that is a trust, has the ability to control the majority of votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust; or
- has the ability to materially influence the policy of the company in a manner comparable to a person who, in ordinary commercial practice, can exercise the element of control referred to in the above points.

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According to Section 92 (3) of the FCCPA, control does not exist in either of the following circumstances:

- credit institutions or other financial institutions or insurance companies acquiring securities of an undertaking in the ordinary course of business on a transitory basis or where the company is raising capital, provided they do not exercise voting rights to determine the competitive behaviour of the undertaking and they dispose of the securities within one year of acquisition; and
- control acquired under the law relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings.

In addition, as explained in **2.1 Notification**, control is only one of the criteria used for assessing whether a merger is notifiable to the FCCPC; the other criterion is the turnover threshold. If these two criteria are met, then a merger is caught and must be notified to the FCCPC.

2.5 Jurisdictional Thresholds

See **2.1 Notification**.

2.6 Calculations of Jurisdictional Thresholds

The jurisdictional threshold necessary to trigger a merger review involves two cumulative criteria that must be met in every case: the control element and the turnover test. Only the turnover test involves calculations which must be done in accordance with the Threshold Regulations. Pursuant to paragraph 1.1 of the Threshold Regulations, the turnover test is met if in the financial year preceding the merger:

- the combined annual turnover of the acquiring undertaking and the target undertaking in,

into or from Nigeria equals or exceeds NGN1 billion; or

- the annual turnover of the target undertaking in, into or from Nigeria equals or exceeds NGN500 million.

Where the applicable turnover is in a foreign currency, the FCCPC uses the prevailing exchange rate determined by the CBN at the end of the financial year preceding the notification or the date on which the contract creating the merger came into force, whichever is later.

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

The businesses or corporate entities that have generated turnover that is attributable to a business or derived from Nigeria are relevant for the purpose of calculating the turnover. In addition, as explained in **2.6 Calculations of Jurisdictional Thresholds**, turnover may be calculated on the basis of the combined annual turnover of the acquiring undertaking and the target undertaking, or on the basis of the annual turnover of only the target undertaking.

Turnover may also be calculated on a group-wide basis, provided it is attributable to and/or derived from Nigeria. According to the practice of the FCCPC, “group-wide” refers to an undertaking in which any of the merger parties has a controlling interest. Lastly, there is no particular procedure prescribed by the FCCPC for changes in the business during the reference period; however, it is conceivable that discussions in this regard may be had with the FCCPC as part of the pre-notification consultation.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions that have a local component are subject to merger control.

According to the FCCPC, a local component exists if a foreign entity has a local nexus, such as having subsidiaries in Nigeria, or if it satisfies the turnover test provided in the Threshold Regulations. Where the target undertaking has no subsidiaries, sales and/or assets in Nigeria, no turnover has been generated and, as such, notification to the FCCPC is not required.

2.9 Market Share Jurisdictional Threshold

At the time of writing, no market share jurisdictional threshold applies in Nigeria.

2.10 Joint Ventures

As a general rule, any joint venture must meet the following basic criteria to qualify for a merger review:

- economic integration of the parties' business activities (for example, through a contribution of productive assets to a new business undertaking);
- elimination of competition between the parties in the joint venture's field of activity through this contribution; and
- the relative permanence of the joint business activity.

Where these basic criteria are met, the joint venture will be brought within the general scope of merger review if the creation of the joint venture will typically involve the transfer of voting equity or assets, and by reference to the underlying combination of previously independent businesses.

In addition, a full-function joint venture must be notified to the FCCPC if the value of its assets or turnover is above the turnover test. A full-function joint venture is one that operates on a lasting basis with all the functions of an autonomous

economic entity, competes with other undertakings in a relevant market, and has sufficient resources and staff to operate independently in the relevant market.

2.11 Power of Authorities to Investigate a Transaction

Section 95 (3) of the FCCPA authorises the FCCPC to require the parties to a merger that does not meet the jurisdictional threshold to notify it of the merger in the prescribed manner and form, if the FCCPC is of the opinion that the merger may substantially prevent or lessen competition. The FCCPC must exercise this power within six months of the merger being implemented.

2.12 Requirement for Clearance Before Implementation

According to Section 93 (1) of the FCCPA, a proposed merger shall not be implemented unless it is first notified to and approved by the FCCPC. Specifically, Regulation 13 (2) of the Merger Review Regulations 2020 (MRR) requires the merging parties to ensure that they take no steps and undertake no activities before and during the notification period that may be deemed coordination or integration of their businesses or their competitive conduct in any of the following respects:

- the exchange of commercially sensitive information;
- the nature of contractual clauses governing the relationship; and
- the activities of the parties before and during the notification of the merger.

To do otherwise would increase their risk of engaging in gun-jumping conduct, which could expose them to fines from the FCCPC. Para-

graph 3.61 of the MRG cites the following examples of gun jumping:

- co-ordination between merging parties on prices or terms to be offered to customers for sales prior to closing the merger;
- allocating customers for sales to be made prior to closing; and
- if, prior to closing, merging firms co-ordinate their negotiations with customers for sales to be made after the merger closes (eg, negotiations of long-term contracts).

For mergers that do not meet the jurisdictional threshold for notification, which are notified to the FCCPC post-transaction, no further steps are required to be undertaken by the merger parties to integrate the respective businesses.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Under the Federal Competition and Consumer Protection Commission (Administrative Penalties) Regulations 2020, the base penalty for gun jumping is 2% of the turnover of the merger parties in the preceding year; the final penalty is calculated on the basis of a number of factors, such as the duration of the months in which the gun jumping persists, the ratio of the aggravating factors and the ratio of the mitigating factors.

On several occasions, the FCCPC has stated that it will impose a penalty on parties that implement a qualifying merger without its approval. As far as is known, no such penalties have been imposed in the case of undertakings domiciled in Nigeria, nor have any such penalties been made public or applied in the case of a foreign-to-foreign merger.

2.14 Exceptions to Suspensive Effect

At the time of writing, there are no general exceptions to the obligation not to implement a qualifying merger without first seeking and obtaining the approval of the FCCPC and/or the NCC.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Global transactions may be implemented without seeking prior approval from the FCCPC in circumstances where there is no local component and the jurisdictional threshold is not met.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is no specific deadline for notification. The requirement of the FCCPA is that the approval of the FCCPC must be sought and obtained before a qualifying merger is implemented.

3.2 Type of Agreement Required Prior to Notification

A copy of all documents that led to the merger is required for the merger review process. These may include heads of terms, memorandums of understanding, sale and purchase agreements, business purchase agreements or similar documents. If these documents are not finalised, then the latest draft should be provided, along with updates on any subsequent changes made. It is important that the notifying parties keep the FCCPC informed of any modifications.

3.3 Filing Fees

Filing fees are payable for merger notifications. The applicable fee is determined by a percentage of either the consideration sum payable for the transaction or the combined turnover in the

preceding financial year of the merging companies (whichever is higher).

The applicable percentages are:

- 0.45% of the first NGN500 million;
- 0.45% of the next NGN500 million; and
- 0.35% of any sum thereafter.

The relevant turnover for calculating the applicable fees for mergers involving foreign entities with a local component is the turnover based on or attributable to the business of or in the local component in Nigeria.

There are no deadlines for payments, but a merger notification will not be considered satisfactory if no payments are made.

3.4 Parties Responsible for Filing

The primary acquiring undertaking and the primary target undertaking are responsible for filing the merger application at the FCCPC, although it is common for such organisations to instruct local counsel to make such filings and notifications on their behalf.

3.5 Information Included in a Filing

The FCCPC requires the submission of copies of specific documents prepared or received by any member(s) of the board of management, board of directors, supervisory board or shareholders' meeting, or other individuals with similar functions or to whom such functions have been delegated or entrusted. Such documents include minutes of meetings where the transaction was discussed and reports, surveys, studies, presentations and related documents that assess or analyse the merger in terms of its rationale, potential for sales growth, market shares, competitive conditions, competitors (actual and

potential), expansion into other markets, and general market conditions.

Analyses, reports, studies, surveys and related documents from the last two years that assess the affected markets concerning market shares, competitors (actual and potential), competitive conditions and potential for sales growth or expansion into other markets should also be submitted. In the case of a full merger, the most recent business plan of both merging parties should be included.

Lastly, the FCCPC requires the information provided to be comprehensive, factual, detailed and translated into English (Nigeria's official language) before submission.

3.6 Penalties/Consequences of Incomplete Notification

Although there are no penalties for failing to provide a complete notification, it is worth noting that the merger review will be suspended if an application is incomplete, until all necessary information or documentation is submitted to the FCCPC.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

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, subject to the provisions of Section 99 1 (a) of the FCCPA. It can also prohibit the merger in its entirety.

Subject to Section 112 of the FCCPA, an undertaking that gives the FCCPC or an authorised officer of the FCCPC any information that the undertaking knows to be false or misleading commits an offence, leading to the following penalties:

- where the undertaking is a natural person: liability on conviction to imprisonment for a term not exceeding two years or to a fine not exceeding NGN10 million, or both; and
- where the undertaking is a body corporate: liability on conviction to a fine not exceeding 10% of its turnover in the preceding business year, and each director of the body corporate is liable to be proceeded against and on conviction dealt with as a natural person.

3.8 Review Process

Subject to the provisions of the MRG and Section 95 of the FCCPA, the merger review consists of two phases. For small mergers, the FCCPA requires the FCCPC's review to be concluded within 20 business days (extendable by a 40-day period) of satisfactory notification of the merger. The period may be extended up to a further 15 business days where the merger raises initial competition concerns and the parties propose acceptable remedies but where the need for a Phase Two review is not expected.

For large mergers, Section 97 of the FCCPA limits the period of review to 60 business days, extendable by an additional 60 business days, which may be extended by up to a further 30 business days where the merger raises initial competition concerns but the need for a Phase Two review is not expected. For most cases where no material competition concerns arise, the FCCPC will seek to complete the first detailed review within 45 business days. Generally, a Phase One review will conclude within the statutory timeframes. Under Regulation 19 of the MRR, the FCCPC utilises the statutory extensions in two ways:

- first, to fulfil the proposed remedies' objective, where they are acceptable; and
- second, to undertake the Phase Two review.

3.9 Pre-notification Discussions With Authorities

The MRG suggest that the pre-notification phase of a merger review is crucial, and the FCCPC encourages merging parties to discuss a proposed merger informally and confidentially before submitting a notification, typically at least two weeks before the submission of a formal notification is contemplated. This gives both the FCCPC and the merging parties the opportunity to discuss legal issues, prepare for investigations and identify potential competition concerns early on.

Such consultations may take place in person, by telephone, by videoconference or other digital means, or by any other means the FCCPC determines to be appropriate to enable the parties and the FCCPC to clarify matters such as jurisdictional questions, as well as substantive and procedural matters. These discussions can be scheduled on the merger notification portal and can be done on a "no-name" basis for confidentiality purposes.

3.10 Requests for Information During the Review Process

During the review process or while conducting its investigation, the FCCPC may undertake market testing of the notified transaction and request additional information from the notifying parties to enable it to proceed or conclude with its review.

Such requests effectively suspend the review pending their resolution.

3.11 Accelerated Procedure

Form 2 (Notice of Merger Simplified Procedure) allows for a simplified procedure if the merger parties assess the proposed merger and believe

that the transaction is unlikely to prevent competition.

Paragraph 21(3) of the MRR provides that the FCCPC may approve the use of a faster process for mergers if requested by the parties involved. This reduces the timeline for all relevant processes during the initial review by 40%, unless stated otherwise in the applicable notice. Notably, this timeframe is subject to any issues raised during the prescribed period. The 40% rule for reducing timeframes only applies to merger notifications that do not have a timeframe already published by the FCCPC.

For foreign-to-foreign mergers with Nigerian components, the Foreign-to-Foreign Merger Guidelines provide an expedited procedure for merger reviews, and the FCCPC will conclude its review and issue a decision within 15 business days upon the payment of a fee of NGN10 million. The FCCPC generally complies with the 15 business day timeframe, except in cases of deficiencies in the notification or where any other issues have been raised.

4. Substance of the Review

4.1 Substantive Test

Section 94 (1) of the FCCPA requires the FCCPC to undertake two levels of review. At the first level, the FCCPC will determine whether the merger is likely to substantially prevent or lessen competition (SPLC) in a relevant market in Nigeria. Where the outcome of the FCCPC's review is negative, the merger will be approved. However, where the FCCPC determines that an SPLC situation does exist, it will undertake a second-level review that involves an in-depth substantive assessment of the merger. At this level, the FCCPC will also examine whether factors such

as efficiency and public interest considerations can offset or reverse the SPLC situation.

The CBN will assess a merger on the basis of whether or not it is likely to lead to an SPLC situation in a relevant market in the financial services sector. The NCC will assess a merger on the basis of whether it is capable of a substantial lessening of competition or would result in a dominant position in a relevant communications market in Nigeria.

4.2 Markets Affected by a Transaction

As a general principle, the FCCPC would not assume that the merging parties operate in the same relevant market(s), even when there appears to be some overlap between their products and the geographic areas in which they conduct business. In addition, the FCCPC considers that the relevant market(s) being analysed for competitive effects may not necessarily correspond to the product categories or service areas established by the merging firms or their rivals for operational purposes. Thus, the conceptual framework adopted by the FCCPC within which relevant information can be organised for the purpose of assessing the competitive effect of a merger is, in the first instance, to identify the products or services and geographic area in which competition may be harmed. In this regard, the FCCPC defines the relevant product market in terms of the set of products that customers consider to be close substitutes, while the relevant geographic market is defined in terms of the location of suppliers; this includes those suppliers that customers consider to be feasible substitutes and it may be local, state-wide, regional, national or wider (transcending national boundaries).

Although neither the FCCPA nor the FCCPC expressly refers to a “de minimis level”, a merger

or acquisition where two or more of the undertakings involved are active in the same product or geographic market but their combined market share is less than 15% is eligible for notification through the simplified procedure. According to the FCCPC, the simplified procedure may be applicable for mergers that do not raise significant competition concerns.

4.3 Reliance on Case Law

As a matter of practice, the FCCPC allows the merger parties to rely on cases and theories from other jurisdictions as a persuasive basis when articulating their views on the overall impact of the merger on competition in the market.

There is no preference for cases from any particular jurisdiction; what is most relevant is that the cases and theories relied on by the parties are applicable to the views that they advance.

4.4 Competition Concerns

In reviewing mergers, the FCCPC is concerned about the following anti-competitive harms that can arise from those mergers:

- unilateral effects in a horizontal merger that involves two competing firms and removes the rivalry between them, allowing the merged firm to raise prices profitably;
- co-ordinated effects in either a horizontal or non-horizontal merger that enables or increases the ability for several firms within the market (including the merged firm) jointly to increase prices because it creates or strengthens the conditions under which they can co-ordinate; and
- vertical or conglomerate effects that may arise principally in a non-horizontal merger that creates or strengthens the ability of the merged firm to use its market power in at

least one of the markets, thus reducing competition.

The FCCPC's approach to the assessment of these harms is set out in the MRG. The CBN and NCC may recognise these same theories of anti-competitive harm.

4.5 Economic Efficiencies

The FCCPC considers economic efficiencies in circumstances where a merger has been determined to be capable of an SPLC situation. In such cases, economic efficiencies would be considered as a trade-off evaluated against the perceived anti-competitive effects of the merger. Such economic efficiencies must result in the better utilisation of existing assets, enabling the combined firm to achieve lower costs than either firm could have achieved alone.

According to the FCCPC, the party relying on efficiencies must prove that the efficiencies are:

- likely to occur;
- merger-specific; and
- greater than the anti-competitive effects of the proposed merger, which they will offset.

4.6 Non-competition Issues

Non-competition issues are taken into account by the FCCPC during the review process. Specifically, the following non-competition issues are considered in applicable circumstances when reviewing a merger.

- Public interest gains, which must be substantial and specific to the merger. In addition, public interest considerations must be assessed under any of the following grounds:
 - (a) gains relating to a particular industrial sector or region – eg, the stable supply of electricity;

- (b) employment;
 - (c) the ability of national industries to compete in international markets; and
 - (d) the ability of small and medium-sized enterprises to become competitive.
- the firm is failing, which can be used to justify the approval of an otherwise anti-competitive merger where one of the merging firms is in financial difficulties or at the risk of bankruptcy. According to the FCCPC, the following conditions must be cumulatively met for the defence of a failing firm to be successfully invoked:
 - (a) the firm must be unable to meet its financial obligations in the near future;
 - (b) there must be no viable prospect of reorganising the business through the process of receivership or otherwise;
 - (c) the assets of the failing firm would exit the relevant market in the absence of a merger transaction; and
 - (d) there is no credible less anti-competitive alternative outcome than the merger in question.

The analytical framework adopted by the FCCPC for the assessments of these defences is set out in the MRG.

There are no specific rules for foreign direct investment in relation to merger control.

4.7 Special Consideration for Joint Ventures

The same standard that applies to the substantive assessment of mergers would also apply to the substantive review of joint ventures. At the time of writing, there is no indication as to whether or not the FCCPC will examine possible co-ordination issues between joint venture parents when reviewing a joint venture.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

Section 98 of the FCCPA authorises the FCCPC to direct any of its officers to investigate a merger. In exercising this power, the FCCPC may also require any person or undertaking to provide any information in respect of the merger. In addition, Regulation 20 (1) of the MRR authorises the FCCPC to prohibit a merger upon the conclusion of the review process.

However, the FCCPC has indicated that only mergers that lessen competition substantially will be prohibited. In assessing whether a merger is likely to prevent or lessen competition substantially, the FCCPC evaluates whether the merger is likely to lead to higher prices, either through the unilateral ability of the merged firm or in co-ordination with other firms. Generally speaking, the prevention or lessening of competition will be considered by the FCCPC to be “substantial” in either of the two following circumstances:

- where the price of the relevant product(s) would likely be higher in the relevant market than it would be in the absence of the merger (“material price increase”); or
- where sufficient new entry would not occur rapidly enough to prevent a material price increase, or to counteract the effects of any such price increase.

Where the merging firms have pre-existing market power, individually or collectively, smaller impacts on competition resulting from the merger will be considered by the FCCPC to meet the test of being substantial.

5.2 Parties' Ability to Negotiate Remedies

The FCCPC may apply remedies or the merger parties may propose remedies, including:

- structural remedies, which typically involve the disposal of a business or assets from the merger parties to create a new source of competition (if sold to a new entrant) or to strengthen an existing source of competition (if sold to an existing competitor);
- behavioural remedies, non-structural remedies or “conduct” remedies, which are ongoing measures designed to modify, regulate or constrain the future conduct of the post-merger firm; and/or
- hybrid remedies, which are a combination of both structural and behavioural remedies and will be applied by the FCCPC when, for example, a merger involves multiple markets or products and competition is best preserved by structural relief in some relevant markets and by non-structural relief in others.

5.3 Legal Standard

Typically, remedies are not required to meet any specific legal standard in order to be deemed acceptable. However, in assessing a remedy, the FCCPC must as a matter of practice ensure that it is tailored to the competition harm(s) identified and that it is effective in mitigating such harm(s).

5.4 Negotiating Remedies With Authorities

Merger parties may put forward remedies to the FCCPC at any time during the merger review process, including during pre-notification consultations. Alternatively, the FCCPC may give the merger parties an opportunity to propose remedies in any of the following circumstances.

After the initial first-level review of the merger, if the FCCPC determines that the merger is likely to give rise to an SPLC situation, it shall issue an issues paper to the merger parties that, among other things, requires the presentation of a written response addressing the competition concerns raised in the issues paper and proposing remedies as applicable to alleviate them.

After consideration of the merger parties' response to the issues paper, if the FCCPC still finds that the merger is likely to lead to an SPLC situation and the remedies proposed by the merger parties do not address the competition issues identified, it shall issue a Statement of Objections and commence the second level of the merger review process. At this level, the merger parties may put forward a remedies proposal in their response to the Statement of Objections to address the competition concerns raised by the FCCPC in the issues paper. Where the FCCPC is satisfied with the presentation of the merger parties, it may approve the merger at this stage but subject to requiring the merging parties to:

- take an action to remedy, mitigate or prevent the substantial lessening or prevention of competition; or
- fulfil any other conditions as may be appropriate in the circumstance of the case.

Thereafter, the FCCPC shall publish a non-confidential version of the remedies proposal in order to give interested third parties an opportunity to comment on the effectiveness and sufficiency of the proposals. Not less than ten working days will be given for this consultation process, following which the FCCPC will determine whether the remedies proposal will be accepted and will finalise the remedies package alongside the final decision on the merger.

The power of the FCCPC to approve a merger subject to conditions also includes the power to impose any remedies, whether or not agreed by the merger parties.

5.5 Conditions and Timing for Divestitures

There is no specific timeline for complying with a remedy. However, in approving a particular remedies package, the FCCPC may prescribe the timeframes within which the remedies shall be implemented to alleviate the competition concerns identified.

Some transactions may be completed prior to implementing the remedies, especially if the remedy is one that is required to be implemented after the merger is approved. In such cases, the FCCPC will as a matter of practice require the merger parties and/or the post-merger firm to undertake to implement the remedy after approval, as a condition for approving the merger.

There is no specific penalty for failure to comply with a remedy approved by the FCCPC; however, non-compliance with an FCCPC order or directive is an offence under the Federal Competition and Consumer Protection Commission (Administrative Penalties) Regulations 2020. Offenders are liable to a base penalty of NGN5 million, which is then used to determine the final penalty on the basis of a number of factors, such as the duration of time in which this offence persists, the ratio of the aggravating factors and the ratio of the mitigating factors.

5.6 Issuance of Decisions

Section 97 (1) (b) of the FCCPA requires the FCCPC to issue a decision in the form of a report after considering a merger, stating whether to:

- approve the merger;
- approve the merger subject to condition(s); or
- prohibit the implementation of the merger.

Merger review decisions are not made publicly available.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

As far as is known, there have been no recent cases where the FCCPC has required remedies or prohibited a merger transaction. However, on 4 March 2023, the FCCPC published and invited comments with respect to the remedies package proposed by the merger parties in the proposed acquisition of a 21.61% equity stake by FMDQ Holdings PLC in Central Securities Clearing Systems PLC. The remedies proposed by the merger parties in this case are both behavioural and structural; no information is available on the outcome of this case nor on any decision of the FCCPC in this regard.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Both the FCCPA and the decisional practices of the FCCPC are silent on the concept of ancillary restraints. However, according to Regulation 13 (2) (b) of the MRR, certain contractual clauses ancillary to the merger transaction may be deemed a co-ordination or integration of the parties' businesses or their competitive conduct, and thus expose them to liability for gun jumping. According to the FCCPC, these clauses demand greater scrutiny during the merger review process and include the following:

- the lack of a precedence clause delineating the effective date of the contract and the date of its execution in relation to the creation of any integration among parties;
- prior non-compete clauses;
- clauses for full or partial payment of non-reimbursable, earnest money deposit or advance payments, in consideration for the target, except in the case of:
 - (a) customary down payments for business transactions;
 - (b) deposits in escrow accounts; or
 - (c) break-up fees (payable if the transaction is not consummated);
- clauses allowing direct interference by either party in the other party's business strategies by submitting, for example, decisions over prices, customers, business/sales policy, planning, marketing strategies and other sensitive decisions (that do not constitute a mere protection against deviation from the normal course of business and, consequently, the protection of the value of the business being sold); and
- in general terms, any clause providing for activities that cannot be reversed at a later time or which implies the expenditure of a significant amount of resources by the agents involved or the authority.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third parties are involved in the merger review process. Regulation 16 (1) of the MRR requires the FCCPC to publish a notice of a proposed merger upon satisfactory notification by the merger parties. Under Regulation 16 (2) of the MRR, the publication of the notice shall include

an invitation to any interested third parties to comment on the merger by providing a written submission to the FCCPC within the prescribed timelines.

In addition, Regulation 16 (3) of the MRR requires the merger parties, in notifying the merger to the FCCPC, to provide evidence of service of notice of the proposed merger to any registered trade union that represents the employees in the acquiring and target undertakings respectively, or to the employees or representatives of the employees of the acquiring and target undertakings if there are no such registered trade unions.

7.2 Contacting Third Parties

In conducting a second-level review of the proposed merger, the FCCPC may hold hearings with third parties, including issuing detailed questionnaires to market participants, such as key customers or competitors, and to industry experts, such as relevant public authorities or regulators.

The FCCPC does not generally market-test the remedies proposed by the merger parties. However, in assessing the effectiveness of a proposed remedy, the FCCPC would consider its competitive impact – ie, whether the remedy is designed to address the identified competition harm that is likely to result from the merger, with due consideration to how the remedy changes the competitive dynamics of the market and the incentives of the post-merger firm post-remedy. In doing this, the FCCPC will set out terms in the Remedy Order that specify and anticipate potential issues that may arise during the implementation phase to help actualise the intended competitive impact (eg, restoring competition) and protect against the merging parties' ability to thwart the intended competitive impact.

7.3 Confidentiality

Public notice of a proposed merger is published by the FCCPC; however, commercial information is treated with the utmost confidentiality by the FCCPC at the request of the merger parties, including business secrets. If the merger parties believe that their interests would be harmed if any of the information they are required to supply were to be published or otherwise divulged to other parties, they should submit this information separately, with each page clearly marked “Business Secrets” under separate cover. They are also required to give reasons why this information should not be divulged or published.

In the case of business combinations or in other cases where the notification is completed by more than one of the parties, business secrets may be severally submitted under separate cover and referred to in the notification as an annex. All such annexes must be included in the submission in order for a notification to be considered complete.

7.4 Co-operation With Other Jurisdictions

As a matter of policy, the FCCPC encourages the merger parties to facilitate international co-operation between the FCCPC and other competition authorities reviewing the same merger. During the pre-notification consultation and actual notification of the merger, the FCCPC encourages the merger parties to disclose the jurisdictions outside Nigeria where the merger is subject to regulatory clearance under merger review rules.

Furthermore, the FCCPC encourages the undertakings concerned to submit waivers of confidentiality that would enable the FCCPC to share information with other competition authorities outside Nigeria reviewing the same merger. Each

waiver is intended to facilitate joint discussion and analysis of a merger as it allows the FCCPC to share relevant information with another competition authority reviewing the same merger, including confidential business information obtained from the undertakings concerned.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Parties may appeal a merger review decision. Merger review decisions from the NCC may, in the first instance, be reviewed by the FCCPC before an appeal can be made to the Competition and Consumer Protection Tribunal (CCPT). Decisions from the FCCPC are, in the first instance, reviewed by the CCPT before an appeal can be made to the Court of Appeal.

8.2 Typical Timeline for Appeals

At the time of writing, there is no specific deadline for filing an appeal. As far as is known, there have been no appeals against a merger review decision at the FCCPC, the CCPT or the Court of Appeal.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Although the FCCPA does not expressly provide for third-party appeals of merger clearance decisions, it is conceivable that parties with a legitimate interest in the merger or those able to establish locus standi may be permitted to appeal such decisions. Notably, there is no precedent for appealing a merger clearance decision issued under the FCCPA in Nigeria, as no such appeal has been lodged to date.

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9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

In Nigeria, there is no foreign direct investment/ subsidies review legislation, nor are there related filing requirements.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

While there have not been any recent changes to the FCCPA and other applicable rules, stakeholders have been calling on the FCCPC to cap the processing fee applicable to a notified merger.

In addition, the FCCPC is poised to introduce a new regulation governing the operation of digital lending in Nigeria. This development is in response to persistent non-compliance with the FCCPC's Limited Interim Regulatory/Registration Framework and Guidelines by certain online lenders, which have been engaging in unacceptable practices such as harassing and defaming defaulting customers. The new regulation aims to address these issues and ensure a more robust and consumer-friendly lending environment. The FCCPC is set to release a new regulation in view of the operation of loan apps in Nigeria, which had resorted to harassment and defamation of defaulting customers.

In the communications sector, the NCC has issued a draft revision of the Competition Practice Regulations, initially introduced in 2007. This revision aims to harmonise with the NCC's current enforcement activities, among other objectives.

10.2 Recent Enforcement Record

The FCCPC and NCC do not make enforcement records public.

In December 2023, the FCCPC reached a final resolution with British American Tobacco (Nigeria) Limited (BATN) and its affiliated companies (BAT Parties), pertaining to a range of infringements of the FCCPA, the National Tobacco Control Act and other relevant legal instruments. The three-year investigation was based on credible information and intelligence over concerns that the company prevented its retailers from equally displaying rival products, leading to searches and seizures at multiple BAT Parties locations. Ultimately, BAT Parties agreed to pay a penalty of USD110 million and will be subject to compliance monitoring for 24 months to ensure appropriate behavioural and business practices.

On 29 April 2024, the CCPT issued an interim injunction, restraining Multichoice Nigeria Limited, a prominent pay-TV operator in Nigeria, from implementing a proposed tariff increase for its services. However, Multichoice Nigeria Limited has subsequently filed an appeal challenging CCPT's decision, and the matter is currently pending before the court for determination.

10.3 Current Competition Concerns

The FCCPA and the merger review process are still a new development in Nigeria. The primary focus as indicated by the FCCPC is to create awareness of compliance with the FCCPA, including the requirements for notifying qualifying mergers. There has also been significant interest in notifying foreign-to-foreign mergers at the FCCPC.

In February 2024, cement manufacturers in Nigeria entered into a voluntary agreement with the Nigerian government to establish a price

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range of NGN7,000 to NGN8,000 for a 50 kg bag of cement. While this development appears to address the increasing cost of a bag of cement, it also raises important questions under competition law: as price fixing is generally prohibited by the FCCPA and may attract fines, it is uncertain whether this specific arrangement would be deemed illegal. This is because the agreement was reached voluntarily and at the request of the Nigerian government, which may potentially exempt it from competition law scrutiny.

Trends and Developments

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Streamsowers & Köhn

Streamsowers & Köhn is a full-service law firm in Nigeria, with offices in Lagos, Abuja and Port Harcourt. Its team comprises six partners, including a Senior Advocate of Nigeria (equivalent to a King's Counsel in the UK), an of counsel and more than 20 associates. Since the enactment of the Federal Competition and Consumer Protection Act 2018, its lawyers have advised a diverse range of clients from different industries in all areas of competition law. Work includes advising an oil and gas industry group on the

anti-competitive effect or otherwise of a proposed technical standard; advising a satellite telecommunications services provider on notifying a merger to the Federal Competition and Consumer Protection Commission (FCCPC) and the Nigerian Communications Commission; and successfully filing a merger notification to the FCCPC in respect of the global acquisition of an edutech company and its Nigerian subsidiary, in a merger valued at USD450 million.

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NIGERIA TRENDS AND DEVELOPMENTS

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Merger Control Trends and Developments in Nigeria 2024

Introduction

Nigeria's merger control regime continued to evolve in 2024 against the backdrop of a significant increase in M&A activity in the country. The Federal Competition and Consumer Protection Commission (FCCPC) is the primary authority responsible for reviewing and approving mergers, and has been actively shaping the regulatory landscape through its enforcement actions and policy initiatives.

Under the Federal Competition and Consumer Protection Act (FCCPA), the FCCPC is empowered to review and approve mergers and acquisitions, and has the authority to impose conditions or prohibit transactions that are likely to substantially prevent or lessen competition in a relevant market in Nigeria. The FCCPC also has the power to publish guidelines and/or regulations that guide the merger review process.

Over the past year, no significant steps have been taken to amend or publish new merger guidelines or regulations, potentially due to changes in the Nigerian political administration. In January 2024, the newly elected President removed the FCCPC's Chief Executive Officer (CEO), with the next-in-command serving in an interim capacity. On 24 June 2024, the President appointed a new CEO and Executive Vice-Chair of the FCCPC, pending Senate confirmation.

Currently, the FCCPC's primary focus continues to be raising awareness about compliance with the FCCPA, including the requirements for notifying qualifying mergers. The FCCPC has also seen a significant increase in notifications for foreign-to-foreign mergers.

Mergers in 2024

In 2023, Nigeria witnessed a surge in high-profile acquisition transactions across various sectors, including telecommunications, banking and technology. Notably, the fintech space saw significant consolidation, aimed at enhancing market competitiveness. These strategic transactions reflected a deliberate realignment of industry players to bolster their market positions and expand their service offerings.

Between January and June 2024, the FCCPC published 26 merger notifications, reflecting various stages of review, with the highest number being acquisitions undertaken in the energy sector, as more companies sought to diversify their energy sources to capitalise on gas and renewable energy projects.

One of the trends observed in the oil and gas sector was the increased divestment and transition of international oil companies from onshore production to deepwater/offshore operations – eg, the agreement between Oando PLC, a prominent indigenous energy solutions provider, and Eni, an integrated energy company, for the acquisition of 100% shares of Nigerian Agip Oil Company Limited (NAOC Ltd) and the acquisition of Equinor Nigeria Energy Company Limited by Project Odinmin Investments Limited. Both acquisition transactions highlight the shift in the oil and gas industry, with indigenous companies playing an increasingly important role.

The FCCPC also granted merger approvals in the healthcare, manufacturing, aviation and agriculture sectors. Noteworthy transactions demonstrating the dynamic and evolving business landscape in Nigeria include:

- the acquisition of an 80% stake in Distell Wines and Spirits Nigeria Limited (Distell

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- Nigeria) and the import business of Heineken Beverages (Holdings) Limited (Heineken Beverages) by Nigerian Breweries;
- the acquisition of a global European in-flight catering business with a Nigerian subsidiary; and
 - the acquisition of local telemedicine by a private health facility to enhance its digital service portfolios and distribution networks.

The FCCPC closely scrutinised the Distell transaction. In defining the market, it drew a distinction between alcoholic and non-alcoholic beverages, and also between the spirits, wine and beer markets. In its review, the FCCPC sought to ensure that the merger did not result in a significant lessening of competition. After a rigorous assessment, it approved the merger.

Regulatory developments and enforcement actions

In 2024, the FCCPC has been demonstrating a firm stance on enforcing merger control regulations to safeguard competition and protect consumer welfare, considering the increasing number of merger transactions. It has also ramped up efforts to scrutinise mergers for potential anti-competitive effects, ensuring compliance with the provisions of the FCCPA.

In addition to reviewing high-profile mergers, the FCCPC has been active in its enforcement efforts, taking several enforcement actions against companies that engaged in anti-competitive behaviour or failed to comply with merger control requirements. Penalties and fines were imposed on entities found to have breached competition laws, sending a clear signal of the FCCPC's commitment to maintaining a level playing field and fostering healthy competition in the market.

While agreements typically fall outside the scope of merger reviews, unless they constitute a joint venture agreement subject to the same standards applied by the FCCPC in reviewing mergers, it is noteworthy that the FCCPC has taken unprecedented action in challenging an anti-competitive agreement and obstruction in the investigation of such practices. It launched an investigation into a prominent alternative power retail company for entering price-fixing arrangements. This decisive intervention further reaffirmed the FCCPC's commitment to maintaining a fair and competitive market environment, free from anti-competitive practices under the FCCPA.

In December 2023, the FCCPC concluded a comprehensive three-year investigation on British American Tobacco (Nigeria) Limited (BATN) and its affiliates. This action was prompted by credible intelligence and uncovered multiple violations of the FCCPA, the National Tobacco Control Act and other relevant regulatory instruments. The investigation revealed that BATN had engaged in anti-competitive practices, restricting retailers from displaying rival products. Following searches and seizures at multiple BATN locations, the company agreed to a settlement, including a significant penalty of USD110 million and 24 months of compliance monitoring to ensure appropriate behavioural and business practices.

This significant fine demonstrates the increasing alignment of African competition authorities with global competition law standards, emphasising corporate accountability. The FCCPC's enforcement actions signal a shift towards enhanced compliance and enforcement within African competition law, as seen in investigations beyond mergers and the use of proactive

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measures such as dawn raids, and mirroring approaches taken in Zambia and Namibia.

Independent of merger-related activities, the Competition and Consumer Protection Tribunal (CCPT) issued an interim injunction on 29 April 2024, temporarily restraining Multichoice Nigeria Limited (MCL – a leading pay-TV operator in Nigeria) from effecting a proposed tariff increase for its services. However, MCL has subsequently filed an appeal challenging the CCPT's decision, and the matter is currently sub judice, pending the court's determination. This development highlights the CCPT's determination to protect and enforce consumer interests in ensuring fair market practices, while also demonstrating the robustness of the regulatory framework in addressing disputes and promoting competition.

Expansion of sector-specific regulations

The FCCPC has demonstrated proactive leadership in guiding businesses on merger control regulations, fostering a collaborative approach to promote competition and consumer protection. Beyond the comprehensive framework established by the FCCPA, the FCCPC has engaged in close collaboration with sector-specific regulators to develop and implement sector-specific competition regulations. This co-operative effort is undertaken under Section 105(5) of the FCCPA, which mandates sector-specific regulators with competition regulation mandates to enter into agreements with the FCCPC. Among other things, these agreements outline the procedures for the concurrent exercise of competition powers by the FCCPC and the sector-specific regulator, ensuring a harmonised approach to regulation and promoting a level playing field across sectors.

Furthermore, the FCCPC has held several stakeholder engagements to ensure that companies

are aware of their obligations and the FCCPC's review process, regardless of the sector in which they operate, as well as capacity-building workshops for its staff to stay updated with the current global compliance and enforcement regimes. For example, in the telecommunications sector, the Nigerian Communications Commission (NCC) has issued a draft revision of the Competition Practice Regulations, initially introduced in 2007. This revision aims to harmonise the NCC's current enforcement activities with the FCCPC's, among other objectives.

Similarly, in the money lending services sector, in August 2023 the FCCPC resumed its registration of digital money lending apps under the Limited Interim Regulatory/Registration Framework and Guidelines for Digital Lending, 2022, a framework aimed at regulating digital lending services in Nigeria. This framework expands the FCCPC's scope to include more oversight over M&A in the digital economy.

Both the FCCPC and the Central Bank of Nigeria (CBN) are expected to seek to align the regulatory provisions with the relevant CBN laws and regulations to attain an effective and efficient regulatory regime for both traditional and digital financial services. A collaboration in the digital banking industry between the FCCPC and the CBN to address both competition and consumer protection in aspects of digital financial services could significantly result in the following.

- Increased scrutiny of digital mergers: the FCCPC will now be able to more closely review and potentially block mergers between major digital lending platforms and companies in Nigeria. This could prevent further consolidation in the already concentrated digital marketplace, preserving competition.

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- Consideration of digital market dynamics: when assessing mergers, the FCCPC will likely need to weigh factors specific to digital markets, such as network effects, contestability, switching costs, multi-sided networks, data-driven advantages, and the potential for merged entities to leverage ecosystem effects. This could lead to a more nuanced merger review process.
- Alignment with global trends: many other jurisdictions have been expanding antitrust oversight of digital markets. Nigeria's move aligns the country with this global trend, which may aid co-operation on cross-border merger cases involving digital firms.

A potential challenge in this regard is the need to effectively police mergers in the fast-moving digital economy, which will require the FCCPC to develop significant in-house expertise. There may also be challenges around defining the relevant markets in the digital economy – particularly the geographic dimension, which in most cases will span several national borders – and assessing anti-competitive effects in complex and evolving digital ecosystems.

In addition, having stronger merger control in Nigeria's digital economy could have ripple effects, influencing investment decisions, reshaping competitive dynamics and impacting consumer welfare.

Overall, the expansion of the FCCPC's scope represents an important step towards ensuring competitive digital markets in Nigeria, but its effectiveness will hinge on the commission's capacity, approach and co-ordination with other regulatory bodies.

Current competition concerns in merger assessments

In line with global best practices, Nigeria has continued to refine its merger control framework to streamline processes and enhance efficiency. The FCCPC continues to implement its online platforms for filing merger notifications, expediting the review process and promoting transparency in decision-making. Moreover, capacity-building initiatives and stakeholder engagements have been prioritised to increase awareness of merger control regulations and facilitate compliance among market participants.

While the FCCPC's merger control efforts have been commendable, the implementation of its decisions has not been without challenges. In some instances, companies have faced difficulties in complying with the remedies imposed by the FCCPC, leading to extended monitoring and enforcement actions.

The FCCPC has also been grappling with the evolving nature of digital markets and the unique competition issues they pose, and has been working to develop specialised expertise and analysis techniques to address these emerging challenges effectively.

Outlook and future developments

Looking ahead, the trajectory of merger control in Nigeria is set for further advancements in response to the digital transformation and technological innovation that are reshaping industries. Collaboration with international counterparts and alignment with global competition standards will be crucial for creating a conducive business environment that promotes investment and growth, and safeguards competition and consumer welfare.

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The recent recapitalisation of Nigerian banks by the CBN is expected to drive further consolidation in the banking and financial services industry as banks form alliances to meet new capital requirements.

As Nigeria's economy grows and attracts international investment, the FCCPC's role in ensuring a competitive marketplace will become increasingly important. Its commitment to effective merger control and its efforts to enhance its regulatory framework and capabilities are vital for fostering a sustainable business environment.

Anticipated changes in the merger control regime include the introduction of capped merger notification fees to address stakeholder concerns over the financial burden, particularly for smaller companies and start-ups. In addition, establishing a clear upper limit aligned with international best practices and developing a tiered fee structure based on transaction value or party size will help to promote a more favourable business environment.

Stakeholder engagement, capacity-building initiatives and awareness campaigns will be key in promoting compliance with merger control regulations and encouraging fair competition and innovation in Nigeria's business landscape.

Increased scrutiny of merger transactions

As the FCCPC continues to strengthen its merger control capabilities, it is expected that there will be an increase in the scrutiny and review of merger and acquisition transactions in Nigeria. The FCCPC is likely to take a more proactive and rigorous approach to its assessments, focusing on the potential impact on competition, consumer welfare and market dynamics.

Parties to merger transactions will need to promptly engage with the FCCPC at the inception and be prepared to provide comprehensive information and analysis to support their proposals. The FCCPC's willingness to impose conditions or even block potential anti-competitive transactions and business activities amongst market players is likely to continue, reinforcing the importance of effective merger control in the Nigerian market.

Expanding scope of merger control

The FCCPC is also expected to expand the scope of its merger control activities, potentially by lowering the notification thresholds and fees or introducing new regulations to capture a wider range of transactions. This could include the review of acquisitions of minority stakes or the acquisition of nascent or innovative competitors, which may not have been captured under the current framework.

Such developments would align Nigeria's merger control regime with global best practices, and ensure that the FCCPC has the necessary tools to address potential competition concerns across a broader spectrum of transactions, including the impact of mergers on digital services and products.

Conclusion

In conclusion, the merger control landscape in Nigeria in 2024 thus far has been characterised by dynamic merger control trends and developments, reflecting the country's commitment to fostering competitive markets and ensuring effective regulation of mergers. As stakeholders navigate this evolving landscape, proactive engagement with the regulatory authorities and adherence to merger control requirements will be essential in navigating the complexities of the

NIGERIA TRENDS AND DEVELOPMENTS

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merger process and unlocking value in a rapidly changing business environment.

Recent acquisition transactions, regulatory developments, enforcement actions and the outlook highlight the need for the continuous monitoring, evaluation and adaptation of merger control policies to address evolving market dynamics and promote sustainable growth and development. By fostering a competitive and transparent business environment, Nigeria can unlock the full potential of its economy and attract investments that drive innovation, job creation and prosperity for all stakeholders.

PERU

Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.512

- 1.1 Merger Control Legislation p.512
- 1.2 Legislation Relating to Particular Sectors p.512
- 1.3 Enforcement Authorities p.512

2. Jurisdiction p.513

- 2.1 Notification p.513
- 2.2 Failure to Notify p.513
- 2.3 Types of Transactions p.513
- 2.4 Definition of "Control" p.514
- 2.5 Jurisdictional Thresholds p.514
- 2.6 Calculations of Jurisdictional Thresholds p.515
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.515
- 2.8 Foreign-to-Foreign Transactions p.516
- 2.9 Market Share Jurisdictional Threshold p.516
- 2.10 Joint Ventures p.516
- 2.11 Power of Authorities to Investigate a Transaction p.516
- 2.12 Requirement for Clearance Before Implementation p.517
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.517
- 2.14 Exceptions to Suspensive Effect p.518
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.518

3. Procedure: Notification to Clearance p.518

- 3.1 Deadlines for Notification p.518
- 3.2 Type of Agreement Required Prior to Notification p.519
- 3.3 Filing Fees p.519
- 3.4 Parties Responsible for Filing p.519
- 3.5 Information Included in a Filing p.519
- 3.6 Penalties/Consequences of Incomplete Notification p.520
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.520
- 3.8 Review Process p.520
- 3.9 Pre-notification Discussions With Authorities p.521
- 3.10 Requests for Information During the Review Process p.522
- 3.11 Accelerated Procedure p.522

4. Substance of the Review p.522

- 4.1 Substantive Test p.522
- 4.2 Markets Affected by a Transaction p.522
- 4.3 Reliance on Case Law p.522
- 4.4 Competition Concerns p.523
- 4.5 Economic Efficiencies p.523
- 4.6 Non-competition Issues p.523
- 4.7 Special Consideration for Joint Ventures p.523

5. Decision: Prohibitions and Remedies p.523

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.523
- 5.2 Parties' Ability to Negotiate Remedies p.523
- 5.3 Legal Standard p.525
- 5.4 Negotiating Remedies With Authorities p.525
- 5.5 Conditions and Timing for Divestitures p.525
- 5.6 Issuance of Decisions p.526
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.526

6. Ancillary Restraints and Related Transactions p.526

- 6.1 Clearance Decisions and Separate Notifications p.526

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.526

- 7.1 Third-Party Rights p.526
- 7.2 Contacting Third Parties p.526
- 7.3 Confidentiality p.526
- 7.4 Co-operation With Other Jurisdictions p.527

8. Appeals and Judicial Review p.527

- 8.1 Access to Appeal and Judicial Review p.527
- 8.2 Typical Timeline for Appeals p.527
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.528

9. Foreign Direct Investment/Subsidies Review p.528

- 9.1 Legislation and Filing Requirements p.528

10. Recent Developments p.528

- 10.1 Recent Changes or Impending Legislation p.528
- 10.2 Recent Enforcement Record p.528
- 10.3 Current Competition Concerns p.528

Bullard Falla Ezcurra+ is a leading Peruvian boutique firm in antitrust/competition law and regulatory matters, bringing its clients the benefit of more than 20 years of experience. The team – comprised of more than ten professionals with extensive expertise in law and economics – has advised clients on the major antitrust cases in Peru. As a leading firm in all aspects of competition law, Bullard Falla Ezcurra+ stands out for its experience in cases of abuse of dominant position and cartel investigations, having advised several clients on the implementa-

tion of competition compliance programmes. The firm has a wealth of experience in merger control procedures within the electricity sector, having provided legal and economic advice to several clients for integrating electric distribution and transmission activities. Many of these transactions were cleared without conditions. Among its strengths is a hands-on experience of regulation of network industries, including energy, transport infrastructure, telecommunications and other regulated activities.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The Peruvian merger control regime is established in Law No 31112 (Merger Control Law) and its Regulations, approved by Supreme Decree No 039-2021-PCM. This regime, applicable to all sectors of the economy – unlike the previous one, which was applicable only to the electricity sector – entered into force in June 2021.

Specific threshold calculation rules are set in the Thresholds Calculation Guidelines. Likewise, the Guidelines for the Qualification and Analysis of Concentration Operations contain criteria and case examples of the type of transactions within the scope of the Law, and criteria for the substantive analysis of concentration operations.

There are also two notification forms: the Ordinary Notification Form and the Simplified Notification Form.

1.2 Legislation Relating to Particular Sectors

Although not a merger control procedure per se, in the telecommunications sector, transfers of concessions and radio spectrum require prior approval from the Ministry of Transport and Communications. By express indication of the Merger Control Law, competition concerns are excluded from the scope of analysis carried out by the Ministry.

1.3 Enforcement Authorities

The authority in charge of the procedure according to the Merger Control Law is the Peruvian Competition Agency (INDECOP), an administrative entity independent from the executive branch. Its Competition Commission is the competent body to decide merger control cases in

the first administrative instance. The National Directorate for the Surveillance and Promotion of Competition (previously known as the Competition Commission's Technical Secretariat) (hereinafter, the "National Directorate") is in charge of instructing the merger control procedure.

Appeals against the Commission's decisions are known by the Competition Tribunal, whose final administrative decision ends the administrative proceeding. The Competition Tribunal's decisions are subject to judicial review.

Other Authorities Involved in the Review Process

Under the Merger Control Law, if the economic concentration involves companies that operate in markets under specific regulation, the Competition Commission is authorised to request non-binding reports from the concerned Regulatory Agencies on the level of the market's concentration, as well as their technical opinion on the possible effects of the transaction.

Concentrations Concerning the Financial Market and Agents Participating in the Stock Market

In the case of the financial market, the Superintendency of Banking, Insurance and Private Pension Funds Management Companies (SBS) has competence to carry out a prior control through a prudential and financial stability analysis, while INDECOP conducts its analysis on competition issues. Authorisation by both entities, each within their areas of competence, is required. For these purposes, the SBS issued its Resolution No 00511-2023, which seeks to harmonise the analysis under its powers with INDECOP's analysis under the Merger Control Law.

If the transaction involves companies that receive deposits from the public or insurance

companies that pose relevant and imminent risks, compromising the strength or stability of the companies or the systems they are part of, only the prior authorisation of the SBS in its field of competence is required.

When the transaction involves economic agents authorised by the Superintendency of the Securities Market (SMV) to act in the stock market, INDECOPi conducts the merger control procedure, while the SMV carries out its prudential evaluation on the matters under its competence. Authorisation by both entities, each within their areas of competence, is required.

2. Jurisdiction

2.1 Notification

Notification of a transaction is mandatory, provided that it qualifies as a concentration operation according to the Law, and that it meets the relevant thresholds.

Notwithstanding this, the Merger Control Law allows the parties to conduct voluntary notifications of concentrations falling below the jurisdictional thresholds. It also grants INDECOPi the power to investigate concluded concentrations on an ex-officio basis. See **2.11 Power of Authorities to Investigate a Transaction**.

2.2 Failure to Notify

Under the Merger Control Law, executing a merger transaction before it has been submitted to the merger review procedure is considered a serious infringement subject to a fine of up to 1,000 tax units (UIT) (approximately USD1.4 million for 2024) provided that such fine does not exceed 10% of sales or gross income earned by the offender, or its economic group. See **2.13**

Penalties for the Implementation of a Transaction Before Clearance.

To date, there are no records of any fines imposed under the Merger Control Law.

2.3 Types of Transactions

Types of Transactions

Concentration operations

The Merger Control Law and its complementary regulations state that concentrations within the scope of the law can arise as a result of:

- a merger;
- the formation of a joint venture, which is intended to be permanent and fully functional;
- the direct or indirect acquisition of control over other companies through different means, such as the acquisition of shares, participations, or through any other contract or legal figure that confers direct or indirect control of a company; and
- the acquisition of productive assets which have been operative in the past 12 months with the following characteristics:
 - (a) to which a defined income volume is attributable;
 - (b) that can reinforce or increase the market share of the acquirer; and
 - (c) that have generated income during the year prior to notification.

Transfer or change of permanent control

The Merger Control Law defines concentration operations as any act or operation that involves a transfer or change in control of a company or part of it. According to the complementary regulations and guidelines, the change of control should be intended to be long-lasting or permanent for a transaction to qualify as a concentration.

Transactions that are not considered to be concentration operations

The Merger Control Law contains a list of the types of transactions that are not considered to be concentration operations subject to notification. These are the following:

- the corporate growth of an economic agent as a result of operations carried out exclusively within the same economic group;
- the internal corporate growth of an economic agent, regardless of whether it takes place through own investment or with resources of third parties that do not participate in the market;
- the corporate growth of an economic agent that does not produce effects in the markets within the domestic territory, either in whole or in part;
- control acquired over an economic agent as a result of a temporary mandate conferred by law relating to the forfeiture or denunciation of a concession, asset restructuring, insolvency, creditors' agreement or other similar procedure; and
- the temporary holding by credit, financial, insurance or capital market institutions of stocks or shares acquired for the purpose of resale, provided that no voting rights are exercised to determine the competitive behaviour of that undertaking.

Internal Restructurings or Reorganisations

According to the Merger Control Law, restructurings or reorganisations do not fall within their scope of application given that they do not entail a transfer or change of control.

Operations Not Involving the Transfer of Shares or Assets

According to the Merger Control Law, the transfer or change of permanent control in a com-

pany or part of it is considered as a decisive factor. Therefore, shareholders' agreements or any other type of contract that involves a change of control will be caught by the law.

2.4 Definition of "Control"

The Merger Control Law defines the term "control" as the possibility of exerting a decisive and continuous influence over an economic agent through rights of ownership or use of all or part of a company's assets, or rights or contracts that allow a decisive and continuous influence on the structure, deliberations or decisions of a company's bodies, determining, either directly or indirectly, the competitive strategy of a firm.

Acquisitions of Minority or Other Interests Less Than Control

Under the Merger Control Law, acquisitions of minority interests are subject to notification, provided they involve the transfer or change of control of a company.

2.5 Jurisdictional Thresholds

The Merger Control Law provides two thresholds to be met concurrently for a transaction to be subject to mandatory notification:

- a total annual gross sales or revenue, or asset value in Peru of the companies involved in the concentration during the fiscal year prior to the notification of the concentration equal to, or greater than, 118,000 UIT (approximately USD156.6 million in 2024); and
- a total annual gross sales or revenue, or asset value in Peru of at least two of the companies involved in the concentration during the fiscal year prior to the notification of the concentration equal to or greater than 18,000 UIT (approximately USD23.8 million in 2024) each.

There are no special jurisdictional thresholds applicable to particular sectors.

2.6 Calculations of Jurisdictional Thresholds

The Regulations of the Merger Control Law state that the authority should consider the annual sales or gross income, or asset value, generated in Peru by the concentrating parties during the previous fiscal year. For these purposes, the authority must consider either the gross income or the asset value involved, and not both at the same time, as established by the Thresholds Calculation Guidelines.

Some of the main rules included in the Thresholds Calculation Guidelines for jurisdictional thresholds calculation by income or assets value are the following.

Income

The calculations shall include income coming from the operations carried out by the concentrating parties during their ordinary course of business. Only the sale of products to clients located in Peru and services provided to clients located in Peru are to be considered.

Threshold calculation excludes income from transactions outside the usual course of business, taxes and sales within the same economic group.

Assets

The calculations shall consider the book value of all assets (tangible and intangible) located in Peru, except for those that were not located in the country during the previous year.

Threshold calculation excludes assets located in Peru for which more than 50% of the income

generated corresponds to sales to foreign customers.

It must be considered that, according to the Thresholds Calculation Guidelines, the relevant exchange rate to be used for threshold calculations is the average exchange rate of the last 12 months prior to the notification, as determined by the Central Bank.

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

According to the Merger Control Law, the jurisdictional thresholds consider the gross sales or revenue, or asset value in Peru of “the companies involved in the concentration operation”. The Regulations of the law establish which entities are relevant for the calculation of jurisdictional thresholds:

- merger and constitution of a joint venture – annual sales or gross income, or asset value of all the parties involved and their economic group;
- acquisition of an economic agent – annual sales or gross income, or asset value of the acquirer, its economic group; and the target (economic agent) and the agents it controls; and
- acquisition of operative assets – annual sales or gross income, or asset value of the acquirer, its economic group and the sales or income generated by the target (the productive asset).

Turnovers of Target and Its Economic Group

The Merger Control Law considers the annual sales or gross income, or asset value of the economic agents involved in the transaction. According to the type of transaction, the income or asset value considered should include those

of the agent involved and its economic group. The Thresholds Calculation Guidelines state that to identify an economic group, the definitions of the law and previous case law should be considered. If an economic agent holds sole or joint control over another company, all the income or asset value of the controlled company should be counted, regardless of the number of shares such economic agent could have over the company.

Group-Wide Calculations

In the Merger Control Law, an “economic group” is defined as the set of economic agents, local or foreign, comprised of at least two members, when any of them exerts control over the others, or when the control over economic agents belongs to one or more individuals that act as a decision unit.

Changes in the Business During the Reference Period

The regulations of the Merger Control Law establish that companies’ information must reflect their status at the time of notification. Companies guarantee, by means of affidavits, that the information they present is reliable and there are sanctions for submitting false information.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions qualifying as concentrations are subject to notification if they have any actual or potential effects in Peru. This can result, for instance, as a consequence of the companies’ having a direct participation in the Peruvian market through subsidiaries or assets located in Peru. See **2.6 Calculations of Jurisdictional Thresholds**.

2.9 Market Share Jurisdictional Threshold

The Merger Control Law does not provide a market share jurisdictional threshold.

2.10 Joint Ventures

According to the Merger Control Law, joint ventures are subject to merger control if they result in the acquisition of joint control over one or more economic agents. Particularly, the law refers to the establishment by two or more independent economic agents of a joint undertaking, joint venture or any other similar contractual arrangement that entails the acquisition of joint control over one or more economic agents, which are to perform the functions of an autonomous economic entity permanently.

Considering this, a joint venture or similar contractual arrangement will be subject to mandatory notification only when it results in the creation of a new economic agent with functional and operational autonomy (a “fully functional joint venture”).

2.11 Power of Authorities to Investigate a Transaction

INDECOPI has the power to investigate and sanction non-notified concentrations that have met the jurisdictional thresholds within a limitation period of four years, starting from the last act of execution of the concentration. However, INDECOPI also has a period of one year to conduct ex officio investigations of operations that were not notified because they did not meet the notification thresholds.

Ex Officio Investigations Under the Merger Control Law

Under the Merger Control Law, INDECOPI has the power to investigate closed transactions that did not meet the jurisdictional thresholds within a

year from their completion on an ex officio basis if the concentration is considered as one that can create a dominant position or that has the potential to restrict competition.

The regulations of the Merger Control Law refer to the following situations in which INDECOPI could investigate a closed transaction:

- transactions in concentrated markets;
- horizontal concentrations that involve the acquisition of an economic agent with a small market share and growth potential;
- horizontal concentrations that involve acquisitions of innovative economic agents that have recently entered the market;
- successive acquisition of competitors in the market; and
- other operations with similar effects.

INDECOPI can only investigate these concentrations when they have effects in the Peruvian market. This requirement is met if the agents involved, or their economic groups, have developed economic activities in Peru or have generated income in the country during the 12 months prior to the formal closing of the operation.

As of May 2024, there are no public records of ex officio investigations under the Merger Control Law.

Remedies and Exceptions

INDECOPI may force the sale of the acquired shares/assets, among other remedies, if it determines that the concentration might potentially restrict competition.

Concentrations within the financial sector that pose relevant and imminent risks, compromising the strength or stability of the companies or the systems they are part of, which have already

been approved by the SBS, cannot be reviewed by INDECOPI through this process. For further information, see **1.3 Enforcement Authorities**.

2.12 Requirement for Clearance Before Implementation

The Merger Control Law provides that the implementation or execution of the transaction must be suspended until there is clearance from the authorities. Such transactions will not have any legal effect if executed without authorisation.

It must be noted that, in order to register transactions in the public registry before a notary, the parties must present an affidavit declaring either that:

- the transaction is not subject to the merger control regime; or
- an express or tacit authorisation has been granted by the corresponding authorities within the merger control procedure.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Under the Merger Control Law, execution of a concentration before the authority's decision qualifies as a serious infringement, punishable with up to 1,000 UIT (approximately USD1.4 million for 2024), provided such amount does not exceed 10% of sales or gross income earned by the offender, or its economic group. INDECOPI is also entitled to order the divestment or dissolution of the concentration operation until the conditions existing prior to the transaction are restored.

Relevant Case Law

In 1999, under the previous Merger Control Law, applicable only to the electricity sector, INDECOPI imposed a sanction for the implementation of a transaction before clearance. The penalty was

imposed by the Commission on the subsidiaries of the companies Endesa Spain and Enersis, in the process of consecutive acquisition of shares of the first company in the second and the increase of the participation of the second company in its subsidiary, Endesa Chile, in decision 012-99-INDECOPI/CLC.

In that case, the Commission imposed a solidarity fine of 150 UIT (approximately USD 203,289 for 2024) for failing to notify the transaction prior to the launch of the takeover bid of shares by Enersis subsidiaries up until the date of its general board agreement to increase the shareholding limit one month later, after which the operation occurred almost immediately without the compliance of the notification duty by the subsidiaries. The sanction was appealed before the Competition Tribunal, which rejected the appellant's arguments and ratified the amount of the sanction imposed in the first instance.

Later on, in decision 0794-2011/SC1-INDECOPI, also regarding Endesa, the Competition Tribunal ruled that Enel violated the previous electricity merger control law by taking control over Endesa after the notification of the operation, but before the Commission issued a decision on the matter. Finally, the Competition Tribunal modified the amount and imposed a 100 UIT penalty (approximately USD 135,526 for 2024).

There is no case law referring to the implementation of a transaction before clearance under the current regime. Nonetheless, according to the Merger Control Law, a sanction for implementing a transaction before clearance would be made public since the decisions issued by the Commission are public and available on its web page. Penalties can be imposed for implementing a transaction involving two foreign economic

agents prior to obtaining clearance, such as the cases presented above.

2.14 Exceptions to Suspensive Effect

The Merger Control Law provides no exceptions for the suspension of the implementation of the transaction until clearance is obtained.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Under the Merger Control Law, there are no provisions that allow the implementation of the transaction before clearance.

However, it is worth mentioning a case analysed under the previous merger control regime, applicable only to the electricity sector. In 2017, ISQ Fund I and ISQ Fund II requested clearance for the acquisition of Inkia Americas Ltd, indirect owner of two electricity generation companies. The transaction had already been closed abroad, but the applicants specified that Inkia had handed over its political rights to a trust managed by an independent third party in an act prior to the closure. In this way, the transfer of the trust (under the control of Inkia and its subsidiaries) to ISQ would be effectively finalised once the authority granted clearance to the operation, which happened later through Resolution 027-2018/CLC.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

Under the Merger Control Law, transactions falling within the scope of the law must be notified prior to their execution. There are no specific terms or deadlines for notification.

Regarding penalties for failing to notify the transaction before execution and penalties effectively applied for failing to notify the transaction before execution, see **2.2 Failure to Notify**. Under the current regulations, a sanction imposed for failure to notify would be public since the decisions issued by the Competition Commission are public and available on its web page.

3.2 Type of Agreement Required Prior to Notification

Under the Merger Control Law, a copy of the most recent agreement signed for the transaction must be submitted. If such agreement has not been signed, documents that reflect the real and serious intention of the parties to carry out the operation, such as Memorandums of Understanding or Letters of Intent, should be presented to the authority.

3.3 Filing Fees

According to the Merger Control Law, a fee should be paid to submit the notice. This fee amounts to the sum of PEN91,629.40 (approximately USD24,764 for May 2024). The fee must be paid when the request for clearance is submitted, in order to start the procedure.

It should be noted that, according to the general rules applicable to administrative proceedings, administrative fees should only cover the costs or expenses related to the activities required to carry out the proceeding.

3.4 Parties Responsible for Filing

The Merger Control Law provides two scenarios:

- in the case of mergers or joint control acquisitions, all the economic agents involved must submit the notification jointly; and

- in other cases, the economic agent that will take control over another agent or asset is responsible for submitting the notification.

3.5 Information Included in a Filing

As mentioned above, there are two notification forms: the Ordinary Notification Form applicable to all transactions and the Simplified Notification Form applicable in two specific cases (conglomerate transactions without overlaps and operations that involve a change from joint to sole control). For further information, see **3.11 Accelerated Procedure**.

The minimum information to be submitted according to the Ordinary Notification Form is the following.

- Description and purpose of the transaction – type of transaction and why it qualifies as a concentration; transaction value and type of financing mechanism; transaction schedule; minutes of corporate bodies regarding the transaction, etc. Internal or external reports, studies, presentations and/or reports on the transaction.
- Ownership and control structure of participants – control structure before and after the operation; kinship, management or ownership links with companies operating in the country.
- Market identification and description – description of relevant markets involved in the transaction. In addition, detailed market information (sales for the last three years, supply structure, demand structure, product differentiation, market entry and exit conditions, market revenues and exits in the last five years, total entry costs for a viable competitor, etc) is required for “identified involved markets”, defined as those in which:

- (a) there is horizontal overlap and a combined market share of at least 20% is identified;
- (b) there are vertical relations and the individual or combined market shares are at least 30%;
- (c) any of the agents has a market share of more than 30% and the other party is a potential competitor; and
- (d) any of the agents has a share of more than 30% and another agent has significant intellectual or industrial property rights in the same market.
- Description of efficiencies – type of scope, reason why it cannot be achieved by means other than concentration, quantification and efficiency transfer mechanism.
- Identification of the countries in which the operation has been notified and resolutions, if available.

On the other hand, the most relevant information of the Simplified Notification Form includes the following.

- Description and purpose of the transaction – type of transaction and why it qualifies as a transaction; transaction value and type of financing; transaction schedule; minutes of corporate bodies regarding the transaction, etc.
- Ownership and control structure of participants – control structure before and after the concentration; kinship, management or ownership links with companies that carry out activities in the country.
- Economic activities carried out by the companies involved – list of economic activities developed by the involved economic agents, main characteristics of the supply and demand of such activities, supporting information that the operation qualifies as a

simplified form assumption (operations without horizontal overlapping or operations that imply a change from joint control to exclusive control).

- Identification of the countries in which the operation has been notified and resolutions, if available.

The Authority has the power to request further information in case a Notification is presented with the Simplified Form.

3.6 Penalties/Consequences of Incomplete Notification

The notification is deemed not to have been submitted if the documentation is incomplete. INDECOPI receives the notification and evaluates whether the necessary information has been provided. If this is not the case, the economic agents are requested to rectify the situation.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

According to the Merger Control Law, submitting incomplete, incorrect, false, fraudulent or misleading information at any stage of the procedure qualifies as a very serious infringement of the law punishable with a fine greater than 1,000 UIT (approximately USD1.4 million for 2024), provided that such fine does not exceed 12% of the turnover of the parties in the preceding fiscal year.

3.8 Review Process

According to the Merger Control Law, the first stage is the notification phase: after the submission, the Competition Direction assesses the information filed by the parties to determine whether all the requirements have been met in a period of ten working days. If any of them is missing, a ten-working-day period is granted

to the parties for rectification, after which the Competition Direction declares the application admissible or inadmissible within a period of five working days.

Phase I

Once the notification is admitted, Phase I involves the Commission's evaluation as to whether the concentration falls within the scope of the law, as well as whether it raises serious competition concerns. This stage lasts a maximum period of 30 working days. If the Commission does not find any serious competition concerns or finds that the transaction does not fall within the scope of the law, the transaction is approved. However, if there are serious competition concerns raised in the Commission's evaluation, the assessment moves on to Phase II. Both decisions must be notified to the parties.

If the Commission does not issue a decision within the provided period, the concentration is automatically authorised in application of positive administrative silence.

Phase II

Phase II lasts a maximum of 90 working days, after notifying the parties that the transaction has moved on to the next stage of evaluation and publishing a brief summary of the concentration in order to allow third parties to present relevant information. This period may be extended for an additional period of 30 working days, with due justification by the authority for such extension.

Both in Phase I and Phase II, the Commission is allowed to suspend the course of the period if the parties have proposed commitments in order to analyse them.

After the issuance of the clearance decision, authorising with conditions or denying the

request, only the party requesting the clearance may appeal such decision within 15 working days, after which the Competition Tribunal has a maximum of 90 working days to decide.

Timeline for Clearance

Under the Merger Control Law, the approximate term of the procedure considering Phase I and Phase II is 190 working days at first instance and 115 working days on appeal.

As of 15 May 2024, INDECOPI had received 54 merger filings. 41 of these concentrations were approved unconditionally in Phase I, two were approved with conditions in Phase II, and five were withdrawn by the parties. As of 15 May 2024, according to the authority, six transactions are still under review as per the public information available.

The concentrations approved in Phase I did not entail any significant negative effects on competition and were approved within less than 30 working days as from the date of admission of the filing. The two concentrations approved with conditions in Phase II were approved within less than 155 working days as from the admission of the filing.

For further information on the concentration that involves a more in-depth competitive analysis, see **5.2 Parties' Ability to Negotiate Remedies**, which includes a discussion of typical remedies.

3.9 Pre-notification Discussions With Authorities

According to the Merger Control Law, prior to the filing of the application, the economic agents involved in the transaction may contact the National Directorate, either jointly or separately, in order to consult whether their transaction falls within the scope of the law, which information

must be submitted with their application and other related aspects. The National Directorate's opinion is not binding for the Competition Commission.

Information provided by the parties, including prior consultation with the authority, is confidential.

3.10 Requests for Information During the Review Process

Under the Merger Control Law, once a notification is presented, the National Directorate can provide a ten-working-day term to complete the notification form. Additional requests for information during the review process are not expressly considered in the law.

For further information, see 3.8 Review Process.

3.11 Accelerated Procedure

Under the Merger Control Law, there is a simplified notification form for concentrations deemed to be less likely to produce any significant restrictions to competition. It must be noted that this is not a fast-track procedure, as it only requires a less burdensome notification form with no changes in the terms for the review of the concentrations.

According to the Regulations of the law, an economic agent may submit a simplified notification in the following situations:

- non-overlap concentrations – when the economic agents involved in the transaction or their economic groups do not carry out economic activities in the same product market and in the same geographic market; or, they do not participate in the same production or value chain; or

- change from joint to sole control – when an economic agent acquires sole control over an economic agent on which it already exerted joint control.

4. Substance of the Review

4.1 Substantive Test

In the Merger Control Law, the substantive evaluation made by the authority seeks to identify if the transaction creates a significant restriction to competition on the involved markets. In addition, the Guidelines for the Qualification and Analysis of Concentration Operations published by INDECOPI contain certain criteria for the substantive analysis of concentration operations.

4.2 Markets Affected by a Transaction

According to the Merger Control Law, it is likely that INDECOPI will conduct its assessments of markets affected by the transaction considering the definition of relevant market, included in Legislative Decree 1034 (Competition Law). According to the Competition Law, the relevant market is composed of the product market, understood as the good or service subject of conduct and its substitutes, and the geographic market, understood as the set of geographical areas where the alternative sources of supply of the relevant product are located. There is no set de minimis level below which competitive concerns are deemed unlikely.

4.3 Reliance on Case Law

So far, in the decisions made public, INDECOPI has relied on international criteria. For instance, when analysing a transaction in the construction sector, INDECOPI took into consideration cases decided by the European Commission for the definition of the relevant markets involved. In this same case, to assess the possible competi-

tion effects of the transaction, INDECOPI used guidelines and case law from the European Commission, the Chilean Competition Authority and the US Department of Justice. Additionally, in cases involving vertical concentrations, the Commission expressly followed the methodology set out in the non-horizontal mergers guidelines of the European Commission.

4.4 Competition Concerns

According to the Merger Control Law, the procedure is intended to analyse whether or not the transaction causes a significant restriction to competition in the markets involved. In that regard, it expressly states that the mere creation or strengthening of a dominant position is not enough to prohibit the operation.

4.5 Economic Efficiencies

According to the Merger Control Law, the authority considers the creation of efficiencies when deciding whether or not to authorise a merger transaction. The burden of proving the positive and supplementary impact of the efficiencies falls on the economic agents that notify the transaction. The analysis considers productive, allocation or innovative efficiencies that meet the following requirements:

- they must be proven by the applicant economic operators;
- they must be inherent in the concentration;
- they must be aimed at outweighing identified restrictive effects on competition and improving consumer welfare;
- they must be transferable to the consumer; and
- they must be verifiable by the authority.

4.6 Non-competition Issues

Under the Merger Control Law, the authority is forbidden from considering non-competition

issues in the assessment of a concentration. In this sense, the law expressly states that, for the purposes of the merger control procedure, INDECOPI does not consider issues different to the set goal of the regime, which is related to economic efficiency and consumer welfare.

4.7 Special Consideration for Joint Ventures

There are no special provisions for the evaluation of joint ventures, as they are governed by the general rules of the Merger Control Law.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

Under the current regulations, INDECOPI is empowered to block a transaction or approve it subject to remedies to ensure the maintenance of competitive conditions in the market.

Furthermore, according to the Merger Control Law, the authority can declare null and without effects all acts and contracts entered into by parties executing a blocked transaction or without compliance with the conditions. Also, the law prohibits the registration of blocked transactions into the public registry.

5.2 Parties' Ability to Negotiate Remedies

The Merger Control Law establishes that economic agents may present a proposal of commitments aimed at mitigating or avoiding the possible negative effects derived from a transaction. The procedure is stayed until the authority has given its opinion on these commitments. Subsequently, INDECOPI may authorise the

transaction under such conditions or under other types of conditions it deems appropriate.

Case Law

To date, two operations have been approved subject to conditions under the current Merger Control Law. Under the previous regime, applicable only to the electricity sector (which operated from 1997 up to 2021), three operations were approved subject to conditions. Further details on these cases are provided below.

Edelnor (1998)

In a case involving the distribution company Edelnor (now ENEL Distribution Peru) the conditions imposed were intended to balance the companies' voting rights in the decision-making process of the Economic Operation Committee of the National Grid (COES) after the transaction, which is in charge of planning and managing the operation of the electric power generation and transmission system. COES' highest governing body is the Assembly, which is made up of the National Grid (SEIN) agents, grouped into four subcommittees, including generators, distributors, transmitters and free users. The Commission considered that the new entity as a result of the transaction could gain decisive influence over its corresponding subcommittee.

In this case, the Commission also imposed on Edelnor (ENEL Distribution Peru) the obligation to bid for its energy acquisition among all the existing generators, in order to avoid any preference to its related generators (Edegel, Etevensa and Eepsa).

Consorcio Transmantaro (2006)

In another case, the Commission imposed a remedy by prohibiting the transmission companies controlled by Interconexión Eléctrica S.A. E.S.P. (ISA) to participate in the second call for

bidding for BOOT Contracts for Guaranteed Transmission Network Systems, in order to ensure that they present their best offer in the first call for bidding. In addition, the Commission imposed some restrictions on ISA's transmission companies' voting rights in order to control their influence over the decision-making process of COES's transmission companies' subcommittee.

Luz del Sur (2020)

In a decision taken in April 2020, INDECOPI cleared a major transaction within the distribution and power generation segments (China Yangtze Power Co, a subsidiary of China Three Gorges Corporation acquired Luz del Sur). As part of its decision, INDECOPI imposed as a condition to clear the transaction that Luz del Sur should bid for its energy acquisition among all the existing generators in order to avoid any preference to its related generators. The bid shall be co-ordinated either by Osinergmin (electricity regulator) or through a competitive and transparent process that shall be informed to INDECOPI. This condition intends to assure competition among generation power companies for serving the regulated market.

Hersil (2022)

After the Commission identified the acquisition of the pharmaceutical company Hersil could imply restrictive effects on competition in various markets (such as antiseptics and disinfectants, aminoglycosides and systemic nasal preparations), Pharmaceutica Euroandina (Euroandina), the acquiring company, proposed two types of commitments:

- a main commitment to license to third parties those products sold by Hersil in markets where risks were identified, to ensure the existence of competitive conditions; and

- a transitory commitment, involving the establishment of a pricing policy, to prevent Euroandina from modifying the commercial conditions of the products until its licensing.

Both commitments were qualified as appropriate, necessary, and proportional to reduce the risks to competition identified by the Commission.

Enel Distribución (2024)

In a decision taken in January 2024, INDECOPI cleared a transaction through which China Southern Power Grid International acquired control over Enel Distribution Peru (electricity distribution company) and Enel X (sustainable energy projects). After detecting possible vertical risks, similar to those analysed in the Edelnor and Luz del Sur operations mentioned above, the Commission approved the following conditions to be fulfilled by the acquirer.

- Conduct bids for the purchase of electricity, where the winners will be the bidders offering the lowest prices.
- Not modify essential aspects regulated in the contracts for the acquisition of electric energy after their subscription.
- Keep INDECOPI and the market informed about the bids procedures and their results.

These commitments were qualified as appropriate, necessary, and proportional to reduce the risks to competition identified by the Commission.

Remedies Typically Used

As it can be seen from the case law, both under the previous and current merger control regimes, INDECOPI has preferred to opt for the use of behavioural remedies (bidding and product

licensing), aimed at mitigating the identified risks to competition.

5.3 Legal Standard

According to the Merger Control Law, the proposed commitments must be suitable for mitigating or avoiding the possible negative effects derived from the transaction.

5.4 Negotiating Remedies With Authorities

As explained in **5.2 Parties' Ability to Negotiate Remedies**, the Merger Control Law allows the parties to propose remedies to the authority either in Phase I or Phase II of the procedure. In Phase I, the parties can submit their proposed remedies within 15 working days from the date of the notification. In Phase II, the parties have a term of 40 working days from the date of the notification of the resolution for the beginning of Phase II to present their proposed remedies.

The regulations of the Law establish that the National Directorate can guide applicants on the feasibility of proposed remedies throughout the procedure.

5.5 Conditions and Timing for Divestitures

As indicated in **5.2 Parties' Ability to Negotiate Remedies**, under the current Merger Control regime there are two cases in which conditions were required by the Commission; however, these did not include structural remedies (meaning full divestitures), but behavioural (such as carrying out bids and trade mark licensing). Additionally, as explained, no structural remedies have been imposed under the previous regulation, applicable only to the electricity sector.

5.6 Issuance of Decisions

According to the Merger Control Law, if the decision is not issued within the prescribed term then the “positive administrative silence” operates, which means that the authorisation for the transaction is considered to be granted.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

To date, under the Merger Control Law, there is no case law on prohibitions or remedies applied in foreign-to-foreign transactions.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Under the Merger Control Law and its regulations, no special provisions for related arrangements have been considered.

Nonetheless, both the Ordinary Notification Form and the Simplified Notification Form require the notifying agent to identify any clause or provision related to the transaction that may restrict competition, such as non-competition clauses or exclusivity agreements on the concentration’s relevant contracts. For instance, in the Hersil (2022) operation mentioned in **5.2 Parties’ Ability to Negotiate Remedies**, the Commission analysed non-competition clauses as ancillary to the transaction.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Under the Merger Control Law, third parties with legitimate interest can participate in the procedure, have the right to access to the file of the case, and can obtain copies of information that is not classified as confidential by the Commission. Further, they can submit relevant information about the transaction without being considered parties to the procedure.

Third parties can ask for their intervention in the procedure only within a term of ten days after the Commission publishes a brief summary of the reasons justifying the transition to the second phase of the procedure. In the case of the ex officio review, the limit is ten days from the publication of the Admission Resolution.

7.2 Contacting Third Parties

The Merger Control Law establishes the duty of public entities to provide information to the Authority, at its request.

Also, according to the law, the Commission must publish a brief summary of the reasons justifying the transition at the beginning of Phase II of the procedure, so that third parties can contribute with relevant information to the analysis of the transaction. It also provides the possibility of the Authority to inform third parties of the commitments proposed by the notifying parties, as long as it is deemed necessary for their assessment.

7.3 Confidentiality

The Merger Control Law states that a declaration of confidentiality of the information submitted in the procedure may be obtained subject to the filing of a special request, a procedure regulated

in Legislative Decree 1034 (Competition Law). To this end, the Confidentiality Guidelines of the Competition Commission apply. These guidelines set forth the specific cases in which certain types of information call for confidential treatment, such as commercial secret.

According to the law, only the parties and third parties with legitimate interest incorporated in the procedure can access the file of the case. The Merger Control Law provides that the authority shall keep reserve of all the information received during the merger control review process, avoiding any risk that could affect the legitimate interest of the companies involved. The authority is forbidden to disclose any business secrets or to make undue use of the information.

7.4 Co-operation With Other Jurisdictions

Related to competition matters, the Third Final Complementary Provision of Legislative Decree 1034 (Competition Law) establishes that the National Directorate may exchange information, including information deemed confidential, with the competition agencies of the countries that are parties to an international co-operation agreement. For that purpose, INDECOPI has subscribed many co-operation agreements with competition agencies in various jurisdictions, such as Chile, Mexico, France and the USA.

The agreements that INDECOPI has signed refer to co-operation in matters of promotion of competition and other matters of its specialty.

The Merger Control Law establishes that INDECOPI may sign memorandums of understanding or other inter-institutional agreements with other national or foreign entities to seek inter-institutional co-operation.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Under the Merger Control Law and its regulations, the first administrative instance decision can be appealed to the Competition Tribunal within 15 working days, counted from the notification of such decision.

The merger approval procedure is administrative in nature. In this connection, all decisions by INDECOPI's last administrative instance can be appealed by the parties to the judiciary through a contentious-administrative action, as established in the Contentious-Administrative Proceeding Act, approved by Supreme Decree No 011-2019-JUS. In this case, the decision issued by INDECOPI's Tribunal ends the administrative instance.

8.2 Typical Timeline for Appeals

See 8.1 Access to Appeal and Judicial Review.

Under the sole system of administrative acts appeals, the term to file an appeal before the judiciary is three months counted as from taking cognisance of, or being served with, the contested action.

Under the Merger Control Law, no decision has been known yet to be subject to judicial review. However, under the previous regulations applicable to the electricity sector, only one administrative appeal has been known to exist. This appeal was filed by Enel against the imposition of a fine of 1000 UIT (approximately USD1.4 million for 2024), for executing the transaction before clearance. In the second instance, the Competition Tribunal reduced the fine to 100 UIT (approximately USD135,526 for 2024).

Notwithstanding the foregoing, in 2013, the economic group formed by Interconexión Eléctrica S.A. E.S.P. (ISA) obtained the reversal of the conditions imposed by the Commission to mitigate the possible anti-competitive effects of the transactions entailed by the acquisition of Consorcio Transmantaro by said economic group. Even though this was not an appeal, it resulted in the review and lifting of the conditions imposed, given that the Competition Tribunal found that there had indeed been changes in circumstances that diluted the concern that had initially given rise to the conditions.

8.3 Ability of Third Parties to Appeal Clearance Decisions

The Merger Control Law does not give legal standing for third parties to appeal any type of INDECOPI's decisions within merger control procedures.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

The Peruvian Legal Framework has no ex ante foreign investment control regime. The only requirement a foreign investor has to comply with is the registration of the investment in PROINVERSION's registry (Private Investment Promotion Agency) in order to, among others, sign a Legal Stability Agreement (mainly to protect the investment from changes to the tax and labour regimes in existence at the time of agreement). These benefits are contained in Legislative Decree No 662.

In relation to foreign subsidies, Peru has no prior control regime in force. Nonetheless, Peru is a member of the World Trade Organization and has signed the Agreement on Subsidies

and Countervailing Measures approved by this organisation. Accordingly, INDECOPI, the public entity of which the Peruvian Competition Agency is a part, also has a special division in charge of prosecuting dumping and subsidies practices (the Dumping, Subsidies and Elimination of Non-tariff Trade Barriers Commission (CDB)). This CDB has the power to impose countervailing measures when necessary. However, this is an ex-post review independent from the merger control procedure.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

As indicated in **1.1 Merger Control Legislation**, the Merger Control Law came into force on 14 June 2021. This law repealed Law No 26876 (Antitrust and Antioligopoly Act for the Electricity Sector), enacted on 19 November 1997, and it implemented a merger control regime of general scope applicable to all economic activities. Since its entry into force, no amendments have been made to the Merger Control Law.

10.2 Recent Enforcement Record

As indicated in **3.8 Review Process**, as of 15 May 2024, INDECOPI has received 54 merger filings. 41 of these concentrations were approved unconditionally in Phase I, two were approved with conditions in Phase II, and five were withdrawn by the parties. As of 15 May 2024, according to the authority and public records, six transactions are still under review, of which 3 are in Phase II (related to the sugar, construction materials and telecommunications sectors).

10.3 Current Competition Concerns

To date, the main concerns of the authority are focused on the implementation of the Merger

Control Law regime. The possibility set out in the law to make consultations to INDECOPI particularly referred to the qualification of a notifiable transaction, the scope of application of the law or the information to be submitted, is proving to be a key tool in this stage of implementation of the law. Nevertheless, the analysis carried out by the authority under the Merger Control Law has been characterised by its technical nature and strict compliance with legal timeframes. This approach has been followed in the operations analysed by the authority related to various sectors such as electricity, hydrocarbons, mining, telecommunications, hotels, pharmaceuticals, food, finance, and automobiles, among others.

PHILIPPINES



Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.534

- 1.1 Merger Control Legislation p.534
- 1.2 Legislation Relating to Particular Sectors p.534
- 1.3 Enforcement Authorities p.534

2. Jurisdiction p.535

- 2.1 Notification p.535
- 2.2 Failure to Notify p.536
- 2.3 Types of Transactions p.536
- 2.4 Definition of "Control" p.537
- 2.5 Jurisdictional Thresholds p.537
- 2.6 Calculations of Jurisdictional Thresholds p.537
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.538
- 2.8 Foreign-to-Foreign Transactions p.538
- 2.9 Market Share Jurisdictional Threshold p.539
- 2.10 Joint Ventures p.539
- 2.11 Power of Authorities to Investigate a Transaction p.539
- 2.12 Requirement for Clearance Before Implementation p.540
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.540
- 2.14 Exceptions to Suspensive Effect p.540
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.540

3. Procedure: Notification to Clearance p.541

- 3.1 Deadlines for Notification p.541
- 3.2 Type of Agreement Required Prior to Notification p.541
- 3.3 Filing Fees p.541
- 3.4 Parties Responsible for Filing p.541
- 3.5 Information Included in a Filing p.541
- 3.6 Penalties/Consequences of Incomplete Notification p.541
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.542
- 3.8 Review Process p.542
- 3.9 Pre-notification Discussions With Authorities p.543
- 3.10 Requests for Information During the Review Process p.543
- 3.11 Accelerated Procedure p.543

4. Substance of the Review p.543

- 4.1 Substantive Test p.543
- 4.2 Markets Affected by a Transaction p.543
- 4.3 Reliance on Case Law p.544
- 4.4 Competition Concerns p.544
- 4.5 Economic Efficiencies p.544
- 4.6 Non-competition Issues p.545
- 4.7 Special Consideration for Joint Ventures p.545

5. Decision: Prohibitions and Remedies p.545

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.545
- 5.2 Parties' Ability to Negotiate Remedies p.545
- 5.3 Legal Standard p.546
- 5.4 Negotiating Remedies With Authorities p.546
- 5.5 Conditions and Timing for Divestitures p.547
- 5.6 Issuance of Decisions p.547
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.547

6. Ancillary Restraints and Related Transactions p.548

- 6.1 Clearance Decisions and Separate Notifications p.548

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.548

- 7.1 Third-Party Rights p.548
- 7.2 Contacting Third Parties p.548
- 7.3 Confidentiality p.548
- 7.4 Co-operation With Other Jurisdictions p.549

8. Appeals and Judicial Review p.549

- 8.1 Access to Appeal and Judicial Review p.549
- 8.2 Typical Timeline for Appeals p.549
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.549

9. Foreign Direct Investment/Subsidies Review p.549

- 9.1 Legislation and Filing Requirements p.549

10. Recent Developments p.549

- 10.1 Recent Changes or Impending Legislation p.549
- 10.2 Recent Enforcement Record p.550
- 10.3 Current Competition Concerns p.550

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Villaraza & Angangco is a full-service law firm that has been at the forefront of the Philippine legal landscape since 1980. It offers professional services of the highest calibre, with lawyers adept at handling the most intricate problems to provide comprehensive solutions, highly trained legal staff and decades of experience in serving a full spectrum of clients' interests. The firm's

corporate and commercial law department is composed of five partners and 19 other highly qualified lawyers. The firm is involved in M&A in industries throughout the Philippines, including banking and finance, telecommunications, transportation, real estate, manufacturing, food retail, business process outsourcing, insurance, entertainment and pharmaceuticals.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The primary merger control legislation is the Philippine Competition Act (Republic Act No 10667, or PCA), its implementing rules and regulations, and other rules and guidelines issued by the Philippine Competition Commission (PCC).

The Revised Corporation Code (Republic Act No 11232) may also be applicable, as may various issuances by the Securities and Exchange Commission (SEC).

Merger control provisions may also be provided for in special laws that apply to specific industries. For example, the Electric Power Industry Reform Act (EPIRA) provides restrictions as to the percentage of the installed generating capacity of a grid and/or national installed generating capacity that an entity may own, operate or control, singly or in combination with others.

1.2 Legislation Relating to Particular Sectors

The Guidelines on the Computation of Merger Notification Thresholds (the “Merger Rules”) provide the rules for determining whether a merger, acquisition of shares or assets, or joint venture has met the merger notification thresholds set by law and is thus subject to compulsory notification.

The Foreign Investments Act (Republic Act No 7042), as amended, and its implementing rules and regulations provide the general framework for foreign investments in the Philippines. Foreign equity investments in certain industries may be subject to restrictions, as provided in the 1987 Constitution and various pieces of legislation. Notably, Republic Act No 11647, further

amending Republic Act No 7042, was passed into law on 2 March 2022, lowering the minimum paid-in capital required for foreign nationals to own micro, small and medium-sized enterprises, subject to certain conditions.

The Foreign Investment Negative List identifies the industries that are subject to nationality restrictions and indicates the foreign equity allowed. It compiles the foreign ownership restrictions found in various laws and regulations, and is amended from time to time to reflect changes in the legislation. On 21 March 2022, the Philippines amended the Public Service Act (Commonwealth Act No 146) to allow full foreign ownership of entities providing services that qualify as public services. On 8 December 2022, Department of Energy Department Circular No 2022-11-0034 (“DOE Circular”) took effect and removed certain limitations on foreign participation in the exploration, development and utilisation of the Philippines’ renewable energy sector. The DOE Circular now allows 100% foreign investment in solar and wind energy projects. However, certain aspects of the business are still subject to foreign ownership restrictions, such as land ownership.

1.3 Enforcement Authorities

Various government agencies regulate foreign investments in the Philippines. However, the primary agencies concerned with ensuring compliance with the rules and regulations on foreign investment in the Philippines are the SEC and the Department of Justice. Republic Act No 11647 introduced the new Inter-Agency Investment Promotion Coordination Committee (IIPCC), which is intended to integrate all the promotion and facilitation efforts to encourage foreign investments in the Philippines. The IIPCC has representatives from various government agencies, including the Department of Trade and

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Industry, the Department of Finance, the Board of Investments, the Philippine Economic Zone Authority, the National Economic Development Authority and the Department of Information and Communications Technology.

Meanwhile, the PCC has original and primary jurisdiction to review proposed mergers, acquisitions and joint ventures. Other government authorities may assist in enforcing and reviewing compliance with the relevant regulation on foreign investment, depending on the industry in which the entity operates and the incentives availed of.

2. Jurisdiction

2.1 Notification

Notification is compulsory if a transaction exceeds the mandatory notification thresholds, namely:

- the aggregate annual gross revenues in, into or from the Philippines, or the value of the assets in the Philippines of the ultimate parent entity (UPE) of at least one of the acquiring or acquired entities, including that of all entities that the UPE controls, directly or indirectly, exceeds PHP7.8 billion (“Size of the Party Test”); and
- the value of the transaction exceeds PHP3.2 billion (“Size of the Transaction Test”).

These new thresholds took effect on 1 March 2024 and represent increases from the Size of the previous Party Test and Size of the Transaction Test of PHP7 billion and PHP2.9 billion, respectively, which were in effect from 1 March 2023 to 29 February 2024. However, the revised thresholds do not apply to transactions that were notified to the PCC before 1 March 2024,

nor to transactions that have already been the subject of a decision by the PCC.

Calculating the value of the transaction depends on the type of the transaction.

Notably, parties to a merger or acquisition with transaction values falling below the above-discussed thresholds may nonetheless voluntarily notify the PCC, and the PCC may, at its discretion, give due course to the same. Voluntary notification to the PCC may be made on the basis of an executed binding preliminary agreement or a definitive agreement.

Mergers and Acquisitions

For mergers or acquisitions of assets in the Philippines, in determining whether the Size of the Transaction Test is met, the amount is calculated based on the value of the assets that are the subject of the transaction or the gross revenues generated in the Philippines by such assets.

Acquisitions of Voting Shares

For acquisitions of voting shares of a corporation or of an interest in a non-corporate entity, the amount is calculated based on the aggregate value of the assets of the acquired entity (other than assets that are shares of said entity and entities it controls) or gross revenues from sales in, into or from the Philippines. Furthermore, as a result of the proposed acquisition, the entity acquiring the shares, together with its affiliates, should own voting shares or interests of:

- more than 35%; or
- more than 50%, if the entity or entities already own more than 35%.

Joint Ventures

For joint ventures, the amount is calculated based on the aggregate value of the assets that

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will be contributed into the proposed joint venture or the gross revenues generated by such assets, including any amount of credit or any obligations of the joint venture that any of the joint venture parties agreed to extend or guarantee.

Creeping Transactions

A merger or acquisition consisting of successive transactions that will take place within a one-year period between the same parties or entities under common control shall be treated as one transaction – ie, a creeping transaction.

Parties that exceed the thresholds are required to notify the PCC within 30 days from the execution of the definitive agreement.

For creeping transactions, if a binding preliminary agreement provides for such successive transactions, the entities shall provide notification on the basis of such preliminary agreement. If there is no binding preliminary agreement, notification shall be made when the parties execute the agreement relating to the transaction that exceeds the thresholds when taken together with the preceding transactions.

2.2 Failure to Notify

A transaction that met the notification thresholds but was not notified to the PCC, and that was consummated prior to the expiration of the waiting period, is considered void and will subject the parties and their UPEs to an administrative fine of 1% to 5% of the value of the transaction.

Pursuant to Memorandum Circular No 21-001, which implemented adjustments to the fines imposable under the PCA, parties that fail to notify the PCC within the period for notification but have yet to consummate the transaction will be fined in the amount of 0.05% of the value of

the transaction for the first 30 days of delay or fraction thereof. The fine shall be increased by 0.01% of the value of the transaction for every additional 30 days of delay or fraction thereof, provided that the total amount of the fine to be imposed shall not exceed PHP2.2 million.

The decisions imposing the penalties are made public.

2.3 Types of Transactions

Joint Ventures

Joint ventures, mergers and acquisitions of shares and assets, and issuances of new company shares have been found by the PCC to have failed to comply with the compulsory notification requirements.

“Joint venture” refers to a business arrangement where two or more entities or groups of entities contribute capital, services, assets or a combination thereof towards undertaking an investment activity or a specific project where each entity will have the right to direct and govern the policies of the joint venture with the intention to share in both profits and risks. An acquisition of shares may be considered as a joint venture if joint control will exist between or among the new existing joint venture partners after the acquisition.

Other Agreements

Other definitive agreements that grant parties the option to acquire the shares of stock, or other conversion agreements that allow other entities to gain or obtain control over an entity, may potentially be covered by the notification requirement.

The following transactions are exempt from the rules on compulsory notification:

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- internal restructuring within a group of companies wherein the acquired and acquiring entities have the same UPE;
- consolidation of ownership wherein the merger or acquisition involves several entities controlled by the same natural person and there is no change in control over the acquired entity post-transaction;
- land acquisition not for the purpose of obtaining control; and
- joint ventures formed by winning bidders in solicited public-private partnership projects under the Build Operate Transfer Law, upon application by the procuring government agency.

2.4 Definition of “Control”

“Control” refers to the ability to substantially influence or direct the actions or decisions of an entity, whether by contract, by agency or otherwise. Control is presumed to exist when the parent owns – directly or indirectly, through subsidiaries – more than half of the voting power of an entity, except in exceptional circumstances where it can clearly be demonstrated that such ownership does not constitute control.

Control may also exist even when an entity owns 50% or less of the voting power of another entity, namely when:

- there is power over more than half of the voting rights by virtue of an agreement with investors;
- there is power to direct or govern the financial and operating policies of the entity under a statute or agreement;
- there is power to appoint or remove the majority of the members of the board of directors or equivalent governing body;
- there is power to cast the majority votes at meetings of the board of directors or equivalent governing body;
- there is ownership over or the right to use all or a significant part of the assets of the entity; or
- there are rights or contracts that confer decisive influence on the decisions of the entity.

With respect to joint ventures, the granting of veto powers may also be deemed to vest control if the veto rights relate to strategic decisions in the business policy or activities of the corporation, such as:

- the appointment of corporate officers or key management personnel;
- determination of the budget;
- adoption of and amendments to the business plan; and
- other similar aspects of business management.

The existence of any such right may be sufficient to constitute control, depending on the content of the veto right and the importance of this right in the context of the specific business of the corporation.

2.5 Jurisdictional Thresholds

See 2.1 Notification. There are no special jurisdictional thresholds applicable to particular sectors.

2.6 Calculations of Jurisdictional Thresholds

The Size of the Party Test is calculated based on the value of the assets and revenues in the Philippines of the UPE, including all the entities it controls.

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The Size of the Transaction Test is calculated based on the value of the assets being acquired and/or gross revenues generated by the assets being acquired, or of the acquired entity and entities it controls, depending on the type of transaction.

In determining the value of the assets being contributed for joint venture transactions, the following shall be included:

- all assets that the joint venture partners agreed to transfer, or for which agreements have been secured for the joint venture to obtain at any time; and
- any amount of credit or any obligations of the joint venture that any of the joint venture parties agreed to extend or guarantee to the joint venture.

The aggregate value of assets or revenues in the Philippines shall be as stated on the most recent audited financial statements or, if the entity is not required to prepare audited financial statements, the last regularly prepared balance sheet in which those assets are accounted for.

The value of the assets or revenues in the Philippines of an entity shall be expressed in Philippine peso. If the financial statements were presented in a foreign currency, the value of the assets shall be converted into Philippine peso according to the average of the foreign exchange rate quoted by the Bangko Sentral ng Pilipinas over the 12 months of that financial year.

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

To satisfy the Size of the Party Test, at least one of the notifying UPEs, including all the entities it controls, directly or indirectly (the UPE and

all entities it controls, directly or indirectly, collectively comprise the “Notifying Group”), must either have aggregate annual gross revenues in, into or from the Philippines or have assets “in” the Philippines exceeding PHP7.8 billion.

The annual gross revenues from sales in, into or from the Philippines of the Notifying Group shall be as stated in the UPE’s consolidated financial statements, in accordance with the general principles discussed above. If, based on the accounting principles adopted by the UPE, the Notifying Group does not prepare consolidated financial statements, the annual gross revenues shall be determined by aggregating the gross revenues from sales in, into or from the Philippines of the entities within the Notifying Group, as booked or reflected in their separate statements of income and expenses.

Note that the gross revenues from sales in, into or from the Philippines of an entity within the Notifying Group that is jointly controlled with a different entity shall be proportionate to its ownership interest. Changes in the business are reflected in the financial statements, in accordance with accounting principles.

2.8 Foreign-to-Foreign Transactions

The PCA covers entities engaged in trade or industry in the Philippines or international transactions that have direct, substantial and reasonably foreseeable effects on trade in the Philippines. Thus, even if it occurs offshore or involves an entity not based in the Philippines, a transaction may be subject to notification to and review by the PCC if the notification thresholds are met. For the purposes of calculating the notification thresholds, the assets or revenues generated by the acquired or acquiring entity in the Philippines, including the entities they control, are material.

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2.9 Market Share Jurisdictional Threshold

There is no market share jurisdictional threshold, but restrictions on market share may be imposed by special laws. As discussed in **1.1 Merger Control Legislation**, the EPIRA, for example, provides restrictions as to the percentage of the installed generating capacity of a grid and/or national installed generating capacity that an entity may own, operate or control, singly or in combination with others.

2.10 Joint Ventures

Joint ventures may be formed by:

- incorporating a joint venture company;
- entering into a contractual joint venture; or
- acquiring shares in an existing company (if joint control will exist between or among the existing joint venture partners).

Joint ventures are subject to compulsory notification if the notification thresholds for size of the party and size of the transaction are met. For the purposes of calculating the size of the party, the contributing entities shall be deemed the acquiring entity, and the joint venture shall be deemed the acquired entity.

The size of the transaction is based on the aggregate value of the assets that will be combined in the Philippines or contributed into the joint venture, or the gross revenues generated in the Philippines by such assets exceeding PHP3.2 billion.

Calculating Asset Value

For purposes of calculating the aggregate value of the assets to determine the size of the transaction, the following shall be included:

- the value of all assets that are not owned by any of the joint venture parties for which agreements have been secured by any of the joint venture parties for the joint venture to obtain at any time, whether or not such joint venture entity is subject to the requirements of the PCA;
- any amount of credit or any obligations of the joint venture that any of the joint venture parties agreed to extend or guarantee to the joint venture, at any time; and
- the value of the assets owned by any of the joint venture parties that will be combined in the Philippines or contributed into the proposed joint venture.

In the formation of a joint venture through the acquisition of shares in an existing corporation, the assets to be combined through such acquisition will include the assets or revenues generated by the assets of the existing corporation.

2.11 Power of Authorities to Investigate a Transaction

The PCC, on its own or upon notification, has the power to review mergers and acquisitions that have a direct, substantial and reasonably foreseeable effect on trade or industry in the Philippines.

The statute of limitations for any action arising from a violation of any provision of the PCA or its implementing rules and regulations is five years, calculated from:

- the time the violation is discovered, in the case of criminal violations; and
- the time the cause of action accrues, in the case of administrative and civil actions.

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2.12 Requirement for Clearance Before Implementation

The parties to a transaction that is subject to compulsory notification are not allowed to consummate the transaction before either the approval of the transaction or the expiration of the relevant period of review.

2.13 Penalties for the Implementation of a Transaction Before Clearance

A transaction that meets the thresholds and does not comply with the waiting periods for PCC review prior to consummation shall be considered void and will subject the parties and their UPEs to an administrative fine of 1% to 5% of the value of the transaction.

2.14 Exceptions to Suspensive Effect

Transactions that meet the notification threshold are required to comply with the mandatory notification to the PCC, except those transactions that are expressly exempted from the notification requirements, as provided in **2.3 Types of Transactions**. There are no exceptions to the waiting periods for transactions subject to compulsory notification.

Even if the transaction is not included among the exempt transactions, parties may consider applying for a Letter of Non-Coverage to confirm that the transaction is not subject to compulsory notification, such as when the notification thresholds are not met or the transaction does not involve any change in control over the entity. Furthermore, as discussed in **2.1 Notification**, voluntary notification may likewise be resorted to, if the parties intend to get an assessment from the PCC as to whether the transaction poses competition concerns. The Merger Rules do not expressly provide a specific period for voluntary notification.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Parties can only consummate a notified transaction without the clearance of the PCC if the PCC fails to issue a decision within the period provided in the law. The PCA provides that the PCC has 30 days from commencement of the Phase 1 review to review the transaction. Within those 30 days, the PCC shall, if necessary, inform the parties of the need for a more comprehensive and detailed analysis of the transaction under a Phase 2 review, and request other information and/or documents that are relevant to its review.

The issuance of such a request has the effect of extending the period within which the agreement may not be consummated for an additional 60 days, beginning on the day after the request for information is received by the parties. The parties shall provide the requested information within 15 days from receipt of said request; otherwise, the notification shall be deemed expired and the parties must refile their notification.

If the PCC does not issue a decision within the period provided by law, the transaction is deemed approved.

Notably, where notification is voluntary and notification was given to the PCC, parties are prohibited from consummating the transaction pending clearance from the PCC. In the case of voluntary notification, the review periods are 45 days for Phase 1 and 90 days for Phase 2 review.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

Parties to transactions that exceed the thresholds are required to notify the PCC within 30 days from the execution of the definitive agreement. See 2.2 Failure to Notify.

3.2 Type of Agreement Required Prior to Notification

Notification may be made based on a binding preliminary agreement upon its execution, even if the complete and final terms and conditions of the merger or acquisition are yet to be agreed upon. A binding preliminary agreement refers to such terms and conditions on which parties to a planned merger or acquisition have reached a consensus and on the basis of which the parties intend to complete the transaction in good faith. The agreement may be in any form, such as a memorandum of agreement, term sheet or letter of intent.

If there is no binding preliminary agreement or if the parties do not wish to notify at that stage, notification to the PCC may be made prior to the execution of the definitive agreement relating to the merger or acquisition. The terms and conditions of the most recent draft of the definitive agreement shall be the basis of the notification, provided that the parties issue an undertaking that they intend to sign the agreement in good faith and to send to the PCC a copy of the executed version. However, if the parties amended or made changes to the agreement, they will be required to renotify the PCC.

3.3 Filing Fees

Notification filing and Phase 1 review are subject to a fee of PHP250,000.

Phase 2 review is subject to a fee of 0.01% of the value of the transaction, which shall not be less than PHP1 million nor exceed PHP5 million.

The fees are payable within ten days from receipt of an order of payment from the PCC.

3.4 Parties Responsible for Filing

If notice to the PCC is required for a merger or acquisition, then all acquiring and acquired pre-acquisition UPEs, or any entity authorised by a UPE to file notification on its behalf, must notify.

3.5 Information Included in a Filing

The notifying parties shall complete the Notification Form provided by the PCC. This includes information on the parties to the transaction, the value of the transaction and the assets and shares, the operations of the parties in the Philippines, horizontal and vertical relationships, and other relevant information. Documents to be submitted include:

- the definitive agreement or binding preliminary agreement;
- corporate documents;
- secretary's certificates that the transaction was approved by the shareholders;
- studies, surveys, analyses and reports that were prepared in relation to the transaction;
- confidential information memoranda;
- ordinary course documents; and
- financial statements and annual reports.

The submission must be in English. Certifications must be notarised, and consularised or apostilled if executed abroad.

3.6 Penalties/Consequences of Incomplete Notification

Incomplete notifications shall not be deemed filed and shall not stop the running of the 30-day

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period after execution of the definitive agreement within which the parties are required to file. Failure to complete the notification shall result in it being deemed unfiled and subject the parties to the penalties for a failure to notify.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The Notification Form includes a certification that the information and all appendices and attachments are complete, true and correct to the best of the ability of the authorised representative of the party filing the notification. If the party is deemed to have supplied incorrect or misleading information, the PCC may, after due notice and hearing, impose upon the party a fine of up to PHP1.1 million. The party may also be liable for perjury.

The supply of incorrect or misleading information has been defined to mean:

- providing information that is false, inaccurate or erroneous; or
- omitting, concealing or failing to make known information reasonably likely to be relied upon by the PCC in the performance of its official functions, provided that such omission, concealment or failure may mislead, tend to mislead, or otherwise create a false impression on the PCC.

Where the incorrect or misleading information is supplied in written or printed form, the supply of such information in any single document shall constitute one violation.

The PCC has yet to issue a decision fining a party for having supplied inaccurate or misleading information. If the information is unclear or incomplete, the PCC usually requests clarifications from the parties.

3.8 Review Process

Upon submission of the notification, the PCC will conduct a sufficiency check over a 15-day period (“Sufficiency Period”) to determine whether it has sufficient information to conduct a Phase 1 review. If the PCC requests further information about the transaction, the parties will have 15 days to provide this information. The PCC will assess the compliance with the request for further information within the period remaining from the Sufficiency Period (this remaining period starts from the issuance of the request for further information), which in no case shall be less than five days. If the PCC determines that the information is sufficient, the parties will be directed to pay a filing fee.

Phase 1

The Phase 1 review period will commence on the first business day following the date of payment of the filing fee, and will last for a maximum of 30 days. The Phase 1 review involves an initial assessment by the PCC to determine whether the transaction raises any competition concerns under the PCA that would warrant a more detailed review. If no competition concerns are raised at this stage, the transaction will be approved by the PCC within the Phase 1 review period.

However, if, for any reason, the PCC identifies competition concerns during the Phase 1 review or determines that it has insufficient information to form a conclusion as to the potential impact of the transaction on competition in the market, the PCC will refer the transaction for a Phase 2 review.

Phase 2

The Phase 2 review shall commence on the day after service by the PCC of a Phase 2 notice. The PCC will then have 60 days to conduct the

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Phase 2 review, during which period the transaction may not be completed. In practice, the Phase 2 review period may last longer than 60 days if the PCC requires more time to determine whether further information is required to conduct the Phase 2 review and, if so, in order for the parties to provide such further information.

3.9 Pre-notification Discussions With Authorities

Prior to filing a notification, parties that are required to notify may inform the PCC of their proposed transaction and request a pre-notification consultation. During consultations, the parties may seek non-binding advice on the specific information needed for the notification and the process for the same. The PCC encourages pre-notification consultations and this process is treated confidentially.

3.10 Requests for Information During the Review Process

Requests for information are common. The PCC is allowed to issue a Notice of Deficiency if a party's notification is insufficient before commencing Phase 1 review. In addition, the PCC Rules on Merger Procedure provide that the PCC may contact third parties, such as customers, suppliers or competitors, to obtain relevant information regarding the market, their views on the merger and any other competition issues. Accordingly, the PCC may likewise co-ordinate with the parties through conference calls or meetings to discuss theories of harm, relevant markets, voluntary commitments and timing of the review, among other matters.

3.11 Accelerated Procedure

The PCC may conduct an expedited review of the transaction for a shortened review period of 15 days for Phase 1 review of the following qualified transactions:

- transaction with no overlaps – the parties to the transaction and their Notifying Groups do not have any actual or potential horizontal, vertical or complementary relationship;
- global transaction with subsidiaries in the Philippines that act merely as assemblers or export manufacturers – the transaction is global where the acquiring and acquired entities are foreign and the Philippine subsidiaries export 95% of the production, while the 5% is minimal in relation to the entirety of the market in the Philippines for such product;
- global transaction with limited presence in the Philippines – the candidate-relevant geographic market of the transaction is global, and the parties have negligible or limited Philippine presence; and
- joint ventures solely for the construction and development of a real estate development project.

4. Substance of the Review

4.1 Substantive Test

In reviewing transactions, the PCC assesses whether the transaction is likely to result in substantially preventing, restricting or lessening competition in the relevant market.

4.2 Markets Affected by a Transaction

Market definition focuses on the extent to which customers would likely switch from one product to another ("Relevant Product Market"), or from a supplier in one geographic area to a supplier in another area ("Relevant Geographic Market"), in response to changes in prices, quality, availability or other features. The Merger Review Guidelines define a relevant market as one that could be subject to an exercise of market power that would likely result in significant harm to competi-

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tion, rather than anti-competitive effects that are insignificant or transient in nature.

The PCC assesses market definition within the context of the particular facts and circumstances of the merger under review. In determining the relevant market, the PCC considers the following factors, among others:

- the possibilities of substituting the goods or services;
- the cost of distribution of the goods or services, their raw materials, supplements and substitutes from other areas and abroad, and the time required to supply the market from those areas;
- the cost and probability of users or consumers seeking other markets; and
- national, local or international restrictions that limit the access by users or to alternative sources of supply, or the access of suppliers to alternative consumers.

Once a market is defined and where circumstances require, the PCC will consider market shares and concentration as part of the evaluation of competitive effects.

Determining Overlap

To determine whether there are overlaps between the parties' activities, the PCC looks at horizontal and vertical relationships between the parties in the relevant market. There is a horizontal relationship when the parties and/or entities within their respective Notifying Groups (which include subsidiaries, affiliates and other entities controlled by the UPE) provide products or services that directly compete in the same market. There is a vertical relationship when the parties and/or entities within their respective Notifying Groups operate at different levels of a production or supply chain (such as when an entity from

a party's Notifying Group produces goods that use raw materials processed by an entity in the other Notifying Group).

An "overlap" in the form of a vertical or horizontal relationship does not necessarily void the transaction, unless it is shown that the transaction is anti-competitive.

4.3 Reliance on Case Law

The PCC assesses market definition within the context of the particular facts and circumstances of the transaction under review. Relevant markets identified in past investigations in the same industry or investigations conducted in other jurisdictions may be informative but are not necessarily applicable to the PCC's assessment of transactions.

4.4 Competition Concerns

The PCC looks at unilateral effects and co-ordinated effects. In analysing the potential of a horizontal merger to result in anti-competitive unilateral effects, the PCC assesses whether the merger is likely to harm competition significantly by creating or enhancing the merged firm's ability or incentives to exercise market power independently. In analysing the potential for co-ordinated effects, the PCC assesses whether the merger increases the likelihood that firms in the market will successfully co-ordinate their behaviour or strengthen existing co-ordination in a manner that harms competition.

4.5 Economic Efficiencies

Anti-competitive mergers may be exempted from prohibition by the PCC when the parties establish that the merger has brought about or is likely to bring about gains in efficiencies that are greater than the effects of any limitation on competition that will likely result from the trans-

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action. Efficiencies that increase competition in the market may also be considered.

In order to be taken into account by the PCC, the efficiencies must be demonstrable, with detailed and verifiable evidence of anticipated price reductions or other benefits. Moreover, the efficiency gains must be merger-specific and consumers must not be worse off as a result of the merger. For that purpose, efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would arise.

4.6 Non-competition Issues

There is no explicit authority for the PCC to consider “non-competition” issues when reviewing transactions. However, as discussed in **4.2 Markets Affected by a Transaction**, the Merger Review Guidelines provide that the PCC assesses market definition within the context of the particular facts and circumstances of the merger under review.

Rules governing foreign direct investment (specifically, the limitations thereon) are not governed by the PCA or other rules or issuances of the PCC. The PCC does not require special filings for foreign direct investment.

4.7 Special Consideration for Joint Ventures

An acquisition of shares in a corporation will be deemed a joint venture transaction if joint control will exist between or among the new and existing joint venture partners post-transaction.

In the context of joint ventures, joint control refers to the ability of the joint venture partners to substantially influence or direct the actions or decisions of the joint venture, whether by

contract, by agency or otherwise. Joint control exists when an entity has the ability to determine the strategic commercial decisions of the joint venture (positive joint control) or to veto such strategic decisions (negative joint control).

For purposes of calculating the aggregate value of the assets to determine the size of the transaction, any amount of credit or any obligations of the joint venture that any of the joint venture parties agreed to extend or guarantee to the joint venture at any time shall be included.

5. Decision: Prohibitions and Remedies

5.1 Authorities’ Ability to Prohibit or Interfere With Transactions

The PCC may prohibit or interfere with a transaction if it will likely result in substantially lessening, restricting or preventing competition in the relevant market. The PCC may prohibit the implementation of the agreement or require modifications or amendments to address competition concerns. It may also impose penalties on the parties and nullify transactions that were consummated in violation of the compulsory notification requirements.

Decisions shall be in writing, and the merger parties shall be furnished with a certified copy of the decision. A non-confidential version may also be furnished to such persons as the PCC considers appropriate and published on the PCC website for public information.

5.2 Parties’ Ability to Negotiate Remedies

Should there be a finding that a merger is likely to substantially prevent, restrict or lessen competition, the parties are allowed to negotiate rem-

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edies to address the competition concerns. At any stage of the review, the parties may propose to amend or modify the agreements or undertake commitments that will remedy, mitigate or prevent the competition concerns identified by the PCC as arising from the merger.

Before accepting them, the PCC must reasonably believe that any commitments are clearly sufficient to address the competition concerns and are proportionate to them. In instances where the PCC considers the commitments proposed by the merger parties to be a suitable remedy, the PCC may decide to consult the stakeholders concerned or the public, and issue an invitation to comment on its website. Third parties may also be approached for their views on an individual basis.

Typical Remedies

The PCC considers two types of remedies to address competition concerns.

- Structural remedies are measures that directly alter market structure and address issues that give rise to competition problems. They include divestitures (forced sale of business units or assets, either in full or in part), licensing (compulsory licensing of legal rights, usually intellectual property rights), rescission (undoing a completed transaction) and dissolution (ending a legal entity).
- Behavioural remedies are measures that directly alter the behaviour of an entity.

The PCC may impose both structural and behavioural remedies simultaneously.

Changes and Alternative Remedies

Should the PCC decide that changes need to be made to the commitments in light of responses

to the consultation, it will discuss the material changes with the parties.

The PCC may consider and impose alternative remedies, notwithstanding the merger parties' proposals. The PCC will adopt a Commitment Decision once it has decided to accept the commitments of the merger parties. Where the PCC has rendered a Commitment Decision, the party that provided the commitment may apply to the PCC to vary, substitute or release such commitment.

5.3 Legal Standard

There is no strict legal standard that remedies must meet in order to be deemed acceptable. However, in determining the remedy or set of remedies that would be appropriate, reasonable and practicable to address the adverse effects of the merger on competition, the PCC shall take into account the adequacy and effectiveness of the action in preventing, remedying or mitigating the anti-competitive effects of the merger.

5.4 Negotiating Remedies With Authorities

At any stage of the review, the merger parties may propose commitments that will remedy, mitigate or prevent the competition concerns identified by the PCC as arising from the merger.

Upon submission of a proposed commitment, the review period shall be suspended for a period of 60 days. However, the PCC may shorten such period or extend it for a maximum of 30 days ("Commitment Review Period") through the merger parties' submission of a model request and waiver together with their proposed commitment. If the Commitment Review Period expires without the PCC's acceptance of the proposed commitment, Phase 1 or 2 review shall resume.

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The PCC will confer with the parties to discuss their proposed commitments. Should the PCC decide that changes need to be made to the commitments in light of responses to the consultation, it will discuss the material changes with the parties.

Alternative Remedies and Applications to the PCC

The PCC may consider and impose alternative remedies, notwithstanding the merger parties' proposals. The PCC will adopt a Commitment Decision once it has decided to accept the commitments of the merger parties. Where the PCC has rendered a Commitment Decision, the party that provided the commitment may apply to the PCC to vary, substitute or release such commitment. The written application shall contain the following:

- a description of the terms of the proposed varied or substitute commitment;
- an explanation as to the impact that the variation or substitution of the commitment will have on the competition concerns;
- for applications for release, an explanation as to whether the competition concerns sought to be addressed by the commitment which the party is seeking release from still exist; and
- full contact details of the main competitors, customers and clients of the party subject to the commitment.

All explanations should be accompanied by relevant supporting documents and certified under oath by an authorised representative of the party. Before varying, substituting or releasing a commitment, the PCC will consult with such persons as it deems appropriate.

5.5 Conditions and Timing for Divestitures

There is no PCC standard approach regarding the conditions and timing for remedies, as they are imposed or agreed upon on a case-by-case basis.

The timing for the enforcement of remedies will depend on the nature of the remedy – specifically, whether or not it is intended to take place prior to consummation (such as a simple divestment of particular assets) or after consummation (such as the submission of monitoring reports, etc).

The penalties for failure to comply with the commitments or conditions imposed by the PCC are usually indicated in the decision issued by the PCC for approval of the transaction. In addition to these penalties, failure by the parties to comply with a ruling, order or decision of the PCC after due notice and hearing may result in a penalty of between PPHP50,000 and PPHP2 million being imposed for each violation. A similar amount of penalty shall also accrue for each day of non-compliance, beginning 45 days from the time that said ruling, order or decision was served and ending when the party fully complies.

5.6 Issuance of Decisions

Decisions shall be in writing, and the merger parties shall be furnished with a certified copy of the decision. A non-confidential version may also be furnished to such persons as the PCC considers appropriate, and published on the PCC website for public information.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

To date, there have been no published decisions where the PCC required remedies or prohibited foreign-to-foreign transactions.

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6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

There is no requirement for separate notification of ancillary restraints. The PCC assessment of a transaction is holistic and, therefore, looks at all the provisions of and mechanisms in the agreement embodying the transaction, including any ancillary restraints. The PCC is not prohibited from reviewing or including in its decision any related arrangements or agreements imposing ancillary restraints if these arrangements or agreements will likely substantially prevent, restrict or lessen competition in the relevant market.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

In relation to a review, the PCC has the power to require the production of documents or information from third parties and to consult them in the process of reviewing commitments. The PCC may contact third parties, such as customers, suppliers or competitors, by means of market calls or enquiry letters in order to obtain relevant information regarding the market, their views on the merger, any competition issues it may raise and how they will be affected. Third parties may also include other governmental entities, sectoral regulators, industry associations, consumer bodies, think-tanks, market research firms or centres for information, among others.

7.2 Contacting Third Parties

Since the PCC was recently established, it often contacts third parties in reviewing transactions

to gather information about the relevant market and the possible effects of the transaction.

7.3 Confidentiality

The decision of the PCC on a transaction subject to compulsory notification is made public. When publishing a decision, the PCC provides a summary of the transaction, subject to the parties' claims of confidentiality.

Commercial information may be subject to claims of confidentiality. Such a claim must be substantiated, in that it must be accompanied by a detailed explanation why particular parts of the submissions should not be disclosed. A non-confidential version should also be provided at the same time as the original submission.

The PCC may share the non-confidential versions of submissions with the merger parties or third parties. Unless there is a claim of confidentiality, it will be presumed that none of the information contained in a party's submission is confidential. The following classes of information, however, are not generally considered to be confidential by the PCC:

- the fact of the merger itself;
- information that relates to the business of any of the merger parties but is not commercially sensitive in the sense that its disclosure would cause harm to the business;
- information that reflects the merger parties' views of how the competitive effects of the merger could be analysed; and
- information that is general knowledge within the industry, or that would likely be verified by any diligent market participant or trade, finance or economic expert.

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7.4 Co-operation With Other Jurisdictions

At any time before the case is submitted for decision, the PCC may consult a sector regulator or other relevant government agencies from foreign jurisdictions, if appropriate.

Information, including documents, shall not be communicated or made accessible by the PCC insofar as it contains trade secrets or other confidential information, the disclosure of which is not considered necessary by the PCC for the purpose of the review. If a transaction is under review in multiple jurisdictions, parties to the transaction may waive the confidentiality protections to allow the PCC to exchange otherwise protected information with competition authorities in other countries.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Parties to the merger may file a motion for reconsideration of a decision, order or resolution of the PCC within 15 days from receipt thereof. A motion for reconsideration shall be based on either of the following grounds:

- the evidence on record is insufficient to justify the decision, order or ruling; or
- the decision, order or ruling is contrary to law.

A final order or decision of the PCC shall be appealable to the Court of Appeals within 15 days from the notice of the final order or decision, in accordance with the Rules of Court. The appeal shall not stay the final order or decision, unless the Court of Appeals shall direct otherwise upon such terms and conditions as

it may deem just. In the appeal, the PCC shall be included as a party respondent to the case.

8.2 Typical Timeline for Appeals

See 8.1 Access to Appeal and Judicial Review. There have been successful appeals of decisions of the PCC – for example, the Court of Appeals reversed the decision of the PCC and upheld the legality of the co-acquisition by PLDT Inc and Globe Telecom Inc, two of the biggest telecommunications providers in the Philippines, of the telecommunications assets of San Miguel Corp.

8.3 Ability of Third Parties to Appeal Clearance Decisions

As a general rule, third parties cannot appeal a decision clearing a transaction. The PCC may also initiate and conduct a fact-finding or preliminary inquiry for the enforcement of the PCA upon a verified complaint being filed by an interested party.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

The Philippines does not have foreign direct investment or foreign subsidies legislation that requires separate filings other than those required under the PCA.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

There have been no significant changes to the PCA, except the adjustment to the notification thresholds, which have been increased to PHP7.8 billion and PHP3.2 billion for the Size of the Party and Size of the Transaction Tests,

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respectively. The PCC also issued two new guidelines:

- the Non-Horizontal Merger Review Guidelines, which outline the principal policy of the PCC with respect to non-horizontal mergers and acquisitions that may have an effect on trade, industry or commerce in the Philippines; and
- the Guidelines for the Motu Proprio Review of Mergers and Acquisitions in Digital Markets, which aim to guide corporations on potential competition issues that arise from mergers or acquisitions occurring in digital markets.

The Non-Horizontal Merger Review Guidelines were issued on 18 May 2023 and outline the factors the PCC takes into account in assessing the effects of non-horizontal mergers on market competition, the legal standards used for its analysis and review, and the framework to be used in determining the impact, effect and potential harm to competition that may arise from non-horizontal mergers.

The Guidelines for the Motu Proprio Review of Mergers and Acquisitions in Digital Markets were issued on 23 October 2023 and aim to provide greater clarity on how the PCC applies the Philippine Competition Act in the context of digital market transactions. They are intended to facilitate discussions and consultations between the PCC and digital market operators to make a preliminary assessment of the competitive effects of a potential transaction in the digital sector.

10.2 Recent Enforcement Record

In its 2022 year-end report, the PCC disclosed that the Competition Enforcement Office completed eight preliminary inquiries in the telecommunications, pharmaceuticals and transportation sectors, four of which became verified

complaints that were processed and investigated promptly. These complaints led to investigations into potential cartels and abuses of dominance in those sectors.

The Competition Enforcement Office also focused its enforcement actions on sectors that were crucial during the pandemic, such as e-commerce, energy, health, construction and public utilities. In line with this objective, the Competition Enforcement Office filed two Statements of Objections in the agriculture and food sectors. It also instituted non-adversarial proceedings and gathered three proposals to address conduct in the telecommunications sector.

With respect to M&A transactions, the PCC received seven notifications in 2022, with an aggregate transaction value of PHP320 billion. Three of these transactions were approved. The sectors involved were finance and insurance, information and communication, manufacturing, and transportation and storage. From 2016 to 2022, the PCC received a total of 260 transactions, with an aggregate transaction value of PHP5.16 trillion, most frequently from the manufacturing, financial and insurance activities, real estate, and electricity, gas, steam and air-conditioning supply sectors.

10.3 Current Competition Concerns

The PCC announced that it will prioritise investigating anti-competitive agreements, emphasising effective detection, prosecution and deterrence. The enforcement efforts of the PCC will focus on key sectors such as food and agriculture, water, energy, electricity, health and pharmaceuticals, telecommunications and e-commerce, with special attention being paid to bid rigging in public procurement. To adapt to the digital economy, the PCC has also introduced

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new enforcement tools, including a digital forensics lab and an online screening tool for detecting bid rigging. These tools enhance the use of electronic evidence and data analysis to improve case-building and increase cartel prosecutions.

POLAND



Trends and Developments

Contributed by:

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Sołtysiński Kawecki & Szlęzak (SK&S) is an independent Polish law firm with a team of more than 180 lawyers offering legal services to businesses from Poland and abroad. The firm has 30 years' experience in providing comprehensive advisory services in all aspects of Polish and EU competition law, as well as representing domestic and international clients before the OCCP, the European Commission and the courts. It obtains European Commission or

OCCP approvals for concentrations, in addition to assisting in cases concerned with payment backlogs and securing contractual advantages. The firm represents entrepreneurs seeking compensation for damage resulting from the breach of competition rules. SK&S has one of the largest competition law teams in Poland, meaning the firm can successfully handle complex cases that require a number of lawyers.

Authors



Krzysztof Kanton is a partner at Sołtysiński Kawecki & Szlęzak, where he has led the firm's competition law practice since 2008. He specialises in competition law, with extensive

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Szymon Murek is a senior associate at Sołtysiński Kawecki & Szlęzak. He advises on Polish and EU competition law in matters related to merger control, abuses of dominant

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Introduction

Competition law enforcement is still going strong in Poland. Ever since 2020 and the establishment of new stewardship, the Polish Competition Authority (*Prezes Urzędu Ochrony Konkurencji i Konsumentów* – PCA) has increased its activity. This past year has proven that the PCA is happy to engage in ever more enforcement measures and is keen to expand on its earlier practices as well as being willing to open up new avenues of co-operation.

Importantly, the PCA has increased its reach out towards the market and practitioners to incorporate the voices of various stakeholders in how enforcement policies and guidelines are designed and later implemented.

The past year has been challenging in terms of merger control. An ever-increasing workload of cases to be handled by the department, a continuation of previous policy switches and the handling of a couple of interesting cases have all contributed to a merger control landscape of rising PCA scrutiny. This has resulted in increased lead times, and also the need for practitioners to deal with and propose ever more novel or market-focused solutions to the PCA's objections.

This summary provides a short account of the applicable regulations, discusses general developments in the field of merger control practice and comments on the PCA's recent outreach to the market in shaping guidelines for foreign direct investment control proceedings.

Brief Overview of the Merger Notification System in Poland and General Trends

Merger notification procedures are regulated in the Act of 16 February 2007 on Competition and Consumer Protection (the “Act”). Transactions and arrangements of independent companies

that involve acquisition of control over another undertaking, mergers, purchase of assets or creation of a common undertaking ought to be notified to the PCA where the parties meet turnover thresholds.

The notification obligation still covers also foreign to foreign joint ventures, even when the joint undertaking will not be based or doing business directly in Poland. The prevalent approach of the PCA is to claim jurisdiction wherever general turnover thresholds are met, irrespective of where the given joint venture is set to operate.

Simple, uncontroversial or competitively immaterial mergers are cleared in Phase I proceedings with a one-month deadline. In practice, consents are issued within six to eight weeks from filing, as requests for information (stopping the review clock) remain a fairly standard practice of the PCA, even in uncomplicated transactions. If the PCA believes the concentration is likely to have anti-competitive effects, requires a market analysis or otherwise sees the case as complicated, Phase II proceedings can be initiated, extending the deadline by another four months.

The legislative framework concerning merger control remains unchanged since the implementation of the ECN+ Directive mid-2023. Moreover, there have been no legislative or other material changes to practice guidelines, which would affect the formal aspects of how notifications ought to be made and how the PCA reviews them.

As such, in recent years, noteworthy changes in relation to the notification include the following:

- ensuring that complete documents (eg, executed agreements governing the transac-

- tion) are provided and translated in full when drafted in a foreign language;
- adequate and up-to-date documentation proving a proper execution of the power of attorney; or
- providing a complete set of financial data.

This approach requires from practitioners a more thorough process of collecting documentation and drafting in order to cover potential avenues of questioning by the PCA during proceedings. Such increased thoroughness at the drafting phase should then result in a more streamlined and quicker review process once the notification is filed and handled by the PCA.

PCA in 2023 – Increased Detail and Formalisation of Proceedings

In 2023, the PCA issued 310 merger approvals, of which three were conditional decisions. In total, 321 new proceedings were initiated. By comparison, in 2022, the PCA issued 327 approvals for concentrations, of which only one decision was conditional. This clearly shows that the workload of the PCA is ever more increasing, with the number of incoming cases still larger than the number of decisions issued.

This trend, coupled with the rotation of case handlers and the slow intake process for new recruits joining the merger control department, means that wait times for decisions increase, even in cases that are uncontroversial in terms of their merits.

The inquisitiveness of the PCA is most apparent in merger control proceedings becoming increasingly formalised and detailed. Given that Polish Merger Control proceedings follow the Code of Administrative Proceedings, ensuring formal compliance was always important.

Moreover, the large workload of the Merger Control Department means that proceedings need to be prolonged in order to meet internal procedures and statutory deadlines. Given that requests for information (RFIs) result in a clock-stop, the PCA not only receives information it requires to review cases thoroughly, but it also gains some additional time to review decisions within the set deadlines.

Furthermore, the PCA is becoming ever more precise with its questions and requests for supporting data for the notification. In particular, the PCA requests increased information on the market structure and more precise market data, as well as, in certain relevant cases, asking for projections of the market structure a couple of years in advance in order to assess potential future effects of a given transaction.

This has the unfortunate effect of prolonging proceedings in all types of merger review cases, making even the most straightforward (in competition law terms) cases being subject to lengthy proceedings, potentially extending to longer than two months. The timing of the proceedings is one issue to be kept in mind in planning the post-signing period.

The PCA's Thorough and Holistic Market Review

Regardless of the increasing workload and length of proceedings, the PCA has not relinquished its thoroughness nor inquisitiveness. It is apparent that the PCA is willing to go into more detail in assessing the submitted concentrations. This is apparent in a few different ways.

Phase II proceedings are more commonplace

Firstly, the recent year has shown a readiness to refer uncertain or close-call cases to Phase II proceedings, which used to be rather rare but

is increasingly becoming a daily occurrence in proceedings before the PCA.

In turn, this has led to a noticeable increase in the PCA issuing decisions containing conditional approvals. A sign of the PCA's increasingly stringent approach, this should translate into the PCA issuing clarifications on conditional approvals for concentrations by entrepreneurs, to make the process more transparent and understandable to all entrepreneurs.

Adoption of a more market-focused approach rather than a case-by-case assessment

Secondly, a more comprehensive approach to assessing mergers in similar fields as well as ensuring continuity between previous filings and market approaches has been observed. This approach has been prompted, in the first instance, by market developments. Given that certain industries – eg, the animal-waste processing sector – have seen a wave of consolidations conducted in nearly the same timeframe, the PCA has decided to practically review these cases together as part of a wider market research exercise.

This was apparent as the simultaneous review of a couple of transactions in the same sector, as well as follow-on deals touching on the conclusions reached as part of these market investigations, were handled by the PCA as part of a wider competitive assessment of the market. Having initiated and concluded market investigations, and subsequently dealing with less controversial cases in the same sector, the PCA most likely cross-checked information across the various notifications and conducted its own fact-finding exercise to confirm these conclusions. Moreover, subsequent transactions relating to this market were later analysed with these findings and

topics fresh on its mind and affecting the review process in the subsequent proceedings.

This is evidence of a more market-focused approach and, potentially, a readiness to use its own database of data and conclusions in cross-checking an applicant's assertions in merger control notifications.

An additional consequence of the above is the PCA's internal cross-referencing of cases involving or filed by the same capital group. The PCA recognises that global conglomerates or multinational capital groups might file independently for the review of unrelated transactions with various attorneys drafting the notifications. Yet, in a couple of proceedings the PCA has directly indicated that it is willing to cross-reference any filings made with previous notifications in order to confirm the completeness and accuracy of data pertaining to the same undertaking.

A New Approach to Assigning Market Power?

An interesting example of an important decision, from the perspective of merger control, is the conditional approval issued by the PCA in October 2023 for Wienerberger's acquisition of Terreal Holding, as the PCA directly assigned market share to the trade mark in this transaction. The concentration involved Wienerberger's acquisition of 100% of Terreal Holding's shares but certain subsidiaries of the acquired company, including Creaton Polska, were excluded from the transaction. The condition was that Wienerberger continues to license the Creaton brand to Creaton Polska.

According to the PCA, the investigation showed that the concentration could lead to a breach of competition on the market for the sale of ceramic and cement roof tiles in Poland. Wienerberger owns the Koramic brand, while the acquired

company holds the rights to the Creaton brand. Their combined share in this market exceeds 40%. The PCA indicated that, due to the fact that Creaton Polska currently enjoys a license for the Creaton brand, the condition imposed is intended to oblige Wienerberger or its subsidiary to continue licensing the Creaton trade mark to Creaton Polska. The license will be free of charge and will cover all permitted uses, including the production, distribution and advertising of clay and cement roofing tiles, roofing underlays and accessories, and photovoltaic products.

This outcome was interesting in that market power was assigned neither to the production capacities nor actual distribution of products, but to the trade mark itself. Given that the transaction, in the scope of pertaining to Poland, concerned no tangible production or distribution business or assets, the PCA ascribed the market share to the trade mark alone and thus concluded that a potential anti-competitive effect could transpire.

It is a novel approach to assessing market power. While indeed in certain regulated markets IP rights could be sufficient to ascribe market power – eg, in pharmaceuticals, where IP and regulatory assets are key to a given product – it is more controversial to claim that a trade mark on its own, in a mature, unregulated and fairly straightforward market, holds sufficient market power to warrant a Phase II investigation and an imposition of remedies.

Finally, the case is material in that it presents a rare acceptance by the PCA of a behavioural remedy in place of a structural one. Divestment-based remedies were largely the PCA's preferred option, yet this case confirms that the authority is ready to negotiate and seek to find remedies

that will address the core of the alleged anti-competitive effect.

Foreign Direct Investment Guidelines and Legislative Problems

The PCA has shown its openness to market concerns in recently issuing updated guidelines on the notification of foreign direct investment (FDI) control transactions and the PCA's requirements in this regard. The May 2024 update is due to several years of practice and experience gained in this regard as well as voices from the practitioners' community, which prompted the PCA to supplement the guidelines with issues related to, among other things, the obligation to send the FDI Form to the European Commission. Additional topics addressed relate to determining who is obliged to submit a notice of planned investment to the PCA, which is addressed more broadly, and additional clarification of procedural and practical issues, including in particular the obligation to legalise foreign official documents.

This represents a welcome instance of the PCA's sensitivity to the voices of stakeholders and willingness to clarify any uncertainties or new developments arising from its practice in this relatively new and potentially unclear area of the law.

The experiences of the last few years have also shown another problem related to FDI. For context, the FDI control process was put in place as part of various COVID-19 pandemic-related regulations and almost arbitrarily vested with the PCA. This initial system, intended to be in force for two years, was extended, yet no major legislative changes were implemented.

A problem with the investment control process, as stated currently, is one of competence. The law requires from the PCA an assessment of a proposed transaction, generally speaking, in

respect of its influence on national and EU safety, interests and public health considerations. These competencies, however, fall outside the scope of traditional antitrust enforcement.

While the relevant legislation has assigned the PCA a new requirement, it does not explicitly provide for a procedure for the PCA to obtain or access information relating to national interests. It is furthermore likely that, with many national safety reports or reviews being confidential or otherwise privileged, the PCA is simply not explicitly entrusted with the right to access the necessary information. Moreover, these considerations are arguably better assessed by other policymakers, including members of government, or by specialised agencies (such as various intelligence authorities). This situation leads to an actual impasse, where the PCA ought to perform an analysis of national interest yet finds its hands tied when attempting to perform the task. The uncertainty leads to problems in foreseeing how and how quickly cases will be handled and what factors will be taken into account by the PCA in reviewing FDI control cases. Hopefully, the coming year will bring some developments.

Resolution of Controversial Cases

Although the year passed at a slower pace in terms of the issuance of important merger control decisions by the PCA, and the PCA focused on antitrust enforcement and consumer protection cases, it faced an important test in front of the courts, defending its appeal of the first instance judgment repealing its decision in the Nord Stream 2 case.

As a reminder, back in 2020 the PCA found that the conclusion of agreements related to financing the construction of the Nord Stream 2 off-

shore gas pipeline amounted to the creation of a joint venture, for which neither Gazprom nor the remaining financial investors (companies from the Engie, Shell, Uniper, OMV and Wintershall capital groups) had received merger clearance in Poland. The PCA imposed maximum fines, with Gazprom fined over PLN29 billion, and total fines amounting to almost PLN30 billion – a world record fine. The PCA also ordered all parties to terminate their contracts related to financing the construction of the Nord Stream 2 pipeline.

The parties involved in the project appealed the PCA decision. The arguments raised were relatively straightforward – the appellants did not question the facts of the case determined by the PCA and confirmed that they had concluded the financing agreements, but stated that such actions do not amount to a creation of joint venture under the Act.

In November 2022, the Competition Court (court of first instance for PCA decisions) annulled the PCA's decision in full. The PCA appealed this judgment to the Appeal Court and in October 2023 received an unfavourable judgment. The Appeal Court upheld the decision of the Competition Court, amending the judgment only to a limited extent, finding that the PCA's decision was not issued in gross violation of the law. This judgment represents a significant blow to the PCA's approach, showcasing a readiness of the courts to rein in too wide an interpretation of the law by the PCA, moreover in a very high-profile and significant case.

At the time of publication of this chapter of the guide (July 2024), no public comments have been made with regard to the PCA filing a cassatory appeal to the Supreme Court.

ROMANIA



Trends and Developments

Contributed by:

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GNP Guia Naghi & Partners has more than 20 years of expertise in the legal business, and has the strong belief that every problem has more than one solution. The firm gathers 28 lawyers with long-standing track records and wide expertise, recognised by reputed international publications for work in competition, TMT, pharma, dispute resolution, IP, public procurement and contracts. GNP's expertise includes competition investigations, recently being involved in the commitment procedure before the Romanian Competition Council in a case on the

poultry meat production and commercialisation market in Romania, as well as state aid, with a strong focus on the energy sector. The firm is currently involved in various merger transactions in the pharma, FMCG, energy, natural resources and retail sectors, including the transaction between Ahold Delhaize group (owner of the Mega Image store chain) and the investment fund MidEuropa (owner of Profi store chain) consisting in the acquisition of the Profi chain by Ahold Delhaize. This EUR1.3 billion deal is expected to be completed by the end of 2024.

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Manuela Guia is a highly qualified lawyer recognised in the Romanian competition field, with more than 20 years' experience. Having previously been a partner at a leading Big4

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Otilia Vilcu is a well-versed lawyer with more than 10 years of experience in navigating the intricate landscape of competition law. Leveraging her extensive and comprehensive

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Introduction

Recent years have seen many important updates to European competition law. After the revision of the Vertical Block Exemption Regulation (VBER) and the update of the Guidelines on Vertical Agreements in 2022, as well as the adoption of the new Guidelines on Horizontal Agreements in 2023, it was soon the turn of the merger control regime to be in the spotlight. As of 1 September 2023, the new Merger Simplification Package applies, which is a welcome step made by the European Commission to simplify the assessment and clearance mechanism for mergers with a European dimension. Moreover, the Foreign Subsidies Regulation established a new category of pre-approval oversight for merging companies in the EU.

In Romania, the merger control mechanism was not per se under scrutiny, but the national landscape nevertheless imposed new obligations on merging parties in the form of new modifications to the Foreign Direct Investments framework.

Relevant European Updates and Their Impact on Merger Control in Romania

The main purpose of the Merger Simplification Package was to establish, on the basis of the European Commission's decision-making prac-

tice, a set of criteria that accurately identifies cases that do not raise competition risks, as it was found that more than 90% of mergers notified to the Commission do not actually raise competition concerns and are cleared unconditionally. The package includes three main acts:

- a new Implementing Regulation on the control of concentrations between undertakings, repealing the 2004 version;
- a Commission Notice on a simplified treatment for certain concentrations; and
- a Commission communication regarding the transmission of documents.

The concrete changes brought about by the Merger Simplification Package include the following:

Extension and clarification of the categories of simplified cases

The simplified procedure has been extended to include two new categories of cases that may benefit from such treatment. These relate to the value of market shares where vertical relationships exist between the merging parties. So-called super-simplification cases were also introduced for cases involving joint ventures whose activities are located exclusively outside the EEA

or cases not involving horizontal overlaps or vertical relationships. The information required for these filings is significantly reduced and parties are advised to notify the Commission directly, without pre-notification contacts, thus saving a lot of time. Moreover, flexibility clauses were introduced to allow for the analysis under the simplified procedure of mergers that would not normally meet the criteria for this procedure.

Also, the new simplified procedure includes a clearer and more detailed list of safeguards and exclusions (ie, situations where a concentration that technically qualifies for simplified treatment could still be investigated under the full procedure).

Changes to the notification forms

A completely new Simplified Notification Form has been introduced, now having a tick-the-box format, where notifying parties simply fill in pre-defined tables for most questions, and fill in text boxes for clarification for more complex situations.

There are also changes to the Notification Form for the full procedure, from which some sections have been eliminated. The new form contains a special section for concentrations to which flexibility causes may apply and it provides clear instructions for requesting exemptions from providing information, which simplifies the subsequent procedure, as there is no need to resort to requests for additional information and clarifications.

The simplification package of 2023 aims to alleviate, where possible, the procedural burden in cases of mergers that do not raise competition concerns and therefore allows the Commission to focus its investigative efforts on more detailed cases.

It is important to note that these new rules only apply to mergers with a European dimension and do not have an impact on national merger control rules. However, they could serve as an inspiration for member states, and therefore for Romania, in regulating their own national merger assessment regimes, in the sense of de-bureaucratisation and simplification. Until then, however, the new provisions will benefit the large Romanian economic operators who intend to carry out mergers with a European dimension.

Article 22 of Regulation 139/2004 on the Control of Concentrations Between Undertakings (the “EU Merger Regulation”)

The new changes to simplify the merger control mechanism are not the only recent concerns of the Commission regarding the merger regime in the European Union. Attention now turns to the developments on the interpretation that the European Commission was promoting with regard to Article 22 of the EU Merger Regulation, which governs the cases in which transactions that do not have a Community dimension can still be referred to the Commission for assessment.

In 2022, the Commission adopted Guidelines on the application of Article 22, which make provision for referring to the European Commission those mergers that do not meet the European thresholds, if the transaction affects trade between member states and threatens to significantly affect competition in the territory of the member state(s) making the referral request. The guidelines also seem to encourage member states to consider referring transactions to the Commission when these are not within the scope of their national merger control rules. In practice, these new guidelines create an unpredictable ex-post merger control mechanism.

This approach caused quite a lot of controversy at the time.

More recently, in March 2024, in the context of the famous Illumina/Grail case, Advocate General Emiliou has challenged the European Commission's approach as it leads to a significantly inflated extension of the EU Merger Regulation and the Commission's jurisdiction, which basically gains the power to review almost any concentration. Moreover, this power is at odds with the principle of "precise allocation" of competence between the Commission and the national competition authorities.

The final judgment of the CJEU in this case is expected to be delivered by the end of 2024 but, until then, merging parties should continue to be cautious.

Updates on Foreign Direct Investments Control in Romania

A topic that occupied the recent public discourse in the Romanian competition field is the severe Foreign Direct Investments (FDI) control mechanism.

Historically, the examination of foreign investments was the prerogative of the European Commission, but member states have gradually created, expanded and strengthened their own investment screening systems. The need for such more rigorous controls has grown, particularly in view of the COVID-19 pandemic and global security concerns following Russia's invasion of Ukraine. Despite regular co-operation and a number of important similarities between national screening mechanisms, member states continue to show variations in the actual screening.

Given the European Commission's desire to implement a decentralised mechanism for examining FDI in the Union, some differences in regulation from state to state are natural. However, in Romania in particular, the system raises an original problem: even European investors (and therefore even Romanian investors) are subject to notification obligations under the national FDI regime.

Observing the progression of modifications that eventually led to the current situation, the first form of GEO 46/2022 on measures to implement Regulation (EU) 2019/452 establishing a framework for the examination of foreign direct investments in the Union (GEO 46/2022) did not differentiate between types of investors and the definition of the foreign investor was clear. In June 2023, however, the concept of "European Investor" was introduced and an exception was established that became, de facto, the rule and gave rise to the interpretation that any investment, regardless of whether the investor is foreign or EU-based, should be subject to FDI scrutiny if the FDI criteria were met. With the modification of the GEO 46/2022 in December 2023, it became apparent that this was indeed the will of the Romanian legislator and therefore, at present, any investment that falls under the scope of the FDI screening, regardless of the identity and nationality of the investor (thus, even Romanian investors), should be notified to the Commission for the Examination of Foreign Direct Investments (CEISD) if the investment cumulatively fulfils the following conditions:

- the investment exceeds EUR2 million; and
- the investment is included in the list of sensitive sectors established by the Supreme Council of National Defence Decision No 73/2012 ("Decision No 73/2012"), namely:
 - (a) the security of citizens and communities;

- (b) border security;
- (c) energy security;
- (d) transport security;
- (e) the security of supply systems for vital resources;
- (f) critical infrastructure security;
- (g) the security of information and communication systems;
- (h) the security of financial, fiscal, banking and insurance activities;
- (i) the security of the production and circulation of weapons, ammunition, explosives, toxic substances;
- (j) industry security;
- (k) protection against disasters;
- (l) protection of agriculture and the environment; and
- (m) protection of the privatisation operations of enterprises with state capital or their management.

Please note that the FDI control applies to investments of any kind that allow the establishment or maintenance of lasting and direct links with the target company (eg, transactions, restructuring, capital increases, investments in tangible or intangible assets, etc). Further, the acquisition of control by the investor does not represent a condition associated with the FDI notification obligation, this being only one of the ways that permits establishing/maintaining lasting links with the target company.

There are also a number of marginal elements of the national legislation that currently pose additional difficulties in the practical application of the provisions of GEO 46/2022. These include the method of establishing the value of the investment, which it is understood will be laid down by instructions from the Romanian Competition Council, as well as the EUR10,000 fee that the investor must pay for the examination.

Moreover, the list of sectors that fall under the scope of the FDI regime is extremely broad, as GEO 46/2022 is referring to CSAT Decision 73/2012, which seems to be an easy way to include as wide a variety of businesses and activities as possible within the scope of the FDI mechanism. Note that, in the absence of any other criteria or circumstances, this can encompass an extremely wide variety of activities and, in one way or another, almost any investment could be subject to scrutiny, creating significant pressure on potential investors who will be put in the position of notifying investments that perhaps only marginally touch one of the 13 areas of interest, in order to shelter themselves from fines of up to 10% of the global turnover in the year prior to sanctioning and to avoid the risk of annulment of the investment.

New Notification Obligations Under the Foreign Subsidies Regulation

Merging parties in Romania should also be mindful of the additional category of ex ante notification obligations introduced by the Regulation 2022/2560 on foreign subsidies distorting the internal market (the “FSR Regulation”).

The FSR Regulation includes three procedures:

- a notification-based procedure to investigate concentrations;
- a notification-based procedure to investigate bids in public procurement; and
- an ex officio procedure to investigate all other market situations, where the Commission can start a review on its own initiative.

In economic concentration cases, a transaction should be notified to the European Commission if at least one of the merging undertakings, the acquired undertaking or the joint venture is established in the Union and generates an

aggregate turnover in the Union of at least EUR500 million and the parties were granted foreign financial subsidies (ie, financial contributions received, directly or indirectly, from non-EU countries which confer a benefit on an undertaking engaging in an economic activity in the internal market) of more than EUR50 million in the last three years.

This implies a standstill obligation until the clearance of the European Commission. The failure to notify a concentration that meets the conditions or implementing a transaction before the authorisation may lead to fines of up to 10% of the annual turnover of the undertakings concerned, in the preceding financial year.

It is important to note that the Commission can also request ad-hoc notifications for concentrations that are below the thresholds, if it suspects the existence of distortive foreign subsidies and, moreover, the ex officio procedure allows the Commission to start investigations on its own initiative if information indicates the possibility that a foreign subsidy distorting the internal market exists.

The procedure under the FSR Regulation and the existing national and EU merger control regimes, as well as the FDI authorisation mechanism, are applicable in parallel, which means that the merging parties should observe three different procedures that, in some cases, may lead to different decisions as the standards of review are distinct.

Insights on Merger Control in Romania

Recent years have been quite intense in merger control at national level. In 2022, the Romanian Competition Council authorised 94 transactions, this being the highest number of cleared economic concentrations in almost 16 years.

In line with this trend, in 2023, the Competition Council cleared 74 transactions in different fields such as:

- energy (eg, the takeover of Next Energy Distribution by Cis Gaz and Toma family and authorisation of the creation of a company for the construction of a combined cycle power plant by Oltenia Energy Complex and Alro);
- pharma (eg, the takeover of a series of pharmacies by Mini-Farm);
- health sector (eg, the takeover of Monza Hospital by Brain Hospital and Roho Medical Investments);
- entertainment industry (eg, the takeover of UNTOLD Universe); and
- food retail (the takeover of Cora stores by the Carrefour group).

Only one of these transactions was authorised with commitments (ie, the takeover of Gedeon Richter Farmacia SA and Pharmafarm SA by Mediplus Exim). Moreover, in 2023, the Commission for the Examination of Foreign Direct Investments (CEISD) issued 105 authorisation decisions, after analysing transactions from the point of view of national security.

The year 2024 also started strongly. Up until June, 23 new economic concentration cases have been filed to the Competition Council in different sectors, including what could be called the transaction of the year, the acquisition of Profi Rom Food SRL, an important food retail chain, by Ahold Delhaize group.

Regarding new developments in merger control at national level, representatives of the Competition Council stated that many of Romania's markets are too fragmented and do need some concentration so that fewer, bigger and more efficient players are created. These play-

ers should be able to compete on the national and international markets and offer better and cheaper services and products. On the other hand, the markets where a higher level of concentration has already been reached will be under more scrutiny, the competition authority already announcing that, in 2024, it will carefully examine mergers in the banking, telecommunications and food retail sectors.

Transactions authorised by June 2024 include important names in the following sectors:

- energy (eg, the takeover of EP Wind Project (ROM) Six by Engie Romania, the takeover of Stratum Energy Romania by Emma Lambda Limited and the takeover of the business line operating three wind plants and four additional wind park projects by Alive Wind Power One);
- banking (eg, the takeover of First Bank by Intesa Sanpaolo Bank);

- retail (eg, the takeover of Drim Daniel Distributie FMCG by Zabka Polska and a series of natural persons); and
- pharma (eg, the takeover by the Fildas-Catena over a group of four pharmacies belonging to Andofarm and Zen pharma).

Especially in the last part of 2023, and continuing in 2024, the competition authority achieved important performance results in reducing the analysis time and issuing authorisation decisions in short periods of time for both ordinary merger control files and the examination of FDI cases.

Prior contact with the authority is also an important element of the Romanian merger control regime, as representatives of the Competition Council are open to discussion and are keen to facilitate the process, their support becoming especially helpful in recent years.

SAUDI ARABIA

Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.570

- 1.1 Merger Control Legislation p.570
- 1.2 Legislation Relating to Particular Sectors p.570
- 1.3 Enforcement Authorities p.570

2. Jurisdiction p.570

- 2.1 Notification p.570
- 2.2 Failure to Notify p.570
- 2.3 Types of Transactions p.572
- 2.4 Definition of "Control" p.572
- 2.5 Jurisdictional Thresholds p.572
- 2.6 Calculations of Jurisdictional Thresholds p.573
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.574
- 2.8 Foreign-to-Foreign Transactions p.575
- 2.9 Market Share Jurisdictional Threshold p.575
- 2.10 Joint Ventures p.576
- 2.11 Power of Authorities to Investigate a Transaction p.577
- 2.12 Requirement for Clearance Before Implementation p.577
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.577
- 2.14 Exceptions to Suspensive Effect p.578
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.579

3. Procedure: Notification to Clearance p.579

- 3.1 Deadlines for Notification p.579
- 3.2 Type of Agreement Required Prior to Notification p.579
- 3.3 Filing Fees p.579
- 3.4 Parties Responsible for Filing p.579
- 3.5 Information Included in a Filing p.579
- 3.6 Penalties/Consequences of Incomplete Notification p.580
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.581
- 3.8 Review Process p.581
- 3.9 Pre-notification Discussions With Authorities p.581
- 3.10 Requests for Information During the Review Process p.582
- 3.11 Accelerated Procedure p.583

4. Substance of the Review p.583

- 4.1 Substantive Test p.583
- 4.2 Markets Affected by a Transaction p.583
- 4.3 Reliance on Case Law p.584
- 4.4 Competition Concerns p.585
- 4.5 Economic Efficiencies p.585
- 4.6 Non-competition Issues p.585
- 4.7 Special Consideration for Joint Ventures p.585

5. Decision: Prohibitions and Remedies p.585

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.585
- 5.2 Parties' Ability to Negotiate Remedies p.586
- 5.3 Legal Standard p.586
- 5.4 Negotiating Remedies With Authorities p.586
- 5.5 Conditions and Timing for Divestitures p.586
- 5.6 Issuance of Decisions p.587
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.587

6. Ancillary Restraints and Related Transactions p.587

- 6.1 Clearance Decisions and Separate Notifications p.587

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.587

- 7.1 Third-Party Rights p.587
- 7.2 Contacting Third Parties p.588
- 7.3 Confidentiality p.588
- 7.4 Co-operation With Other Jurisdictions p.588

8. Appeals and Judicial Review p.588

- 8.1 Access to Appeal and Judicial Review p.588
- 8.2 Typical Timeline for Appeals p.589
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.589

9. Foreign Direct Investment/Subsidies Review p.589

- 9.1 Legislation and Filing Requirements p.589

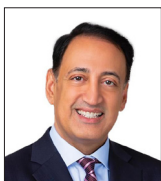
10. Recent Developments p.589

- 10.1 Recent Changes or Impending Legislation p.589
- 10.2 Recent Enforcement Record p.589
- 10.3 Current Competition Concerns p.589

GLA & Company provides strategic, cost-effective and forward-thinking legal representation for companies seeking to do business in the Middle East. The firm's practice encompasses all legal issues companies will likely encounter in the global business environment. With extensive experience advising clients in the Gulf Cooperation Council (GCC) states of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE, it offers unique insights for companies seeking to establish or expand business operations in

these nations. The firm's emphasis on deals is to get them cleared with the local competition authority and it has excellent relationships with regulators in the GCC. GLA has been successful in securing no objections from these bodies to clear deals. The firm's lawyers are intimately familiar with the governing sources of authority and routinely work with the relevant agencies, departments and committees on behalf of clients.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The key merger control legislation in Saudi Arabia comprises the following:

- Cabinet Resolution No 372 of 1440H promulgating the Kingdom of Saudi Arabia (KSA) Competition Law (Royal Decree No (M75) of 1440H) (the “KSA Competition Law”).
- The KSA Competition Law is supplemented by the implementing regulations pursuant to Resolution No 337 of 25/1/1441H concerning the Executive Regulations of the KSA Competition Law (“Executive Regulations”).

1.2 Legislation Relating to Particular Sectors

In terms of the legislation concerning particular sectors, there are the updated Merger Review Guidelines issued by the GAC (defined in **1.3 Enforcement Authorities**) in November 2023 (“Guidelines”).

1.3 Enforcement Authorities

The KSA General Authority For Competition (GAC) enforces the relevant legislation.

2. Jurisdiction

2.1 Notification

Notification is compulsory with respect to any entity that is encompassed within the scope of the KSA Competition Law.

Exceptions:

- transactions that do not result in a change of control (eg, acquisition of minority interests with no veto rights over strategic decisions or

internal restructuring within the same corporate group); and

- public institutions and state-owned companies if they are solely authorised by the government to supply goods or services in a certain field.

2.2 Failure to Notify

The KSA Competition Law provides for the following penalties upon breach.

- In respect of Articles 5, 6, 7, and 11 (Anti-competitive Practices, Abuse of a Dominant Position, and Unlawful Economic Concentrations), a fine not exceeding an amount equal to 10% of the total annual sales of the subject matter of the violation, or, where it is not possible to assess the relevant sales, a fine not exceeding SAR10 million, may be imposed. The Settlement Committee (GAC committee charged with reviewing any alleged breaches of the KSA Competition Law and Executive Regulations, excluding Articles 12 and 24, and imposing penalties appropriately) may, at its discretion, elect instead to impose a fine not exceeding three times the profit generated by the offence. The amount of the fine may be doubled in the case of a repeat offence.
- In respect of Article 16 (impeding investigation), a fine not exceeding an amount equal to 5% of total annual sales, or, where it is not possible to assess the relevant sales, a fine not exceeding SAR5 million, may be applied. The value of the fine may be doubled in the case of a repeat offence.
- In respect of other breaches, a fine not exceeding SAR2 million may be enforced.

When the Settlement Committee imposes any of the aforementioned penalties, the following shall be taken into consideration.

- If the establishment is engaged in several activities where each activity differs from the other, any fine shall be assessed according to the nature of the activity of the subject matter of the violation, taking into account:
 - (a) the activities targeted by the violation;
 - (b) the conditions and circumstances of the violation;
 - (c) the gravity of the violation; and
 - (d) the effects of the violation.

With respect to penalties implemented, the GAC publishes the relevant performance review across all of its competencies. The latest report provided on the GAC's website is for year 2022. The report details that the GAC, since its inception, received 642 complaints in regard to violations of the KSA Competition Law to date (including 127 new complaints for 2022). Ultimately, the GAC proceeded with 22 new cases in total and decided to initiate investigation, research, and evidence-gathering. In 2022, an undisclosed number of final judgments were issued in favour of the GAC, in comparison to 21 judgments in 2021. Pursuant to Article 19 of the KSA Competition Law, the final judgments implemented against the violators shall be published at the expense of the violators. As such, the GAC published, in its 2022 annual report, tables of judgments issued in its favour, along with each issuer, the number of enterprises, the fine amounts, the violation types and the sectors each violator did business in. The top two violation types involved were categorised as "Collusion in tenders" and "abuse of dominant position". The total amount of collected fines collected was SAR90,566,313.70 for the year 2022 compared to SAR102.12 million in 2021.

On the economic concentration landscape, the GAC has issued its full year-round statistics of notifications for 2023 and the statistics for

Q1 2024. The numbers showcase the amount of economic concentration notifications filed before the GAC, the amount of clearances by the GAC, the amount of no-notification-required decisions, and the amount of notifications under review, among other relevant information. On one hand, Q1 2024 saw 93 new economic concentration notifications submitted to the GAC, as opposed to a total of 313 notifications in 2023. The Q1 2024 notifications ended in 48 clearances, and 32 no-notification-required decisions with 13 notifications still under review. On the same track, the GAC's decisions were a total of 172 clearances, 128 no-notification-required decisions, and three conditional clearances with only ten notifications still under review by the end of 2023.

It should be noted that the percentage of the 2023 notifications were 83% acquisitions, and 14% joint ventures, followed by a low 2% of merger notifications, among others. Q1 2024 has a similar pattern seeing 71% acquisitions, and 21% of joint ventures, followed by a stable 2% of merger notifications, among others. Regarding economic concentrations involving foreign parties, 63% of the notifications involved foreign parties in Q1 2024, as opposed to a total of 64% of the notifications in 2023 (foreign-to-foreign and a foreign party included).

In terms of economic-concentration-related violations, the GAC has imposed its first fine, since October 2020, for failing to notify an economic concentration. This is the second time such a fine was imposed since the Competition Law was implemented. The fine was issued against Panda Retail Company and Atabat Al-Bab Telecom and Information Technology Company, as announced by the GAC.

The GAC, in a piece of media circulated by Talal Al Hogail, head of the GAC's M&A Department, stated that it undertook investigative efforts upon a decision by of the GAC Board of Directors, revealing that the parties to the transaction have indeed engaged in a notifiable economic concentration, and concluded its implementation without notifying the GAC, in violation of Article 7 of the Competition Law. Upon concluding that the Parties are indeed in violation of the Competition Law, the GAC has sanctioned each party with a financial fine of SAR400,000. This sanction is in line with the penalties prescribed under Article 19 of the Competition law for failure to notify an economic concentration.

2.3 Types of Transactions

The KSA Competition Law uses a principle of economic concentration to identify merger control issues. Economic concentration is defined as any action that results in a total or partial transfer of ownership of assets, rights, equity, stocks, shares, or liabilities of a firm to another by way of merger, acquisition, takeover, or the joining of two or more managements in a joint management, or any other form that leads to the control of an entity, including influencing its decision, the organisation of its administrative structure, or its voting system. This definition captures asset and share purchases, joint ventures, mergers, and takeovers.

Exceptions:

- The Guidelines confirm that if a transaction does not lead to a change of control over the target entity, then no GAC filing would be required.
- Public institutions and state-owned companies, if they are solely authorised by the government to supply goods or services in certain a field.

2.4 Definition of “Control”

While prior to the issuance of the Guidelines it remained unclear how the GAC would analyse the elements of control, the Guidelines now clarify this by defining “control” as “the ability to exercise decisive influence over the strategic or operational decisions of the target entity”, including the appointment of senior management and approval of budgets, business plans, and major investments.

It is now clear that transactions that do not result in a change of control (eg, acquisition of minority interests with no veto rights over strategic decisions or internal restructuring within the same corporate group) are within the scope of the KSA Competition Law and notice to the GAC is not required.

2.5 Jurisdictional Thresholds

Article 7 of the KSA Competition Law provides that the entities involved in the economic concentration must notify the concentration to the GAC if the total annual sales value of the entities seeking to participate in the economic concentration exceeds the amount determined by the Regulations.

Article 12 (1) of the Executive Regulations specifies that the concentration must be notified to the GAC if the total annual sales value of all entities intending to participate in the economic concentration exceeds SAR200 million. This requirement was established in accordance with the GAC's approved decision dated 23/08/1444H corresponding to 15/03/2023G, which increased the threshold from SAR100 million to SAR200 million.

Furthermore, the GAC Board of Directors, in its meeting No 84 dated 23 October 2023, announced new requirements for an economic

concentration's eligibility for notification before the GAC, making KSA a minimum-threshold jurisdiction.

In addition to the financial threshold established by the Executive Regulations above, the parties must also fulfil the following.

- **Target Entity Sales Threshold** – of the Financial Threshold, the annual sales of the target entity (in and outside KSA) in an economic concentration must exceed SAR40 million.
- **Local Sales Threshold** – the combined total sales realised locally (within the territory of the Kingdom of Saudi Arabia (KSA)) by the parties to the economic concentration must exceed SAR40 million.

Article 12 (2) of the Executive Regulations also provides that where it is impossible to estimate the annual sales value of the entities, or where the entities' business activities do not extend for a full fiscal year, then the annual sales value for the whole year shall be estimated based on the firms' activity, as the case may be.

2.6 Calculations of Jurisdictional Thresholds

Threshold and Calculation

The KSA Competition Law bases the notification threshold on "the total annual sales value of the entities seeking to participate in the economic concentration".

Total annual sales value

- In most cases, the "total annual sales value" will be the total gross revenues of the relevant entity. These are the amounts obtained by the entity from the sale of products and services falling within the entity's ordinary business and related activities. For most entities that have financial statements prepared under

the standards of the Saudi Organisation for Certified Public Accountants (SOCPA) or the equivalent prevailing accounting standards in the relevant entity's place of incorporation, the annual sales will be the entity's revenue appearing in the entity's income statement, as reflected in the entity's most recent audited financial statement. Where the entity is not required to produce audited financial statements, the annual sales will be the entity's revenue appearing in its most recent annual statement of income and expenses regularly prepared in accordance with the SOCPA standards or the equivalent accounting principles adopted by the entity, as the case may be.

- In the event that the relevant undertaking is an individual or a natural person, the GAC will in general apply the same principles to determine the relevant annual sales of the individual. The individual's annual sales will generally be their annual revenue amounts obtained from their ordinary business activities. The GAC will determine this on a case-by-case basis within the context of these general principles.
- However, where the entity's total sales incorporate sales rebates subsequently provided to its customers, the value of the sales rebates may be deducted from the gross sales figures to calculate the entity's total sales for the purposes of the notification threshold.
- In addition, where the entity's total sales revenues incorporate the amount of value-added taxes and other taxes directly related to sales, the value of such taxes may be deducted from the gross sales figures to calculate the entity's total sales for the purposes of the notification threshold.
- Lastly, the KSA Competition Law does not distinguish between sales taking place within

the KSA and those taking place outside the KSA. Accordingly, the GAC will consider the relevant annual sales figures to be the combined aggregate group-wide and worldwide sales figures of all the relevant entities.

Currency

If the entity's financial statements are presented in a foreign (other than KSA) currency, then the annual gross revenues should be converted to values in Saudi Arabian riyals according to the average over the relevant financial year of the foreign exchange rate quoted by the Saudi Central Bank.

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

Please see 2.8 Foreign-to-Foreign Transactions.

The KSA Competition Law specifies "all the entities participating in the concentration" and does not distinguish between acquiring and selling an entity or between mergers and acquisitions. The KSA Competition Law therefore requires that the notification threshold considers the total sales of all entities participating in the concentration without distinction or exclusion.

The GAC considers that the entities "participating" in the concentration are all those that form part of the newly concentrated entity after the economic concentration transaction has been completed. This means that where:

- two or more entities merge, the relevant entities are the merging entities in their entirety;
- one entity acquires another entity, the relevant concentrated entities are the entire entity that is acquiring the other entity, and the entity

being acquired, but not the entity that is selling the entity being acquired;

- one entity acquires a part of another entity's operations, for example through purchasing a subsidiary or operational division, the relevant entities are:

- (a) the entire entity which is acquiring the operations or division; and
- (b) the operations or division it is acquiring, but not the entity which is selling the operations or division. This is because the acquiring entity and the target operations or division generally form/s part of (and are therefore participating in) the economic concentration, but the selling entity generally does not form part of the economic concentration; and

- two or more entities together participate in a full-function joint venture, the relevant entities for the notification threshold are all the entities acquiring joint control of the joint venture in addition to the joint venture itself. This principle applies both to newly formed joint ventures and to the acquisition of joint control of pre-existing entities.

Group of Companies

Two or more legal entities will be considered to form part of the same economic entity if they constitute a "single economic entity". The primary criterion in determining whether different legal entities form part of a single economic entity is "control". If one legal entity controls other legal entities (such as subsidiaries), either directly or indirectly, then for the purposes of determining the total annual sales values of the entity, the relevant single economic entity will include the controlling entity and all of the entities it controls. If a single economic entity consists of two or more legal entities, and each of those legal entities prepares accounts, then the total sales of the single economic entity for the purposes

of calculating the notification thresholds are the total combined gross sales revenues of all of the entities. A group will therefore include all companies that have direct or indirect control-based links with the entity concerned, including its subsidiaries, but also including its parent company(ies) and any other companies within the parent company's group.

Exception

The single economic entity's revenues will exclude revenues resulting from transactions between the different legal entities within the group. Such intra-group transactions are not considered to be sales of the single economic entity.

2.8 Foreign-to-Foreign Transactions

The KSA Competition Law applies to all undertakings inside the KSA. It also applies to undertakings outside the KSA where those undertakings' activities, including any economic concentration, may have an effect on a market in the KSA. Article 3 of the Executive Regulations further provides that the GAC may assess the effect, actual or potential, of such conduct outside the KSA on a market inside the Kingdom.

Nexus Test

- The GAC will require economic concentrations taking place outside the KSA to be notified where there is a sufficient nexus between the economic concentration and a market inside the KSA. Pursuant to the KSA Competition Law and the Executive Regulations, this nexus is established where the foreign conduct (including economic concentrations among foreign undertakings) may have an effect on a market inside the KSA.
- The GAC will consider that there is sufficient influence on a market in the KSA where that

potential result is direct, substantial, and reasonably foreseeable.

- Such economic concentrations among foreign undertakings are subject to Article 7 of the KSA Competition Law and must, therefore, in general be notified if the other relevant criteria for required notification are also fulfilled.
- The GAC will generally not consider there to be sufficient impact on the KSA market where the foreign conduct (including economic concentrations) does not meet these criteria. For clarity, a direct effect is not limited to direct sales and may take place by way of indirect sales (eg, sales by way of a distributor).
- The GAC will also look at whether the actual or potential effect on competition is substantial. This requires that the effect takes place within a market in the KSA. The GAC considers that this test will generally mean that jurisdiction is established where the actual or potential effect of the conduct on a market inside the KSA is more than trivial.
- Furthermore, the GAC will look at whether the potential effects on a market are reasonably foreseeable. In the general case, this will mean that the effect of the foreign conduct (including an economic concentration) can be reasonably foreseen and is more than merely speculative.
- In general, the GAC will consider it to be sufficient to establish a nexus if one or more of the foreign undertakings has sales in the KSA. However, sales in the KSA are not necessary to establish a sufficient nexus with a market in the KSA.

2.9 Market Share Jurisdictional Threshold

The GAC will consider market shares and market concentration in the context of the other relevant factors that it may consider in order to conclude if

a market concentration will take place. The GAC typically measures market concentration using market shares, market concentration ratios, and the Herfindahl-Hirschman Index (HHI). The HHI is calculated by adding the sum of the squares of the post-merger market share of the merged firm and each rival firm in the relevant market, thereby giving greater weight to the market shares of the larger firms. The HHI therefore requires the market shares, or estimates of them, for all the participants in the relevant market.

The GAC will generally use the following HHI thresholds to undertake a preliminary assessment of the potential competition effects of an economic concentration.

- The GAC is unlikely to identify horizontal competition concerns in an economic concentration in a market with a post-concentration HHI below 1,000. Such an economic concentration generally does not require extensive further analysis.
- The GAC is unlikely to identify horizontal competition concerns in an economic concentration with a post-concentration HHI between 1,000 and 2,000 and an HHI delta below 250, or an economic concentration with a post-concentration HHI above 2,000 and an HHI delta below 150, except where special circumstances that require additional competition analysis are present.

2.10 Joint Ventures

The KSA Competition Law uses the principle of economic concentration to assess merger control issues. A joint venture will constitute an “economic concentration” when “the joint venture forms an autonomous economic undertaking, or performs the economic functions of an autonomous economic undertaking, on a lasting basis”. This would be considered a “full-function

joint venture”. The GAC will decide whether a joint venture would be considered a full-function joint venture on a case-by-case basis. Attributes of a full-function joint venture include the following.

- The joint venture must operate in a market and perform the functions normally carried out by a commercial undertaking operating in that market.
- The joint venture must ordinarily have a management team dedicated to its day-to-day operations and access to sufficient resources, including finance, staff, and assets (tangible and intangible), in order to conduct, on a lasting basis, its business activities within the area provided for in the joint-venture agreement.
- It must be intended to operate for a sufficiently long period to bring about a lasting change in the structure of the undertakings concerned (the joint-venture resources would be indicative, on this point).
- It will ordinarily have sufficient autonomy from its parent undertakings, in terms of its operational decision-making, to be considered a full-function joint venture.

A joint venture may begin its life as a non-full-function joint venture and subsequently becomes a full-function joint venture. It will, at that time, be considered as a new economic concentration requiring notification. Such a change in the nature of the joint venture can include the following.

- The joint venture’s activities are enlarged during its lifetime, such as commencement of commercial sales to third parties in an open market.
- Enlargement of the joint venture, such as through acquisition by the joint venture of the

whole or part of another undertaking from the parent undertakings.

- The parent undertakings transfer significant additional assets, contracts, know-how, or other rights to the joint venture, where this transfer would constitute or enable an extension of the joint venture's activities, products, or geographic markets that were not the object of the original joint venture.
- A change in the organisational structure of the joint venture.

Changes in the nature of the joint venture are considered to have taken place upon the shareholder/s or the joint venture's management taking the relevant decision that led to the joint venture becoming a full-function joint venture, or from when the relevant activity commenced.

2.11 Power of Authorities to Investigate a Transaction

The GAC has no authority to investigate a transaction that does not meet the jurisdictional thresholds expressed under the KSA Competition Law and Executive Regulations.

2.12 Requirement for Clearance Before Implementation

The Competition Law provides that the undertakings participating in the economic concentration (or transaction) may not complete the transaction unless notified by the GAC of its approval in writing, or if 90 days have elapsed since the review period by the GAC commenced and it has not provided an approval or rejection.

The 90-day regulatory review period will begin on the date on which the GAC notifies the applicant that the notification submission is complete. If the last day of this regulatory review period corresponds to an official holiday, the next working

day thereafter shall be considered the last day of this regulatory review period.

The regulatory review period may be suspended under certain circumstances.

- When the GAC requests any information or documents from the applicants, it may suspend the regulatory review period from the date when it requests the information or documents to the date when the applicant provides the requested information or documents.
- When the GAC finds that the economic concentration parties or their representatives have provided incorrect information or failed to submit available information to the GAC within the prescribed period.

Where the regulatory review period is suspended, the days during which it is suspended are not counted as part of the 90-day regulatory review period.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Where an economic concentration must be notified to the GAC, it is a violation of the KSA Competition Law for the transaction to be completed unless the participating parties have received the GAC's approval in writing. Refer to **2.12 Requirement for Clearance Before Implementation**.

See **2.2 Failure to Notify** with respect to the penalties implemented and their publication. The GAC's 2022 annual report (most recent [report here](#)) does not indicate that any of the penalties imposed were with respect to parties who have implemented the transaction prior to the GAC's clearance.

2.14 Exceptions to Suspensive Effect Exemption

- The GAC's board of directors has the authority, pursuant to Article 8 of the KSA Competition Law and Chapter 7 of the Executive Regulations, to provide a party or parties with an exemption that would exclude the KSA Competition Law from being applied to a specific transaction or economic concentration. The exemption will be granted if it would lead to improved market performance or improve the performance of undertakings in terms of the quality of the product, or technological development, creative efficiency, or both. The benefit of such exemption to the consumer should outweigh the effects of restricting the freedom of competition.
- An application for exemption under this mechanism must be made and will be considered by the GAC if the application:
 - (a) is made in the format and on the forms specified under the Executive Regulations;
 - (b) provides adequate justification for the application;
 - (c) includes sufficient evidence of the positive results envisaged from the economic concentration; and
 - (d) provides supporting documents and any other information that the GAC requires to review the application.
- The board may, upon the recommendation of the technical committee, approve the application if the exemption would:
 - (a) lead to improving the market or undertakings' performance in terms of quality, diversification, technological development, or innovative efficiency;
 - (b) benefit consumers to a degree that outweighs the negative effects from the restriction of competition; and

- (c) does not enable the undertaking(s) benefiting from the exemptions to exclude competition or competitors from any market.

All three conditions must be met for an exemption application to be approved. In addition to these conditions, the board may also consider any other factor relevant to assessing the degree of restriction of competition, along with the benefits, resulting from the exemption.

Failing Firm

- While the GAC does not provide for a waiver or exemption for a failing firm under the KSA Competition Law, it does take this aspect into consideration in its assessment. Where one of the economic concentration parties is a failing firm, the GAC may decide that an economic concentration which would otherwise cause competition problems may nonetheless be approved if the failing firm would be likely to exit the market even if the economic concentration does not take place.
- The basic requirement for a "failing firm defence" is that the deterioration of the competitive structure that follows the economic concentration would take place with or without the economic concentration and therefore cannot be said to be caused by the economic concentration.
- The GAC will generally only consider a "failing firm defence" to be appropriate if the economic concentration parties can demonstrate all three of the following criteria:
 - (a) that it is highly likely or inevitable that the allegedly failing undertaking would, in the near future, be forced to exit the market because of financial difficulties if it is not taken over by another undertaking;
 - (b) that the assets of the failing firm would also be highly likely or inevitable to exit

the market if they do not participate in an economic concentration; and

- (c) that there is no less anti-competitive alternative purchase or other alternative to the notified economic concentration.
- The onus is on the relevant parties to provide the GAC, in due course, with the “failing firm defence”, with all the relevant information necessary to demonstrate as such.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

There are no circumstances where the authorities will permit closing before clearance or an exemption. It may be possible to carve out the businesses or assets in the KSA and implement global closing to the extent the closing does not have a sufficient affect (see **2.8 Foreign-to-Foreign Transactions**) on the KSA market. GAC approval may be required.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

With respect to the required notification in the event the KSA Competition Law and Executive Regulations are applicable to a specific economic concentration, the relevant participants must notify the GAC 90 days before completion of the economic concentration.

Refer to **2.2 Failure to Notify** with respect to penalties and their imposition.

3.2 Type of Agreement Required Prior to Notification

As part of the initial application for notification to the GAC, the applicant must also provide a finalised, duly executed agreement to carry out the

economic concentration, stating the nature of the transaction and a description of the shares, equity, assets, rights, or obligations to be purchased or transferred, or managements to be joined, between the relevant entities. The GAC requires these documents for valid notification. If notification is made without all the requisite documents being provided, the GAC reserves the right to close the notification file.

3.3 Filing Fees

The fee to be paid for examining the economic concentration (the “notification fee”) is 0.0002 times (0.02% of) the total annual sales value of undertakings intending to participate in the economic concentration, with an upper limit of SAR250,000. The parties must pay the notification fee before submission of the notification and must submit proof of payment of the notification fee along with the other notification documents and information. The GAC requires this proof of payment before the notification will be considered to be complete.

3.4 Parties Responsible for Filing

The parties intending to participate in the economic concentration transaction must notify the GAC of the transaction. Notice of the transaction may be provided by the parties’ legal representative. A failure by the concentration parties to submit a notification does not preclude the GAC from initiating a review and assessment of the economic concentration either prior to or after the completion of the transaction.

3.5 Information Included in a Filing

The notification should in general be completed in the Arabic language. Notifying parties may choose to complete the forms in the English language but this must be accompanied by a translation into Arabic.

When submitting the notification, the applicant should submit the following information and documents:

- the duly completed notification form, including the declaration as to the validity and accuracy of the information contained in the notification;
- relevant identification documents of the person submitting the notification;
- attach the required parties' documents (explained below);
- proof of payment of the prescribed fees for examining the economic concentration;
- the finalised, duly executed agreement to carry out the economic concentration, stating the nature of the transaction and a description of the shares, equity, assets, rights, or obligations to be purchased or transferred, or managements to be joined, between the relevant entities;
- a report that describes the economic impact of the transaction on the relevant markets ("Economic Report"), and this report should include a detailed description of the following items:
 - (a) the economic concentration transaction and the participating parties;
 - (b) the relevant sectors and markets in which the economic concentration may have an affect;
 - (c) the key customers of the participating parties in those sectors and markets;
 - (d) the key competitors of the participating parties in those sectors and markets; and
 - (e) the potential impact of the economic concentration transaction on competition in those sectors and markets – the GAC can discuss with the notifying parties the contents of such an Economic Report, and provide a brief template, upon request, plus any other data, information, or

documents required by the GAC to review the economic concentration; and

- a full explanation of the above submitted documents.

For the acquiring entity/merging entity/first partner in the joint venture:

- validated Power of Attorney (POA) by the Ministry of Justice/KSA Embassy/KSA Consulate/Apostilled;
- articles of association;
- commercial register; and
- financial statements for last financial year (LFY).

For the target entity/merged entity/second partner in the joint venture:

- validated POA by the Ministry of Justice/KSA Embassy/KSA Consulate/Apostilled;
- articles of association;
- commercial register; and
- financial statements for LFY.

For the seller:

- validated POA by the Ministry of Justice/KSA Embassy/KSA Consulate/Apostilled;
- commercial register; and
- the official contact persons for the economic concentration parties and any relevant third parties are specified in the submission.

3.6 Penalties/Consequences of Incomplete Notification

If notification is made without all the requisite documents being provided, the GAC reserves the right to close the notification file. The GAC's annual reports for 2022, 2021, 2020 and 2019 reveal that only one application was rejected in 2021 due to an incomplete notification applica-

tion. This is in contrast to the years 2020 and 2019, when there were no rejected applications. However, in 2022, one application was rejected due to potential efficiencies from the transaction involved in the concentration parties' view, which could be realised without the transaction consummating. Additionally, it was determined that the potential harms to competition outweighed the expected benefits if the transaction were completed.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Pursuant to Article 49 of the Executive Regulations, if the notifying party is found to have withheld information, provided misleading information, or concealed or destroyed documents that are useful in the GAC's investigation, they would be punished by a fine not exceeding 5% of the total annual sales turnover or not exceeding SAR5 million when it is impossible to estimate the annual sales.

3.8 Review Process

The economic concentration must be notified to the GAC at least 90 days prior to the completion of the economic concentration. The applicant's notification submission will be considered to be complete when the applicant has satisfied the required conditions for notification, including providing the required information and documents necessary for complete notification. The 90-day regulatory review period will begin on the date on which the GAC informs the applicant that the their notification submission is complete.

The regulatory review period may be suspended when:

- the GAC requests any information or documents from the applicants – it may suspend

the regulatory review period from the date when it requests the information or documents, to the date when the applicant provides the requested information or documents; or

- the GAC finds that the economic concentration parties or their representatives have provided incorrect information or failed to submit available information to the GAC within the prescribed period.

A case team will be appointed to conduct a review and investigation into the economic concentration, within the 90-day period. Once the case team has completed its review, it will submit a detailed note outlining its opinion for the GAC's board of directors. The board will evaluate the case team's opinion, taking into account all relevant factors and its objectives under the KSA Competition Law and Executive Regulations. The board will issue a decision in one of the following three ways:

- approval of the economic concentration application;
- refusal of the economic concentration application, where such decision will be accompanied by a statement of reasons; or
- approval of the economic concentration, subject to conditions determined by the board, where such decision will be accompanied by a statement of reasons.

3.9 Pre-notification Discussions With Authorities

The GAC is generally available for discussions with parties or their representatives prior to the formal notification of an economic concentration transaction.

Pre-notification discussions are entirely voluntary and at the parties' discretion. The GAC

will not conduct pre-notification discussions on a hypothetical basis or without knowing the identities of the parties and markets at issue. To request a pre-notification discussion, the parties or their representatives should provide the following information to the GAC:

- the names and contact information of the economic concentration parties and their representatives (if any);
- the type of transaction;
- the markets or goods and services affected by the proposed transaction; and
- the possible impact of the transaction on competition in general terms.

It is generally recommended that this information be provided in the form of a brief confidential memorandum to the GAC as this will assist the efficiency of the pre-notification process.

Pre-notification discussions are encouraged by the GAC and treated as strictly confidential.

3.10 Requests for Information During the Review Process

The information requested during the review process includes:

- documents, records, data, files, specific written information, and other information that the GAC considers relevant for its review of the transaction;
- such information from other parties, including from competitors, other stakeholders, and the general public;
- the GAC may similarly accept information that has been offered voluntarily by other parties; and
- the GAC may require any of the economic concentration parties or other parties to provide it with market information to evaluate

the effects of the economic concentration on competition.

Written Requests

- A request for information will ordinarily take place by way of a written request for information addressed to the relevant parties or their nominated representatives. The written request for information will state the purpose of the request, specify what information is required, and specify the time limit within which the information is to be provided.
- A written request for information may cover all types of information helpful to the case team in assessing the transaction, including, but not limited to, written responses to specific questions, data and statistics, economic studies and market surveys, the parties' internal documents such as strategic plans, strategic analyses of corporate markets, pricing policies, business plans, marketing plans, long- and short-term forecasts, a list of major customers, information about competitors, marketing and sales reports, sales and bidding data, excess capacities data, production costs, and any other documents and data that the GAC deems to be necessary for its assessment of the intended economic concentration.

Meetings and Interviews

The GAC may also gather information by holding meetings and direct interviews with the concentration parties or third parties. The GAC may communicate by phone with any of the representatives or affiliates of the concentration parties, and request any information required for the review of economic concentrations at any stage of the review process, when necessary.

Information that may be sought by way of phone communications or meetings may include the following:

- basic or summary information that is required without delay;
- verification of specific claims submitted by one of the concentration parties or third parties;
- identification of specific individuals who can provide evidence; and
- any other information that may appropriately be sought in this way.

The 90-day regulatory review period may be suspended under certain circumstances:

- when the GAC requests any information or documents from the applicants, it may suspend the regulatory review period from the date when it requests the information or documents to the date when the applicant provides the requested information or documents; and
- when the GAC finds that the economic concentration parties or their representatives have provided incorrect information or failed to submit available information to the GAC within the prescribed period.

3.11 Accelerated Procedure

There is no indication that there is an option for an accelerated procedure under the applicable law or GAC regulations.

4. Substance of the Review

4.1 Substantive Test

The substantive test employed by the GAC pursuant to the KSA Competition Law and Executive Regulations is whether there is an economic

concentration (as defined under the KSA Competition Law) that causes a sufficient impact on the KSA market and lessens competition. Further, the GAC considers change of control to be directly correlated with an economic concentration taking place.

4.2 Markets Affected by a Transaction

When assessing whether an economic concentration substantially lessens competition, the GAC will examine the competitive impact of the transaction in the context of the markets relevant to the economic concentration.

In defining markets in their product and geographic dimensions, the GAC focuses on two key dimensions of substitution.

- The product dimension – substitution between products is a central concept in defining the product dimension of markets. The GAC notes that “product” in this context includes goods, services, and other equivalent economic outputs.
- The geographic dimension – substitution between different locations of the relevant goods or services is a central concept in defining the geographic dimension of markets. The GAC notes that the “geographic dimension” in this context may be local, regional, national, or wider, including world-wide.

When defining markets, the GAC will in most cases follow a general approach.

- First, the products and geographic regions actually or potentially supplied by the economic concentration parties will be identified. This is the first step in identifying the markets that may be relevant in the analysis of the economic concentration. In this way,

the GAC begins by considering those areas of activity where competitive harm may occur, by considering in each case the products and geographic regions where there may be an overlap between the activity of the economic concentration parties, or some other meaningful economic relationship such as an actual or potential vertical relationship. This is done on a case-by-case basis. In many cases, more than one potential market may be identified.

- The GAC then considers the boundaries of those potential markets in their product and geographic dimensions. A properly defined relevant market includes all those products and geographic regions that are sufficiently close substitutes of the products and geographic regions first considered.

Further to the above, there are specific factors enumerated in the Executive Regulations that the GAC may pass within its overall objectives of protecting and promoting competition within a market. These are as follows:

- Structures of relevant markets and the level of actual or potential competition between undertakings inside the KSA or abroad, in cases where it has an impact on local markets.
- Financial positions of the parties to an economic concentration.
- Commodity alternatives that are available to consumers, vendors, and clients, and how accessible such alternatives are.
- Level of product differentiation.
- Consumer interests and welfare.
- Potential impact of the economic concentration on prices, quality, diversification, innovation, or development in a relevant market.

- Actual or potential harm or benefits to competition from the economic concentration transaction.
- Supply and demand growth and trends in the relevant market and commodities.
- Barriers to entry or exit of new undertakings into a relevant market, their continuation therein, or expansion, including regulatory barriers.
- The extent to which an economic concentration may create or strengthen a significant market power or a dominant position of an undertaking – or group of undertakings – in any relevant market.
- The level and historical trends of anti-competitive practices in a relevant market, either for the parties to an economic concentration or the undertakings influential in such market.
- Views of the public, economic concentration-related parties, and sector regulators.

Dominance in a relevant market can be demonstrated if one or both of the following criteria are achieved.

- A market share of 40% or more of the relevant market – whether it is the share of a single firm or a group of firms, whenever that group acts with a common will in committing the violation or causing the effect.
- Ability to influence a relevant market such as controlling prices, production, or demand – whether it is the ability of a single firm or a group of firms, whenever that group acts with a common will in committing the violation or causing the effect.

4.3 Reliance on Case Law

There is no indication of the GAC relying on case law with respect to issues such as market definitions from other jurisdictions.

4.4 Competition Concerns

The GAC will broadly consider the following three categories of economic concentration.

- Horizontal concentrations – these involve concentrations of (actual or potential) suppliers of substitutable goods or services, typically operating on the same or a comparable functional level of the supply chain, and therefore commonly a concentration of competitors in the same market.
- Vertical concentrations – these involve undertakings operating (or potentially operating) at different functional levels of the same vertical supply chain, commonly where the output in one market is an input into production in the other market, and are therefore commonly not in direct competition with each other in any market.
- Conglomerate concentrations – these involve undertakings that operate (or potentially operate) in different markets and without being in the same vertical supply chain, but supply goods or services that are in some way related to each other; eg, products that are complements for consumers or in production.

4.5 Economic Efficiencies

The GAC assesses the effect of economic concentrations on competition, competitive constraints, and the efficiency of markets, rather than on the efficiency of individual entities.

The consideration of efficiencies is relevant to the competition assessment if, and only if, the efficiencies are likely to result in lower (or not significantly higher) prices, increased output and/or higher quality goods or services, in which case the conclusion may be that the economic concentration may not substantially lessen competition.

For the GAC to take account of efficiency claims in its assessment of an economic concentration and to be in a position to reach the conclusion that, as a consequence of efficiencies, the economic concentration is unlikely to substantially lessen competition, the efficiencies have to:

- benefit consumers;
- be specific to the economic concentration; and
- be verifiable.

All of these conditions must be satisfied for the GAC to consider efficiencies in the context of its competitive assessment of economic concentrations.

4.6 Non-competition Issues

There is no express limitation or permission on what the GAC can take into account to achieve the objectives of the KSA Competition Law and Executive Regulations.

The KSA has a standalone law with respect to foreign investments that seems to be separate from the KSA Competition Law.

4.7 Special Consideration for Joint Ventures

See 2.10 Joint Ventures.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

To the extent the transaction creates an economic concentration that sufficiently impacts the KSA market, the GAC board has the authority to reject the notification filing and block the transaction from taking place or require conditions

for the transaction to proceed. The GAC has this authority pursuant to the KSA Competition Law and Executive Regulations.

5.2 Parties' Ability to Negotiate Remedies

The parties may propose structural or behavioural remedies.

In most cases, remedies are proposed by the economic concentration parties, at their discretion, as a means of permitting a transaction to be approved subject to conditions rather than the transaction being blocked altogether. In principle, the structure and content of the remedies offered to the GAC will therefore be a matter for the party offering the remedies. However, the GAC will only accept remedies as conditions if it is satisfied that they address the GAC's competition concerns to a degree sufficient to allow the GAC to approve the transaction subject to those conditions. The GAC will generally provide detailed feedback on the form and content of remedies proposed by the parties, including regarding whether the GAC would be satisfied that they would alleviate the competition concerns sufficiently, and, if not, what amendments to the proposed remedies would be required for the GAC to accept them.

Economic concentration parties therefore have strong incentives to propose effective and enforceable remedies to the GAC to alleviate the identified competition concerns.

5.3 Legal Standard

There is no specifically expressed legal standard for remedies. An acceptable remedy must adequately address and alleviate the potential competition harm created by the specific economic concentration.

5.4 Negotiating Remedies With Authorities

Economic concentration parties are free to propose remedies to the GAC at any time throughout the transaction review process, including at the outset of the review, the pre-notification phase, the moment of first notification, and after the economic concentration parties have been advised of potential competition concerns during a review. In general, economic concentration parties are encouraged to begin discussions with the GAC as early in the process as possible.

When an economic concentration raises competition issues at the outset or during a review, the economic concentration parties may decide to offer remedies to the GAC. If the GAC accepts that the remedies are sufficient to address the competition concerns in that case, the GAC may decide to approve the economic concentration subject to the condition that the remedies be implemented, rather than blocking the economic concentration.

5.5 Conditions and Timing for Divestitures

A divestiture remedy will normally specify the following key elements:

- the scope of the divestiture package, such as the assets or businesses (or parts of businesses) to be disposed;
- the process for selecting a purchaser; and
- the process for the disposal, including the required timeline for the disposal.

Parties may not complete a transaction before remedies are complied with.

The GAC maintains a role in relation to remedies and conditions accepted with respect to economic concentrations, including:

- monitoring parties' compliance with commitments; and
- investigating suspected breaches and enforcing remedies and conditions, including by legal action where appropriate.

Non-compliance or breach of an agreed remedy is a violation of the KSA Competition Law.

- Where the economic concentration parties commit a breach of an obligation under the conditions, the GAC may revoke its approval decision. In some cases, such as where a required divestiture is not made within the required timeframe, the GAC's decision to approve the economic concentration subject to the conditions may lapse on the basis that the required condition was not fulfilled. This, and comparable breaches of the conditions, may subject the economic concentration parties to fines under Article 19 of the KSA Competition Law.
- The economic concentration parties may also be subject to fines under Article 20 of the KSA Competition Law, and other measures under Article 21 of the KSA Competition Law, including requiring the economic concentration parties to unwind the economic concentration. Furthermore, the GAC will also take into account all other relevant provisions of the KSA Competition Law and the Executive Regulations in setting fines and other measures, including but not limited to Article 22 of the KSA Competition Law and Chapter 7 of the Executive Regulations.

5.6 Issuance of Decisions

A formal decision permitting or prohibiting a transaction may be issued to the party by the GAC. In the event that the investigation period of 90 days elapses without the issuance of a decision by the GAC, then it would be considered an

approval pursuant to the KSA Competition Law. The application decisions are made public (as a statistic in the GAC annual report); however, the party names are not mentioned unless they are penalised.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The firm is not aware of the GAC having required remedies or prohibited foreign-to-foreign transactions.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Clearance decisions will only cover competition issues.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Relevant third parties could be involved in the review process by the applicant including them in the application submission, or by the GAC requiring their input. The third parties have a right to request an interview or make a claim as part of a specific investigation for economic concentration. The GAC may elicit information from third parties by conducting a survey.

The case team may discuss its interim assessment with third parties in order to identify and to seek to resolve any unresolved issues. The team may present its assessment or a part thereof to third parties for their opinions, while taking into

account the need to obtain objective, impartial, and substantiated opinions.

The third parties' interests in confidentiality will be preserved throughout the assessment and investigation process. No documents of the third parties will be shared with others, except pursuant to the procedures outlined in the guidelines. Where a GAC document to be released during interim consultations contains information that is confidential to a third party, the GAC will prepare a public version of that document which redacts any such confidential information. The parties whose confidential information is to be redacted will be given an opportunity to comment on this redaction.

7.2 Contacting Third Parties

See 7.1 Third-Party Rights.

7.3 Confidentiality

The KSA Competition Law provides that the members of the board of directors and the employees of the GAC must maintain the confidentiality of information, records, data, files, and documents (together, "information") obtained from the economic concentration parties or other entities in the course of collecting evidence or investigations. Such information may not be passed to other parties except with the approval of the board, where the board's approval has been recorded in the meeting minutes, or with the approval of the Governor in the following cases:

- with the consent of the party providing the information;
- for submission of the information to judicial and quasi-judicial bodies; or
- for the purposes of the exchange of views and opinions with international competition authorities concerned with the review

process, where the economic concentration parties have been notified of the GAC's intention to disclose the information, and provided that the international competition authority receiving the information shall take the necessary legal measures for the protection of the confidentiality of the information.

7.4 Co-operation With Other Jurisdictions

Where an economic concentration is also being reviewed by competition authorities in other countries, including in cases where the possibility of remedies has also been raised in those other countries, the GAC will seek, where possible and reasonable, to consult and co-ordinate with those foreign competition authorities. This consultation and co-ordination is for the purpose of seeking consistency where this is feasible and appropriate, including in relation to remedies.

Where appropriate, the GAC will seek confidentiality waivers from economic concentration parties that allow the GAC to exchange confidential information relating to the economic concentration with the relevant overseas competition authorities. The GAC expects economic concentration parties to give it the same notice of economic concentrations and any potential remedies offered as the parties give to the overseas competition authorities, and normally requires simultaneous lodgement of submissions with the GAC and overseas competition authorities.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

The parties have 30 days from the date of notification or from the date specified for delivering the decision to the parties of the case, even

if they failed to appear, to appeal the GAC's decision to the Riyadh Administrative Court of Appeal, otherwise it will become final.

If one of the parties appeals the GAC's decision before the Riyadh Administrative Court of Appeal, that party must notify the GAC within three working days from the date of appeal, by means of a letter containing the GAC's decision number and date, and the number and date of the appeal filed with the Riyadh Administrative Court of Appeal and a copy thereof.

8.2 Typical Timeline for Appeals

No statistics have been released with respect to successful or unsuccessful appeals against the GAC.

8.3 Ability of Third Parties to Appeal Clearance Decisions

The authors are not aware of any third-party appeals of GAC decisions as of yet.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

Generally, any company registered to do business in the KSA, and thereafter entered onto the transaction involving the entering or exiting of shareholders, would need to file the proper documentation reflecting the change in the company commercial registry. For clarity, the Ministry of Investment in the KSA should be notified in the event that there is a change in ownership within a company. Otherwise, there is no specific filing required with respect to foreign direct investment or foreign subsidies.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

See 2.5 Jurisdictional Thresholds and 3.3 Filing Fees.

10.2 Recent Enforcement Record

See 2.2 Failure to Notify.

10.3 Current Competition Concerns

The latest GAC annual report is from 2022 and the Authority has yet to publish the 2023 report. As such, there is no current information from the GAC in this regard.

SERBIA

Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.593

- 1.1 Merger Control Legislation p.593
- 1.2 Legislation Relating to Particular Sectors p.593
- 1.3 Enforcement Authorities p.594

2. Jurisdiction p.594

- 2.1 Notification p.594
- 2.2 Failure to Notify p.594
- 2.3 Types of Transactions p.594
- 2.4 Definition of "Control" p.595
- 2.5 Jurisdictional Thresholds p.595
- 2.6 Calculations of Jurisdictional Thresholds p.596
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.596
- 2.8 Foreign-to-Foreign Transactions p.596
- 2.9 Market Share Jurisdictional Threshold p.597
- 2.10 Joint Ventures p.597
- 2.11 Power of Authorities to Investigate a Transaction p.597
- 2.12 Requirement for Clearance Before Implementation p.597
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.597
- 2.14 Exceptions to Suspensive Effect p.597
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.597

3. Procedure: Notification to Clearance p.598

- 3.1 Deadlines for Notification p.598
- 3.2 Type of Agreement Required Prior to Notification p.598
- 3.3 Filing Fees p.598
- 3.4 Parties Responsible for Filing p.598
- 3.5 Information Included in a Filing p.598
- 3.6 Penalties/Consequences of Incomplete Notification p.599
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.599
- 3.8 Review Process p.599
- 3.9 Pre-notification Discussions With Authorities p.600
- 3.10 Requests for Information During the Review Process p.600
- 3.11 Accelerated Procedure p.600

4. Substance of the Review p.600

- 4.1 Substantive Test p.600
- 4.2 Markets Affected by a Transaction p.600
- 4.3 Reliance on Case Law p.601
- 4.4 Competition Concerns p.601
- 4.5 Economic Efficiencies p.601
- 4.6 Non-competition Issues p.601
- 4.7 Special Consideration for Joint Ventures p.601

5. Decision: Prohibitions and Remedies p.601

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.601
- 5.2 Parties' Ability to Negotiate Remedies p.602
- 5.3 Legal Standard p.602
- 5.4 Negotiating Remedies With Authorities p.602
- 5.5 Conditions and Timing for Divestitures p.602
- 5.6 Issuance of Decisions p.602
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.603

6. Ancillary Restraints and Related Transactions p.603

- 6.1 Clearance Decisions and Separate Notifications p.603

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.603

- 7.1 Third-Party Rights p.603
- 7.2 Contacting Third Parties p.603
- 7.3 Confidentiality p.603
- 7.4 Co-operation With Other Jurisdictions p.603

8. Appeals and Judicial Review p.604

- 8.1 Access to Appeal and Judicial Review p.604
- 8.2 Typical Timeline for Appeals p.604
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.604

9. Foreign Direct Investment/Subsidies Review p.604

- 9.1 Legislation and Filing Requirements p.604

10. Recent Developments p.604

- 10.1 Recent Changes or Impending Legislation p.604
- 10.2 Recent Enforcement Record p.604
- 10.3 Current Competition Concerns p.605

Subotić Law is one of the leading Serbian law firms in competition law and regulatory matters, with a motivated and highly regarded team in merger control, cartel investigations, abuse of dominance and state aid proceedings. The firm has represented leading domestic and international clients in the most complex and high value competition cases in Serbia and the wider

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Serbian merger control rules are laid down in the Law on the Protection of Competition (Official Gazette of RS, No. 51/2009 and 95/2013) (the “Competition Act”), applicable as of 1 November 2009.

In addition to the Competition Act, merger control is governed by several bylaws and implementing regulations, of which the most relevant are:

- the Decree on the Content and the Manner of Submission of Merger Notifications (*Uredba o sadržini i načinu podnošenja prijave koncentracije*) (Official Gazette of RS, no. 5/2016), which regulates the required content and form of merger notifications;
- the Decree on the Criteria for Defining Relevant Markets (*Uredba o kriterijumima za određivanje relevantnog tržišta*) (Official Gazette of RS, no. 89/2009);
- the Decree on the Criteria for Determining the Amount Payable on the Basis of Measures for the Protection of Competition and Procedural Penalties, the Manner and Deadlines for their Payment and the Conditions for Determining these Measures (*Uredba o kriterijumima za određivanje visine iznosa koji se plaća na osnovu mere zaštite konkurencije i procesnog penala, načinu i rokovima plaćanja i uslovima za određivanje tih mera*) (Official Gazette of RS, no. 50/2010) (“Decree on Fines”);
- the Guidelines on the Application of the Ordinance on Fines (of 19 May 2011) (*Smernice za primenu Uredbe o kriterijumima za određivanje visine iznosa koji se plaća na osnovu mere zaštite konkurencije i procesnog penala, načinu i rokovima plaćanja i uslovima*

za određivanje tih mera), which supplement the Decree on Fines; and

- the Guidelines on the Content and Manner for submission of the Request for Protection of Data Protection of the Commission for the Protection of Competition of 7 April February 2023 (*Uputstvo o sadržini i načinu podnošenja zahteva za određivanje mere zaštite podataka*).

1.2 Legislation Relating to Particular Sectors

A foreign investment regime comparable to European regimes prescribed by the EU FDI Screening Regulation does not exist in Serbia; however, certain transactions in the defence sector are to be notified for foreign investment screening and approval.

The Competition Act applies to concentrations regardless of sectors they relate to. Nonetheless, in certain sectors, sector-specific legislation is applicable in addition to the Competition Act, as follows:

- For banks, insurance companies and voluntary pension funds: Acquisition (direct or indirect) of a qualified shareholding requires the previous approval of the National Bank of Serbia.
- For open and alternative investment funds: Acquisition (direct or indirect) of a qualified shareholding requires the prior approval of the Securities Exchange Commission.
- Media: Any change in the ownership structure of a participant in the media market that is subject to regulatory permit is also subject to the prior approval of the Regulatory Body for Electronic Media.
- Telecommunications: Acquisition (direct or indirect) of qualified shareholdings is to be

notified to the Regulatory Agency for Electronic Communications and Postal Services.

1.3 Enforcement Authorities

The authority responsible for the enforcement of the Competition Act is the Serbian Commission for Protection of Competition (*Komisija za zaštitu konkurencije*) (the “Serbian NCA”).

2. Jurisdiction

2.1 Notification

Notification to the Serbian NCA is compulsory if the transaction meets the turnover thresholds (as outlined in 2.5 Jurisdictional Thresholds).

Theoretically, notification is possible on a voluntary basis if the transaction does not meet the above thresholds but includes parties whose combined market share on the Serbian market is at least 40%, or where, due to some other reasons, it cannot be concluded with certainty that such transaction will not significantly impede competition. Nevertheless, the authors of this text are not aware of any such case before the Serbian NCA.

2.2 Failure to Notify

A failure to notify the Serbian NCA of a notifiable transaction and/or its implementation without obtaining a previous clearance decision is subject to a fine of up to 10% of the total annual turnover generated in Serbia in the preceding year.

There has been a significant increase in the opening of ex officio investigation proceedings for breaches of the Competition Act. In that context, since 2017, the Serbian NCA has initiated eight investigations relating to concentrations implemented without prior notification and con-

sequently without a previous clearance decision (a so-called gun-jumping violation).

Four concentrations were later cleared by the Serbian NCA; however, within the same decision, the said authority imposed a monetary fine against the acquirer. These decisions have been made public. As to the other four investigations, in one it was determined that the relevant jurisdictional thresholds were not fulfilled, while the three remaining investigations are still ongoing. In all these cases, with one exception, both parties to the concentration generated a turnover on the Serbian market, so the transaction theoretically could affect competition in Serbia. In two cases, an investigation proceeding was initiated against an acquirer that is a foreign company.

2.3 Types of Transactions

Pursuant to the Competition Act, the following types of transactions are to be considered as concentrations:

- mergers and other statutory changes leading to consolidation of undertakings;
- acquisitions by one (sole control) or more (joint control) undertakings of direct or indirect control over another undertaking or undertakings, or parts of undertakings which can be considered to constitute an individual business unit; and
- establishments of joint ventures or acquisitions of joint control over existing undertakings, performing on a long-term basis all functions of an autonomous undertaking.

Based on the practice of the Serbian NCA, acquisition of control over the assets shall be considered as a concentration only if such assets constitute a business with a market presence to which a turnover can be attributed.

The Competition Act does not cover internal restructurings or reorganisations, provided they do not result in a change of control.

Transactions not involving the transfer of shares or assets (eg, shareholders' agreements, changes to articles of association) may be notifiable if they involve a change of control.

The Competition Act specifies that there is no obligation to file a merger notification in the following situations:

- where banks, other financial undertakings or insurance companies whose normal activities include transactions and dealing in securities are temporarily in possession of interests in an undertaking acquired with the intention to resell, provided that they do not exercise ownership rights for the purpose of determining the competitive conduct of that undertaking and that the disposal takes place within one year of the date of acquisition;
- where control is acquired by a bankruptcy administrator;
- where an investment fund or investment fund holding company acquires an undertaking, provided that the voting rights held by such company are only exercised to retain the full value of the acquired undertaking and not to determine its competitive conduct; or
- the creation of a joint venture that has as its aim the co-ordination between two or more undertakings which retain their independence, whereby each joint venture will be assessed in accordance with the rules on restrictive agreements.

2.4 Definition of "Control"

Pursuant to the Competition Act, an undertaking is deemed to have control over another undertaking if it has the potential to exercise decisive

influence on the latter's activities. Such influence can be based on: (a) a controlling shareholding; (b) ownership or ownership rights over the assets (or parts of the assets) of an undertaking; (c) rights deriving from contracts or securities; and (d) receivables, guarantees over receivables, or based on business practice determined by the controlling undertaking. In addition, the said Act recognises two categories of control: sole and joint.

Acquisition of a minority shareholding is caught by merger control only when it grants de facto or de jure (sole or joint) control of the acquiring undertakings over the target. As per the existing practice of the Serbian NCA, effective control over the company includes: (i) potential to decide the most important/strategic business decisions independently; (ii) potential to dispose independently of major value assets; and/or (iii) holding of veto rights not limited exclusively to the protection of its investors' interests.

2.5 Jurisdictional Thresholds

According to the Competition Act, a merger notification must be filed to the Serbian NCA if the following thresholds are met:

- the combined aggregate annual worldwide turnover of all parties to the concentration exceeds EUR100 million, and (ii) at least one of the parties to the concentration generated a turnover in excess of EUR10 million on the Serbian market; or
- the combined aggregate annual turnover of at least two parties to the concentration on the Serbian market exceeds EUR20 million, and (ii) each of at least two of the parties to the concentration generated a turnover in excess of EUR1 million on the Serbian market.

The Competition Act provides a special rule in case the control over a Serbian joint stock company is acquired through a public bid, in which case, regardless of whether the above thresholds have been fulfilled, the concentration must be notified.

Furthermore, based on said Act, the Serbian NCA may open an ex officio investigation proceeding even when the above-mentioned thresholds were not met if the following two conditions are fulfilled: (i) a market share of the parties to the concentration in Serbia is at least 40% or there is a reasonable indication that the concentration is to be prohibited; and (ii) the transaction has already been implemented. However, it is yet to be seen how this rule will be applied by the Serbian NCA.

Special jurisdictional thresholds applicable to particular sectors have not been prescribed; however, the applicability of the sector-specific regulation (as noted in **1.2 Legislation Relating to Particular Sectors**) requires previous approval of a competent regulator, irrespective whether the above jurisdictional thresholds for the merger filing have been met.

2.6 Calculations of Jurisdictional Thresholds

Turnovers are calculated by taking into account all revenues derived from the sale of products or provision of services in the year preceding the year in which the concentration is notified. The Competition Act provides special rules for the calculation of the turnover applicable to banks, credit institutions and financial entities as well as insurance companies.

Amounts expressed in euros are calculated in RSD at the middle exchange rate of the National

Bank of Serbia on the day of calculation of the annual turnover.

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

The turnover that is considered for the purpose of calculating the thresholds differs according to the type of transaction, as follows:

- in the case of acquisition of sole control, for the acquiring party, the turnover assumes the group consolidated turnover and, for the seller, the turnover of the target. The value of exports must be deducted for the calculation of local (domestic) turnover;
- in the case of a merger, the turnover assumes the group consolidated turnover of all merging undertakings; and
- in the case of the acquisition of joint control over a joint venture, the turnover assumes the group consolidated turnover of all parent companies and, in the case of a pre-existing activity, the turnover of the joint venture itself.

The calculation of the turnover is based on the verified accounts for the financial year preceding the concentration. Changes in the business during the reference period shall not be taken into the account.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions that meet the above thresholds are subject to the Serbian merger control regime. Moreover, the “domestic effects doctrine”, according to which there is no notification requirement in case of lack of local effects of a transaction, has not been recognised by the Serbian NCA. Finally, there is not an exemption for transactions with no overlap of the activities, although there is a short form notification available.

In practice, the vast majority of the concentrations notified and approved by the Serbian NCA related to foreign-to-foreign transactions, where the target was not present at all on the Serbian market, ie, did not generate any turnover.

2.9 Market Share Jurisdictional Threshold

In Serbia there is no market share jurisdictional threshold.

2.10 Joint Ventures

As explained in 2.3 **Types of Transactions**, joint ventures are subject to merger control. Regarding the calculation of jurisdictional thresholds in case of joint ventures, please see 2.5 **Jurisdictional Thresholds**.

2.11 Power of Authorities to Investigate a Transaction

Transactions are subject to the merger control of the Serbian NCA only to the extent they meet turnover thresholds explained at 2.5 **Jurisdictional Thresholds**.

Still, as noted therein, even if the transaction does not meet the said thresholds, upon learning of its implementation, the Serbian NCA may decide to open ex officio investigation proceedings if it finds that the combined market share of the parties on the Serbian market is at least 40%, or if there is a reasonable indication that the transaction is to be prohibited.

The statute of limitations on the authorities' ability to investigate is five years from the implementation of the transaction.

2.12 Requirement for Clearance Before Implementation

A transaction cannot be implemented before it has been approved by the Serbian NCA.

The only exception is where control over a Serbian joint stock company is acquired through a public bid, provided that the transaction is immediately notified, and that the acquirer does not exercise the voting rights attached to the shares in question or only does so based on an exemption granted by the subject authority.

2.13 Penalties for the Implementation of a Transaction Before Clearance

As described in 2.2 **Failure to Notify**, parties that implement a concentration before obtaining a clearance decision issued by the Serbian NCA may be subject to a fine. Since 2017, there has been a tendency of the said authority to investigate such transactions and impose fines.

2.14 Exceptions to Suspensive Effect

As explained in 2.12 **Requirement for Clearance Before Implementation**, a takeover bid may be implemented before a clearance decision is issued by the Serbian NCA, provided that the concentration is immediately notified, and that the acquirer does not exercise the voting rights attached to the securities in question or only does so based on an exemption granted by the authority. In other cases, it is not possible to seek a waiver or derogation from the suspensive effect.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

There is no carve-out provision in Serbia. Apart from the exceptions detailed in 2.14 **Exceptions to Suspensive Effect**, the Competition Act does not provide any specific circumstance allowing closing of the transaction before its clearance by the Serbian NCA.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

A concentration must be notified within 15 days following any of the following acts, whichever occurs first:

- conclusion of an agreement;
- publication of a public bid, offer or closing of the bid; or
- acquisition of control.

On 11 November 2009, the Serbian NCA issued an opinion explaining that a bidder might opt to file a merger notification within 15 days following either the publication of the public bid or the closing of the bid.

3.2 Type of Agreement Required Prior to Notification

The parties may notify a transaction if they demonstrate their serious intent to enter into an agreement (eg, by signing a letter of intent, announcing their intent to make a takeover offer, or any other similar act demonstrating serious intent).

In its Notice on notifications filed based on serious intent, published on 5 July 2016, the Serbian NCA explained that the document evidencing serious intent must explicitly show such intent of all parties to engage in the transaction and must be signed by all of them. If such document deviates in key facts on which the Serbian NCA based its clearance decision from the final and binding transactional document, the parties will bear all the risks connected with implementing such a transaction contrary to said decision.

3.3 Filing Fees

The filing fee for clearance decisions issued in a summary (Phase I) proceeding is 0.03% of the combined annual turnover of the undertakings concerned – capped at EUR25,000. For clearance decisions in an investigation (Phase II) proceeding, the fee is 0.07% of the combined annual turnover of the undertakings concerned – capped at EUR50,000.

The said fees are to be paid within three days following the submission of the notification, failing which, the notification will be deemed withdrawn.

3.4 Parties Responsible for Filing

Under the Competition Act, if an undertaking acquires control over the whole or part of one or more other undertakings, the undertaking acquiring the control must file the merger notification.

In the case of joint ventures, a notification is to be submitted by the joint venture partners.

3.5 Information Included in a Filing

In line with relevant bylaws, there are two types of notification: the short and the long form, both available on the website of the Serbian NCA.

A concentration eligible for a short form notification should meet one of the following conditions:

- Where two or more undertakings merge, or one or more undertakings acquire sole or joint control over another undertaking or a part thereof, provided that no party to the concentration is active in the same relevant product and geographic markets, or in the same relevant product market as any other party to the concentration upstream or downstream.

- Where two or more undertakings merge, or one or more undertakings acquire sole or joint control over another undertaking or a part thereof, provided that the following conditions are met:
 - (a) the aggregate market share of all parties in a horizontal merger is lower than 20%; and
 - (b) the individual or aggregate market share of all parties in a vertical merger is lower than 30%.
- Where the notifying party acquires sole control over an undertaking over which it already has joint control.
- Where the aggregate market share of all the horizontally related parties in the concentration is lower than 40% and the change (delta) in the HHI resulting from the concentration is less than 150.

If none of the above specified criteria are met, the concentration must be notified in the regular (long form) notification. The Serbian NCA can also request that a long-form filing be submitted in cases where the facts of the case indicate that a concentration does meet the criteria for it to be approved.

The merger notification must be submitted in the Serbian language, and it must be undersigned by the legal representatives of the notifying parties. All appendices can be submitted as copies, while documents in a foreign language must be submitted along with their translation into Serbian by a sworn court interpreter. The Serbian NCA may request any other information it considers relevant for the assessment of the intended concentration, and if it is not provided, the notification might be dismissed.

3.6 Penalties/Consequences of Incomplete Notification

If the notification is deemed incomplete, the case handler at the Serbian NCA shall request the notifying parties to provide additional information, within a fixed timeline. Should the parties fail to provide the additional information, the notification will be dismissed.

Pursuant to the Competition Act, parties that do not comply with a request to provide all required documentation and/or data, or provide false or incorrect data, face procedural fines in the range of EUR500–5,000 per day of delay, capped at 10% of the total annual turnover achieved by the violating undertaking(s). In several merger control cases, the Serbian NCA has imposed such procedural fines.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

For possible penalties and consequences of supplying inaccurate or misleading information to the Serbian NCA, please see **3.6 Penalties/Consequences of Incomplete Notification**.

3.8 Review Process

Under the Competition Act, the Serbian NCA is obliged to decide within one month from the receipt of a complete notification whether to clear the transaction in a summary (Phase I) proceeding or to open, ex officio, an investigation (Phase II) proceeding.

The “clock will start ticking” only once the notifying party has submitted all documents which the Serbian NCA requires for assessment of the concentration, but there is no formal deadline for the review of completeness of the notification.

If the authority does not decide within one month from the receipt of a complete merger notifica-

tion (to clear the concentration in a summary (Phase I) proceeding or open an investigation (Phase II) proceeding), the concentration is deemed cleared (so-called tacit approval).

However, should the Serbian NCA decide to open investigation (Phase II) proceedings, it must decide ultimately whether to (unconditionally or conditionally) clear or prohibit the transaction within four months from the date of its opening, otherwise the concentration is deemed cleared.

The vast majority of transactions cleared by the Serbian NCA were decided within the summary (Phase I) proceeding. In practice, in such cases, if the parties prepared the notification well, a clearance decision was issued within 25 days from the date of filing.

Phase II includes a deeper investigation by the authority, including detailed market surveys. Sometimes it includes an economic analysis and eventually the negotiation on remedies, so often it lasts for a longer period beyond the above-mentioned four-month deadline.

3.9 Pre-notification Discussions With Authorities

Pre-notification discussions with the Serbian NCA are not regulated and in practice, they are rare.

3.10 Requests for Information During the Review Process

The Serbian NCA enjoys significant information-gathering powers and may request information from the parties to the concentration and from third parties (customers, suppliers and competitors) as well as from state officials and agencies (ministries, tax authorities, statistical office, Serbian Chamber of Commerce, etc).

Requests for information (“RFIs”) during the merger review process are relatively frequent and can be burdensome for the parties to the concentration. If the Serbian NCA sends an RFI to the parties, the period from the date of delivery of such request to the date of response is not included in the statutory time limits for issuing a decision.

3.11 Accelerated Procedure

There are two types of notification to be used: the short and the long form, depending on actual transaction.

For more information on the criteria for the applicability of a short form notification and on summary (Phase I) proceedings please see 3.5 Information Included in a Filing and 3.8 Review Process.

4. Substance of the Review

4.1 Substantive Test

The Serbian NCA uses a test of significant impediment to effective competition. Consequently, a concentration will be considered incompatible with the Serbian market where it would significantly impede effective competition in the market, in particular because of the creation or strengthening of a dominant position.

4.2 Markets Affected by a Transaction

When determining which markets may be affected by the transaction, the Serbian NCA considers the market definition proposed by notifying parties, but also it investigates alternative market definitions, relying on its own practice as well as the European Commission’s decisional practice. In cases where the market definition is rather complex, the Serbian NCA may query

competitors and customers in order to obtain their opinions.

The focus of the Serbian NCA is on the markets where both parties to the concentration perform economic activity (horizontal overlaps); however, vertically connected markets are assessed also. The concept of a de minimis level is not applicable.

4.3 Reliance on Case Law

The decisional practice of the Serbian NCA, including on market definition, follows its own case law and, quite often, the European Commission's decisional practice.

4.4 Competition Concerns

As explained at 4.1 **Substantive Test**, the test against which a concentration will be assessed by the Serbian NCA is whether it would cause a “significant restriction, distortion or prevention of competition, particularly as a result of the creating or strengthening of a dominant position”.

It includes a review of the horizontal, vertical and/or conglomerate aspects of the proposed concentration. Pursuant to the Competition Act, the said authority shall base its appraisal considering:

- structure of the relevant market;
- existing and potential competitors;
- market position of the parties to the concentration and their economic and financial power;
- freedom of choice when choosing suppliers and consumers;
- legal and other market entry barriers;
- the level of competitiveness of the parties to the concentration;
- trends of supply and demand of relevant goods and/or services;

- trends of technical and economic development; and
- consumers' interests.

4.5 Economic Efficiencies

The Serbian NCA has a legal basis to take into account economic efficiencies when assessing concentrations; however, this ground is not very often referred to.

4.6 Non-competition Issues

When assessing a transaction, the Serbian NCA should not take into account non-competition issues.

Rules separate from merger control in case of foreign direct investments do not exist, and filings for foreign direct investments are not required.

4.7 Special Consideration for Joint Ventures

Full-function joint ventures are analysed by means of the same substantive test as other concentrations.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The Serbian NCA can prohibit a concentration, provided that the latter leads to a significant restriction, distortion or prevention of competition on the Serbian market, in particular if it would create or strengthen a dominant position. The said authority issues a prohibition decision in a written form, in which it must provide detailed explanations for its conclusions.

In addition, if a concentration has been implemented in violation of the Competition Act or in breach of a prohibition decision, the authority may require the undertakings concerned to dissolve the concentration, so as to restore the situation in the market prevailing before its implementation.

5.2 Parties' Ability to Negotiate Remedies

A notifying party may negotiate remedies if the Serbian NCA concludes that the proposed transaction will significantly restrict, distort or prevent competition. In such case, the authority shall issue a statement of objections to the notifying party to notify the facts and evidence on which it intends to base its decision and shall ask the notifying party to provide its comments. In its reply, the notifying party may also suggest obligations and conditions which it is willing to undertake with the aim of removing the anti-competitive concerns identified. If said authority concludes that such remedies are sufficient, it will clear the transaction.

Remedies may be of a structural or behavioural nature. The decisional practice of the Serbian NCA shows that behavioural remedies are used more often.

5.3 Legal Standard

There is no legal standard that remedies must meet to be deemed acceptable. However, as per the practice so far of the Serbian NCA, such remedies must be proportionate and directly related to the competition concerns at hand.

5.4 Negotiating Remedies With Authorities

Even though the Competition Act suggests that the remedies can be offered only when the Serbian NCA issues a statement of objections to the

notifying parties, in practice remedies could be offered from the beginning of the merger control process, even before initiation of an investigation (Phase II) proceeding.

The Serbian NCA cannot propose or impose, by its decision, remedies not being proposed by the notifying party.

5.5 Conditions and Timing for Divestitures

The conditions and timings for all types of remedies are individual and vary case by case.

Parties to the concentration may complete a transaction only when the Serbian NCA has made them binding in its clearance decision.

If the remedies are implemented after a deadline set by the clearance decision, the Serbian NCA may impose a fine of up to 10% of the undertaking's turnover acquired on the Serbian market and also may order the undertaking to dissolve the concentration, so as to restore the situation in the market prevailing before its implementation.

5.6 Issuance of Decisions

A formal decision permitting or prohibiting a transaction is issued to the notifying parties. The Serbian NCA publishes a non-confidential version of its clearance decision on its website.

Also, the said authority publishes on its website a decision to open an investigation (Phase II) proceeding immediately after its adoption, and invites all undertakings which might have information and documents relevant for the assessment of the subject concentration to submit them to the Serbian NCA as soon as possible. The said decision of the Serbian NCA contains

a summary of the notification, with a description of the key elements of the concentration.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

So far, the Serbian NCA has prohibited implementation of transactions only twice. Both decisions dated to ten years ago.

Decisions ordering remedies occur, but not so regularly. There is no difference between the remedies required in local as opposed to foreign-to-foreign transactions.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Neither the Competition Act nor any bylaws regulate ancillary restraints. In practice, the Serbian NCA uses the European Commission's Ancillary Restraints Notice as a framework for its own appraisal of concentration, so ancillary restraints are to be covered by a clearance decision.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third parties, including competitors, may be involved through their answers to the Serbian NCA's RFIs or market surveys. In case of an investigation (Phase II) proceedings, third parties may voluntarily provide the authority with relevant information and documents, as the decision on opening the said proceeding is to be published on the website of the Serbian NCA.

However, third parties that submit information and documentation and provide comments stating their concerns regarding the transaction cannot intervene in the review process.

7.2 Contacting Third Parties

In complex merger control proceedings, the Serbian NCA typically contacts third parties, mostly in a form of an RFI. Market testing of the offered remedies is not standard.

7.3 Confidentiality

When it renders a final decision concerning the concentration, the Serbian NCA will generally issue a statement in this respect on its official website and will also publish the said decision, redacted of all confidential information of the parties to the concentration.

Notifying parties are requested to identify, in separate requests, both in the notification and in responses to additional RFIs, all information that they consider should be kept confidential and submit a non-confidential version of these documents.

7.4 Co-operation With Other Jurisdictions

The Serbian NCA co-operates on general policy matters with a few organisations and authorities in other jurisdictions such as the European Commission, the United Nations Conference on Trade and Development ("UNCTAD") and the International Competition Network ("ICN"). It participates also in the Organisation for Economic Co-operation and Development's Regional Competition Centre, the Sofia Competition Forum. Furthermore, the Serbian NCA co-operates with several national competition authorities, including most of the competition authorities from the region.

However, the said authority is not entitled to share any information on specific transactions with other jurisdictions.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Decisions of the Serbian NCA are final and may be challenged via submission of an administrative claim for judicial review before the Administrative Court (*Upravni sud*). Such filing does not postpone enforcement of the decision.

Claims against rulings of the Administrative Court are lodged with the Supreme Court of Cassation (*Vrhovni kasacioni sud*) and are limited to points of law.

8.2 Typical Timeline for Appeals

The deadline for bringing a claim to the Administrative Court is 30 days from the date of receipt of a decision of the Serbian NCA.

The Competition Act stipulates fixed deadlines for the review process before the Administrative Court and the Supreme Court of Cassation.

In practice, success in claims based on decisions on merger control is quite rare.

8.3 Ability of Third Parties to Appeal Clearance Decisions

The Competition Act does not regulate who is entitled to bring a claim before the Administrative Court.

Based on the practice of the Administrative Court so far (confirmed in a few cases by the higher court instance), third parties, such as direct competitors or consumers, do not have

standing to bring a claim or to appear before the Administrative Court in this kind of dispute.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

In case of transactions involving direct investment or foreign subsidies, there is no legislation which requires any type of separate filing, other than under the merger control rules.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

There have not been any recent changes to the legislation or implementing regulations.

There are some publicly announced initiatives which might result in changes to the Serbian merger control rules, in particular requests for the increase of the jurisdictional thresholds; however, so far, they have not been successful.

10.2 Recent Enforcement Record

The Serbian NCA remains one of the most active competition authorities in the field of merger control in the CEE region.

Since 2017, the said authority has started more actively to look for potential gun-jumping violations. Most of these cases involved Serbian companies. For more information on this, please see **2.2 Failure to Notify**.

With regard to remedies, these are still an exception; however, over recent years, the said authority has been applying them more frequently. In January 2004, the Serbian NCA rendered a

landmark decision on approving an acquisition of Strauss Adriatic by Atlantic Grupa (which are two major coffee producers in Serbia and the region), subject to fulfilment of certain structural and behavioural remedies. What is interesting is that in parallel with above merger control proceeding, the authority investigated and on December 2023, decided that the same parties infringed competition law, by agreeing and co-ordinating their business strategy on prices in the period from 2014 to 2021.

10.3 Current Competition Concerns

The Serbian NCA remains active in investigating and sanctioning cartel cases as well as resale price maintenance practice. However, in the last few years, the said authority has focused also on investigations of possible gun-jumping violations, and it seems that this trend is continuing.

Trends and Developments

Contributed by:

Uroš Popović and Tina Petrić

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Bojović Drašković Popović & Partners (BD2P) is a leading full-service business law firm providing legal services in both Serbia and in Montenegro, founded in January 2013. The firm's partners are locally and internationally educated and qualified, specialising in specific industry sectors in order to provide expert advice to the most demanding clients in relation to the most complex of transactions. BD2P handles the needs of foreign and domestic clients in all commercially relevant areas of law, including general corporate counselling, M&A, financial

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Introduction

As in most jurisdictions on this side of the Atlantic, merger control stands as a vital third pillar of competition protection policy in the Republic of Serbia. Clear and enforceable regulations on concentration control are crucial for preventing concentrations that could strengthen or establish dominant market positions or facilitate collusion among market participants which prevents or disrupts competition.

Before undertaking any significant alterations in the status or structure of a company, such as mergers, acquisitions or changes in ownership, a thorough assessment is necessary. This evaluation determines whether the proposed transaction meets the criteria for submitting a notification to the Commission for the Protection of Competition (the “Commission”).

The Serbian merger control system, governed by the Law on Protection of Competition (Official Gazette of the RS, No 51/2009 and 95/2013) (the “Law”) and secondary acts of legislation (regulations, instructions and guidelines), aims to regulate concentrations between undertakings to ensure unimpeded competition within the Serbian market.

More precisely, the current regulations applicable to concentrations in Serbia include the Regulation on the Content and Manner of Submitting the Notification on Concentration (Official Gazette of the RS, No 5, 25 January 2016) and the Regulation on the Criteria for Defining the Relevant Market (Official Gazette of the RS, No 89/2009, 2 November 2009). These regulations provide essential guidelines for the submission process and criteria for determining the relevant market, ensuring transparency and adherence to competition laws within Serbia’s concentration control system.

“Problematic” concentrations have the potential to disrupt competition by creating unfavourable market structures that serve as grounds for non-competitive behaviour, such as entering into prohibited restrictive agreements or creating and strengthening abusive dominant positions. Thus, concentration control serves as a significant tool for preserving competitive market structures, which are essential for generating favourable effects on economic efficiency and societal well-being.

Overview of the Current Serbian Concentration Control System

A concentration between undertakings arises in the following cases:

- mergers and other status changes where a change of control in the concerned undertakings occurs;
- acquisition of direct or indirect control over another undertaking or a part thereof that may constitute an independent economic entity; and
- joint ventures between two or more undertakings to create a new undertaking or acquire joint control over an existing one, performing on a lasting basis all the functions of an autonomous economic entity.

However, the obligation to notify the Commission does not apply to every transaction involving a change of control in undertakings or every company implementing such changes. Instead, it arises only when certain statutory requirements are met. In this regard, concentrations must be notified to the Commission if:

- the aggregate worldwide annual turnover of all parties to the concentration in the preceding financial year exceeds EUR100 million, provided that the turnover of at least one party on the market of the Republic of Serbia exceeds EUR10 million; or
- the aggregate domestic annual turnover of at least two parties to the concentration in the preceding financial year exceeds EUR20 million, provided that the turnover of each of at least two parties on the market of the Republic of Serbia exceeds EUR1 million in the same period.

Regarding the calculation of the turnover, total income is calculated as the sum of business, financial and other income.

In cases of related entities, the total annual income is calculated as the sum of all total income achieved by market participants who are considered related and belong to the group to which the filing party belongs (acquirer of control). When calculating the annual total income, the income that the participants in the merger achieve in mutual exchange does not count.

In addition, concentrations implemented through a takeover bid within the meaning of the Law on Takeovers of Joint Stock Companies must be notified even if the turnover threshold requirements are not met.

Regarding approval, concentrations of undertakings are permitted unless they significantly restrict, distort or prevent competition in the market of the Republic of Serbia or its part, especially if that restriction, distortion or prevention results from creating or strengthening a dominant position.

The permissibility of concentrations is determined concerning the following factors:

- structure of the relevant market;
- actual and potential competitors;
- market position of participants in concentration and their economic and financial power;
- possibility of choosing suppliers and customers;
- legal and other barriers to entering the relevant market;
- level of competitiveness of participants in concentration;
- supply and demand trends of the relevant goods or services;

- technical and economic development trends; and
- interests of consumers.

The preventative character of the concentration control system ensures that notified concentrations may generally only be completed after approval by the Commission. The concentration control procedure is divided into two phases. The Law explicitly stipulates that the Commission must issue (the equivalent of) a Phase I clearance decision or a decision to commence (the equivalent of) a Phase II investigation within one calendar month of filing a complete notification (complete with all information and supporting documentation, including translation into Serbian). The one-month period starts running from the first calendar day following the submission of a complete notification. If either decision is not reached within one calendar month, the Commission is prohibited from further examining the proposed concentration, and it may be implemented without reservations. In practice, case handlers sometimes extend this deadline by requesting additional information from the parties, thus “stopping the clock” (ie, indicating that the notification was incomplete as submitted).

The Commission has the discretion to either approve, prohibit or approve concentrations with specified conditions. Normally, the Commission issues a Phase I clearance decision if the concentration does not lead to the “creation or strengthening of a dominant position”.

The Commission is obligated to issue the Phase II decision within four months from the date of issuing the conclusion on the commencement of Phase II. The four-month period starts running from the first calendar day following the date of issuance of the conclusion.

A concentration is deemed cleared if the Commission fails to deliver a decision within one month following the submission of a complete merger notification (four months if ex officio investigation proceedings are opened).

It should be noted that, due to the set-up of the relevant financial thresholds, any concentration engaged in by an entity with over EUR100 million worldwide and over EUR10 million turnover in Serbia becomes notifiable in Serbia. This is why many foreign-to-foreign transactions are notified in Serbia, attracting significant criticism from the professional community.

In addition to the notification obligation within the statutory time limit, there is a standstill obligation that prohibits the implementation of a concentration before its clearance. The Commission may impose measures for the protection of competition (up to 10% of the aggregate annual turnover) for violating the standstill obligation through early implementation of a transaction, including procedural penalty measures.

Concentrations and negotiations on their implementation may pose a high risk of potential competition infringements, as undertakings may gain insights into confidential business information about competitors. Therefore, it should be ensured that employees involved in the process:

- comply with data confidentiality agreements, especially under competition regulations;
- do not share information learned about competitors with other employees of companies involved in transactions executing a concentration; and
- in the most extreme cases, consider creating a “clean room” with sensitive data and limiting access to it to only the minimum number of professionals involved in the process.

Recent Practice Under Serbian Concentration Control

In 2024, the Commission reached a landmark decision concluding the initiated proceedings for approving the reported concentration in the ex officio procedure while simultaneously investigating the violation of competition by major coffee production market participants Atlantic Group and Strauss Adriatic.

In the ex officio investigation of the competition infringement against Atlantic Group – Zagreb, Atlantic Brands – Belgrade, Atlantic Grand – Belgrade, and Strauss Adriatic – Šimanovci, initiated on 16 September 2021, the Commission found that those companies agreed and coordinated their business strategy through direct or indirect exchange of information regarding pricing policy and future wholesale prices of ground coffee in the Republic of Serbia, thereby concluding a restrictive agreement. During the procedure, it was noted that the parties changed their behaviour patterns at the end of 2021, and thereafter, there was a greater similarity in price behaviour on the stock exchange and the price of coffee in Serbia.

Based on the findings, the Commission imposed competition protection measures on both market participants totalling RSD237,907,176 (approximately EUR2 million).

While the infringement investigation was ongoing, on 10 November 2023 the Commission considered the concentration notified to it between Atlantic Grand d.o.o. – Belgrade and Strauss Adriatic – Šimanovci. The Commission conditionally approved the concentration in the investigative procedure continued ex officio initiated.

The Commission assessed that the subject concentration cannot be implemented without fulfill-

ing the following conditions imposed on Atlantic Grand d.o.o. Belgrade:

- to divest the factory where coffee processing and production of coffee products take place, including the immovable property on which this factory is located, equipment and machinery necessary for the mentioned activity;
- not to renew contracts for the production of coffee under private brand names for other market participants and not to conclude new contracts within five years; and
- to provide the Commission with general sales conditions and to report on the total quantity and price of imported raw coffee, production capacities and utilisation rate of production capacities of Atlantic Grand and Strauss Adriatic companies in Serbia, annual quantity of production of traditional (domestic) roasted coffee in production capacities of these companies, total quantity and wholesale price of sold traditional roasted coffee in Serbia, as well as export data for the next five years.

When assessing that the concentration could be approved only with the imposition of specific conditions, the Commission also took into account the observed changes in consumer habits regarding the consumption of coffee products, indicating trends in the growth of consumption of espresso coffee, filter coffee and coffee capsules, as well as the decline in the market share of the target company and its operating losses in the last two years.

The Commission assessed that within the five-year period designated for monitoring the mentioned behavioural measures, it will be able to monitor the operations and behaviour of Atlantic Group, as well as initiate proceedings for a new

competition infringement, in which case Atlantic Group would be a recidivist.

When approving the concentration, the Commission considered the current state of the coffee market and the future effects of implementing the concentration. It also took into account the procedure for investigating competition infringements committed in the period from 2014 to 2021.

Concentrations in 2023/2024

In 2023, the Commission for Protection of Competition received a total of 223 merger notifications, out of which 210 notifications were submitted in abbreviated form in accordance with the Regulation on the Content and Manner of Submitting the Notification on Concentration, accounting for 94% of the total number of merger notifications. Compared to this figure, 38 cases were carried over from 2022.

Concerning the economic sectors to which the reported mergers pertain and based on the defined relevant market, the energy and mining sector stands out with a total of 32 notifications, followed by the real estate sector with a total of 25 notifications, the construction industry and construction materials with 22 notifications, the automotive industry with 17 notifications, the pharmaceutical sector with 15 notifications, banking and finance with 13 notifications, and telecommunications with 12 notifications. Additionally, a significant number of notifications were submitted in areas such as the chemical industry, food industry, IT sector, and business logistics.

The majority of issued approvals, of the total number of issued approvals for mergers in the abbreviated procedure, relate to cases involving the acquisition of control over another market

participant or part thereof (78.1%). In cases of joint investments by two or more market participants or the acquisition of joint control over another participant, 41 approvals were issued (21.9%).

The high number of reported concentrations is a result of the extremely low thresholds for concentration control prescribed by the Serbian Law, especially when compared to relevant EU rules. These low control thresholds often lead to unnecessary scrutiny of a large number of mergers, ultimately acting as a tax on doing business. In essence, such low thresholds often trigger the examination of mergers that pose minimal to no threat to competition in the Serbian market.

Aligning Serbian Concentration Control With EU Competition Policy

The Serbian concentration control system largely mirrors the foundational principles of EU concentration control regulations. The laws of the Republic of Serbia generally align with EU standards, providing a solid foundation for competition protection. However, certain provisions are lacking, hindering the efficiency and effectiveness of concentration control procedures. Addressing these gaps could enhance procedural efficiency and economic effectiveness by reducing unnecessary administrative burdens (the extremely low thresholds for concentration control) on market participants and the Commission. While the Stabilisation and Association Agreement (SAA) obliges adherence to EU competition rules, it does not explicitly cover concentration control. Nonetheless, Serbia's commitment to harmonising its laws with the EU implies the potential for indirect application of EU principles, especially when interpreting the aligned legislation. This approach would involve aligning concentration control practices with EU standards, particularly

in cases where legal ambiguities exist, ensuring consistency with the essence of Serbian law.

For the development of Serbian competition case law, the impact of the revision of the Market Definition Notice on the Commission's future decisions is of particular relevance. The significant change in the EU in 2024 with the revision of this notice carries significant importance and it will be crucial to observe how the Serbian Commission integrates these updated rules into its future practice. The Market Definition Notice provides essential guidance on principles and best practices for applying relevant geographic and product market concepts in the EU competition legislation. Although the Serbian Commission is not directly bound by EU regulations, it is anticipated that the guidance provided in this notice will be considered when making decisions on future cases. This should potentially lead to the emergence of a new, innovative body of competition law cases in Serbia, influenced by these developments.

Finally, given that one of the competencies of the Commission is to issue guidelines for the implementation of the Law, it could be beneficial for specific instructions or guidelines to be issued for the detailed regulation of numerous issues related to concentrations, including relevant provisions of the revised Market Definition Notice. This would facilitate the implementation of aligned regulations, reduce potential uncertainties and difficulties in practice, and enable the introduction of solutions in line with EU best practice.

SINGAPORE

Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.616

- 1.1 Merger Control Legislation p.616
- 1.2 Legislation Relating to Particular Sectors p.616
- 1.3 Enforcement Authorities p.617

2. Jurisdiction p.617

- 2.1 Notification p.617
- 2.2 Failure to Notify p.617
- 2.3 Types of Transactions p.617
- 2.4 Definition of "Control" p.618
- 2.5 Jurisdictional Thresholds p.619
- 2.6 Calculations of Jurisdictional Thresholds p.619
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.619
- 2.8 Foreign-to-Foreign Transactions p.619
- 2.9 Market Share Jurisdictional Threshold p.619
- 2.10 Joint Ventures p.619
- 2.11 Power of Authorities to Investigate a Transaction p.620
- 2.12 Requirement for Clearance Before Implementation p.620
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.620
- 2.14 Exceptions to Suspensive Effect p.621
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.622

3. Procedure: Notification to Clearance p.622

- 3.1 Deadlines for Notification p.622
- 3.2 Type of Agreement Required Prior to Notification p.622
- 3.3 Filing Fees p.622
- 3.4 Parties Responsible for Filing p.622
- 3.5 Information Included in a Filing p.622
- 3.6 Penalties/Consequences of Incomplete Notification p.623
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.623
- 3.8 Review Process p.623
- 3.9 Pre-notification Discussions With Authorities p.624
- 3.10 Requests for Information During the Review Process p.624
- 3.11 Accelerated Procedure p.625

4. Substance of the Review p.625

- 4.1 Substantive Test p.625
- 4.2 Markets Affected by a Transaction p.625
- 4.3 Reliance on Case Law p.625
- 4.4 Competition Concerns p.625
- 4.5 Economic Efficiencies p.626
- 4.6 Non-competition Issues p.627
- 4.7 Special Consideration for Joint Ventures p.627

5. Decision: Prohibitions and Remedies p.627

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.627
- 5.2 Parties' Ability to Negotiate Remedies p.627
- 5.3 Legal Standard p.628
- 5.4 Negotiating Remedies With Authorities p.628
- 5.5 Conditions and Timing for Divestitures p.629
- 5.6 Issuance of Decisions p.629
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.629

6. Ancillary Restraints and Related Transactions p.630

- 6.1 Clearance Decisions and Separate Notifications p.630

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.630

- 7.1 Third-Party Rights p.630
- 7.2 Contacting Third Parties p.631
- 7.3 Confidentiality p.631
- 7.4 Co-operation With Other Jurisdictions p.631

8. Appeals and Judicial Review p.632

- 8.1 Access to Appeal and Judicial Review p.632
- 8.2 Typical Timeline for Appeals p.633
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.633

9. Foreign Direct Investment/Subsidies Review p.633

- 9.1 Legislation and Filing Requirements p.633

10. Recent Developments p.633

- 10.1 Recent Changes or Impending Legislation p.633
- 10.2 Recent Enforcement Record p.634
- 10.3 Current Competition Concerns p.634

Drew & Napier LLC is a full-service law firm with one of the oldest and largest dedicated competition law practices in Singapore, which has grown in tandem with the development of national and sectoral competition laws in Singapore. It comprises an experienced and highly qualified team of 12 lawyers who handle competition and regulatory matters both generally under the Competition Act 2004 and in the carved-out sectors, such as telecommunications, media, energy and post; the practice

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The merger control legislation in Singapore is set out in the Competition Act 2004, which is the primary competition legislation in Singapore. In particular, Section 54 of the Competition Act prohibits mergers and acquisitions that have resulted – or may be expected to result – in a substantial lessening of competition (SLC) within any market in Singapore (the Section 54 Prohibition).

The Competition Act was enacted on 19 October 2004 and implemented in phases, with the merger provisions coming into force on 1 July 2007. It is enforced by the Competition and Consumer Commission of Singapore (the Commission), which has issued the following guidelines on how it will interpret and give effect to the merger control provisions in the Competition Act:

- Guidelines on Merger Procedures (revised on 1 February 2022); and
- Guidelines on the Substantive Assessment of Mergers (revised on 1 February 2022).

1.2 Legislation Relating to Particular Sectors

While Singapore does not have any general legislation prohibiting or requiring consent for foreign transactions or investments, certain sectors (eg, media and telecommunications) may have laws on foreign ownership.

Certain industry sectors, such as telecommunications, media, post, gas and electricity, are regulated by industry-specific statutes containing merger control provisions, which are in turn enforced by industry-specific regulators. In particular, the Section 54 Prohibition does not apply to the following mergers specified in the Fourth Schedule of the Competition Act:

- mergers approved by any minister or any regulatory authority (other than the Commission), including the Monetary Authority of Singapore, pursuant to any requirement imposed by or under any written law;
- mergers under the jurisdiction of another regulatory authority under any written law or code of practice relating to competition;
- mergers relating to the supply of licensed and regulated ordinary letter and postcard services, potable piped water, wastewater management services, licensed bus ser-

vices, licensed and regulated rail services, or licensed and regulated cargo terminal operations; and

- mergers with economic efficiencies that outweigh the adverse effects of the SLC within a market in Singapore.

1.3 Enforcement Authorities

The Commission is the statutory body responsible for administering and enforcing the Competition Act. With effect from 1 April 2018, the Commission also assumed responsibility for administering and enforcing the Consumer Protection (Fair Trading) Act 2003, which provides for the protection of consumers against unfair practices and related matters.

As mentioned in **1.2 Legislation Relating to Particular Sectors**, sectoral regulators have purview over merger control in their respective sectors.

In cross-sectoral competition matters, the Commission will work with the relevant industry-specific regulator(s) to determine which regulator is best placed to handle the matter in accordance with statutory powers. The lead will be taken by the agency that is best placed in terms of its ability to investigate the alleged anti-competitive conduct and impose any necessary remedies.

2. Jurisdiction

2.1 Notification

Notification in respect of a merger or an anticipated merger is voluntary. Merger parties may notify a merger before, during or after the merger comes into effect. However, there are risks attached to proceeding with a merger before or during notification, as the Commission may commence investigations on its own initiative

and issue directions or impose financial penalties if any infringement is found.

2.2 Failure to Notify

As notification is voluntary, there are no sanctions for failing to notify the Commission of a merger. Merger parties should undertake a self-assessment to determine if notification is appropriate – eg, if they think that the merger may result in an SLC within any market in Singapore.

Even if no notification is made, the Commission may nonetheless initiate an investigation if it has reasonable grounds for suspecting that the Section 54 Prohibition has been or will be infringed. If the Commission decides that there is or will be an infringement, it may decide on actions to remedy, mitigate or prevent any adverse effects to competition caused by the merger. These actions may include a direction to divest all or part of the business or to unwind the merger (see **5.2 Parties' Ability to Negotiate Remedies**).

If the Commission finds that the infringement was committed intentionally or negligently, a financial penalty may be imposed on any of the merger parties, which may not exceed 10% of each party's business turnover in Singapore for each year of infringement, up to a maximum of three years.

2.3 Types of Transactions

In general, mergers and anticipated mergers that have resulted – or may be expected to result – in an SLC within any market in Singapore will be caught. A merger occurs if:

- two or more undertakings, previously independent of one another, merge;
- one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or

- the result of an acquisition by one undertaking (the first undertaking) of the assets (including goodwill), or a substantial part of the assets, of another undertaking (the second undertaking) is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate, the part of the business in which that undertaking was engaged immediately before the acquisition.

While an undertaking's acquisition of a majority stake in another undertaking is one of the more obvious examples of a merger, the creation of a joint venture through the transfer or pooling of assets may also be subject to the merger provisions.

Certain transactions do not constitute a merger for the purposes of the Competition Act, as follows:

- if the person acquiring control is a receiver or liquidator acting as such, or is an underwriter acting as such;
- if all of the undertakings involved in the merger are under the control of the same undertaking, directly or indirectly;
- if control is acquired solely as a result of a testamentary disposition, intestacy or the right of survivorship under a joint tenancy; or
- if control is acquired by an undertaking whose normal activities include carrying out transactions and dealings in securities for its own account or for the account of others under the circumstances specified in Section 54(9) of the Competition Act.

The determination of whether a merger exists is based on qualitative rather than quantitative criteria, focusing on the concept of control, which may occur on either a legal or de facto basis.

2.4 Definition of “Control”

Control is the ability to exercise “decisive influence” in relation to the activities of an undertaking. This requires consideration of all relevant circumstances of the case and not only the legal effect of any instrument, deed, transfer, assignment or other act.

As provided in Section 54(3) of the Competition Act, control of an undertaking is deemed to exist if decisive influence is capable of being exercised, particularly by:

- ownership of, or the right to use all or part of, the assets of an undertaking; or
- rights or contracts that enable decisive influence to be exercised with regard to the composition, voting or decisions of the organs of an undertaking.

The Commission considers that decisive influence is deemed to exist if there is ownership of more than 50% of the undertaking's voting rights. Where ownership is between 30% and 50% of the undertaking's voting rights, there is a rebuttable presumption that decisive influence exists. “Voting rights” refers to all the voting rights linked to the share capital of an undertaking and currently exercisable at a general meeting. That said, control could potentially be established at levels below these indicative thresholds if other relevant factors (eg, other forms of voting rights) provide strong evidence of control.

The Commission may also assess whether a party has de facto control over an undertaking, on a case-by-case approach. For example, decisive control may exist where minority shareholders have additional rights that allow them to veto decisions that are essential for the strategic commercial behaviour of the undertaking, such as the budget, business plans, major

investments, the appointment of senior management or market-specific rights. The acquisition of a minority shareholding that confers decisive influence over an undertaking could amount to a merger that is considered reviewable by the Commission.

2.5 Jurisdictional Thresholds

The Commission is unlikely to investigate a merger involving only small companies where the following applies in the financial year preceding the merger:

- each party's turnover in Singapore was below SGD5 million; and
- the combined worldwide turnover of all the parties was below SGD50 million.

The Commission generally takes the view that competition concerns are unlikely to arise in a merger situation unless the market share of the merged entity will be:

- 40% or more; or
- between 20% and 40%, and the post-merger market share of the three largest firms is 70% or more.

As merger notification is voluntary, the above thresholds set out by the Commission are indicative thresholds, and mergers that fall below these thresholds may still be investigated in appropriate circumstances.

Conversely, mergers that meet or exceed the above thresholds are not necessarily prohibited under Section 54 of the Competition Act. Merger parties are encouraged to carry out self-assessments as to whether their transaction is likely to lead to an SLC in any market in Singapore and if notification to the Commission is recommended.

There are also prescribed notification thresholds in the merger control regimes of some sectors regulated by industry-specific statutes.

2.6 Calculations of Jurisdictional Thresholds

The indicative thresholds are calculated on the basis of market shares.

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

Market share thresholds are based on how the market is defined and this, in turn, is dependent on the specific facts and circumstances of the particular merger under assessment or investigation. The Commission typically adopts the hypothetical monopolist test in defining the relevant markets.

2.8 Foreign-to-Foreign Transactions

Bar the exceptions set out in the Fourth Schedule to the Competition Act, the Section 54 Prohibition applies to any merger or anticipated merger that has resulted – or may be expected to result – in an SLC within any market in Singapore, regardless of whether or not the parties to the merger have a local presence within Singapore.

2.9 Market Share Jurisdictional Threshold

While, theoretically, one party may meet the indicative market share thresholds in the absence of a substantive overlap, notification of the merger to the Commission is recommended only where there are concerns that the merger will lead to an SLC in any market in Singapore.

2.10 Joint Ventures

The merger provisions apply to joint ventures that constitute a merger – ie, if they:

- are subject to joint control;
- operate in the market and perform all the functions of an autonomous economic entity operating in that market; and
- are intended to operate on a lasting basis.

There is joint control where two or more parties are able to exercise decisive influence over the undertaking, which includes the power to block actions that determine the strategic commercial behaviour of the undertaking. Joint control is characterised by the possibility of a deadlock arising from the power of two or more parent companies to reject proposed strategic decisions; therefore, there is a requirement that the shareholders must reach a consensus in determining the commercial activities of the joint venture.

A joint venture is subject to the Section 54 Prohibition only if it operates in the market and performs all the functions of an autonomous economic entity. A joint venture that only takes over one specific function within the parent companies' business activities without access to the market will not come under the purview of the Section 54 Prohibition – for example, if the joint venture is limited to research and development, or production only, or the distribution or sales of its parent companies' products. However, a joint venture that makes use of one or more of its parent companies' distribution networks or outlets, or relies almost entirely on sales to or purchases from its parent companies for an initial start-up period, is not precluded from being regarded as performing all the functions of an autonomous economic entity, if it is geared to play an active role in the market.

A joint venture that constitutes a merger must be intended to operate on a lasting basis, which may normally be demonstrated by the commit-

ment of resources by its parent companies. For joint ventures established with a specified duration, the agreement should provide for a sufficiently long time period in order to bring about a lasting change in the structure of the undertakings concerned, or otherwise for the possible continuation of the joint venture beyond this period. Conversely, a joint venture established for a short, finite duration will not be considered to be operating on a lasting basis.

2.11 Power of Authorities to Investigate a Transaction

The Commission may conduct an own-initiative investigation into mergers that were not notified if there are reasonable grounds to suspect that the Section 54 Prohibition has been or will be infringed. The Commission may also investigate a merger based on information from complaints by third parties or its market intelligence function. There is no statute of limitations on the Commission's ability to investigate a merger or apply sanctions.

2.12 Requirement for Clearance Before Implementation

There is no requirement for parties to suspend the implementation of a merger or anticipated merger prior to clearance. While merger parties may implement an anticipated merger or further integrate a completed merger before or during notification to the Commission, these actions are taken at the parties' own risk if there is a likelihood that the merger may lead to an SLC; see 2.13 Penalties for the Implementation of a Transaction Before Clearance.

2.13 Penalties for the Implementation of a Transaction Before Clearance

The Commission may issue directions imposing any interim measures it considers appropriate for mergers under investigation. Interim direc-

tions are issued for the purposes of preventing merger parties from taking any action that may prejudice the Commission's investigations or its ability to impose the appropriate remedies, or as a matter of urgency to prevent serious, irreparable damage to a particular person or category of persons, or to protect the public interest. These measures may include:

- suspending the merger;
- prohibiting the transfer of staff; or
- setting limits on the exchange of commercially sensitive information.

If the parties concerned do not comply with the Commission's direction, the Commission may apply to register the direction with a district court, following which any person who fails to comply with the registered direction without reasonable excuse may be found to be in contempt of court. Sanctions for contempt of court include the imposition of a fine or imprisonment. The court may also issue orders to secure compliance with the direction, or to require any person to remedy, mitigate or eliminate any effects arising from non-compliance.

As a matter of practice, the Commission is unlikely to use these powers unless it believes there is a real possibility of the merger raising serious competition concerns. As of 16 May 2024, the Commission has only exercised its power to issue interim directions twice:

- the first instance was Grab's acquisition of Uber's South-East Asian business and Uber's acquisition of a 27.5% stake in Grab (Grab-Uber case); and
- the second instance was the possible acquisition by Grab of the whole or part of the business of Delivery Hero in Southeast Asia, including Singapore, although this set of

interim measures ceased to be in effect from 23 February 2024 after the Commission was informed that the possible acquisition had been abandoned.

Where the Commission finds that there has been an infringement of the Section 54 Prohibition, it will decide on the appropriate action to remedy, mitigate or prevent the adverse effects resulting from the merger, and to prevent the recurrence of such infringements. Such actions may involve directions requiring the unwinding of the merger or the divesting of one of the overlapping businesses that led to the competition concerns, as well as the imposition of financial penalties; see **5.2 Parties' Ability to Negotiate Remedies**.

2.14 Exceptions to Suspensive Effect

The notification of a merger under the Competition Act does not itself have a suspensive effect on the transaction. However, where the Commission issues interim directions to the parties, there are no prescribed general exceptions to the suspensive effect of such interim directions. Prior to the issuance of interim directions (ie, to suspend a merger), the Commission will provide parties with the proposed interim directions and an opportunity to make written representations. The Commission will consider the written representations before making a decision on whether or not to issue the interim directions.

If issued, the interim directions take effect immediately from the date of issuance and remain in effect until the completion of the Commission's investigations, or unless otherwise varied by the Commission.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

As notification is voluntary, merger parties may choose to implement an anticipated merger or further integrate a completed merger while it is being considered by the Commission, or before notifying the Commission. However, see 2.12 Requirement for Clearance Before Implementation and 2.13 Penalties for the Implementation of a Transaction Before Clearance regarding the risks of proceeding with a merger before clearance.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

As notification is voluntary, the Competition Act does not stipulate any deadlines for notification. Instead, merger parties are strongly encouraged to conduct a self-assessment of the merger and consider whether to notify the Commission. Parties may choose to notify their merger to the Commission for a decision at any time before, during or after the merger.

Anticipated mergers may only be notified if they are no longer confidential and may be made known to the public, preferably prior to the completion of the merger. For completed mergers, an application may be made at any time, although parties are encouraged to do so as soon as possible after completion.

3.2 Type of Agreement Required Prior to Notification

For anticipated mergers, an application can only be made once the parties have a bona fide intention to proceed with the transaction and the merger has been made public, or if the parties

have no objections to the Commission publicising their merger for the purpose of seeking third-party views. In practice, the Commission is likely to require a memorandum of understanding or draft agreement to evidence such an intention. For completed mergers, the Commission would require a binding agreement for the filing to be made.

3.3 Filing Fees

The filing fees for mergers or anticipated mergers are as follows:

- where the turnover of the target undertaking or asset is equal to or less than SGD200 million, the fee is SGD15,000;
- where the turnover of the target undertaking or asset is between SGD200 million and SGD600 million, the fee is SGD50,000; and
- where the turnover of the target undertaking or asset is above SGD600 million, the fee is SGD100,000.

If the merger parties are small or medium-sized enterprises (SMEs) or if the acquiring party is an SME, and direct or indirect control in the SME will not be (or has not been) acquired, the filing fee will be SGD5,000. SMEs are defined in the Competition (Fees) Regulations 2007 as undertakings with an annual sales turnover of not more than SGD100 million or having no more than 200 employees.

3.4 Parties Responsible for Filing

Any party to a merger or anticipated merger may apply to the Commission for a decision. Joint filings are encouraged by the Commission.

3.5 Information Included in a Filing

The Commission will review a merger in either one or two phases. A Phase 1 review, which begins with the submission of a completed Form

M1, entails a quick assessment and allows the Commission to give a favourable decision with regard to a merger situation that clearly does not raise any competition concerns. If the Commission is unable to clear a merger situation after a Phase 1 review, it will provide the applicant(s) with a summary of its key concerns and conduct a more detailed assessment in a Phase 2 review, upon receiving a completed Form M2 and response to the Phase 2 information request from the applicant(s).

Applicants should include all relevant documents to support statements and explanations made in Form M1, including transaction documents, annual reports and accounts, and business plans.

Form M2 lists the further information and supporting documents that may be required by the Commission in a Phase 2 review. If the applicants consider that the merger is likely to go into a Phase 2 review, they may also voluntarily submit the information required in Form M2 at the outset, together with Form M1.

Even where Forms M1 and/or M2 have been completed and submitted, the Commission may require additional information from the applicant(s) for the purposes of assessing the merger situation.

3.6 Penalties/Consequences of Incomplete Notification

The Commission may refuse to accept an application if it is not:

- complete;
- accompanied by relevant supporting documents;
- substantially in the prescribed form;
- accompanied by the appropriate fee; or

- in compliance with any requirement prescribed under the Competition Act or accompanying regulations.

To avoid any unnecessary delay, merger parties should therefore ensure that the application is complete and all filing requirements are met upon submission.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

If the Commission has issued a favourable decision based on information that was incomplete, false or misleading, it may review and revoke the decision.

Persons who recklessly or intentionally provide false or misleading information to the Commission may also be charged and convicted of a criminal offence under the Competition Act. Upon conviction, such persons may face a fine of up to SGD10,000 or imprisonment for up to 12 months, or both. As of 16 May 2024, based on publicly available information, no cases have been brought in respect of such offences under the Competition Act.

3.8 Review Process

In general, the Phase 1 review is expected to be completed within 30 working days, commencing on the working day after the day of receipt of a completed application. If a Phase 2 review is required, the Commission will endeavour to complete it within 120 working days of the applicant(s) submitting a completed Form M2 and a response to the Phase 2 information request that is deemed satisfactory by the Commission. In any event, the indicative timeframe for Phase 2 will only commence after the expiry of the indicative timeframe of 30 working days for the Phase 1 review.

Merger parties should note that the indicative timeframes are not binding on the Commission and that the Commission has the power to “stop the clock” during the review – eg, if the merger parties fail to provide the Commission with the additional information requested within the stipulated time period (or any extensions of time given), or if commitments are being considered.

3.9 Pre-notification Discussions With Authorities

Parties may either engage the Commission in pre-notification discussions (PNDs) or seek confidential advice before submitting Form M1 and commencing the formal notification process.

PNDs

To expedite the review process, merger parties intending to make an application may engage the Commission in PNDs to discuss the content of the notification and the timing of the formal notification.

No specific timetable is given, since the Commission states that the length and formality of PNDs depend on the merger parties’ preference, the transaction’s complexity and the concerns that may be raised. The Commission states that PNDs are most useful where a draft Form M1 is provided.

In PNDs, the Commission will generally not give its views on whether a merger situation is likely to proceed to Phase 2 review or if it might lead to an SLC.

While parties can engage in PNDs for anticipated mergers that may not yet be made public, PNDs are not intended to relate to purely speculative or hypothetical transactions. Parties should demonstrate a good-faith intention to proceed with

the transaction – eg, by already having a draft agreement in place.

Confidential Advice

Parties may approach the Commission for confidential advice on a merger, especially at the stage when merger parties are concerned about preserving the confidentiality of the transaction. This process is only available if the Commission is satisfied that the following conditions are met:

- the merger must not be completed but there must be a good-faith intention to proceed with the transaction;
- the merger must not be in the public domain, unless exceptional circumstances apply;
- the merger situation must raise a genuine issue relating to competitive assessment in Singapore – eg, if there is a lack of relevant precedents – and therefore the Commission’s approach to the merger situation is genuinely in doubt; and
- the requesting party or parties are expected to keep the Commission informed of significant developments in relation to the merger in respect of which confidential advice was obtained – eg, the completion date or abandonment of the merger.

If the Commission decides that the above conditions are not met, it will return the confidential information that was submitted by the merger parties. The Commission will not disclose the fact that confidential advice was requested, nor the parties’ information, to other organisations or foreign competition authorities unless relevant waivers are given by the merger parties.

3.10 Requests for Information During the Review Process

In both Phase 1 and Phase 2 reviews, the Commission may request additional or more com-

prehensive information when it is clear that such information is necessary. Applicants are encouraged to comply with such information requests promptly and by such deadline as the Commission deems appropriate, so that the merger assessment can be completed within the indicative timeframes. If the requested information cannot be furnished by the deadline, the applicants should promptly request an extension of time from the Commission.

The Commission may “stop the clock” and thereby extend the relevant time period for assessing the merger. If the applicant fails to provide the additional information within the deadline and any time extensions that have been granted, the Commission has the power to determine the application by not giving a decision, and then commence its own investigation into the merger using its statutory powers.

3.11 Accelerated Procedure

No separate accelerated review procedure is currently available. However, Phase 1 is generally considered a quick assessment that allows the Commission to issue a favourable decision in the case of a merger that is unlikely to raise any competition concerns.

4. Substance of the Review

4.1 Substantive Test

The Commission employs the SLC test in assessing mergers. There is no precise threshold as to what constitutes an SLC. In applying the SLC test, the Commission will compare the likely state of competition in the scenario where the merger has proceeded against the scenario where the merger has not proceeded (often referred to as the counterfactual). The counter-

factual should not involve a violation of competition law.

4.2 Markets Affected by a Transaction

As noted in 2.5 Jurisdictional Thresholds, the Commission will seek to define the relevant market(s), in order to assess the extent of competition in each relevant market both with and without the merger. However, as market shares alone do not provide deep insight into the nature of competition between firms in a market, an SLC could potentially be established at thresholds below those set out in 2.5 Jurisdictional Thresholds, if other relevant factors provide strong evidence of an SLC.

4.3 Reliance on Case Law

While market definition depends on the specific facts and circumstances of the particular merger under assessment or investigation, the Commission may be guided by market definitions from other jurisdictions if such definitions are relevant, based on the facts of the case.

4.4 Competition Concerns

In assessing whether a merger situation might have the effect of an SLC in the relevant market, the Commission will look at:

- the extent to which the merger parties are close competitors;
- competition from existing competitors operating in the relevant market;
- competition from potential competitors; and
- the degree of countervailing buyer power of customers, such that some or all customers would be able to prevent the merged entity from raising prices.

For horizontal mergers, the Commission will consider whether the merger situation gives

rise to non-co-ordinated effects or co-ordinated effects, or both.

Non-co-ordinated Effects (or Unilateral Effects)

Non-co-ordinated effects (or unilateral effects) may arise where a firm has merged with its closest competitor and could find it profitable to raise prices (or reduce output, quality or innovation) because of the loss of competition between the merged entities. Rival firms in the market may also find it profitable to increase their prices independently because of the loss of competitive pressure arising from the merger. Non-co-ordinated effects may also arise when an existing firm merges with a potential or emerging competitor, thereby preserving the market power of the incumbent firm that would otherwise have been threatened, or in markets where innovation is an important feature of competition and where one or more of the merging parties is a key innovator and has the potential to exert significant competitive pressure in the future.

Co-ordinated Effects

Co-ordinated effects may arise due to the merger situation increasing the possibility that, post-merger, some or all firms in the same market may find it profitable to co-ordinate their behaviour by raising prices or by reducing quality, output or innovation. This may occur where a merger reduces competitive constraints from actual or potential competition in a market, thus increasing the probability of collusion or strengthening a tendency for competitors to collude.

Non-horizontal Mergers

Non-horizontal mergers, such as vertical mergers and conglomerate mergers, may also trigger competition concerns in certain circumstances. With respect to vertical mergers, the Commission will consider factors such as the possibility

of foreclosure, the increased potential for collusion, the creation of barriers to entry and the ability of customers to exercise countervailing power. With respect to conglomerate mergers, the Commission will consider factors such as:

- the prospects of the conglomerate merger increasing the feasibility of potential co-ordinated and non-co-ordinated effects;
- whether the replication of the range of products offered by the merged entity itself represents a strategic barrier to entry; and
- the ability of customers to exercise countervailing power.

4.5 Economic Efficiencies

Economic efficiencies may be considered by the Commission at two distinct points in the analytical framework.

Firstly, efficiencies may be assessed when considering whether the merger is likely to lead to an SLC in the first place. A merger may not result in an SLC where, for example, the efficiency gains from the merger of two of the smaller firms in a market allow the merged entity to exert greater competitive pressure on larger competitors. Secondly, efficiencies may also be taken into account where they outweigh the adverse effects resulting from the SLC caused by the merger, such that there are net economic efficiencies in markets in Singapore.

In general, efficiencies must be demonstrable (ie, clear and quantifiable), merger-specific (ie, likely to arise from the merger), timely (ie, the benefits will materialise within a reasonable period of time) and sufficient in extent (with reference to the magnitude of the efficiencies).

4.6 Non-competition Issues

The Minister for Trade and Industry (the Minister) has the power to exempt a merger or an anticipated merger on the grounds of any public interest consideration, upon the application of a merger party that has been notified that the Commission proposes to issue an unfavourable decision in respect of the merger. For the purposes of the Competition Act, “public interest consideration” refers to “national or public security, defence and such other considerations as the Minister may, by order published in the Gazette, prescribe”. As of 16 May 2024, the Minister has not gazetted any other matters as “public interest considerations” under Section 2 of the Competition Act.

As mentioned in **1.2 Legislation Relating to Particular Sectors**, Singapore does not have general legislation prohibiting or requiring consent for foreign investment. However, some sectors and industries, such as news media, banking, telecommunications and real estate, have specific requirements on foreign ownership. These regulations are separate from the merger control rules under the Competition Act.

For example, the Telecommunications Act 1999 requires a person to obtain the approval of the Info-communications Media Development Authority before becoming a 12% controller or a 30% controller, before obtaining effective control over a designated telecommunications licensee, or before acquiring any business (or any part of such business) of a designated telecommunications licensee as a going concern.

4.7 Special Consideration for Joint Ventures

The same substantive assessment applies to a joint venture that is deemed to constitute a merger for the purposes of the Competition Act.

As the creation of a joint venture merger may increase the probability of co-ordination between the joint venture parent entities in some cases, the Commission will assess any co-ordination that takes place outside of the approved joint venture with a view to establishing whether the behaviour poses competition concerns.

5. Decision: Prohibitions and Remedies

5.1 Authorities’ Ability to Prohibit or Interfere With Transactions

Where the Commission makes a decision that a merger has infringed the Section 54 Prohibition, or that an anticipated merger will infringe the Section 54 Prohibition if it is carried into effect, it may give such directions as it thinks appropriate. The directions may include provisions prohibiting an anticipated merger from being brought into effect or requiring a merger to be dissolved or modified in such a manner as the Commission may direct (eg, requiring the disposal of such operations, assets or shares of such undertaking in a manner specified).

The Commission may also require merger parties that intentionally or negligently infringe the Section 54 Prohibition to pay a financial penalty, determined by the Commission.

5.2 Parties’ Ability to Negotiate Remedies

Generally, merger parties are encouraged to take the initiative to propose commitments that are appropriate to meet any competition concerns at any time before the Commission decides on the merger. The Commission will only accept commitments that are proportionate and sufficient to clearly address the identified adverse effects on competition. Even if merger parties

propose commitments, the Commission may consider and impose alternative remedies.

The Commission may consider two types of remedies: structural remedies and behavioural remedies.

Structural Remedies

Structural remedies are generally preferred to behavioural remedies because they clearly address the market structure issues that gave rise to the competition problems and, once implemented, require little ongoing monitoring by the Commission. Typically, structural remedies involve the sale of one of the overlapping businesses that led to the competition concern. The Commission considers that, ideally, this should be a self-standing business that is capable of being fully separated from the merger parties and, in most cases, will be part of the acquired enterprise.

The sale should be completed within a specified period, subject to the Commission's approval of the buyer. This is to ensure that the proposed buyer has the necessary expertise, resources and incentives to operate the divested business as an effective competitor in the marketplace. Otherwise, it is unlikely that the proposed divestiture will be an effective remedy for the anti-competitive elements identified.

In appropriate cases, the Commission will also consider other structural or quasi-structural remedies, such as the divestment of the buyer's existing business (or part of it) or an amendment to intellectual property licences.

Behavioural Remedies

The Commission will consider behavioural remedies in situations where divestment is considered to be impractical or disproportionate to the

nature of the concerns identified. In some cases, behavioural remedies may also be necessary to support structural divestment.

In determining which remedies would be appropriate and comprehensive, the Commission will take into account how effectively the action would prevent, remedy or mitigate the competition concerns caused by the merger. The Commission's starting point will be to choose the remedial action that will restore the competition that has been – or is expected to be – substantially reduced as a result of the merger. Given that the effect of a merger is to change the structure of the market, remedies that aim to restore all or part of the pre-merger market structure are likely to be a more direct way of addressing the adverse effects, although other remedies may be considered in view of the associated costs and effectiveness.

5.3 Legal Standard

When deciding on the appropriate remedy, the Commission will consider the effectiveness of different remedies and their associated costs, and will have regard to the principle of proportionality.

5.4 Negotiating Remedies With Authorities

As the Commission may accept commitments at any time before making its decision, parties can generally propose commitments at any time during the Commission's review or investigation. While merger parties are encouraged to take the initiative to propose commitments that they think may be appropriate to meet any competition concerns, the Commission may also invite merger parties to consider whether they want to offer commitments.

Phase 1 and 2 Reviews

If the Commission identifies competition concerns in Phase 1 which indicate that a Phase 2 review may be appropriate, those concerns will be communicated to the applicant(s) in writing through an issues letter. This presents the applicant(s) with a final opportunity to propose commitments to address these concerns in Phase 1.

Towards the end of Phase 2, if the Commission reaches a preliminary view that the merger is likely to give rise to an SLC, it will issue a Statement of Decision (Provisional), which may outline remedies that the Commission considers appropriate. Parties will be given a final opportunity to respond and propose commitments.

Invitations to Comment

In both Phase 1 and Phase 2, where the Commission considers that the commitments proposed by the merger parties are a suitable remedy, it will issue an invitation to comment on its website, and may also approach third parties individually for their views. Having obtained third-party views, the Commission will decide whether or not the commitments are appropriate and may be accepted. Where commitments have been accepted, the Commission will issue a favourable decision and may publish the details of all commitments as part of its decision on the merger on its public register. If an unfavourable decision is issued (eg, if the Commission finds that the proposed commitments would not be appropriate or sufficient to address competition concerns arising from the merger), directions will be given in writing to such person(s) as the Commission considers appropriate, and the decision and directions will be published on the public register.

5.5 Conditions and Timing for Divestitures

Divestitures to a pre-approved buyer should be completed within a specified period. An independent trustee may be appointed, at the undertaking's expense, to monitor the operation of the business pending disposal and/or to handle the sale if the undertaking has not completed the divestiture within the specified period.

If the parties are required to complete divestitures pursuant to a commitment accepted by the Commission, which has issued a favourable decision, the Commission may revoke the decision for failure to adhere to the terms of the commitment.

Where divestitures are ordered pursuant to directions imposed by the Commission but are not complied with, the Commission may seek to enforce its directions with a district court. See 2.13 Penalties for the Implementation of a Transaction Before Clearance regarding the possible penalties for non-compliance with the Commission's directions.

5.6 Issuance of Decisions

The Commission will give notice of its decision to the applicant(s), announce the decision on its website, and publish the text of the decision (with confidential information redacted if the Commission agrees with the confidentiality claims of the merger parties) on the public register.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

For foreign-to-foreign transactions, there have been two cases where the Commission has accepted commitments from the merger parties:

- on 29 January 2016, the proposed acquisition by ADB BVBA of all the shares of Safe-

gate International AB from Fairford Holdings Private AB received a clearance decision from the Commission that was subject to certain commitments (ADB-Safegate); and

- on 24 May 2021, the Commission granted approval for the acquisition of Refinitiv Holdings Limited by the London Stock Exchange Group plc, conditional upon the implementation of and compliance with the final commitments (LSE-Refinitiv).

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

If merger parties have included ancillary restrictions in their notification application, a clearance decision will cover ancillary restrictions as well. Separate notifications for guidance, or a decision, may be necessary for parties that have not notified their mergers.

The Commission considers that ancillary restrictions are agreements, arrangements or provisions that are directly related and necessary to the implementation of a merger. Pursuant to an exception under the Third Schedule of the Competition Act, restrictions that fit within this definition are excluded from the application of Section 34 of the Competition Act, which prohibits anti-competitive agreements, and Section 47 of the Competition Act, which prohibits abuse of a dominant position.

However, a restriction is not automatically deemed directly related to the merger simply because it is agreed at the same time as the merger, or is expressed to be so related. To be directly related, the restriction must be economi-

cally connected with the merger but ancillary or subordinate to its main object.

A restriction is likely to be necessary if, for example, in the absence of the restriction, the merger would not go ahead or could only go ahead at substantially higher costs, over an appreciably longer period, or with considerably greater difficulty. In determining the necessity of the restriction, the Commission will consider whether its duration, subject matter and geographical field of application are proportionate to the overall requirements of the merger.

In addition, merger parties must demonstrate that they have chosen the option that is the least restrictive of competition, if equally effective alternatives are available for attaining the same objective.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third parties are permitted to be involved in the review process; see **7.2 Contacting Third Parties** for further information. Third parties may also make complaints to the Commission.

In general, parties that suffer loss or damage as a result of a competition law infringement will have a private right of action to seek relief in civil proceedings. Such rights will only arise after the Commission has made a decision that a merger has infringed the Section 54 Prohibition and the appeal period has expired, or, where an appeal has been brought, upon the determination of the appeal. Private actions must be brought within two years from the date of the Commission's

decision or from the determination of the appeal, whichever is later.

Relief may be in the form of an injunction or declaration, damages, and such other relief as the court deems fit.

7.2 Contacting Third Parties

The Commission gathers information about the competitive effects of the merger from the merger parties and from third parties, including customers, competitors, suppliers and other regulatory bodies and government departments, where relevant.

The Commission will invite third parties to comment on the merger and commitments (if any) via a public consultation exercise.

7.3 Confidentiality

Details of notified mergers will be published on the public register when the Commission receives a satisfactory application. The details published will usually include:

- the names of the merger parties;
- a description of the transaction;
- a description of the merger parties' business activities (worldwide and in Singapore);
- a description of the overlapping goods or services, including brand names;
- a description of substitute goods or services; and
- the applicant's views, including but not limited to the definition of the relevant markets, barriers to entry and countervailing buyer power, and the competitive effects of the merger.

All relevant information, including information that may be confidential, must be provided to the Commission. Both confidential and non-con-

fidential versions of an application or submission should be provided, as non-confidential versions are required to facilitate the Commission's discussions and meetings with third parties and the publication of a non-confidential version of the decision without delay.

If excessive or unreasonable confidentiality claims are made, the Commission may "stop the clock" until the applicant files a non-confidential version that is deemed acceptable by the Commission.

While the Commission will treat all parties' submissions on confidentiality seriously, confidential information may need to be disclosed in exceptional circumstances. In such cases, the Commission will liaise with the parties in advance to consider ways to minimise any detriment to them. Applicants will also be given an opportunity to review the draft decision before publication to determine whether it contains confidential information, although the Commission retains the final discretion to decide whether or not information is confidential.

7.4 Co-operation With Other Jurisdictions

The Commission is permitted under the Competition Act to enter into co-operation arrangements with any foreign competition body with approval from the Minister, which may take the form of information exchange or any other assistance as may be necessary to assist in the enforcement or administration of competition laws.

The Commission has entered into a number of memoranda of co-operation and understanding, as follows:

- on 22 June 2017, the Commission and Japan's Fair Trade Commission concluded a memorandum of co-operation;
- on 30 August 2018, the Commission signed a memorandum of understanding with Indonesia's Commission for the Supervision of Business Competition;
- on 17 September 2019, the Commission concluded a memorandum of understanding with Canada's Competition Bureau;
- on 29 November 2021, the Commission signed a memorandum of understanding with the Philippine Competition Commission; and
- on 29 December 2021, the Commission signed a memorandum of understanding with the State Administration for Market Regulation of the People's Republic of China.

Generally, the memoranda reinforce and formalise existing technical assistance and co-operation between the Commission and these foreign antitrust authorities. Co-operation includes work on areas such as information exchange, case notification, co-ordination of enforcement, technical co-operation and the sharing of experiences.

On 16 May 2019, the Commission announced that it had joined the International Competition Network's Framework on Competition Agency Procedures (CAP), as a founding member. The CAP advances basic non-binding principles on procedural fairness and transparency among antitrust agencies and enables closer co-operation through dialogue to better understand the processes of participating agencies.

Form M1 requires the parties to state which other jurisdictions they intend to notify (or have notified) of the merger. Merger parties will also be asked if they would be willing to provide a waiver that allows the Commission to exchange

confidential information with competition agencies in other jurisdictions.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Parties have a right to appeal to the Competition Appeal Board (the Board) against the Commission's decision or direction (including interim measures). The Board is an independent body comprising members appointed by the Minister.

Any merger party may appeal against the Commission's decision, whereas the Commission's direction may be appealed by the party on which the direction is imposed. The Board can confirm, impose, revoke or vary a direction, or make any other direction or decision, as long as it is a decision or direction that the Commission itself could have given. While parties may appeal against the Commission's refusal to vary, substitute or release existing commitments, they cannot appeal against the Commission's refusal to accept any commitments offered.

An appeal to the Board against a direction will not operate to suspend that direction, except in the case of appeals against financial penalties; the infringement decision and the direction will remain in effect (unless suspended by an interim order made by the Board or, in the case of a further appeal, the relevant appeal court).

Further appeals against the decisions of the Board are limited only to points of law and the amount of the financial penalty imposed, and may be made to the General Division of the High Court and then to the Court of Appeal. Appeals are brought by way of originating application, and the procedure governing the appeal is set

out in Order 20 of the Rules of Court 2021. Only a party to the proceedings at which the Board reached its decision can make such appeals. The General Division of the High Court may determine any such appeal by confirming, modifying or reversing the Board's decision and making such further or other order on appeal. There is no further appeal right from the Court of Appeal.

8.2 Typical Timeline for Appeals

Parties that wish to appeal to the Board must lodge a notice of appeal in the prescribed form within four weeks of the date on which they were notified of the contested decision or the date of publication of the decision, whichever is earlier. The Board may, at its discretion and on the appellant's application, extend the time limit provided for lodging a notice of appeal.

As soon as is practicable, the Board will:

- set a timetable outlining the preparatory steps to be taken by the parties for the oral hearing of the appeal;
- fix the hearing date;
- notify the parties in writing of the timetable and the date and place of the hearing; and
- send the parties a report summarising the factual context of the case and the parties' principal submissions, if it is considered to be necessary for the expeditious disposal of the appeal.

As of 16 May 2024, there has only been one appeal filed before the Board in respect of the Section 54 Prohibition in Singapore. The matter concerned Uber's appeal against the Commission's decision issued on 24 September 2018, which found that Grab and Uber had infringed the Section 54 Prohibition. Uber filed its notice of appeal on 20 October 2018 and the Board dismissed the appeal on 29 December 2020,

upholding the Commission's financial penalties and directions. In addition, the Board awarded costs of the appeal to the Commission.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Parties to an anticipated merger or a completed merger have a right to appeal against the Commission's decision.

Any other person to whom the Commission has given a direction under Sections 58A, 67 or 69 of the Competition Act may also appeal to the Board.

As of 16 May 2024, there are no cases in which third parties have brought an appeal against a clearance decision by the Commission.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

Singapore does not have general legislation prohibiting or requiring consent for foreign investment: see 1.2 Legislation Relating to Particular Sectors and 4.6 Non-competition Issues. However, some sectors and industries, such as news media, banking, telecommunications and real estate, have specific requirements on foreign ownership. These regulations are separate from the merger control rules under the Competition Act.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

The most recent amendments to the Competition Act were passed on 19 March 2018

and came into effect on 16 May 2018, following a public consultation conducted between 21 December 2017 and 11 January 2018. The revised guidelines, which came into effect on 1 February 2022, considered the 2018 amendments to the Competition Act as well as studies conducted by the Commission.

There are currently no published reform proposals.

10.2 Recent Enforcement Record

As of 16 May 2024, a total of 109 mergers and acquisitions have been notified to the Commission since the merger provisions came into force on 1 July 2007. The Commission has cleared 98 mergers, with three mergers pending, while the remaining eight mergers have been withdrawn or abandoned. Of the 98 clearance decisions, the following six mergers were cleared conditional to the Commission receiving remedies or commitments from the parties:

- the proposed acquisition by Seek Asia Investments Pte Ltd of the Jobstreet Business in Singapore (cleared on 13 November 2014);
- ADB-Safegate (cleared on 29 January 2016);
- the proposed acquisition by Times Publishing Limited of Penguin Random House Pte Ltd and Penguin Books Malaysia Sdn Bhd (cleared on 25 September 2017);
- the acquisition by Pathology Asia Holdings Pte Ltd of Innovative Diagnostics Private Limited and Quest Laboratories Pte Ltd (cleared on 21 October 2019);
- LSE-Refinitiv (cleared on 24 May 2021); and
- the proposed acquisition by Talace Private Limited of Air India Limited (cleared on 5 March 2024) (Talace-Air India).

Of these cases, only the ADB-Safegate, LSE-Refinitiv and Talace-Air India mergers concerned foreign-to-foreign transactions.

As of 16 May 2024, the Grab-Uber case is the only case in which the Commission has:

- investigated a merger that was not notified to the Commission; and
- imposed financial penalties for an infringement of the Section 54 Prohibition.

Following the Grab-Uber merger announcement on 26 March 2018, the parties started the process of transferring acquired assets without notifying the Commission. This led to the Commission initiating an investigation of its own accord, as there were reasonable grounds to suspect an infringement of the Section 54 Prohibition. While investigations were ongoing, the Commission issued interim measures, which, inter alia, required the parties to cease any action that could lead to further integration of the merger or prejudice the Commission's ability to assess the merger.

Ultimately, when the Commission issued its final infringement decision on 24 September 2018, a total of approximately SGD13 million in financial penalties was imposed on Grab and Uber for completing an irreversible merger that harmed competition, as the transfer of assets made it impossible to restore competition and market conditions to the pre-transaction state. The Board dismissed Uber's appeal against the infringement decision on 29 December 2020, upholding the Commission's financial penalties and directions.

10.3 Current Competition Concerns

In 2020, the Commission conducted the E-commerce Platforms Market Study, focused on gain-

ing an in-depth understanding of the business models and operating environment of e-commerce platforms that compete or potentially compete across multiple market segments offering distinct products and/or services. Notably, with respect to merger control, certain amendments in the revised Guidelines on the Substantive Assessment of Mergers can be traced back to the Commission's findings and recommendations from its E-commerce Platforms Market Study.

In view of the rise and growing dominance of "Big Tech" giants amidst consolidation in digital industries and the COVID-19 pandemic's acceleration of digital businesses, the e-commerce industry could be an area of interest for the Commission moving forward.

SOUTH KOREA

Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.640

- 1.1 Merger Control Legislation p.640
- 1.2 Legislation Relating to Particular Sectors p.640
- 1.3 Enforcement Authorities p.640

2. Jurisdiction p.640

- 2.1 Notification p.640
- 2.2 Failure to Notify p.641
- 2.3 Types of Transactions p.642
- 2.4 Definition of "Control" p.642
- 2.5 Jurisdictional Thresholds p.642
- 2.6 Calculations of Jurisdictional Thresholds p.644
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.644
- 2.8 Foreign-to-Foreign Transactions p.645
- 2.9 Market Share Jurisdictional Threshold p.645
- 2.10 Joint Ventures p.645
- 2.11 Power of Authorities to Investigate a Transaction p.645
- 2.12 Requirement for Clearance Before Implementation p.646
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.646
- 2.14 Exceptions to Suspensive Effect p.646
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.646

3. Procedure: Notification to Clearance p.646

- 3.1 Deadlines for Notification p.646
- 3.2 Type of Agreement Required Prior to Notification p.647
- 3.3 Filing Fees p.648
- 3.4 Parties Responsible for Filing p.648
- 3.5 Information Included in a Filing p.648
- 3.6 Penalties/Consequences of Incomplete Notification p.648
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.648
- 3.8 Review Process p.649
- 3.9 Pre-notification Discussions With Authorities p.649
- 3.10 Requests for Information During the Review Process p.649
- 3.11 Accelerated Procedure p.649

4. Substance of the Review p.650

- 4.1 Substantive Test p.650
- 4.2 Markets Affected by a Transaction p.651
- 4.3 Reliance on Case Law p.651
- 4.4 Competition Concerns p.652
- 4.5 Economic Efficiencies p.652
- 4.6 Non-competition Issues p.652
- 4.7 Special Consideration for Joint Ventures p.652

5. Decision: Prohibitions and Remedies p.653

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.653
- 5.2 Parties' Ability to Negotiate Remedies p.653
- 5.3 Legal Standard p.654
- 5.4 Negotiating Remedies With Authorities p.654
- 5.5 Conditions and Timing for Divestitures p.654
- 5.6 Issuance of Decisions p.655
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.655

6. Ancillary Restraints and Related Transactions p.655

- 6.1 Clearance Decisions and Separate Notifications p.655

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.655

- 7.1 Third-Party Rights p.655
- 7.2 Contacting Third Parties p.655
- 7.3 Confidentiality p.656
- 7.4 Co-operation With Other Jurisdictions p.656

8. Appeals and Judicial Review p.656

- 8.1 Access to Appeal and Judicial Review p.656
- 8.2 Typical Timeline for Appeals p.656
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.656

9. Foreign Direct Investment/Subsidies Review p.657

- 9.1 Legislation and Filing Requirements p.657

10. Recent Developments p.657

- 10.1 Recent Changes or Impending Legislation p.657
- 10.2 Recent Enforcement Record p.657
- 10.3 Current Competition Concerns p.658

Lee & Ko is one of the largest and most well-established law firms in South Korea, with approximately 890 professionals in offices in South Korea, China and Vietnam. The antitrust and competition practice group consists of lawyers fully dedicated to advising on antitrust and competition law matters, in-house economists, former judges and prosecutors, and one of the strongest teams of former Korea Fair Trade Commission officials and lawyers in Korea. This group also has unparalleled experience in handling all aspects of the merger control process,

from transaction structuring, formulating market definitions and analysing anti-competitive effects to developing legal, economic and political arguments and rationale for clearance. **Lee & Ko** has recently worked on some of the most high-profile transactions to receive clearance in South Korea, such as the Novozymes A/S-Chr. Hansen Holding A/S and Raytheon-United Technologies mergers, Danaher's acquisition of the GE Biopharma business and the LGES-Stellantis and LGES-Honda joint ventures.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

In South Korea, the relevant merger control legislation is the Monopoly Regulation and Fair Trade Act (MRFTA) and the Enforcement Decree of the MRFTA. Additional guidelines and standards for merger control established by the Korea Fair Trade Commission (KFTC) include:

- Guidelines for Notification of Business Combinations;
- Guidelines for Review of Business Combinations;
- Guidelines for Imposition of Administrative Fines on Business Combinations for the Violation of Notification Provisions;
- Guidelines for Imposing Corrective Orders on Business Combinations; and
- Standards for Imposing Enforcement Fines to Compel Compliance with Corrective Orders on Business Combinations.

1.2 Legislation Relating to Particular Sectors

There are no other relevant laws within the authority of the KFTC for foreign transactions or investments related to particular sectors. However, the MRFTA provides that the merger filing requirement with the KFTC will not be applicable or required if the head of another central administrative agency consults with the KFTC in connection with such agency's merger control review of a certain transaction pursuant to other laws. In this regard, there are finance and broadcasting/telecommunications laws that mandate the review of business combinations in these sectors by the relevant regulatory agencies in lieu of the KFTC, such as the Structural Improvement of the Financial Industry Act, the Financial

Holding Companies Act and the Telecommunications Business Act.

The Financial Supervisory Commission (FSC) and the Minister of the Ministry of Science and ICT (MSIT) are granted the authority to review business combinations in their respective sectors but are required to consult with the KFTC as part of the review. Therefore, although it will not be making the final determination on clearance for these business combinations, the KFTC will participate in the review process. Once the FSC or the MSIT makes a final decision on clearance, there are no separate merger notification requirements to be satisfied with the KFTC.

1.3 Enforcement Authorities

The KFTC is the administrative authority responsible for enforcement of the MRFTA and related laws. However, as explained in **1.2 Legislation Relating to Particular Sectors**, the FSC or MSIT is responsible for merger control review of business combinations in the finance and broadcasting/telecommunications sectors. Such review includes the requirement to consult with the KFTC on the potential anti-competitiveness of the business combination under review.

2. Jurisdiction

2.1 Notification

Merger notification is compulsory in South Korea if the jurisdictional thresholds for notification are triggered (see **2.5 Jurisdictional Thresholds**).

The following are exempt from merger filing obligations.

- A venture investment company or venture capital fund (as defined in Article 2 subparagraphs 10 and 11 of the Venture Investment

Promotion Act) that obtains ownership of at least 20% (or 15% for a listed corporation under the Capital Markets and Financial Investment Business Act) of the total number of shares of a start-up enterprise (as defined in Article 2 subparagraph 3 of the Support for Small and Medium Enterprise Establishment Act) issued by another company (excluding non-voting shares under Articles 344-3 (1) and 369 (2) and (3) of the Commercial Act).

- A new technology venture capital or new technology venture fund (as defined in Article 2 subparagraph 14-3 or 14-5 of the Specialised Credit Finance Business Act) that obtains ownership of shares of at least 20% (or 15% for a listed corporation under the Capital Markets and Financial Investment Business Act) of a new technology business (as defined in subparagraph 1 of Article 2 of the Korea Technology Finance Corporation Act), or that becomes the largest investor by participation in the establishment of a new technology business entity, jointly with another company.
- A company that is required to report its business combination and obtains at least 20% (or 15% for a listed corporation under the Capital Markets and Financial Investment Business Act) of shares of any of the following companies, or becomes the largest investor by participating in the establishment of any of the following companies, jointly with another company:

- (a) an investment company under Article 9 (18) 2 of the Financial Investment Services and Capital Markets Act;
- (b) a company designated as a concessionaire of a public-private partnership project for infrastructure, pursuant to the Act on Public-Private Partnerships in Infrastructure;
- (c) an investment company established for the purpose of investing in such a com-

- pany (limited to a company under Article 51-2 (1) 6 of the Corporate Tax Act); or
- (d) a real estate investment company (as defined under subparagraph 1 of Article 2 of the Real Estate Investment Company Act).

Following the implementation of the amended MRFTA, the following types of transactions will also be exempt from merger filing obligations as of 7 August 2024:

- the establishment of a private equity fund, as defined under the Capital Markets and Financial Investment Business Act – ie, where the investor will be the largest shareholder of the PEF (Article 11 (3) 4 of the MRFTA);
- statutory mergers or business transfers between the parent company and a subsidiary, as defined under Article 342-2 (1) of the Commercial Code – ie, a company with shares exceeding 50% of the total number of issued shares (Article 11 (1) 4 of the MRFTA);
- interlocking directorates involving fewer than one-third of directors of the counterparty, except in cases whether the representative director of the counterparty is one of the interlocking directorates (Article 11 (1) 3b of the MRFTA); and
- statutory mergers between affiliates with respective values of less than KRW30 billion (assets and sales of merger entity are calculated on a non-consolidated basis) (Article 9 (5) of the MRFTA).

2.2 Failure to Notify

Under the MRFTA, failure to notify may result in a civil fine (monetary penalty for negligence) of up to KRW100 million for the reporting company, and up to KRW10 million for the responsible officer/employee. If the KFTC becomes aware of a filing requirement in South Korea, through the

media or other means, it may pursue this type of penalty against the delinquent parties.

In 2021 and 2022, the KFTC issued this type of civil fine in an amount totalling KRW425 million in 30 cases, and totalling KRW226 million in 20 cases for failure to notify. In 2023, the KFTC issued this type of civil fine in an amount totalling KRW380 million in 23 cases. The issuance of these civil fines results from formal decisions made by the KFTC. However, only statistical data on these KFTC decisions is published by the KFTC, not the decisions in their entirety.

2.3 Types of Transactions

The KFTC notification is mandatory where the relevant threshold is triggered (see **2.5 Jurisdictional Thresholds**) and any of the transaction parties is engaging in one of the following business combinations.

- Share acquisition type 1: Company A acquires 20% or more (15% or more if the target is a listed company on the Korean stock exchange) of the total outstanding shares (excluding non-voting shares) of Company B, which is not an affiliate of Company A.
- Share acquisition type 2: Company A acquires additional shares of Company B and becomes the largest shareholder of Company B (where Company A already holds 20% or more shares in Company B), but the acquisition of additional shares is not reportable if Company A is already the largest shareholder in Company B.
- Interlocking directorate: where a director, officer or employee of Company A or its affiliates is appointed to concurrently hold the position of both director and another managing position of Company B, when Company B is not an affiliate of Company A.

- Statutory mergers: Company A merges with Company B.
- Acquisition of business or assets: Company A acquires or leases the whole or a substantial part of the business or assets of Company B – eg, if Company A takes over or leases the whole or a substantial part of the business, undertakes the management or takes over all or part of the fixed operating assets of Company B.
- Participation as the largest shareholder in the establishment of a new joint venture: two or more companies with no affiliate relationship establish a corporate joint venture.

2.4 Definition of “Control”

In South Korea, control is not considered when determining whether a merger notification has been triggered, but it is considered when making the determination on whether a business combination is anti-competitive. In that regard, simplified merger reviews are applicable to business combinations that do not involve obtaining control, as these transactions are deemed not to be anti-competitive.

2.5 Jurisdictional Thresholds Foreign Mergers

Business combinations occurring between foreign undertakings (undertakings with a principal place of business in a foreign country or established under foreign laws) or domestic undertakings acquiring foreign undertakings must be reported to the KFTC if:

- the business combination is a share acquisition, interlocking directorate, statutory merger, acquisition of business or assets, or formation of a joint venture;
- one of the relevant undertakings (including all affiliates) has total consolidated worldwide assets or sales revenue during the most

recent completed fiscal year of KRW300 billion or more, and the other party (including all its affiliates) has total worldwide assets or sales revenue during its most recent completed fiscal year of KRW30 billion; and

- consolidated sales revenues in or into Korea in the amount of KRW30 billion or more for both of the relevant undertakings (including all their affiliates), respectively, during the most recent completed fiscal year.

Interlocking directorates occurring in business combinations between foreign corporations must be reported to the KFTC if:

- the appointing entity (including all its affiliates) has total consolidated worldwide assets or sales revenue of KRW2 trillion or more, and the target (including all its affiliates) has total consolidated worldwide assets or sales revenue of KRW30 billion or more; and
- the appointing entity (including all its affiliates) and the target (including all its affiliates) have consolidated sales revenue into Korea of KRW30 billion or more.

Domestic Mergers

Domestic mergers are business combinations that involve a domestic or offshore acquirer and a domestic target. Domestic mergers must be reported to the KFTC if:

- the business combination is a share acquisition (type 1 or type 2), interlocking directorate, statutory merger, acquisition of business or assets, or formation of a joint venture; and
- the acquirer (including all its affiliates) or the target (including all its affiliates) has total consolidated worldwide assets or sales revenue of KRW300 billion or more and the other party (including all its affiliates) has total consoli-

dated worldwide assets of sales revenue of KRW30 billion or more.

Interlocking directorates occurring in domestic mergers must be reported to the KFTC if the appointing entity (including all its affiliates) has total worldwide consolidated assets of KRW2 trillion or more, and the target (including all its affiliates) has worldwide assets or sales of KRW30 billion or more.

Relevant Undertakings

The relevant undertakings based on the type of transaction are as follows:

- share acquisition: the acquirer and the target (but please note that the seller's turnover would be relevant if the seller remains an affiliate of the target post-transaction);
- statutory mergers: the merging companies;
- acquisition of business or assets: the acquirer and the seller; and
- participation as the largest shareholder in the establishment of new joint ventures: the largest shareholder and any one of the other shareholders.

Please note that, for merger filing purposes, "affiliates" means companies that are affiliates prior to the transaction and remain as such post-transaction.

Size of Transaction Test

Business combinations must submit a merger filing if all of the following requirements for the Size of Transaction Test are met:

- the value of the business combination is KRW600 billion or more;
- the acquirer meets the current assets or turnover thresholds; and

- the target that does not meet the current assets or turnover thresholds has significant business activities in South Korea.

Under the Enforcement Decree, the requirement for “significant business activities” is met if the following occurs during the three immediately preceding fiscal years:

- the target company sold or provided products or services in the Korean market to at least 1 million persons (the number of persons for internet-based services, such as social media, is calculated based on the number of monthly active users or visitors) per month in any month during this period; or
- the annual budget of the target company for leasing R&D or the fee for R&D personnel in Korea is KRW30 billion or more in any year during this period, assessed by aggregating the amount treated as annual ordinary R&D costs and development costs (intangible assets) of the acquired company.

The KFTC provides the following guidance on calculating the transaction value for the Size of Transaction Test:

- in share acquisitions, this is calculated by the sum of the total transaction amount and the book value of the relevant shares plus the assumed liabilities;
- in statutory mergers, the value of the transaction is the aggregate amount of the price of the shares issued as consideration in return for the merger and assumed liabilities;
- the transaction value for the acquisition of a business is the addition of the price of the acquisition of a business plus the assumed liabilities; and
- the transaction value for joint ventures is the investment amount by the investor that will

be the largest shareholder of the new joint venture.

2.6 Calculations of Jurisdictional Thresholds

The turnover of an entity and all its affiliates (remaining affiliates post-transaction) as listed on the consolidated financial statement from the immediately preceding fiscal year must be included in calculating the turnover or assets of said entity, to determine if the jurisdictional threshold is satisfied (see **2.5 Jurisdictional Thresholds**). For foreign entities, all companies that are included in such entity’s group consolidated financial statements are typically considered to be affiliates.

Foreign currency is converted to KRW, applying the exchange rate at the end of the fiscal year immediately prior to the year of the merger when calculating total assets, paid-in capital and total shareholders’ equity. The average exchange rate for the immediately preceding fiscal is applied when calculating the total turnover and net profit.

If the thresholds are asset-based, this is also determined based on the consolidated financial statements. For finance and insurance companies, operating income is also viewed as turnover.

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

The MRFTA defines an “affiliate” as a member of an enterprise group, which is in turn defined as “a group of companies controlled by the same ultimate controlling person”. In that regard, “control” for determining whether a shareholder is the ultimate controlling shareholder means that:

- the shareholder holds 30% or more of the shares in a company and is the largest shareholder of the company, based on its own shareholdings combined with those of specially related parties; or
- the shareholder has a controlling influence over the company's business operations, directly or through a specially related party.

With respect to foreign corporations, companies included in the consolidated financial statements of a foreign entity, over which the foreign entity has ultimate control, would typically be considered affiliates. Thus, the foregoing should be used in determining the relevant businesses or corporate entities for calculating jurisdictional thresholds in South Korea.

In a merger filing context, affiliates are defined as companies that are affiliates prior to the transaction and remain affiliates post-transaction. As such, if a seller remains an affiliate of the target post-transaction, then its turnover would be included with the target's turnover.

If new shares or bonds are issued during the fiscal year in which the business combination is reported, the sum of the total amount of assets disclosed on the balance sheet of the immediately preceding fiscal year and the increase resulting from the new shares and bonds should be calculated. In addition, if shares in another company are acquired during the fiscal year in which the business combination is reported, the sales and total assets of the acquired company must be calculated if it becomes an affiliate.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger filing if both parties to the transaction meet the threshold requirements (see **2.5 Jurisdictional Thresholds**) and have KRW30 billion

or more in Korean sales revenue. However, the KFTC has discretion to require merger control review of a foreign-to-foreign transaction triggering no sales and/or assets thresholds in South Korea if there is concern it may give rise to potential anti-competitive effects (see **2.11 Power of Authorities to Investigate a Transaction** for more details).

2.9 Market Share Jurisdictional Threshold

There is no market share jurisdictional threshold in South Korea.

2.10 Joint Ventures

Joint ventures are subject to merger control if they trigger the jurisdictional threshold (see **2.5 Jurisdictional Thresholds**).

2.11 Power of Authorities to Investigate a Transaction

The KFTC may conduct an ex officio review of business combinations with potential anti-competitive effects even in the absence of a merger filing. Merger filings are submitted to inform the KFTC of the details of a business combination in advance, and the notification obligation is to provide the relevant information for the KFTC's review and assessment. In practice, the majority of cases are reviewed by the KFTC after it receives the filed notification, and it is uncommon for the KFTC to conduct an ex officio review of a business combination.

Please note that there is KFTC precedent on ex officio reviews. For example, in 2023, in Adobe's proposed acquisition of Figma, the KFTC requested the parties to submit a voluntary filing over concerns of potential anti-competitive effects on innovation, even though the jurisdictional threshold for acquisitions was not met. Accordingly, the parties submitted the filing

in September 2023, but withdrew the filing in December of the same year as they subsequently backed out of the transaction.

The statute of limitations for violations of the MRFTA is seven years from the cessation of the prohibited conduct. For example, if a company failed to report a transaction, the KFTC has the right to investigate a transaction up to seven years after the transaction's closing. However, in cartel cases, the statute of limitations is seven years from the cessation of the prohibited conduct or five years after the KFTC initiates an investigation. This would be relevant in cases where the KFTC determined that collusion occurred, such as during the establishment of a new joint venture company.

2.12 Requirement for Clearance Before Implementation

Business combinations that require pre-notification (see 3.1 Deadlines for Notification) must be suspended until KFTC clearance is obtained.

2.13 Penalties for the Implementation of a Transaction Before Clearance

The implementation of a transaction prior to clearance (gun-jumping) may result in a civil fine (monetary penalty for negligence) of up to KRW100 million. In 2013, the KFTC issued this type of civil fine in the amount of approximately KRW30 million in the Lotte-Shinsegae merger for gun-jumping. Gun-jumping may also result in cartel enforcement (similar to the EU) under Korean competition law, but there has yet to be a reported case where such enforcement action was taken.

Based on the disclosed decisions published by the KFTC up to 2015, there has not been a case of a foreign-to-foreign transaction having received penalties for gun-jumping (ie, a case

when the parties notified the transaction but closed the transaction prior to receiving clearance). On the other hand, there have been cases when the KFTC did impose penalties for failing to notify the transaction subject to merger control review. Since the KFTC has not published decisions on this type of civil fine for gun-jumping since 2016, it is uncertain whether there have been more recent cases involving penalties for gun-jumping. However, the KFTC's position on gun-jumping has been to enforce violations when detected.

2.14 Exceptions to Suspensive Effect

In South Korea, post-closing filings are an exception to the suspensive effect (see 3.1 Deadlines for Notification).

2.15 Circumstances Where Implementation Before Clearance Is Permitted

In the case of a pre-merger notification, closing prior to obtaining KFTC clearance is not permitted; there are no exceptions.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

Pre-merger notification is required if total assets or turnover of one of the relevant undertakings exceeds KRW2 trillion. A pre-closing filing should be submitted as soon as practicable in order to obtain clearance prior to the desired closing date; there is no deadline.

A post-closing filing is required if the jurisdictional thresholds for notification are triggered and none of the transaction parties trigger the KRW2 trillion threshold. Business combinations requiring a post-closing filing must be reported within

30 calendar days from implementation. The following are always subject to a post-closing filing, irrespective of triggering the pre-closing requirement:

- the acquisition of shares by competitive trading in the stock market, pursuant to Article 9, Paragraph 13 of the Financial Investment Services and Capital Markets Act – however, this shall not apply to the acquisition of shares by determining the quantity, price, etc, in accordance with a contract or agreement between the parties to the transaction and settling the transaction through the stock market;
- the ownership ratio of shares increases due to forfeited shares or as a result of a paid-in capital increase;
- the ownership ratio of shares increases due to the retirement or reduction of shares through the resolution of the board of directors or general shareholders' meeting of another company, irrespective of the intention;
- tender offer;
- bequests;
- business combinations that require notification to another administrative agency based on a different law, and subsequent notification to such administrative agency is made in accordance with that law;
- the enforcement of a security interest;
- the restoration of voting rights for non-voting shares; and
- the acquisition of shares in another company through capital conversion, in accordance with the Debtor Rehabilitation and Bankruptcy Act.

Failure to notify may result in a civil fine (monetary penalty for failure to file) being imposed by the KFTC; decisions on such fines have not been published since 2016.

3.2 Type of Agreement Required Prior to Notification

To initiate the formal review process of the proposed business combination, an executed version of a definitive agreement is required in pre-merger filings. However, a letter of intent, memorandum of understanding or near final draft form of an agreement may be used as a basis for voluntary preliminary filing.

Under the MRFTA, a voluntary preliminary filing is a formal process that may be initiated during the early stages of a transaction (eg, term sheet or memorandum of understanding stages). This process involves the same level of scrutiny by the KFTC as a formal filing, but with the starting point of the KFTC's review being moved forward to the earlier stage of the transaction. The voluntary preliminary filing is essentially the same as a formal filing and has the same review period (30 calendar days, which may be extended by up to 90 additional days).

If the final agreement is executed prior to the KFTC issuing its preliminary decision, a formal filing may be submitted on the basis of the final agreement to reset the review period to commence from the date of this submission. A shorter review period may be possible in such cases, as the KFTC would in effect be continuing its review rather than starting from the beginning.

On the other hand, if the KFTC issues the preliminary decision on merger clearance for the voluntary preliminary filing prior to the submission of a formal filing, a formal filing will still be required after the final agreement is executed. In such cases, the KFTC will review the formal filing, and the parties may implement the business combination only after obtaining official clearance for the formal filing (in the case of a pre-merger notification). As such, filing and clear-

ance obtained in a voluntary preliminary review will not exempt the notifying party from filing a formal notification. Nonetheless, if the formal filing does not contain any substantive changes from the preliminary voluntary filing, the KFTC would be required to issue a formal decision on clearance within 15 days of the formal filing.

3.3 Filing Fees

There are no filing fees in South Korea.

3.4 Parties Responsible for Filing

The filing responsibility of the parties is as follows.

- Share acquisitions: the acquirer would be responsible for the filing.
- Interlocking directorates: the company with interlocking directorates is responsible for filing (ie, the company with worldwide assets or consolidated sales revenue exceeding KRW2 trillion).
- Statutory mergers: the surviving entity is responsible for filing, but both parties bear the obligation to file if a new entity is created through the merger.
- Participation as the largest shareholder in the establishment of a new joint venture: the largest shareholder would be responsible for filing. However, if there are two or more shareholders that equally possess the largest shareholdings (eg, the shareholding ratio of two shareholders of the joint venture is equally 50%), such shareholders are obliged to file. If one of the largest shareholders were to file merger notification with the KFTC, the other shareholders would also be determined to have filed notification with the KFTC.

3.5 Information Included in a Filing

The reporting company must submit a merger filing form provided by the KFTC based on the

type of transaction, along with additional supporting documents as required. The merger form requires information on the notifying party and counterparty, including financial information, Korean sales, information on affiliates, and detailed information on and a competitive assessment of the relevant market. Other documents that must be submitted to the KFTC include transaction documents, each of the parties' audit reports and a certified copy of the corporate registry.

While the merger filing form itself must be submitted in Korean, the other documents do not need to be submitted in Korean. However, with respect to transaction documents, the KFTC may request Korean translations of the material terms of the agreements during its review. Documentation submitted to the KFTC does not require certification, notarisation or apostilles.

3.6 Penalties/Consequences of Incomplete Notification

If the KFTC deems the information in the merger filing to be incomplete, it will request the notifying party to provide the required supplemental information and stop the clock on the merger review period until the requested information is provided to the satisfaction of the KFTC. During the course of the merger review, it is common for the KFTC to issue requests for information when supplemental information is required.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The KFTC may impose a civil fine (monetary penalty for negligence) if misleading or inaccurate information is provided. As the KFTC has not published data on this type of violation since 2016, it is uncertain if there have been recent violations, but the KFTC's position has been to enforce this type of violation.

3.8 Review Process

There are two phases to the merger review process in South Korea.

- Phase I: the timeline for Phase I is 30 calendar days. If the deadline for the review period falls on a weekend or holiday, the deadline for Phase I is automatically extended to the next business day. If the KFTC issues a request for information (RFI), the clock is stopped on the review period until the reporting company submits a response to the RFI that meets the satisfaction of the KFTC. In other words, the time between the RFI being issued and the response being submitted by the reporting party is not included in the calculation of the 30 calendar days.
- Phase II: the initial 30-day period may be extended up to 90 additional calendar days (total of 120 calendar days). As in Phase 1, if the RFI is issued by the KFTC, the clock is stopped from the issuance date until the day after the reporting party submits responses that are deemed satisfactory to the KFTC.

The KFTC commonly issues around one to three RFIs, even for cases that do not raise anti-competitive concerns, which may further extend the merger review period. As such, the parties should typically expect a KFTC decision in business combinations that do not have significant competitive concerns within four to six weeks after the submission date.

In cases where there are significant anti-competitive concerns regarding a business combination, the actual review period may be much longer than 120 days. For example, in 2023, the KFTC's review of the Hanwha Aerospace-Daewoo Shipbuilding and Engineering and Broadcom-VMware business combinations took approximately five months and 13 months,

respectively; the KFTC's review of the Korean Air-Asiana Airlines business combination (notification filed in 2022) took nearly 16 months to complete.

3.9 Pre-notification Discussions With Authorities

There are no pre-notification discussions in South Korea. However, the parties may engage in pre-notification discussions as needed, and the KFTC is amenable to such discussions. Furthermore, the KFTC has recently recommended conducting pre-notification discussions for business combinations with concerns over potential restrictions on competition.

3.10 Requests for Information During the Review Process

It is common for the KFTC to issue RFIs during the course of its review. The review clock is stopped when the RFI is issued and will resume when the responses to the RFI are submitted to the KFTC's satisfaction. Even in transactions without anti-competitive concerns, the KFTC typically issues between one and three RFIs, but it will issue more in cases where there are concerns on competition restraints. It is difficult to predict the average number as the outcome is case-specific.

The burden to respond to the RFIs varies, with some questions being straightforward and relatively simple to answer, and others involving the definition or information on the relevant market or assessments on the restriction of competition being significantly more difficult to answer (these types of questions require a strategic approach when drafting the response).

3.11 Accelerated Procedure

The KFTC has a short-form filing, which is also subject to the simplified review procedure. The

following transactions qualify for the short-form filing:

- business combinations between affiliates;
- interlocking directorates involving fewer than one third of directors of the counterparty, except in cases where the representative director of the counterparty is one of the interlocking directorates;
- participations in the establishment of an institutional private equity fund under Article 9, Paragraph 19 (1) of the Financial Investment Services and Capital Markets Act;
- business combinations involving a special purpose company under Article 2, subparagraph 5 of the Asset-backed Securitisation Act;
- participations in the establishment of a ship investment company under the Ship Investment Company Act;
- participations in the establishment of a project financial investment company by meeting the requirements of Article 104-31 (1) of the Act on Restriction on Special Cases Concerning Taxation;
- new limited partners making investments in an already established institutional private equity fund (excluding those jointly participating in the management of the business that the institutional private equity fund invests, such as those prescribed in Article 271-19 (2) 2 of the Enforcement Decree of the Financial Investment Services and Capital Markets Act);
- an executive concurrently holding an executive position under a contract or agreement identical or continuous with the acquisition of shares or the establishment of a joint venture, which is exempt from the obligation to file under the MRFTA; and
- formal notification of a business combination that has been approved through the request

for a voluntary preliminary filing (except in cases where there has been a significant change in facts or market conditions).

The KFTC also has a simplified review procedure for business combinations that are not expected to have any effect on the Korean market. This streamlined process requires the KFTC to complete the simplified review within 15 calendar days. In addition to transactions that qualify for short-form filing, the following transactions are subject to the simplified review procedure:

- acquisitions of real estate by real estate investment companies or by ordinary companies for investment purposes;
- transactions where the target is a foreign company and such transaction is not expected to have any impact on the Korean market;
- transactions without the creation of control;
- conglomerate mergers where the acquirer fails to satisfy the threshold of KRW2 trillion in worldwide consolidated assets or sales revenue, or where the relevant products are not complementary or substitutes – certain mergers involving online platforms are excluded from simplified review following the implementation of the revised merger guidelines on 1 May 2024 (see **10.1 Recent Changes or Impending Legislation**); and
- transactions that are clearly for investment purposes.

4. Substance of the Review

4.1 Substantive Test

The substantive tests used by the KFTC are not very different from those used by the competition authorities in the US and the EU. The KFTC considers:

- unilateral and co-operative effects for horizontal mergers;
- foreclosure and co-operative effects for vertical mergers; and
- potential anti-competitive effects, the exclusion of competitors, increased barriers to entry and network effects for conglomerate mergers.

Bundling or portfolio effects are considered as types of exclusionary effects. The KFTC also considers the effects of a business combination on innovation markets and information assets.

Furthermore, the amount of foreign competition, potential for new market entrants, the existence of neighbouring markets and strong buyers are considered to be mitigating factors to restrictions on competition. Efficiency gains that are specific to a particular business combination are also considered, and the failing firm defence may also be used.

4.2 Markets Affected by a Transaction

The market share is the basis for determining whether there is a restriction on competition. Under the MRFTA, there are safe harbours and presumptions of anti-competitiveness based on market share.

Safe Harbours

These apply to horizontal mergers that meet any of the following conditions (although not if there is a presumption of anti-competitive effect, as explained below):

- when the Herfindahl-Hirschman Index (HHI – the sum of the squares of the market shares of each competitor in a given market) is less than 1,200;
- when the HHI is between 1,200 and 2,500 and the increase in the HHI is less than 250 points; or
- when the HHI is 2,500 or more and the HHI increase is less than 150 points.

They apply to vertical or conglomerate mergers that meet any of the following conditions:

- when the HHI in the relevant market of the parties is less than 2,500 and the market share of the parties is less than 25%; or
- when the parties' position is 4th or lower in the relevant market or the market share of the parties is less than 10%.

Presumption of Anti-competitive Effects

Such a presumption exists if:

- the combined market share satisfies the criteria for dominant market position (ie, one company has a market share of 50% or more, or the top three players in the relevant market have a combined market share of 75% or more);
- the combined market share ranks first in the relevant market; or
- the difference between the combined market share and the market share of the second-largest company (other than the parties) is at least 25% of the combined market share.

4.3 Reliance on Case Law

The KFTC references certain decisions of major foreign competition authorities, such as those of the US and the EU. The KFTC has well-established channels of communications with these foreign competition authorities, and is more likely to contact them in foreign-to-foreign transactions that give rise to substantial anti-competitive concerns. The KFTC may also opt to wait until the US or EU competition authorities

issue their final decisions before rendering its own decision.

4.4 Competition Concerns

Please refer to 4.1 Substantive Test.

4.5 Economic Efficiencies

The Merger Review Guidelines state that the KFTC will consider:

- efficiency gains in production, sales and R&D;
- efficiency gains arising from the nature of online platforms, as recently included in the KFTC's amendment to the Merger Review Guidelines to consider the nature of the digital economy (particularly online platforms) when reviewing business combinations; and
- overall efficiency gains in the national economy.

In order for efficiency gains to be recognised, they must be unique to the business combination and must outweigh the anti-competitive effects. In practice, however, the KFTC rarely approves business combinations that are presumed to be anti-competitive simply based on significant efficiency gains. The KFTC does consider the effect of efficiency gains when determining the degree and substance of corrective measures.

4.6 Non-competition Issues

Separate from merger filings, additional regulatory filings under the Foreign Investment Promotion Act and Foreign Exchange Transactions Act may be required for a foreign direct investment. Depending on the type of domestic business being acquired, further regulatory filings under the Act on Prevention of Divulgence and Protection of Industrial Technology and the Act on Special Measures for Strengthening and Protecting the Competitiveness of National High-Tech Strategic Industries may also be necessary.

As discussed in 4.5 Economic Efficiencies, the Merger Review Guidelines require the consideration of the overall efficiency gains in the national economy. The following criteria are considered, as set forth in the Merger Review Guidelines:

- whether it significantly contributes to increasing employment;
- whether it significantly contributes to the development of the local/regional economy;
- whether it significantly contributes to the development of related upstream and downstream industries;
- whether it contributes to the stability of the national economy and livelihood of citizens;
- whether it significantly contributes to the reduction of pollution to the environment; or
- if a start-up is a party to the business combination, whether the business combination significantly contributes to the revitalisation of the domestic start-up ecosystem by enabling the recovery of the capital invested into the start-up, leading to the creation of a new start-up and market entry.

However, the KFTC rarely considers the efficiencies in the overall national economy during merger reviews, and there is only one case where it approved a business combination on this basis (conditional approval of the Hyundai-Kia merger in 1999 during the IMF crisis). Recently, there have been cases when the KFTC has approved business combinations where one of the reasons for approval was that the transaction would significantly contribute to the reduction of pollution to the environment.

4.7 Special Consideration for Joint Ventures

There is no separate section in the Merger Review Guidelines on anti-competitiveness in the formation of joint ventures. However, in practice,

the KFTC focuses on the relationship between the parent company and the joint venture, and considers possible co-ordination issues regarding exchange of information between the parent companies.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The KFTC has the ability to impose both behavioural and structural remedies (corrective measures) in accordance with the MRFTA, including:

- blocking the deal or post-closing filing to restore pre-merger status;
- the divestiture of businesses;
- behavioural restrictions to prevent potential negative effects on competition (prohibition of price increases during a certain time period, etc); and
- other remedies deemed necessary to correct MRFTA violations.

In order to impose remedies, the KFTC is first required to draft an Examiner's Report detailing the violations of the MRFTA. The parties then have the option to file a response to the Examiner's Report. Thereafter, the KFTC will hold a plenary hearing to decide on the issuance of remedies.

As the MRFTA prohibits business combinations that substantially restrict competition in the relevant market, the KFTC must prove that the transaction substantially restricts competition in the relevant market.

The KFTC's general perspective is that a business combination presumed to be anti-com-

petitive under the MRFTA substantially restricts competition. Even though there is no statutory presumption regarding vertical and conglomerate mergers, the KFTC generally perceives that a vertical merger substantially restricts competition if there is a high market share in both the upstream and downstream markets, or in conglomerate mergers if there is a high market share in neighbouring markets of both markets. However, the KFTC does not solely rely on the statutory presumption, but also refers to qualitative evidence to support the assertion that various characteristics of the relevant markets restrict competition.

5.2 Parties' Ability to Negotiate Remedies

Under the amended MRFTA, which will take effect from 7 August 2024, official commitment procedures will be implemented to boost the efficiency and effectiveness of KFTC merger reviews. Prior to the amendment, the KFTC imposed remedies on transactions based on the limited information it received from the parties to the transaction, including information in the merger filing and unofficially submitted remedies, among others. After the amended MRFTA takes effect, the parties may officially submit proposed remedies for KFTC consideration.

The stipulations regarding commitment procedures under the amended MRFTA are as follows:

- proposed remedies to address anti-competitive concerns may be officially submitted to the KFTC in writing during the course of the merger review process (Article 13-2 (1) and (2) of the MRFTA);
- the KFTC may request the revision of the proposed remedies when they fail to resolve anti-competitive concerns or cannot be

implemented in an appropriate period of time (Article 13-2 (3) of the MRFTA); and

- proposed remedies may be considered by the KFTC during its determination of appropriate remedies.

In horizontal mergers, the typical remedy is a corrective order for the divestiture of the business in the relevant market at issue. For vertical mergers, corrective measures requiring the relevant products to be offered on non-discriminatory terms are typically issued. As for conglomerate mergers, the remedies may vary based on the type of business.

It is exceptionally rare for remedies to be issued to address non-competitive issues. However, a recent merger between food delivery apps resulted in a corrective order prohibiting the unfavourable treatment of delivery drivers post-transaction. This remedy could be viewed as being implemented to address labour rather than competition issues.

5.3 Legal Standard

The KFTC refers to the Guidelines on the Imposition of Corrective Measures, the main contents of which are as follows.

- In principle, when issuing corrective measures, structural remedies should generally be imposed, and any behavioural remedies issued should be complementary to the effective implementation of structural remedies. However, in cases where structural remedies are not possible or effective, only behavioural remedies may be imposed.
- Priority in divestitures shall be given to business units that can be easily separated from other assets, have been operating independently prior to the business combination, and

have the proven ability to survive and compete in the relevant market.

- Divested assets should include not only tangible assets but, to the extent possible, also assets required for the efficient production and distribution of relevant products, such as distribution networks, key employees, contracts for product transactions, supply contracts for raw materials, management of infrastructure and intangible assets.
- The period of implementation for the divestment of assets shall be determined, in principle, within three to six months, and take into consideration the size and complexity of the assets subject to divestment, the overall economic situation and standard industry trade practices.

5.4 Negotiating Remedies With Authorities

Notwithstanding the 7 August 2024 amendment to the MRFTA, the KFTC may unilaterally impose its own corrective measures even if the parties do not propose any corrective measures. This is also applicable if the parties first propose corrective measures and an agreement cannot be reached.

Regardless of whether the parties first propose corrective measures or the KFTC imposes its own remedies, the KFTC must follow the procedures detailed in **5.1 Authorities' Ability to Prohibit or Interfere With Transactions** when imposing remedies.

5.5 Conditions and Timing for Divestitures

Following the KFTC's issuance of a formal written decision on the remedies, the parties may close the transaction even if the remedies have yet to be implemented. For example, if the KFTC imposes a corrective order for a divestiture, the

parties can close the transaction and fulfil the obligations under the corrective order thereafter. If the parties fail to implement the remedies, the KFTC may impose a separate non-performance penalty, and criminal sanctions may also be imposed (up to two years' imprisonment or a criminal fine not exceeding KRW150 million).

5.6 Issuance of Decisions

If no remedies are issued, the parties are issued a letter of clearance. Such letters of clearance are not published, but in cases the KFTC deems to have a high profile, a press release will be issued stating that the KFTC cleared the deal without conditions and the reason therefor. However, if the KFTC imposes remedies or blocks the business combination, then a formal written decision is provided to the parties following the completion of the KFTC's review, and the KFTC then publishes the non-confidential version of the decision. The KFTC will also issue a press release.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The KFTC imposes remedies on business combinations that raise competition concerns in the Korean market, irrespective of whether or not they are foreign-to-foreign transactions. The KFTC also aligns with competition authorities from other jurisdictions (particularly those in the US and EU) when other jurisdictions have also received notification and the relevant market is global. One example is Danaher's 2020 acquisition of the Biopharma business of General Electric Life Sciences, where a corrective order for the divestiture of General Electric Life Sciences' bioprocessing facilities was issued.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

There is no separate reporting system for ancillary restraints. However, the KFTC may examine the effects of ancillary restraints during its review of the business combination, although this is dependent on the case handler and is not mandatory. Even when the KFTC issues clearance, it is difficult to assume it has approved an ancillary restraint. However, in practice, there has yet to be a case where the KFTC has conducted a separate investigation or issued sanctions on an ancillary restraint for an agreement as anti-competitive.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

In South Korea, third parties are not permitted to have an active role in the merger review process but may submit information and their opinions regarding a proposed business combination.

7.2 Contacting Third Parties

The KFTC usually contacts third parties, except in cases that are subject to a simplified merger review or where it is clear that the business combination will have a minimal impact on the Korean market. The KFTC usually contacts third parties by sending written questionnaires.

To date, the KFTC has not conducted market tests for remedies as it imposes corrective orders for remedies unilaterally, but the KFTC is expected to conduct market tests, as required, after the implementation of the amendment of

the Merger Review Guidelines allowing parties to formally propose remedies.

7.3 Confidentiality

Information obtained by the KFTC during the course of merger reviews is generally kept confidential. However, the KFTC may seek the opinions of third parties regarding the business combination and disclose information regarding the business combination in connection therewith. During such inquiries, the KFTC strives not to disclose business secrets to third parties, to the extent possible. Also, the fact that a notification has been made to the KFTC and a description of the business combination subject to review are generally not published.

However, if a business combination is determined to be anti-competitive, leading the KFTC to impose remedies or block the business combination, the KFTC will issue a press release of its decision and publish a non-confidential version. Please note that the KFTC may even issue a press release on the decision to clear a business combination without conditions if it is deemed to be of public interest.

7.4 Co-operation With Other Jurisdictions

The provision of the MRFTA on international co-operation (Article 56) permits the KFTC to:

- enter into co-agreements with foreign governments that do not conflict with the laws or interests of Korea;
- assist the enforcement efforts of foreign governments; and
- provide assistance for foreign government enforcement requests if the foreign government requesting assistance guarantees to provide the same or similar assistance.

In practice, the KFTC does co-operate with foreign governments in establishing general policies (memorandum of understanding, etc) and when reviewing the same business combination in South Korea. In cases where business combinations are reported to foreign competition authorities (particularly in the US or the EU), the KFTC will discuss with and, if necessary, align on the definition of the relevant market, theories of harm and remedies. The KFTC requires permission from the parties (ie, waiver) prior to sharing information in a specific merger filing with a foreign competition authority.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Any party to a business combination has the right to:

- file an appeal with the KFTC;
- forego appealing to the KFTC and directly file an appeal with the Seoul High Court; or
- first file an appeal with the KFTC, and thereafter file an appeal with the Seoul High Court if the party disagrees with the KFTC's appeal decision.

8.2 Typical Timeline for Appeals

Appellants must file an appeal with the KFTC within 30 days of receiving the KFTC's written decision on the merger filing, or with the Seoul High Court within 30 days of receiving the KFTC's written decision on the merger filing or on the appeal, as the case may be.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties to merger clearance decisions do not have the right to appeal under the MRFTA.

However, in 2015, a competitor filed a complaint against the KFTC's decision in a business combination case with the Constitutional Court of Korea, which examined whether the KFTC violated the competitor's constitutional basic rights. In that regard, it may be possible for a third party to file a complaint with the Constitutional Court opposing the KFTC's decision in a business combination on the ground that the decision violated the third party's constitutional rights.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

Please refer to 4.6 Non-competition Issues.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

On 7 August 2024, the following changes under the amended MRFTA will become effective:

- formal commitment procedures (see 5.2 Parties' Ability to Negotiate Remedies) that permit the transacting parties to submit officially proposed remedies to the KFTC for consideration in addressing anti-competitive concerns will be introduced – the KFTC will be drafting detailed guidelines on the implementation of these commitment procedures; and
- certain transactions will become exempt from merger filing obligations, as described in 2.1 Notification.

The KFTC implemented amendments to the Merger Review Guidelines on 1 May 2024 to improve the merger review process and reflect the current trend of increasing transactions

involving digital service suppliers, including online platforms. The amended merger review guidelines will establish the following:

- a method for providing a market definition for industries where entities provide free services;
- methods for determining the restriction of competition by online platforms, such as the consideration of network effects and the evaluation of the restriction on competition through the provision of free services and in conglomerate mergers;
- the use of direct evidence and examples for determining restrictions by online platforms – this will include past examples in the same or similar markets of business combinations or new market entry resulting in changes in the market, the results of economic analysis that concludes the possibility of price increase without an analysis of the market concentration (upward pricing pressure analysis and merger simulation, etc), examples of prior responses from companies during past business combinations and the opinion of interested third parties and experts;
- additional examples of increased efficiencies that take into account the unique characteristics of the digital economy; and
- the exclusion of transactions involving online platforms from a simplified merger, even those which involve conglomerate mergers, if an online platform acquires a target exceeding the prescribed threshold of an average of more than 5 million monthly users or exceeds KRW30 billion in expenditures on R&D activities during the immediately preceding fiscal year.

10.2 Recent Enforcement Record

In January 2023, the KFTC established the International M&A Division to review business combi-

nations between foreign entities. Since establishment, the division has conducted more in-depth reviews of business combinations involving foreign entities that may restrict competition. Thus far, the division seems to be more active in seeking the opinions of interested third parties, conducting economic analyses and communicating with foreign competition authorities. For example, in the 2023 Adobe-Sigma case, which did not meet the jurisdictional threshold requirements for merger notification, the KFTC monitored the review status of foreign competition authorities and requested the parties to submit a voluntary filing.

10.3 Current Competition Concerns

The KFTC has received criticism for failing to strictly review business combinations involving online platforms, resulting in the uncontrolled expansion of online platforms. In May 2024, the KFTC responded by revising the criteria for reviewing business combinations involving the digital economy. Going forward, the KFTC is expected to more actively review business combinations involving online platforms.

SWITZERLAND



Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.663

- 1.1 Merger Control Legislation p.663
- 1.2 Legislation Relating to Particular Sectors p.663
- 1.3 Enforcement Authorities p.664

2. Jurisdiction p.664

- 2.1 Notification p.664
- 2.2 Failure to Notify p.664
- 2.3 Types of Transactions p.664
- 2.4 Definition of "Control" p.665
- 2.5 Jurisdictional Thresholds p.665
- 2.6 Calculations of Jurisdictional Thresholds p.665
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.666
- 2.8 Foreign-to-Foreign Transactions p.666
- 2.9 Market Share Jurisdictional Threshold p.666
- 2.10 Joint Ventures p.666
- 2.11 Power of Authorities to Investigate a Transaction p.667
- 2.12 Requirement for Clearance Before Implementation p.667
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.667
- 2.14 Exceptions to Suspensive Effect p.667
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.667

3. Procedure: Notification to Clearance p.668

- 3.1 Deadlines for Notification p.668
- 3.2 Type of Agreement Required Prior to Notification p.668
- 3.3 Filing Fees p.668
- 3.4 Parties Responsible for Filing p.668
- 3.5 Information Included in a Filing p.668
- 3.6 Penalties/Consequences of Incomplete Notification p.669
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.669
- 3.8 Review Process p.669
- 3.9 Pre-notification Discussions With Authorities p.669
- 3.10 Requests for Information During the Review Process p.669
- 3.11 Accelerated Procedure p.669

4. Substance of the Review p.670

- 4.1 Substantive Test p.670
- 4.2 Markets Affected by a Transaction p.670
- 4.3 Reliance on Case Law p.670
- 4.4 Competition Concerns p.670
- 4.5 Economic Efficiencies p.670
- 4.6 Non-competition Issues p.671
- 4.7 Special Consideration for Joint Ventures p.671

5. Decision: Prohibitions and Remedies p.672

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.672
- 5.2 Parties' Ability to Negotiate Remedies p.672
- 5.3 Legal Standard p.672
- 5.4 Negotiating Remedies With Authorities p.672
- 5.5 Conditions and Timing for Divestitures p.672
- 5.6 Issuance of Decisions p.673
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.673

6. Ancillary Restraints and Related Transactions p.673

- 6.1 Clearance Decisions and Separate Notifications p.673

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.673

- 7.1 Third-Party Rights p.673
- 7.2 Contacting Third Parties p.673
- 7.3 Confidentiality p.673
- 7.4 Co-operation With Other Jurisdictions p.674

8. Appeals and Judicial Review p.674

- 8.1 Access to Appeal and Judicial Review p.674
- 8.2 Typical Timeline for Appeals p.674
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.674

9. Foreign Direct Investment/Subsidies Review p.674

- 9.1 Legislation and Filing Requirements p.674

10. Recent Developments p.675

- 10.1 Recent Changes or Impending Legislation p.675
- 10.2 Recent Enforcement Record p.676
- 10.3 Current Competition Concerns p.677

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Swiss merger control is governed by the Federal Act on Cartels and other Restraints of Competition (the “Cartel Act” or CartA) and the Ordinance on the Control of Concentrations of Undertakings (the “Merger Control Ordinance” or MCO).

In addition, the Swiss Competition Commission (“ComCo”) and its Secretariat have published communications and guidelines on the application of the relevant merger control provisions.

1.2 Legislation Relating to Particular Sectors

There is currently no general foreign investment control regime in force in Switzerland. Special requirements apply in certain sectors where the conduct of business requires prior authorisation (in particular, in sectors that were formerly served by public monopolies), such as telecommunications, broadcasting and airline transport services. Furthermore, the acquisition of a real estate company (a company with the primary purpose of holding real estate) in Switzerland may require a permit from the competent cantonal authority under the Federal Act on the Acquisition of Real Estate by Foreign Persons. This legislative framework may change, however.

Foreign Investment Control Legislation

In March 2020, the Swiss parliament asked the Federal Council (Switzerland’s executive body) to propose foreign investment control legislation, aimed in particular at protecting Swiss expertise, employment, public order and safety. In August 2021, the Federal Council presented the key points of its proposal for Swiss investment control. Under the planned regime, the acquisition of control over Swiss companies by foreign inves-

tors will be subject to review in certain industries if the companies provide non-substitutable services or if state entities in security-relevant areas are critically dependent upon them.

A new Federal Act on FDI Control

Furthermore and regardless of the sector, review is envisaged for investments by foreign states or state-related actors. The Federal Council published the preliminary draft bill and opened the consultation process for a new Federal Act on Foreign Direct Investment Control in May 2022. In that draft, it was proposed to introduce a notification and approval requirement for certain takeovers of domestic undertakings by foreign investors (prior to closing) that endanger or threaten public order or security in Switzerland. Whereas the focus was on state-owned and state-related foreign investors (notification and approval requirement for all sectors, except of de minimis threshold), private foreign investors were also subject to the notification and approval requirement in particularly security-relevant sectors, partly if certain turnover-related thresholds were met.

Revised bill with limited scope

The consultation process for the new bill ended in September 2022. Then, on 10 May 2023, the Federal Council decided to substantially revise the proposal from the consultation. It announced the drafting of a heavily revised bill for the attention of parliament and instructed the Federal Department of Economic Affairs, Education and Research (EAER) to draw up a bill by the end of 2023 that was limited to the investments that are most critical for security. A limitation in scope was announced in the way that the investment review is to take effect when a foreign state-controlled investor takes over a domestic company that is active in a particularly critical area. See

9. Foreign Direct Investment/Subsidies Review for more details.

1.3 Enforcement Authorities

Swiss merger control law is enforced by ComCo and the Secretariat. ComCo consists of 11 to 15 members (currently 13), elected by the Federal Council, and is the decision-making body. The Secretariat conducts investigations, prepares the decisions of ComCo and, together with one member of the presiding body of ComCo, issues the necessary procedural rulings.

The total headcount of the Secretariat at the end of 2021 (the most recent report available) amounted to 76 employees (65.2 FTE). The Secretariat is split into four departments responsible for product markets, services, infrastructure and construction; a fifth department, resources, provides administrative and technical services within the Secretariat.

In the banking sector, the Swiss Financial Market Supervisory Authority (FINMA) may intervene if it considers that the concentration risks impair the interests of creditors. In such a case, the FINMA takes the place of ComCo, which it will invite to submit an opinion. The proposed takeover of CS by UBS by way of an absorption merger within the meaning of Article 3(1)(a) and Article 4(1)(a) of the Merger Act is subject to the review competence of FINMA as a merger within the meaning of Article 4(3)(a) CartA, because the protection of creditor interests is decisive for the assessment of admissibility and FINMA has assumed jurisdiction.

2. Jurisdiction

2.1 Notification

Notification is compulsory if the relevant turnover thresholds are exceeded or if the undertaking concerned has been held to be dominant in a relevant market in a final and binding decision (see **2.5 Jurisdictional Thresholds**). There are no exceptions to this regime.

2.2 Failure to Notify

If a notifiable concentration is implemented without prior notification, the undertaking that was obliged to notify may be fined up to CHF1 million. In such a case, ComCo may investigate the concentration ex officio and impose any necessary remedies. In addition, the responsible individual(s) may be fined up to CHF20,000 each.

There have been several cases where undertakings have been fined for failure to notify. These fines are made public. So far, no individuals have been fined.

If a notifiable concentration is not notified, its legal effect under civil law is suspended (ie, the closing is null and void).

2.3 Types of Transactions

The following transactions constitute concentrations subject to merger control:

- the merger of two or more previously independent undertakings; and
- any transaction, but in particular the acquisition of an equity interest or the conclusion of an agreement, by which one or more undertakings acquire direct or indirect control of one or more previously independent undertakings or parts thereof.

2.4 Definition of “Control”

“Control” is understood under Swiss merger control as the ability to exercise a decisive influence over the activities of another undertaking by the acquisition of rights or shares or by any other means. It is irrelevant whether control is acquired directly or indirectly, de jure or de facto. The means of obtaining control may in particular involve the acquisition of the following, either individually or in combination:

- ownership rights or the right to use all or part of the assets of an undertaking; and/or
- rights or agreements that confer a decisive influence on the composition, deliberations or decisions of the organs of an undertaking.

The acquisition of minority or other interests that do not confer control is not notifiable in Switzerland. However, such acquisition may be reviewed as a potentially anti-competitive agreement. According to ComCo, an acquisition may constitute an anti-competitive agreement if the parties intend to co-operate.

2.5 Jurisdictional Thresholds

Swiss merger control in the first instance applies a turnover test. A concentration is notifiable if two turnover thresholds are cumulatively met:

- in the financial year preceding the concentration, the undertakings concerned together reported a turnover of at least CHF2 billion or a turnover in Switzerland of at least CHF500 million; and
- at least two of the undertakings concerned reported a turnover in Switzerland of at least CHF100 million.

Compared to international standards, these turnover thresholds are relatively high. The undertakings concerned are the merging parties (in the

case of a merger) or the acquiring and acquired undertaking, that is, excluding the seller (in the case of an acquisition of control).

In addition, notification of a concentration is mandatory – irrespective of the turnover achieved – if one of the undertakings concerned (acquirer and target, but excluding the seller) has in a final and non-appealable decision been held to be dominant in a market in Switzerland, and if the concentration concerns either that market, an adjacent market or a market upstream or downstream thereof. For this threshold to be applicable, dominance needs to be determined in the binding part of the decision – that is, the notification obligation is not triggered if an undertaking is only held to be dominant in the reasoning of a decision.

2.6 Calculations of Jurisdictional Thresholds

Turnover is calculated on a consolidated basis (excluding intra-group sales). Turnover is geographically allocated in the place where competition for the relevant customer has taken place, which is normally the domicile of the customer. If the parties to the concentration make no sales to customers in Switzerland, but the invoicing for transactions taking place outside of Switzerland is carried out via billing addresses in Switzerland, such turnover is not considered to be achieved in Switzerland.

In the case of insurance companies, “turnover” is replaced by “annual gross insurance premium income”, and in the case of banks and other financial intermediaries by “gross income”.

Sales booked in a foreign currency will be converted into Swiss francs in accordance with generally accepted accounting principles applicable in Switzerland. In practice, the average yearly

exchange rates published by the Federal Tax Administration are regularly used to convert foreign currencies.

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

The turnover of an undertaking comprises the turnover of the entire group – that is, the turnover of its subsidiaries, parent companies, sister companies and joint venture companies, but excluding intra-group sales. The seller's turnover need not be included with that of the target. The turnover of a joint venture that is jointly controlled by undertakings will be apportioned among those undertakings in equal parts (again, excluding any intra-group sales).

Changes in the business during the reference period are reflected in a similar way as under EU competition law. The turnover of a business divested in the financial year preceding the concentration must be subtracted in full, and the turnover of acquired businesses must be added in full.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control in Switzerland if the relevant thresholds are met. According to the Federal Supreme Court, the fact that the thresholds are met in a certain case sufficiently indicates local effects.

Foreign joint ventures are an exception to this, however. The Secretariat has published a notice according to which it does not consider the establishment of a joint venture in Switzerland notifiable (even if the turnover thresholds are met by the joint venture's parent companies) if the joint venture does not have any activities in Switzerland and such activities are neither planned

nor foreseeable. However, although that exemption has been confirmed in recent cases, there has been a case (VW/Enel/JV, 2021) where that general rule has not applied. In this case, the target company was to build charging stations for electric vehicles exclusively in Italy. ComCo assumed local effects regarding the target company, arguing that the usability of electric vehicles in Switzerland would be limited if they could not be charged in Italy, as many Swiss travel there for holidays. However, this case was very fact-specific and particular, and the conclusion might be drawn that the exemption for foreign joint ventures is not generally affected.

2.9 Market Share Jurisdictional Threshold

Jurisdictional thresholds in Switzerland are in the first instance turnover-based. The additional notification obligation based on one party's confirmed dominance (see 2.5 Jurisdictional Thresholds) requires that the concentration concerns either that market or an adjacent market or a market upstream or downstream thereof. Therefore, confirmed dominance of one party is in itself not sufficient to trigger a notification obligation.

Conversely, it is also not required that there is a substantive overlap in the market where one party is dominant for this threshold to be met, but it is sufficient that the transaction has a competitive relation to such market.

2.10 Joint Ventures

Three types of joint ventures are subject to merger control:

- the acquisition of joint control over an existing joint venture constitutes a concentration if the joint venture performs all the functions of

- an autonomous economic entity on a lasting basis;
- the creation of a new joint venture constitutes a concentration if the joint venture performs all the functions of an autonomous economic entity on a lasting basis and if the business activities of at least one of the controlling undertakings are transferred to the joint venture; and
- the acquisition of joint control over an existing undertaking constitutes a concentration.

2.11 Power of Authorities to Investigate a Transaction

If the jurisdictional thresholds are not met, ComCo does not have the power to investigate a transaction or to impose any corrective measures if a transaction creates or strengthens a dominant position liable to eliminate effective competition.

2.12 Requirement for Clearance Before Implementation

Implementation of a transaction must be suspended prior to clearance.

2.13 Penalties for the Implementation of a Transaction Before Clearance

If a notifiable transaction is implemented before clearance, the undertakings concerned may be fined up to CHF1 million. The responsible individual(s) may in addition be fined up to CHF20,000. These fines are made public. Fines have also been imposed in the case of foreign-to-foreign transactions.

2.14 Exceptions to Suspensive Effect

The parties may request ComCo to authorise implementation of the concentration prior to the review period. The parties need to show good cause for such implementation in that the concentration might otherwise not be implemented,

or that third parties might suffer significant harm if the implementation was suspended during the review period.

Special rules apply to concentrations of banks that are deemed necessary for reasons of creditor protection. Such concentrations are reviewed by FINMA, which may allow implementation at any stage of the proceedings. The proposed takeover of CS by UBS by way of an absorption merger within the meaning of Article 3(1)(a) and Article 4(1)(a) of the Merger Act is subject to the review competence of FINMA as a merger within the meaning of Article 4(3)(a) CartA, because the protection of creditor interests is decisive for the assessment of admissibility and FINMA has assumed jurisdiction.

There are no specific rules for public takeover bids. ComCo should be contacted in advance in case of such bids in order to allow for coordination of their proceedings with the proceedings of the competent takeover board. It is also possible to request authorisation prior to the expiry of the review period in such cases or to propose arrangements on voting rights (see 2.15 Circumstances Where Implementation Before Clearance Is Permitted).

2.15 Circumstances Where Implementation Before Clearance Is Permitted

A carve-out of affected businesses or assets to allow for the closing of a global transaction before receipt of clearance in Switzerland does not appear to have so far been accepted by ComCo. In particular, in the case of takeover bids, ComCo has in practice accepted arrangements on the limitation of voting rights during pending merger control proceedings.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There are no specific deadlines for notification. Notification must be submitted prior to the implementation of the concentration, and the concentration must not be implemented prior to clearance (or grant of a derogation from the suspensive effect). Implementation without notification (see **2.2 Failure to Notify**) or during pending proceedings (see **2.13 Penalties for the Implementation of a Transaction Before Clearance**) may result in a fine for the entity concerned of up to CHF1 million.

In addition, the responsible individual(s) may be fined up to CHF20,000 each.

3.2 Type of Agreement Required Prior to Notification

In principle, a concentration can only be notified once the parties have reached a binding agreement. In practice, ComCo accepts notifications already at an earlier stage when the parties can document a good faith intent to reach a binding agreement, as expressed in particular in a letter of intention or memorandum of understanding. There have yet to be any cases where a notification has been accepted at a stage where such good faith intention could not be documented in writing.

3.3 Filing Fees

For the Phase I review period, a filing fee of CHF5,000 is charged. Usually, the notifying undertaking is asked for payment after expiry of the review period. For a Phase II investigation, the fees are charged based on the time spent by ComCo and the Secretariat. Hourly rates range from CHF100 to CHF400, depending on the

urgency of the matter and the seniority of the respective individuals.

3.4 Parties Responsible for Filing

In the case of a merger, both merging parties need to jointly submit the notification. In the case of an acquisition of control, the notification obligation is upon the undertaking(s) acquiring control. If a joint notification is made, the notifying companies have to designate at least one joint representative.

3.5 Information Included in a Filing

ComCo has published a form for the notification of concentrations. Essentially, the notifying undertaking(s) are required to submit the following information:

- name, domicile and a brief description of the business activities of the undertakings concerned;
- a description of the planned concentration, including the goals that are pursued with it;
- the turnover, gross premiums or gross income, as the case may be, of the undertakings concerned in Switzerland and worldwide;
- information on the relevant product and geographic markets affected, including market shares of the undertakings concerned and principal competitors for the preceding three years; and
- information regarding market entries in the past five years and excepted market entries, as well as the market entry costs.

In addition, copies of the following documents need to be provided:

- the most recent annual accounts and reports of the undertakings concerned;
- any agreements affecting or related to the transaction;

- in the case of a public takeover, offer documentation; and
- reports, analyses and business plans made with regard to the concentration, to the extent they contain relevant information for the competitive assessment of the concentration.

The notification form may be submitted in any official Swiss language (ie, German, French or Italian). Accompanying documents may also be submitted in English. There are no requirements for formalisation of submitted documents, such as certification, notarisation or apostillation.

3.6 Penalties/Consequences of Incomplete Notification

There are no penalties for incomplete notifications. However, the review period will only commence once the notification is complete. Within ten days of submission of the notification, the Secretariat will confirm its completeness, or request additional information.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

An undertaking that submits incorrect or misleading information may be fined up to CHF100,000. In addition, ComCo may withdraw the clearance decision.

3.8 Review Process

ComCo is required to notify the undertakings concerned within one month from receipt of the complete notification whether it intends to open an investigation (Phase I). If no such notice is given within that time period, the transaction may be implemented. ComCo often provides the companies in such cases with a “comfort letter” stating that it considers the concentration unobjectionable.

If ComCo decides to open an investigation, this must be completed within four months, unless ComCo is prevented from doing so for reasons attributable to the undertakings concerned (Phase II).

3.9 Pre-notification Discussions With Authorities

The parties can and typically do engage in pre-notification with the Secretariat. The parties submit a draft filing that the Secretariat will review and comment upon with regard to any information still required for the notification to be considered complete. In complex transactions, pre-notification is generally welcomed by the Secretariat and highly recommended.

3.10 Requests for Information During the Review Process

The Secretariat regularly requests information during the review process. If the request pertains to information that the Secretariat considers required for completeness of the notification, the review period only starts once such information has been submitted. The Secretariat may also request additional information that is not required for completeness of the notification.

The parties are obliged to provide such information within the deadline set by the Secretariat, but the request does not suspend the review period.

3.11 Accelerated Procedure

Prior to the notification of a concentration, the undertakings concerned and the Secretariat may mutually agree on the details of the content of the notification. The Secretariat may grant exemptions from the obligation to submit specific information or documents. In practice, this is relevant in particular for foreign-to-foreign mergers with limited effects on the Swiss market.

4. Substance of the Review

4.1 Substantive Test

The substantive test is based on a dominance test supplemented by an additional test on the remaining degree of competition. According to this “dominance-plus test”, a concentration may only be prohibited if:

- the transaction creates or strengthens a dominant position;
- that dominant position is liable to eliminate effective competition in the relevant market; and
- the transaction does not strengthen competition in another market outweighing the negative effects of the dominant position.

Compared to other jurisdictions, this threshold is high. In view of this high threshold, in the past 22 years (the current merger control system was introduced in 1996), only five mergers have been prohibited by ComCo: Berner Zeitung/Thuner Tagblatt (1998, notification withdrawn prior to formal prohibition); Berner Zeitung/20 Minuten (2004, subsequently cleared upon appeal subject to obligations); France Télécom/Sunrise Communications (2012); Ticketcorner/Starticket (2017); and Schweizerische Post/Quickmail Group (2024).

It is currently contemplated to replace this dominance-plus test by the SIEC test (significant impediment to effective competition) as applied in the EU. The Federal Council has published a draft for an amendment of the Cartel Act and conducted a public consultation procedure that lasted until March 2022. In March 2023, the Federal Council instructed the Department of Economic Affairs, Education and Research to submit a dispatch on the partial revision of the Cartel Act, including the replacement of the domi-

nance-plus test by the SIEC test by the second quarter of 2023. On 24 May 2023, the Federal Council adopted the dispatch on the partial revision of the Swiss Cartel Act. The proposals for the modernisation of merger control remain essentially unchanged compared to the previous draft. The core element is the introduction of the SIEC test and thus, the alignment of the substantive test criteria for mergers with EU law.

4.2 Markets Affected by a Transaction

Markets are considered affected by the transaction if either two or more of the undertakings concerned jointly hold a market share of 20% or more in Switzerland or in the relevant geographic market, or in which one of the undertakings concerned holds a market share of 30% or more in Switzerland or in the relevant geographic market.

4.3 Reliance on Case Law

ComCo regularly considers the practice of the European Commission, in particular with regard to market definitions. Furthermore, the case law in neighbouring countries of Switzerland will also be considered, more specifically, the practice of the German Federal Cartel Office.

4.4 Competition Concerns

As mentioned in **4.1 Substantive Test**, the current substantive test in Switzerland is a dominance-plus test. Applying this test, ComCo investigates unilateral effects, co-ordinated effects in the case of oligopolies, conglomerate effects, as well as vertical concerns and the elimination of potential competition.

4.5 Economic Efficiencies

In the past, ComCo often did not consider economic efficiencies as a mitigating factor. In theory, efficiencies may be taken into account if they

are likely to prevent the elimination of effective competition.

Furthermore, under the Swiss substantive test, economic efficiency gains in one market may outweigh the effects of the creation or strengthening of a dominant position in another market (see **4.1 Substantive Test**). This part of the test has for a long time not had practical relevance. In a recent case, however, for the first time ComCo authorised a concentration (Gateway Basel Nord, 2019) explicitly based on that provision (Article 10(2)(b) Cartel Act), which indicates the increased role of economic efficiencies in Swiss merger control law (see **10.2 Recent Enforcement Record**).

4.6 Non-competition Issues

ComCo does not consider non-competition issues, such as industrial policy, national security, foreign investment, employment or other public interest issues, in its review of planned concentrations. As an exception to that principle, the Cartel Act provides that in a concentration of banks that is deemed necessary by FINMA for reasons related to creditor protection, the interests of creditors may be given priority (Article 10(3) Cartel Act). In such a case, FINMA takes the place of ComCo. To give an example from the year 2023, the proposed takeover of CS by UBS by way of an absorption merger within the meaning of Article 3(1)(a) and Article 4(1)(a) of the Merger Act was subject to the review competence of FINMA as a merger within the meaning of Article 4(3)(a) CartA, because the protection of creditor interests is decisive for the assessment of admissibility and FINMA has assumed jurisdiction.

Further, in the case of a prohibition of a concentration by ComCo, the undertakings concerned may request the Federal Council of Switzerland

to authorise the concentration for reasons of public interest. In such a case, the Federal Council may take into account both competition-related and non-competition-related considerations in its assessment of the concentration. Up to now, no such authorisation has been granted.

Proposed Federal Act on Foreign Direct Investment Control

The Federal Council conducted a consultation process for a new Federal Act on Foreign Direct Investment Control in May 2022. In May 2023, the Federal Council decided to substantially revise the proposal from the consultation, following which, a revised draft of the Investment Control Act was published on 15 December 2023. The proposed Federal Act will introduce foreign investment control into the Swiss legal framework (see **1.2 Legislation Relating to Particular Sectors**). It is proposed to introduce a notification and approval requirement for certain takeovers of domestic undertakings by foreign state investors (prior to closing) that endanger or threaten the public order or security of Switzerland. The investment control rules will be separate from the merger control rules. It is envisaged that the notification must be submitted to the State Secretariat for Economic Affairs (SECO) but that the competence not to approve a notifiable investment will, however, be held exclusively by the Federal Council at the request of the EAER. See **9. Foreign Direct Investment/Subsidies Review** for more details.

4.7 Special Consideration for Joint Ventures

No specific rules are applicable to joint ventures, which are also assessed under the dominance-plus test (see **4.1 Substantive Test**).

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

ComCo may prohibit or interfere with a transaction only if the conditions of the dominance-plus test are met (see 4.1 **Substantive Test**). If the companies do not comply with a prohibition decision, ComCo may take all the necessary steps to restore effective competition. In particular, ComCo may order the separation of any combined undertakings or the cessation of the controlling influence. In addition, ComCo may sanction companies that do not comply with a prohibition decision with a fine of up to CHF1 million.

5.2 Parties' Ability to Negotiate Remedies

A concentration may be cleared subject to certain conditions or obligations. The law does not specify the types of conditions or obligations that may be ordered. In practice, both divestitures and certain behavioural remedies have been implemented, and the scope of these remedies is discussed by the parties with ComCo.

Both behavioural and structural remedies have been used in practice, and the choice depends on the characteristics of the affected markets and the identified competition concerns. While ComCo prefers structural undertakings (ie, divestitures), it has been shown to be more open to behavioural remedies than the European Commission.

In the case of international transactions, it is particularly important to co-ordinate the remedies offered with those offered by other competition authorities, in particular the European Commission.

Remedies ordered by ComCo can only take into account competition issues.

5.3 Legal Standard

The law does not set a standard that remedies must meet to be deemed acceptable.

5.4 Negotiating Remedies With Authorities

Other than in EU merger control proceedings, there are no procedural provisions under Swiss law with regard to remedies, such as the timing of their negotiations. The most appropriate moment to commence remedy negotiations has to be determined in each individual case.

ComCo does not depend on the parties to propose remedies – that is, it can order remedies on its own. However, in practice, the parties are closely involved in the development of potential remedies.

5.5 Conditions and Timing for Divestitures

Swiss law distinguishes between conditions and obligations: conditions need to be implemented before the concentration is completed, whereas obligations need to be implemented thereafter. In the latter case, according to the practice of ComCo, the remedy must be implemented within a specified period – that is, it is not sufficient for the parties to commit to divest certain assets “as early as possible”.

If remedies are not fully complied with, ComCo may impose sanctions of up to CHF1 million or, in the case of repeated non-compliance, an amount of up to 10% of the overall turnover of all the undertakings concerned in Switzerland.

5.6 Issuance of Decisions

At the end of Phase I proceedings (preliminary investigation), ComCo may issue an order to clear the transaction if conditions and obligations are imposed. Without remedies, ComCo does not regularly issue a formal order at the end of Phase I, but provides the parties with a comfort letter clearing the transaction. ComCo cannot prohibit the transaction at the end of Phase I.

At the end of Phase II proceedings (in-depth investigation), a formal decision is ordered clearing (potentially subject to conditions and/or obligations) or prohibiting the concentration.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

In 2017, ComCo issued a prohibition decision (one of only five prohibitions since 1996) regarding the proposed concentration of Ticketcorner and Starticket. There has not been a clearance subject to conditions and/or obligations recently.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

ComCo only considers ancillary restraints to the extent they are directly related to and necessary for the concentration. Whether these conditions are given is assessed according to criteria that are comparable to the criteria applicable under EU competition law, as set out in the European Commission's Notice on Ancillary Restraints.

However, ancillary restraints that qualify under these criteria are not automatically covered by the clearance of the transaction, but only upon specific request. ComCo expects the notifying undertaking(s) to specifically describe the ancil-

lary restraints and provide an assessment in the notification as to why they qualify as directly related and necessary to the concentration.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

The Secretariat regularly sends out questionnaires to third parties, in particular customers and competitors, to solicit their opinion on a planned concentration and to obtain a better understanding of the market conditions and the competitive environment. These third parties do not have any formal procedural rights. ComCo is neither obliged to send out questionnaires, nor to consider the replies received.

Third parties also do not have legal standing to appeal merger decisions.

7.2 Contacting Third Parties

The Secretariat regularly contacts third parties as part of its review process by sending out questionnaires. Where remedies are offered, the Secretariat may obtain the assessment of such remedies by market participants (ie, market testing).

7.3 Confidentiality

The fact of the submission of a notification is not made public. Conversely, the decision to open an investigation proceeding (Phase II) and the final decision of ComCo authorising or prohibiting a concentration are published in the Official Federal Gazette and in the Swiss Official Gazette of Commerce. Further, ComCo regularly publishes the reasoning of its merger decisions in its quarterly journal.

The undertakings concerned may specify what information they consider as business secrets and ask ComCo to keep such information confidential. In the event of a difference of opinion on whether certain information constitutes a business secret, ComCo will issue an appealable order.

7.4 Co-operation With Other Jurisdictions

The agreement between the EU and Switzerland concerning co-operation on the application of their competition law provides a framework for co-operation between ComCo and the European Commission. By virtue of this agreement, information may under limited circumstances be shared with the other authority without the consent of the undertakings concerned (second-generation agreement). In such a case, ComCo has to notify the undertaking concerned and invite it to state its views before transmitting the data to the European Commission.

With regard to other authorities, such exchange of information is only possible with the consent of the parties. Typically, ComCo will then request a waiver letter from the undertakings concerned.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Decisions of ComCo in merger control cases are subject to an appeal to the Federal Administrative Court. The Federal Administrative Court has full jurisdiction to review ComCo's findings of fact, legal assessment and sanctions or penalties, under all aspects of fact and law.

The judgment of the Federal Administrative Court may be appealed to the Federal Supreme

Court. The Federal Supreme Court can review the judgment only with respect to its conformity with the law. It is bound by the facts that have been established before the Federal Administrative Court, unless they are manifestly incorrect or have been determined in violation of legal provisions.

8.2 Typical Timeline for Appeals

An appeal to the Federal Administrative Court needs to be filed within 30 days of formal notification of ComCo's decision. The duration of the appeals proceeding varies, but regularly amounts to significantly more than a year.

An appeal to the Federal Supreme Court needs to be filed within 30 days of receipt of the formal notification of the judgment of the Federal Administrative Court. The duration of the proceedings regularly amounts to a year or more.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties cannot appeal a clearance decision.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

There is currently no general foreign investment control in Switzerland, although special requirements apply in certain sectors where prior government approval is required (eg, banking/ securities and real estate) – see **1.2 Legislation Relating to Particular Sectors**. However, the legal situation might change in the future.

In March 2020, the Swiss parliament asked the Federal Council to propose foreign investment control legislation, aimed in particular at protect-

ing Swiss expertise, employment, public order and safety. Following the presentation of the key points of a proposal for Swiss investment control in August 2021, the Federal Council published the preliminary draft bill and opened the consultation process for a new Federal Act on Foreign Direct Investment Control in May 2022. Following the consultation process, this draft turned out to be too extensive in scope. According to the initial draft, the acquisition of control over Swiss companies by foreign investors should be subject to review in certain industries if the companies provide non-substitutable services or if state entities in security-relevant areas are critically dependent upon them. Furthermore and regardless of the sector, review was envisaged for investments by foreign states or state-related actors. According to that initial draft, private foreign investors were also subject to the notification and approval requirement, particularly in security-relevant sectors.

On 15 December 2023, the Federal Council adopted the dispatch on the Investment Control Act. As compared to the preliminary draft of 2022, the draft bill is a minimal solution with significantly reduced scope of application. According to the draft, acquisitions of Swiss undertakings will only be notifiable if:

- a foreign state investor acquires control;
- a (security-)critical sector is concerned; and
- certain de minimis or turnover thresholds are exceeded.

Examples for (security-)critical sectors are defence equipment, electricity grids and production, and health and telecoms infrastructures.

The investment control rules will be separate from the merger control rules. It is envisaged that the notification must be submitted to SECO

and that the decision not to approve a notifiable investment will, however, be held exclusively by the Federal Council at the request of the EAER.

The draft Investment Control Act is now being tabled in parliament for deliberation. It is expected to come into force in 2025 at the earliest.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

Introduction of the SIEC Test

With respect to the substantive test for assessing mergers, the replacement of the current dominance-plus test by the SIEC test, as applied in the EU, is currently being contemplated. The Federal Council has published a draft for an amendment of the Cartel Act and conducted a public consultation procedure, which lasted until March 2022. In March 2023, the Federal Council instructed the EAER to submit a dispatch on the partial revision of the Cartel Act by the second quarter of 2023. On 24 May 2023, the Federal Council adopted the dispatch on the partial revision of the Swiss Cartel Act. The proposals for the modernisation of merger control remain essentially unchanged compared to the previous draft. The core element is the introduction of the SIEC test. The change from the current dominance-plus test to the SIEC test will bring the antitrust review standard for mergers in line with international practice (see 4.1 **Substantive Test**). In addition, the consideration of efficiencies is to be expressly anchored in the law (Article 10(2) (b) of the draft CartA). The dispatch emphasises that these amendments will make merger control more closely aligned with economic principles and more targeted. When examining mergers, “justified and verifiable” efficiency advantages for consumers must be taken into account. Fol-

lowing the practice in the EU, the “appropriate participation” – understood in a dynamic sense – of consumers should be necessary. If such efficiency benefits at least offset the negative effects of the merger, it must be approved.

Exemptions from notification obligations

The dispatch also provides for exemptions from the notification obligation for certain internationally notified mergers. In particular, there should be no notification obligation if all affected markets include at least Switzerland and the EEA (no mere national geographic market) and the proposed concentration is also notified to the European Commission (Article 9(1bis) of the draft CartA). In these cases, the companies should submit a copy of the notification to ComCo within ten days of submitting it to the European Commission (Article 9(1ter) of the draft CartA).

Federal Act on Foreign Direct Investment Control

In March 2020, the Swiss parliament asked the Federal Council to propose a foreign investment control legislation, aimed in particular at protecting Swiss know-how, employment, public order and safety. In August 2021, the Federal Council presented the key points of its proposal for Swiss investment control. The Federal Council published the preliminary draft bill and opened the consultation process for a new Federal Act on Foreign Direct Investment Control in May 2022. Subsequent to the consultation process, the Federal Council decided to substantially revise the proposal from the consultation. On 15 December 2023, the Federal Council adopted the dispatch on the Investment Control Act. As compared to the preliminary draft of 2022, the draft bill is a minimal solution with significantly reduced scope of application (see **1.2 Legislation Relating to Particular Sectors**).

10.2 Recent Enforcement Record **Ticketcorner and Starticket**

In 2017, ComCo issued its fourth prohibition decision in the 22-year history of merger control in Switzerland by prohibiting the proposed merger between Ticketcorner and Starticket, two Swiss ticketing companies that are controlled by Tamedia and Ringier, two Swiss media groups. The two companies are active, among others, in the market for distribution of tickets for events, such as concerts and shows, through physical and online channels (primary ticketing). ComCo concluded that the proposed merger would eliminate effective competition in primary ticketing, and strengthen the market position of the two ticket companies. For lack of feasible remedies, the concentration was prohibited.

Gateway Basel Nord

In 2019, ComCo explicitly relied on economic efficiency considerations in a recent concentration in the logistics sector (Gateway Basel Nord). In the respective case, three companies planned a large terminal with gateway function for combined transport resulting in major efficiency gains (lower shunting costs and volume bundling). The investigation by ComCo revealed the possibility of eliminating effective competition in the markets for certain cargo-handling services.

As provided for under Article 10(2)(b) of the Cartel Act, a concentration leading to or strengthening a dominant position liable to eliminate effective competition can be cleared if the concentration strengthens competition in another market such that the harmful effects of the dominant position are outweighed (see **4.5 Economic Efficiencies**). ComCo considered that the large terminal would lead to considerable improvements in combined transport and significant savings of cost and time, mainly related to rail freight transport

and operator services. It concluded that these improvements outweighed the disadvantages in the markets for cargo-handling services. Therefore, ComCo cleared the concentration unconditionally.

Schweizerische Post, Quickmail and Planzer

In July 2023, Schweizerische Post (Swiss Post) announced the takeover of the Quickmail Group. Schweizerische Post justified this transaction with the financial situation of Quickmail. In 2024, ComCo announced its prohibition decision by prohibiting the proposed acquisition of control by Schweizerische Post over Quickmail Group by press release. The Quickmail Group, with its two subsidiaries Quickmail and Quickpac, delivers letters, unaddressed mail (eg, advertising flyers), newspapers and magazines, as well as parcels, throughout Switzerland. Schweizerische Post is also active in these areas. ComCo examined this takeover in detail and found that it would eliminate competition in the market for national addressed bulk mail items weighing over 50 grams for business customers. It would also create or strengthen a dominant position for Schweizerische Post in various letter and parcel post markets and the market for the delivery of newspapers and magazines. The takeover would create a de facto monopoly for Schweizerische Post.

Schweizerische Post and Quickmail argued that this was a restructuring takeover. ComCo can allow such a takeover if it impairs competition, but the negative effects on competition would also occur without the merger (“failing company defence”). This would be the case if the Quickmail Group were to disappear from the market within a short period of time without sup-

port and, as a result, a large proportion of the Quickmail Group’s customers would switch to Schweizerische Post anyway. In addition, there must be no more competition-friendly alternative to the merger. ComCo’s in-depth investigation revealed that the latter condition was not met. In addition to Schweizerische Post, there was an alternative potential buyer of the Quickmail Group, which had many years of experience in the area of postal services. The takeover by this alternative prospective buyer would enable the Quickmail Group to continue to exist on the market, thereby maintaining competition with Schweizerische Post and thus representing a more competition-friendly solution than the takeover by Schweizerische Post. Shortly after ComCo’s prohibition decision, it was announced that the logistics company Planzer would take over the postal service providers Quickpac and Quickmail.

10.3 Current Competition Concerns

Given the high threshold for intervention when a dominant position is liable to exclude effective competition (see **4.1 Substantive Test**), single-firm dominance (unilateral effects) is rather rare. Instead, there is a certain focus in ComCo on collective dominance (co-ordinated effects), where it is assumed that the merged entity may enter into collusive practices together with another company. A full analysis of these effects was recently conducted in a proposed merger in the telecommunications sector (Sunrise/UPC, 2019), in an acquisition of joint control over an existing undertaking in the field of rail transport of goods and related logistics (SBB Cargo, 2020) and in an acquisition of control in the field of Out-of-Home Advertising (TX Group/Clear Channel, 2022).

Trends and Developments

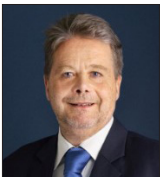
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Prager Dreifuss Ltd is one of Switzerland's leading law firms for business law with its headquarters in Zurich, a branch in Berne and a representative office in Brussels. It offers advice in all areas of commercial law and strives to find integrated, innovative solutions for its clients that are adapted to legal and economic realities. The branch in Berne deals with competition and international trade law. The competition team is headed by Professor Dr Philipp Zurkinden and focuses on cartels and dominance abuse

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Overview of the Current Swiss Merger Control System

Merger control is governed by the Federal Act on Cartels and other Restraints of Competition (“CartA”). A proposed merger must be notified to the Swiss Competition Commission (“ComCo”) if, in the audited annual reports of the business year before the notification, the turnover figures of the undertakings concerned exceeded CHF2 billion worldwide or CHF500 million in Switzerland, and if at least two of the undertakings concerned each had a turnover of more than CHF100 million in Switzerland.

A proposed concentration is always subject to clearance by ComCo even if the turnover thresholds are not met, if one of the undertakings concerned has, in proceedings under the CartA in a final and formally binding decision, been held to be dominant in a market in Switzerland, and if the concentration concerns either that market or an adjacent market, or a market upstream or downstream thereof.

Finally, if a concentration of banks within the meaning of the Swiss Banking Act is deemed necessary by the Swiss Financial Market Supervisory Authority (FINMA) for reasons related to creditor protection, the interests of creditors may be given priority. In such cases, FINMA takes the

place of the Competition Commission and the latter is just invited to submit an opinion (Article 10, paragraph 3, CartA).

Introduction of the substantive assessment criterion

The substantive assessment criterion is the dominance test. Accordingly, a proposed merger may only be prohibited by ComCo if the newly merged entity would create or strengthen a dominant position that results in an elimination of effective competition (“qualified dominance”). Practice shows that this qualified dominance test makes it very difficult to prohibit mergers.

Furthermore, as a matter of law, unilateral effects below the market dominance threshold are not within the scope of ComCo’s review powers.

In the case of concentrations of banks pursuant to Article 10, paragraph 3 of CartA, FINMA must consider the interests of creditors and the stability of the Swiss financial centre.

ComCo approval

The preventative character of the merger control system is secured in that notified concentrations within the meaning of the CartA may in principle only be closed after their approval by ComCo. The merger control procedure is divided into two

phases. Following the submission of a complete merger notification, ComCo and, respectively, its Secretariat examine within a period of one month whether there are indications that the proposed concentration would create or strengthen a dominant position. In the absence of such indications, ComCo is barred from further examining the proposed concentration and it may be implemented without reservations.

Although a formal notice that no in-depth investigation will be conducted is not foreseen in the CartA, ComCo regularly informs the undertakings concerned of this fact. Conversely, if the preliminary examination shows indications that the concentration could create or strengthen a dominant position, ComCo and, respectively, its Secretariat will conduct an in-depth investigation which could take up to four months. ComCo may either fully approve or prohibit, or approve subject to the conditions of notified concentrations.

From the rough description above it is apparent that the current Swiss merger control system was mainly inspired by the first EU merger control regulation.

A prohibition of mergers is difficult under the substantive dominance test

The current substantive dominance test (“qualified dominance”) makes it difficult for the competition authorities to prohibit merger projects. This is proved by the fact that since the introduction of the preventative merger system in 1995, only four merger projects have been prohibited, and only two prohibition decisions have become final and binding.

The first case was a merger in the media sector which was approved on appeal. The second case was the merger between France Telecom Swit-

zerland (Orange) and Sunrise. ComCo stated the creation of a collective dominance between the newly merged entity and the Swiss incumbent Swisscom. The decision was not appealed.

The third case concerned a merger between Ticketcorner and Starticket, the only two significant ticketing enterprises active in Switzerland. ComCo determined that the proposed merger between Ticketcorner and Starticket would have strengthened Ticketcorner’s dominance and eliminated effective competition in the market for the distribution of tickets by third parties. In its competition assessment, ComCo examined the position of the current providers of ticketing services active in Switzerland as well as potential market entries.

It also examined the market development as well as the role technology companies, such as Spotify, Facebook or Google could play. Despite advances in technology, ComCo concluded that current and potential competitors would not be able to exert sufficient competitive pressure on the merged entity. This decision was under appeal before the Federal Supreme Court after the Federal Administrative Court had dismissed the appeal, when TX group in 2020 abandoned the merger project between Ticketcorner and Starticket and sold the latter to the British See Tickets group, which forms part of Vivendi Ltd.

The latest case to which ComCo objected concerned the acquisition of Quickmail Group by Swiss Post which was notified to ComCo on 30 October 2023. Within the one-month investigation period, ComCo found indications that the concentration would establish or strengthen a dominant position in various markets (see further below).

Merger cases in 2023

The takeover of the Quickmail Group

In 2023, ComCo received 33 merger notifications. It objected, on 15 January 2024, to the proposed acquisition of the Quickmail Group by Swiss Post. The Quickmail Group is a competitor of Swiss Post and – along with its subsidiaries Quickpac and Quickmail – provides nationwide delivery services for letters (above the 50 grams monopoly on letters granted to Swiss Post), unaddressed mail (eg, advertising flyers), newspapers, magazines, and parcels. Swiss Post is also active in these areas. As emerged from the decision, ComCo concluded that the transaction would eliminate competition in the market for national addressed bulk mail over 50 grams for business customers. Furthermore, ComCo concluded that the transaction would establish or reinforce the dominant position of Swiss Post in various letter and parcel markets as well as in the market for newspaper and magazine delivery. As a consequence, ComCo found that the transaction would create a de facto monopoly for Swiss Post which would negatively impact competition to the detriment of consumers and business customers.

The notifying parties argued that this was a rescue takeover which ComCo could allow under the failing company defence. Apparently, the Quickmail Group was in financial difficulties and the notifying parties argued that the negative effects on competition would occur even without the proposed merger. The “failing company defence” has in the past led to the approval of mergers in six cases. According to ComCo’s practice, the following criteria must be cumulatively met:

- the target (here, the Quickmail Group) would disappear from the market within a short period without support;

- most of the target’s customers would switch to the acquiring company which, accordingly, would absorb most of the target’s market share; and
- no more competition-friendly alternative to the merger is available.

ComCo considered that the last condition was not met as there was an alternative purchaser interested in the Quickmail Group that had many years of experience in postal services. In ComCo’s view, a takeover by this alternative purchaser would ensure the continued presence of the Quickmail Group in the market, maintain competition with Swiss Post, and thus represent a more competition-friendly solution. If the alternative purchaser’s offer were to be accepted, bankruptcy proceedings due to excessive debt would not be necessary, and the Quickmail Group could continue to operate in the market as an alternative provider, benefiting consumers and business customers. Indeed, only two weeks after ComCo objected to the proposed merger, the Swiss company Planzer, a large family-owned logistics company, acquired Quickpac and Quickmail.

The acquisition of Credit Suisse by UBS

Apart from the Quickmail Group transaction, several other transactions have raised interesting questions. First and foremost, the acquisition of Credit Suisse by UBS. On 19 June 2024, FINMA finally published the merger decision along with ComCo’s long-withheld opinion and therewith concluded its control procedure. FINMA, which had already approved the transaction on 19 March 2023, prior to UBS filing a merger notification (which was possible based on Article 17 of the Merger Control Ordinance), did not impose any conditions and obligations. In summary, although ComCo considered that there were indications that UBS would acquire

or strengthen a dominant position (the threshold for an in-depth (Phase II) investigation) in the markets for funds and fund-like products, global custody, passive asset management, Swiss real estate as an investment class, fund management for single investor funds, and corporate banking for large companies and companies with specific needs, it came to the prima facie conclusion that this would not eliminate effective competition. As the threshold for an in-depth (Phase II) investigation was met, however, it recommended FINMA to conduct an in-depth (Phase II) investigation, which FINMA rejected, mainly for procedural reasons. FINMA held that merger control proceedings which fell in its jurisdiction were sui generis proceedings not subject to the procedural provisions set forth in the CartA. Accordingly, a one- or two-stage procedure (Phase I and Phase II) as provided for in Articles 32 and 33 CartA was not possible under these conditions. Although FINMA did not consider a Phase II examination possible, it nevertheless requested ComCo to carry out an in-depth analysis sui generis prior to completion of the merger notification by UBS.

FINMA specifically asked ComCo to examine whether the conditions for the failing company defence were met. Interestingly, ComCo concluded, based on publicly available information, that the conditions for a failing company defence were not met, because it had been reported that other undertakings had been interested in acquiring at least parts of Credit Suisse, that is, that there had been alternatives to the proposed transaction. Conversely, FINMA concluded that there was at no time a concrete, legally binding offer from another competitor willing to acquire Credit Suisse in whole or in significant parts. Furthermore, according to FINMA, on the weekend of 18/19 March 2023, no one other than UBS

was in a position to take over Credit Suisse or significant parts of it.

Following FINMA's decision and ComCo's observations, the price surveillance authority, on 4 July 2024, decided to place UBS under observation to examine whether there were any indications of an abusive price increase or price maintenance. At the time of publication, the first market the Price Watchdog intended to examine was corporate banking.

The conversion of a cantonal pharmacy into a company limited by shares

In its annual report, ComCo included a case concerning the healthcare sector. The canton of Zurich decided to convert the cantonal pharmacy into a company limited by shares and then sell it to the University Hospital. This caused ComCo to open a market monitoring procedure. According to ComCo, the question may arise in cases involving companies owned by cantons and municipalities whether such companies form a single economic entity with the canton or municipality or whether they are to be regarded as autonomous entities. ComCo stated that such companies would normally be considered to form a single economic entity with the canton or municipality if the latter has a decisive influence on the business activities of the company concerned or such cannot be ruled out. ComCo considers that the question is relevant particularly in the following cases:

- a canton or municipality decides to buy a company or part of a company from a private company or another canton or municipality; or
- a canton or municipality establishes a joint venture with another canton or municipality or with a private company; or

- a canton or municipality accepts a controlling interest from other companies or cantons or municipalities in the ownership of a company formerly controlled by that canton or municipality.

The ComCo Secretariat handed down an opinion regarding the geographical allocation of turnover in merger control proceedings. Although the matter appears quite straightforward under the existing practice, questions regarding the geographical allocation regularly pop up. The facts reveal that Company A was to acquire the target from Company B. The target reported a turnover in Switzerland of more than CHF100 million, of which a significant part resulted from sales to a Company D. The target would manufacture certain devices for D under a framework agreement entered between the target and a subsidiary of Company D domiciled in Switzerland. All invoices from the target would be addressed to the Swiss subsidiary of Company D. The question was whether the revenue generated by the target from the sale of the manufactured devices under an FCA (Free Carrier) clause to companies of the D Group outside Switzerland was considered Swiss turnover, if these products were never imported into Switzerland. In its analysis, the ComCo Secretariat also looked into the practice of the European Commission. The ComCo Secretariat explained that the decisive criterion was the actual place of delivery of the goods and not, for example, a different place of performance agreed for the special regulation of cost or risk bearing, such as, for example, an FCA clause. The ComCo Secretariat noted that the actual place of delivery was the place where the various suppliers are in competition. Accordingly, in that instance, only the revenue generated from the sale of such goods actually designated to be delivered to Switzerland would constitute Swiss turnover. Conversely, the revenue generated

from the sale of goods shipped directly from the target company's foreign production facilities to companies of the D Group outside Switzerland, should not be considered Swiss turnover, provided that the target company was merely issuing invoices for transactions occurring outside Switzerland to billing addresses in Switzerland, and competition with alternative suppliers did not take place in Switzerland.

Reform of Swiss Merger Control

After the total reform of the CartA in 1995, a partial revision in 2003 and a failed reform attempt in 2012, the Swiss Federal Council mandated on 12 February 2020 that the Federal Department of Economic Affairs, Education and Research (EAER) should draft amendment proposals. The draft amendments of Swiss merger control, as well as other amendments of the CartA together with the Official Report of the Swiss Federal Council, were published on 24 May 2023. An important aspect of [the proposed reform](#) is merger control. Apart from some procedural adaptations to EU law, the change from the current substantive dominance test to the significant impediment to effective competition test (the "SIEC test") will be the main element of the respective amendment proposals of the EAER.

The proposal is currently pending in the Swiss parliament and was deliberated, on 11 June 2024, by the Council of States as the first of the two parliamentary chambers. The Council of States adopted the Federal Council's proposal to move from a substantive dominance test to the SIEC test.

Before mandating the EAER with the drafting of amendment proposals, the Swiss government and the Swiss Federal Office for Economy asked Prager Dreifuss Ltd and a specialised team of experts from [Polynomics](#) for an opinion

on the consequences of a change to the SIEC test. In this legal and economic opinion, merger decisions of ComCo concerning wholesalers and retailers, telecommunications companies and the media were analysed and compared to similar transactions examined by competition authorities applying the SIEC test. It was concluded that the SIEC test is suitable for preventing harmful mergers below the qualified dominance threshold, whereas the current Swiss substantive test allows a prohibition or approval subject to conditions only in such cases where the concentration would result in qualified dominance. As this brief description of Swiss merger practice shows, it is a fact that the actual dominance test does not, from a ComCo perspective, allow Switzerland to exercise adequate merger control.

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Contents

1. Legislation and Enforcing Authorities p.689

- 1.1 Merger Control Legislation p.689
- 1.2 Legislation Relating to Particular Sectors p.689
- 1.3 Enforcement Authorities p.689

2. Jurisdiction p.689

- 2.1 Notification p.689
- 2.2 Failure to Notify p.690
- 2.3 Types of Transactions p.690
- 2.4 Definition of "Control" p.691
- 2.5 Jurisdictional Thresholds p.691
- 2.6 Calculations of Jurisdictional Thresholds p.692
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.692
- 2.8 Foreign-to-Foreign Transactions p.692
- 2.9 Market Share Jurisdictional Threshold p.693
- 2.10 Joint Ventures p.693
- 2.11 Power of Authorities to Investigate a Transaction p.693
- 2.12 Requirement for Clearance Before Implementation p.693
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.693
- 2.14 Exceptions to Suspensive Effect p.693
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.694

3. Procedure: Notification to Clearance p.694

- 3.1 Deadlines for Notification p.694
- 3.2 Type of Agreement Required Prior to Notification p.694
- 3.3 Filing Fees p.694
- 3.4 Parties Responsible for Filing p.694
- 3.5 Information Included in a Filing p.694
- 3.6 Penalties/Consequences of Incomplete Notification p.696
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.696
- 3.8 Review Process p.696
- 3.9 Pre-notification Discussions With Authorities p.696
- 3.10 Requests for Information During the Review Process p.696
- 3.11 Accelerated Procedure p.696

4. Substance of the Review p.697

- 4.1 Substantive Test p.697
- 4.2 Markets Affected by a Transaction p.697
- 4.3 Reliance on Case Law p.697
- 4.4 Competition Concerns p.697
- 4.5 Economic Efficiencies p.698
- 4.6 Non-competition Issues p.698
- 4.7 Special Consideration for Joint Ventures p.698

5. Decision: Prohibitions and Remedies p.698

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.698
- 5.2 Parties' Ability to Negotiate Remedies p.699
- 5.3 Legal Standard p.699
- 5.4 Negotiating Remedies With Authorities p.699
- 5.5 Conditions and Timing for Divestitures p.700
- 5.6 Issuance of Decisions p.700
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.700

6. Ancillary Restraints and Related Transactions p.700

- 6.1 Clearance Decisions and Separate Notifications p.700

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.700

- 7.1 Third-Party Rights p.700
- 7.2 Contacting Third Parties p.701
- 7.3 Confidentiality p.701
- 7.4 Co-operation With Other Jurisdictions p.701

8. Appeals and Judicial Review p.701

- 8.1 Access to Appeal and Judicial Review p.701
- 8.2 Typical Timeline for Appeals p.702
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.702

9. Foreign Direct Investment/Subsidies Review p.702

- 9.1 Legislation and Filing Requirements p.702

10. Recent Developments p.702

- 10.1 Recent Changes or Impending Legislation p.702
- 10.2 Recent Enforcement Record p.703
- 10.3 Current Competition Concerns p.703

Lee and Li, Attorneys-at-Law has been recognised as the leading adviser of competition law practice in Taiwan. Its antitrust/competition law practice group has expertise and extensive experience in handling merger filing, cartel, antitrust and unfair competition cases for various industries. It provides effective representation and strategic advice, and has successfully represented local and international clients in most

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The Taiwan Fair Trade Act (TFTA) is the relevant merger control legislation in Taiwan and was last amended on 14 June 2017, with the newly amended Enforcement Rules of the TFTA (“Enforcement Rules”) being announced on 7 April 2022. The supplementary rules on merger control include:

- the Directions for Enterprises Filing for Mergers;
- the Taiwan Fair Trade Commission Disposal Directions (Guidelines) on Handling Merger Filings (“Merger Guidelines”); and
- the Guidelines on the Provision of Pre-Filing Consultation Service.

See **10.1 Recent Changes or Impending Legislation** for details of a series of amendments to the merger control regime promulgated by the Taiwan Fair Trade Commission (TFTC) in June 2023.

1.2 Legislation Relating to Particular Sectors

The Taiwan Fair Trade Commission Disposal Directions (Guidelines) on Extraterritorial Mergers (“Guidelines on Extraterritorial Mergers”) used to be the relevant legislation for merger filings related to foreign mergers, under which the TFTC took the local effect into consideration when determining whether it will exercise the jurisdiction. However, the Guidelines on Extraterritorial Mergers were repealed by the TFTC on 30 June 2023.

In Taiwan, there is no other legislation for mergers relating to particular sectors. However, under several of the TFTC’s guidelines on sectoral con-

trol of certain industries affecting public welfare, such as airlines, banking/finance or 4C industries, certain specific factors will be taken into account by the TFTC when reviewing a merger involving that particular industry.

1.3 Enforcement Authorities

The TFTC is the competent authority enforcing the TFTA. It is the regulatory body responsible for the execution of the TFTA, and also the agency that interprets the TFTA by rulings and stipulates the enforcement rules and relevant regulations of the TFTA. The TFTC may seek comments from other authorities during the review process but has the final say on its own decision.

2. Jurisdiction

2.1 Notification

If any of the filing thresholds is met, a notification is compulsory.

The following circumstances are exceptions for a notification even if the filing thresholds are met:

- where an enterprise or its 100% held subsidiary combines with another enterprise in which it already holds 50% or above of the voting shares or capital contribution;
- where enterprises of which 50% or above of the voting shares or capital contribution are held by the same enterprise combine;
- where an enterprise assigns all, or a substantial part of, its business or assets, or all or a substantial part of its business that could be separately operated, to another enterprise to be newly established and wholly owned by the former enterprise – please note that “substantial part” is not further defined under the TFTA and should thus be judged on a case-by-case basis;

- where an enterprise redeems its outstanding shares in order to convert them into treasury stock or because of minority shareholders' exercise of appraisal rights, causing the other shareholders' shareholdings to be increased to one-third or more of the voting shares in the enterprise; or
- where a single enterprise reinvests to establish a subsidiary and holds 100% of the shares or capital contribution of such subsidiary.

On 18 July 2016, a ruling was promulgated by the TFTC to exempt the following types of transactions from the requirement to make a filing:

- an enterprise merging with another enterprise that is under the control of the latter enterprise or is subordinate to it;
- an enterprise merging with another enterprise where both are under the control of the same controlling enterprise;
- an enterprise transferring its part of (or entire) voting shares or capital contribution of a third enterprise to another enterprise that is under the control of the latter enterprise or is subordinate to it; and
- an enterprise transferring its part of (or entire) voting shares or capital contribution of a third enterprise to another enterprise that is under the control of the same controlling enterprise.

On 28 June 2023, the TFTC promulgated amendments to the "Combination Types to Which Paragraph 1, Article 11 of the Taiwan Fair Trade Act Does Not Apply" by adding an additional "non-notifiable/exemption" type of combination of joint ventures. Please see **10.1 Recent Changes or Impending Legislation** for details.

To correspond with its amendments to the Merger Guidelines, the TFTC concurrently repealed

the Guidelines on Extraterritorial Mergers. Thereafter, except for non-notifiable types of combination, an extraterritorial combination that meets any of the filing thresholds must be notified to the TFTC in accordance with the TFTA, and the waiver of jurisdiction will no longer be applicable. Please see **10.1 Recent Changes or Impending Legislation** for details.

2.2 Failure to Notify

Failing to notify a combination that meets a filing threshold may cause the TFTC to impose penalties, including the prohibition of the combination, divestiture, transfer of the business acquired, and/or removal of personnel designated by the enterprises if the TFTC discovers such violation. The TFTC is also authorised to impose an administrative fine of between TWD200,000 and TWD50 million.

Penalties imposed on parties for violating merger control rules will be published by the TFTC. Public information shows that there was no penalty imposed during 2023 in terms of merger control violation.

2.3 Types of Transactions

According to the TFTA, a transaction that falls under the definition of a "combination" and also meets certain thresholds prescribed by the TFTA requires a notification to the TFTC in advance. According to the TFTA, a "combination" is broadly defined to include:

- a merger;
- the holding or acquisition of one-third or more of the voting shares of, or interest in, another enterprise;
- a transfer or lease of the whole, or a substantial part, of an enterprise's business or assets;
- a contractual arrangement with another enterprise for joint operation on a regular and

- ongoing basis, or the management of another enterprise's business on a contract of entrustment; and
- a direct or indirect control over the business operation or personnel management of another enterprise – whether “control” exists should be evaluated on a case-by-case basis since there is no definitive definition thereof.

Internal restructuring or reorganisation, under certain circumstances, may fall into the exceptions under the TFTA and be exempted from a filing obligation; please refer to **2.1 Notification** for details. An operation that does not involve the transfer of shares or assets (eg, shareholders' agreements, contractual arrangements on joint business operation) will constitute a combination only if it falls under the combination defined under one of the last two points set forth above.

2.4 Definition of “Control”

Whether “control” exists is not defined under the TFTA, and thus should be evaluated on a case-by-case basis.

The acquisition of a minority shareholding or other interests less than control will constitute a combination only if it falls under the combination defined under the second, fourth or fifth points set forth in **2.3 Types of Transactions**.

2.5 Jurisdictional Thresholds

Under Article 11 of the TFTA, a notification would be required if:

- the combination would result in any of the enterprises acquiring at least one-third of the market share;
- any of the enterprises participating in the combination holds a market share of at least one-quarter before the combination; or

- the preceding fiscal year's turnover of a participating enterprise exceeded the amount set forth by the TFTA – ie:
 - (a) the aggregate global turnover of all the participating enterprises in the preceding fiscal year exceeded TWD40 billion, and at least two of the participating enterprises had a turnover in Taiwan of at least TWD2 billion in the preceding fiscal year;
 - (b) for a combination among non-financial enterprises, one of the participating enterprises generated a turnover in Taiwan of at least TWD15 billion in the preceding fiscal year, while the other participating enterprise generated a turnover in Taiwan of at least TWD2 billion in the preceding fiscal year; or
 - (c) for a combination between financial enterprises, one of the participating enterprises generated an annual turnover of at least TWD30 billion, while the other participating enterprise generated an annual turnover of at least TWD2 billion.

Article 11, Paragraph 2 of the TFTA specifically stipulates that the turnover should be calculated on a “group/consolidated” basis by including the sales revenues of an enterprise that is controlled by, controlling or affiliated with the enterprise in the combination, and of an enterprise where both itself and the enterprise in the combination are under common control of the same enterprise or enterprises.

The “control/subordinate” relation under Article 11, Paragraph 2 of the TFTA is further explained in Article 6 of the Enforcement Rules, as follows.

- When enterprise X holds more than half of the shares in enterprise Y, or if enterprise X directly/indirectly controls the business operation or the appointment or discharge of the

personnel of enterprise Y, enterprise X can be viewed as having control over enterprise Y. Furthermore, in the event that the whole or the substantial part of the business or assets of enterprise Y is assigned or leased to enterprise X, or where enterprise X jointly operates with enterprise Y on a regular basis, or is entrusted by enterprise Y to operate enterprise Y's business that results in enterprise X having control over enterprise Y, this situation can also be deemed to be a type of "control/subordinate" relation.

- If a person or an organisation and/or its related persons hold a majority of the total number of outstanding voting shares or the total capital of another enterprise, it should be concluded that the "control/subordinate" relation exists among the aforementioned entities.
- The "control/subordinate" relation is presumed to exist if a majority of the executive shareholders or directors in a company are simultaneously acting as the executive shareholders or directors in another company, or if a majority of the total number of outstanding voting shares or the total amount of the capital interest of a company and another company is held by the same shareholders.

Please note that, when calculating the turnover threshold for foreign entities, only the Taiwanese sales are relevant, which shall include:

- sales generated "in" Taiwan by the parties' affiliates, branch offices or any other entities defined by Article 11, Paragraph 2 of the TFTA; and
- direct sales "into" Taiwan by selling to Taiwanese customers.

2.6 Calculations of Jurisdictional Thresholds

For more details on the calculation of the jurisdictional thresholds, please see **2.5 Jurisdictional Thresholds**. The TFTA is silent on the conversion of sales booked in a foreign currency. In practice, using the annual average exchange rate published by the Central Bank of Taiwan for the conversion is acceptable to the TFTC.

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

For details, please see **2.5 Jurisdictional Thresholds**.

Specifically, Article 11, Paragraph 2 of the TFTA stipulates that the turnover should be calculated on a "group-wide/consolidated" basis – ie, by including the sales amount of an enterprise that is controlled by, controlling or affiliated with the enterprise in the combination, and of an enterprise where both itself and the enterprise in the combination are controlled by the same enterprise or enterprises.

The TFTA is silent on whether any change in the business during the reference period (such as other acquisitions, divestments or business closures) should be factored in when calculating the turnover; however, in general, the TFTC accepts the annual turnover figures stated in the parties' audited financial statements as the benchmark to calculate the turnover.

2.8 Foreign-to-Foreign Transactions

As long as a foreign-to-foreign transaction falls under the definition of a combination as stated in **2.3 Types of Transactions**, and meets any of the filing thresholds as provided in **2.5 Jurisdictional Thresholds**, such transaction is subject to merger control in Taiwan.

Prior to June 2023, there was a local effects test under the TFTA, according to which the TFTC may decide not to exercise its jurisdiction over a pure foreign-to-foreign transaction after weighing several factors.

However, on 30 June 2023, the TFTC promulgated amendments to the Merger Guidelines, and concurrently repealed the Guidelines on Extraterritorial Mergers. Thereafter, except for non-notifiable types of combination, an extraterritorial combination that meets any of the filing thresholds must be notified to the TFTC in accordance with the TFTA, and the waiver of jurisdiction will no longer be applicable. Please see **10.1 Recent Changes or Impending Legislation** for details.

2.9 Market Share Jurisdictional Threshold

As the TFTA does not limit the filing threshold assessment to only overlapping products/services, it is possible for one party – either a target or an acquirer – to meet the threshold in the absence of a substantive overlap.

2.10 Joint Ventures

Joint ventures are likely to be covered by the merger control rules, as long as they meet the definition of combination under the TFTA and any filing threshold is triggered.

The term “joint venture” is not defined under the TFTA. However, the TFTC ruled in 2002 that the establishment of a joint venture, whether it is a newly incorporated enterprise or an existing enterprise, will be subject to merger control if it constitutes a combination as defined under the TFTA. Note that the TFTA does not further categorise joint ventures into different types based on their function or corporate structure.

In addition, on 28 June 2023, the TFTC promulgated amendments to the “Combination Types to Which Paragraph 1, Article 11 of the Fair Trade Act Does Not Apply” by adding an additional “non-notifiable/exempted” type of combination of joint ventures; please see **10.1 Recent Changes or Impending Legislation** for details.

2.11 Power of Authorities to Investigate a Transaction

The TFTC does not have the power to investigate a transaction that does not meet the jurisdictional thresholds. However, it does have the power to issue letters to the parties, requesting them to provide explanations and relevant documents to prove that the jurisdictional thresholds are not met, if deemed necessary.

The statute of limitations for the TFTC to enforce merger control regulations is five years.

2.12 Requirement for Clearance Before Implementation

The implementation of a transaction must be suspended until clearance is obtained.

2.13 Penalties for the Implementation of a Transaction Before Clearance

The sanctions for implementing a transaction prior to receiving clearance are the same as those applicable for the failure to file a notification; please see **2.2 Failure to Notify**. Public information reveals that no penalties have been imposed in the case of foreign-to-foreign transactions.

2.14 Exceptions to Suspensive Effect

There are no general exceptions to or waivers from the suspensive effect.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

There is no exception under the TFTA that allows parties to close a transaction prior to receiving the TFTC's clearance. Furthermore, whether the TFTC will accept the parties' proposal to temporarily carve-out transactions related to Taiwan is unclear, since no case precedent is available.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

The law does not stipulate a deadline for making a filing. However, since the TFTC requests a definitive agreement or relevant board resolution to be submitted with the notification to evidence the parties' intention of conducting the transaction, once the parties' board approves the proposed transaction or completes the signing of the definitive agreement, the parties may then make a filing, which is deemed to be the earliest time at which to do so.

3.2 Type of Agreement Required Prior to Notification

A definitive agreement or relevant board resolution to be submitted along with the notification is required in order to prove the parties' intention of conducting the transaction. The TFTC will review whether a filing based on a less formal agreement such as a letter of intent or memorandum of understanding is acceptable in each case. If the parties are unable to provide any written agreement indicating their intention of proceeding with the proposed transaction, the TFTC may reject the filing.

3.3 Filing Fees

No filing fee is required.

3.4 Parties Responsible for Filing

The following parties shall file a combination notification:

- all the enterprises involved in the transaction, where an enterprise is merged into another enterprise, regularly runs operations jointly with another enterprise or is commissioned by another enterprise to run operations;
- the holding or acquiring enterprise, where an enterprise holds or acquires shares or capital contribution of another enterprise;
- the transferee or lessee, where an enterprise transfers or leases its operations or assets to another enterprise; and
- the controlling enterprise, where an enterprise directly or indirectly controls the business operations or the appointment or discharge of personnel of another enterprise.

If an enterprise required to file has not yet been established, the existing enterprises in the merger shall file the notification. Companies considering a combination should note that the Enforcement Rules indicate that, in a combination-type acquisition of shares or capital contributions of another enterprise, if a control/subordinate relation exists between the acquirers or the acquirers are under common control of one or more entities, the ultimate parent company of the acquirers shall be the notifying party.

3.5 Information Included in a Filing

The following information is required to be included in the main content of a filing.

- The participating parties' basic information.
- Information on the cost of production or other operational costs, selling prices, the quantity and value of production, and sales of the top three major services, and related products/

services, of the participating parties for the last three years in Taiwan.

- Horizontal competition information regarding the structure of the relevant market of the participating parties in Taiwan.
- Market information regarding the upstream (suppliers) and downstream (customers) industries for the participating parties in Taiwan.
- A description of the transaction, including:
 - (a) the estimated timeframe and closing date;
 - (b) the consideration;
 - (c) the result of the transaction (ie, post-closing structure); and
 - (d) whether the proposed transaction is also notified in other jurisdiction and, if so, its review status.
- A description of the relevant market, including:
 - (a) the product market;
 - (b) the geographic market; and
 - (c) horizontal and vertical competition status (including major competitors).
- Information regarding the possible obstacles in entering the relevant market, including:
 - (a) the minimum capital or working capital requirement for entering into the relevant market, if any;
 - (b) the legal restriction for entering into the relevant market, if any;
 - (c) the intellectual property involved in the relevant market, if any;
 - (d) the materials supply sources, if any;
 - (e) the ratio of the fixed cost to the total cost of the production of relevant products, if applicable;
 - (f) the tariff or non-tariff barrier, if applicable;
 - (g) the transaction's impacts on the market, if any; and
 - (h) any other obstacle regarding the market entry.

- An economic analysis of:

- (a) the advantages created by the proposed transaction to each of the participating parties;
- (b) the disadvantage to each of the participating parties if the proposed transaction is prohibited;
- (c) the advantages created by the proposed transaction to the overall economy in Taiwan created by the proposed transaction; and
- (d) the anti-competition disadvantages to the Taiwan market caused by the proposed transaction.

- The participating parties' investment status in Taiwan, such as subsidiaries and branches.

The following supporting documents should be enclosed with a filing:

- the participating parties' latest annual reports or financial reports;
- a copy of the definite agreement of the proposed transaction or resolutions adopted by the board meeting of the participating parties approving the proposed transaction;
- a power of attorney executed by the participating parties' ultimate parent company authorising local counsel to file the combination notification on their behalf; and
- the participating parties' most recent certificate of incorporation.

Filings must be submitted in Chinese (Mandarin). If any document is written in a foreign language, an excerpted translation should also be prepared. All other documents can be in duplicate copy, except the power of attorney, which should be an original copy (no certifications, notarisations or apostilles are required).

3.6 Penalties/Consequences of Incomplete Notification

In practice, the TFTC may reject the filing or request the parties to withdraw the filing if the notification is deemed incomplete after several rounds of requests for information (RFIs). There is no penalty under such circumstance but the parties cannot close the deal since no clearance has been granted.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The TFTC may impose penalties, including the prohibition of the combination, divestiture, transfer of the business acquired and/or removal of personnel designated by the enterprises, if it discovers that the notifying party is deemed to have supplied inaccurate or misleading information in the filing and proceeds with the combination. The TFTC also has the power to impose an administrative fine of between TWD100,000 and TWD1 million.

There has been no case precedent in this regard in the past five years, according to public information.

3.8 Review Process

The review process is not divided into different phases by the TFTC. Rather, after the initial filing is submitted, the TFTC will request the parties to provide supplemental information by issuing an RFI letter. The RFI procedure will end once the TFTC deems that all the required documents and information have been provided. Once the TFTC deems that the filing is complete, the waiting period can start to run. The parties to the proposed transaction are then free to proceed with the merger if the TFTC does not make any objection to the filing within 30 business days following the filing date (with complete documents and information). If it is deemed neces-

sary, the TFTC may shorten the 30-day waiting period or extend it by up to 90 business days.

3.9 Pre-notification Discussions With Authorities

The Guidelines on Offering Pre-Filing Consultation were published by the TFTC on 18 August 2021 and aim to help the notifying parties clarify certain filing-related issues before the parties submit a formal filing. However, as the TFTC's opinions expressed in such consultation are non-binding, the parties might not necessarily find such consultation to be beneficial to their filing decision. The process is treated confidentially.

3.10 Requests for Information During the Review Process

The RFIs will be issued by the TFTC during the review process requesting the parties to supplement information; such requests reset the clock. Subject to the complexity of the case, there may be two or more rounds of RFIs.

3.11 Accelerated Procedure

Other than the simplified procedure stated below, there is no other type of accelerated procedure or informal way to expedite the clearance.

The waiting period of the following circumstances can be shortened by applying the simplified procedure.

- The enterprise files the notification for reaching the turnover threshold, but its respective market shares meet one of the following criteria:
 - (a) where the combining parties engage in a horizontal merger, the combined market shares after the merger are below 20%;
 - (b) where the combining parties engage in a horizontal merger, the combined market

- shares after the merger are below 25% and the market share of one of the participating parties is below 5%; or
- (c) where the combining parties engage in a vertical merger, the combined market shares in each individual market are below 25%.
- Where the combining parties engage in a conglomerate merger, the factors below are considered, and it is established that the parties do not have any major potential for competition between each other:
 - (a) the impact of an increase of regulation and control on the cross-industry operation by merging parties;
 - (b) the probability of cross-industry operation by the merging parties because of technological advancement; and
 - (c) the merging parties' original cross-industry development plan besides the merger.
- One of the enterprises participating in the merger directly owns more than one-third and less than half of the voting shares or paid-up capital of the other merging party.

Nonetheless, the TFTC would still request the parties to follow the standard procedure in certain situations, such as where the merger involves major public interest or the entry barriers are high, even if they have met the above-mentioned criteria to be eligible for the simplified procedure.

4. Substance of the Review

4.1 Substantive Test

If there is no suspicion of obvious competition restraints after all relevant factors have been considered, the TFTC will conclude that the overall economic benefits of the merger outweigh the disadvantages resulting from com-

petition restraint. Otherwise, the TFTC should further examine the overall economic benefits of the merger to determine whether they outweigh the disadvantages resulting from competition restraint.

4.2 Markets Affected by a Transaction

In general, to determine the markets that may be affected by the transaction, the TFTC will examine the markets where the parties' activities overlap and/or have a vertical relationship. In practice, the TFTC will also look into the parties' respective major businesses in Taiwan from time to time, even if such businesses have no relevance to the proposed transaction. There is no *de minimis* concept under the TFTA.

4.3 Reliance on Case Law

The TFTC may sometimes rely on its own case precedents to review the present case. Although the TFTC may take the case laws in other jurisdictions into consideration, it is less likely to rely solely on other jurisdictions' views to make its decision.

4.4 Competition Concerns

The competition concern that the TFTC will investigate varies depending on the type of combinations. If the combining enterprises engage in a horizontal combination, the TFTC will take the following factors into consideration:

- unilateral effects;
- co-ordinated effects;
- market entry;
- countervailing power; and
- other factors that may impede competition.

If the combining enterprises engage in a vertical combination, the TFTC will take the following factors into account:

- the possibility for other competitors to choose trading counterparts after the combination;
- the level of difficulty for businesses not participating in the combination to enter the relevant market;
- the possibility for the market power to be abused by participating parties in the relevant market;
- the possibility of increasing competitors' cost;
- the possibility of concerted actions occurring as a result of the combination; and
- other factors likely to lead to market foreclosure.

When reviewing conglomerate combinations, the following factors may be considered by the TFTC to determine whether potential competition exists between the parties to a conglomerate combination:

- the possibility of a change of regulations and its impact on the participating parties' cross-industry operations;
- the possibility of technological improvement enabling engagement in cross-industry operations by the participating parties;
- whether any of the participating parties originally has the intention to develop cross-industry operations; and
- other factors likely to have an impact on market competition.

If significant potential competition is deemed likely in a conglomerate combination, further analysis of the factors concerning anti-competition under a horizontal or vertical combination is required.

4.5 Economic Efficiencies

While the TFTC will certainly consider economic efficiencies when determining whether the proposed transaction will benefit the economy over-

all, there is no case precedent on how the TFTC weighs this factor.

4.6 Non-competition Issues

Whether the TFTC will take any non-competition issues into account as part of the review process is unclear, since no case precedent is available. The TFTA or relevant regulation is silent on whether the consideration of these non-competition issues should be permitted.

The ruling for foreign direct investments in Taiwan is separate from the merger control regime. In principle, an investment into Taiwan is subject to the prior approval of the Department of Investment Review of the Ministry of Economic Affairs.

4.7 Special Consideration for Joint Ventures

There are no special considerations in the substantive review of joint ventures; however, possible co-ordination issues between joint venture parents will be examined by the TFTC.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The TFTC has the ability to prohibit or otherwise interfere with a transaction; it exercises this power by issuing a binding decision at the end of the regulatory process. Such decision is generally in one of the following four categories:

- a waiver to the jurisdiction (for extraterritorial transactions with no local effect);
- clearance without condition;
- clearance with conditions; and
- a prohibition on the combination.

In a decision to prohibit a combination, the TFTC will state its reasons regarding the anti-competition disadvantages to the Taiwan market caused by the proposed transaction.

5.2 Parties' Ability to Negotiate Remedies

Although the TFTA provides no remedy mechanism, experience suggests that the parties are able to propose remedies to the TFTC for its consideration when it has concerns about a transaction. If the proposed remedies would constitute a material change to the notification, and thereby lead to the TFTC requiring additional information for its evaluation, the TFTC may stop the clock and the waiting period will be reset only after the supplemental information is submitted. If the proposed remedies would not constitute a material change to the notification, the TFTC will take into account such remedies when rendering its decision on the merger notification before the waiting period expires. The TFTC will assess whether it would grant its clearance with conditions referring to such remedies.

Typical Remedies

In terms of the particular kinds of remedies that are typically used in practice, since the primary purpose of the remedies is to eliminate the anti-competition concerns, most competition authorities in different jurisdictions recognise that divestitures, a type of structural remedy, are the best way to achieve such a goal. In line with these international practices, the TFTC appears to accept structural remedies for divestitures (disposal of shares held by the party) and impose such remedies as conditions to clearance. In fact, the public records indicate that the TFTC has indeed adopted the divestment approach in a transaction involving a cable television business.

The TFTC amended the Merger Guidelines in September 2012 to include its official standards for remedies. According to the Merger Guidelines, TFTC can impose the following remedies as conditions.

- Measures impacting the structural aspect: order the parties to take measures to dispose of the shares or assets in their holding, transfer part of their operations, or remove personnel from certain positions.
- Measures impacting the behavioural aspect: order the parties to continue to supply critical facilities or essential elements to businesses outside the merger, order the parties to license such businesses to use their intellectual property rights, and prohibit the parties from engaging in exclusive dealing, discriminatory treatment and tie-in sales.

Despite the foregoing, the TFTC still reserves the right to impose other types of remedies on a case-by-case basis. The Merger Guidelines also point out that the TFTC may seek the parties' opinions on the possible remedy before making a final decision.

Whether remedies are ever required to address non-competition issues is unclear since no case precedent is available.

5.3 Legal Standard

There is no legal standard that remedies must meet in order to be deemed acceptable.

5.4 Negotiating Remedies With Authorities

The parties can begin negotiating remedies with the TFTC within the waiting period by submitting a proposal to the TFTC. Meanwhile, the TFTC has the authority to propose remedies on its own motion. Although the TFTC may choose

to consult the parties before imposing the remedies, it can nonetheless impose remedies that the parties have not agreed. Please see **5.2 Parties' Ability to Negotiate Remedies** regarding the procedural steps with respect to remedies.

5.5 Conditions and Timing for Divestitures

Please see **5.2 Parties' Ability to Negotiate Remedies** regarding the standard approach for conditions and timing for divestitures or other remedies.

Depending on the nature of a remedy, it is acceptable for the parties to complete the merger before complying with the remedies. The TFTC will conduct periodic reviews of the parties' behaviour or divestment status to ensure that the parties comply with the conditions imposed by the TFTC.

Since the remedies will serve as conditions to the TFTC's clearance, the parties must adhere to the conditions. If the TFTC discovers any violation, it may impose penalties on the parties, including the prohibition of the combination, divestiture, transfer of the business acquired, and/or removal of personnel designated by the enterprises. The TFTC also has the power to impose an administrative fine of between TWD200,000 and TWD50 million.

5.6 Issuance of Decisions

When the TFTC clears a transaction without any condition/remedy, it will only publish a news release summarising its decision on its website and does not issue a formal decision letter. For a decision with a condition/remedy or prohibiting a transaction, the TFTC will issue an official decision to the parties, which will also be published on the TFTC's website.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

To date, the TFTC has never imposed "structural" remedies (such as divestment of assets or disposal of shares) in foreign-to-foreign mergers. However, the TFTC has certainly attached behavioural remedies to a few foreign-to-foreign mergers, most of which involve sensitive industries such as the semiconductor or technology licensing industries.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

As far as is known, no case precedent is available in Taiwan, so it is unclear whether ancillary restraints (such as non-competition agreement) will be covered by a clearance decision.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third parties (eg, customers, competitors, complainants) may have opportunities to be involved in the review process.

If the TFTC accepts a combination notification and decides to exercise its jurisdiction on the transaction, it will post a summary of the proposed transaction on its website for one week to seek public opinion. In some cases where the TFTC considers that the transaction will have a great impact on the local market, it will:

- hold a symposium or a public hearing and invite competitors, upstream and downstream

enterprises, relevant competent authorities and scholars to provide their opinions; and/or

- issue letters to the parties' Taiwanese customers, suppliers and sometimes competitors to seek their opinions.

7.2 Contacting Third Parties

As stated in **7.1 Third-Party Rights**, if the TFTC accepts a combination notification and decides to exercise its jurisdiction on the transaction, it will post a summary of the proposed transaction on its website for one week to seek public opinion.

It is unclear whether the TFTC will “market test” any remedies offered by the parties.

7.3 Confidentiality

As stated in **7.1 Third-Party Rights**, if the TFTC accepts a combination notification and decides to exercise its jurisdiction on the transaction, it will post a summary of the proposed transaction on its website for one week to seek public opinion. Under such circumstances, the fact of the notification and/or description of the transaction will be publicised.

The parties may request the TFTC not to disclose specific confidential information to the public and to handle combination notifications confidentially. If the parties have any particular concerns about the TFTC's public announcement, they can also submit an application requesting the TFTC not to disclose certain information regarding the combination transaction. However, whether such request will be granted is subject to TFTC's discretion. If the TFTC considers that the information about the transaction has an impact on the Taiwanese market, it will reject the non-disclosure request and make a public announcement soliciting the public's opinions. Nevertheless, the TFTC will generally not dis-

close the parties' commercial information that is specifically marked confidential in their filings to the general public, such as trade secrets.

7.4 Co-operation With Other Jurisdictions

While reviewing the filing for certain cross-border transactions, the TFTC will consult the regulatory authorities of the parties' home countries. In addition, there are several co-operation agreements and memorandums for the application of competition regulations between the TFTC and the following countries: Australia, Canada, France, Hungary, Mongolia and New Zealand. Co-operation between the TFTC and these countries can be anticipated.

It is unclear whether such co-operation is simply on a general policy level or whether the TFTC exchanges specific transaction information with other jurisdictions.

In practice, the TFTC will seek the parties' consent before sharing information with other jurisdictions.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

The parties (or any interested parties with legal standing) may appeal against the TFTC's administrative decision to the High Administrative Court for judicial review within two months of receipt of said decision.

The procedure of administrative litigation is basically the same as the procedure of civil litigation. The case will be heard in a court and the TFTC, as the defendant, and the parties subject to the

decision, as the plaintiff, will be in front of judges in a formal legal proceeding.

Although the decision of the High Administrative Court can be appealed to the Supreme Administrative Court for legal review, the Supreme Administrative Court will not hold any hearing. The High Administrative Court's judgment will be reversed only when such judgment is legally flawed.

8.2 Typical Timeline for Appeals

The parties (or any interested parties with legal standing) can appeal against the TFTC's decision to the court within two months of receipt of the decision. The timeline for an appeal is approximately 12 to 18 months. As far as is known, no enterprise has filed an appeal in the High Administrative Court against the TFTC's merger filing decision in the past five years.

8.3 Ability of Third Parties to Appeal Clearance Decisions

If any clearance decision will have an adverse effect or impose burdens on a third party, such interested third party can appeal. As far as is known, no third party has filed an appeal in the High Administrative Court against the TFTC's merger filing decision in the past five years.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

Taiwan welcomes and encourages foreign direct investment (FDI). Under the Statute for Investment by Foreign Nationals, which was promulgated on 14 July 1954 and further amended on 19 November 1997, all foreign investment must be approved by the Department of Investment

Review of the Ministry of Economic Affairs in advance.

FDI is generally permitted in Taiwan, except for certain specific businesses and industries in which foreign investments are prohibited or restricted due to concerns about national security, public order, environmental protection, public health, etc, such as aviation and telecommunications. To provide a clear guideline on the restricted and/or prohibited foreign investment, the Department of Investment Review promulgated the "Negative List", which sets forth the sectors in which foreign investment is either restricted or prohibited. Sectors that are not in the Negative List are open to foreign investment without any restriction (other than the requirement to obtain foreign investment approval in advance).

However, it is important to note that investors from the People's Republic of China (PRC) are subject to different and stricter rules and regulations, and greater regulatory scrutiny. PRC investors may only invest in certain permitted businesses listed in the "Positive List" promulgated by the Department of Investment Review. The definition of a PRC investor is a PRC individual, legal person, organisation, other institution or their third-area company. A third-area company is deemed as a PRC investor if 30% of its shares are held or controlled by a PRC individual, legal person, organisation or any other institution.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

The TFTC promulgated amendments to the "Combination Types to Which Paragraph 1, Article 11 of the Fair Trade Act Does Not Apply" on

28 June 2023 and the Merger Guidelines on 30 June 2023. The key amendments are as follows.

An Additional “Non-notifiable/Exempted”

Type of Combination

There is no substantial benefit to regulating a combination involving foreign enterprises that jointly establish or operate a joint venture outside of Taiwan, where the joint venture is not engaging in economic activities within Taiwan, as the transaction has less connection with Taiwan’s domestic market and there is no direct, substantial and reasonably foreseeable impact on Taiwan’s relevant market; thus, the participating parties are not required to notify the TFTC of the combination. Pursuant to Article 12, Paragraph 1, Subparagraph 1 of the TFTA, this type of combination is exempted from the merger filing obligation prescribed under Article 11, Paragraph 1 of the TFTA.

Nevertheless, the TFTC notes that the joint venture “is not engaging in economic activities within Taiwan” means that it is not engaging in any economic activities that involve the supply and demand of goods or services in Taiwan’s domestic market. For example, the products produced by the joint venture are sold only outside of Taiwan or are sold exclusively to its foreign parent company, without affecting the supply and demand in the Taiwan market. The so-called “economic activities” include the sale of goods or services, the provision of quotations, bargaining and the conclusion of sales, contracts or engagement with counterparties in connection with the sale.

Simplified Procedure Applies to More Types of Combinations

In addition to the five types of combination specified under Section 7 of the Merger Guidelines, the simplified procedure also applies to the fol-

lowing four types of combination as they have a relatively lower impact on Taiwan’s domestic markets:

- where the transaction value is below TWD2.5 billion;
- in a horizontal combination, where the combined Taiwan revenues of the participating parties’ relevant products or services does not reach TWD200 million;
- in a vertical combination, where none of the participating parties has generated TWD200 million or more in Taiwan for the relevant products or services; or
- where the enterprise being combined generates no Taiwan revenue.

To correspond with such amendments, the TFTC concurrently amended the Merger Guidelines and repealed the Guidelines on Extraterritorial Mergers. Thereafter, except for the non-notifiable types of combination, an extraterritorial combination that meets any of the filing thresholds must be notified to the TFTC in accordance with the TFTA, and the waiver of jurisdiction will no longer be applicable.

10.2 Recent Enforcement Record

According to public information, the TFTC reviewed a total of 46 merger filing cases in 2023, 31 of which were approved while the review process of the other 15 cases was terminated, meaning that the TFTC decided to waive its jurisdiction over those cases; no case was prohibited. Public information also shows that there was no sanction decision in terms of merger control in 2023.

10.3 Current Competition Concerns

In March 2022, the TFTC published a draft White Paper on Competition Policy in the Digital Economy, inviting comments and feedback from the

public. After taking the opinions collected from various parties into account, the TFTC finalised the draft White Paper and released the official version thereof on 20 December 2022 (“White Paper”).

While the competition issues explored in the White Paper include “killer acquisitions” and the role of privacy in merger review, it remains unclear at present whether the White Paper will lead to amendments to the merger control rules to specifically address the issues arising from digital mergers. In fact, the TFTC states in the White Paper that the content thereof only reflects its position at this moment in time and does not preclude future adjustments to varying degrees in response to economic development and changes in the industry.

Trends and Developments

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Lee and Li, Attorneys-at-Law has been recognised as the leading adviser of competition law practice in Taiwan. Its antitrust/competition law practice group has expertise and extensive experience in handling merger filing, cartel, antitrust and unfair competition cases for various industries. It provides effective representation and strategic advice, and has successfully represented local and international clients in most

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Overview of Taiwan Merger Control Rules

Merger control in Taiwan is regulated by the Taiwan Fair Trade Act (TFTA), and the competent authority is the Taiwan Fair Trade Commission (TFTC). Filing with the TFTC is required for a transaction that falls within the definition of a “combination” under the TFTA if any of the filing thresholds is met and no exemption applies.

Type of combination

Article 10 of the TFTA defines a “combination” to include:

- a merger;
- a holding or acquisition of at least one-third of the voting shares of or interest in another enterprise;
- a transfer or lease of all or a substantial part of an enterprise’s business or assets;
- having an arrangement with another enterprise for joint operation on a regular, ongoing basis, or the management of another enterprise’s business based on a contract of entrustment; or
- having direct or indirect control over the operation or personnel of another enterprise.

Filing thresholds

The TFTA stipulates both a turnover filing threshold and a market share filing threshold, as follows:

- the aggregate global turnover of all the enterprises party to a combination in the preceding fiscal year exceeded TWD40 billion, and each of at least two of the enterprises had a turnover in Taiwan of at least TWD2 billion in the preceding fiscal year;
- for a combination of non-financial enterprises, one of the enterprises generated a turnover in Taiwan of at least TWD15 billion in the preceding fiscal year while the other enterprise

generated a turnover in Taiwan of at least TWD2 billion in the preceding fiscal year;

- as a result of the combination, the enterprises to a combination will jointly acquire at least one-third of the market share in Taiwan; or
- one of the enterprises participating in the combination holds a market share of at least one-quarter in Taiwan before the combination.

Substantive test and review timeline

In terms of the substantive test, as prescribed under Article 13 of the TFTA, clearance would be granted if the TFTC concludes, after considering all relevant factors, that the overall economic benefits of the combination outweigh the disadvantages resulting from competition restraint.

With respect to the timeline, if the TFTC does not make any objection to the filing within 30 working days following the filing date, the parties to the proposed transaction would be free to proceed with the combination. The TFTC may shorten the 30-day waiting period or extend the period by up to another 60 working days if it deems it necessary to do so.

It should be noted that this filing date refers to the date on which the TFTC confirms that all required documents and information have been completed. To be specific, after receiving the initial filing, the TFTC may issue letters of request for information (RFI) instructing the parties to provide supplemental information. Such RFI procedure will end if and when the TFTC is satisfied that the parties have submitted all required documents and information.

Merger Review in the Era of Digital Economy

To address the competition issues arising from the emergence of novel business models in the digital economy and the rise of technology giants, the Digital Economy Competition Policy

Task Force at the TFTC started to draft the White Paper on Competition Policy in the Digital Economy in 2021. Following several rounds of Task Force meetings and Commissioners' meetings, the TFTC released the draft White Paper on 2 March 2022. After taking the opinions collected from various parties into account, the TFTC finalised and released the official version of the White Paper on 20 December 2022 ("White Paper").

As the White Paper is the TFTC's first comprehensive overview of competition issues specific to the digital economy, along with its relevant enforcement stance and policy direction, it will definitely play a crucial role in shaping the future trends and development of Taiwan's regulatory regime on competition issues.

Among the topics discussed in the White Paper, the following two are related to merger control.

Killer acquisitions

The unresolved issue in this area is whether major digital technology giants' acquisitions of potentially competitive start-ups constitute violations of the competition law. Thus far, the TFTC has no experience of handling so-called "killer acquisitions", even though it has dealt with conglomerate combination cases of technology giants and has accumulated law enforcement experience in examining merger cases from the perspective of "potential competition".

For future enforcement, the White Paper indicates that the TFTC will continue to monitor the international development trends and adjust relevant review standards and principles in a timely manner. Moreover, when dealing with the issues of killer acquisitions in the future, the TFTC should also consider the benefits arising from technological innovations.

Privacy in merger reviews

Another of the issues addressed in the White Paper is whether personal data protection is a parameter for assessing competition when reviewing the establishment of a new joint venture. Thus far, the TFTC has not included privacy protection in its analysis, but it will start to consider how privacy protection can be internalised in a merger review from the perspective of "quality" competition.

Nonetheless, according to the White Paper, if the TFTC wants to examine privacy issues in a merger filing case, it must first determine whether there is competition by the means of privacy protection, and such privacy issues should be considered only when the parties use privacy protection as a way to retain or attract users. In the context of protecting privacy and maintaining competition, the TFTC should consider not only the potential disadvantage of a reduction in privacy protection after the merger, but also the potential disadvantage to competition that may result from enhancing privacy protection.

The White Paper also recognises the difficulty of quantifying the extent and necessity of privacy protection, which can pose a challenge to law enforcement in terms of seeing privacy protection as a "competition on quality". In the short term, the TFTC may seek the views of privacy and consumer protection authorities in order to apply the rule of reason test properly and to allow for a more comprehensive analysis in the context of merger reviews. In addition, the TFTC will continue to look at how other countries develop a more objective and even quantitative analysis, with a view to improving enforcement.

Relaxation of Merger Control Rules

After the TFTC sought the public's comments and consulted with various stakeholders, includ-

ing industry associations and academic scholars, three major amendments to the merger control rules took effect in June 2023.

Additional type of combination exempted from a filing

The newly added exemption provided under the amendment is a combination regarding a joint formation/operation of an offshore joint venture by foreign enterprises where the joint venture will not engage in economic activities in Taiwan (“Offshore JV Exemption”).

Reasons for the Offshore JV Exemption

Because a combination “where foreign enterprises jointly establish or operate a joint venture outside the territory of Taiwan, and the joint venture is not engaged in economic activities within the territory of Taiwan”, has a weaker connection to Taiwan’s domestic market and has no direct, substantial and reasonably foreseeable impact on Taiwan’s relevant market, there is no substantial benefit to regulating this type of combination, so the participating enterprises are not required to notify the combination to the TFTC.

“Not engaged in economic activities within the territory of Taiwan”

According to the TFTC, a joint venture “not engaging in economic activities within the territory of Taiwan” means that the economic activities engaged in by the joint venture do not involve supply and demand in Taiwan’s domestic market for the relevant goods or services. For example, the products produced by the joint venture are sold only outside of Taiwan’s territory or are sold exclusively to its foreign parent company, without affecting the supply and demand in the Taiwan market.

Defining “economic activities” under the Offshore JV Exemption

As clarified by the TFTC, “economic activities” include the sale of goods or services, the offer-

ing of quotations, bargaining, and the conclusion of sales, contracts or engagement with counterparties in connection with the sale.

Additional types of combination eligible for simplified procedure

Under Section 7 of the “Taiwan Fair Trade Commission Disposal Directions (Guidelines) on Handling Merger Filings” (“Merger Guidelines”), five types of combination are allowed to adopt the simplified procedure for merger filing:

- where the aggregate market share of the participating parties to a horizontal combination is less than 20% of the total market;
- where the aggregate market share of the participating parties to a horizontal combination is less than 25% of the total market and the market share of one of the participating parties to the combination is less than 5% of the total market;
- where the aggregate market share of the participating parties in a vertical combination in each relevant market is less than 25% of the total market;
- where, after examining the considerations specified in paragraph 1 of Point 12 of the Merger Guidelines, the TFTC concludes that potential competition between the participating parties to a conglomerate combination is insignificant; and
- where one of the participating parties directly holds more than one third but less than half of the voting shares or capital contributions of another business and combines with said business.

After the amendments to the Merger Guidelines became effective in June 2023, the following four types of combinations are also now eligible for the simplified procedure:

- where the transaction value is below TWD2.5 billion;
- in a horizontal combination, where the combined Taiwan revenue of the participating parties' relevant products or services does not reach TWD200 million;
- in a vertical combination, where none of the participating parties have generated TWD200 million or more in Taiwan for the relevant products or services; and
- where the enterprise being combined generates no Taiwan revenue.

Abolishment of the guidelines on handling extraterritorial combinations ("Extraterritorial Guidelines")

According to the Extraterritorial Guidelines, the TFTC would previously exercise its jurisdiction over a foreign-to-foreign combination only if the subject transaction would affect the Taiwanese market. Therefore, even though legally speaking it is the TFTC rather than the parties to a transaction that has the discretion to determine the local effect, in practice there may be some room for the parties to argue that a filing in Taiwan should not be required based on the lack of local effect.

However, in June 2023 the TFTC announced the abolishment of the Extraterritorial Guidelines is abolished, as it seems unnecessary for the TFTC to additionally determine whether or not to exercise its jurisdiction over an extraterritorial combination as it clearly prescribes the thresholds triggering the filing requirements. Therefore, the TFTC deems it appropriate to follow the practices of the competition agencies in the USA, the EU, Japan and Korea, and to apply the "effect principle" when evaluating any "local effect" of a combination. Therefore, the Extraterritorial Guidelines should be abolished.

After the repeal of the Extraterritorial Guidelines, a combination without a significant local effect may be eligible for the simplified filing procedure, as stipulated under the amended Merger Guidelines. In other words, where an extraterritorial combination meets any of the filing thresholds, unless any exemption applies, it must be notified to the TFTC in accordance with the TFTA, and the waiver of jurisdiction will not be applicable.

Proposed Removal of Market Share Filing Thresholds

On several occasions during the past few years, the TFTC has proposed to remove the market share filing thresholds under Article 11 of the TFTA. The latest effort was made in June 2023 when the TFTC published the draft amendments to the TFTA ("2023 Draft Amendments"), which covered a wide range of topics, with a focus on handling antitrust issues under new business models. Under the 2023 Draft Amendments, the market share filing thresholds were removed, while the TFTC may set sector-specific turnover filing thresholds as supplementary measures.

After collecting opinions on the 2023 Draft Amendments, the TFTC deemed that further considerations should be taken into account and thus held off on the legislation process. In January 2024, the TFTC proposed an updated version of the draft amendments ("2024 Draft Amendments") and invited comments from various stakeholders, including industry associations, scholars and government agencies. The proposal to remove the market share filing thresholds under the 2024 Draft Amendments is basically the same as that under the 2023 Draft Amendments. To date, no public information indicates whether or when the 2024 Draft Amendments will take effect, or whether all the 2024 Draft Amendments will be fully accepted by the Legislative Yuan.

THAILAND



Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.714

- 1.1 Merger Control Legislation p.714
- 1.2 Legislation Relating to Particular Sectors p.714
- 1.3 Enforcement Authorities p.714

2. Jurisdiction p.714

- 2.1 Notification p.714
- 2.2 Failure to Notify p.714
- 2.3 Types of Transactions p.714
- 2.4 Definition of "Control" p.715
- 2.5 Jurisdictional Thresholds p.715
- 2.6 Calculations of Jurisdictional Thresholds p.715
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.715
- 2.8 Foreign-to-Foreign Transactions p.715
- 2.9 Market Share Jurisdictional Threshold p.715
- 2.10 Joint Ventures p.715
- 2.11 Power of Authorities to Investigate a Transaction p.715
- 2.12 Requirement for Clearance Before Implementation p.716
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.716
- 2.14 Exceptions to Suspensive Effect p.716
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.716

3. Procedure: Notification to Clearance p.716

- 3.1 Deadlines for Notification p.716
- 3.2 Type of Agreement Required Prior to Notification p.716
- 3.3 Filing Fees p.716
- 3.4 Parties Responsible for Filing p.716
- 3.5 Information Included in a Filing p.716
- 3.6 Penalties/Consequences of Incomplete Notification p.717
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.717
- 3.8 Review Process p.717
- 3.9 Pre-notification Discussions With Authorities p.717
- 3.10 Requests for Information During the Review Process p.717
- 3.11 Accelerated Procedure p.717

4. Substance of the Review p.717

- 4.1 Substantive Test p.717
- 4.2 Markets Affected by a Transaction p.718
- 4.3 Reliance on Case Law p.718
- 4.4 Competition Concerns p.718
- 4.5 Economic Efficiencies p.718
- 4.6 Non-competition Issues p.718
- 4.7 Special Consideration for Joint Ventures p.718

5. Decision: Prohibitions and Remedies p.718

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.718
- 5.2 Parties' Ability to Negotiate Remedies p.718
- 5.3 Legal Standard p.718
- 5.4 Negotiating Remedies With Authorities p.719
- 5.5 Conditions and Timing for Divestitures p.719
- 5.6 Issuance of Decisions p.719
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.719

6. Ancillary Restraints and Related Transactions p.719

- 6.1 Clearance Decisions and Separate Notifications p.719

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.719

- 7.1 Third-Party Rights p.719
- 7.2 Contacting Third Parties p.719
- 7.3 Confidentiality p.719
- 7.4 Co-operation With Other Jurisdictions p.720

8. Appeals and Judicial Review p.720

- 8.1 Access to Appeal and Judicial Review p.720
- 8.2 Typical Timeline for Appeals p.720
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.720

9. Foreign Direct Investment/Subsidies Review p.720

- 9.1 Legislation and Filing Requirements p.720

10. Recent Developments p.720

- 10.1 Recent Changes or Impending Legislation p.720
- 10.2 Recent Enforcement Record p.720
- 10.3 Current Competition Concerns p.720

Chandler MHM Limited is one of the largest and oldest full-service law firms in Thailand, with over 100 lawyers covering all areas of law. It has a dedicated team with extensive experience advising on antitrust and trade competition matters. Its experience covers the full spectrum of the applicable regulations, including abuse of dominance, general misconduct, severe and non-severe cartels, merger control and offshore arrangements. The Chandler MHM team offers the full spectrum of professional services within the realm of antitrust and trade competition law,

including internal audits of business units to identify gaps, creation and revision of internal manuals for employees to prevent inadvertent breaches, merger control review and filing, internal training and workshops, general advice, revision of contracts for compliance while ensuring retention of commercial advantages and original desired positions, defence against allegations by counterparties and advice on investigations by the Office of Trade Competition Commission.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The relevant merger control legislation is Section 51 of the Trade Competition Act B.E. 2560 (2017) (the “Act”), as well as supplementary announcements from the Trade Competition Commission of Thailand (TCCT), the overseeing regulator of the Act. The TCCT will often look to internationally recognised precedents from other major jurisdictions when adjudicating any issue.

1.2 Legislation Relating to Particular Sectors

There are a few specific provisions regarding merger control that exist within other industries, such as telecommunications and energy, that technically may be used in place of (but practically alongside with) the merger control provisions of the Act. Merger control for all other industries is governed by the Act. Other areas of trade competition (misconduct, cartels, etc) are also solely governed by the Act.

1.3 Enforcement Authorities

The TCCT is the primary regulator. The TCCT may ask other regulators for opinions during any process.

2. Jurisdiction

2.1 Notification

If the prospective merger transaction is deemed as reportable under the Act (whether as a pre-merger approval filing or a post-merger notification filing), it must be filed with the TCCT. The operators have the burden of deciding whether their transaction is reportable or not.

2.2 Failure to Notify

If a transaction requires approval and the parties breach this requirement, the parties can be fined up to 0.5% of the transaction value, and in theory the transaction may be unwound, although this has never been enforced before. If a transaction requires post-merger notification and the parties breach this requirement, they can be fined up to THB200,000 plus THB10,000 per day during the time such breach is ongoing. Directors and other natural persons responsible for such breach may also be fined alongside the juristic parties. Please note that the TCCT has almost always imposed fines on both the juristic parties and their responsible natural persons.

2.3 Types of Transactions

A merger under the Act is defined as corporate amalgamation, acquisition reaching or passing 25% of voting rights in any Thailand-listed company, acquisition of more than 50% of voting rights in any other type of company, or acquisition of more than 50% of operating assets.

Generally, if a merger will result in a new or enhanced dominant player, or an acquisition of a dominant player, the parties must undertake a pre-merger approval filing. However, if a merger will only result in a substantial reduction of competition, then the acquiring or resultant party must only undertake a post-merger notification filing. Internal reorganisation is exempted from filing.

A dominant player is defined as any business with 50% of market share and THB1 billion in annual sales for any market (normally the domestic market), or a top-three operator with combined 75% of market share and by itself having THB1 billion in annual sales and at least 10% of market share for any market (normally the domestic market). Substantial reduction of competition is defined

as having THB1 billion in annual sales for any market (normally the domestic market).

2.4 Definition of “Control”

See 2.3 Types of Transactions for changes that trigger merger filing. See 2.7 Business/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds for corporate linkage (control) that mandates group calculation.

2.5 Jurisdictional Thresholds

See 2.3 Types of Transactions.

2.6 Calculations of Jurisdictional Thresholds

See 2.3 Types of Transactions. Normally, market share is viewed through sales, but can also be viewed through production volume and production capacity. Normally, sales and market share calculations are done at the domestic level, but there are cases of exceptions where the geographical area is smaller (such as for products with special characteristics, like ice) or larger than domestic (such as for products that may cross borders more easily), although in such cases the parties may also have to provide domestic-market analysis.

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

Calculation of sales and market share figures are always done on a group-wide basis and will include all entities within such group that are under the same control of the ultimate controlling entity, with control defined as having a majority of voting rights or vote control (multiple levels), or the ability to appoint half of the directors (one level). For the review of the merger transaction, sales and market share of both sides of the transaction will be reviewed together.

2.8 Foreign-to-Foreign Transactions

Based on the current interpretation, foreign-to-foreign transactions are covered by the Act only if both sides have corporate presence in Thailand as well as local sales/effect. Having corporate presence in Thailand is only the first step of the review, and the parties will also have to hit the market share and sales figure threshold.

2.9 Market Share Jurisdictional Threshold

See 2.3 Types of Transactions for market share information. Even if there is no overlap in any particular market, a filing may be required if the sales threshold and/or the market share threshold are met.

2.10 Joint Ventures

A joint venture by way of a new incorporation is not technically subject to the merger control provision of the Act. However, if the process of setting up such joint venture touches upon asset transfer or share acquisition, then the merger filing requirement may be triggered.

2.11 Power of Authorities to Investigate a Transaction

The TCCT has complete discretion to investigate under the Act, request documents and interviews, and apply fines or actions if deemed appropriate. This includes situations where a transaction may not hit the threshold, but the TCCT feels that it wishes to confirm such fact. There is no statute of limitation on the TCCT's ability to investigate as it can revisit the issue at any time even after the closing of the transaction.

2.12 Requirement for Clearance Before Implementation

If the transaction requires pre-merger approval, then the merger cannot take place until approval is granted.

2.13 Penalties for the Implementation of a Transaction Before Clearance

See 2.2 Failure to Notify. Penalties have been applied in the past and many cases have been issued as precedents, including cases of foreign-to-foreign transactions.

2.14 Exceptions to Suspensive Effect

There are no general exceptions to the suspensive effect and there is no precedent indicating otherwise.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

There are no circumstances where the authorities will permit closing before clearance and there is no precedent indicating otherwise. The only way to close a transaction without clearance is to ensure that relevant businesses are carved out in a way that will not trigger any requirement to file.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

See 2.2 Failure to Notify. If the parties must obtain a pre-merger approval, then the approval must be obtained before the transaction is closed. If, however, the acquiring or resultant party only needs to undertake a post-merger notification filing, then such filing must be done within seven days from the transaction date. Any breach will result in penalties being incurred, which have been applied in the past.

3.2 Type of Agreement Required Prior to Notification

The TCCT normally does not check the depth of intention, but the parties must submit an agreement or parts thereof that address the merger transaction for their review.

3.3 Filing Fees

There is no filing fee for a post-merger notification filing, but there is a THB250,000 filing fee for pre-merger approval filing.

3.4 Parties Responsible for Filing

Both sides of the transaction (normally the entities attempting the transaction) will be responsible for filing the pre-merger approval filing, but sometimes the parent entities of the entities to the transaction can file in their place and the officers have accepted this minor deviation in the past. Furthermore, in the past, a couple of cases were filed with only the signature of the acquiring side and the officers have also accepted this minor deviation. For post-merger notification filing, only the acquiring or resultant entity needs to file the document.

3.5 Information Included in a Filing

Post-merger notification filing is much less detailed than pre-merger approval filing, but both will generally require the transaction agreement (or at least relevant parts thereof), financial statements, market share and sales figures, details of shareholders (pre and post transaction) and types of businesses, details of affected products and services and possibly a list of all products and services of the parties, and economic and commercial rationale for the transaction. All applications and attachments must normally be in Thai or translated into Thai, unless the applicant is specifically exempt from this requirement by the officers in charge. In the past, some case officers have accepted simple

documents in English, such as certain pages of financial statements.

3.6 Penalties/Consequences of Incomplete Notification

If an application is incomplete on the face of it, the filing will not be formally accepted. However, if an application has been formally accepted but later the officers find any part to be incomplete or have additional follow-up questions, the parties will have to submit additional information, documents and details in order to receive final acknowledgement or approval, as the case may be.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

If the parties are suspected to have filed something that may be incorrect, incomplete or misleading, the officers will require follow-up explanations, and if it is subsequently proven that such was done deliberately, then the officers will undertake further investigation or may propose that the TCCT reject the application for merger.

3.8 Review Process

For post-merger notification filing, the parties generally can no longer submit a draft for the officers' review due to a change in policy, and will simply have to prepare a draft as best as they can and submit such without review of the officers. After the transaction is completed, the parties can then submit the application within seven days.

For pre-merger approval filing, the parties will need to informally submit the draft application for the officers' review. The officers will normally ask as many questions and request as many documents as they need until they are satisfied that the presentation to the TCCT will be smooth. This can take between a couple of months to

many months, depending on the complexity of the deal and workload of the officers. After the officers provide their acquiescence, the parties can then formally submit the application to them. The authority will then have in total 105 days to review and provide an answer, which can be unconditional approval, conditional approval or rejection.

3.9 Pre-notification Discussions With Authorities

Parties can engage in pre-notification discussions with the authorities and this is highly encouraged. The process will be treated confidentially.

3.10 Requests for Information During the Review Process

Operators can expect the officers to come back with follow-up questions during the review period, and this will not stop the clock or suspend any part of the process, meaning the parties are highly encouraged to do their best to provide additional information, as lack of information will likely lead to a negative result.

3.11 Accelerated Procedure

There is no short form or fast track for review.

4. Substance of the Review

4.1 Substantive Test

The authority will review the case from a holistic standpoint, including review from the perspectives of competitors, suppliers and vendors, service providers, customers and the public as a whole. The authority will review details from both the supply and demand side, vertical and horizontal relationships, and co-ordination and non-coordination.

4.2 Markets Affected by a Transaction

The authority will look at all markets that hit the THB1 billion threshold, and will often look at other markets below the threshold as well. There is no precedent on a de minimis level below which competitive concerns are deemed unlikely, as long as such market already hits the threshold.

4.3 Reliance on Case Law

The authorities will rely on their own precedents and those from other major jurisdictions. Normally the TCCT will accept precedents from the EU, the US, Japan, Korea and Singapore.

4.4 Competition Concerns

The authority will look at all competition concerns from a holistic point of view. There is no clear precedent to pinpoint weight or to discard any of these areas.

4.5 Economic Efficiencies

The authority will normally consider economic efficiencies as the positive rationale to counter negative impact, but this does not mean that the efficiencies will automatically override all other issues.

4.6 Non-competition Issues

The authority will normally consider all non-competition areas, except for the environment, which has not historically been addressed. Employment has also been discussed, but to a much lesser extent when compared to industrial policy, national security or other public interest issues. Generally, the authority is given complete discretion to consider any of the non-competition areas as it deems fit. Please note that non-competition concerns from the perspective of foreign direct investment are addressed under the Foreign Business Operation Act, which is a separate law under a separate overseeing authority. Separate licensing may be required.

4.7 Special Consideration for Joint Ventures

See 2.10 Joint Ventures. A joint venture is technically exempt.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The authority has complete power to prohibit the transaction if it falls under its mandate. Any breach of this order can result in a fine or unwinding. The TCCT normally will issue a letter demanding explanation or mandating putting a stop to the prospective merger, a breach of which will render the parties liable under the Act.

5.2 Parties' Ability to Negotiate Remedies

The parties can negotiate for remedies, although the channel to do so may be more limited than in other jurisdictions. It is normally easier for the parties to propose this at the very outset.

Typical Remedies

Remedies have rarely been used, but those that have been used are an increase of participation of certain groups within the industry, moratorium on contractual change with vendors and suppliers, indefinite prohibition of sharing of certain data between the merging parties, etc.

5.3 Legal Standard

There is no legal standard that remedies must meet in order to be deemed acceptable. This is all at the discretion of the TCCT.

5.4 Negotiating Remedies With Authorities

See 5.2 Parties' Ability to Negotiate Remedies.

The parties are recommended to propose remedies from the beginning as it may be difficult to propose this during the review process by the TCCT. In theory, the authority can unilaterally impose a remedy as a condition to their approval. In practice, they may discuss with the parties beforehand.

5.5 Conditions and Timing for Divestitures

There is no standard timing and this will entirely depend on the TCCT. If the remedies are not fully complied with, the parties will be deemed to have breached the order of the TCCT on the merger, and the TCCT can revoke the approval for the merger, meaning the parties will need to unwind the transaction. Generally, all conditions must be met as mandated by the TCCT before the merger can take place, unless such conditions are planned for any period after the closing.

5.6 Issuance of Decisions

A formal decision will be provided to the parties, whether it is an unconditional approval, a conditional approval, or a rejection. Relevant parts of the decision may be issued to the public as a precedent, but commercially sensitive information will normally be redacted from the publication.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

As long as a transaction falls under its mandate because of thresholds having been reached, regardless of whether it is a domestic or foreign-to-foreign transaction, the TCCT will oversee the case. The TCCT has historically imposed fines on foreign-to-foreign transactions, but there is no evidence of any outright prohibition.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

The decision will cover all related arrangements, if such have been made known to the authority in the filing. If any part of the transaction is not made known to the authority, such will not be covered by the decision and the parties can be at fault if the authority later learns of such part of the undisclosed arrangements, and such part somehow breaches the law on its own.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Any party can submit their opinion if they know about the pending case, and the TCCT may sometimes invite other parties to submit their opinion as well. However, these parties do not have any other right to stop the process of the TCCT, unless they find a valid cause of action to be filed with the Administrative Court.

7.2 Contacting Third Parties

The authority can contact third parties and has historically done so. Normally this is done via a written notice or questionnaire. There is no precedent that the authority has market-tested any remedies offered by the parties.

7.3 Confidentiality

Normally all details are kept strictly confidential. Only parts of the filing that do not contain commercially sensitive information may be published as a precedent.

7.4 Co-operation With Other Jurisdictions

There is no clear evidence that the authority has historically shared details of specific transactions with other jurisdictions, but this has been indicated by the authority as one of its powers and intended courses of action. The authority, if wishing to do so, does not need the permission of the filing parties.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

The parties can technically resubmit the case if they can change the facts of the case or remedies, to simply ask for the TCCT's reconsideration. The parties can also appeal to the Administrative Court if they have a solid ground to argue so within 60 days after the date of decision.

8.2 Typical Timeline for Appeals

There has not been any case of appeal within the merger control realm. The parties must appeal within 60 days after the date of decision.

8.3 Ability of Third Parties to Appeal Clearance Decisions

In theory third parties can appeal to the Administrative Court if they have solid grounds that the decision was made in error. None of these attempts have been successful.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

There are different licensing requirements based on foreign ownership thresholds for different industries, but these do not concern antitrust or trade competition aspects of the operation or acquisition. Separate licensing may be required in any case.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

There have been no recent changes to legislation or regulations, or proposals to change these. All current interpretations have been reflected as outlined above.

10.2 Recent Enforcement Record

Based on public records, no pre-merger approval transaction has been prohibited, but there were around six transactions that were investigated and subject to fines, all for not filing within seven days of the transaction date for post-merger notification filing.

10.3 Current Competition Concerns

There is no current concern or trend within the merger control realm that can be specifically pinpointed.

Trends and Developments

Contributed by:

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Chandler MHM Limited is one of the largest and oldest full-service law firms in Thailand, with over 100 lawyers covering all areas of law. It has a dedicated team with extensive experience advising on antitrust and trade competition matters. Its experience covers the full spectrum of the applicable regulations, including abuse of dominance, general misconduct, severe and non-severe cartels, merger control and offshore arrangements. The Chandler MHM team offers the full spectrum of professional services within the realm of antitrust and trade competition law,

including internal audits of business units to identify gaps, creation and revision of internal manuals for employees to prevent inadvertent breaches, merger control review and filing, internal training and workshops, general advice, revision of contracts for compliance while ensuring retention of commercial advantages and original desired positions, defence against allegations by counterparties and advice on investigations by the Office of Trade Competition Commission.

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No Change in Policy

Thailand held its general election on 14 May 2023, and the winner of the election was the self-proclaimed liberal populist Move Forward Party, which is populated by young idealists and technocrats, and which came in first in an unexpected win that shocked the nation. The populist Puea Thai Party, which was a clear favourite prior to the election day, came only in second. After months of failed negotiations and haggling, Puea Thai Party formed a coalition government with other smaller parties that were part of the previous government, hence creating a “unity government”.

Prior to the election day, it was widely expected that the Move Forward Party, once in a coalition government, would attempt to institute reforms and changes to curtail the power of large companies and promote participation by smaller operators. With the formation of the new government with remnants of the old government and without elements of the Move Forward Party, the country has seen little change on the antitrust and trade competition policy front. The Trade Competition Act B.E. 2560 (2017) (TCA) itself

has since been left untouched, no new major supplement has been enacted, and the policy of the Trade Competition Commission of Thailand (TCCT), which naturally triggers down to the officers of the Office of Trade Competition Commission (OTCC), has remained largely the same, which is to regulate trade competition and anti-competitive behaviours based on what the existing law requires and allows. Although there is no change in their policy via increased pressure from the new government, the TCCT continues to do its job, with a regular and increasing number of investigations and issuing of case precedents. Overall, the TCCT is being seen more and more as a force to be reckoned with within the business community, and operators are now more careful with their commercial behaviours as they fear being investigated or called into question by the TCCT. Many examples have been set whereby questionable business dealings, commercial behaviours, and contractual terms have been investigated by the TCCT, and the results often ranged from administrative fines at worst to costly and lengthy defence processes at best.

Enforcement Areas

The year 2024 has already seen numerous cases of investigations and reviews, encompassing all three areas of the law, namely merger review, unilateral misconduct and abuse of dominance, and cartel and arrangements. To summarise, the TCA addresses three primary areas of trade competition: (i) merger control and filing, including pre-merger approval filing and post-merger notification filing, (ii) unilateral misconduct by one operator against a trade partner, vendor, customer, etc, including abuse of dominant position by large operators and misconducts of smaller operators, and (iii) cartel activities and arrangement. Although the Act itself has been supplemented by numerous Announcements by the TCCT, there are still a myriad of issues within the Act that have yet to be clearly codified. In this regard, the TCCT has allowed the OTCC to publish cases that have been finally adjudicated or settled by the TCCT for public viewing and understanding. To date, the OTCC has published a total of 161 cases, the majority of which concern merger control review and procedures, while the minority are about unilateral misconduct, such as unfair trade conditions, exclusivity, prohibitions, etc. Only eight cases are about cartel arrangement and discussions. The year 2024 has so far seen over 20 cases, the majority of which concern unilateral misconduct and abuse of market position and merger filings, and only one case that concerns cartel investigation.

Merger Control

For merger control and procedures, 2024 has been a largely positive year as many precedents have been formed and published for public viewing, and these have cleared up many of the previously ambiguous procedures and scope of coverage of reportability. Many of the cases that have been published are examples of filings that were not necessary to be filed under

the Act, while others simply confirm our understanding of the procedures and provide reliable definitions. The precedents have provided a set of corporate and business characteristics that business operators wishing to undertake a merger can review against themselves to see if their merger transaction will need to be filed with the TCCT. In the past, operators often had to consult with the officers of the OTCC on a case-by-case basis to determine whether their merger transaction needed to be filed, but now operators should be able to review their own circumstances and come up with a clearer answer. This positive development goes hand-in-hand with a particular change in policy that makes absolute determination of filing requirement much more difficult for special circumstances. Historically, it was possible for prospective merging parties to consult with the officers of the OTCC for both pre-merger approval filing and post-merger notification filing, and submit their draft filing for the officers' review, thus allowing the parties to pinpoint the existence of their obligation and whether their draft application had any flaw. The new policy which has come into effect no longer allows the parties to submit a draft of the post-merger notification filing, meaning that it is now largely in the hands of the parties to determine if they need to make the post-merger notification filing, and if so, what their documents should look like. Nevertheless, it is still possible to ask for the officers' opinion regarding a filing obligation for post-merger notification filing based on the nature of the transaction and categories of products and services, although draft applications will no longer be accepted. Despite this generally positive development, the operators must also be mindful that the TCCT and the OTCC have been much more active and assertive. So far, based on available information and precedents, six merger transactions have been investigated, and their responsible parties have

been fined in the last two years. Although the fines are not financially debilitating compared to fines levied by relevant authorities in other jurisdictions, their existence serves as a reminder that the TCCT and the OTCC are taking unfiled merger transactions very seriously.

More notable is the fact that half of the fined transactions were involuntarily discovered by the authority. This means that the TCCT and the OTCC have sufficiently morphed from largely passive regulatory bodies waiting for complaints during their early years into active players who seek out information from both conventional sources, such as news and business reports, and unconventional sources, such as complaints and whistle-blowers. This conclusively means that operators planning to undertake any merger transaction with effect in Thailand need to be more vigilant and, if possible, abide by the requirements of the Act to avoid investigation by the OTCC and the TCCT. In particular, offshore operators need to bear in mind that even though the Act itself may not have the practical force to reach beyond Thai borders, capture any breaching offshore operators and bring them back to face their scrutiny in Thailand, it is best to not upset the TCCT, as they have absolute discretion to undertake investigation of any business, meaning the offshore operators' Thai operations can be put onto the TCCT's radar and face future risks if their offshore parents decide to blatantly breach the requirements of the Act. Furthermore, it may be difficult for management of any offshore entity to have to explain internally and to their shareholders why there is a pending fine in Thailand, regardless of whether such fine can really be applied against the company.

Unilateral Misconduct

For unilateral misconduct (including abuse of dominance and general misconduct), 2024 saw

only a handful of cases, and the trend of enforcement is still on a gradual incline. So far, there is no clear focus and it seems that the officers are looking at all sectors, although digital platforms are clearly still on their radar based on available information. The authority announced in 2023 that there have been numerous complaints from restaurants and partner-riders, whereby their rates of compensation have been unfairly reduced and business opportunities unfairly restricted, and that the TCCT and the OTCC would focus their efforts on discussion with, and investigation of, these mega-platforms. Based on available information, it seems that this focus is still ongoing. Furthermore, a large part of the authority's effort in educating the public focuses on misconduct. The OTCC and TCCT have issued numerous publications, infographics, education videos, and other materials to tackle misconceptions and educate the operators and the public about this area of law, often via popular online platforms. This points to the OTCC's and TCCT's flexibility in their operation; something which is largely missing from other authorities in Thailand.

Many of the published cases ended in putting a stop to investigation due to lack of clear evidence, which represents the same trend in previous years. This provides two valuable lessons: It can be reaffirmed that the TCCT is still generally exceptionally conservative in its prosecution, and perhaps rightly so, as any case that does not contain strong evidence will likely be dropped instead of being dragged out for more investigation. On the other hand, hindered operators need to maintain immaculate records of operations and such must include unequivocal commercial and monetary impact caused by misconduct of a trade partner, or their case will not be properly entertained by the TCCT and the OTCC. Although most cases have been dropped, their

preliminary investigations serve to remind all operators that the TCCT and the OTCC are continuing to ramp up their efforts at investigation and ensuring legal compliance. This goes hand-in-hand with the gradual increase in workforce of the OTCC. Operators are reminded that it is perhaps more economically sensible to strictly abide by the TCA's requirements and the authority's recommendations rather than risk facing expensive and possibly lengthy investigation by the TCCT and the OTCC.

Cartels

The trend of enforcement for cartels in 2024 and the previous years is somewhat different from those of the first two areas of law. Discussions and arrangements between direct competitors were historically prevalent within the Thai economy, and to some extent continue to happen. The TCA was enacted partly to combat this anti-competitive behaviour, which has an immense negative impact on end-users and business operators, as well as unknowingly inhibiting the ability of business operators who engage in any particular cartel activity to improve their operation, as there would be less need for such operators to improve their products, services and technology. Since its inception, the Act has been used to deal with numerous cases within the merger control and unilateral misconduct areas, but the number of cases involving cartel activities is comparatively small. The actual number of cartel cases that went through the investigatory process of the OTCC remains confidential, but so far only eight cases involving cartel activities have been published for public review, compared with numerous cases for merger control and unilateral misconduct. Out of these eight cases, only one ended with an actual fine against the participants, while others were simply dropped because there was lack of

unequivocally clear evidence that a cartel was established.

Useful examples are cases that involved publication of prices by nationally recognised trade associations and allegations of discussion by financial institutions. For the trade association case, although the TCCT recognised that some of these prices have been followed by the association members on certain occasions, the lack of routine adherence and mechanism of enforcement against deviation played a major role when the TCCT decided that there was not enough evidence to pursue the involved parties. This appears to be a lenient approach when compared to enforcement in other jurisdictions, but it may stem partly from the intention to slowly ease the public into the law. For the financial institution case, which has recently been issued in 2024, the TCCT simply did not find any concrete evidence of discussion. Despite a low number of case precedents for cartel activities, operators should be mindful that breach of cartel regulation is generally more serious than committing unilateral misconduct (unless you are a dominant player in any market) or breaching a merger filing requirement, as a cartel activity, if and once properly proven, may carry a term of imprisonment. Furthermore, despite the fact that tangible results of a cartel discussion play an important role within the decision-making process of the TCCT when adjudicating the case, cartel activities are much more clear-cut than other types of misconduct and can be more easily adjudicated against when discovered. The most important element of cartel allegation is the natural lack of ability to undertake an effective fight. It is naturally difficult for any entity or person to choose to fight a cartel allegation when a possible outcome is imprisonment in the case of defeat, while the alternative is just an administrative fine if the

entity or person chooses to accept the allegation.

Conclusion

Overall, 2024 has so far followed through with what 2022 and 2023 started, and we have seen some minor clarifications and developments within the area of antitrust and trade competition within Thailand, both through the attempts and procedures of the cases that were eventually dropped and cases that resulted in fines. At the same time, more examples and affirmation of interpretations continue to be outlined to the public, thus making it easier to delineate between compliance and non-compliance. This ongoing disclosure and enforcement trend will likely be continued by the TCCT despite lack of change in policy or increase in pressure from the government, and operators – especially the large ones – should continue to monitor the situation and take necessary actions to align themselves to the TCA as much as possible.

Contributed by:

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Contents

1. Legislation and Enforcing Authorities p.731

- 1.1 Merger Control Legislation p.731
- 1.2 Legislation Relating to Particular Sectors p.731
- 1.3 Enforcement Authorities p.732

2. Jurisdiction p.732

- 2.1 Notification p.732
- 2.2 Failure to Notify p.733
- 2.3 Types of Transactions p.734
- 2.4 Definition of "Control" p.734
- 2.5 Jurisdictional Thresholds p.735
- 2.6 Calculations of Jurisdictional Thresholds p.735
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.736
- 2.8 Foreign-to-Foreign Transactions p.737
- 2.9 Market Share Jurisdictional Threshold p.737
- 2.10 Joint Ventures p.737
- 2.11 Power of Authorities to Investigate a Transaction p.738
- 2.12 Requirement for Clearance Before Implementation p.738
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.738
- 2.14 Exceptions to Suspensive Effect p.738
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.738

3. Procedure: Notification to Clearance p.739

- 3.1 Deadlines for Notification p.739
- 3.2 Type of Agreement Required Prior to Notification p.739
- 3.3 Filing Fees p.739
- 3.4 Parties Responsible for Filing p.739
- 3.5 Information Included in a Filing p.739
- 3.6 Penalties/Consequences of Incomplete Notification p.740
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.740
- 3.8 Review Process p.740
- 3.9 Pre-notification Discussions With Authorities p.740
- 3.10 Requests for Information During the Review Process p.740
- 3.11 Accelerated Procedure p.741

4. Substance of the Review p.741

- 4.1 Substantive Test p.741
- 4.2 Markets Affected by a Transaction p.741
- 4.3 Reliance on Case Law p.741
- 4.4 Competition Concerns p.741
- 4.5 Economic Efficiencies p.742
- 4.6 Non-competition Issues p.742
- 4.7 Special Consideration for Joint Ventures p.742

5. Decision: Prohibitions and Remedies p.743

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.743
- 5.2 Parties' Ability to Negotiate Remedies p.743
- 5.3 Legal Standard p.744
- 5.4 Negotiating Remedies With Authorities p.744
- 5.5 Conditions and Timing for Divestitures p.745
- 5.6 Issuance of Decisions p.745
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.745

6. Ancillary Restraints and Related Transactions p.745

- 6.1 Clearance Decisions and Separate Notifications p.745

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.746

- 7.1 Third-Party Rights p.746
- 7.2 Contacting Third Parties p.746
- 7.3 Confidentiality p.746
- 7.4 Co-operation With Other Jurisdictions p.747

8. Appeals and Judicial Review p.747

- 8.1 Access to Appeal and Judicial Review p.747
- 8.2 Typical Timeline for Appeals p.748
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.748

9. Foreign Direct Investment/Subsidies Review p.748

- 9.1 Legislation and Filing Requirements p.748

10. Recent Developments p.748

- 10.1 Recent Changes or Impending Legislation p.748
- 10.2 Recent Enforcement Record p.749
- 10.3 Current Competition Concerns p.749

ELIG Gürkaynak Attorneys-at-Law is a leading law firm of 95 lawyers based in Istanbul. Founded in 2005, the firm combines a solid knowledge of Turkish law with a business-minded approach to developing legal solutions that meet the ever-changing needs of clients in their international and domestic operations. The competition law and regulatory department is led by founding partner Gönenç Gürkaynak, along with six other partners, eight counsel and 42 associates. In addition to its unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience of defending companies before

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Article 7 of Law No 4054 on Protection of Competition (the “Competition Law”) governs M&A, in particular, and mandates the Turkish Competition Board (“the Board”) to regulate and establish a merger control regime. Accordingly, certain M&A are subject to the Turkish Competition Authority (TCA)’s review and approval in order to gain validity.

The amendment to the Competition Law, Law No 7246 (the “Amendment Law”), was published in the Official Gazette and entered into force on 24 June 2020. Furthermore, Communiqué No 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board (“Communiqué No 2010/4”) is the primary legal instrument that establishes the Turkish merger control regime. On 4 March 2022, the TCA published Communiqué No 2022/2 on the Amendment of Communiqué No 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board (“Communiqué No 2022/2”). Communiqué No 2022/2 introduces certain new regulations concerning the Turkish merger control regime, which have fundamentally affected the notifiability analysis of merger transactions and the merger control notifications submitted to the TCA.

Other guidelines adopted by the TCA on merger control matters are:

- the Guidelines on Cases Considered as Mergers and Acquisitions and the Concept of Control (the “Guidelines on the Concept of Control”);
- the Guidelines on the Assessment of Horizontal Mergers and Acquisitions;

- the Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions;
- the Guidelines on Market Definition;
- the Guidelines on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions (the “Guidelines on Undertakings Concerned”); and
- the Guidelines on Remedies Acceptable in Mergers and Acquisitions (the “Remedy Guidelines”).

1.2 Legislation Relating to Particular Sectors

No other legislation is applicable to foreign transactions or investment in Türkiye as far as the merger control rules are concerned. However, there are specific merger control rules for mergers concerning banks, privatisation tenders and certain other sectors.

Banks

Banking Law No 5411 (the “Banking Law”) provides that mergers in the banking industry fall outside the merger control regime, subject to the condition that the sectoral share of the total assets of the banks does not exceed 20%. The Competition Law does not apply to foreign acquiring banks already operating in Türkiye if the conditions for the application of the Banking Law exception are fulfilled.

Privatisation Tenders

Communiqué No 2013/2 prescribes an additional pre-notification process that applies to privatisations in which the turnover of the undertaking, asset or unit intended for the production of goods or services to be privatised exceeds TRY30 million. Statutory sales to public institutions and organisations, including local governments, are excluded for the purposes of this calculation. If the threshold is met, a pre-notification

should be filed with the TCA before the public announcement of the tender specifications.

The Board will issue an opinion that will serve as the basis for the preparation of the tender specifications. This opinion does not mean that the transaction will be cleared. Following the tender, the winning bidder must still make a merger filing and obtain clearance before the Privatisation Administration's decision on the final acquisition.

Other Sector-Specific Rules

There are various sector-specific rules alongside the merger control rules for sectors such as media, telecommunications, energy and petrochemicals. By way of example, in the energy sector, approval from the relevant authority is required for share transfers of more than 10% (5% in the case of publicly traded company shares) in an electricity or natural gas company. In the broadcasting sector, Law No 6112 states that a transfer of shares in a joint stock company holding a broadcasting licence should be notified to the Turkish Radio and Television Supreme Council.

1.3 Enforcement Authorities

The relevant legislation is enforced by the TCA, which is a legal entity with administrative and financial autonomy and which consists of the Board, the presidency and service departments. The Board is the competent decision-making body of the TCA and is responsible for, inter alia, reviewing and resolving M&A notifications. The Board consists of seven members and is located in Ankara.

The Main Services Unit comprises:

- six supervision and enforcement departments;
- a department of decisions;

- an economic analysis and research department;
- an information technologies department;
- an external relations and competition advocacy department;
- a strategy development department; and
- a cartels on-site inspections support division.

There is a “sectoral” job definition of each supervision and enforcement department.

Other authorities may get involved in the review of mergers in certain sectors. By way of example, the TCA is statutorily required to get the opinion of the Turkish Information Technologies Authority for mergers concerning the telecommunications sector and must obtain the opinion of the Turkish Energy Markets Regulatory Authority in energy mergers.

2. Jurisdiction

2.1 Notification

Article 7 of Communiqué No 2010/4 amended by the Communiqué No 2022/2 provides for a number of notification thresholds.

A transaction must be notified in Türkiye if one of the following increased turnover thresholds is met:

- the aggregate Turkish turnover of the transaction parties exceeds TRY750 million and the Turkish turnover of at least two of the transaction parties each exceeds TRY250 million;
- the Turkish turnover of the transferred assets or businesses in acquisitions exceeds TRY250 million and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY3 billion; or

- the Turkish turnover of any of the parties in mergers exceeds TRY250 million and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY3 billion.

Communiqué No 2022/2 introduced a thresholds exemption for undertakings active in certain markets/sectors. Pursuant to Communiqué No 2022/2, the above-mentioned “TRY250million Turkish turnover thresholds” will not be sought for the acquired undertakings active in or assets related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies if they:

- operate in the Turkish geographical market;
- conduct research and development activities in the Turkish geographical market; or
- provide services to Turkish users.

The new regulation does not seek the existence of an “affected market” in assessing whether a transaction triggers a notification requirement. If a concentration exceeds one of the alternative jurisdictional thresholds, the concentration will automatically be subject to the approval of the Board.

Once the above-mentioned thresholds are exceeded, the parties are obliged to notify the transaction.

The following transactions are not subject to the approval of the Board:

- intra-group transactions and other transactions that do not lead to a change of control;
- temporary possession of securities for resale purposes by undertakings whose normal activities are to conduct transactions with

such securities for their own account or for the account of others, provided that the voting rights attached to such securities are not exercised in a way that affects the competition policies of the target company;

- statutory and compulsory acquisitions by public institutions or organisations for reasons such as liquidation, winding-up, insolvency, cessation of payments, concordat or privatisation; and
- acquisition by inheritance.

Another exception pertains to the Turkish Wealth Fund, which was incorporated as a national wealth and investment fund company under Law No 6741. Transactions performed by the Turkish Wealth Fund and/or companies established by the Turkish Wealth Fund are not subject to merger control rules.

2.2 Failure to Notify Competition Law

The Competition Law introduces penalties for failing to notify or for closing the transaction before clearance. Where the parties to a merger or acquisition that requires the Board’s approval close the transaction without or before obtaining the Board’s approval, the Board imposes a turnover-based monetary fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision on the relevant undertaking(s). In acquisitions, the fine is levied on the acquirer, whereas in mergers it is levied on all merging parties. This monetary fine does not depend on whether or not the TCA ultimately clears the transaction.

The minimum amount of this fine is revised each year. For 2024, it is set at TRY167,473.

Article 7 Violations

If the parties close a transaction that violates Article 7 (ie, transactions that significantly impede competition – in particular, by creating a dominant position or strengthening an existing dominant position), the Board will impose a turnover-based monetary fine of up to 10% of the parties' turnovers generated in the financial year preceding the date of the fining decision. Employees and managers that had a determining effect on the creation of the violation may also be fined up to 5% of the fine imposed on the undertakings.

If the parties close a notifiable merger or acquisition without or before the approval of the Board, the transaction will be deemed legally invalid (with all attendant legal consequences in Türkiye), pending clearance.

If the Board finds that the transaction violates Article 7, it shall issue a board resolution ordering:

- the parties concerned to follow or avoid certain behaviours in order to establish competition; and
- structural remedies such as transfer of certain activities or shareholdings.

However, the relevant amendment introduces a “first behavioural, then structural remedy” rule for Article 7 violations. Therefore, in cases where behavioural remedies are ultimately considered to be ineffective, the Board will order structural remedies. Undertakings must comply with the structural remedies within a minimum of six months. If there is a possibility of serious and irreparable damages occurring, the Board is authorised to take interim measures until the final resolution on the matter.

There have been many cases where companies have been fined for failing to file a notifiable transaction (TAIF/SIBUR, 21-55/776-383, 11 November 2021; BMW/Daimler/Ford/Porsche/Ionity, 20-36/483-211, 28 July 2020; Brookfield/JCI, 20-21/278-132, 30 April 2020; Elon Musk/ Twitter Inc, 23-12/197-66, 2 March 2023, etc). The penalties are publicly announced via the Board's reasoned decisions, which are published on the TCA's official website.

2.3 Types of Transactions

Notifiable transactions are as follows:

- a merger of two or more undertakings;
- the acquisition of direct/indirect control on a lasting basis over all (or part) of one or more undertakings by one or more undertakings – or by persons who currently control at least one undertaking – through the purchase of assets or all (or part) of its shares, an agreement or other instruments; and
- the formation of a full-function joint venture.

These transactions are caught if they exceed the applicable thresholds (see **2.1 Notification**).

Operations that do not involve the transfer of shares or assets can be caught if they result in a change of control and the parties' turnovers surpass the applicable thresholds.

2.4 Definition of “Control”

Communiqué No 2010/4 provides the definition of “control”, which is akin to the definition in Article 3 of Council Regulation No 139/2004.

According to Article 5(2) of Communiqué No 2010/4, control can be constituted by:

- rights, agreements or any other means that – either separately or jointly, de facto or de jure

- confer the opportunity to exercise a decisive influence on an undertaking (particularly by ownership or the right to use all or part of the assets of an undertaking); or
- rights or agreements that confer decisive influence on the composition or decisions of the organs of an undertaking.

Acquisitions of minority or other interests that do not lead to a change of control on a lasting basis are not subject to notification. However, where acquired minority interests are granted certain veto rights – for example, privileged shares conferring management powers – that may influence the strategic management of the company, then the nature of control could be deemed as changed (from sole to joint control) and the transaction could be subject to filing.

2.5 Jurisdictional Thresholds

Please see **2.1 Notification** for further details of jurisdictional thresholds, including a threshold exemption for undertakings active in certain markets/sectors.

2.6 Calculations of Jurisdictional Thresholds

Communiqué No 2010/4 sets out detailed rules for turnover calculation. The calculation methods can be summarised as follows:

- the turnover of the entire economic group will be taken into account, including that of the undertakings controlling the undertaking concerned and that of all undertakings controlled by the undertaking concerned;
- when calculating turnover in an acquisition transaction, only the turnover of the acquired part will be taken into account with regard to the seller;
- the turnover of jointly controlled undertakings (including joint ventures) will be divided

equally by the number of controlling undertakings; and

- two or more transactions carried out by the same parties within a two-year period will be considered as one transaction for the purpose of turnover calculation.

However, there are certain special turnover calculation methods for entities such as banks, financial institutions, leasing companies, factoring companies, securities agents, and insurance companies.

Communiqué No 2022/2 also updates the rules that apply to the calculation of turnover of the financial institutions in accordance with the recent changes to the financial regulations. The recent updates of Article 9 of Communiqué No 2010/4 are as follows.

- For the calculation of financial institutions' turnovers, Communiqué No 2022/2 aligns the wordings and terms in view of the applicable banking and financial regulations – ie, it excludes the term “participation banks” and refers to the term “banks” in general, which covers all legal forms of banks.
- Communiqué No 2022/2 updates the names and references of the relevant regulations issued by the Banking Regulatory and Supervisory Agency and the Capital Markets Board referred to in Article 9 of Communiqué No 2010/4.

In respect of various financial institutions, the turnover determined by the special turnover calculation method consists of the sum of the following.

- Banks and participation banks – as included within the income statement requested under the Communiqué Concerning the Finan-

cial Tables to be Disclosed to the Public by Banks, and Related Explanations and Footnotes (Banking Regulatory and Supervisory Agency, 10/2/2007, 26430):

- (a) interest and profit-sharing income;
- (b) collected fees and commissions;
- (c) dividend income;
- (d) commercial profits/losses (net); and
- (e) other operational income.
- Financial leasing, factoring and funding companies – real operating income and other operating income, as included within the income statement requested under the Communiqué Concerning the Uniform Accounting Plan to be Implemented by Financial Leasing, Factoring and Funding Companies and the Explanation Note Thereof, and Concerning the Format and Content of the Financial Tables to be Disclosed to the Public (the Banking Regulatory and Supervisory Agency, 17/5/2007, 26525).
- Intermediary institutions and portfolio management companies – as included within the detailed income statement requested under the Communiqué Concerning the Principles on Financial Reporting within the Capital Market (the Banking Regulatory and Supervisory Agency, 9/4/2008, 26842):
 - (a) sales income;
 - (b) interests;
 - (c) fees;
 - (d) premiums;
 - (e) commissions and other income;
 - (f) other operating income;
 - (g) shares in the profits/losses of the investments valued via the equity method; and
 - (h) financial income other than operating income.
- Insurance, reinsurance and pension companies – in accordance with the last financial statements or data either (i) published by the Undersecretariat of the Treasury, the Asso-

ciation of Insurance and Reinsurance Companies of Türkiye, or the Pension Monitoring Centre or (ii) disclosed to the public by the companies related to the merger or acquisition (to be confirmed by the Undersecretariat of Treasury):

- (a) domestic direct premium production for insurance companies (gross);
- (b) domestic direct premium production for reinsurance companies (gross); and
- (c) the total amount of contributions and the total amount of funds in pension companies, as well as domestic direct premium production (gross) for those pension companies that also operate in life insurance.
- Other financial institutions – interest and similar income, income generated from securities, commissions, net profit generated from financial activities, and other operating income.

Sales and assets that are booked in a foreign currency should be converted into Turkish lira by using the average buying exchange rate of the Central Bank of Türkiye for the financial year in which the sales or assets are generated.

Turnover-based thresholds are used in the Turkish merger control regime. Therefore, the regime does not deal with asset-based thresholds.

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

See 2.6 Calculations of Jurisdictional Thresholds.

The seller's turnover is only included with that of the target in exceptional situations. It is included in joint-venture transactions if the seller remains a controlling party in the joint venture post-transaction (ie, both the seller and the buyer would be

considered as buyers in cases where the buyer and the seller form a joint venture).

The Board will only consider the changes in the business during the reference period if they are reflected in the relevant balance sheets of the businesses in question.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control if the turnover thresholds are triggered. The Competition Law states that the criterion to apply is whether or not the undertakings concerned affect the goods and services markets in Türkiye. Even if the relevant undertakings do not have local subsidiaries, branches, sales outlets, etc, in Türkiye, the transaction may still be subject to merger control if the relevant undertakings have sales in Türkiye and thus have effects on the relevant Turkish market.

The likelihood of the Board discovering a transaction is relatively high, as it closely follows M&A in the local and international press, and also the case practice of the EC and other important competition authorities. It may also examine the notifiability of past transactions in the context of a new notification.

Even transactions concerning the formation of a joint venture that will not be active in Türkiye in the foreseeable future could trigger a mandatory merger control filing if the parents trigger the applicable thresholds.

Board Decisions

There have been some cases where the Board has cleared decisions regarding joint ventures that do not involve sales in Türkiye and considered them notifiable. Recent cases include Baoshan Iron&Steel/Saudi Arabian Oil Company/Public Investment Fund (23-40/782-274,

31 August 2023), Nestle SA/PAI Partners Sarl (23-28/531-180, 22 June 2023), Gs Yuasa International/Leoch Battery Company (23-48/925-328, 12 October 2023), Tricon/Chemieuro-JV (22-15/248-107, 31 March 2022), and Baker Hughes/Dussur-Baker Petrolite (22-28/451-182, 23 June 2022).

2.9 Market Share Jurisdictional Threshold

Article 7 of Communiqué No 2010/4 provides turnover-based thresholds and does not seek a market share threshold when assessing whether or not a notification is required for a transaction.

2.10 Joint Ventures

In the case of a full-function joint venture, the transaction is subject to merger control once the turnover thresholds are exceeded. In order to qualify as a full-function joint venture, there must be joint control over the joint venture and it must be an independent economic entity established on a lasting basis.

The Guidelines on the Concept of Control explain the concept of “full functionality”. The following elements should be considered:

- sufficient resources to operate independently;
- activities that go beyond one specific function for the parents;
- independence from the parents in sale and purchase activities; and
- operations on a lasting basis.

Please refer to 2.8 Foreign-to-Foreign Transactions for details of the Board’s approach to joint venture cases.

2.11 Power of Authorities to Investigate a Transaction

If a transaction raises substantive competition law concerns and is viewed as problematic under the SIEC (“significant impediment to effective competition”) test, the TCA may still investigate the transaction either upon complaint or on its own initiative – even where the transaction does not meet the jurisdictional thresholds. The applicable limitation period is eight years, pursuant to Article 20(3) of the Law on Misdemeanours No 5326.

2.12 Requirement for Clearance Before Implementation

The Turkish competition law regime features a suspension requirement, whereby implementation of a notifiable concentration is prohibited until approval by the Board (Sections 7, 10, 11 and 16 of the Competition Law) (see **2.13 Penalties for the Implementation of a Transaction Before Clearance**). The implementation of a notifiable transaction is suspended until clearance by the Board is obtained. Therefore, a notifiable merger or acquisition is not legally valid until the approval of the Board is received, and such notifiable transaction cannot be closed in Turkey before the clearance of the Board.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Pursuant to Article 16 of the Competition Law, if the parties to a notifiable transaction violate the suspension requirement, a turnover-based monetary fine (based on the local turnover generated in the financial year preceding the date of the fining decision at a rate of 0.1%) will be imposed on the incumbent firms – ie, the acquirer(s), in the case of an acquisition, or both merging parties in the case of a merger. A monetary fine imposed for a violation of the suspension requirement will be no less than TRY167,473 in 2024. The word-

ing of Article 16 does not give the Board discretion as to whether or not to impose a monetary fine for a violation of the suspension requirement – rather, once the violation of the suspension requirement is detected, the monetary fine will be imposed automatically.

These penalties are applied frequently in practice. In recent years, examples have included:

- TAIF/SIBUR, 21-55/776-383, 11 November 2021;
- BMW/Daimler/Ford/Porsche/Ionity, 20-36/483-211, 28 July 2020; and
- Brookfield, 20-21/278-132, 30 April 2020.

2.14 Exceptions to Suspensive Effect

If the control is acquired from various sellers through a series of securities transactions in the stock exchange, the concentration could be notified to the Board after the transaction is realised, provided that the following conditions are satisfied:

- the concentration is notified to the Board without delay; and
- the voting rights attached to the acquired securities are not exercised or the voting rights are exercised only upon an exception provided by the Board that ensures the full value of the investment is protected.

Apart from this, there are no general exceptions to the suspensive effect and it is not possible to seek a waiver or obtain derogation from the suspensive effect.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

The Board would not permit closing before the clearance decision. There is no specific regula-

tion allowing or disallowing carve-out or hold-separate arrangements. However, the Board has so far consistently rejected all carve-out or hold separate arrangements proposed by undertakings (eg, Total SA, 20 December 2006, 06-92/1186-355; CVR Inc-Inco Limited, 1 February 2007, 07-11/71-23). The Board argued that a closing is sufficient for it to impose a suspension violation fine and an analysis of whether change in control actually took effect in Türkiye is unwarranted. The Board therefore considers the “carve-out” concept to be unconvincing.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is no specific deadline for filing in Türkiye. However, the filing should be made and approval should be obtained before the closing. In practice, it is recommendable to file the transaction at least 60 calendar days before the projected closing.

For details of penalties in the case of failure to do so, please see **2.13 Penalties for the Implementation of a Transaction Before Clearance**.

3.2 Type of Agreement Required Prior to Notification

A binding agreement is not required prior to notification. Parties can file on the basis of a less formal agreement, such as a letter of intent, a memorandum of understanding or a non-binding term sheet. There are some cases where the parties merely enclosed a letter of intent and/or a memorandum of understanding (Defacto Perakende/European Bank, 22-55/872-359, 15 December 2022; Kavak/Araba Sepeti, 21-43/627-309, 16 September 2021; Opel-Saft, 20-08/78-45, 6 February 2020). However, Com-

muniqué No 2010/4 requires the submission of a written document prior to notification. A filing thus cannot be made where there is nothing in writing (eg, based on a good-faith intention to reach an agreement).

3.3 Filing Fees

No filing fees are required under the Turkish merger control regime.

3.4 Parties Responsible for Filing

Pursuant to Article 10 of Communiqué No 2010/4, a filing can be made solely by one of the parties or jointly by some or all of the parties. The filing can be submitted by the parties' authorised representatives. In the event of filing by just one of the parties, the filing party should notify the other party.

3.5 Information Included in a Filing

The notification form is similar to Form CO. The Board requires one hard copy and an electronic copy of the notification form to be submitted in Turkish. The recent updates allow notifying parties to submit the notification form via “e-Devlet”, which is an elaborate system of web-based services that includes electronic submission. E-Devlet had already been made available for submissions, especially during the pandemic period. However, Communiqué No 2010/4 explicitly mentions this alternative form of submission now to make it official.

Additional documents are also required, such as:

- the executed or current copies and sworn Turkish translations of the transaction document(s) that brings about the transaction;
- financial statements (including the balance sheets of the parties); and

- market research reports for the relevant market (if available).

A signed and notarised (and apostilled, if applicable) power of attorney is also required.

3.6 Penalties/Consequences of Incomplete Notification

The TCA considers a notification to be complete when it receives the notification in its complete form. The parties are obliged to file correct and complete information with the TCA. If the parties provide incomplete information, the Board would request further data regarding the missing information. The Board deems notification to be complete on the date that the submitted information is complete.

In practice, the Board sends written information requests when there is information missing. The TCA's written information requests will cut the review period and restart the 30-day period as of the date on which the responses are submitted.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Where incorrect or misleading information is provided by the parties, the TCA imposes a turnover-based monetary fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision (Brookfield, 20-21/278-132, 30 April 2020; Akzo Nobel, 10- 24/339-123, 18 March 2010). If this is not calculable, the monetary fine is based on the turnover generated in the financial year nearest to the date of the fining decision.

3.8 Review Process

Upon its preliminary review (Phase I) of the notification, the Board will decide either to approve the transaction or to investigate it further (Phase II). The Board notifies the parties of the outcome

within 30 days following a complete filing. There is an implied approval mechanism whereby a tacit approval is deemed if the Board does not react within 30 calendar days upon a complete filing. However, in practice, the Board almost always reacts within the 30-day period – either by sending a written request for information or, very rarely, by rendering its decision within the original 30-day period. The TCA also frequently asks formal questions and adds more time to the review process, as it is advisable to notify the filing at least 60 calendar days before the projected closing.

If a notification leads to an investigation (Phase II), it turns into a full-fledged investigation, which takes about six months under Turkish law. If deemed necessary, this period may be extended only once – for an additional period of up to six months.

3.9 Pre-notification Discussions With Authorities

Other than privatisation tenders, the Turkish merger control rules do not have a pre-notification mechanism. Also, in practice, a filing is seen as a one-sided review by the TCA once a formal one-shot notification is made. The TCA may issue various information requests, but it will only do so after the notification is made (see 3.6 Penalties/Consequences of Incomplete Notification and 3.8 Review Process).

3.10 Requests for Information During the Review Process

It is common practice for the TCA to send written requests to the parties involved in the transaction to any other party related to the transaction or to third parties such as competitors, customers or suppliers. The TCA's written information requests will cut the review period and restart

the 30-day period as of the date on which the responses are submitted.

3.11 Accelerated Procedure

Communiqué No 2010/4 also brought a modified notification form that will replace the current notification form as of 4 May 2022. According to the modified notification form, there is a short-form notification (without a fast-track procedure) if a transition from joint control to sole control is at stake or if there are no affected markets within Türkiye.

The Turkish merger control regime does not include a fast-track procedure to speed up the clearance process. Apart from close follow-up with the case-handlers reviewing the transaction, the parties have no other possible way to speed up the review process.

4. Substance of the Review

4.1 Substantive Test

The substantive test is a SIEC test under the Amendment Law, similar to the approach under EU Merger Regulation. Hereby, the TCA will be able to prohibit not only transactions that may create a dominant position or strengthen an existing dominant position, but also those that could significantly impede competition. There is currently no case law or secondary legislation regarding how the SIEC test will be applied.

In terms of creating or strengthening a dominant position, Article 3 of the Competition Law defines a dominant position as “any position enjoyed in a certain market by one or more undertakings by virtue of which those undertakings have the power to act independently from their competitors and purchasers in determining economic parameters such as the amount of production,

distribution, price and supply”. Market shares of about 40% and higher are considered an indication of a dominant position in a relevant product market – as are other factors such as vertical foreclosure or barriers to entry.

4.2 Markets Affected by a Transaction

Pursuant to Communiqué No 2010/4, the relevant product markets are those that might be affected by the notified transaction where:

- two or more of the parties are commercially active in the same product market (horizontal relationship); or
- at least one of the parties is commercially active in the downstream or upstream market of any product market in which another party operates (vertical relationship).

4.3 Reliance on Case Law

The TCA closely follows the EC’s decisions (eg, *L’Oréal SA v The Body Shop*, 06-41/515-136, 7 June 2006; *IBM Danmark v Maersk Data*, 04-69/983-239, 27 October 2004; *Flir Systems v Raymarine*, 10-44/762-246, 17 June 2010; and *Efes Pazarlama*, 05-48/696-184, 21 July 2005), as well as the CJEU’s precedents, and regularly incorporates them into its decisions.

The Board has also referred to the US Federal Trade Commission decisions (eg, *Google*, 16-39/638-284, 16 November 2016), as well as the French and German competition authorities’ precedents (eg, *BSH Ev Aletleri*, 17-27/454-195, 22 August 2017; and *Yemeksepeti*, 16-20/347-156, 9 June 2016).

4.4 Competition Concerns

The TCA primarily focuses on unilateral effects, but may also consider co-ordinated effects (*Ladik*, 05-86/1188-340, 20 December 2005) and vertical effects (*Migros*, 15-29/420-117, 9

July 2015 – in which the transaction was conditionally cleared). However, the TCA has not yet prohibited a transaction on the grounds of “conglomerate effects”.

4.5 Economic Efficiencies

The Board considers economic efficiencies to the extent that they operate as a beneficial factor in terms of better-quality production or cost savings (eg, reduced product development costs or reduced procurement and production costs) generated through the integration.

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 with the Communiqué No 2022/2 does not provide the freedom to skip the relevant sections of the notification form on efficiencies based on the parties’ market shares in the affected markets.

4.6 Non-competition Issues

The TCA does not take non-competition issues such as industrial policies, national security, foreign investment, employment or other public interest issues into account when assessing a merger. Therefore, the TCA is independent while carrying out its duties. Article 20 of the Competition Law implies that no organ, authority, entity or person can give orders or directives to affect the final decisions of the Board.

The TCA has so far kept its independence and impartiality in its enforcement activities in respect of both local and foreign investors. The merger control regulations also apply to foreign direct investments, given that there are no separate merger control regulations for foreign direct investments in Türkiye.

4.7 Special Consideration for Joint Ventures

Special consideration is given to joint ventures under the Turkish merger control regime. A joint venture must not have the object or effect of restricting competition between the parties and itself. Article 5 of the Competition Law defines that the parties may notify the non-full-function joint venture to the Board for individual exemption. Communiqué No 2010/4 provides individual exemption for full-function joint ventures if the joint venture has the object or effect of restricting competition between the parties and the joint venture.

The standard SIEC test applies to the full-function joint venture. In addition, the notification form includes a certain section that is aimed at collecting information to assess whether the joint venture will lead to co-ordination. Article 13/3 of Communiqué No 2010/4 provides that the Board should carry out an individual exemption review on notified joint ventures that emerge as an independent economic unit on a lasting basis but have as their object or effect the restriction of competition among the parties or between the parties and the joint venture itself. The wording of the standard notification form also allows for such a review.

Non-full-function joint ventures are not subject to merger control but may fall under Article 4, which prohibits restrictive agreements. The parties may conduct a self-assessment to see if the non-full-function joint venture fulfils the conditions for individual exemption.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The Board may render either a clearance or a prohibition decision. However, it may also decide to give a conditional approval.

The Board has broad powers during the investigation stage. If it determines that the transaction may violate the Competition Law, the Board may notify the undertaking (or associations of undertakings) concerned of a decision regarding the actions to be taken or avoided so as to establish and maintain competition before infringement occurs. The Board may also forward its opinion on how to terminate such infringement.

The Board can re-examine a clearance decision at any time. It may subsequently decide on prohibition and the application of other sanctions for a merger or acquisition if:

- the clearance was granted based on incorrect or misleading information from one of the undertakings; or
- the obligations provided in the decision are not complied with.

For there to be a prohibition decision, the Board must show that the transaction could significantly impede competition. In cases of conditional clearance, the Board must show that the transaction would produce these effects in the absence of the relevant structural and/or behavioural remedies.

5.2 Parties' Ability to Negotiate Remedies

The parties are able to negotiate remedies according to Article 14 of Communiqué No

2010/4, which enables the parties to provide commitments to remedy substantive competition law issues of a concentration under Article 7.

The Remedy Guidelines require that the parties should submit detailed information on how the remedy would be applied and how it would resolve the competition concerns. The guidelines state that behavioural or structural remedies may be submitted by the parties and outline the acceptable remedies, which include:

- divestment in order to cease all kinds of connection with the competitors;
- remedies that enable undertakings to access certain infrastructure issues (eg, networks, IP, essential facilities); and
- remedies in respect of concluding/amending long-term exclusive agreements.

Typical Remedies

The number of cases in which the Board has requested divestment or licensing commitments or other structural or behavioural remedies has increased dramatically in the past few years. In practice, the Board is inclined to apply different types of divestment remedies. Examples of the Board's pro-competitive divestment remedies include divestitures, ownership unbundling, legal separation, access to essential facilities, and obligations to apply non-discriminatory terms.

Remedy Guidelines

The Remedy Guidelines include all steps and conditions for the enforcement of remedies.

The intended effect of the divestiture will take place only if the divestment business is assigned to a purchaser that can create an effective competitive power in the market. To make sure that the business will be divested to a suitable pur-

chaser, the proposed remedy must include the elements that define the suitability of the purchaser.

The approval of a possible purchaser by the Board is dependent on the following requirements.

- The purchaser must be independent of and not connected to the parties.
- The purchaser must have the financial resources, business experience and ability to become an effective competitor in the market through the divestment business.
- The transfer transaction to be carried out with the purchaser must not cause a new competitive problem. In the event that such a problem exists, a new remedy proposal will not be accepted.
- The transfer to the purchaser must not risk delaying the implementation of the commitments. The purchaser must be capable of obtaining all the necessary authorisations from the relevant regulatory authorities concerning the transfer of the divestment business.

The conditions may be revised on a case-by-case basis. In some cases, for example, an obligation may be imposed such that the purchaser is active in the sector rather than seeking financial investment.

As per the Remedy Guidelines, there are two methods that are accepted by the Board. The first is for a purchaser fulfilling the aforementioned conditions to acquire the divested business within a period of time following the authorisation decision and upon the approval of the Board. The second is the signing of a sales contract with a suitable purchaser before the authorisation decision (“fix-it-first”).

5.3 Legal Standard

Pursuant to the Remedy Guidelines, the parties must take the following principles into account when submitting proposed remedies.

- Parties must base their remedies on the legal and economic principles specific to the transaction at hand. Solutions must aim to protect the market from the potential effects of the transaction through the protection of the market’s competitive structure.
- The main aim of a remedy is to protect the pre-transaction level of competition.
- The remedy must protect competition, rather than protect the competitors.
- The conditions of the remedy must be clear and feasible.

The Board should only accept remedies that have been shown to eliminate the problem of significant restriction on competition. In addition, the Remedy Guidelines require the remedies to be capable of being implemented effectively as soon as possible, as market conditions may change before the implementation of the proposed remedy.

5.4 Negotiating Remedies With Authorities

The parties may submit proposals for possible remedies during either the preliminary review or the investigation process.

There have been several cases where the Board has accepted remedies or commitments (such as divestments) proposed to or imposed by the EC, as long as these remedies or commitments ease competition law concerns in Türkiye (eg, Synthomer plc/OMNOVA Solutions, 20-08/90-55, 6 February 2020; Obilet/Biletal, 21-33/449-224, 1 July 2021; and American Securities/Ferro, 22-10/144-59, 24 February 2022).

For further details, see **5.1 Authorities' Ability to Prohibit or Interfere With Transactions.**

5.5 Conditions and Timing for Divestitures

The Board may condition its approval decision on the observance of the remedies. The characteristics of the remedies are important when determining whether the parties may complete the transaction before the remedies are complied with. The remedies are different in nature – some a condition precedent for the closing, some an obligation that could only be complied with after closure – and the parties cannot complete the transaction unless the remedies are complied with before the closing.

The TCA imposes a turnover-based monetary fine of 0.05% of the turnover generated in the financial year preceding the date of the fining decision if the parties do not comply with the remedies. Where this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be used.

5.6 Issuance of Decisions

The Board serves the final decisions to the representative(s) of the notifying party/parties. Following the removal of any confidential business information, final decisions are also published on the website of the TCA.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

In an example of a conditional clearance case (Synthomer plc/OMNOVA Solution, 20-08/90-55, 6 February 2020), the Board granted its conditional approval to the transaction based on the commitments provided by the parties to the EC during its Phase II review. Moreover, in Nidec/Embraco (19-16/231-103, 18 April 2019), Bayer Aktiengesellschaft (18-14/261-126, 8 May

2018) and NV Bekaert (15-04/52-25, 22 January 2015), the Board granted its conditional approval to the transactions based on the commitments provided by the parties during its Phase II review. The Board also prohibited the acquisition of Beta Marina and Pendik Turizm by Setur (a subsidiary of Koç Holding, Türkiye's largest industrial conglomerate).

There are a few decisions in which behavioural remedies were recognised (eg, Bekaert/Pirelli, 15-04/52-25, 22 January 2015; Migros/Anadolu, 29/420-117, 9 July 2015). Nonetheless, the great majority of conditional clearance decisions rely on structural remedies (eg, Harris Corporation/L3 Technologies, 19-22/327-145, 20 June 2019; Nidec/Embraco, 19-16/231-103, 18 April 2019).

In some of these cases (eg, Cadbury/Schweppes, 07-67/836-314, 23 August 2007), the parties initially proposed purely behavioural remedies, which ultimately failed. However, in Luxottica/Essilor (18-36/585-286, 1 October 2018), certain structural and behavioural remedies were submitted to the TCA and the Board approved the transaction.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

The Board's approval of the transaction must also cover the restraints that are directly related to and necessary to enforce the transaction (Article 13(5) of Communiqué No 2010/4). Therefore, a restraint shall be covered to the extent that its nature, subject matter, geographic scope, and duration are limited to what is necessary to enforce the transaction.

General rules on ancillary restraints are defined in the Guidelines on Undertakings Concerned. The parties make a self-assessment as to whether a certain restriction could be deemed ancillary; therefore, the Board will not allocate a separate part in its decision to explaining the ancillary status of all the restraints. The Board may review the restraints per the parties' request and, if the ancillary restrictions are not compliant with the merger control regulation, may launch an Article 4 investigation.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

The Board is authorised to request information from third parties such as customers, competitors, complainants and other persons related to the transaction. During the review process, third parties may submit complaints about a transaction and request a hearing from the Board, provided that they prove their legitimate interest to do so. They may also challenge the Board's decision regarding the transaction before the competent judicial tribunal – again, provided that they prove their legitimate interest.

If the legislation requires the TCA to ask for another public authority's opinion, this would cut the review period, which would then start when the Board receives the public authority's opinion.

7.2 Contacting Third Parties

The Board frequently contacts third parties as part of its review process, where needed. This is usually in a written form; oral communication with third parties only takes place in exceptional circumstances. There are a limited number of decisions where the Board has applied a market

test to the proposed remedies (eg, *Mars Sinema v AFM*, 11-57/1473-539, 17 November 2011). Although the Board does not tend to conduct a proper economic analysis, it does make a comprehensive assessment based on the content of the proposed remedies nonetheless (eg, *Anadolu v Moonlight Capital*, 15-29/420-117, 9 July 2015).

7.3 Confidentiality

Communiqué No 2010/4 introduces a mechanism that requires the TCA to publish notified transactions on its official website, including only the names of the undertakings concerned and their areas of commercial activity. Once the parties have notified a transaction to the TCA, the existence of a transaction is no longer a confidential matter.

Communiqué No 2010/3 on the Regulation of Right to Access to File and Protection of Commercial Secrets ("Communiqué No 2010/3") is the main legislation that regulates the protection of commercial information. Pursuant to Communiqué No 2010/3, undertakings must identify and justify information or documents as commercial secrets.

Undertakings are obligated to request confidentiality from the Board in writing and to justify their reasons for the confidential treatment of the information or documents. The general rule is that if confidentiality is not requested, then the information and documents are accepted as non-confidential.

As mentioned in **5.7 Issuance of Decisions**, the reasoned decisions of the Board are published on the website of the TCA once confidential business information has been removed. Moreover, the Board and personnel of the TCA are bound by a legal obligation not to disclose any trade

secrets or confidential information they have acknowledged during the course of their work.

In the event that the Board decides to have a hearing during the investigation, hearings at the TCA are – in principle – open to the public. However, in order to protect public morality or trade secrets, the Board may decide that the hearing must be held in camera.

Article 15(2) of Communiqué No 2010/3 implies that the TCA may not consider confidentiality requests related to information and documents that are necessary evidence to prove the infringement of competition. In such cases, the TCA can disclose information and documents that could be classed as trade secrets – provided it takes into account the balance between public interest and private interest and makes the disclosure in accordance with the proportionality criterion.

7.4 Co-operation With Other Jurisdictions

The TCA is authorised to contact certain regulatory authorities around the world, including the EC, in order to exchange information. Authorities are not obliged to seek the parties' permission to share information with each other.

Article 43 of Decision No 1/95 of the EC–Türkiye Association Council (Decision No 1/95) empowers the TCA to notify the EC and request that the Directorate-General for Competition applies relevant measures if the Board believes that transactions realised in EU territory adversely affect competition in Türkiye. This provision grants reciprocal rights and obligations to the parties (EU–Türkiye) and, thus, the EC has the authority to ask the Board to apply the necessary measures to restore competition in the relevant markets.

In addition, the TCA's research department makes periodical consultations with relevant domestic and foreign institutions and organisations. In the past, the EC has been reluctant to share any evidence or arguments that the TCA had explicitly requested on a limited number of occasions.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Parties can appeal the Board's final decisions before the administrative courts of Ankara, including decisions on interim measures and fines. Third parties can also challenge a Board decision before the competent administrative courts, provided that they have a legitimate interest. Decisions by the Board are classed as administrative acts and, as such, legal actions against them shall be pursued in accordance with Turkish administrative procedural law. The judicial review comprises both procedural and substantive review.

Filing an administrative action does not automatically stay the execution of the Board's decision. However, at the request of the plaintiff, the court may – by providing its justifications – decide on a stay of execution if the execution of the Board's decision is highly likely to:

- cause serious and irreparable damages; and/or
- be against the law (ie, upon showing of a *prima facie* case).

Judicial Review Period

Administrative litigation cases are subject to judicial review before the regional courts. This creates a three-level appellate court system con-

sisting of administrative courts, regional courts and the High State Court.

Regional Courts

The regional courts will investigate the case file, on both procedural and substantive grounds, and make their decision based on the merits of the case. The regional court's decision will be considered final in nature.

Pursuant to Article 46 of the Administrative Procedure Law, the decision of the regional court will be subject to the High State Court's review in exceptional circumstances. In such a case, the High State Court may decide to uphold or reverse the regional court's decision. If the decision is reversed by the High State Court, it will be remanded back to the deciding regional court, which will in turn issue a new decision that takes the High State Court's decision into account.

8.2 Typical Timeline for Appeals

The parties should file an appeal case within 60 calendar days of receiving the reasoned decision of the Board. The judicial review period before the Ankara administrative courts of first instance usually takes about 12 to 24 months. The appeal period before the High State Court usually takes about 24 to 36 months. Court decisions in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts 24 to 30 months.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties can challenge a Board decision before the competent administrative courts, provided they have a legitimate interest.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

As previously mentioned in 4.6 **Non-competition Issues**, merger control regulations under the Turkish competition law regime are also applicable to foreign direct investments. There are no separate merger control regulations for foreign direct investments.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

Communiqué No 2022/2 was published in the Official Gazette on 4 March 2022 and entered into force on 4 May 2022. Communiqué No 2022/2 raised the jurisdictional turnover thresholds under Article 7 of Communiqué No 2010/4.

Two of the most significant developments resulting from Communiqué No 2022/2 are the introduction of a threshold exemption for undertakings active in certain markets/sectors and an increase in the applicable turnover thresholds that trigger mandatory merger control filing before the TCA.

Communiqué No 2022/2 does not seek a Turkish nexus in terms of the activities that render the threshold exemption. In other words, the threshold exemption would apply to a target company that is active in the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies anywhere in the world, provided that the target company either:

- 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 above-mentioned ones.

Accordingly, for the exemption on the local turnover thresholds to become applicable, Communiqué No 2022/2 does not require the target company to:

- generate revenue from customers located in Türkiye;
- conduct R&D activities in Türkiye; or
- provide services to the Turkish users concerning the above-mentioned fields.

Concentrations related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies are expected to be more closely scrutinised by the TCA.

10.2 Recent Enforcement Record

The TCA has published the Mergers and Acquisitions Insight Report for 2023. To summarise, the Board assessed 217 transactions in 2023. The number of assessments in 2023 was higher than the average number of assessments made between 2013 and 2020. Only one transaction was taken under at Phase II and the review process for this transaction is ongoing. The Board did not prohibit any transaction in 2023.

10.3 Current Competition Concerns

A notable decision rendered by the Board in 2023 was the Board's the Anadolu Etap İçecek/CCI decision (23-17/318-106, 6 April 2023). The Anadolu Etap İçecek/CCI decision 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").

The Board noted that the competitive environment in the market would not change to a substantial degree even in the worst-case scenario, in which Anadolu Etap İçecek directs all of its production to CCI, considering that most of Anadolu Etap İçecek's total production is sold at export markets and most of its domestic sales are made to CCI.

The Board concluded that the key criteria of actual or potential customers for preferring a supplier are product variety and prices, and CCI would not have an incentive for customer foreclosure. The Board decided that the transaction will not significantly impede the effective competition in terms of the vertically affected markets in Türkiye and cleared the transaction.

In Activision Blizzard/Microsoft (23-31/592-202, 13 July 2023), the transaction concerns a reverse triangular merger in which Anchorage Merger Sub Inc ("Merger Sub"), a solely controlled subsidiary of Microsoft established exclusively for the purpose of realising the transaction, will be merged with Activision Blizzard under Activision Blizzard, after which Merger Sub will cease to exist and Activision Blizzard will be the surviving company. As a result of the transaction, Activision Blizzard will become a 100% subsidiary of Microsoft and will be under its sole control.

The Board assessed that the transaction will not result in a significant impediment of competition in terms of both unilateral effects and co-ordination-inducing effects.

The Board concluded that it would not make economic sense for Microsoft to impose input foreclosure, considering the market shares in

the console hardware market, Sony's leading position in the market, the significance of CoD on Xbox, and the importance of the cross-play feature. Microsoft has also committed to provide CoD for Nintendo consoles for ten years. Additionally, it was assessed that Microsoft needs third-party games to continue its console hardware activities and therefore will not have any customer foreclosure incentive.

As for unilateral effects in the cloud gaming services market, the Board evaluated that even if Microsoft begins to offer cloud gaming services in Türkiye, input foreclosure would not be economically feasible for Microsoft in light of its global share and the presence of many large and powerful players in the cloud gaming services market, while the parties' limited share in the market for game development and publishing and the fact that Microsoft generates revenue largely through the games of third-party developers would result in the inability of customer foreclosure.

Finally, in terms of the co-ordination-inducing effects of the transaction, the Board determined that the presence of a large number of players operating in the market will make it difficult to establish co-ordination among undertakings and to discipline non-compliant undertakings as a result of a possible co-ordination. The Board held that the transaction will not significantly impede competition and may be cleared.

Trends and Developments

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Balcıoğlu Selçuk Ardiyok Keki Attorney Partnership (BASEAK) is an Istanbul-based full-service law firm led by experienced professionals and founded in 2007. BASEAK's practice areas include competition and antitrust, corporate, banking and finance, energy, M&A, arbitration, dispute resolution, IP, joint ventures, and regulatory. Drawing on broad experience gained at Turkish and global law firms and international organisations, the firm has a strong team of more than 130 lawyers and economists (includ-

ing 18 partners), each well-equipped to provide creative and diligent transaction counselling and cutting-edge legal services. BASEAK assists both national and multinational companies subject to public institutions and government interventions and, with its in-depth experience in competition rules, public policy and regulations, advises clients on sector-specific risks and liabilities and provides support on the planning and monitoring of compliance with public policies.

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The Turkish Competition Authority's Year in Review

The Turkish Competition Authority (TCA) had an active year in 2023, reviewing a total of 217 M&A transactions. Although the merger cases handled by the TCA have decreased by 12% compared with the previous year, it has remained close to the average number of cases reviewed during the past ten years. This reduction in the number of merger cases is closely related to the change in the thresholds within the scope of the Amendment of the Communiqué Concerning the Mergers and Acquisitions Calling for the Authorisation of the Competition Board (the “Merger Regulation”) in 2022. Accordingly, after ten years of application, the TCA increased the turnover thresholds determining which transactions must be notified to the authority to be valid. Considering the increasing appreciation of foreign currencies against the Turkish lira throughout the years (especially after 2021), the previous thresholds had become markedly inadequate, leading to diminished effectiveness in identifying transactions with the risk of creating competitive concerns. On a separate note, even though the turnover thresholds seem to have been raised, they have actually been only slightly increased above their foreign currency equivalents for 2010.

Consequently, a sharp increase in notified transactions was experienced in 2021. It was expected that the updated thresholds would significantly reduce the number of transactions and, indeed, the declining trend in transaction numbers observed in 2022 continued to decrease throughout the following year at a diminishing rate. To illustrate, while the number of notified transactions dropped by 20% in 2021, the number of transactions decreased by 12% in 2023.

On the other hand, the transaction value of the notified mergers in 2023 increased tenfold in

Turkish lira and sevenfold in dollar terms. The total transaction value of the mergers reviewed in 2023 is approximately USD2.416 billion. Among these, 94 transactions involved target companies based in Türkiye. The combined value of these transactions reached approximately TRY162.6 billion (USD6.85 billion). Additionally, the TCA scrutinised three privatisation deals with a collective transaction value of about TRY425 million (USD18 million).

Consequently, the total value of M&A activities involving Turkish companies in 2023 was around TRY163 billion (USD6.87 billion) across 97 transactions. In 2023, investors from Germany led foreign investments in Turkish target companies, participating in eight transactions. They were followed by Dutch investors, who were involved in five transactions. By comparison, in 2022, Dutch and UAE investors tied for the lead – each initiating five transactions.

Foreign-to-foreign mergers fall under the jurisdiction of the Act No 4054 on the Protection of Competition when they impact relevant markets within Türkiye. This applies regardless of whether the involved parties have a physical presence in Türkiye. Sales within Türkiye can necessitate notification if the turnover thresholds are met. Even without local presence in Türkiye, a transaction could still be governed by Turkish competition laws if there is an effect on the Turkish market. This kind of foreign-to-foreign transaction is considered an atypical case. In 2023, the TCA examined 113 international (foreign-to-foreign) M&A transactions that did not involve direct investments in Turkish companies. Six transactions were deemed outside the scope, owing to lack of control changes. In 2023, the TCA conducted a final review of one transaction. As Türkiye progresses through the second quarter of 2024, it is noted that already two

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transactions are currently under final review. In this regard, there appears to be a growing focus on scrutinising M&A more closely. Although the thresholds were increased in 2022, the number of transactions notified to the TCA remained considerably high at 217.

The period of review is approximately 13 days from the last submission date (the day of the responses for the last request for information received). The review period was 15 days in 2022, 18 days in 2021 and 11 days in 2020. In this respect, it can be stated that the duration of the reviews have not significantly changed throughout the years.

One transaction in 2023 was taken to final examination (Phase II), while the TCA cleared the above-mentioned 217 transactions.

Rigorous merger review process: keeping pace with dynamic markets

The TCA has embraced a significantly more stringent approach in recent years towards the enforcement of competition law. An increasing number of investigations and a stricter approach towards resale price maintenance, as well as online sales bans, no-poaching agreements, intensified legislative efforts, and the heightened enforcement of administrative fines arising from hindrance of on-site inspections demonstrate the TCA's determination to fight against anti-competitive behaviour. The merger control process and principals have also received their share of this determination.

Within this context, the Amendment of the Merger Regulation in 2022 aims to scrutinise “killer acquisitions”. It introduced a unique concept of “technology undertaking” to capture the acquisition of start-ups in the digital sector. This concept can be considered a reflection of the TCA's

long-standing focus on digital markets. The TCA became one of the leading competition authorities that intensely scrutinise the digital markets with investigations and the preparation of a legislation to ex ante regulate them. Indeed, in one of his last interviews, the president of the TCA emphasised that the introduction of technology exhibits the TCA's commitment to prevent anti-competitive practices in digital markets by not preventing innovation.

The technology undertaking concept includes biotechnology, pharmacology, agricultural chemicals, digital platforms, software, and fintech. The president of the TCA highlighted that the Amendment of the Merger Regulation has equipped the TCA with an effective tool to supervise transactions that may limit competition when larger incumbents acquire start-ups or emerging firms. Furthermore, he underlines that the TCA may consider expanding the scope according to the need forced by the changing market conditions and dynamics, yet the TCA does not perceive a need to include new markets under this special regime at this stage.

In addition to the notification thresholds and the introduction of technology undertaking, related merger guidelines have been updated in line with the significant reduction of effective competition tests. In that regard, the revised guidelines cover the recent discussion on merger control, such as potential competition, competition proximity analysis, and damage theories pertinent to digital and innovation-driven markets. Moreover, consumer data on competition – which has become increasingly significant with digitalisation – was integrated into the relevant guidelines.

The TCA president also touched upon sustainability in merger control, one of the most recent discussions. He suggested that the TCA closely

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monitors and contributes to the discussions yet awaits reaching a certain level of maturity to integrate sustainability into the merger control regime.

The recent legislative changes suggest that the TCA prioritises recent discussions in merger control, such as killer acquisitions (particularly in digital markets), potential competition, and consumer data. Additionally, the high-level statements from the TCA indicated their close monitoring of developments in merger control discussions and expressed readiness to enact new adjustments should market conditions warrant. Nevertheless, the TCA appended that, at present, the TCA does not perceive such a requisite.

Finally, the Amendment of the Merger Regulation in 2022 is expected to begin to fully manifest its effects in 2023. The increased thresholds are anticipated to reduce the number of notified transactions, whereas the concept of technology undertaking would have an upwards impact on the numbers. The transaction numbers show that the downwards trend stemming from the thresholds is indicated to be more markedly pronounced. On the other hand, there has hardly been a decision to observe the implications of the newly adopted approaches in the guidelines.

Technology undertakings decisions

Reviewing the merger cases in 2023 provides some insightful examples through which to interpret the technology undertaking concept. For the transactions involving the acquisition of a technology undertaking in Türkiye, the TCA does not require the local threshold (around USD7.8 million) to be exceeded for the transaction notification. This is a unique regulation with no equivalent in other jurisdictions. The concept was defined as “undertakings operating in the

fields of digital platforms, software and game software, financial technologies, biotechnology, pharmacology, agricultural chemicals, and health technologies, or their related assets”. The exemption from the local threshold is applied on the condition that these companies either operate in the Turkish market, have R&D activities in the Turkish market, or provide services to users located in Türkiye. Therefore, the unique threshold has two aspects that present some ambiguities in practice requiring clarification within the case law, which are:

- the field of operation; and
- local nexus.

Reviewing the decisions taken in 2023 reveals a total of 50 decisions, with the following subject distribution:

- software and/or game software – 28;
- digital platforms – 8;
- biotechnology/pharmacology/health technologies – 13; and
- agricultural chemicals – 1.

The main question regarding the operation field concerns the extent to which the engagement with the above-mentioned activities is regarded by a company as being qualified as a technology undertaking. The answer is challenging in today’s business world, where technology and software are deeply integrated into business. Most of the above-mentioned cases mentioned were straightforward, with the targets’ primary activities aligning with the specified technology areas.

However, in the Cinven/IFGL decision in 2022 (Decision No 22-23/372-157 of 18 May 2022), the TCA classified the operation field as “technology undertakings” – even though the areas

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of activity of the target did not directly conform to these definitions. The target, IFGL, primarily operates by providing savings and investment products to individual investors through life insurance packages via a local broker in Türkiye. Although only a small part of IFGL's activities in Türkiye's life insurance sector, it has been reported that IFGL offers services to its digitally accessible customers through digital platforms. In this context, approximately 230 registered users in Türkiye have access to and use these digital platforms. Owing to this limited digital platform activity, IFGL has been classified as a technology undertaking. However, this broad interpretation regarding the area of activity was not observed in the decisions made in 2023, suggesting that Cinven/IFGL decisions are an exemption rather than an example of the general approach of the TCA.

The most noteworthy aspect of these decisions is the inaugural decision concerning "agricultural chemicals". In the transaction where Sabic Agri-Nutrients acquired joint control of ETG Inputs (Decision No 23-05/48-18 of 19 January 2023), the target company ETG Inputs was classified under "agricultural chemicals". This classification was based on the target's activities involving the importing, blending and distributing fertilisers.

As regards meeting the requirement of operating in Türkiye (or local nexus), it has been deemed sufficient for undertakings to be indirectly active in addition to their direct activities. In the TCA's Meltwater decision (Decision No 23-16/276-95 of 30 March 2023), the target undertaking to provide services to Türkiye not directly but through its other global units was considered operating in Türkiye. The TCA approached the issue similarly in the BAM Digital decision (Decision No 23-47/885-312 of 5 October 2023). The target

undertaking was deemed to qualify for local nexus based on possible future operations in the country despite not currently being active in Türkiye. As seen in the TCA's recent jurisprudence, the condition for operating in Türkiye is being interpreted broadly, and this approach appears to continue. It should be noted that this broad interpretation creates significant challenges, particularly for small-scale companies and start-ups. The main guide in determining those undertakings that do or do not fall within the scope of operations in Türkiye is the decisions that render undertakings outside this broad definition. However, given that there is no reasoning for the decisions ruling that undertakings do not fall within this definition, ambiguity arises. This lack of clarity underscores the need for comprehensive guidelines to ensure consistent and fair application of the rules.

Transactions under final examination or cleared with commitments

The TCA, which is responsible for reviewing M&A that may result in a significant lessening of competition in the market, may take M&A under a final review (Phase II) if there is a need to deepen the assessment in terms of their impact on the competitive structure of the market. In 2023, one transaction was taken under final review. The TCA has officially published on its website that the acquisition of the sole control of Stellantis Automotive by Tofaş Türk Otomobil Fabrikası AŞ – a leading Turkish automobile manufacturer that is a joint venture (JV) of Fiat-Chrysler Automobiles and Koç Holding (the latter of which has a similar JV with Ford) – is under final examination, as the review process has not yet been completed.

Even though only one transaction was under final examination in 2023, the TCA has announced that two more transactions would be reviewed

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under final examination in the first quarter of 2024. The first transaction taken to final examination is the acquisition of Metser Demir Çelik's sole control by Speyside I GP through Opta Germany. Metser Demir Çelik is a local Turkish bobbin producer, while Opta Germany is a globally integrated processor, distributor and seller of industrial minerals. The second transaction within this scope is the acquisition of Kartek Holding AŞ's sole control by Param Holding International. Both companies operate in the fintech sector.

The other group of decisions that is worth mentioning are the examples involving the approval of the transaction within the framework of the commitments proposed by the notifying parties, which will eliminate the competitive problems that may arise from the transaction. One of these is the Fraport TAV decision issued in mid-2023 (Decision No 23-22/426-142 of 12 May 2023). The transaction in question concerns transferring the construction and operation rights of the fuel supply and storage facilities that Fraport TAV will have at Antalya Airport during the new concession period to Potas Akdeniz. In its assessment, the TCA stated that it has various reservations on issues such as access to storage facilities and pricing; on the other hand, within the scope of the commitments, the TCA stated that:

- all licensed suppliers will have access to the facilities without any time or quantity limitations; and
- the commitments regarding non-discrimination against any undertaking in terms of price and other practices ensure that competing fuel suppliers will not be disadvantaged in competition against Potas Akdeniz.

Another decision approved upon commitments is the DFDS-Ekol acquisition case mentioned

in Issue 2 of the TCA's Competition Newsletter. Accordingly, DFDS operates extensively in Europe, spanning maritime transportation, terminal management and land logistics. In Türkiye, its subsidiary, DFDS Türkiye, manages the Pendik Ro-Ro Port and provides Ro-Ro vessel services. Ekol, on the other hand, offers land, air and sea transportation services, including intermodal transportation and logistics. Through its subsidiary, EUTS BV, Ekol operates internationally. When DFDS proposed acquiring Ekol's business line, concerns arose regarding potential information sharing and discrimination against Ekol post-acquisition. To address these, a "Chinese Wall" will be established to prevent sensitive information exchange. DFDS commits to maintaining its reservation and embarkation procedures to ensure fairness. These behavioural commitments will initially last for three years, with the option for an extension if needed, thereby satisfying the regulatory concerns surrounding the acquisition according to the assessment of the TCA.

Finally, Elon Musk's acquisition of Twitter (Decision No 23-12/197-66 of 2 March 2023) is worth mentioning. The decision attracted significant media coverage due to the monetary fine attached to the case. Although the TCA approved the acquisition of the sole control of Twitter Inc by SpaceX owner Elon Musk, it imposed a fine of one per thousand of its 2022 revenue in Türkiye, owing to the fact that this transaction was not notified to the TCA and took place without the approval of the TCA. The decision stated that the amended Merger Regulation should be applied to the case, as the transaction was closed after the Amendment in the Merger Regulation entered into force. As such, Twitter is a technology undertaking, and the local threshold should not be sought for notification. Given that the global turnover of Elon Musk exceeds

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the global threshold, the transaction should have been notified to the TCA; however, as it took place without approval, the fine for gun-jumping was imposed.

Conclusion

The TCA's 2023 is critical when it comes to extracting insights about the future approach of the TCA towards merger control, as the impacts of the recent extensive amendment of Turkish merger control after ten years only began to manifest fully in 2023. The increased thresholds reduced the workload of the TCA as anticipated – although the exemption for technology undertakings brought 50 cases in front of the TCA. The decisions made by the technology department generated a certain degree of clarification regarding the scope of the activity and the local nexus. The level of integration for the software or platform to be qualified as technology undertakings still requires more elucidation in the light of case law; it is much more apparent that the TCA has a broad interpretation of operating in Türkiye (local nexus).

The Amendment of the Merger Regulation itself and the high-level statements suggest stringent enforcement in merger control and investigations, particularly in killer acquisitions and digital markets. The TCA closely follows the current discussion of merger control (eg, regarding sustainability, and the needs of the markets), yet it signalled that no further amendment will be made to the regime in the short run.

The increasing number of Phase II cases at the beginning of 2024 also demonstrates stringent merger control enforcement. Yet, there were no cases in which the TCA refused, and commitments were used as an effective tool in the merger control regime to ease the TCA's concerns. The TCA's decisions in 2023 also showed that the TCA has no tolerance for gun-jumping.

In light of the foregoing, the authors believe that guidance on technology undertakings would clarify the contextual ambiguity regarding the operation field and location clause. Moreover, incorporating pre-merger negotiations into the merger control system would signify a positive advancement in the regulatory framework.

Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.763

- 1.1 Merger Control Legislation p.763
- 1.2 Legislation Relating to Particular Sectors p.764
- 1.3 Enforcement Authorities p.765

2. Jurisdiction p.765

- 2.1 Notification p.765
- 2.2 Failure to Notify p.765
- 2.3 Types of Transactions p.766
- 2.4 Definition of "Control" p.768
- 2.5 Jurisdictional Thresholds p.768
- 2.6 Calculations of Jurisdictional Thresholds p.768
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.769
- 2.8 Foreign-to-Foreign Transactions p.770
- 2.9 Market Share Jurisdictional Threshold p.770
- 2.10 Joint Ventures p.770
- 2.11 Power of Authorities to Investigate a Transaction p.770
- 2.12 Requirement for Clearance Before Implementation p.771
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.771
- 2.14 Exceptions to Suspensive Effect p.771
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.771

3. Procedure: Notification to Clearance p.771

- 3.1 Deadlines for Notification p.771
- 3.2 Type of Agreement Required Prior to Notification p.772
- 3.3 Filing Fees p.772
- 3.4 Parties Responsible for Filing p.772
- 3.5 Information Included in a Filing p.772
- 3.6 Penalties/Consequences of Incomplete Notification p.773
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.773
- 3.8 Review Process p.773
- 3.9 Pre-notification Discussions With Authorities p.774
- 3.10 Requests for Information During the Review Process p.774
- 3.11 Accelerated Procedure p.774

4. Substance of the Review p.774

- 4.1 Substantive Test p.774
- 4.2 Markets Affected by a Transaction p.775
- 4.3 Reliance on Case Law p.775
- 4.4 Competition Concerns p.775
- 4.5 Economic Efficiencies p.775
- 4.6 Non-competition Issues p.775
- 4.7 Special Consideration for Joint Ventures p.776

5. Decision: Prohibitions and Remedies p.776

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.776
- 5.2 Parties' Ability to Negotiate Remedies p.777
- 5.3 Legal Standard p.777
- 5.4 Negotiating Remedies With Authorities p.777
- 5.5 Conditions and Timing for Divestitures p.777
- 5.6 Issuance of Decisions p.777
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.778

6. Ancillary Restraints and Related Transactions p.778

- 6.1 Clearance Decisions and Separate Notifications p.778

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.778

- 7.1 Third-Party Rights p.778
- 7.2 Contacting Third Parties p.778
- 7.3 Confidentiality p.779
- 7.4 Co-operation With Other Jurisdictions p.779

8. Appeals and Judicial Review p.779

- 8.1 Access to Appeal and Judicial Review p.779
- 8.2 Typical Timeline for Appeals p.780
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.780

9. Foreign Direct Investment/Subsidies Review p.780

- 9.1 Legislation and Filing Requirements p.780

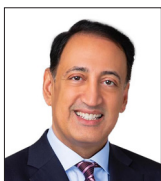
10. Recent Developments p.780

- 10.1 Recent Changes or Impending Legislation p.780
- 10.2 Recent Enforcement Record p.780
- 10.3 Current Competition Concerns p.780

GLA & Company provides strategic, cost-effective and forward-thinking legal representation for companies seeking to do business in the Middle East. The firm's practice encompasses all legal issues companies will likely encounter in the global business environment. With extensive experience advising clients in the Gulf Cooperation Council (GCC) states of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE, it offers unique insights for companies seeking to establish or expand business operations in

these nations. The firm's emphasis on deals is to get them cleared with the local competition authority and it has excellent relationships with regulators in the GCC. GLA has been successful in securing no objections from these bodies to clear deals. The firm's lawyers are intimately familiar with the governing sources of authority and routinely work with the relevant agencies, departments and committees on behalf of clients.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Four pieces of legislation should be read together to understand the framework of antitrust and merger control in the UAE. This legislation significantly interlinks to display the bigger picture for complying with the antitrust and merger control regulatory requirements. The following list details the relevant legislation, and can be called the “UAE Competition Legislation”:

- Federal Law No 36 of 2023 concerning the Regulation of Competition (the “Competition Law”);
- Cabinet Resolution No 37 of 2014 – Implementing Regulations of the Competition Law (the “Competition Regulations”);
- Cabinet Resolution No 13 of 2016 on the Rates and Rules Applying to the Competition Law (the “Competition Threshold Rules”); and
- Cabinet Resolution No 22 of 2016 on Unified Definition of Small and Medium Enterprises (the “SME Definition Decision”).

It is important to note that the implementing regulations of the Competition Law have not yet been issued. Consequently, according to Article 39 of the Competition Law, the existing Competition Regulations and any other resolutions related to the previous competition law will remain in effect until their replacements are issued. The authors anticipate the new implementing regulations to be issued shortly, as the Ministry must issue such regulations within six months from the date the Law took effect.

The Competition Law and Competition Regulations regulate merger control, prohibitions on antitrust arrangements, and abuse of a dominant position. Abuse of a dominant position includes

predatory pricing, discriminating among customers without objective justification, refusal to supply, limiting production, failure to satisfy demand, and tying arrangements.

The Competition Law further provides that the aim of the law is to protect and enhance competition in the UAE and to combat monopoly practices through:

- providing a stimulating environment for businesses to enhance efficiency, competitiveness and the interest of consumers, and to achieve sustainable development in the UAE; and
- sustaining a competitive market governed by the market’s mechanisms through the principle of economic freedom by way of banning restrictive agreements, banning the businesses and actions that lead to the abuse of a dominant position, controlling the operations of economic concentrations, and avoiding everything that may create prejudice within, limit, or prevent competition.

Meanwhile, the Competition Threshold Rules define what is meant by “dominance” and set out the relevant antitrust and merger control filing thresholds.

The relevance of the SME Definition Decision, on the other hand, is limited to defining small and medium enterprises exempt from the application of the Competition Law.

It should be noted that both the Competition Law and the Competition Regulations are, theoretically speaking, largely based on EU Competition Law and reflect many elements of the international best practice norms (including the US). However, it could also be said that the law would only apply if the thresholds under the Competi-

tion Threshold Rules are met, which are higher than most (if not all) of the jurisdictions in the Gulf and Middle East regions.

It is important to highlight that antitrust and merger control rules and restrictions under the UAE Competition Legislation (to be discussed later) do not apply to undertakings in Abu Dhabi Global Market (ADGM) or Dubai International Financial Centre (DIFC). This is despite Article 3 of the Competition Law providing that the law shall apply to all undertakings with regards to their economic activities in the UAE and exploitation of intellectual property rights inside or outside the UAE, thereby affecting competition in the UAE.

The reason why the UAE Competition Legislation does not apply to undertakings in such financial free zone areas, can be legally justified via Article 121 of the UAE Constitution, which enabled the UAE federation to create financial free zones in the UAE, and most importantly, to exclude the application of certain federal laws in these financial free zones. Furthermore, Federal Law No 8 of 2004 on Financial Free Zones in the UAE further provides that financial free zones are exempt from all federal civil and commercial laws.

Neither ADGM nor DIFC have separate legislation to regulate antitrust or merger control. Accordingly, it is safe to assume that the UAE Competition Legislation applies only to onshore UAE undertakings and exclude financial free zone undertakings unless the activities or transactions taking place via an undertaking based in either of the two financial free zones (ie, ADGM or DIFC) affect the competition in the UAE mainland, whether directly, indirectly, or through an onshore-based subsidiary.

1.2 Legislation Relating to Particular Sectors

Sectors and Exemptions

The UAE Competition Legislation applies to all undertakings operating in the UAE, as well as to activities that take place abroad and have an affect on competition in the UAE commercial activities and transactions for both local and international undertakings.

It should be noted that the following are exempt from the application of the UAE Competition Legislation.

- Any agreement, practice or action related to a specific good or service in whose respect the authority to regulate competition rules is granted, by virtue of another law that includes provisions related to regulating the rules and procedures for considering anti-competitive practices and cases of their exemption and economic concentration operations, to a sectoral regulatory body, unless the sectoral regulatory body requests in writing the ministry to take over this matter, in whole or in part, and the ministry agrees to that.
- Establishments owned by the federal government and that are determined by a cabinet decision based on the minister's proposal after coordination with the concerned authority.
- Establishments owned by one of the Emirates' governments, operating within the Emirate, and which are determined by a decision issued by the local government.

Small and Medium Enterprises (SMEs)

The Competition Law repealed the exemption of the SMEs which was stated in the Law No 4 of 2012.

1.3 Enforcement Authorities

The UAE Competition Legislation provides that the responsibility for enforcement lies with the Competition Department at the UAE Ministry of Economy (the “Competition Department”). The performance of the Competition Department is supervised by the Competition Regulation Committee, chaired by the Undersecretary of the Ministry of Economy (the “Competition Committee”).

Both the Competition Committee and the Competition Department report to the UAE Federal Minister of Economy (the “Minister”), who heads the UAE Federal Ministry of Economy (the “Ministry”).

2. Jurisdiction

2.1 Notification

Pursuant to the Competition Law, economic concentration is realised if:

- the total annual sales value of the parties in the relevant market during the last fiscal year exceeds the amount determined by the UAE council of ministers; and
- the total share of the parties exceeds the percentage of the total transactions in the relevant market during the last fiscal year determined by the UAE council of ministers.

The implementing regulations of the new Competition Law will establish the guidelines for submitting economic concentration applications, the required documents that shall be attached thereto, and the mechanisms for examining the application. Since these implementing regulations have not yet been issued, we must adhere to the Competition Threshold Rules. These rules specify that, economic concentration, such as

total or partial alienation, merger, or acquisition, is realised if the total transactions of a certain undertaking in the relevant market are more than 40%.

For activities or transactions meeting such a threshold, filing the notification becomes compulsory. Otherwise, there is no requirement for a voluntary notification if such a threshold is not met.

For the purposes of filing the notification, the filing is made to the Competition Department and attached to it, amongst other things, is an economic report explaining the positive impact of the required exemption. The Competition Department will then assess the requested exemption and submit a report to the Committee. The Minister of Economy, who will decide on the requested exemption within 90 days of notification of the request for exemption. This deadline may be extended by an additional 45 days. If the Minister does not issue his decision by the specified deadline, the notified activity or transaction will be deemed by law to be exempt.

On the other hand, no notification is required if the activity or transaction is relevant to “Sectors and Exemptions” in **1.2 Legislation Relating to Particular Sectors**.

2.2 Failure to Notify

Failure to notify a reportable economic concentration transaction may result in a fine between 2% and 10% of the turnover generated in the UAE by the relevant undertaking during the last financial year or, if such data is not available, a fine will be imposed between AED500,000 and AED5 million.

Nevertheless, as far as we are aware, the Ministry has never disclosed any penalties that have

been imposed for violating an economic concentration transaction. Penalties imposed by the Ministry usually become public when disclosed via the Ministry's official channels (ie, websites and social media pages) in addition to the local newspapers, which are likely to pick up immediately on such news.

2.3 Types of Transactions

Competition Law

The Competition Law has three defined terms key to understanding the regulatory framework of merger control in the UAE.

The first definition is “relevant market”, which means, “The market that is based on two elements:

- Concerned Products – the product or service or all products or services which are, in view of their prices, characteristics and uses, interchangeable to meet a particular need of the consumer.
- Specific Geographical Location – it means the physical or digital place where supply and demand converge for a product or service and where competition conditions are similar or homogeneous.”

The second is the definition of “economic concentration”, which is “any act resulting in a total or partial transfer (merger or acquisition) of a property, usufruct rights, rights, stocks, shares or obligations from an undertaking to another, empowering the undertaking or a group of undertakings to directly or indirectly control another undertaking or another group of undertakings”.

As mentioned previously and pursuant to the Competition Threshold Rules, economic concentration exists if the relevant person(s) or

undertaking(s) exceeds 40% of the total transactions of the relevant market in the UAE. The definition of economic concentration is wide and includes several types of transactions, such as internal restructuring or reorganisation. The Competition Law does not consider control as a determining factor for triggering the regulatory requirement for notification. Rather, the determining factor will always be whether or not such transactions create dominance or economic concentration.

Transactions not involving the transfer of shares or assets (such as shareholders' agreements, and changes to articles of association) can still be caught under the auspices of the UAE Competition Legislation if considered a “restrictive agreement” or if it leads to an abuse of a dominant position.

This brings us to the third significant term which is the definition of “agreements”, defined as “agreements, arrangements, coalitions, or practices between two undertakings or more or any co-operation among establishments or resolutions issued by undertakings' consortiums whether they are written or oral, explicit or implicit, or public or confidential”.

The Competition Law considers agreements between undertakings which aim to create prejudice within, limit, or prevent competition in the UAE as “restrictive agreements”, especially those:

- specifying the prices for buying or selling commodities or services, directly or indirectly, by creating the increase, decrease or stabilisation that may negatively affect the competition;

- specifying the conditions of buying, selling, or performing of services, and/or any other similar obligation;
 - colluding in bids, tenders, practices, or any other supplying offers;
 - phasing out or limiting the operations of production, development, distribution, or marketing, or any other aspects of investment;
 - colluding to refuse to buy from or to sell or supply to certain undertaking(s) and to halt or impede such undertaking(s) from carrying out their activities or transactions;
 - limiting the freedom of commodities or services flow to the relevant market(s) or withdrawing them from the market, including the concealment or storage of such commodities or services unlawfully, abstaining from dealing with such commodities or services or suddenly creating their abundance that may lead to trading such commodities or services with unreal prices;
 - dividing markets or assigning clients based on geographic areas, distribution centres, quality of clients, seasons and time, or any other basis that may negatively affect competition; and/or
 - taking procedures to hinder the entrance of undertakings to the market, exclude such undertakings from the market, or hinder joining existing agreements or coalitions.
- Determining whether any undertaking is abusing its dominant position in the relevant market(s), the Competition Department will consider if such undertaking is:
- imposing the prices or conditions of reselling commodities or services directly or indirectly;
 - selling a commodity or performing a service with a price less than the actual cost with the aim of hindering competitive undertakings from entering the relevant markets, excluding them from such markets, or causing them losses, preventing them from continuing their activities in such markets;
 - discriminating without justification amongst clients with identical contracts with regards to prices of such commodities or services, or the terms and conditions of buying or selling contracts;
 - obliging a client not to deal with a competitive undertaking;
 - the total or partial rejection to deal according to the usual commercial conditions;
 - unjustifiably abstaining from dealing in commodities or services through buying or selling, or limiting or hindering such dealing that may lead to imposing an unreal price of such commodities or services;
 - suspending the buying or selling of commodities or services unless other commodities or services are received in return which, by nature or commercial use, the latter commodities or services to be received in consideration are irrelevant to the original transaction in its normal business course;
 - intentionally publishing incorrect information about commodities or prices;
 - decreasing or increasing the available supply of the commodity to create a false scarcity or abundance of such commodity;
 - controlling or limiting production, markets, or technological development; or
 - unjustifiably preventing or obstructing other undertakings from accessing its own networks, facilities, or any physical or digital infrastructure it owns or exploits if this is the only basic and economically feasible solution for practicing economic activity or entering the relevant market.
- To conclude the above, the triggering factors to consider whether transactions not involving the transfer of shares or assets are a restrictive

agreement or an abuse of a dominant position would be:

- whether the relevant undertakings meet the threshold identified in the Competition Threshold Rules, which is always the first step; and
- if yes, determine whether the activity or transaction captures any of the above prohibitions.

2.4 Definition of “Control”

Control is not a defined term under any of the UAE Competition Legislation. Control in the context of UAE merger control would be relevant only in two instances.

The first is the percentage of control required by UAE federal or local governments over undertakings to consider whether or not such undertakings are exempted from the application of the UAE Competition Legislation. So, if the control, directly or indirectly, by the federal or local government over an undertaking is 50% or more, then such undertaking is exempted from the UAE Competition Legislation. If the said control is less than 50%, then it will need to meet the threshold under the Competition Threshold Rules before being captured by the requirements or prohibitions of the Competition Law.

The second is to identify the controlling undertaking in the event of economic concentration as determined under the Competition Law. The purpose of identifying the controlling undertaking is to name it as being responsible for complying with the regulatory requirements under the UAE Competition Legislation.

2.5 Jurisdictional Thresholds

As previously stated, the Competition Law includes turnover and market share thresholds, the amounts and percentages of which shall be

defined in the forthcoming implementing regulations. In the interim, the three jurisdictional thresholds under the Competition Threshold Rules shall be adhered to, which, if met, then require the regulatory notification requesting exemption in addition to the other obligations and restrictions under the UAE Competition Legislation. These jurisdictional thresholds are as follows.

- “Restrictive agreements” – if such agreements represent 10% or more of the total transactions of the undertaking in the relevant market with regards to a specific product and/or service.
- “Dominant position” – is assumed if the market share of an undertaking exceeds 40% of its transactions in the relevant market with regards to a specific product and/or service.
- “Economic concentration” – is when the economic concentration transaction leads the undertaking to control more than 40% of the total transactions in the relevant market with regard to a specific product and/or service.

It is worth mentioning that “total transactions” are defined under the general principles of EU competition laws (on which the Competition Law is significantly based) as the total value of sales of goods or services in the relevant market. On the other hand, no special jurisdictional thresholds would apply to particular sectors, and the above applies across all sectors and regions in the UAE. It is important to reiterate that the jurisdictional thresholds do not apply to Exempted Activities & Enterprises.

2.6 Calculations of Jurisdictional Thresholds

None of the UAE Competition Legislation has identified how jurisdictional thresholds are calculated (including how sales or assets booked

in a foreign currency are converted or if the threshold is based on the book or fair market value). There is also no sufficient data, due to the absence of case law, to understand how the Competition Department would carry out such calculations.

The absence of case law could be justified by:

- the high jurisdictional thresholds usually not met by the undertakings based or doing business in the UAE, and accordingly do not require any filings or notifications requesting exemptions;
- the huge volume of economic concentration transactions and activities taking place in financial free zones, such as ADGM or DIFC, exempted from the UAE Competition Legislation;
- many of the undertakings are carrying out activities that are categorised as Exempted Activities & Enterprises; and
- the several incentives provided by the UAE government to promote the UAE as a regional hub leading to relaxing some of the regulatory restrictions usually found in developed markets, which, at the same time, would not apply to the UAE, considered one of the most competitive emerging markets in the Gulf and Middle East regions.

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

It is important to clarify that an “undertaking” is defined under the Competition Law as “any natural or legal person conducting an economic activity or any person in connection with such persons or any grouping of these persons regardless of their legal form”. No other definitions are provided under the UAE Competition

Legislation with regards to corporate entities or individuals, or group-wide.

This means that the undertaking meeting the threshold could be the undertaking directly involved in the economic concentration transaction or activity, or it could be a parent or holding company based outside the UAE.

Strictly speaking, the undertaking that is directly carrying out an economic concentration transaction or activity in a relevant market, whether based inside or outside the UAE, and meets the jurisdictional threshold, as an entity and not as a group, will have to notify the Competition Department requesting an exemption.

However, if we apply the same principles used in the EU, the calculation of the jurisdictional thresholds should be carried out after consolidating the turnover of the transactions of the group as a whole, not just the undertaking that is a party to the transaction.

Unfortunately, due to the absence of case law and the regulatory guidance on the calculation methodology, it is unclear if the Competition Department would strictly follow the wording of the Competition Law or apply the same interpretation followed under the general principles of EU competition laws, including the method of reflecting changes in the business during a reference period (such as other acquisitions, divestments, or business closures).

Therefore, the safe approach is to consult the Competition Department prior to concluding an economic concentration transaction where there are grounds to believe that the jurisdictional thresholds are met at the group level but not at the level of the undertaking.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions by way of sale, acquisition, or merger (whether shares or assets) are captured under the auspices of the UAE Competition Legislation once the jurisdictional thresholds under the Competition Threshold Rules are met, regardless of the location or nationality of the parties, and subject to the local effects test (ie, the parties carrying out their activity or transaction in a relevant market or engaging in activities or carrying out transactions that have harmful effects on competition in the UAE).

In general, 100% foreign ownership of UAE onshore companies is allowed, subject to restrictions or prohibitions on foreign investment for companies engaging in activities which have a strategic impact.

The Economic Departments in the Emirates of Dubai and Abu Dhabi have published lists of more than 1,000 commercial and industrial activities which do not have a “strategic impact”. Companies incorporated in these Emirates that are engaged in non-strategic activities are open to full foreign ownership.

2.9 Market Share Jurisdictional Threshold

As per the Competition Law there will be a market share threshold which will be determined in the implementing regulation. If it is met, notification becomes compulsory pursuant to the Competition Law and in accordance with the Competition Regulations.

2.10 Joint Ventures

Joint ventures are subject to the same restrictions and prohibitions applicable to any other activity or transaction. As long as the joint venture does not contain any condition making such

arrangement a restrictive agreement or an economic concentration, the joint venture will not trigger any of the regulatory requirements under the UAE Competition Legislation to notify the Competition Department requesting an exemption.

If the joint venture is labelled as a restrictive agreement or an economic concentration, the filing of the notification becomes a regulatory requirement.

It is clear that filing the regulatory notification is first subject to meeting the jurisdictional threshold under the Competition Threshold Rules as an initial step and even prior to checking whether the joint venture is defined as a restrictive agreement or an economic concentration.

2.11 Power of Authorities to Investigate a Transaction

According to the Competition Regulations, the Competition Department has full power and authority to investigate, on its own initiative or following complaints submitted by third parties, complaints of a possible violation of competition practices and competition-related activities and transactions.

There is no limitation with regards to the Competition Department’s ability to investigate an activity or a transaction. During the investigation, the Competition Department can either hold interviews or request information from the enforcement or competent authorities in the UAE. Following the investigation, the department prepares a report and submits it to the Minister to issue a decision.

2.12 Requirement for Clearance Before Implementation

Following the receipt of the regulatory notification, the Competition Department will assess it and ensure that it meets the formal requirements under the Competition Regulations. After assessing the notification, the Competition Department will notify the Minister to issue a final decision.

Legally speaking, a transaction (if it meets the regulatory thresholds and is considered by law an economic concentration transaction) should not be completed without obtaining clearance from the Minister. From a procedural point of view, a transaction could still be completed without such clearance since the federal and local authorities will not require it as part of the documents needed to effect a transaction in the public records and relevant constitutional documents such as commercial licences, commercial registries, notarised share transfer agreements, etc.

There is a clear prohibition in the Competition Law prohibiting the relevant undertakings from concluding any transactions during the merger control review period. Therefore, obtaining the clearance from the Minister is usually included as a condition precedent in the agreements of an economic concentration transaction, making it conditional to obtaining the clearance for closing the transaction.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Failing to comply with the regulatory requirement to suspend the implementation of a transaction during the merger control review, until:

- a clearance is obtained; or
- the specified deadline expires,

this will lead to imposing a fine of no less than AED50,000 and no more than AED500,000.

2.14 Exceptions to Suspensive Effect

There are no exceptions under the UAE Competition Legislation to the suspensive effect of the regulatory notification.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Implementation before clearance is not permitted under the Competition Law.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is uncertainty regarding the precise time when the transaction must be notified to the Competition Department. The Competition Law provides that economic concentration transactions have to be notified at least 90 days before completion of the transaction.

Practically speaking, notifications should be made shortly after entering into the transaction documents since it is usually a condition precedent to obtain the regulatory approval prior to closing. In this case, the applicant would comply with both the Competition Law and the Competition Regulations.

As previously mentioned, failing to notify a reportable economic concentration may result in a fine between 2% and 10% of the turnover generated in the UAE by the relevant undertaking during the last financial year or, if such data is not available, a fine will be imposed between AED500,000 and AED5 million.

3.2 Type of Agreement Required Prior to Notification

The new implementing regulation of the Competition Law shall determine the required documents and the procedures. However, in the meantime we should abide by the Competition Regulations which indirectly require a binding agreement prior to the notification for approving an economic concentration transaction. As part of the notification made to the Competition Department, it is required to attach a term sheet or an agreement, whether in an executed or draft form.

Therefore, a less formal agreement such as a letter of intent or memorandum of understanding can be attached to the notification. In all events and for the purposes of the notification, a written document should be provided explaining the transaction, whether in a signed or a draft form. Without it, the Competition Department would most likely put the application on hold until the term sheet or agreement is submitted as part of the notification filing.

3.3 Filing Fees

There are no fees for filing the regulatory notification.

3.4 Parties Responsible for Filing

According to the Competition Regulations, the regulatory filing for an economic concentration is made by the relevant undertaking. There is no clear definition of what is meant by relevant undertaking(s). It could be interpreted from the text that a relevant undertaking would be:

- the undertaking directly involved in the transaction; and
- meeting the jurisdictional threshold following the conclusion of the economic concentration transaction.

If more than one undertaking meets the above requirements, then filing should be made jointly.

Refer to **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**.

3.5 Information Included in a Filing

As mentioned, the new implementing regulations shall include all the filing documents and procedures. However, in the meantime the authors shall adhere to the competition legislation, which includes the following:

In addition to:

- the notification form (which is still to be released by the Competition Department and, therefore, up to the date of this guide, notifications could be submitted in the form that the relevant undertaking deems appropriate as long as it complies with the regulatory requirements); and
- the term sheet or agreement, whether executed or in a draft form,

the relevant undertaking(s) must also submit the following as part of the notification filing:

- constitutional documents of the relevant undertaking(s), including their memorandum and articles, which have to be duly attested;
- audited consolidated financial statements of the relevant undertaking(s) for the past two years;
- shareholders' register of the relevant undertaking(s); and
- an economic report analysing the positive impact of the transaction.

The notification form, term sheet or agreement (whether executed or in draft form), and the

aforementioned attachments should be submitted in Arabic. An English translation of the notification form can also be filed, but practically speaking, the Competition Department will only refer to the Arabic documents and disregard the English copy.

The Competition Regulations require three hard copies of the notification with the attachments to be submitted. However, practically the Competition Department now accepts the notification and attachments to be sent in an electronic form, and it is no longer necessary to submit hard copies. If some of the documents or information in the notification or its attachments are confidential, the relevant undertaking(s) may refer the Competition Department to such confidential information and may also submit a non-confidential summary of the same to maintain it. Additional documents and information can be requested by the Competition Department during the process of the merger control review.

3.6 Penalties/Consequences of Incomplete Notification

There is no penalty for an incomplete notification if it was an honest mistake or done in good faith. The only consequence is that the Competition Department will not assess or analyse it until all documents are submitted, whether required by law or further requested by the Competition Department.

It is important to note that the 90 days' timeframe, during which a decision should be issued and could be extended for an additional 45 days for this purpose, will not start until the Competition Department considers the notification complete, and this can only happen when all documents and information requested by the Competition Department are submitted.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

A provision under the UAE Federal Crimes and Penalties Law No 21 of 2021 states that imprisonment and/or a fine will be imposed on anyone who, in bad faith, makes a false statement to a judicial or administrative authority. Nonetheless, none of the above penalties should apply if the inaccurate information was provided by way of an honest mistake or on a good faith basis where the applicant honestly believed that such information was true and accurate. Inaccurate information should be promptly rectified and updated once it is known to the relevant undertaking that such inaccurate information was provided.

3.8 Review Process

The review process will be defined in the new implementing regulations of the Competition Law. Until these regulations are issued, the procedures will be carried out in two phases. The first phase is carried out by the Competition Department, ensuring first that the notification is complete and includes all the relevant information and documents. To ensure the completeness of the notification, the Competition Department may require the relevant undertaking(s) and any other concerned party, as the Competition Department would deem appropriate, to provide the necessary information or documents or to attend interviews with the Department. Consultations with other authorities in the UAE may also be made for the assessment.

Once all required documents and information are provided, the Competition Department will then prepare a detailed report on the economic concentration transaction notified. The report will include:

- a statement of all procedures and actions taken;

- the underlying data;
- the results of the assessment from both legal and economic aspects, especially with regard to the positive and negative effects of the transaction on the competition in the relevant market; and
- the recommendation(s) of the Competition Department and proposed decision to be made by the Minister.

The second phase would be submitting the detailed report to the Minister for his review and final decision.

In all events, the process should not be longer than 90 days which could be extended for an additional 45 days; otherwise, approval should be assumed to be granted if no decision is made during this timeframe. Such a timeframe begins once all necessary documents and information are provided, and no further engagement is required with the Competition Department to prepare the detailed report.

3.9 Pre-notification Discussions With Authorities

Discussions and engagement with the Competition Department are carried out with:

- the relevant undertaking(s) directly concerned with the transaction;
- other undertakings or third parties believed by the Competition Department to be affected, directly or indirectly, by the transaction; and
- other UAE authorities, consultants or third parties as the Competition Department deems appropriate.

Such discussions could be notified to the relevant undertaking(s) or remain confidential. The Competition Department has full discretion to

engage in the way it believes to be in the best interest of all concerned parties.

3.10 Requests for Information During the Review Process

There is no regulatory limitation or threshold as to the number of requests that the Competition Department could make during its course of reviewing the documents and information required for reviewing the notification.

The Competition Department is entitled by law to request any number of interviews or any volume of documents or information from any of the concerned parties that the Department deems appropriate for its review.

Once the Competition Department declares that it has all the information it needs to prepare its detailed report, the 90 days clock starts counting down, although it could be extended by an additional 45 days.

There is no clarity on how common or burdensome some of these requests could be; however, practically speaking, it is highly likely to be reasonable and essential for adequately and accurately assessing the notification.

3.11 Accelerated Procedure

There is no short-form or fast-track, or other types of accelerated procedure for reviewing the notification. The process is for any and all economic concentration transactions.

4. Substance of the Review

4.1 Substantive Test

The substantive test employed by the Competition Department considers the below criteria during the course of reviewing the notification:

- actual and potential competition in the relevant market;
- new undertakings' ease of access to the relevant market;
- the extent of the potential impact on prices of relevant commodities or services;
- whether there are systemic barriers affecting the entry of new competitors;
- how likely the emergence is of a dominant position in the relevant market;
- the extent of the potential impact on innovation, creativity, and technical competence;
- the extent of contribution required to promote investment or export, or support UAE undertakings' ability to compete in the international marketplace; and
- the extent of the impact on consumers' interests.

It is important to note that these criteria might be amended after the issuance of the new implementing regulations.

4.2 Markets Affected by a Transaction

Pursuant to the new UAE Competition Law, the market share is the total share of the parties' transactions as compared to the percentage of the total transactions in the relevant market during the last fiscal year determined by the UAE Council of Ministers and as per the Competition Threshold Rules. An economic concentration is created if the market share of the undertaking(s) exceeds 40% of the total transactions in a relevant market of goods or services that are interchangeable based on their price, characteristics and usage in the relevant market.

As such, the Competition Department will usually first identify the relevant market and then measure the market share in terms of the aggregate turnover of the relevant undertaking(s), divided

by the total value of sales of the products or services pertaining to the relevant market.

As explained previously, "total transactions" is not defined under the UAE Competition Legislation, but could be interpreted as the combined annual turnover of the undertaking(s) from the total sales of the products or services pertaining to the relevant market.

4.3 Reliance on Case Law

Unfortunately, the case law of UAE merger control is rare and not publicly available due to the high threshold causing limited application of the law. Therefore, reliance up to the date of this guide is heavily weighted on the interpretation of the UAE Competition Legislation.

4.4 Competition Concerns

Please refer to 4.1 Substantive Test.

4.5 Economic Efficiencies

Please refer to 4.1 Substantive Test.

4.6 Non-competition Issues

There are seven strategic sectors in which foreign investment is restricted or prohibited, according to Cabinet Decision No 55 of 2021 on the Determination of the List of Strategic Impact Activities. The restricted or prohibited sectors include security and defence, banks and insurance, and telecommunications. If the regulatory authority for the relevant sector approves the application by a foreign investor who wishes to invest in a company engaged in one of these sectors, it must determine the minimum percentage of share capital that must be held by UAE shareholders and the maximum percentage that may be held by the foreign shareholder.

However, sector regulators and other government authorities in the UAE retain a certain

degree of discretion to approve or reject proposed transactions affecting competition in the UAE. Hence, for example, while the regulated sectors have been excluded from the scope of application of the Competition Law, investment in these sectors (including in relation to a foreign company operating through a branch in the UAE) will generally require a separate approval procedure to be undertaken with the relevant regulator, in particular, to update the undertaking's UAE licences and registration. Considerations in this context will not necessarily or exclusively be competition-related, and sector regulators and other government authorities retain considerable discretionary powers to reject a transaction where they have concerns, including national security or public policy.

4.7 Special Consideration for Joint Ventures

Joint ventures are not dealt with separately under the UAE Competition Legislation and are considered as any other transaction in terms of whether the undertaking is meeting the jurisdictional threshold and if there are any considerations as to whether it should be a restrictive agreement or if there is an abuse of a dominant position.

Therefore, other than the economic concentration aspects that will be evaluated, the Competition Department will also consider if the joint venture should be considered a restrictive agreement, or if it abuses a dominant position.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

Once the decision is made by the Minister, the relevant competent authorities (including the Ministry) have the power and authority to enforce the decision. The authorities have the ability to prohibit or otherwise interfere with a transaction.

The clearance or rejection decision is made by the Minister, so it is worth highlighting the powers of the Minister that extend, amongst other responsibilities, to the following areas:

- commercial transactions;
- commercial agency;
- consumer protection;
- commercial companies, including publicly listed companies;
- financial and capital markets; and
- intellectual property.

Therefore, the Minister can significantly affect the provision of a product or a service in the UAE and can request the intervention of the UAE enforcement bodies to support any decision made in this regard.

On a relevant note, the Competition Law further provides that the Ministry shall co-ordinate with the competent authorities and the sectoral regulatory bodies for the execution of the provisions of the Competition Law. Furthermore, employees of the Competition Department determined by a resolution of the UAE Minister of Justice in agreement with the Minister and the concerned authority shall have the capacity of judicial officers to prove the violations of the provisions of the UAE Competition Legislation.

5.2 Parties' Ability to Negotiate Remedies

When the Competition Department have concerns about a transaction, the parties may propose remedies; for example, divestitures, or structural or behavioural remedies, and the Competition Department then has the sole discretion to reject or accept such remedies and include the same in its recommendations submitted to the Minister who will then consider such remedies and make a final decision.

5.3 Legal Standard

There is no specific legal standard that remedies must meet to be deemed acceptable, and it is up to the parties to agree with the Competition Department on the most suitable remedies, which then should be accepted by the Minister.

5.4 Negotiating Remedies With Authorities

Remedies can be proposed anytime until the Minister makes the final decision. It can be proposed by the relevant undertaking(s) making the notification, the Competition Department, or even the Minister, who can issue clearance of the economic concentration transaction subject to satisfying certain remedies. Proposals for remedies are usually communicated in writing but can also be initially discussed verbally for the purpose of submitting the final proposal of the remedy in writing.

5.5 Conditions and Timing for Divestitures

Divestiture (ie, the commitment to sell a business unit) may either take the form of:

- a horizontal division where the same shareholders own the shares of the new companies; or

- a vertical division where part of the existing company is carved out and transferred to a newly established subsidiary owned by the parent company.

It is most likely that the Competition Department will entrust the relevant undertaking(s) with preparing the divestiture plan (if acceptable to the Competition Department) and overseeing the implementation of the same post issuing the clearance. However, there is no general preference for any type of divestiture; it is assessed on a case-by-case basis.

Hence, there is no standard approach regarding conditions and timing for divestitures or other remedies. It will be left to the remedy arrangement agreed with the Competition Department or stipulated in the clearance issued by the Minister, including completing a transaction before remedies are complied with.

Failing to comply with the remedies may lead to withdrawing the clearance and/or imposing a fine, the value of which will be subject to the discretion of the Competition Department, and requires the approval of the Minister, while being limited to the thresholds stipulated by the Competition Law for fines imposed.

5.6 Issuance of Decisions

Decisions are issued formally, permitting or prohibiting a transaction, and notified to all concerned parties, bearing in mind that a decision would be implied if it is not made during the 90-day window provided in the Competition Law that may be extended for an additional 45 days.

Decisions are not available publicly and, therefore, cannot be revisited by the public to check such decisions. There is a privity to the parties made aware of such decisions which could be

limited only to the undertaking(s) or include third parties such as concerned UAE authorities and regulatory bodies or parties directly or indirectly affected by the decision.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The authors are not aware of the Competition Department requiring remedies or prohibiting foreign-to-foreign transactions since this is not publicly available information.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

According to the Competition Regulations, the Minister issues a reasoned decision in either of the following forms:

- a clearance decision to approve the transaction if it does not negatively affect competition or if it has positive economic impacts on competition that outweigh the negative impacts;
- a clearance decision to approve the transaction, provided that the relevant undertakings comply with the conditions and obligations specified by the Minister; or
- a decision to reject the transaction.

The decision should cover the transaction as a whole including any related arrangement (ancillary restraints) if it was part of the notification made to the Competition Department. No separate notifications would be required in addition to the decision.

The Minister may revoke the clearance if it appears that:

- the circumstances under which the approval has been granted no longer exist;
- the relevant undertaking(s) has/have breached any conditions or obligations on which the approval has been granted; or
- the approval has been granted on the basis of misleading or incorrect information – in that case, the Competent Authority shall take appropriate legal actions so as to sue and prosecute the relevant undertaking(s) in breach.

It should be noted that the Competition Department maintains a special record for recording decisions issued by the Minister regarding the notifications for approval of economic concentration transactions. This record is not publicly available.

It is important to highlight that these procedures might be amended in the new implementing regulations.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Refer to 3.9 Pre-notification Discussions With Authorities.

7.2 Contacting Third Parties

The Competition Department may contact third parties in any manner they deem appropriate, including telephone calls, emails, written letters to be sent by mail or electronically, or by way of interviewing such third parties (interviews are most likely to take place at the offices of the Competition Department).

The Competition Department may also request third parties that may be affected by the clearance of the transaction, to submit their comments in this regard within 15 days from the Competition Department's request (market test).

7.3 Confidentiality

The Competition Law requires the Ministry's employees to take steps to maintain the confidentiality of sensitive information which could cause serious damage if disclosed. In this regard, the Ministry's employees are not permitted to disclose any information reviewed as part of the notification application unless such disclosure is to the concerned parties or upon the request of the relevant authorities.

Violating the confidentiality duties could, under the Competition Law, lead to imposing a fine of no less than AED50,000 and no more than AED200,000.

Confidential documents submitted as part of the notification application should be labelled as "confidential" and non-confidential summaries should be provided.

7.4 Co-operation With Other Jurisdictions

There is no obligation for, or prohibition of, the Ministry to co-operate with other regulators in other jurisdictions.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Any concerned party can request the Minister to review a competition decision adopted by the Minister himself within 14 days from the date the applicant became aware of such decision.

The request should be in writing and explain the grounds on which the request is being made, with all the necessary supporting documents attached.

The Committee will, in return, review the request and submit its recommendation in this respect to the Minister within ten days from the date on which the application was referred.

The Minister should adopt a final decision within 30 days from the filing of the request. If a decision is not adopted within this timeframe, the request is deemed to be rejected.

Decisions issued by the Minister can be appealed before the competent court within 60 days from notification of the Minister's decision to the concerned parties.

It is important to note, however, that the Minister may enter into a settlement with undertakings deemed to have breached the Competition Law, except for breaches of unauthorised disclosure of the confidential information protected under the Competition Law.

Settlement with breaching undertakings is subject to the following:

- undertakings pay a fine amounting to no less than two times the minimum provided by the Competition Law; and
- the settlement is entered into before the filing of a criminal case.

The settlement is immediately effective post the payment of the fine by the relevant undertaking.

It is important to note that these durations and procedures might be amended after the issuance of the new implementing regulations.

8.2 Typical Timeline for Appeals

Refer to 8.1 Access to Appeal and Judicial Review for the timelines.

On a separate note, appeals are not a public record so the firm is not aware of any successful appeals.

8.3 Ability of Third Parties to Appeal Clearance Decisions

See 8.1 Access to Appeal and Judicial Review.

It should be further noted that the public records of the courts, up to the date of this guide, do not show any decisions appealing a clearance decision.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

There is no applicable information in this jurisdiction regarding legislation and filing requirements.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

The Competition Law is a newly issued law that repealed the Law No 4 of 2012. The authors anticipate the implementing regulations to be issued shortly, as it has already been more than six months since the effective date.

10.2 Recent Enforcement Record

Competition enforcement records are not publicly available and there is no publicly available information about any enforcement records in terms of imposing fines, prohibiting transactions, or requiring remedies, particularly for foreign-to-foreign transactions.

10.3 Current Competition Concerns

The authors are unaware of any current competition concerns of the Ministry or the Competition Department. Thus, there are no notable trends in the UAE with regards to merger control review or enforcement.



Law and Practice

Contributed by:

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Contents

1. Legislation and Enforcing Authorities p.785

- 1.1 Merger Control Legislation p.785
- 1.2 Legislation Relating to Particular Sectors p.785
- 1.3 Enforcement Authorities p.785

2. Jurisdiction p.786

- 2.1 Notification p.786
- 2.2 Failure to Notify p.786
- 2.3 Types of Transactions p.787
- 2.4 Definition of "Control" p.787
- 2.5 Jurisdictional Thresholds p.788
- 2.6 Calculations of Jurisdictional Thresholds p.788
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.789
- 2.8 Foreign-to-Foreign Transactions p.790
- 2.9 Market Share Jurisdictional Threshold p.790
- 2.10 Joint Ventures p.790
- 2.11 Power of Authorities to Investigate a Transaction p.790
- 2.12 Requirement for Clearance Before Implementation p.790
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.791
- 2.14 Exceptions to Suspensive Effect p.791
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.791

3. Procedure: Notification to Clearance p.791

- 3.1 Deadlines for Notification p.791
- 3.2 Type of Agreement Required Prior to Notification p.792
- 3.3 Filing Fees p.792
- 3.4 Parties Responsible for Filing p.792
- 3.5 Information Included in a Filing p.792
- 3.6 Penalties/Consequences of Incomplete Notification p.793
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.793
- 3.8 Review Process p.793
- 3.9 Pre-notification Discussions With Authorities p.794
- 3.10 Requests for Information During the Review Process p.795
- 3.11 Accelerated Procedure p.795

4. Substance of the Review p.795

- 4.1 Substantive Test p.795
- 4.2 Markets Affected by a Transaction p.795
- 4.3 Reliance on Case Law p.796
- 4.4 Competition Concerns p.797
- 4.5 Economic Efficiencies p.797
- 4.6 Non-competition Issues p.797
- 4.7 Special Consideration for Joint Ventures p.798

5. Decision: Prohibitions and Remedies p.798

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.798
- 5.2 Parties' Ability to Negotiate Remedies p.798
- 5.3 Legal Standard p.798
- 5.4 Negotiating Remedies With Authorities p.798
- 5.5 Conditions and Timing for Divestitures p.801
- 5.6 Issuance of Decisions p.802
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.802

6. Ancillary Restraints and Related Transactions p.802

- 6.1 Clearance Decisions and Separate Notifications p.802

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.802

- 7.1 Third-Party Rights p.802
- 7.2 Contacting Third Parties p.802
- 7.3 Confidentiality p.803
- 7.4 Co-operation With Other Jurisdictions p.803

8. Appeals and Judicial Review p.803

- 8.1 Access to Appeal and Judicial Review p.803
- 8.2 Typical Timeline for Appeals p.804
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.804

9. Foreign Direct Investment/Subsidies Review p.804

- 9.1 Legislation and Filing Requirements p.804

10. Recent Developments p.806

- 10.1 Recent Changes or Impending Legislation p.806
- 10.2 Recent Enforcement Record p.807
- 10.3 Current Competition Concerns p.807

Van Bael & Bellis is widely acknowledged as having one of the leading practices in EU and UK competition law, including merger control. From its main office in Brussels and its newest office in London, the competition team at Van Bael & Bellis has assisted clients at both the EU and national levels, notably appearing before the European Commission, the UK Competition and Markets Authority (CMA) and the EU and UK courts, where the firm has acted as counsel in many landmark cases. Within the field of merger control, Van Bael & Bellis has a

dedicated team of EU and UK specialists who regularly represent merging parties as well as complainants in cases involving key issues of jurisdiction, procedure and substantive law. The firm has succeeded in obtaining clearance for numerous complex transactions before the European Commission and the CMA. The team also routinely helps clients to obtain merger clearance from member state authorities for transactions that do not meet EU thresholds. The firm is frequently called on to co-ordinate merger control filing efforts across the world.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013 (EA), provides the legal basis for the UK merger control regime.

The Competition and Markets Authority (CMA) is the primary competition regulator in the UK and is responsible for enforcing the UK merger control regime.

The CMA has published a [collection of guidance on its mergers work](#), which can be found on its website, including –

- Mergers: Guidance on the CMA’s jurisdiction and procedure (2024 – revised guidance);
- CMA rules of procedure for merger, market and special reference groups;
- Merger Assessment Guidelines;
- Mergers: How to notify the CMA of a merger;
- Mergers: Exceptions to the duty to refer and undertakings in lieu;
- Merger remedies; and
- Providing initial documents to the CMA.

1.2 Legislation Relating to Particular Sectors

The National Security and Investment Act 2021 (the “NSI Act”), which entered into force on 4 January 2022, created a separate investment screening regime in the UK. The NSI Act gives the government powers to investigate transactions on the grounds of national security (see **9.1 Legislation and Filing Requirements**).

In addition, under the EA, the secretary of state has the power to intervene in “public interest mergers” and “special public interest mergers”.

“Public interest mergers” include transactions involving media enterprises, the UK financial system, and public health emergencies. “Special public interest mergers” include transactions involving newspaper and broadcasting companies.

Although there is no separate sectoral merger control legislation, the CMA has published sector-specific merger-related guidance and commentary, including:

- Water and sewerage mergers – CMA49;
- Energy network mergers – CM190;
- Retail mergers commentary – CMA62; and
- Review of NHS mergers – CMA29.

1.3 Enforcement Authorities

The CMA is the sole merger control authority in the UK (see **1.1 Merger Control Legislation**).

There are no specific merger control provisions for other regulated utilities, such as telecommunications, postal services, rail, airports, and air traffic services (see **1.2 Legislation Relating to Particular Sectors**). That said, a transaction in these industries may require the modification of an operating licence or give rise to other issues falling within the competence of the relevant sectoral regulator. The CMA therefore works closely with sectoral regulators where mergers raise questions which fall within their sectoral competence or expertise.

Note that the CMA no longer has jurisdiction to review mergers solely involving NHS foundation trusts, NHS trusts or a combination of these, as these are now assessed by NHS England under the Health and Care Act 2022.

2. Jurisdiction

2.1 Notification

The UK is technically a voluntary (and non-suspensory) jurisdiction. However, it should more accurately be described as a “self-assessment” or even “ignore at your own risk” regime.

While the EA does not oblige merging parties to notify a merger to the CMA (and there is thus no requirement for merging parties to obtain clearance from the CMA before completing a transaction), the CMA has a duty to track merger activity in order to determine whether an unnotified merger which falls within the CMA’s jurisdiction may raise potential substantive concerns. As such, the CMA’s mergers intelligence function not only receives complaints but also very actively scans for proposed or completed mergers to investigate on its own initiative.

Therefore, the decision not to notify in cases where the CMA could investigate carries potentially significant risks – especially for the purchaser. In addition to the typical legal/deal execution, cost, and timing implications of a thorough review by a sophisticated and well-resourced merger control authority, the CMA also has the power to issue interim orders, which prevent any action that may prejudice or impede its investigation (eg, integrating the merging businesses). If the CMA has reasonable grounds to believe that the parties to a completed merger are integrating their businesses, it can require that this integration is stopped, and potentially unwound (see 2.2 Failure to Notify).

Accordingly, where a proposed transaction meets the relevant jurisdictional thresholds – and, more importantly, potentially gives rise to competition concerns which will very likely attract the CMA’s attention if unnotified – the

purchaser is typically incentivised to file a formal merger notification with the CMA for reasons of legal certainty.

Briefing Note

The merging parties also have the option of submitting a short “briefing note” (usually of around five pages) to the CMA’s mergers intelligence function. As a general rule, the CMA will consider a briefing note only after the parties have entered into the transaction agreement.

In such a note, the merging parties explain why the relevant merger should not attract further CMA scrutiny – ie, typically because (i) the jurisdictional thresholds may not be met, and (ii) in any event, the transaction does not give rise to any competition concerns in the UK. If such a briefing note is persuasive, and the CMA does not decide to investigate immediately, the merging parties will obtain a level of comfort that the CMA does not, at that moment, intend to investigate. Many purchasers will decide to proceed to closing on that basis. That being said, the CMA also has the power to investigate – and take action against – mergers that have completed, provided that completion has taken place not more than four months before the reference to an in-depth Phase 2 investigation is made.

In light of this, parties may decide to make completion of the transaction conditional on a positive response from the CMA to the briefing note (ie, “no further questions” indicating that an investigation will not be immediately opened).

2.2 Failure to Notify

As the UK merger control regime is voluntary, there are no penalties for failing to notify a merger to the CMA.

However, if the transaction raises substantive competition concerns and the CMA decides to investigate, it is typical for the CMA to issue interim orders preventing any action that may prejudice or impede its investigation (see **2.1 Notification**).

Moreover, following a Phase 2 investigation, the CMA may also require termination of a completed transaction – and, thus, the disposal of the acquired businesses or assets (see **5.4 Negotiating Remedies With Authorities**).

2.3 Types of Transactions

The UK merger control rules apply to “relevant merger situations”. Although purely internal restructurings or reorganisations will not usually amount to such a situation, it is possible that changes to shareholders’ agreements and articles of association could result in a relevant merger situation, where they lead to a change in control (see **2.4 Definition of “Control”**).

A “relevant merger situation” arises when:

- two or more enterprises cease to be distinct, or will cease to be distinct, due to being brought under common ownership or control;
- the applicable jurisdictional thresholds are met (see **2.5 Jurisdictional Thresholds**); and
- the transaction has not yet completed or was completed within the CMA’s four-month time limit to issue a decision on referring a transaction for a Phase 2 investigation.

Note that in the case of a transaction being completed (i) without the CMA being notified, or (ii) without any public notification (such as a press release), the four-month period will start running from the date the CMA was notified or the date when completion was publicised, whichever is earlier.

As the term “enterprise” is broadly defined under the EA as “the activities, or part of the activities, of a business”, consequently, acquiring the assets of a business may be considered as acquiring an enterprise, rather than “bare assets”. In order to make the distinction, the CMA will take account of “economic continuity” when:

- acquiring the assets gives the acquirer more than they might have acquired by going into the market and buying factors of production; and
- the extra benefit obtained by the acquirer is attributable to the fact that the assets were previously used in combination in the “activities” of the target business.

In its assessment of economic continuity and the facts related to the transaction, the CMA will also take account of the transfer of specific types of assets such as intellectual property rights (trade marks, trade names, and domain names), business data, employees, tangible/intangible assets, and/or goodwill.

2.4 Definition of “Control”

The EA sets out three levels of control.

- Legal control – a controlling interest generally means holding more than 50% of the voting rights in a company.
- De facto control – the ability to unilaterally determine the target company’s commercial policy, despite holding less than the majority of the voting rights in the target.
- Material influence – the acquirer’s ability to exert material influence over the target’s commercial policy and conduct on the market, which may be evidenced through shareholding, board representation, contractual, financial, or other arrangements. In general, the CMA considers that material influence will

arise if the acquirer has more than 25% of the shares in the target. However, material influence can be conferred by a lesser shareholding (15%), as the CMA takes a holistic view.

The CMA will also take account of transactions that increase control in stages. Where there are multiple transactions or events increasing control over a target in a single two-year period, the CMA may consider the transactions as a whole and, for the purposes of review, take the date of the most recent transaction as the date of completion – and, in this context, the CMA may also take account of transactions that have not yet completed but are in contemplation.

2.5 Jurisdictional Thresholds

Under the general UK merger control regime, there are two alternative jurisdictional thresholds that apply, and the CMA can open an investigation if one is met.

- **Turnover Test** – this applies if the annual UK turnover of the target exceeded GBP70 million.
- **Share of Supply Test** – this applies if there are at least two enterprises that supply or purchase goods or services of a particular description, and the transaction results in a combined share of supply or procurement of 25% in the UK, or a substantial part of the UK, for those goods or services of a particular description – with an increment in such share of supply as a result of the transaction. Importantly, as this is not a market share test (see **2.6 Calculations of Jurisdictional Thresholds**), the CMA therefore enjoys significant discretion in its application of this test (and, thus, asserting jurisdiction over mergers which do not meet the Turnover Test).

See **10.1 Recent Changes or Impending Legislation** for relevant changes under the recently passed Digital Markets, Competition and Consumers (DMCC) Act.

Note that, in certain sector-specific mergers (such as those involving two or more water and sewage companies), sector-specific jurisdictional thresholds apply (see **1.2 Legislation Relating to Particular Sectors**).

2.6 Calculations of Jurisdictional Thresholds

Calculation of the Turnover Test

For the purposes of calculating the turnover threshold, the term “turnover” refers to revenue achieved by the target and derived from the sale of products and/or the provision of services in the ordinary course of business in the UK in the last completed business year for which accounts are available (see **2.5 Jurisdictional Thresholds**).

- Revenues are calculated on the basis of net turnover (ie, after the deduction of sales rebates, value added tax, and any other taxes directly related to the relevant turnover).
- The CMA may adjust the turnover value if it is appropriate to do so (eg, where an acquisition or divestment following the end of the financial year materially impacts the turnover value).

Note that the CMA’s merger guidance provides additional details on applying the Turnover Test to different contexts such as joint ventures, and outlines the specific provisions that apply to enterprises in financially regulated markets such as credit institutions, financial institutions and insurance businesses.

Calculation of the Share of Supply Test

In determining share of supply, the CMA will examine three key elements and, in doing so, will exercise broad discretion.

- **Product** – the CMA will give a description of the goods or services supplied or procured by the parties. This is distinct from a market share test, but the CMA will have regard to any “reasonable description” of a group of goods or services.
- **Territory** – the CMA will determine what constitutes a substantial part of the UK. Although the CMA will take several key factors into account, including the size of the territory, population, and economic importance, the “substantial part of the UK” is not required to be comprised of a single, unified geographic area.
- **Level of supply or purchase** – the CMA will consider what measures are appropriate to calculate the merging parties’ combined share of supply or purchase and to determine whether the combined share meets the 25% threshold.

Notably, it is not required for either of the merging parties to realise any turnover in the UK in order to satisfy the Share of Supply Test (eg, Roche/Spark). Further, there is no de minimis increment in the share of supply or procurement (eg, Sabre/Farelogix).

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

Linked Enterprises

The CMA may consider other enterprises linked to the target when calculating the turnover test (see 2.5 Jurisdictional Thresholds). Where enterprises – consisting of two or more businesses – are under common ownership or con-

trol, the applicable turnover will be calculated by adding together the applicable turnover of each business. For example, the turnover of any enterprise over which the target has control (meaning, at least, the ability to materially influence policy) will be included when determining the applicable turnover (see 2.4 Definition of “Control”).

Joint Ventures

In the case of joint ventures, the approach the CMA takes is dependent on whether the enterprises will remain under the same ownership or control. Where a 50:50 joint venture is formed, incorporating all assets and businesses from each enterprise, neither enterprise will remain under the same ownership or control as previously, therefore, the highest turnover of the enterprises would be excluded from determining the applicable turnover. In contrast, where the joint venture incorporates assets and businesses in a particular area of activity, and the parent companies remain under the same ownership and control post-merger but cease to be distinct from the target business they have each contributed to, the relevant turnover will be the sum of the turnover of each of the contributed enterprises, less the turnover of the parent companies.

Intra-group Transactions

In the case of intra-group transactions, the approach the CMA takes is dependent on post-merger ownership and control. With enterprises that will remain under the same common ownership or common control post-merger, only external sales are to be taken into account when calculating the applicable turnover. However, the CMA has discretion, in certain cases, to take previously internal sales into account and attribute an appropriate value to those sales, if needed. With enterprises that will cease to be

under the same common ownership or common control post-merger, the CMA may assess the applicable turnover based on the amounts derived from previously internal transactions. Again, in this case, the CMA has discretion to attribute an appropriate value to such transactions if it believes that the turnover attributed is not reflective of open market value.

2.8 Foreign-to-Foreign Transactions

The jurisdictional thresholds are based on the Turnover Test and the Share of Supply Test (see 2.5 Jurisdictional Thresholds), which take account of the merging parties' activities in the UK, irrespective of whether one or all of the merging parties have a local presence. Notably, the Share of Supply Test does not require the parties to generate turnover in the UK. Therefore, foreign-to-foreign transactions may be subject to UK merger control.

2.9 Market Share Jurisdictional Threshold

There is no market share jurisdictional threshold test (see 2.5 Jurisdictional Thresholds).

2.10 Joint Ventures

To the extent that a joint venture satisfies the criteria of a "relevant merger situation", then it may be subject to UK merger control rules (see 2.3 Types of Transactions).

2.11 Power of Authorities to Investigate a Transaction

The CMA has the authority to investigate transactions when at least one of the jurisdictional thresholds is met.

The CMA has a four-month time limit – from the time the completed transaction was notified to the CMA or publicised (see 2.3 Types of Transactions) – within which to issue a decision on

referring a transaction for a Phase 2 investigation.

For the purposes of the CMA's investigation, a transaction will be considered publicised by the acquirer if:

- material facts related to the transaction have been published in the UK press (national and relevant trade publications); and
- the acquirer has published details prominently on its website (usually, in the form of a press release).

2.12 Requirement for Clearance Before Implementation

As the UK merger control regime is non-suspensory, there is no general standstill obligation requiring parties to suspend implementation of a transaction until they have received clearance.

However, and as noted above, in cases where the CMA decides to investigate a merger, it may impose interim measures to ensure that no pre-emptive action which might prejudice the outcome of a Phase 2 investigation (or impede an appropriate remedy) is taken by the parties. Most typically, such interim measures will prohibit integration, including actions related, for instance, to the sale or closure of sites, key employee retention, the dilution of brand independence, altering product lines, and exchanging confidential and commercially sensitive information. However, in exceptional circumstances, the CMA can also prevent the completion of a transaction – if this in itself could result in pre-emptive action (eg, Gardner Aerospace/Northern Aerospace).

Initial Enforcement Orders (IEO)

During Phase 1 investigations, the CMA can impose IEOs to prevent and/or unwind pre-emptive action in relation to completed and anticipat-

ed transactions. An IEO will remain in force until clearance or remedial action is taken, unless varied, revoked, or replaced. The CMA may also use its powers to unwind integration that has already taken place prior to the IEO coming into force. Each transaction under investigation will be assessed on a case-by-case basis.

Generally, the CMA will use its standard IEO template (available on its website).

Interim Orders (IO)

Once a transaction has been referred for a Phase 2 investigation, the IEO will remain in force unless the CMA imposes an IO at Phase 2. The CMA may also accept interim undertakings from the parties at Phase 2.

Restrictions imposed by the EA

Separate to the imposition of interim measures – and where a transaction has been referred to Phase 2 – the EA prevents the parties of an anticipated transaction from acquiring any interest in shares in a company involved as a merging party in the investigation without the CMA's consent. In completed transactions, the EA prevents the parties from completing any further matters in connection with the transaction, including changes to ownership or control of the target business, without the CMA's consent.

Complying with interim measures

In most cases, the CEOs of both parties will be required to provide the CMA with a compliance statement each fortnight confirming that the relevant business has complied with the interim measures during the appropriate period.

The CMA may also require, at the parties' expense, the appointment of a monitoring trustee, and/or a hold-separate manager as an addi-

tional safeguard to oversee compliance with interim measures.

Note that the CMA may grant derogations from interim measures, in order to consent to the parties taking actions that would otherwise be prohibited under such measures.

The CMA expects full compliance with such interim measures and can impose a fine of up to 5% of the worldwide turnover of the relevant parties for non-compliance. The most recent example of the CMA's heightened enforcement activity in this area is its imposition of fines totalling GBP52 million upon Meta for various failures to comply with interim measures imposed in relation to its proposed acquisition of GIPHY.

2.13 Penalties for the Implementation of a Transaction Before Clearance

See 2.12 Requirement for Clearance Before Implementation.

2.14 Exceptions to Suspensive Effect

See 2.12 Requirement for Clearance Before Implementation.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

See 2.12 Requirement for Clearance Before Implementation.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

As notification is voluntary in the UK, there is no deadline for notification.

3.2 Type of Agreement Required Prior to Notification

There is no requirement to have a formal agreement in place prior to notification. A good-faith intention to proceed with the transaction is generally enough if it is sufficient to satisfy the CMA.

However, with respect to submitting a briefing note to the CMA, generally, the parties will need to have entered into a transaction agreement in order for the CMA to take the matter under consideration (see 2.1 Notification).

3.3 Filing Fees

Filing fees are determined based on the size of the UK turnover of the target in its financial year preceding the date of completion or the date of clearance (for anticipated transactions). Fees are also payable in cases where the CMA investigates a transaction on its own initiative (and reaches a decision accordingly).

Where payable, these are:

- GBP40,000 (target's UK turnover is equal to or less than GBP20 million);
- GBP80,000 (target's UK turnover exceeds GBP20 million but does not exceed GBP70 million);
- GBP120,000 (target's UK turnover exceeds GBP70 million but does not exceed GBP120 million); or
- GBP160,000 (target's UK turnover is above GBP120 million).

It is worth noting that there are limited exceptions where the merger filing fee is not applicable.

If the CMA finds that the transaction does not qualify as a relevant merger situation, then no fee is payable.

No fee is payable for submitting a briefing note.

3.4 Parties Responsible for Filing

As there is no penalty for not filing, no party has a legal responsibility to file. However, the usual practice is for the purchaser to file, and thus bear responsibility for paying the filing fee. Where two parties are merging or forming a joint venture, it is usually the case that both file jointly.

3.5 Information Included in a Filing Template Merger Notice and Draft Notice

Notifying a transaction to the CMA requires completing the CMA's template merger notice (available on its website). The merger notice sets out the categories of information to be provided by the parties, and the specific information that will be required will be dependent on the relevant facts (eg, the activities of the parties and any horizontal overlaps).

For the purposes of advancing pre-notification discussions, merging parties are encouraged to submit a draft notice to the CMA that includes any information the parties consider necessary for a Phase 1 investigation, and providing brief explanations as to why any information requested but not provided is not relevant. During pre-notification discussions, it is common practice for the CMA to issue a number of requests for further information.

Given that the CMA typically reviews transactions that raise at least potential competition concerns, the merger notice requires extensive information on the transaction, the parties, market definition, competitive constraints, contact details, and the potential effects of the transaction in the relevant industry context.

Supporting Documents

In addition to the merger notice, the CMA will expect parties to provide a substantial number of supporting documents, including copies of any related documents prepared by or for senior management and shareholders, as well as reports on prevailing market conditions. Although it is possible to agree on a narrower scope of required supporting documents during pre-notification discussions with the CMA, it is frequently the case that the CMA requests a large volume of internal documents which it considers relevant to the potential theory(ies) of harm/competition concern(s).

The CMA typically also requests such documents where there has been no voluntary notification and it has commenced a review of the transaction on its own initiative.

Merger notices should be provided in English.

3.6 Penalties/Consequences of Incomplete Notification

There are no penalties as such for providing an incomplete draft merger notice. However, a Phase 1 investigation will begin only once the CMA has confirmed that the merger notice is satisfactory.

In order to obtain the information it requires, the CMA may issue a notice under Section 109 of the EA (a “Section 109 Notice”), which is, in essence, a mandatory information request. Issuing such a notice has the effect of compelling any person given the notice to provide documents, witness evidence, or information by a deadline set by the CMA. If a party fails to respond by the prescribed deadline, the CMA may extend the statutory timetable for its review.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

There are criminal and administrative penalties for providing inaccurate, false or misleading information and/or failing to comply with information requests.

Criminal Penalties

Intentionally altering, suppressing or destroying any document required under a Section 109 Notice, or knowingly or recklessly providing false or misleading information to the CMA in connection with any of their merger functions are criminal offences, which could lead to up to two years’ imprisonment for an individual found guilty of such offences, as well as a fine.

Administrative Penalties

Failure to comply with the requirements of a Section 109 Notice, either intentionally or without reasonable excuse, may result in the CMA imposing administrative penalties of a fixed amount (GBP30,000) and/or a daily rate (GBP15,000). Further, under the DMCC Act, the CMA is empowered to impose significant fixed penalties of up to 1% of a business’s annual worldwide turnover and a daily penalty of up to 5% of daily worldwide turnover (while non-compliance continues) for, among other violations, concealing, destroying, or falsifying evidence, or for providing false or misleading information to the CMA (see 10.1 Recent Changes or Impending Legislation).

3.8 Review Process

The CMA’s review process consists of two phases: a standard Phase 1 review and, if necessary, an in-depth Phase 2 investigation.

Phase 1

A standard CMA Phase 1 review lasts up to 40 working days, running from the first working day

following the CMA's confirmation to the parties that it has received a complete merger notice or that it has sufficient information to begin an investigation. This timeline may be extended in certain circumstances, such as where the parties fail to respond to a Section 109 Notice by the prescribed deadline.

During Phase 1, the CMA will also solicit views from interested third parties (see **7.2 Contacting Third Parties**) and, separately, may receive spontaneous feedback in response to its public announcement of the review.

At the end of Phase 1, the CMA will decide whether to refer the transaction for a Phase 2 investigation. However, as explained in more detail in **5.4 Negotiating Remedies With Authorities**, if the parties offer remedies (so-called “undertakings in lieu”, or UILs) to address any concerns identified by the CMA at Phase 1 (with a view to avoiding an in-depth, Phase 2 review), an additional period for negotiating and finalising such remedies may apply.

Phase 2

The CMA has a statutory time period of up to 24 weeks to conclude a Phase 2 investigation. This deadline may be extended once, by a period of up to eight weeks, if there are justifiable reasons why the extension is required, or if the parties fail to respond to a Section 109 Notice by the prescribed deadline (see **10.1 Recent Changes or Impending Legislation** for relevant changes under the recently passed DMCC Act).

In addition, in cases where the CMA proposes to impose remedies on the parties, or to clear the transaction on condition that remedies are implemented, it will have a period of 12 weeks from the date of its Phase 2 Final Report – potentially extendable by up to a further six weeks, in

certain circumstances – within which to negotiate and finalise those remedies.

Note that – on 25 April 2024 – the CMA issued updated guidance outlining a revised process for Phase 2 investigations. However, these changes are procedural as opposed to substantive in nature, and are only applicable to Phase 1 cases opened by the CMA from 25 April 2024 which are referred for an in-depth Phase 2 investigation (see **5.4 Negotiating Remedies With Authorities** for changes to the Phase 2 remedies process).

3.9 Pre-notification Discussions With Authorities

Pre-notification discussions with the CMA are common prior to the commencement of a Phase 1 review, where the parties are planning to formally notify the transaction. This reduces the risk of a notification being declared incomplete after submission (see **3.6 Penalties/Consequences of Incomplete Notification**). It may also reduce the risk of a transaction being referred for a Phase 2 investigation.

If the notifying parties wish to participate in pre-notification discussions, the process is initiated by submitting a Case Team Allocation Form to the CMA (available on its website). The CMA will aim to allocate a case team within a reasonable timeframe. Upon allocation, the case team will review the draft merger notice and identify any additional information that it requires or considers necessary. This process may involve multiple rounds of questions to reach the stage of the merger notice being considered satisfactory. In some cases, the CMA may invite the merging parties to make early submissions on specific theories of harm that it is considering.

As pre-notification is not part of the formal process, it has no fixed timeline and, in certain

cases, can last for several months. The case team will often wish to ensure that they have a thorough understanding of the markets and competitive issues involved in a transaction before the clock officially starts. Therefore, the CMA may begin informal market testing if the parties have already made the transaction public. Despite this, all pre-notification discussions are confidential.

3.10 Requests for Information During the Review Process

In addition to the extensive information provided at the filing stage (see **3.5 Information Included in a Filing**), it is common for the CMA to request further information from the parties. These detailed requests may arise due to competition concerns raised by interested third parties in relation to the transaction or where complex issues require further investigation (eg, a transaction is referred for a Phase 2 review).

3.11 Accelerated Procedure

There is no official accelerated procedure under the UK merger control regime. However, parties may submit a request to the CMA to fast-track its review from a Phase 1 investigation to either a consideration of UILs or a Phase 2 investigation (see **10.1 Recent Changes or Impending Legislation** for relevant changes under the recently passed DMCC Act).

If there are other timing constraints due to the fact that a transaction is subject to other regulatory procedures (eg, filings in other jurisdictions), the parties may inform the CMA and request that it exercise its discretion to come to a decision earlier than the statutory deadline. Such requests will be assessed by the CMA on a case-by-case basis.

4. Substance of the Review

4.1 Substantive Test

The substantive test is whether a relevant merger situation has resulted or may be expected to result in a “substantial lessening of competition” (SLC) in one or more markets within the UK.

- At Phase 1, the legal standard is met if the CMA forms a reasonable belief that there is a realistic prospect of an SLC in light of the relevant facts of the case.
- At Phase 2, the legal standard is an assessment on the balance of probabilities (ie, an SLC is more likely than not).

What constitutes “substantial” in the context of the SLC test will be determined by the CMA on a case-by-case basis. Notably, the CMA does not apply market share or concentration thresholds to assess whether a loss of competition is substantial.

If, on the basis of its review, the CMA determines that a transaction is likely to result in an SLC – meaning a 50% or more likelihood – it must refer the transaction for a Phase 2 review. If the likelihood of a transaction resulting in an SLC is less than 50% but still a distinct possibility, the CMA must exercise its discretion as to whether a Phase 2 reference is required.

At Phase 2, if the CMA establishes – on the balance of probabilities – that the transaction has resulted, or may be expected to result, in an SLC, it must decide whether the SLC or any resulting adverse effect(s) should be remedied, mitigated, or prevented.

4.2 Markets Affected by a Transaction

The CMA does not apply any thresholds to market share, number of remaining competitors, or

on any other measure to determine whether a loss of competition is substantial.

Based on the range of evidence before it, considered in the round, the CMA will consider whether a merger would give rise to an SLC on one or more of the following bases:

- unilateral effects – where a horizontal merger involves two competitors and effectively removes the rivalry between them, resulting in a loss of competition that would enable the new merged entity to profitably raise prices;
- co-ordinated effects – where a merger (horizontal or non-horizontal) impacts market conditions in such a way that it allows or increases the potential for several entities within the market, including the merged entity, to co-ordinate their activities and jointly raise prices; and/or
- vertical or conglomerate effects – where a merger (principally, a non-horizontal merger) reduces rivalry by enabling the merged entity, either through creating or strengthening its ability, to use its market power in at least one relevant market.

In order to determine which markets may be affected by a transaction, the CMA assesses the competitive effects of a transaction by examining the relevant market, typically taking account of the product scope as well as the geographic scope.

Product Scope

Determining the relevant product market includes identifying the most significant competitive alternatives available to the merging parties' customers, and the CMA will generally consider evidence from the parties, the parties' customers, and/or competitors, as well as third-party reports.

- The CMA will examine the parties' overlapping products in the narrowest plausible candidate product pool in a horizontal merger (ie, where merging parties are competitors).
- In a non-horizontal merger (ie, where parties are at different levels of the supply chain or at the same level but not competing), the CMA will start with at least one party's product.
- The CMA may then widen the product scope and consider either demand-side substitution (eg, how customers would respond to a small but significant and sustained increase in price (the "SSNIP" test)), or supply-side substitution (eg, how competitors would respond to a small but significant and sustained increase in price). Note that the CMA may also review evidence that relates to non-price considerations.
- Note that while the CMA's assessment is representative of current competitive constraints, it will also take account of how competitive conditions will develop and evolve in the future.

Geographical Scope

Determining the relevant geographic market involves identifying the territory where the merging parties' customers can source the most important competitive alternatives. This assessment typically involves consideration of demand-side substitution, and the CMA will review relevant evidence.

The CMA will usually only make a definitive assessment of the boundaries of the relevant market at the Phase 2 stage. At Phase 1, the CMA may formulate an initial analysis without reaching a definitive conclusion.

4.3 Reliance on Case Law

The CMA is not required to follow its previous decisions. That being said, the CMA's past deci-

sions, as well as decisions of major jurisdictions (particularly in the US and EU), may inform the CMA's assessment but, importantly, the CMA can depart from (and has frequently departed from) its past decisional practice, especially in the last ten years.

4.4 Competition Concerns

See 4.1 Substantive Test.

4.5 Economic Efficiencies

The CMA is able to take account of any factors that may prevent or appreciably reduce any harmful impact of the merger, and parties are encouraged to engage with the CMA on this issue as early as possible, if any efficiencies are to be claimed.

The CMA considers merger efficiencies to fall into two categories:

- rivalry-enhancing efficiencies – these are efficiencies that incentivise the merging parties to act as stronger competitors to their rivals (eg, by reducing their marginal costs which incentivises them to provide better prices or a better quality, range or service to customers); or
- relevant customer benefits – these are benefits to UK customers resulting from the merger (such as improved innovation resulting from the combination of unique assets of the merging parties applying to products on which the parties do not compete, or reduced carbon emissions to the extent that the parties do not normally compete on sustainability).

In claiming such efficiencies, parties will need to provide supporting evidence demonstrating that:

- the efficiencies are timely, likely, and sufficient to prevent an SLC; and
- the efficiencies are transaction-specific such that they could not exist in the absence of the transaction.

4.6 Non-competition Issues

The general UK merger control regime assesses transactions on the basis of competition concerns. However, there are certain contexts where non-competition issues may be considered.

National Security

The NSI Act enables the UK government to examine and intervene in mergers on the grounds of national security. If a transaction requires both a national security and a competition review, the Investment Security Unit (ISU) and the CMA will work closely together (see 9.1 Legislation and Filing Requirements).

Sustainability

In assessing economic efficiencies such as relevant customer benefits, the CMA may consider sustainability enhancements. Recently, the CMA has been vocal in its willingness to take account of environmental improvements where appropriate and in general, supporting the UK's Net Zero Strategy.

Public Interest

The secretary of state is able to intervene in “public interest mergers” and “special public interest mergers” under the EA (see 1.2 Legislation Relating to Particular Sectors). In public interest mergers, transactions will be assessed on public interest grounds and may also be assessed on competition grounds. In special public interest mergers, transactions will be assessed on public interest grounds only.

4.7 Special Consideration for Joint Ventures

Joint ventures are assessed using the same considerations as other relevant merger situations.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

At Phase 2, if the CMA establishes that the transaction has resulted, or may be expected to result, in an SLC, it must decide whether the SLC or any resulting adverse effect(s) should be remedied, mitigated or prevented (see **4.1 Substantive Test**). In general, this means the CMA will typically impose remedies at the end of the Phase 2 review, which may include prohibiting, or unwinding, a completed transaction.

5.2 Parties' Ability to Negotiate Remedies

Merging parties may offer remedies to address competition concerns raised by the CMA at either Phase 1 or Phase 2, or during pre-notification discussions. Merging parties are encouraged to consider possible remedy packages at an early stage of the process, if a transaction is expected to raise competition concerns. This approach is usually taken to avoid a Phase 2 reference, aiming to offer remedies capable of resolving issues raised by the CMA at Phase 1, known as UILs.

If the CMA decides to accept offered UILs, it will no longer be able to refer the case to Phase 2. Therefore, the CMA will need to be convinced that the UILs will effectively resolve the identified competition concerns and are capable of being implemented within the Phase 1 timetable.

Note that the CMA is not able to unilaterally impose UILs on merging parties – ie, they are entirely voluntary and it is up to the parties concerned to formulate and offer them as they see fit.

5.3 Legal Standard

In considering any remedies put forth, the CMA is required by the EA to have regard to the need to achieve a comprehensive solution that is fit for the purpose of remedying, preventing or mitigating an SLC as well as any resulting adverse effects, taking account of how reasonable, proportionate and practicable such a solution would be.

5.4 Negotiating Remedies With Authorities

The CMA's guidance on merger remedies sets out the common principles that apply to the assessment of remedies at Phase 1 and Phase 2. In seeking remedies that are effective in addressing an SLC and any resulting adverse effects (see **5.2 Parties' Ability to Negotiate Remedies**), the CMA should:

- aim to select the least costly and intrusive remedy that it considers to be effective;
- ensure that any remedies offered are not disproportionate in relation to the SLC and its adverse effects; and
- have regard to any relevant customer benefits arising from the merger.

In addition to these common principles, the CMA's guidance lays out specific requirements for both structural and behavioural remedies.

Structural Remedies

The CMA has expressed a clear preference for structural remedies, that is, divestments, as these are designed to have immediate and last-

ing market impact and do not require ongoing oversight.

Divestments typically relate to the business being acquired. However, the CMA will consider divestment in relation to the acquirer, as long as the SLC can be effectively addressed in that way.

In determining the scope of the divestiture package, the CMA will typically seek to identify the smallest viable, standalone business that can independently compete successfully on an ongoing basis and that includes all the relevant operations applicable to the area of competitive overlap.

At Phase 1, the CMA will usually require an “upfront buyer” for a divestment. An “upfront buyer” is a purchaser who:

- has contractually committed to purchasing the divested business; and
- is approved by the CMA.

Where no such buyer is found, the CMA may still refer the transaction for a Phase 2 review.

At Phase 2, although the parties are still able to proactively offer remedies, the CMA has the power to ultimately impose remedies, such as, full divestment of the target’s business in a completed transaction.

Behavioural Remedies

The CMA is generally more sceptical of behavioural remedies (ie, commitments by the parties to behave in a certain way on the market) as these tend to be more complex to implement and monitor.

The CMA will generally only use behavioural remedies where:

- structural remedies are not feasible;
- the SLC is not expected to be sustained; or
- at Phase 2, such measures would preserve substantial relevant customer benefits that would otherwise be eliminated by structural measures.

Examples of behavioural remedies include supply obligations, access to key technology or infrastructure, licensing commitments, and fire-wall measures.

Note that the CMA may use behavioural commitments to supplement structural remedies.

Process for Proposing Remedies at Phase 1 and Phase 2

The parties may:

- offer UILs at Phase 1, once the CMA has identified an SLC; and
- propose remedies at Phase 2 once the CMA has reached a provisional finding of an SLC.

Process for Proposing UILs at Phase 1

Offered UILs should be formally submitted to the CMA using the CMA’s Remedies Form for Offers of Undertakings in Lieu of Reference and the CMA’s applicable template (available from its website). The UIL process at Phase 1 can be summarised as follows.

- Upon receipt of the CMA’s SLC decision, the parties have up to five working days to offer UILs to address the SLC.
- Once UILs are offered, the CMA has until the tenth working day after receipt of the SLC decision by the parties to decide on the acceptability of the offer. If the CMA decides

to accept a modified version of the UILs offer, the parties will have a short period of time to confirm their agreement with the modified package.

- If the CMA decides that the offered UILs might be acceptable in principle, it will confirm this to the parties and publish a non-confidential version of its decision on its website, which triggers a public consultation process.
- Third parties will have the opportunity to submit their views to the CMA during the public consultation period which lasts at least 15 calendar days. If the UILs are modified in a material way, then a second consultation of at least seven calendar days is required.
- Taking account of third-party comments, a full assessment of the offered UILs will be undertaken by the CMA and it will decide whether to accept the UILs within 50 working days of the SLC decision. An extension of up to 40 working days is available, if the CMA considers that there are special reasons for granting this.

Process for Proposing Remedies at Phase 2

As a general matter, the CMA's recently updated procedural guidance codifies – at various points – the CMA's position that it encourages early “without prejudice” discussions/proposals on remedies at Phase 2. More specifically, in the updated guidance, the CMA now envisages enhanced opportunities for the merging parties to propose draft submissions and hold early discussions with the inquiry group – and, crucially, obtain feedback – ahead of the publication of the interim report (eg, on the basis of a draft Phase 2 Remedies Form).

Notwithstanding earlier opportunities to engage on remedies, where the inquiry group identifies an SLC in its interim report, it will consider potential remedies it deems appropriate to address

the SLC and will consult with the merging parties, as well as third parties, on any proposed remedies. More specifically:

- In order to propose possible remedies for the inquiry group's consideration, merging parties should submit a Phase 2 Remedies Form (or an updated version if a draft Phase 2 Remedies Form has already been submitted) as soon as practicable, but usually no more than 14 calendar days from the notification of the interim report. Merging parties should confirm to the CMA case team whether they intend to submit a completed Phase 2 Remedies Form as soon as possible after they are notified of the CMA's interim report – and, in any case, within three working days of publication of the CMA's interim report. The level of detailed information required by the CMA in the Phase 2 Remedies Form will vary according to the type and structure of remedy/remedies proposed.
- Following submission by the merger parties of the Phase 2 Remedies Form, the CMA will publish an Invitation to Comment on Remedies – which will set out any remedy proposals provided by the merging parties in the Phase 2 Remedies Form (based on the non-confidential summary of the proposal), and which thus serves as a basis for consultation with the merging parties and other parties (including customers, competitors and any relevant sectoral regulator). Where merging parties do not submit a Phase 2 Remedies Form, the CMA will issue an Invitation to Comment on Remedies based on the information available to the CMA at that time.
- Following the merging parties' submission of the Phase 2 Remedies Form – and prior to the Interim Report on Remedies – the CMA will continue to assess remedies, by gathering further evidence and consulting with the

merger parties and third parties (eg, on the basis of remedy calls/meetings).

- Once the CMA has consulted as required, it will issue an Interim Report on Remedies (which has replaced the remedies working paper) to the merging parties, setting out its provisional decision on remedies based on the inquiry group's assessment of the different options. The merging parties will typically have at least seven calendar days to respond to this report. Where the Interim Report on Remedies indicates that the inquiry group provisionally considers that any remedies proposed by the merger parties would not be practicable or effective, the merger parties may wish to amend their remedy proposals to address the concerns that have been identified.
- Following the merging parties' response to the Interim Report on Remedies, they may be invited to a final remedies call with the CMA, which is primarily intended to enable the CMA to clarify any aspects of the merger parties' response that may be unclear.
- In light of the constraints imposed by the CMA's statutory timetable – and the need to prepare and publish the final report setting out the inquiry group's final decisions on the SLC and remedies – the CMA case team will indicate to the merging parties a deadline after which the inquiry group will not be able to take into account further submissions on remedies (or further modifications to their remedy proposal).
- Following consultation on the Interim Report on Remedies and any further discussions between the CMA and the parties, the CMA will take a final decision on remedies, which will be published in the Phase 2 final report.
- Following the final report, the CMA has 12 weeks to accept final undertakings, where offered by the parties, or to make a final

order. The time period may be extended by up to six weeks, if the CMA considers that there are special reasons for doing so.

5.5 Conditions and Timing for Divestitures

The acquisition of a divestment by an “upfront buyer” will be subject to the CMA's acceptance of UILs (at Phase 1) or undertakings (at Phase 2). See 5.4 Negotiating Remedies With Authorities.

The process and timing regarding the divestment to a “non-upfront buyer” is slightly different but it still requires the parties to obtain the CMA's approval of an appropriate purchaser, and conclude a sales agreement with that purchaser.

The length of time for the merging parties to achieve effective disposal of the agreed divestiture package to a non-upfront buyer – ie, the divestiture period – will depend on each individual case, but it will normally be for a maximum period of six months.

In determining the appropriate divestiture period, the CMA will seek to strike a balance between factors which favour a shorter duration (such as minimising asset risk and giving timely effect to the remedy) and those which favour a longer duration (such as sourcing and selection of suitable purchasers and facilitating adequate due diligence).

If no appropriate purchaser is found within the specified time period, the CMA may appoint a monitoring trustee to sell the divestment business at no minimum price.

If a case has been referred for a Phase 2 review, or interim measures or undertakings are in place, it is possible to complete a transaction while the

divestment process is in progress, as long as the CMA consents to this.

If any remedies or conditions are breached by the parties, the CMA can take enforcement measures by commencing civil proceedings. Affected third parties may also choose to commence proceedings, such as damages actions.

5.6 Issuance of Decisions

The CMA will provide the formal, confidential version of its decision to the parties at Phase 1 and/or Phase 2 – typically very shortly before such decision is formally announced. Commercially sensitive information of third parties will be excised.

The CMA will then – in due course – publish a formal, non-confidential version of its decision on its website, with commercially sensitive information of the parties involved excised.

In addition, the CMA's merger decision will be announced via the Regulatory News Service.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

See 2.5 Jurisdictional Thresholds and 2.8 Foreign-to-Foreign Transactions.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

The CMA will not usually give a view in its merger decision as to whether a transaction-related restriction constitutes an ancillary restraint.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third parties play an important role throughout the CMA's review process, and the CMA will actively seek third-party feedback at key stages of the review, including in the context of remedies (see 3.8 Review Process, 5.4 Negotiating Remedies With Authorities and 7.2 Contacting Third Parties).

Examples of how third parties may be involved in the review process include:

- where merging parties have notified a transaction and it raises competition concerns, the CMA will typically contact businesses that the parties have identified in the notification as their main competitors, customers, or suppliers;
- where the CMA has decided to initiate its own investigation, the CMA must consult any person likely to be impacted in a substantial way by the CMA's decision; and
- during a Phase 2 review, the CMA will usually publish key documents (with confidential information excised) related to the transaction on its website, which third parties may be invited to comment on.

7.2 Contacting Third Parties

See 7.1 Third-Party Rights.

The CMA may request or invite information from third parties in writing or orally. In practice, this may take the form of questionnaires, telephone calls and/or online or in-person meetings.

In addition, the CMA may require third parties to provide information or documents, or give evi-

dence as a witness, by issuing a Section 109 Notice which constitutes a mandatory request (see **3.6 Penalties/Consequences of Incomplete Notification**).

In the context of remedies, and following the CMA's provisional finding of an SLC, it will invite comments from interested third parties on any proposed remedies (see **5.4 Negotiating Remedies With Authorities**).

7.3 Confidentiality

The CMA has an obligation to protect the confidentiality of commercially sensitive information provided to it by the merging parties as well as interested third parties of a transaction. However, the CMA is also required to publish its decisions as well as the supporting reasons, which sometimes creates a trade-off between these two obligations.

During the CMA's investigation, it will actively publicise the transaction at issue so as to solicit views from interested third parties. Therefore, upon submitting a merger notice, parties are required to confirm that the transaction has been publicised (see **3.5 Information Included in a Filing**).

With respect to documents published by the CMA in the context of an investigation, the parties may request that certain commercially sensitive information is kept confidential and excised from such documents before publication.

7.4 Co-operation With Other Jurisdictions

The CMA generally seeks to co-operate with other competition authorities in multi-jurisdictional mergers. This co-operation may relate to substantive assessment of the transaction, the discussion of any potential or actual remedies,

and, where appropriate, the gathering of information to facilitate co-ordinating certain stages of the investigation timetables between the CMA and other competition authorities. However, the CMA maintains its independence as a decision-making authority uninfluenced by the decisions of other regulators (note recent examples of divergence such as Cargotec/Konecranes and Microsoft/Activision, where the UK took a more interventionist approach compared to the European Commission, and Booking/eTraveli and Amazon/iRobot, where – in both cases – the European Commission challenged a transaction that the CMA had cleared unconditionally at Phase 1).

As the CMA is not permitted to disclose the confidential information of businesses, the CMA will typically ask merging parties to sign a confidentiality waiver before exchanging information relevant to the transaction with other competition authorities in relevant jurisdictions.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

A CMA merger decision (such as a decision to clear, refer or prohibit a transaction) can be reviewed on an application to the UK Competition Appeal Tribunal (CAT) under Section 120 of the EA. Decisions imposing fines can also be appealed before the CAT.

An appeal to the CAT can only be made on grounds of judicial review. Therefore, the CAT's review will be limited to examining the lawfulness of the decision and not the merits of the case.

The CAT may decide to either dismiss the application or quash the decision and refer the matter

back to the CMA, in which case the CMA will be under a direction to reconsider and issue a new decision.

8.2 Typical Timeline for Appeals

An application to the CAT must be made within four weeks of the date of the CMA's decision.

The CAT's Guide to Proceedings states that it will typically consider applications for review of merger decisions with a certain level of urgency. However, the CAT is not subject to a fixed statutory timetable within which to deliver its judgment. In practice, the main hearing will generally take place within three months.

A judgment of the CAT may be appealed on a point of law to the Court of Appeal of England and Wales within 14 days and with leave to appeal from either the CAT or the Court of Appeal.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Clearance decisions can be challenged by third parties who are aggrieved by the relevant decision of the CMA.

Aggrieved third parties will typically be market competitors, but may extend to customers and interest groups.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

The NSI Act created a separate investment screening regime in the UK which captures foreign direct investment (FDI) in certain sectors with potential national security implications (see 1.2 Legislation Relating to Particular Sectors

and 4.6 Non-competition Issues). While certain specified sectors are subject to mandatory notification, transactions outside of those sectors may be voluntarily notified or called in for review if they pose a national security risk.

Mandatory Notification

The mandatory regime of the NSI Act applies to 17 sensitive sectors of the economy, such as artificial intelligence, data infrastructure, defence, energy, military and dual-use, and suppliers to emergency services and transport (the full list is accessible in the UK government's guidance on how the rules apply to acquisitions).

Qualifying transactions include:

- transactions involving the acquisition of a 25% or more stake in an entity in a key sector; or
- transactions where the acquirer increases their level of interest exceeding certain thresholds (eg, from 25% to more than 50%).

A qualifying entity is one which carries on activities in the UK or supplies goods or services to persons in the UK.

There are no turnover or share-of-supply thresholds under the NSI regime. Thus, any planned acquisition in one of the 17 mandatory sectors will require approval from the UK secretary of state before it can be completed. Otherwise, such an acquisition will be void, and civil and criminal penalties may be enforced.

Voluntary Notification

For acquisitions involving entities outside of the 17 sectors, the parties may choose to voluntarily notify if the transaction may give rise to national security concerns. Where the transaction is not notified, the secretary of state has the power to

“call it in” for NSI assessment. Any transaction can be caught under the “call-in” regime, as there are no identified sectors.

The voluntary regime and the call-in power also apply to asset deals resulting in the acquisition of land, tangible movable property and intellectual property. However, it is likely that such a transaction will be called in if it relates to one or more of the 17 sectors under the mandatory regime (otherwise the asset deal in question would be less likely to raise a national security concern).

2024 Call for Evidence

On 18 April 2024, the government published its Response to the Call for Evidence launched at the end of 2024 to invite views from stakeholders (such as law firms, trade bodies, banks or investors, businesses operating in the mandatory areas, and academic/research institutions) on the practical impact of the NSI regime.

In its response, the government set out five key areas it will be focusing on in 2024 to enhance the regime (see below), and on 21 May 2024, it published updated guidance about the operation of the NSI Act, including:

- publishing an updated Section 3 statement to provide more clarity on the factors relevant to exercising its call-in powers, with specific updates released on 21 May 2024 covering –
 - (a) the circumstances in which certain acquisitions could be considered under the NSI Act;
 - (b) how the government may consider technology transfer risks when reviewing asset acquisitions;
 - (c) where the government may see risk from UK acquirers or acquirers that have previously been cleared through the NSI

system; and

- (d) improved examples of how the government assesses target risk, acquirer risk and control risk;

- publishing updated market guidance that addresses stakeholders’ requests for further guidance on situations in which the Act can apply to Outward Direct Investment, and that provides specific information for universities considering when to notify acquisitions to the Investment Security Unit (ISU) (the updates released on 21 May 2024 also include new examples);
- consulting on updates to the mandatory notification areas, including providing clearer definitions (in particular for AI and advanced materials), improved guidance on their interpretation (in particular for defence and critical suppliers to government), and the potential addition of new areas such as semiconductors, critical minerals and water;
- considering technical exemptions to the mandatory notification requirement where, for example, certain types of transactions confer either minimal levels of – or no additional – control, such as exempting the appointment of liquidators, official receivers and special administrators from the regime (the government has confirmed it will bring forward secondary legislation to address this) and considering other possible targeted exemptions such as for intra-group reorganisations or for those transactions involving public bodies or Scots law share pledges; and
- improving the operation of the NSI system such as changes to the ISU’s operational processes, the notification forms and the NSI Notification Service portal.

Increased intervention on the basis of national security is a clear trend, with the UK government confirming that – as of 18 April 2024 – it has

reviewed over 1,700 notifications and made 22 necessary and proportionate final orders under the NSI Act.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

On 24 May 2024, the much-anticipated Digital Markets, Competition and Consumers (DMCC) Bill was passed. The DMCC Act establishes a new digital markets regime in the UK as well as significant reforms to UK competition law, both of which include merger control implications.

Strategic Market Status (SMS)

Firms with substantial and entrenched market power, in at least one digital activity, providing them with a strategic position in respect of that digital activity will be designated as having SMS by the Digital Markets Unit (DMU) of the CMA. This new targeted regime is designed to actively shape the behaviour of the most powerful players in the digital sphere. Only firms with a global turnover above GBP25 billion, or UK turnover above GBP1 billion, will be in scope.

Notably, the Act provides that firms with SMS designation will be obliged to report:

- certain transactions for a consideration of at least GBP25 million; and
- transactions leading to the increase of shareholding to 15% or more, to more than 25%, and to more than 50%.

Reforms to UK Competition Law

The DMCC Act also introduces significant changes to merger control thresholds. However, the general UK merger control regime will remain voluntary and non-suspensory.

Changes include:

- the creation of a new “acquirer-focused” merger control threshold under which the CMA will have jurisdiction if –
 - (a) one of the parties has an existing share of supply of goods or services in the UK of at least 33% and a UK turnover of more than GBP350 million; and
 - (b) the other party is a UK business, or supplies goods and services in the UK (the current share-of-supply test will continue to apply in parallel);
- the turnover threshold relating to the target will be raised from GBP70 million to GBP100 million (except in the case of public interest interventions in media mergers, where the turnover threshold will remain at GBP70 million);
- the introduction of a “safe harbour” for small mergers, exempting transactions from review if neither party’s UK turnover exceeds GBP10 million; and
- various procedural amendments, including enhanced flexibility of fast-track references to Phase 2.

In the wake of the DMCC Bill receiving royal assent and becoming an Act, the CMA has published certain draft guidance documents in relation to the digital markets competition regime established by the DMCC Act – and has launched a consultation on such guidance. Following the conclusion of the consultation period, the CMA will – in due course – publish non-confidential versions of the responses that it receives.

While it remains to be seen how the UK General Election will impact the timeline of the Act’s roll-out, according to the CMA’s published provisional approach to implementing the new digital markets competition regime, the CMA is working

towards October 2024 for expected commencement, with the first SMS designations expected – following the first raft of SMS investigations – by summer 2025.

Separate to the DMCC Act, on 25 April 2024, the CMA issued updated guidance outlining a revised process for Phase 2 investigations (see **3.8 Review Process**).

10.2 Recent Enforcement Record

In recent years, the CMA has been one of the most active competition authorities, referring a number of transactions for Phase 2 reviews, imposing significant fines for breaches of IEOs (JD Sports/Footasylum and Meta/GIPHY), and diverging from the approaches of other competition authorities (Cargotec/Konecranes, Microsoft/Activision, Amazon/iRobot and Booking/eTraveli). See the [UK Trends & Developments article](#) for a full overview of CMA merger review statistics for 2023–2024.

10.3 Current Competition Concerns

Following Brexit, the CMA now reviews all major international transactions that would previously have been reviewed by the European Commission. How this has applied in practice is perhaps evident in the fact that recent years have seen a marked increase in what some market commentators have described as a more aggressive and interventionist UK enforcement environment – leading to less predictable outcomes for deal parties.

Notably, the CMA states that its main goal in all decisions is to protect UK consumers and businesses from anti-competitive mergers. This is particularly evident in the regulator’s attentiveness to novel theories of harm (eg, the ecosystem theory of harm mentioned at Phase 1 in Microsoft/Activision) as well as its flexible approach to asserting jurisdiction over deals without an obvious UK nexus.

Finally, the CMA has clearly indicated that deals in the digital space will be particularly closely monitored and scrutinised (see **10.1 Recent Changes or Impending Legislation**), which means that businesses in this space – whether incumbents or challengers – will need to be alert to the various types of risks and opportunities that this presents.

Trends and Developments

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Van Bael & Bellis

Van Bael & Bellis is widely acknowledged as having one of the leading practices in EU and UK competition law, including merger control. From its main office in Brussels and its newest office in London, the competition team at Van Bael & Bellis has assisted clients at both the EU and national levels, notably appearing before the European Commission, the UK Competition and Markets Authority (CMA) and the EU and UK courts, where the firm has acted as counsel in many landmark cases. Within the field of merger control, Van Bael & Bellis has a

dedicated team of EU and UK specialists who regularly represent merging parties as well as complainants in cases involving key issues of jurisdiction, procedure and substantive law. The firm has succeeded in obtaining clearance for numerous complex transactions before the European Commission and the CMA. The team also routinely helps clients to obtain merger clearance from member state authorities for transactions that do not meet EU thresholds. The firm is frequently called on to co-ordinate merger control filing efforts across the world.

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The CMA Over the Past Year – an Evolution, Not a Revolution

The CMA's caseload

The UK Competition and Markets Authority (CMA) has had another busy year. Although the relevant statistics never provide a complete picture, they are always of interest. During the latest financial year (April 2023 to March 2024), it is worth noting that:

- The CMA's Mergers Intelligence Committee (MIC)¹ carried out almost 800 initial screenings of transactions, received around 150 briefing notes and called in 15 cases for a Phase 1 investigation, two of which were ultimately referred to Phase 2. The MIC's caseload appears to have stabilised across the last three years, after a very substantial – almost 100% – increase in the submission of briefing notes following the end of the EU exit transition period.
- The average length of the various procedural steps appears to be broadly the same compared to FY2023, with a slight decrease in the average duration of pre-notification – down to 65 working days from 71 working days. That said, some cases continue to experience particularly long pre-notification periods, which is especially the case in multi-jurisdictional deals.
- The total number of Phase 1 decisions increased by 25% over the past financial year – from 43 to 54 – a number similar to the relevant figure for 2021–2022.
- Just under 50% of the Phase 1 merger reviews involved a remedy, meaning that – in 26 of 54 Phase 1 merger decisions – the CMA accepted “undertakings in lieu” (UILs) of a Phase 2 referral. This is the highest number of Phase 1 remedy decisions ever – with a significant number involving local merger cases. This appreciable increase is, at least

in part, the result of two cases involving the review of the acquisition of multiple veterinary practices. These two cases are also responsible for an even more substantial increase in Initial Enforcement Orders (IEOs) imposed on completed mergers, a total of 32 compared to 13 in the previous financial year.

- The proportion of unconditional Phase 1 clearances has gone up to 33% from 26% in the previous financial year, without any clear indication that the relevant Phase 1 reviews presented fewer complex issues compared to those undertaken during the previous year. In addition, a somewhat smaller – but still high – proportion of cases were subject to the full “case review meeting” (CRM) process (59% compared to 72% the previous year). Such a drop could be (partially) explained by the higher proportion of cases which were fast-tracked to the UILs stage.
- The number of Phase 1 cases referred to Phase 2 has significantly decreased from 14 to four in FY2024, with two further cases being abandoned after they were referred from Phase 1 (but before Phase 2 formally commenced). Such a significant decrease in referrals, including as a percentage of Phase 1 decisions, reverses the trend of a gradual increase in Phase 2 referrals over the last decade. The high number of conditional Phase 1 clearances (ie, those involving a remedy) in the latest financial year is partly responsible for the decrease in referrals to Phase 2.
- Unconditional Phase 2 approvals significantly increased in 2023/24 – to five out of nine decisions – without an increase in the number of transactions abandoned during Phase 2. To the contrary, only one transaction was abandoned during a Phase 2 review. Additionally, one deal was blocked and two ultimately required divestment remedies. To

compare, in FY2023 only two out of 13 cases reviewed resulted in an unconditional Phase 2 approval. As such, these intervention rates suggest that the CMA Phase 2 review has not become tougher over the past year.

- Regarding multi-jurisdictional reviews, it appears that the number of parallel cases reviewed by the CMA and the European Commission (EC), and/or the US authorities, further decreased by 50% (from 20 to ten). Despite a handful of high-profile cases where appreciable differences could be observed in the approach adopted by the EC compared to the CMA, it appears fair to argue that genuine divergence remains the exception overall.

Generally, it seems that the CMA has maintained its reputation as a robust and sophisticated enforcer. It remains confident investigating both domestic and global transactions with rigour, not being afraid of examining more novel theories of harm and drawing its own conclusions from the merging parties' internal documents. The CMA also continues to work very closely with international competition authorities with standard confidentiality waivers used as a basis to exchange information and actively co-ordinate procedural steps. Lastly, the CMA has shown willingness to inject a level of pragmatism and flexibility into its processes, while defending its wide margin of discretion when its decisions are challenged before the UK courts.

Enforcement trends: the local impact of consolidating consumer-facing businesses remains under the CMA's microscope

Although not necessarily capturing international headlines, the CMA has continued to investigate transactions in consumer-facing sectors involving overlaps in local markets.

A number of such investigations involved a series of acquisitions of independent veterinary and dentistry businesses, partly driven by financial investors' so-called "roll-up" strategies. In this context, it is also worth noting that, in September 2023, the CMA launched a market study into the veterinary sector, and in March 2024, it provisionally identified competition concerns due to significant sector consolidation, among other issues.

During the relevant period, transactions in other consumer-facing sectors were also investigated – including road fuel, convenience stores/grocers, student accommodation, pharmacies, car parts and air-conditioning, and refrigeration.

In almost all such cases, the CMA identified local areas where horizontal overlaps resulted in a substantial lessening of competition, and many such local concerns were ultimately resolved by merging parties offering Phase 1 structural remedies in the form of UILs. It is worth noting that – in nearly half of those investigations – the merging parties requested their case be fast-tracked to consideration of UILs.

Extensive review of novel theories of harm – including ecosystem concerns – is here to stay

During the relevant period, the investigation of more typical horizontal consolidation issues has of course remained a (significant) part of the CMA's merger control diet, with notable examples including:

- Viasat/Inmarsat (ultimately unconditionally cleared at Phase 2); and
- Hitachi/Thales (conditionally cleared at Phase 2 – and also cleared by the EC subject to the same remedy, albeit at Phase 1).

That being said, there is also no question that the CMA remains confident in its ability to comprehensively apply new analytical frameworks in order to identify and assess more novel competition concerns. While such increased focus on assessing dynamic competition has not necessarily led to more negative outcomes for the merging parties (as also reflected in the statistics summarised above), it could be argued that analytical uncertainty – as well as the cost of such reviews, primarily due to the amount of evidence (including internal documents and third-party data) assessed by the CMA in order to reach a conclusion – has increased.

By way of example, the extensively reported Microsoft/Activision saga was not the result of a horizontal overlap, nor a concern that Microsoft would undermine the strength of its competitors (Sony in particular) in console gaming services by limiting access to (primarily) Activision's leading *Call of Duty* title. Instead, the CMA's main concern related to the developing market of cloud-gaming services, where Microsoft is a strong provider offering a "multi-product ecosystem". As such, the CMA found that Microsoft would have the ability and incentive to withhold Activision's games from rival cloud-gaming service providers. In contrast to the EC, which accepted a behavioural remedy addressing these concerns, the CMA rejected essentially the same behavioural remedy – and considered that a prohibition would be the only effective and proportionate remedy in the absence of a structural alternative (ie, divestment).

Following the CMA imposing a Prohibition Order, in August 2023 Microsoft announced a restructured transaction excluding Activision's non-EEA cloud streaming rights (which were to be divested to Ubisoft). The CMA was ultimately satisfied that such a restructured deal addressed its

concerns, as Ubisoft would be able to replicate the role that Activision would have played, in the absence of the acquisition – pursuing whatever licensing (business) model it wishes to. Certain additional safeguards were offered in the form of fast-tracked UILs to ensure that the terms of the divestment to Ubisoft would be effective, resulting in conditional approval of the deal.

The unpredictable nature and length of the process, the interaction between the global regulators involved, together with various political actors, complainants and the entire gaming community has rendered this deal one of the most prominent CMA cases in recent history. In addition, the divergence between the EC and the CMA when it comes to what constitutes an acceptable remedy will continue to generate heated debates. It is worth noting that the CMA's willingness to: (i) rethink its Phase 2 processes, injecting additional opportunities to engage with stakeholders; (ii) foster further collaboration with other regulators; and (iii) preserve its independence from political interference, represent positive steps in the right direction.

So far, the CMA has not blocked a deal based exclusively on an ecosystem theory of harm but – as explained above – such concerns have been gaining traction in recent reviews. The CMA also took this into account when assessing the impact of the parties' combined offerings in Adobe/Figma and how this combined ecosystem could diminish the competition posed by smaller players offering more specialised solutions. Ecosystem concerns were also examined in Booking/eTraveli, a case that the CMA decided to clear – at Phase 1 – on the basis that the merger would not appreciably raise barriers to entry in the UK online holiday reservations market. Notably, the EC did not agree with this view – and prohibited the deal.

When it comes to the assessment of dynamic competition, Adobe/Figma is also a recent example of growing scepticism towards the so-called “make or buy” dilemma, where the CMA has concerns about the acquirer discontinuing its own innovation efforts. In an analysis heavily based on the interpretation of internal documents, the CMA provisionally found that – in relation to product design – the merger would remove a key constraint on Figma posed by Adobe’s existing offering and its ongoing product development. Regarding creative design software, the CMA provisionally found that Figma was a credible threat to Adobe – as it had the incentive and resources to expand its presence. Ultimately, the transaction was abandoned following the EC’s statement of objections and the CMA’s provisional findings in the respective Phase 2 processes.

By contrast, the CMA unconditionally cleared the acquisition of iRobot by Amazon at Phase 1 – despite finding a realistic prospect that Amazon would develop its own robot vacuum cleaner if it did not acquire iRobot. In any event, iRobot happened to have a modest position in the UK and there were many other strong competitors present. Examining the vertical elements of this transaction, the CMA found that Amazon would not have the incentive to foreclose iRobot’s competitors post-acquisition. The EC reached a different conclusion on this point, which led to the deal being ultimately abandoned in light of the concerns raised by the EC at Phase 2.

Separately, Arcelik/Whirlpool represents a case where – positively for the merging parties – the CMA took into account a potential future business development and found that, in the absence of the transaction, Whirlpool’s European business would have been smaller. This potentially more limited future market position, combined

with the existing competitive constraints, led to the transaction being unconditionally cleared at Phase 2.

Finally, it is notable that the CMA referred two vertical mergers, Broadcom/VMware and Optum/EMIS, for in-depth reviews. Both were cleared unconditionally following very thorough Phase 2 investigations, including examining any incentives and ability to foreclose competitors by reducing interoperability. It is interesting that – in both of these cases – the CMA also assessed the access the merged entity would have to the sensitive information of its rivals and the potential effect of such access.

Scrutiny of CMA merger decisions: anything new?

The recent ruling of the Court of Appeal in *Cérélia/Jus-Rol* provided an important clarification on the scope of the Competition Appeal Tribunal’s (CAT’s) review of the CMA’s merger decisions. In reviewing such decisions, the CAT applies a “judicial review” standard rather than conducting a “re-hearing” on the merits – differing from the approach that the EU and US courts apply.

The Court of Appeal dismissed in its entirety the appeal brought against the CAT’s judgment upholding the CMA’s decision requiring the divestment of Jus-Rol, acquired by *Cérélia* back in 2022. *Cérélia* has filed to appeal the Court of Appeal’s decision before the Supreme Court.

The ruling clearly confirms the position that challenging the CMA’s substantive assessment remains a very difficult task, given the high degree of judicial deference the CAT is expected to show (such that it remains focused on any procedural failings by the CMA). That said, the Court of Appeal recognises (a view already

acknowledged by the CAT itself) that the CAT is a specialist tribunal, and – in contrast to a typical court – it is expected to: (i) engage in a detailed assessment of the evidence in order to decide whether the CMA has acted within legitimate bounds; and (ii) examine whether the CMA's decision is sufficiently supported by evidence. It could be argued that the Court of Appeal ruling supports the CAT's appetite to – in some cases – examine the CMA's interpretation of the evidence. Whether there will be any practical implications as a result of the Court of Appeal ruling in this case remains to be seen.

Upcoming Reforms

Major legislative reforms around the corner

On 24 May 2024, the much-anticipated Digital Markets, Competition and Consumers (DMCC) Bill was passed, establishing a significant number of changes to the UK merger control regime, including:

- a new “non-overlap” share-of-supply threshold for so-called “killer acquisitions” of nascent enterprises where one of the merging parties has a UK share of supply of at least 33% and a UK turnover of over GBP350 million;
- an increase in the existing turnover threshold of GBP70 million to GBP100 million (to reflect inflation);
- a new “safe-harbour” regime for small enterprises (where each party's UK turnover is less than GBP10 million);
- more flexibility in the fast-track reference process to Phase 2; and
- increased financial penalties for –
 - (a) non-compliance with deadlines to respond to information requests; and
 - (b) providing false or misleading information to the CMA.

Moreover, the DMCC Act introduces mandatory pre-completion reporting obligations for acquisitions by businesses designated with “Strategic Market Status” (SMS) where:

- an SMS firm acquires a stake of at least 15% in the target enterprise;
- the transaction value is at least GBP25 million; and
- the target enterprise has a UK nexus.

The SMS firm may not close the transaction until the expiry of a five-day “waiting period” after reporting the transaction to the CMA, unless the CMA provides its consent.

In the wake of the DMCC Bill receiving royal assent and becoming an Act, the CMA swiftly published certain draft guidance documents in relation to the digital markets competition regime established by the DMCC Act – and launched a consultation on such guidance.

The consultation period will run until 12 July 2024, with the CMA noting on its case page that it will in due course publish non-confidential versions of the responses that it receives.

While it remains to be seen how the UK General Election will impact the timeline of the Act's roll-out, according to the CMA's published provisional approach to implementing the new digital markets competition regime, the CMA is working towards October 2024 for expected commencement.

CMA updates of procedural and other guidance

On 25 April 2024 the CMA adopted revised guidance on jurisdiction and procedure in merger control cases – and, in this context, notably updated its Phase 2 framework. Without going

into detail, there are three main areas – in our view – where the most notable changes have been made (although this is not a comprehensive overview of everything that is changing):

- earlier focus on key issues (where the CMA has sought in particular to address feedback that the main party hearings could focus more on substantive issues, and that the provisional findings (PFs) come too late in the process to enable a meaningful response in most cases);
- improved engagement (where the CMA has sought to address feedback requesting more opportunities for merging parties to engage directly with the Inquiry Group, in particular, at the beginning of the Phase 2 process); and
- remedies (where the CMA has sought to address feedback that constructive discussions on remedies take place too late in the statutory timetable).

It should be emphasised that the proposed changes are procedural rather than substantive in nature – such that the Phase 2 legal standard for substantive assessment, the relevant decision-makers, etc, will not change. However, and while it of course remains to be seen how such reforms will play out in practice, such changes should nevertheless bring the CMA's Phase 2 process more in line with the EC's Phase 2 process – eg, in terms of enabling more meaningful remedies discussions earlier in Phase 2 – and should thus (hopefully) ultimately result in fewer divergent outcomes over time.

In addition to publishing the new Phase 2 guidance, the CMA has also updated its merger notice form and template confidentiality waiver.

Finally, the CMA has also consulted on updating the de minimis exception and has published revised guidance. In particular, the CMA has increased the de minimis threshold from GBP15 million to GBP30 million (which remains non-binding). The CMA has indicated that this exception is less likely to apply to nascent markets or sectors subject to increased deal activity.

UKRAINE



Law and Practice

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Contents

1. Legislation and Enforcing Authorities p.819

- 1.1 Merger Control Legislation p.819
- 1.2 Legislation Relating to Particular Sectors p.819
- 1.3 Enforcement Authorities p.820

2. Jurisdiction p.820

- 2.1 Notification p.820
- 2.2 Failure to Notify p.820
- 2.3 Types of Transactions p.820
- 2.4 Definition of "Control" p.821
- 2.5 Jurisdictional Thresholds p.822
- 2.6 Calculations of Jurisdictional Thresholds p.822
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.823
- 2.8 Foreign-to-Foreign Transactions p.823
- 2.9 Market Share Jurisdictional Threshold p.823
- 2.10 Joint Ventures p.824
- 2.11 Power of Authorities to Investigate a Transaction p.824
- 2.12 Requirement for Clearance Before Implementation p.824
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.824
- 2.14 Exceptions to Suspensive Effect p.824
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.824

3. Procedure: Notification to Clearance p.824

- 3.1 Deadlines for Notification p.824
- 3.2 Type of Agreement Required Prior to Notification p.825
- 3.3 Filing Fees p.825
- 3.4 Parties Responsible for Filing p.825
- 3.5 Information Included in a Filing p.825
- 3.6 Penalties/Consequences of Incomplete Notification p.826
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.826
- 3.8 Review Process p.826
- 3.9 Pre-notification Discussions With Authorities p.827
- 3.10 Requests for Information During the Review Process p.827
- 3.11 Accelerated Procedure p.828

4. Substance of the Review p.828

- 4.1 Substantive Test p.828
- 4.2 Markets Affected by a Transaction p.828
- 4.3 Reliance on Case Law p.828
- 4.4 Competition Concerns p.829
- 4.5 Economic Efficiencies p.829
- 4.6 Non-competition Issues p.829
- 4.7 Special Consideration for Joint Ventures p.829

5. Decision: Prohibitions and Remedies p.830

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.830
- 5.2 Parties' Ability to Negotiate Remedies p.830
- 5.3 Legal Standard p.830
- 5.4 Negotiating Remedies With Authorities p.830
- 5.5 Conditions and Timing for Divestitures p.830
- 5.6 Issuance of Decisions p.831
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.831

6. Ancillary Restraints and Related Transactions p.831

- 6.1 Clearance Decisions and Separate Notifications p.831

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.831

- 7.1 Third-Party Rights p.831
- 7.2 Contacting Third Parties p.832
- 7.3 Confidentiality p.832
- 7.4 Co-operation With Other Jurisdictions p.832

8. Appeals and Judicial Review p.832

- 8.1 Access to Appeal and Judicial Review p.832
- 8.2 Typical Timeline for Appeals p.832
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.833

9. Foreign Direct Investment/Subsidies Review p.833

- 9.1 Legislation and Filing Requirements p.833

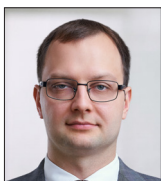
10. Recent Developments p.833

- 10.1 Recent Changes or Impending Legislation p.833
- 10.2 Recent Enforcement Record p.833
- 10.3 Current Competition Concerns p.833

AVELLUM is a leading Ukrainian full-service law firm with a key focus on finance, corporate, dispute resolution, tax, real estate and infrastructure, energy, and antitrust. **AVELLUM** is based in Kyiv. Its aim is to be the firm of choice for large businesses and financial institutions in respect of the most important and challenging transactions. The firm builds lasting relationships with its clients and makes them feel secure in new uncertain economic and legal realities. The team of professionals at **AVELLUM** success-

fully applies time-efficient and cost-effective approaches and creates integrated solutions for businesses. The partners take an active role in every transaction and ensure smooth teamwork. The antitrust team has four members and advises domestic and world industry leaders, including British American Tobacco, Kaspi.kz, Quarter Partners, Mondelez, Continuum Group Ukraine, Efes Breweries International, Data-group Holding Limited, Horizon Capital and Uber BV.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The relevant merger control legislation in Ukraine includes the following:

- Commercial Code of Ukraine;
- Law on Protection of Economic Competition (the “Competition Law”);
- Law on the Antimonopoly Committee of Ukraine;
- Regulation on the Procedure for Consideration of Applications and Cases of the Concentration of Undertakings 2002;
- Methodology for Assessment of the Monopoly (Dominant) Position of Undertakings on the Market;
- Procedure for Calculating the Fines for Violation of Legislation on Protection of Economic Competition (the “Procedure on Fines”);
- Guidelines on the Assessment of Horizontal Mergers;
- Guidelines on the Assessment of Non-horizontal Mergers;
- Guidelines on Definition of Control;

- Guidelines on the Assessment of Joint Ventures (the “Guidelines on JV”); and
- Guidelines on the Application of the SSNIP test.

1.2 Legislation Relating to Particular Sectors Sanctions

Under the Law of Ukraine on Sanctions and the Competition Law, the Antimonopoly Committee of Ukraine (AMC) will reject merger notifications or halt their review if:

- any of the parties or undertakings under their control is on the Ukrainian sanctions list; and
- a specific sanction applies to the parties or undertakings under their control (eg, a prohibition to sell shares or assets).

Other Restrictions

Foreign companies have limited or restricted abilities to make investments in certain sectors, but such limitations are not related to merger control.

1.3 Enforcement Authorities

The AMC is the primary state authority entrusted with ensuring protection of competition. The AMC reviews, clears and prohibits transactions (concentrations). If the AMC prohibits a concentration, the Cabinet of Ministers of Ukraine (CMU) may overrule that decision on public interest considerations. Judicial review is also available if the parties wish to appeal the AMC's decision in courts.

2. Jurisdiction

2.1 Notification

Compulsory Notification

Notification is compulsory if the parties hit the jurisdictional thresholds (see **2.5 Jurisdictional Thresholds**). The parties must obtain clearance before closing a notifiable transaction. Yet, the parties can make a voluntary notification even if they do not meet the jurisdictional thresholds (eg, when there are difficulties in obtaining relevant financial information).

No exceptions

Apart from transactions that do not qualify as concentrations, there are no other exceptions (see **2.3 Types of Transactions**).

2.2 Failure to Notify

Financial Penalties for Failing to Notify

Failing to notify may result in a fine of up to 5% of the group's worldwide turnover in the year preceding the fine's imposition.

In practice, the fines seldom reach the statutory limit of 5%. When determining the base fine, the AMC should rely on the Procedure on Fines and can consider various factors such as the effect of the infringement on competition, the significance of the market, and the profitability of the

economic activity related to the infringement. This may result in an increase or decrease of the fine. Furthermore, the AMC may additionally adjust the fine based on mitigating or aggravating factors.

Other Risks in Failing to Notify

Apart from financial penalties, the parties could potentially face any of the following adverse consequences:

- third-party damages claims;
- reputational damages;
- closer examination of future notifications; and
- invalidation of the transaction in some cases.

Recent Penalties

In 2023, the biggest fine for failure to notify was around EUR1.19 million, and the smallest fine for such infringement was around EUR2,015.

Publicity and Confidentiality

The AMC must publish non-confidential versions of decisions on infringement of the Competition Law. In addition, the AMC makes a brief press release regarding the adopted decision or resolution (including the parties' identities, penalties and the case outcome).

2.3 Types of Transactions

Transactions Considered Concentrations

The Competition Law provides an exhaustive list of transactions defined as concentrations that may require prior merger clearance.

- The merger of at least two independent undertakings or the takeover of one undertaking by another.
- The acquisition of direct or indirect control over an undertaking or its part through:
 - (a) the purchase or lease of its assets;
 - (b) contractual arrangements allowing an

undertaking to direct the business activities of the target undertaking, etc;

- (c) the acquisition of shares (or other equity stakes) with control rights attaching to them; and
- (d) appointments to management positions resulting in cross-directorship.

This list is open-ended, so any change in control over an undertaking (based on shareholders' agreements, changes to articles of association, etc) may be caught.

- The creation by at least two undertakings of a new full-function undertaking that will independently conduct business activities on a lasting basis while its creation does not result in co-ordinating competitive behaviour between its parents or between the parents and the new undertaking.

Internal Restructurings, Reorganisations, and Other Exempted Transactions

Under the Competition Law, the following transactions are not considered concentrations and do not require notification and clearance as such.

- Intra-group transactions and reorganisations, provided that the control links within the group were established in compliance with the Ukrainian merger control rules.
- The creation of a new undertaking aiming at or resulting in the co-ordination of competitive behaviour of either its parents or the new undertaking and its parents. Such a transaction is considered a concerted practice and may require separate antitrust clearance.
- The acquisition of shares by a financial institution with the intention of reselling them within one year (extendable), provided that

the financial institution refrains from exercising voting rights during the holding period.

- The acquisition of control over an undertaking or a part of it by a receiver or a representative of a state authority.
- The acquisition of an undertaking's assets or shares by a bank or other financial institution under the restructuring plan, provided that such assets/shares are subsequently sold to a third party within two years from the acquisition date.
- The acquisition of an undertaking's assets or shares by a bank or other financial institution as a result of foreclosure on collateral provided that (i) the acquirer refrains from exercising voting rights/utilising acquired assets during the holding period, and (ii) such shares/assets are subsequently sold to a third party within one year from the acquisition date (extendable).

2.4 Definition of "Control"

Definition of "Control"

The Competition Law defines "control" quite broadly as the possibility of exercising decisive influence (including through veto rights) on an undertaking's business activities. It is presumed that control exists where one undertaking directly or indirectly:

- holds or manages over 50% of shares in another undertaking;
- holds over 50% of votes in another undertaking's highest governing body;
- has the authority to appoint CEO, deputy CEO, or more than 50% of the members of the supervisory board (the board of directors), etc;
- has the right to receive at least 50% of another undertaking's profits; or

- exercises control over another undertaking in other ways (through charter documents, contractual arrangements, etc).

Ukrainian competition law distinguishes between:

- sole and joint control;
- negative and positive control; and
- de jure and de facto control;

Notably, standard minority shareholder protection rights generally do not confer control over the undertaking.

Minority non-controlling stakes can be caught

Acquisitions of minority stakes are caught if they ensure control (eg, on a contractual basis) over the relevant undertaking (see **2.3 Types of Transactions**). A mere acquisition of a non-controlling minority shareholding does not require prior merger clearance.

2.5 Jurisdictional Thresholds

A transaction that qualifies as a concentration requires merger clearance if the parties to the concentration hit one of the following jurisdictional thresholds:

- the combined worldwide value of assets or turnover of the parties exceeds EUR30 million, and the value of the Ukrainian assets or turnover of each of at least two parties exceeds EUR4 million; or
- the value of the assets in Ukraine or the Ukrainian turnover of a party exceeds EUR8 million and the worldwide turnover of at least one other party exceeds EUR150 million.

There are no special jurisdictional thresholds applicable to particular sectors. However, under

certain conditions, the jurisdictional thresholds will not apply to transactions in the military sector (see **2.3 Types of Transactions**).

2.6 Calculations of Jurisdictional Thresholds

Reporting Period

The value of assets and turnover is calculated for the financial year preceding the year of the concentration. For the calculation of jurisdictional thresholds, a series of transactions entered into by the same undertakings (or groups of undertakings) and affecting the same or adjacent markets within a two-year period is considered as one and the same concentration arising on the date of the last transaction.

Calculation Rules

The value of assets is based on book value. Special calculation rules apply for banking and insurance companies:

- one-tenth of the bank's assets should be considered when calculating the turnover/asset threshold; and
- an insurance company's net assets are relevant for calculating the asset threshold, while the revenues generated from insurance activities (including insurance premiums) are relevant for calculating the turnover threshold.

Sales and assets booked in a foreign currency should be converted into euros using the exchange rate set by the National Bank of Ukraine on the last day of the respective fiscal year.

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

Group-Wide Basis

All undertakings linked with parties to a concentration by control relationships (a group-wide basis) are relevant for the purpose of calculating the jurisdictional thresholds. Therefore, a group-wide basis is based on the concept of control (see 2.4 Definition of “Control”).

Attribution of JV’s Assets/Turnover

For purposes of calculating jurisdictional thresholds, a JV’s assets/turnover should be evenly distributed among its controlling shareholders regardless of the number of shares/votes they hold. However, the full turnover/value of assets of a co-controlling JV shareholder should be attributed to the JV.

Disregard Non-controlling Interests

Turnover or assets figures of non-controlling interests are not taken into consideration when determining the turnover or assets for the purpose of jurisdictional thresholds calculation.

The Seller May Remain Relevant

The selling party’s assets and turnover can only be excluded from the target group’s performance if the target possesses no Ukrainian assets, has no current operations in Ukraine, and has not been active there during the two preceding financial years. Yet, the wording of the relevant provisions is vague, so even a one-time operation can be considered an activity in Ukraine, setting the bar for excluding the selling party’s financials quite high.

Consideration of Business Structure Changes

Changes in the business during the reference period (such as other acquisitions, divestments or business closures) are generally reflected

in the calculation of jurisdictional thresholds. If business entities were sold or closed, they should not be considered in the calculation of the jurisdictional threshold. Similarly, if a party acquired another undertaking during the reference period, the assets and turnover of such an undertaking should be considered for the jurisdictional threshold.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control if the parties hit the jurisdictional thresholds. Therefore, a transaction with no reasonable nexus to Ukraine (ie, with no local presence, effects, or sales/assets) may still be caught if it meets the jurisdictional thresholds.

The only exception during martial law is defence/military-related transactions. Jurisdictional thresholds do not apply to the concentration if such a deal meets the following conditions:

- it is conducted outside Ukraine;
- it is aimed at the development of technologies and production of military and dual-use goods;
- the final recipients and/or purchasers of the products and technologies are the Armed Forces of Ukraine or law enforcement/military agencies in Ukraine;
- the products and technologies are either not developed or produced in Ukraine, or their production levels are insufficient; and
- an acquirer is active in the military sector or produces/develops dual-use goods.

2.9 Market Share Jurisdictional Threshold

Ukraine does not have a market share jurisdictional threshold.

2.10 Joint Ventures

Concentration or Concerted Practice?

Under the Competition Law, the creation by two or more undertakings of a new full-function undertaking that will independently pursue business activities on a lasting basis qualifies as a concentration, unless such creation results in the co-ordination of competitive behaviour either of its parents or of the new undertaking and its parents.

Under the Competition Law and the Guidelines on JV, joint ventures have to meet the full-functionality criterion, meaning they must be able to perform all functions of an autonomous economic entity, to be considered concentrations.

There are no special rules for determining whether joint ventures meet the jurisdictional thresholds (see 2.5 Jurisdictional Thresholds).

2.11 Power of Authorities to Investigate a Transaction

In general, the AMC cannot investigate a transaction that does not meet jurisdictional thresholds. However, the AMC does constantly monitor the public domain and can make inquiries to check merger control compliance.

The limitation period for the AMC to take action in relation to mergers is five years from closing.

2.12 Requirement for Clearance Before Implementation

The implementation of a transaction must be suspended until clearance.

2.13 Penalties for the Implementation of a Transaction Before Clearance

See 2.2 Failure to Notify.

2.14 Exceptions to Suspensive Effect

There are no general exceptions to the suspensive effect. The suspension effect applies globally, and the Ukrainian merger control rules do not provide for any possibilities to obtain individual waiver or derogation from the suspensive effect.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Closing prior to clearance constitutes an infringement of the Ukrainian merger control rules. As described in 2.14 Exceptions to Suspensive Effect, the suspensive effect applies globally. Simply carving out the Ukrainian business or assets and proceeding with global closing will not absolve parties of liability.

Yet, the AMC may consider ring-fence or hold separate arrangements as a mitigating factor when determining the amount of a fine. It is crucial for parties to inform the AMC in advance about any carve-out arrangement before closing and provide a detailed explanation of how it will work.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

In general, there are no deadlines for notification. Obtaining merger clearance before closing is the only requirement.

If a concentration is carried out through auctions or similar methods, the parties can make the notification before or after the start of the auction but no later than 30 days from the date of announcing the winner. However, the Competition Law does not provide liability for missing such a deadline.

3.2 Type of Agreement Required Prior to Notification

A binding agreement is not required prior to notification. Parties can file on the basis of a less formal agreement (eg, a draft of transactional documents, letter of intent or memorandum of understanding) as long as such a document sufficiently outlines the key terms and conditions of the transaction.

3.3 Filing Fees

The filing fee is UAH42,500 per notifiable event (around EUR1,000). Multiple notifications may be necessary depending on the transaction's structure. The filing fees must be paid before notification.

3.4 Parties Responsible for Filing

The buy-side and the sell-side are jointly responsible for filing. The following undertakings can act as the applicants depending on the transaction structure:

- the acquirer and the target;
- the controlling parents of the acquirer and the target;
- the founders of the joint venture; or
- the controlling parents of the merging undertakings.

In the case of a hostile takeover, the AMC may agree to accept a notification submitted by one of the parties.

3.5 Information Included in a Filing

The information and documents required for filing depend on the review procedure.

For the simplified review procedure:

- filing fee payment orders;

- information on the parties' worldwide and Ukrainian activities, indicating undertakings that are active and/or registered in Ukraine;
- a description of the transaction structure, indicating the transaction stages and the timeline for their implementation;
- information on merger clearance sought or granted in other jurisdictions;
- parties' asset and turnover data globally and in Ukraine for the previous financial year;
- for the relevant markets, value and volume-based sales and market share data, indicating competitors and their estimated market shares on overlapping markets for the preceding three years and, in practice, the latest reporting period;
- corporate structures of parties to a concentration before and after closing;
- a description of the source of funds and documents:
 - (a) confirming the availability of own funds to pay the consideration (eg, financial statements, excerpts from a bank account); and
 - (b) confirming that the lender does not acquire control over the borrower as a result of the financing arrangement (eg, loan agreement);
- PoAs from the notifying parties (notarised and apostilled or legalised); and
- a draft or copy of transactional documents (share purchase agreements, shareholders' agreements, memorandums of understanding, etc).

For the standard review procedure (in addition to the items mentioned in the list above):

- a detailed feasibility study of the concentration's effect on the Ukrainian markets;

- information regarding parties' membership in associations and their constitutional documents; and
- parties' excerpts from the trade register or similar (notarised and apostilled or legalised).

Confidential information must be clearly labelled for appropriate treatment by the AMC.

The filing must be submitted in Ukrainian language. Extracts from trade registers and PoAs of foreign undertakings must be notarised and apostilled or legalised. Documents in a foreign language must be provided with a certified translation into Ukrainian.

Parties must submit a hard copy and an electronic version (PDF, Word document, etc) of the notification and all attached documents on a flash drive.

3.6 Penalties/Consequences of Incomplete Notification

If any necessary information/document is absent at the outset, the AMC may either ask for it during the review process or give a notice of incompleteness within the 15-day preview period. The parties will then have to file again, including the missing information/documents. In this situation, the AMC will not impose any penalties.

Providing wrong or false information in the filing, subject to adjustments taking into account any aggravating or mitigating factors, may lead to a penalty of up to 1% of the relevant party's revenue from the year preceding the fine's imposition. The AMC may further adjust this amount, taking into account any aggravating or mitigating factors. In addition, the AMC may reconsider its decision if it was based on misleading information.

If the parties do not provide requested information during the Phase II review, the AMC may close a merger case without ruling on the essence. The parties have the option to resubmit their application.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

See 3.6 Penalties/Consequences of Incomplete Notification.

3.8 Review Process

The phases of the review process are as follows.

Standard Review Procedure

Preview period

The AMC will take up to 15 calendar days to evaluate whether the notification is complete and can proceed for substantive review (Phase I). If the AMC considers the notification incomplete, the regulator may reject it. In this case, the parties would need to file again, supplementing the original notification with the missing information.

During the preview period, the AMC asks follow-up questions that do not suspend the 15-day preview period. Generally, parties have several days to provide the requested information (see 3.10 Requests for Information During the Review Process).

Substantive review (Phase I)

The AMC will take up to 30 calendar days to evaluate whether to approve the concentration or if there are grounds to prohibit it. If there are potential grounds for prohibition, Phase II will begin.

In-depth review (Phase II)

The Phase II review entails a meticulous evaluation of the transaction and the related compe-

tition issues, as well as a thorough scrutiny of expert opinions, consumers' and competitors' views, and any other supplementary information. The AMC will publish information on the commencement of the Phase II review on its website. Third parties (eg, competitors, customers/consumers, suppliers), which believe that the transaction may significantly affect their interests, may give the AMC their reasoned opinions on why the transaction should be prohibited. Furthermore, the AMC commonly conducts surveys among consumers and customers, as well as requesting information from third parties and public authorities, to gather their opinions on how a potential transaction may impact them or relevant markets.

It is recommended that the Phase II review period should not exceed three months from the day the parties provided exhaustive information the AMC asked for in the Phase II notice. If required, the parties may request an extension of the review period. However, any request made by the AMC will pause the review period.

Simplified Review Procedure

A transaction may be eligible for a 25-day review procedure if either:

- only one party is active in Ukraine; or
- the parties' combined shares do not exceed 15% in the relevant market and 20% in vertically related markets.

However, in practice, the AMC applies the simplified review procedure where only one party is active in Ukraine or none has a market share over 15% in any product market, whether relevant or not.

Overall Timeline for Clearance

In unproblematic transactions, the parties should expect merger clearance within:

- 45 calendar days from the filing date under the standard review procedure; or
- 25 calendar days from the filing date under the simplified review procedure.

Typically, the AMC takes the entire review period to evaluate a transaction and adopts a decision during the last week leading up to the deadline. However, in practice it is possible to request a quicker review, though there is no formal procedure.

In addition, if the AMC fails to adopt a decision regarding the concentration before or on the date that the Phase I or Phase II period ends, it will be assumed that clearance has been granted by tacit consent. Normally, the AMC provides formal clearance.

3.9 Pre-notification Discussions With Authorities

Ukrainian competition law does not provide for pre-notification discussions with the AMC. Yet, informal discussions are usually possible and encouraged in complex mergers. Such discussions can be held on a no-name basis, if necessary.

3.10 Requests for Information During the Review Process

Requests for information are common during the preview period and the Phase I review. Although such requests are not typically burdensome, the AMC tends to set tight deadlines since the requests do not stop the clock or suspend the review.

Under the Competition Law, Phase II may last up to three months after the AMC receives all the necessary data. This period can be extended if additional documents, information or expert opinions are needed. However, in practice, Phase II should not take more than three months from the day the parties provided exhaustive information the AMC asked for in the Phase II notice.

3.11 Accelerated Procedure

See 3.8 Review Process.

4. Substance of the Review

4.1 Substantive Test

Under the Competition Law, the AMC will clear a transaction if it does not lead to monopolisation (achievement or strengthening of a dominant position in the market) or a substantial restriction of competition in the Ukrainian market or a significant part of it. Otherwise, the AMC will prohibit such a transaction unless the parties offer sufficient remedies.

A rebuttable presumption of dominance exists where:

- a single undertaking holds more than 35% of the market share;
- the two or three undertakings with the highest market shares combined hold more than 50% of the market share; and/or
- the four or five undertakings with the highest market shares combined hold more than 70% of the market share.

4.2 Markets Affected by a Transaction

Under Ukrainian competition law, the relevant market is defined as a market on which a concentration of undertakings takes place, and it

will be affected or can be affected by such a concentration. The relevant market combines the product market and the geographic market, defined as follows:

- a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use; and
- a relevant geographic market comprises the area where there are buying and selling relations and consumers (customers) can easily satisfy their demand for a particular product under normal conditions. The geographic market may encompass a state, region, district, city, or their parts.

The Methodology for Assessment of the Monopoly (Dominant) Position of Undertakings includes a detailed list of steps to determine the relevant market in a merger case. If the AMC is unable to define the market boundaries with this approach, the regulator will use the SSNIP test.

However, in practice, the AMC typically accepts the relevant product market definition proposed by the notifying parties unless it is unreasonably broad or outrightly incorrect. At the same time, the AMC generally prefers a narrower definition for the relevant product market, focusing on the core business activities of the parties.

4.3 Reliance on Case Law

The AMC may take into account case law of the EU Commission or other international competition authorities if the AMC lacks the necessary experience in a particular market.

4.4 Competition Concerns

Under the Guidelines on the Assessment of Horizontal Mergers, the AMC will evaluate whether a concentration may:

- eliminate important competitive constraints on one or more firms, which consequently would have increased market power (non-coordinated effects); and/or
- change the nature of competition in such a way that firms that previously were not co-ordinating their behaviour, are now significantly more likely to co-ordinate and raise prices or otherwise harm effective competition (co-ordinated effects).

Under the Guidelines on the Assessment of Non-horizontal Mergers, the AMC will evaluate whether a concentration may:

- raise the costs of downstream rivals by restricting their access to an important input (input foreclosure);
- foreclose upstream rivals by restricting their access to a sufficient customer base (customer foreclosure);
- reduce 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/or
- increase the possibility of tacit co-ordination.

4.5 Economic Efficiencies

The AMC may consider economic efficiencies when reviewing a notification, but such arguments are unlikely to be decisive. At the same time, the CMU considers economic and other practical efficiencies when deciding whether to allow a transaction that the AMC has previously prohibited. The CMU will clear a transaction if the benefits to the public outweigh the nega-

tive impact on competition, except when the competition restriction is not necessary for the concentration's goal, or it threatens the market economy system.

4.6 Non-competition Issues

In general, the AMC should not take into account any non-competition issues as part of the review process. Sometimes, the AMC may scrutinise a transaction more closely if it takes place in a strategic sector (eg, in the defence industry) or involves an undertaking having a sanctioned person in its corporate structure (even non-controlling shareholding by such person may raise the regulator's concerns). However, ultimately, the AMC must clear a transaction if it does not lead to monopolisation or significant restriction of competition.

At the same, the AMC will not review any transaction if Ukrainian sanctions apply to the parties of such a transaction (see **1.2 Legislation Relating to Particular Sectors**).

Currently, Ukraine does not have an FDI regime in place.

4.7 Special Consideration for Joint Ventures

There are no special considerations in the substantive review of joint ventures. However, if the creation of a JV results in the co-ordination of competitive behaviour, such a JV is considered as a concerted practice and will be assessed accordingly.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The AMC can prohibit a concentration if it leads to monopolisation or a substantial restriction of competition in the Ukrainian market or a significant part of it.

5.2 Parties' Ability to Negotiate Remedies

The parties may offer structural or behavioural remedies to remove or mitigate the negative impact of the concentration on competition during the Phase II review. Statistically, the AMC imposes behavioural remedies in the majority of cases. However, starting in 2024, structural remedies will take precedence over other types of remedies.

Conditional approvals often involve the imposition of reporting obligations that enable the AMC to oversee and ensure compliance. In essence, the remedies are not aimed at addressing non-competition issues.

5.3 Legal Standard

There is no specific legal standard that remedies must meet in order to be deemed acceptable. Nevertheless, the Competition Law requires remedies to be proportionate to the potential negative impact on competition and not be excessive, while oversight of their implementation should be reasonable. Additionally, the parties should prove their intention and ability to implement them.

After the parties have suggested the remedies, the AMC conducts a market survey. The AMC asks the parties' competitors, customers and other interested parties whether the suggest-

ed remedies are appropriate. Afterwards, the authority assesses the remedies' potential to eliminate possible harm to competition.

5.4 Negotiating Remedies With Authorities

If the AMC identifies grounds for prohibiting the transaction during the Phase II review, it must notify the parties. In response, the parties may offer remedies to the AMC within a 30-day period (extendable upon the parties' request), which would allow the AMC to clear the transaction.

The parties may initiate discussions on remedies during Phase I, but this would not prevent the case from proceeding to the Phase II review.

The AMC does not propose remedies to the parties on its own, but it engages in consultations with them to reach an agreement on the terms and conditions of the potential remedies. The AMC refrains from imposing remedies that have not been mutually agreed upon by the parties. However, if the AMC and the parties are unable to reach an agreement, this could potentially lead to the AMC's prohibition of the transaction.

5.5 Conditions and Timing for Divestitures

There is no one-size-fits-all approach when it comes to conditions and timing for remedies. The approach varies based on the specific case and competition concerns identified during the review process. The AMC's main goal is to ensure that the remedies effectively address the competition concerns.

The parties must adhere to the remedies outlined in the decision issued by the AMC following closing. Usually, behavioural remedies have a duration of three to five years. In a recent case, the AMC imposed structural remedies

and granted the parties a one-year compliance period for their commitments.

Failure to comply with the remedies is an infringement of the Competition Law and can lead to severe penalties and consequences. The AMC may impose a penalty of up to 5% of the party's turnover for the last financial year preceding the fine's imposition. Moreover, non-compliance with remedies may trigger a review of the approved transaction, and, in the worst case, it could lead to the prohibition of the transaction altogether.

5.6 Issuance of Decisions

In most cases, the AMC issues a formal decision permitting or prohibiting a transaction to the parties. The AMC must publish non-confidential versions of its decisions on merger and concerted practices cases within ten business days of the decision date. Additionally, the AMC publishes a summary of the decision on its website, including the parties involved and the main points of the decision.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions Behavioural Remedies

As a matter of practice, the AMC usually clears most transactions unconditionally. In more complex cases, the AMC issues approvals subject to certain behavioural commitments. For example, out of all merger cases in 2022 and 2023, only six and four, respectively, were cleared subject to parties undertaking behavioural commitments, while only one case was closed without a decision on the merits. These commitments have involved prohibiting unjustified refusal of service, ensuring equal terms for equivalent transactions, and forbidding market information exchange for three to five years.

Structural Remedies

Notably, on 15 August 2023, the AMC required Advent to sell one of GfK's market research businesses as a structural remedy. The AMC considered that the transaction would raise concerns in the Ukrainian markets for retail measurement services (RMS) for fast-moving consumer goods and consumer panel services (CPS). In particular, the AMC found that Advent would likely have bundled its CPS with RMS for fast-moving consumer goods, foreclosing competitors in both markets.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Merger clearance will not cover related arrangements (ancillary restraints). Ancillary restraints may require separate antitrust clearance. Antitrust notifications are usually filed and reviewed simultaneously with merger notifications.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

During the review process, the AMC may involve third parties such as competitors, suppliers, consumers and experts if the decision on the transaction may significantly impact the rights and interests of such third parties. This typically occurs during Phase II. The AMC operates independently in making its decision, which is later communicated to the notifying parties. Third parties are permitted to submit their observations, specifically regarding the transactions and their impact on the market. These observations are

then added to the case as evidence and must be taken into account when the AMC reaches a decision.

Third parties have the right to review filing materials (except for confidential information), provide evidence, and submit comments, objections or proposals. Furthermore, they can request a copy of the AMC's decision regarding the transaction and have the right to appeal against that decision.

7.2 Contacting Third Parties

The AMC typically contacts third parties during the Phase II review by sending out a written request for information or documents. The AMC will set deadlines for provision of the requested information. The AMC may impose penalties on a third party for non-compliance with the request.

The AMC will “market test” remedies offered by the parties.

7.3 Confidentiality

On the publication of the AMC's decisions, see **5.6 Issuance of Decisions**.

Automatic confidentiality does not apply to any information. However, parties may request confidentiality and provide a valid justification for it. In such cases, a non-confidential version of the information must also be provided. If the justification is not satisfactory, the AMC will reject the request for confidentiality. In practice, the AMC typically satisfies confidentiality requests, so commercial information, including business secrets, will be kept confidential.

7.4 Co-operation With Other Jurisdictions

The AMC typically co-operates with other competition authorities through bilateral treaties. In addition to exchanging information about ongoing or past cases, the AMC may engage in broader co-operation with these authorities, such as co-operating on updates to competition legislation. The AMC also works 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.

The AMC does not have to seek the parties' permission to share information with other jurisdictions. However, the AMC should ask for the parties' permission before sharing confidential information.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

If the AMC prohibits the concentration, the CMU may still grant clearance. The CMU will clear a transaction if the benefits to the public outweigh the negative impact on competition, except when the restriction is not necessary for the concentration's goal or it threatens the market economy system.

The parties can also challenge the AMC's decisions in commercial courts.

8.2 Typical Timeline for Appeals

The parties can file an appeal to the CMU within 30 calendar days from the decision date. However, there are no publicly available cases where the CMU granted clearance for a concentration that was prohibited by the AMC.

The parties can file an appeal to a commercial court within two months of the date of receipt of the decision. Court decisions can be appealed within 20 days. Unsuccessful appeals can be brought to the Supreme Court.

Courts may consider relevant claims:

- up to 135 calendar days at first instance;
- up to 65 calendar days at appeal; and
- up to 80 calendar days at cassation.

However, these terms are not always followed due to various administrative reasons. There is no public record of successful appeals against AMC clearance decisions.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties have the right to challenge a clearance decision by the AMC in commercial courts. However, there are no publicly available cases of any such appeal being successful.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

Currently, Ukraine does not have foreign direct investment or foreign subsidies legislation that may require separate filings for transactions beyond that which is necessary under merger control law.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

A new law has been enacted to exempt certain transactions in the military/defence sector from mandatory notification during martial law and within 90 days from the date of its termination. For more details, please see **2.8 Foreign-to-Foreign Transactions**.

10.2 Recent Enforcement Record

In 2023, the AMC identified 41 failures to notify. The total penalties amounted to EUR2,220,000. In comparison, in 2022, the AMC identified 28 failures to notify. The total penalties amounted to over EUR266,000.

On remedies and other statistics, see **5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions**.

10.3 Current Competition Concerns

It is expected that the AMC will be focusing, in the foreseeable future, on the following:

- petroleum products;
- railway rolling stock components;
- socially important goods;
- pharmaceuticals;
- procurements in the construction and energy sectors;
- reinforcing the AMC's role; and
- co-operation with the EU's antitrust watchdog and the OECD.

Trends and Developments

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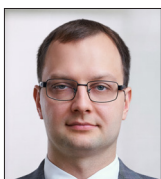
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Comprehensive Reform of Competition Law – AMC Dawn Raid Procedures

At the beginning of 2024, a new piece of competition regulation entered into force marking an important milestone of a comprehensive global reform of Ukraine's competition law.

Antitrust reform at a glance

On 9 August 2023, the Ukrainian Parliament adopted a set of long-awaited changes to Ukrainian competition law aimed at strengthening and refining key aspects of the existing antitrust framework system (the "Reform"). The development and adoption of the Reform were driven by Ukraine's commitments under the Association Agreement with the EU to align the Ukrainian competition law and enforcement practices with the EU *acquis communautaire*.

The Reform provided amendments regarding the merger control regime, introduced new types of liability for competition law infringements, implemented the settlement procedure, updated the leniency procedure, etc. However, central to this Reform is the Antimonopoly Committee of Ukraine (AMC): strengthening its institutional capacity and powers has long been a legisla-

tive priority. With the signing of the Memorandum on Economic and Financial Policies on 24 March 2023, Ukraine has reaffirmed its commitment to enhancing the antitrust framework. As a result, from 1 January 2024, the AMC has been equipped with some new rights and responsibilities, a move that is expected to significantly enhance its overall performance.

One of the most significant changes introduced by the Reform is the enhancement of the AMC's dawn raid procedures.

Filling enforcement gaps

Over the past several years, the AMC has infrequently conducted dawn raids. This infrequency has been caused by a number of factors, including a temporary moratorium on dawn raids from late 2016 to 2018 and restrictions caused by the COVID-19 pandemic. It is expected that the AMC will fill an existing enforcement gap.

Strengthening the institutional capacity of the AMC to conduct dawn raids

Now, the AMC will conduct dawn raids in connection with the following:

- reviewing an application submitted by an interested party or a submission from state authorities regarding an alleged infringement of competition law;
- investigating an already initiated case;
- detecting potential infringements of competition law by the AMC on its own initiative; and
- verifying information received by the AMC regarding state control over compliance with competition law.

The Reform introduces a fundamentally new ex-ante court's control over the AMC's right to conduct dawn raids by courts. Dawn raids can now only be conducted based on a ruling of a commercial court and an order from the AMC issued as based on such a court ruling. To do so, the AMC must submit an application to the commercial court, which is considered without notifying or summoning the representative of an inspected undertaking. This means that businesses will only learn about a dawn raid once it begins when the AMC representatives appear at their office.

Upon receipt of a court ruling authorising the dawn raid, an undertaking has the right to appeal it within five days. However, such an appeal does not suspend the dawn raid conducted by the AMC.

So, businesses facing dawn raids should carefully review the content of a court ruling and pay special attention to the following aspects:

- the permitted duration of the dawn raid;
- the types of procedural actions the AMC is authorised to perform; and
- the list of premises, storage locations, electronic communication systems, and other properties subject to dawn raid and procedural actions.

Until the Reform, the AMC determined the duration of a dawn raid at its own discretion. Starting from 1 January 2024, dawn raids generally last 30 calendar days (unless otherwise specified in the court ruling) and can be extended by the court upon the AMC's request for an additional 30 calendar days (with the mandatory consent of an inspected undertaking) or for the duration of an expert examination, if required.

The Reform permits the AMC to have nearly unrestricted access, upon receiving the relevant court approval, to almost all areas of an undertaking's infrastructure. This includes information storage facilities (such as computers, servers and employees' workstations), premises, and other properties.

Another noteworthy issue is the broad definition of other property that the AMC is entitled to have access to, including vehicles, areas designated for permanent or temporary storage of material assets, and land plots of the undertaking.

If the AMC's representatives conducting dawn raids are denied access to specific premises, electronic communication systems, or places of information storage, and there are sufficient grounds to believe that documents or other information that may serve as evidence in a case may be stored there, the AMC may seal such premises to preserve evidence. In this case, the undertaking must ensure the integrity of the sealed premises until they are unsealed by the AMC.

For unauthorised unsealing, the Reform introduces a specific type of liability in the form of a fine of up to 1% of the undertaking's income for the last financial year.

In fact, the AMC can essentially seal and temporarily seize (as explained below) any property found during the dawn raid. According to the Procedure, if the AMC discovers additional documents, data carriers, premises, etc during the dawn raid that have not been specified in the court ruling, it may temporarily seize or seal them. In this case, the AMC must file a relevant application with the court no later than the next business day after the temporary sealing or seizure of the property.

Another innovation in the AMC's procedures is its expanded powers and authorities to collect evidence. The AMC can now collect not only copies or extracts but also the originals of documents, data carriers, and other property. This right may be exercised if an undertaking refuses to provide requested copies or if there is a risk that the relevant items may be destroyed.

If the seizure is impossible, the AMC may arrest the above-mentioned property, including their originals. An arrest means a ban on the disposal or, if necessary, the use (ie, by sealing) of the evidence that cannot be seized. For this, the AMC makes a preliminary inventory of the evidence. If the AMC arrests property that requires state registration, then, according to the Procedure, the AMC must inform banks, other payment service providers or authorities responsible for registering property and encumbrances on movable property of such an arrest. The arrest ceases upon expiration of the period specified in the court ruling.

After completing the inspection, the AMC prepares an inspection report within ten business days from the date of its completion (in the prescribed form). One copy of the report must be sent to an undertaking no later than the next business day after its preparation.

Currently, there is no public information on how the above provisions are implemented in practice or whether they are implemented at all. It is evident that, in the near future, the AMC will focus its efforts and resources on refining these provisions in real-life scenarios, making inspections a prominent trend in its activity.

How businesses should prepare

The implemented changes strengthening the AMC's powers and authorities during dawn raids encourage companies to refresh or even implement antitrust compliance manuals and specific policies (the "Guidelines") assisting businesses in handling dawn raids in an efficient manner, ensuring legal compliance while protecting their legal rights.

The following will discuss key aspects that should ideally be covered by the Guidelines.

Firstly, an undertaking should designate a person responsible for overseeing dawn raids, along with their deputies. Typically, this person is a compliance officer, but not necessarily. This person should:

- notify the company management about the arrival of the AMC and ensure ongoing updates on the progress of a dawn raid;
- immediately call a lawyer or legal counsel to participate in the dawn raid;
- verify the authority of the AMC;
- accompany the AMC and be present during procedural actions performed by the AMC (eg, sealing, seizure or arrest of the property, etc);
- provide comments on the reports prepared during the dawn raid (if any); and
- inform the AMC about restrictions to preserve confidentiality, etc.

In other words, the Guidelines should detail a checklist of the responsible person's rights and duties, enabling them to oversee the dawn raid process and give instructions to other company employees.

Secondly, the Guidelines should specify initial actions for receptionists and security staff, which include promptly informing the compliance officer, their deputies or other persons designated by the Guidelines, and other subsequent actions. The Guidelines should outline such duties as:

- ensuring that the AMC does not leave the conference or reception area unless accompanied by the compliance officer or their deputies;
- making copies of the AMC's official IDs;
- avoiding any negotiations with the AMC and not providing any substantive answers to their questions regarding the dawn raid; and
- not signing any documents produced by the AMC.

Additionally, specific instructions should be provided for other situations, such as handling visitors with appointments at the company office on the day of the dawn raid.

Thirdly, it is crucial to establish clear rules for the rest of the staff. This section places particular emphasis on how employees should handle requests for oral explanations about documents or specific facts from the AMC. Employees should be instructed to direct all inquiries to the compliance officer or senior management, who will then determine the most appropriate person to respond. However, since the AMC is entitled to question any company employees, the Guidelines need to introduce the following recommendations for the employees:

- not to provide any information voluntarily unless specifically requested by the AMC;
- limit explanations strictly to answering the question asked;
- respond only with known facts and avoid assumptions; and
- if uncertain about specific circumstances, co-ordinate the response in advance with a senior-level employee.

In addition to the above, the Guidelines should provide detailed instructions regarding specific actions by the AMC, ie, examining the company's books and other business records, taking copies of or extracts from the books and business records, etc.

For instance, if the AMC requests the provision of documents, the compliance officer or another member of staff should identify specific documents or categories of documents to be provided under a court ruling. If the court ruling does not specify certain documents, they should determine whether the particular documents or categories of documents requested by the Commission fall within the scope of the dawn raid. If a compliance officer encounters challenges in providing the specific documents requested by the Commission, they should communicate these difficulties to the AMC and provide written confirmation of the issue shortly thereafter, etc.

Separately, the Guidelines may also introduce a list of measures to be taken during the dawn raid. For example, the compliance officer or another member of staff must do the following:

- record the list of documents and other property inspected;
- list all documents and carriers of information copied, etc;
- make a note of all oral explanations given;

- verify the accuracy of information specified in the protocols; and
- ensure that personal property of company employees is not investigated during the dawn raid, etc.

Main takeaways

The AMC's newly enhanced powers to conduct dawn raids and access and seize almost any property highlight businesses' critical need to manage potential risks proactively. To mitigate these risks, companies should develop a comprehensive manual that outlines the procedures and protocols for employees to follow during a dawn raid. This manual should include detailed instructions on responding to AMC officials, protecting sensitive information, and complying with legal requirements.

Moreover, it is essential for companies to hold regular training sessions for their staff. These sessions should ensure that all employees are familiar with the manual, understand their specific roles and responsibilities, and are prepared to act swiftly and appropriately in the event of a raid. By implementing these measures, businesses can better safeguard their interests and ensure compliance with the law, thereby reducing the likelihood of legal complications and potential penalties.



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Contents

1. Legislation and Enforcing Authorities p.843

- 1.1 Merger Control Legislation p.843
- 1.2 Legislation Relating to Particular Sectors p.844
- 1.3 Enforcement Authorities p.844

2. Jurisdiction p.844

- 2.1 Notification p.844
- 2.2 Failure to Notify p.844
- 2.3 Types of Transactions p.845
- 2.4 Definition of "Control" p.845
- 2.5 Jurisdictional Thresholds p.845
- 2.6 Calculations of Jurisdictional Thresholds p.846
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.847
- 2.8 Foreign-to-Foreign Transactions p.847
- 2.9 Market Share Jurisdictional Threshold p.848
- 2.10 Joint Ventures p.848
- 2.11 Power of Authorities to Investigate a Transaction p.848
- 2.12 Requirement for Clearance Before Implementation p.849
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.849
- 2.14 Exceptions to Suspensive Effect p.849
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.849

3. Procedure: Notification to Clearance p.849

- 3.1 Deadlines for Notification p.849
- 3.2 Type of Agreement Required Prior to Notification p.850
- 3.3 Filing Fees p.850
- 3.4 Parties Responsible for Filing p.850
- 3.5 Information Included in a Filing p.850
- 3.6 Penalties/Consequences of Incomplete Notification p.851
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.851
- 3.8 Review Process p.852
- 3.9 Pre-notification Discussions With Authorities p.852
- 3.10 Requests for Information During the Review Process p.852
- 3.11 Accelerated Procedure p.853

4. Substance of the Review p.853

- 4.1 Substantive Test p.853
- 4.2 Markets Affected by a Transaction p.853
- 4.3 Reliance on Case Law p.854
- 4.4 Competition Concerns p.854
- 4.5 Economic Efficiencies p.854
- 4.6 Non-competition Issues p.854
- 4.7 Special Consideration for Joint Ventures p.855

5. Decision: Prohibitions and Remedies p.855

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.855
- 5.2 Parties' Ability to Negotiate Remedies p.856
- 5.3 Legal Standard p.856
- 5.4 Negotiating Remedies With Authorities p.856
- 5.5 Conditions and Timing for Divestitures p.857
- 5.6 Issuance of Decisions p.857
- 5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.857

6. Ancillary Restraints and Related Transactions p.858

- 6.1 Clearance Decisions and Separate Notifications p.858

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.858

- 7.1 Third-Party Rights p.858
- 7.2 Contacting Third Parties p.858
- 7.3 Confidentiality p.858
- 7.4 Co-operation With Other Jurisdictions p.858

8. Appeals and Judicial Review p.859

- 8.1 Access to Appeal and Judicial Review p.859
- 8.2 Typical Timeline for Appeals p.859
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.859

9. Foreign Direct Investment/Subsidies Review p.859

- 9.1 Legislation and Filing Requirements p.859

10. Recent Developments p.860

- 10.1 Recent Changes or Impending Legislation p.860
- 10.2 Recent Enforcement Record p.861
- 10.3 Current Competition Concerns p.862

Axinn, Veltrop & Harkrider LLP is a highly regarded, speciality firm known for its strategic acumen in the areas of antitrust, intellectual property, and high-stakes litigation. Axinn's

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation Merger Control Legislation

The primary merger control legislation in the US is Section 7 of the Clayton Act, which prohibits its acquisitions that may substantially lessen competition. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the “HSR Act”) (Section 7A of the Clayton Act) governs the pre-merger notification process. Mergers may also be challenged under the Sherman Act, which prohibits agreements that unreasonably restrain trade (Section 1) and monopolisation, attempts to monopolise and conspiracies to monopolise (Section 2), or Section 5 of the Federal Trade Commission Act (the “FTC Act”), which prohibits unfair methods of competition. States, as well as the District of Columbia, Puerto Rico and the Virgin Islands, have their own antitrust laws, many of which are analogous to the federal antitrust statutes, and may also challenge mergers under the federal antitrust laws.

Merger Guidelines

The FTC and the Antitrust Division of the Department of Justice (DOJ) (the “Agencies”) share jurisdiction over merger review.

In December 2023, the FTC and DOJ released updated Merger Guidelines, which describe the “factors and frameworks” the Agencies use to review proposed mergers. The new Guidelines, coupled with recent process changes and proposed expansion of the content of HSR filings, indicate a scepticism towards transactions, with lower market concentration thresholds and rejection or narrowing of certain defences.

Agency Rules and Guidance

The FTC is authorised to issue formal regulations that are “necessary and appropriate” to carry out the purposes of the HSR Act. The “HSR Rules” are complex and extensive, and address reportability, exemptions and filing procedures. As of July 2024, the FTC and DOJ are finalising revisions to the HSR Rules.

The FTC’s Premerger Notification Office also issues guidance relating to the application of the HSR Act and related regulations in the form of both formal and informal interpretations.

1.2 Legislation Relating to Particular Sectors

Sector-Specific Approvals

Transactions within highly regulated sectors of the economy, such as banking, healthcare, insurance, telecommunications, railroads, and defence, may also require approval from their federal or state sectoral regulators. For example:

- banking transactions may require approval by the Federal Reserve Board;
- telecom transactions may require approval by the Federal Communications Commission;
- transactions involving energy companies may require approval of the Federal Energy Regulatory Commission;
- mergers of insurance companies may require approval by state Commissioners of Insurance; and
- mergers of healthcare organisations may be subject to review and approval by state health departments and antitrust agencies.

1.3 Enforcement Authorities

Primary Enforcement Agencies

Both the FTC and DOJ enforce the federal anti-trust laws and share jurisdiction over merger review under the Clayton Act and the HSR Act. The FTC also has authority to challenge mergers under the FTC Act. In addition, the FTC manages the HSR pre-notification regime. Under Section 16 of the Clayton Act, State Attorneys General can also seek to enjoin mergers.

The Agencies allocate merger cases through a co-operative clearance process that is primarily based on the expertise of each Agency. The FTC tends to investigate mergers relating to healthcare, pharmaceuticals, professional services, retail industries, and food, whereas the DOJ typically investigates mergers relating to media and entertainment, telecommunications, insurance,

aerospace, financial services, and agriculture. In other industries, such as digital platforms, responsibility is less clear and the decision about which agency will review a transaction can be more complex.

Courts

To delay closing of a proposed merger, the Agencies must obtain preliminary injunctive relief from a federal district court. To block a transaction, the DOJ must seek a final injunction from a federal district court, while the FTC proceeds through its Part 3 administrative court process. State Attorneys General frequently join the Agencies in federal district court actions. Private parties, including customers and competitors, may also challenge mergers in federal courts. Private enforcement actions, however, are relatively rare.

2. Jurisdiction

2.1 Notification

If the transaction meets the jurisdictional thresholds of the HSR Act and does not qualify for an exemption, the parties must each submit a pre-merger notification form and observe the HSR waiting period. The parties must file their HSR Forms with both Agencies.

2.2 Failure to Notify

Failure to comply with the requirements of the HSR Act may result in civil penalties of up to USD51,744 per day. The FTC adjusts the maximum HSR civil penalty annually for inflation. In practice, parties are rarely penalised with the maximum amount.

Historically, the FTC has had an informal “one free pass” practice and generally has not sought civil penalties for a party’s first inadvertent viola-

tion if that party self-reports the violation, makes a corrective filing, and provides a detailed explanation of the circumstances that contributed to their failure to file. The FTC routinely seeks penalties of hundreds of thousands or millions of dollars in cases where the FTC suspects bad faith or a party is a repeat offender.

2.3 Types of Transactions

HSR-Reportable Transactions

The HSR Act requires that parties to certain mergers or acquisitions notify the Agencies prior to closing the proposed transaction. HSR filing requirements apply to transactions involving the acquisition of voting securities, assets, or non-corporate interests that meet certain jurisdictional thresholds. See **2.5 Jurisdictional Thresholds**.

Internal Restructuring

To be HSR reportable, a transaction must result in a transfer of beneficial ownership of voting securities, assets or non-corporate interests from one ultimate parent entity to a different ultimate parent entity. See **2.4 Definition of “Control”**. Restructurings or reorganisations in which the ultimate parent entity does not change generally do not require an HSR filing.

Entity Formation

HSR notification is required for the formation of certain types of joint ventures. The formation of corporate joint ventures is treated under the HSR Rules as acquisitions of voting securities of the venture by the venturers.

The formation of non-corporate joint ventures requires HSR notification only when one of the parties will “control” the new venture. See **2.10 Joint Ventures**.

2.4 Definition of “Control”

“Control” is defined under the HSR Act as either:

- holding 50% or more of the outstanding voting securities of an issuer or, for an unincorporated entity, having the right to 50% or more of the entity’s profits or, upon dissolution, its assets; or
- having the present contractual power to designate 50% or more of the directors of a corporation or of the trustees of certain trusts.

An entity or individual that is not controlled by any other entity is considered the Ultimate Parent Entity (UPE). The relevant “persons” for HSR Act purposes are the UPE of the acquiring party, together with all entities it controls directly or indirectly (the “Acquiring Person”), and the UPE of the acquired party, together with all entities it controls directly or indirectly (the “Acquired Person”).

Minority Acquisitions

Minority acquisitions of corporate voting securities – even small percentages – may be reportable if they meet the HSR thresholds and no exemption applies. In contrast, acquisitions of interests in non-corporate entities (such as limited liability companies or partnerships) are only reportable if the acquisitions confer control.

2.5 Jurisdictional Thresholds

Three jurisdictional tests determine whether a transaction is within the scope of the HSR Act:

- the commerce test;
- the “size-of-transaction” test; and
- the “size-of-person” test.

HSR thresholds are adjusted annually based on changes in the US gross national product. The revised thresholds are typically announced by the FTC in January and take effect 30 days later. The following discussion is based on the thresholds in effect from March 2024.

Commerce Test

The commerce test is met if either party is engaged in commerce or any activity affecting commerce; therefore, nearly all transactions will satisfy the commerce test.

Size-of-Transaction Test

The size-of-transaction test is met if, as a result of the transaction, the Acquiring Person will hold voting securities, assets or non-corporate interests of the Acquired Person valued in excess of USD119.5 million. In general, the size of the transaction includes the present value of any voting securities and non-corporate interests of the Acquired Person already held by the Acquiring Person. For asset acquisitions, the size of transaction includes the present value of any assets acquired from the Acquired Person within the previous 180 days and the present value of any assets of the Acquired Person to be acquired pursuant to a letter of intent executed in the preceding 180 days. Depending on the transaction structure, valuing the size of a transaction can be complex. See 2.6 Calculations of Jurisdictional Thresholds.

Size-of-Person Test

The size-of-person test is applicable for transactions valued at more than USD119.5 million but not more than USD478 million. Transactions valued at more than USD478 million will be subject to HSR notification without regard to the size of the parties if no exceptions apply.

In general, the size-of-person test is met if one of the persons involved in the transaction has USD239 million or more in annual net sales or total assets, and the other has USD23.9 million or more. If the acquired person is not engaged in manufacturing, only its total assets are considered, unless its total sales are USD239 million

or more. There also are specific size-of-person rules applying to joint venture formations.

Exemptions

Even if a transaction meets the HSR thresholds, it may still be non-reportable if it qualifies for one of the numerous exemptions. Some key exemptions include:

- acquisitions of certain assets in the ordinary course of business, including new goods and current supplies;
- acquisitions of certain types of real property, such as certain new and used facilities, unproductive real property (eg, raw land), office and residential property, and hotels and motels (excluding ski facilities and casinos);
- acquisitions of up to 10% of voting securities of an issuer if for the purposes of investment only;
- acquisitions of interests in entities that themselves hold HSR-exempt assets;
- stock dividends and splits and reorganisations;
- acquisitions of certain foreign assets and certain foreign-issuer voting securities; and
- intra-person transactions.

2.6 Calculations of Jurisdictional Thresholds

Size-of-Transaction Test

The size-of-transaction test is calculated based on the value of the voting securities, assets and non-corporate interests that the Acquiring Person will hold in the Acquired Person as a result of the transaction.

- Publicly traded voting securities are valued based on the greater of the market price (generally the lowest closing quotation during the 45 days prior to closing) or the acquisition

price (all consideration to be paid, whether in cash or in kind).

- Acquisitions of non-publicly traded voting securities and non-corporate interests are valued based on the acquisition price (or, if the acquisition price is not determined, the fair market value).
- Acquisitions of assets are valued based on the greater of the fair market value or, if determined, the acquisition price.

Size-of-Person Test

The size-of-person test is calculated based on the worldwide sales or assets of the Acquiring and Acquired Persons as reflected in each party's last regularly prepared consolidated annual income statement and last regularly prepared consolidated balance sheet. These financial statements must be no more than 15 months old. Where a person does not have a regularly prepared annual income statement or balance sheet, the UPE must prepare a pro forma balance sheet that lists all assets held at the time of the acquisition and – in the case of the Acquiring Person – excludes any cash to be used as consideration for the acquisition, any expenses incidental thereto, and any securities of the same Acquired Person. An Acquired Person's revenues and assets include the assets and/or revenues of the target.

The size-of-person assessment should reflect the annual net sales and total assets of all controlled entities at the time of the proposed acquisition. If there is a change of business between the date of the last balance sheet and time of filing – such as an acquisition or divestiture – it must be taken into account.

Annual net sales recorded in a foreign currency should be converted to US dollars based on the average interbank exchange rate for the given

year, and assets recorded in a foreign currency should be converted to US dollars based on the interbank exchange rate as of the date of the business's last regularly prepared balance sheet.

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

Whether an entity meets the HSR size-of-person threshold is based on the revenues and assets of the Acquiring and Acquired Persons. See 2.4 Definition of "Control" and 2.6 Calculation of Jurisdictional Thresholds.

2.8 Foreign-to-Foreign Transactions

Certain foreign-to-foreign transactions and acquisitions of foreign assets or voting securities by US entities that are otherwise covered by the HSR Act may qualify for an exemption. These exemptions are intended to exclude from HSR reportability acquisitions that may have limited significance or impact in the US.

Under the HSR Rules, a foreign person is an entity whose UPE is not incorporated in the US, is not organised under the laws of the US, and does not have its principal offices within the US or, in the case of a natural person, a person who is not a citizen of the US and who does not reside in the US.

Asset Acquisitions

Acquisitions of assets located outside the US that generated aggregate sales in or into the USA of USD119.5 million or less in the most recent fiscal year are exempt. This exemption applies to acquisitions by both US and non-US acquirers.

Asset acquisitions valued at USD478 million or less are exempt where both the Acquiring and Acquired Persons are foreign persons under the

HSR Rules, the aggregate sales of the Acquiring and Acquired Persons in or into the USA are less than USD262.9 million, and the aggregate total assets of the Acquiring and Acquired Persons located in the USA have a fair market value of less than USD262.9 million.

Acquisitions of Voting Securities of a Foreign Issuer

Acquisitions of voting securities of a foreign corporate issuer by a US person are exempt unless the issuer holds US-based assets (excluding investment assets, voting or non-voting securities of another person, or certain credits or obligations related to joint ventures) with a fair market value of over USD119.5 million, or made sales in or into the USA, on an aggregate basis with its controlled entities, of over USD119.5 million in the most recent fiscal year.

Acquisitions of voting securities of a foreign corporate issuer by a foreign Acquiring Person are exempt unless the acquisition will confer control of the issuer and the issuer holds US-based assets in excess of the thresholds described above.

Acquisitions of voting securities of a foreign corporate issuer by a foreign Acquiring Person are exempt if the transaction is valued at USD478 million or less, the aggregate sales of the Acquiring and Acquired Persons in or into the USA are less than USD262.9 million, and the aggregate total assets of the Acquiring and Acquired Persons located in the USA (excluding investment assets, voting or non-voting securities of another person, or certain credits or obligations related to joint ventures) are valued at less than USD262.9 million.

Acquisitions by or From Foreign Governmental Entities

Acquisitions by or from foreign governmental entities are exempt if the UPE of either the Acquiring or Acquired Person is controlled by a foreign state, foreign government or foreign agency and the acquisition is of assets located within the foreign state or of voting securities or non-corporate interests of an entity organised under the laws of that jurisdiction.

2.9 Market Share Jurisdictional Threshold

The HSR Act filing thresholds do not include a market share test.

2.10 Joint Ventures

Joint ventures are subject to specific and complex rules under the HSR Act and may be notifiable unless an exemption applies. Under the HSR Rules, the contributors to a joint venture are deemed Acquiring Persons, and the joint venture is deemed the Acquired Person.

2.11 Power of Authorities to Investigate a Transaction

The Agencies have authority to investigate and challenge transactions that do not meet HSR filing requirements. Although such investigations have historically occurred somewhat infrequently, the Agencies at times have acted quickly to challenge non-reportable transactions. The Agencies also appear to be more active recently in investigating non-reportable transactions. Parties should not assume that non-HSR-reportable transactions will escape review.

The Agencies' power to challenge conduct under the Clayton Act, the Sherman Act or the FTC Act does not have a statute of limitations, and therefore the potential for Agency scrutiny is indefinite. The Agencies may investigate a transaction

post-closing even if they declined to challenge the transaction during the HSR review process or if the transaction was not HSR reportable. The FTC most notably exercised this authority in 2021 in bringing suit against Facebook, alleging, among other charges, that Facebook had consummated multiple anti-competitive acquisitions in an effort to maintain monopoly power, including its acquisitions of Instagram in 2012 and WhatsApp in 2014. Similarly, in 2023, the FTC brought suit against US Anesthesia Partners (USAP) and private equity firm Welsh Carson, alleging, among other charges, that between 2014 and 2020, USAP and Welsh Carson engaged in a series of acquisitions that harmed competition in the commercially insured hospital-only anaesthesia market in Houston, Texas. These suits are both ongoing as of July 2024.

2.12 Requirement for Clearance Before Implementation

If an HSR filing is required, parties may not close the transaction until the expiration or termination of the waiting period. Typically, the statutory waiting period is 30 days and begins after both parties submit their HSR filings and the filing fee has been paid. For open-market purchases, conversions, option exercises and certain other (generally, non-negotiated) transactions, the waiting period begins once the Acquiring Person submits an HSR filing.

Unless the Agencies issue a second request or sue to block the transaction, the waiting period expires automatically on the 30th day after filing at 11.59pm Eastern Time (ET), and the parties may close the transaction. In cash tender offers and certain bankruptcy transactions, the waiting period is shortened to 15 days. The waiting period extends to the next business day when

a waiting period expires over a weekend or on a federal public holiday.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Parties that close a transaction or transfer beneficial ownership prior to the expiration or termination of the waiting period (conduct commonly referred to as “gun-jumping”) are subject to civil penalties of up to USD51,744 per day. Although in the majority of cases the Agencies have imposed penalties substantially less than the maximum permitted by law, gun-jumping fines commonly range in the hundreds of thousands, if not millions, of dollars. See 2.2 Failure to Notify.

2.14 Exceptions to Suspensive Effect

There are no exceptions to the waiting requirement of the HSR Act. Parties to all reportable transactions must observe the applicable waiting period prior to consummation.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Under no circumstances will the Agencies permit closing before expiration or early termination of the applicable waiting period. Carve-outs, ring fencing or hold-separate agreements are not permitted. Premature closing may subject the parties to civil penalties of up to USD51,744 per day of non-compliance and potential additional equitable relief.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There are no deadlines for making HSR filings; under current rules, parties can submit HSR fil-

ings at any time after executing a transaction agreement or letter of intent (LOI). See **3.2 Type of Agreement Required Prior to Notification**.

Once the waiting period ends, the parties have one year to close the transaction before a new filing is needed. In the case of an acquisition of less than a controlling interest in a corporation, the Acquiring Person has one year to meet or cross the notification threshold (based on size-of-transaction) it reported on its filed HSR Form. Once the reported threshold is met or crossed, for four more years, the Acquiring Person may acquire further voting securities from the same Acquired Person without further HSR filing as long as the sum of the initial and further acquisitions does not cross the next, higher HSR notification threshold.

3.2 Type of Agreement Required Prior to Notification

A signed agreement, such as a letter of intent, merger agreement, or purchase and sale agreement, typically must be submitted with each HSR filing, with the exception of certain types of transactions, such as tender offers, secondary acquisitions and certain bankruptcy transactions. Agreements need not be formal or binding, but parties must attest to a good faith intention to complete the transaction.

In June 2023, the FTC published a notice of proposed rule-making which would require parties to execute a definitive agreement or detailed term sheet, rather than proceed on the basis of a simple LOI. As of July 2024, the new rules have not been published.

3.3 Filing Fees

The size of the transaction reported on the parties' HSR Form determines the filing fee. The

following fee amounts and transaction value thresholds are effective beginning March 2024:

- USD30,000 for transactions valued in excess of USD119.5 million but less than USD173.3 million;
- USD105,000 for transactions valued at USD173.3 million or greater but less than USD536.5 million;
- USD260,000 for transactions valued at USD536.5 million or greater but less than USD1.073 billion;
- USD415,000 for transactions valued at USD1.073 billion or greater but less than USD2.146 billion;
- USD830,000 for transactions valued at USD2.146 billion or greater but less than USD5.365 billion; and
- USD2.335 million for transactions valued at USD5.365 billion or greater.

Fees may be paid prior to or upon filing. Delays in paying filing fees can delay the effective date of the filing. The Acquiring Person is responsible for payment of the filing fee, although it may be allocated between the parties by agreement. Fees are payable by electronic wire transfer (EWT), bank cashier's check or certified check. Fees must be paid in US currency.

3.4 Parties Responsible for Filing

For most transactions, both the Acquiring and the Acquired Persons must submit separate HSR filings. As a matter of practice, parties typically co-ordinate on the content and timing of their respective filings.

3.5 Information Included in a Filing

A complete HSR filing consists of the HSR Form(s) (including required attachments and accompanying affidavit(s)) and the filing fee.

HSR Form

Among other requirements, the HSR Form requires each person to:

- describe the transaction's structure;
- list US revenues for the most recent completed year by North American Industry Classification System codes (NAICS Codes) and, for manufacturing industries, by North American Product Classification System codes (NAPCS Codes);
- provide additional disclosures with respect to any overlapping lines of business, including prior transactions;
- submit all documents prepared by or for officers or directors for the purpose of evaluating or analysing the transaction with respect to competition, competitors, markets, market shares, potential for sales growth or expansion into product or geographic markets, as well as all confidential information memoranda, bankers' books, other third-party consultants' materials, and documents describing synergies and efficiencies ("4(c) and 4(d) documents"); and
- disclose information about each party's controlled entities, significant shareholders and minority shareholdings.

An Acquiring Person must respond on behalf of itself and all its controlled entities. By contrast, an Acquired Person's filing is largely limited to disclosures concerning the entities or assets being sold.

Unlike antitrust or merger control filings in other jurisdictions, parties are not currently required to describe the transaction's impact on the market or competition. Instead, the Agencies rely on the 4(c) and 4(d) documents to assist in the assessment of the competitive impact of the transaction.

Parties are not required to translate HSR attachments into English but must provide any English-language versions that are available at the time of filing.

In June 2023, the FTC published a notice of proposed rule-making which would dramatically expand the scope of information required in parties' initial HSR filings. Among the many additions proposed are new narrative descriptions about the parties and their transaction, broader document production requirements, and expanded disclosures about corporate governance. As of July 2024, the new HSR filing requirements have not been published.

3.6 Penalties/Consequences of Incomplete Notification

The Premerger Notification Office of the FTC rejects as incomplete filings missing required information (often referred to as "bouncing" an HSR notification). If the HSR filing is incomplete, the waiting period will not begin until the requisite information is provided. As long as parties observe the waiting period and take steps to cure any filing deficiencies, no fines will be levied.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Acquiring or Acquired Persons that consummate a reportable transaction based on an incomplete or inaccurate HSR Form may be subject to civil penalties. Additionally, an individual who knowingly signs an incomplete or inaccurate HSR Form on behalf of the Acquiring or Acquired Person may be subject to criminal prosecution for perjury.

3.8 Review Process

Initial Waiting Period

The “initial waiting period” (30 calendar days or 15 days in the case of cash tender offers and certain bankruptcy transactions) begins when both parties have filed their HSR Forms (or when an acquirer files in the case of acquisitions of voting securities or non-corporate interests from third parties). If the initial waiting period expires without either Agency taking any action, the parties may consummate the transaction.

During the initial waiting period, either Agency may open a preliminary investigation of the proposed transaction to identify competitive issues and determine whether further information is required. An Agency may request briefings with the parties and/or request that the parties provide additional information on a voluntary basis.

Under the HSR Rules, parties to a transaction may restart the waiting period once with no additional filing fee by withdrawing the filing and refiling within two business days. This “pull-and-refile” process effectively extends the initial waiting period by an additional 30 days to allow time to address unresolved issues and potentially avoid a second request.

Second Request

Before the end of the initial waiting period, the reviewing Agency may choose to issue a “second request” formally requesting additional documents and information. The issuance of a second request suspends the waiting period while the parties respond and certify substantial compliance. Once each party has substantially complied with its second request, a second waiting period begins (typically 30 days, or 10 days in the case of a cash tender offer or bankruptcy filing). If the reviewing Agency does not seek to block the transaction during the second

waiting period, the parties may consummate the transaction.

3.9 Pre-notification Discussions With Authorities

For most transactions, pre-notification discussions with the Agencies are not required. When a transaction is likely to raise significant competitive concerns, parties may engage the Agencies in pre-notification discussions to provide additional time to review the transaction and reduce the risk or narrow the scope of a second request.

3.10 Requests for Information During the Review Process

Voluntary Access Letter

If the reviewing Agency opens a preliminary investigation, the reviewing Agency may issue a “voluntary access letter” during the initial HSR waiting period. A voluntary access letter requests information that is not required in the HSR filing, such as strategic and marketing plans, information on overlapping products, market share information, top customer contact information, customer win/loss data, competitor and supplier lists, and other information. Parties should be prepared to respond to a voluntary access letter within a few days. Prompt co-operation increases the likelihood that the reviewing Agency will be able to resolve competitive concerns within the initial waiting period.

Second Request

If competitive concerns are not resolved at the end of the initial waiting period, the reviewing agency may issue a “second request”, which generally extends the waiting period until 30 days after compliance. A second request is a voluminous demand for documents and data as well as detailed interrogatories. Second requests are extraordinarily burdensome and costly. A typical second request response includes mil-

lions of pages of documents and compliance may take several months. Both Agencies have published model second requests that provide examples of the type of information typically requested.

Parties that receive second requests may enter into a timing agreement with the Agency establishing protocols for compliance with a second request, milestone dates for events leading up to substantial compliance, and extensions of time for the Agency to make an enforcement decision after waiting period expiry. Both Agencies have published model timing agreements on their websites.

3.11 Accelerated Procedure

All transactions subject to HSR notification requirements must complete an HSR filing. There is no short form or simplified procedure.

Historically, the Agencies granted “early termination” of the initial waiting period for transactions that posed little competitive risk. If early termination is granted, the names of the parties to the transaction are published in the Federal Register and posted on the FTC’s website. In February 2021, the Agencies announced they would temporarily stop granting early termination. As of July 2024, the Agencies have not resumed granting early termination.

4. Substance of the Review

4.1 Substantive Test

A detailed guide to the Agencies’ approach to merger analysis is contained in the 2023 Merger Guidelines. The 2023 Merger Guidelines outline a wide range of theories of competitive harm for both horizontal and non-horizontal transactions, and signal continued aggressive merger

enforcement, consistent with the Agencies’ public statements and actions in the first three years of the Biden Administration.

In general, the Agencies review a proposed transaction to determine whether the transaction will create, enhance, or entrench market power or facilitate its exercise. The Agencies consider whether a horizontal transaction is likely to reduce competition or negatively impact consumers (eg, result in increased prices or reduced output, quality or innovation) either because (i) the merged firm will have sufficient market power such that raising prices or reducing output, quality or innovation will be profitable, or (ii) there will be so few firms left in the market that the remaining firms will be able to co-ordinate their conduct. The Agencies consider vertical issues of whether a transaction will combine market power at different levels of the supply chain in a manner that might create the incentive and ability to disadvantage rivals or provide access to competitively sensitive information of competitors. The Agencies also examine trends towards consolidations, serial acquisitions, multi-sided platforms, potential competition, labour market effects, and the potential impact of minority interests, among other issues.

To block a transaction, the Agencies must show in court that a transaction is likely to substantially reduce competition or tend to create a monopoly in a relevant market.

4.2 Markets Affected by a Transaction

Affected markets are defined on both a product and geographic dimension. In general terms, relevant product markets comprise all the products and services that customers perceive as close substitutes; a geographic market is that area where customers would likely turn to buy the goods or services in the product market.

Recently, the Agencies have also focused on a transaction's potential effects on labour markets, particularly where the parties draw their work force from a common pool of employees.

In addition to econometric analysis, the Agencies also consider a variety of qualitative factors, such as industry recognition of the product as its own market and whether the product has peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, and/or specialised vendors.

4.3 Reliance on Case Law

There is a significant body of merger jurisprudence in the US courts. The Agencies do not rely on case law from other jurisdictions in making enforcement decisions but may co-ordinate with foreign competition authorities on individual merger investigations.

4.4 Competition Concerns

The Agencies have investigated mergers under theories of unilateral effects, co-ordinated effects, the elimination of potential competition, and vertical merger theories of foreclosure of competitors and raising rivals' costs. In 2023, the FTC also brought a challenge to a pharmaceutical merger based on a conglomerate bundling theory of harm (Amgen/Horizon). The current leadership has expressed interest in moving away from the traditional "consumer welfare" standard (which focused on impacts on consumers from increased prices, lower quality and reduced innovation) to considering a broader range of factors, including harms to workers, monopsony, conglomerate effects, aggregation of data, exclusionary practices, cross-market effects and increased ownership by private equity firms.

Labour market issues are a particular priority for the Biden administration, and consequently impacts on workers have become significantly more important in merger reviews and challenges over the last three years. The Agencies' 2023 Merger Guidelines specifically address review of a transaction's potential effects on labour markets by articulating principles of market definition and theories of harm to workers that may result from lessened competition in labour markets.

4.5 Economic Efficiencies

The Agencies will consider economic efficiencies generated by a transaction as a potential offset to competitive concerns. Both Agencies have expressed scepticism about efficiency justifications, however, and the "efficiencies defence" has not been routinely accepted by courts.

The burden on parties to demonstrate efficiencies is significant, and when a reviewing agency believes a transaction would harm competition, even well-documented and substantial efficiencies are unlikely to fully resolve concerns.

Parties must provide evidence that the asserted efficiencies are likely to occur, cannot be accomplished through other means, and are sufficient to counteract the proposed transaction's harm to consumers. For efficiencies to be recognised, they must be quantifiable, verifiable and merger-specific and cannot result in any anti-competitive reduction in output or service. The Agencies will not consider vague or speculative claims.

4.6 Non-competition Issues

Historically, the Agencies have not considered non-competition issues when analysing proposed transactions. The current leadership, however, has expressed a broader view of the role of antitrust than previous administrations,

arguing that vigorous antitrust enforcement plays a role in supporting the “preservation of our democratic political and social institutions”. In addition to considering a broader range of competition effects, including effects in labour markets (see **4.4 Competition Concerns**), the Agencies have suggested that they will consider impacts of transactions on a variety of factors, including the environment, social and racial inequity, and privacy.

4.7 Special Consideration for Joint Ventures

The Agencies typically review joint ventures (JVs) by analysing their overall competitive effect. JVs may be pro-competitive if they allow participants to provide goods or services that are less expensive, more valuable to consumers, or brought to market faster than would be possible without the JV. JVs may harm competition if they reduce the JV parties’ incentives to compete against one another, if the parties’ independent decision-making is limited outside the JV because of combined control or combined financial interests, or if the JV facilitates collusion.

5. Decision: Prohibitions and Remedies

5.1 Authorities’ Ability to Prohibit or Interfere With Transactions

The judicial processes that each Agency may pursue to block a transaction differ.

DOJ

To obtain an order to either block a proposed transaction or unwind a completed transaction, the DOJ must file in federal district court a complaint and motions for a preliminary injunction (if the transaction has not closed) and a permanent injunction.

To obtain a preliminary injunction to prevent a transaction closing pending a decision on the merits, the DOJ must show that its likelihood of success on the merits and the threat of irreparable harm outweigh any potential harm to the defendant and any opposing public interest in granting the injunction. To prove a Section 7 violation and obtain a permanent injunction, the DOJ has the burden to demonstrate with a “reasonable probability” (ie, greater than a “mere possibility” but less than a “certainty”) that the merger will, or currently does, substantially lessen competition. Frequently, courts collapse the preliminary and final injunction hearings into one. The losing party may appeal to the federal court of appeals for the relevant circuit.

FTC

The most common path that the FTC follows to challenge a proposed merger is to seek a preliminary injunction in federal district court under Section 13(b) of the FTC Act, while simultaneously filing an administrative complaint under Part 3 of the FTC Rules seeking an order that the transaction violates the FTC Act (“Part 3 proceedings”). If a transaction has already closed, the FTC proceeds under Part 3 only. If the FTC fails to obtain a preliminary injunction (and does not appeal or loses an appeal of the preliminary injunction decision), its current policy is to discontinue Part 3 proceedings unless continuing to do so would serve the public interest.

To obtain injunctive relief under Section 13(b), the FTC need only make “a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest”. This is understood to be a lower standard than the “balancing of the equities” standard applying to DOJ preliminary injunction cases.

Administrative complaints are litigated before an administrative law judge (ALJ), an FTC employee appointed by the Office of Personnel Management. The ALJ's initial decision and order may be appealed to the full Commission, whose decision may then be reviewed by the federal court of appeals.

5.2 Parties' Ability to Negotiate Remedies

The Agencies have traditionally accepted remedies to address competitive concerns. Over the last several years, both Agencies have expressed a strong preference for structural remedies and scepticism of the effectiveness of behavioural remedies. More recently, both Agencies have indicated that merger remedies will only be available as a way to address competitive concerns in exceptional cases, which is borne out by their recent enforcement activities. See **10.2 Recent Enforcement Record**.

While remedy discussions may take place at any stage in the review process, they rarely begin before the Agency staff have investigated the transaction and identified concerns. In transactions with narrow but obvious concerns, parties may approach the Agency early with a pre-arranged "fix".

The FTC's 2012 Negotiating Remedies Manual and DOJ's 2020 Merger Remedies Manual provide insight into the Agencies' negotiating process and requirements, but may not fully reflect the preferences of the current administration.

When the Agencies determine that a horizontal merger is likely to have anti-competitive effects, the Agencies generally prefer structural remedies consisting of divesting an ongoing standalone business unit. Structural divestitures consisting of less than a standalone business must include

all assets (or licences to those assets) necessary for the divestiture purchaser to be an effective, long-term viable competitor of the merged entity. The Agencies typically require the parties to obtain prior approval of a contractually bound buyer for the divested assets before they will approve the consent agreement.

As mentioned above, the Agencies accept behavioural or conduct remedies in very limited circumstances and have expressed scepticism about whether behavioural remedies are effective. See the [Trends and Developments](#) chapter of this guide for further discussion.

In very rare cases, the Agencies have also pursued disgorgement of profits in consummated mergers as a remedy. The FTC's authority to obtain disgorgement is currently in question under a recent Supreme Court ruling.

5.3 Legal Standard

In September 2020, the DOJ issued its most recent Merger Remedies Manual, which states that the DOJ will insist on a remedy that preserves competition and resolves the anti-competitive problem. Similarly, the FTC's 2012 Negotiating Merger Remedies Statement notes that "acceptable" remedies must "maintain or restore competition in the markets affected by the merger".

5.4 Negotiating Remedies With Authorities

The Agencies have different procedures for accepting and finalising negotiated remedies.

DOJ

The parties and the DOJ staff negotiate a consent agreement in the form of a Proposed Final Judgment (PFJ). Once the PFJ has been approved by the Assistant Attorney General, the Agency

files in federal district court a complaint, the PFJ and a competitive impact statement. The court enters a preliminary order accepting the PFJ, which usually permits the parties to close the transaction. Under the Tunney Act, the DOJ must publish the PFJ and related materials for a 60-day public-comment period, following which it submits a report to the court that the PFJ is in the “public interest” and the court makes the PFJ final. The Tunney Act process is usually uneventful; however, in one notable case (CVS/Aetna, 2019), a judge did ask the parties to hold the acquired business separate pending public comment, and conducted hearings with live witnesses before concluding that the settlement was in the public interest.

FTC

The parties and the FTC staff negotiate a proposed consent agreement, which must be signed by the staff and merging parties, approved by the Director of the Bureau of Competition, and approved by a majority of the Commissioners. At this point, the parties are usually permitted to close their transaction. The FTC then opens a 30-day public comment period, issuing a complaint, provisional Decision and Order, and an Analysis of Proposed Consent Order to Aid Public Comment. Following the public comment period, the FTC can accept the Decision and Order as final, reject it, or revise it.

5.5 Conditions and Timing for Divestitures

Conditions and Timing

See 5.4 Negotiating Remedies With Authorities.

Monitoring and Enforcement

The Agencies monitor and enforce compliance with negotiated remedies. Where provided in the consent agreement, the Agencies may also

appoint monitors to ensure the compliance and effectiveness of the remedy.

5.6 Issuance of Decisions

The Agencies do not affirmatively approve proposed mergers. They simply allow the HSR waiting period to expire or terminate the waiting period early. Occasionally, for significant transactions, the Agencies will issue a press release when closing an investigation and/or a “closing statement” explaining the reasons for closing the investigation, such as the DOJ’s July 2020 statement on the closing of its investigation of London Stock Exchange Group and Refinitiv.

Challenges to mergers are public. Complaints are filed in federal district court (and in the case of the FTC, Part 3), and appear on public court and agency dockets. In addition, the Agencies make press releases when challenging mergers. Court and Part 3 decisions in merger challenges are on the public record.

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The Agencies may seek remedies or challenge foreign-to-foreign transactions where the transactions impact US markets. For example, in June 2021, the DOJ filed suit to block UK firm Aon PLC’s proposed USD30 billion acquisition of UK company Willis Tower Watson, alleging the transaction would eliminate competition in US markets by merging two of the “Big Three” global insurance brokers. Shortly after the DOJ filed suit to block the transaction, Aon and Willis abandoned the merger.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Parties must submit the transaction agreement as well as any agreements not to compete and any other agreements between the parties with their HSR filings. The Agencies will review the transaction as a whole and may raise concerns about ancillary restraints in the review process. Recently, employment-related non-compete agreements have been a particular focus of review. Typically, parties amend ancillary agreements rather than jeopardise clearance of the entire transaction.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Complaints and Agency-solicited input from customers, suppliers, competitors and other industry participants often meaningfully inform merger review. Customer complaints are typically most influential; however, input from other industry participants can also be important in identifying non-reportable transactions or causing the Agencies to look more closely at certain aspects of a transaction.

Third parties may challenge transactions in district court, although such actions are rare. See **1.3 Enforcement Authorities**.

7.2 Contacting Third Parties

The Agencies routinely seek input from customers, suppliers, competitors and other third parties to confirm or complement staff's competitive analyses of proposed transactions or remedies.

The Agencies frequently interview customers, suppliers and competitors. The Agencies may also issue subpoenas for depositions (DOJ) or investigational hearings (FTC) and frequently request documents and information from third parties either voluntarily or through Civil Investigative Demands (CIDs) and subpoenas.

7.3 Confidentiality

All materials submitted by the Acquiring and Acquired Persons under the HSR Act are confidential under the Freedom of Information Act, subject only to public disclosure if the transaction is challenged by one of the Agencies. The "fact of filing" is also confidential, unless disclosed by the parties themselves, or unless early termination is requested and granted, in which case the parties' names are published in the Federal Register and on the FTC's website. Additionally, such confidential information may be disclosed to a committee or subcommittee of Congress.

The confidentiality of information obtained from third parties through informal phone calls and meetings, or through formal Civil Investigative Demands (CIDs), and the identity of third parties under either process, is statutorily protected.

7.4 Co-operation With Other Jurisdictions

The USA has bilateral and/or multilateral co-operation agreements including commitments to consult and co-operate on competition matters and to properly maintain the confidentiality of shared information with 13 jurisdictions: Germany, Australia, the EU, Canada, the UK, Brazil, Israel, Japan, Mexico, New Zealand, Chile, Colombia and Peru. The Agencies have also entered into less-formal, non-binding memoranda of understanding with competition agencies in Russia, the People's Republic of China, India

and South Korea. The Agencies also co-operate through multilateral organisations including the Organisation for Economic Co-operation and Development (OECD) and International Competition Network (ICN).

When competition issues span multiple jurisdictions, the Agencies may exchange views and information with their foreign counterparts; however, to share information submitted by the parties, the Agencies must first obtain a waiver of confidentiality. Parties typically agree to such waivers to appease enforcers and potentially avoid incompatible remedies. The Agencies have released a joint model waiver of confidentiality.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

As discussed in **5.1 Authorities' Ability to Prohibit or Interfere With Transactions** and **5.6 Issuance of Decisions**, the Agencies must seek an injunction in federal district court to stop a proposed transaction from closing after the expiration of the HSR waiting period. The parties or the Agencies may appeal this decision to the federal court of appeals for the relevant circuit. The parties may also appeal adverse FTC Part 3 decisions to the full Commission and appeal Commission decisions to a federal court of appeals.

8.2 Typical Timeline for Appeals

Appeals can take many months to conclude and are rarely pursued.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties do not have the right to appeal an Agency's decision not to challenge a transaction. Third parties with standing may, however, bring a private action against the merging parties under the Clayton Act or Sherman Act. See **1.3 Enforcement Authorities**.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements Foreign Direct Investment

The Committee on Foreign Investment in the United States (CFIUS) is an interagency body that has jurisdiction to review any transaction that may result in foreign control of a US business. CFIUS also has jurisdiction over transactions that involve a foreign actor obtaining a *non-controlling* interest in certain types of businesses that are of special concern to US national security (referred to as "TID" businesses since they involve "critical Technologies" or "critical Infrastructure" or the collection or maintenance of "sensitive personal Data" of US citizens). Most CFIUS filings are voluntary, but a filing is mandatory for acquisitions in which (i) a foreign government actor will obtain a substantial interest in a US TID business, or (ii) any foreign actor will acquire an interest in a US business associated with technologies that require US regulatory authorisation for export or transfer. CFIUS can impose penalties for a failure to file a mandatory transaction.

CFIUS evaluates each transaction it reviews along three dimensions:

- the ability and intention of the acquirer to harm national security ("threat");

- the degree to which the target US business is susceptible to exploitation by the acquirer (“vulnerability”); and
- the reasonably foreseeable impact on US national security (“consequence”).

CFIUS tends to focus on transactions involving the defence industry, emerging technologies, critical infrastructure, and the mass collection of sensitive personal data. While CFIUS’s enabling legislation and regulations apply equally to acquirers of all nationalities, acquirers with ties to China have tended to receive greater scrutiny. If CFIUS determines it has national security concerns about a given transaction, it can negotiate with the parties to put in place measures that mitigate those concerns (eg, limiting access to sensitive systems or facilities to US personnel) or it may recommend that the President block the transaction altogether. A Presidential block is rare – fewer than ten transactions have been blocked in the 40-plus years CFIUS has been in existence.

CFIUS has historically focused on inbound investment. Pursuant to President Biden’s August 2023 Executive Order, a new Outbound Investment Program (OIP) will be established to regulate outbound investments, focusing on investments into China in the areas of semiconductors and microelectronics, quantum information technologies, and artificial intelligence. Parties should monitor OIP implementation to ensure their transactions comply with all operative requirements.

Foreign Merger Subsidy Disclosure Act

Under the Foreign Merger Subsidy Disclosure Act (FMSDA), signed into law in December 2022, parties filing pre-merger notifications under the HSR Act will be required to disclose information about subsidies they receive from “foreign

entities of concern”, such as entities controlled by China, Iran, North Korea, Russia, and other entities included on the Specially Designated Nationals and Blocked Persons List (SDN).

10. Recent Developments

10.1 Recent Changes or Impending Legislation

The HSR thresholds are adjusted annually, and changes in the interpretations of the HSR Act and its regulations – issued by the Premerger Notification Office of the FTC – are common. As of July 2024, the FTC and DOJ are finalising revisions to the HSR Rules.

Policy Changes

As noted in **3.11 Accelerated Procedure**, in February 2021, the Agencies announced they would temporarily stop granting early termination during the initial HSR waiting period. That change is still in place at the time of publication of this guide (July 2024).

In October 2021, the FTC announced a policy of requiring all merging parties subject to an FTC remedy order to obtain prior approval for a minimum of ten years before closing any future transactions affecting any relevant markets in which a violation was alleged. Prior approval requirements may even extend beyond the narrow markets affected by the original transaction, and the FTC has claimed it may pursue prior approval requirements even if a transaction is abandoned. Transactions subject to prior approval will not benefit from HSR Act review timelines or the ability to force the FTC to sue to block a deal, and accordingly prior approvals may take significantly longer than traditional HSR review. Additionally, all buyers of divested assets must seek prior approval for a minimum of ten years

before selling assets acquired through consent decrees.

In November 2022, the FTC announced a new policy regarding Section 5 of the FTC Act, which covers “unfair methods of competition”. The FTC’s previous policy applied Section 5 only in a narrow set of circumstances, when a restraint of trade was unreasonable in economic terms. Under the updated policy, the FTC will broaden its approach to Section 5 to address conduct such as “mergers, acquisitions, or joint ventures that have the tendency to ripen into violations of the antitrust laws”.

Recently Enacted Legislation

The Merger Filing Fee Modernization Act of 2022, adopted in December 2022, made significant changes to the schedule of HSR filing fees, including much larger filing fees for high-value acquisitions (see **3.3 Filing Fees**); requires HSR filings to include a detailed accounting of any subsidy a filing person has received from a foreign government; and limits litigants’ ability to transfer and consolidate antitrust actions brought by State Attorneys General into multi-district litigations.

Pending Rule-Making

In June 2023, the FTC published a notice of proposed rule-making which would dramatically expand the scope of information required in parties’ initial HSR filings. (See **3.2 Type of Agreement Required Prior to Notification** and **3.5 Information Included in a Filing**.) Parties filing HSR in 2024 should monitor the FTC’s progress through the rule-making process to ensure their filings meet all operative requirements.

10.2 Recent Enforcement Record Remedies

Under the Biden administration, both Agencies have noted that they prefer to block transactions outright rather than accept remedies that they believe do not fully preserve competition. The Agencies have expressed scepticism that remedies effectively preserve competition and have increasingly rejected the use of behavioural remedies.

In 2023, the FTC accepted remedies in only three cases, two of which the FTC accepted only after first challenging the transactions in court (Intercontinental Exchange/Black Knight; Amgen/Horizon). In 2024, as of May 1st, the FTC has accepted one remedy (Exxon/Pioneer). The DOJ accepted one remedy proposal in 2023 after challenging the transaction in court (Assa Abloy/Spectrum Brand Holdings) and in 2024 has not accepted any remedy proposals as of May 1st.

Enforcement Actions

The Agencies have undertaken several merger enforcement actions in 2023 and 2024. Enforcement actions can take several forms:

- settling with negotiated remedies at the conclusion of an investigation (two cases);
- challenging a transaction in court (ten cases, in two of which the parties abandoned the transaction shortly after the complaint was filed).

Between 1 January 2023 and 1 May 2024, the Agencies have won two cases, lost two cases, and settled three cases. In over half of in-depth merger reviews over this period in which the Agencies have filed a complaint or raised serious concerns pre-complaint, parties have opted to abandon proposed transactions rather than face

their chances in litigation, in one case restructuring the transaction voluntarily. There are several active merger litigations ongoing.

Fines

As discussed in **2.2 Failure to Notify**, the FTC routinely seeks penalties for repeat offenders that fail to file a required HSR Notification. In 2021, in *US v Clarence L Werner* and *US v Biglari Holdings, Inc*, the DOJ settled claims that the defendants had unlawfully failed to report their acquisitions for USD486,900 for 4,708 days of non-compliance and USD1.4 million for 126 days of non-compliance.

10.3 Current Competition Concerns

The Biden administration has taken an aggressive stance on antitrust enforcement and sought to embolden federal antitrust agencies in challenging mergers and other potentially anti-competitive conduct. See further discussion in the [US Trends and Developments](#) chapter of this guide.

DOJ

At the DOJ, Assistant Attorney General Kanter's enforcement agenda includes:

- championing a move away from the consumer welfare standard (which focuses on a transaction's effects on output, price and quality) towards an approach that focuses on rivalry and competition;
- reassessing "outdated" precedents in light of "new market realities";
- litigating rather than settling cases with the intent to establish new case law; and
- bringing more monopolisation cases.

Under Kanter's leadership, since 2021 the DOJ has challenged or threatened to challenge multiple transactions. The DOJ has had a mixed

record in its challenges, winning its challenges to Penguin Random House's proposed acquisition of Simon & Schuster, and Jet Blue's acquisition of Spirit. DOJ lost its challenges to United Healthcare's acquisition of Change Healthcare, Booz Allen's acquisition of EverWatch, and US Sugar's acquisition of Imperial Sugar Company. It settled its challenge to Assa Abloy's acquisition of Spectrum Brand Holdings. In several other cases, DOJ concerns and/or challenges have caused deals to be abandoned.

FTC

At the FTC, Chair Khan has set out an aggressive enforcement agenda. Her broad vision for the Commission calls for a strategic approach that, among other things, targets "root causes" of harm, focuses on "structural incentives that enable unlawful conduct", and implements forward-looking action, particularly regarding next-generation innovation and nascent industries. Under Chair Khan, the FTC has implemented wide-ranging policy changes designed to discourage mergers.

Since 2021, the FTC successfully challenged a merger of two New Jersey hospitals in Hackensack Meridian/Englewood, successfully challenged IQVIA's acquisition of Propel Media, and also issued an order prohibiting the acquisition of Grail by Illumina (overturning a decision by the FTC Administrative Law Judge, who found for the parties). Illumina announced it would divest Grail after the Fifth Circuit largely upheld the FTC's ruling against the merger. The FTC lost its challenges to Axon Enterprise's acquisition of Safariland and Meta's acquisition of Within Unlimited. It settled its challenges to Intercontinental Exchange's acquisition of Black Knight, and Amgen's acquisition of Horizon Therapeutics. In addition, the FTC has challenged or raised concerns pre-complaint in several other

transactions, causing the parties to abandon their deals.

Limits to US Enforcement Efforts

The Agencies' aggressive and emboldened enforcement approach under the Biden administration has faced a mixed reception in US courts. Nevertheless, the Agencies' persistent willingness to challenge transactions rather than accept remedies will continue to have a chilling effect on companies reluctant to become test cases for the Agencies' unconventional theories of harm.

Trends and Developments

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Axinn, Veltrop & Harkrider LLP is a highly regarded, speciality firm known for its strategic acumen in the areas of antitrust, intellectual property, and high-stakes litigation. Axinn's

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Go Your Own Way: Agency and Practitioner Approaches to Merger Remedies in the Biden Administration

Much has been written about aggressive merger control enforcement under the Biden Administration. The US Department of Justice (DOJ) and Federal Trade Commission (FTC) have earned those headlines due, in part, to their professed scepticism towards negotiated merger remedies. While negotiated consent decrees are not extinct under the current administration, the agencies' stated preference for litigating merger challenges – rather than entering into settlement agreements to resolve competition concerns – has pushed practitioners to become proactive and creative in addressing potential issues.

Agency statements and practices regarding merger remedies

Historically, where an Agency has identified that a deal poses potential competition concerns, parties have frequently sought to resolve these concerns collaboratively with antitrust enforcers. These resolutions generally have taken one of two forms: divestitures of some overlapping business unit of the buyer or target; or behavioural commitments to adopt or avoid certain business practices. This negotiated settlement would be submitted for court approval (in a DOJ

settlement) or agency action (in an FTC settlement), rendering the parties' commitments enforceable by court or agency order.

The current administration, however, has expressed hostility towards these settlements. This new approach to merger remedies was first signalled by Assistant Attorney General Jonathan Kanter in 2022, shortly after his appointment to lead the Department of Justice Antitrust Division. In [prepared remarks](#) to the Antitrust Section of the New York State Bar Association, Kanter announced that he was "concerned that merger remedies short of blocking a transaction too often miss the mark" and "suffer from significant deficiencies".

Kanter outlined a three-pronged critique of the history of negotiated remedies in antitrust merger reviews.

- In his view, it is difficult for the agencies to predict the effectiveness of a divestiture in maintaining competition in dynamic markets. Preservation of existing competition under the status quo, in Kanter's assessment, is the surer bet for the government.
- Divestiture buyers may not be as effective or as motivated in continuing to operate a

divested business unit competitively, as compared to the pre-divestiture owner under the status quo.

- Settlements do not generate precedential guidance from courts to businesses. In litigation, Kanter has stated the DOJ intends to “take risks and ask the court to reconsider the application of old precedents” to “set out the boundaries of the law as applied to current markets”. This endeavour requires “new published opinions from courts that apply the law in modern markets”, which are only generated through litigation.

AAG Kanter concluded that “when the [DOJ] concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction.” Kanter conceded that “[s]ometimes business units are sufficiently discrete and complete that disentangling them from the parent company in a non-dynamic market is a straightforward exercise, where a divestiture has a high degree of success.” But Kanter insisted that those cases “are the exception, not the rule”.

Statements from the FTC have also been critical of merger remedies, but not as sweeping as AAG Kanter’s statements. Henry Liu, the Director of the FTC’s Bureau of Competition, [has described](#) the history of merger remedies as “checkered” but has also indicated a willingness by the FTC “to accept remedies when they resolve an underlying concern”. Chair Lina Khan [announced](#) that the FTC was “going to be focusing our resources on litigating, rather than on settling” merger challenges.

These statements have corresponded to meaningful changes in agency enforcement practices. Chair Khan began her tenure as Chair of the FTC at the end of Fiscal Year 2021, and AAG Kanter

began his tenure leading the DOJ early in Fiscal Year 2022. Since that time, negotiated merger settlements have decreased precipitously.

While the DOJ and the FTC have not yet published enforcement statistics for Fiscal Year 2023, negotiated merger settlements appear to have fallen off a cliff. Neither the DOJ nor the FTC announced a settlement negotiated pre-complaint in a merger case in all of Fiscal Year 2023. Thus far in Fiscal Year 2024, the DOJ has not yet announced a consent decree negotiated pre-complaint. The FTC has issued two consent orders negotiated pre-complaint in Fiscal Year 2024 (in addition to two settlements that were reached after complaints were filed).

The practitioner response: fix it first

In response, practitioners have embraced a strategy of remedying potential competition concerns without the collaboration historically offered from the agencies, often after having tried and failed to get the agencies to agree to remedies in the course of an investigation. In these cases, the parties publicly commit to a certain course of action in the hope that this commitment will either (i) dissuade regulators from challenging the transaction or, failing that, (ii) assuage competition concerns from a reviewing court.

This “fix-it-first” approach did not begin under the Biden Administration. One notable example came in 2018, in media distributor AT&T’s vertical acquisition of media content creator Time Warner. There, the parties recognised a concern that the post-merger Time Warner would be incentivised to raise carriage fees in negotiations with AT&T’s distributor-competitors (such as national cable provider Cox Communications or regional provider RCN). Those higher fees would cause AT&T’s distributor-competitors

to raise prices on consumers or to lose Time Warner content valued by consumers – in either case, to AT&T’s advantage.

Unable to reach a negotiated remedy with the DOJ, the parties publicly committed to Time Warner’s distributors that post-transaction Time Warner would agree to third-party arbitration of carriage fee disputes and would not black out Time Warner content while that dispute was pending. This commitment did not deter the Trump Administration Justice Department from bringing suit to enjoin the acquisition. But in court, both the D.C. District Court and D.C. Circuit Court of Appeals noted this commitment in finding that the merger did not violate the Clayton Act.

In the current regulatory climate, the fix-it-first strategy has become more prevalent. At times, these proactive commitments from merging parties have successfully assuaged regulators’ concerns before they brought litigation; in other cases, parties have “litigated the fix” against an unmoved regulator, in the manner of AT&T.

Microsoft/Activision

In 2022, the Federal Trade Commission brought suit to enjoin Microsoft from acquiring video game developer Activision. The FTC’s primary concern was that Microsoft – which markets the video game platform Xbox – would deny competitor video game platforms access to Activision’s most popular titles. Recognising this concern, Microsoft publicly committed to maintain Activision’s most popular title (“Call of Duty”) on competing platforms offered by Sony’s Playstation and Valve’s Steam. Microsoft even went beyond the distribution status quo under Activision, negotiating agreements with Nintendo and other cloud providers to host Activision’s most

popular franchise on their platforms for the first time.

The District Court denied the injunction sought by the FTC. Citing Microsoft’s commitments to maintain its premier title on Sony’s Playstation and introduce that title to Nintendo’s platform, the court declared that the government’s “scrutiny has paid off”, as Microsoft’s commitments have ensured “more consumer access to Call of Duty and other Activision content”. In light of those facts, the Court found the acquisition was unlikely to substantially lessen competition. The FTC has appealed the District Court’s decision to the Ninth Circuit Court of Appeals, which remains ongoing, even after the parties closed the acquisition.

United/Change

In 2022, the DOJ brought suit to enjoin United Healthcare’s acquisition of Change Healthcare, a technology solutions vendor for health insurers. Among Change’s products is a claim-editing software product that allows insurers to process insurance claims against an insurer’s plan rules to reach a provisional conclusion as to whether each submitted claim should be paid or rejected. The DOJ’s complaint alleged that United offered the primary competitor to Change’s claim-editing software product, and that the acquisition would therefore afford United market power against competing insurers that rely on Change’s claim-editing product. The DOJ also alleged that United’s acquisition of this claim-editing product would afford United access to competitively sensitive information about competing insurers’ processes for approving and denying claims.

Before the DOJ filed its complaint against United and Change, the parties had proposed divesting Change’s claim-editing business to resolve the government’s concerns. The DOJ acknowl-

edged this offer in its complaint but asserted that that remedy would be insufficient to preserve competition. The parties pressed on in identifying a divestiture buyer and negotiating a sale, contingent on antitrust clearance of the United/Change merger. When the Court ultimately ruled on the government's motion to enjoin the deal, it found that the parties' divestiture effectively addressed the horizontal competition concerns articulated in the DOJ complaint. The government's challenge was dismissed, and the parties were cleared to complete their transaction.

Pfizer/Seagen

In 2023, Pfizer announced its proposed acquisition of Seagen Inc, a biotechnology company that develops cancer medication. Notably, one of Pfizer's drugs is the primary competitor to Seagen in treating metastatic urothelial cancer. To address potential concerns arising from the consolidation of those products, Pfizer publicly committed to irrevocably donate to the American Association for Cancer Research the royalties for sale of its metastatic urothelial cancer drug and also abandoned its partnership with Merck KGaA on the same drug. The FTC issued a "Second Request" to the parties to allow for a more thorough investigation, but ultimately did not file suit to seek an injunction against the transaction. When Pfizer announced later in 2023 that the acquisition had received antitrust clearance and would close, Pfizer highlighted that its donation of royalties from the overlapping drug addressed the competition concerns of the FTC.

JetBlue/Spirit

Even in the failed merger of JetBlue and Spirit Airlines, the parties benefited at trial from proactively identifying potential remedies to certain competition concerns in labour markets. While the transaction was under review by the DOJ, JetBlue and Spirit committed to increase flight

attendant wages, protect flight attendants from furloughs and displacements, and otherwise improve flight attendants' working conditions. In turn, the union representing Spirit flight attendants wrote an open letter to the DOJ and Department of Labor supporting the merger.

When the DOJ filed suit to block the transaction, its complaint did not include any allegations that the deal would lessen competition for airline labour. Ultimately, the government successfully blocked the deal on the basis of its potential impact on competition for passengers.

Kroger/Albertsons

One of 2024's most notable merger litigations also features an attempt to "fix it first". As the FTC was investigating the proposed merger of grocery chains Kroger and Albertsons, the parties announced an agreement to sell 413 stores and other assets.

The FTC still filed suit, alleging in its complaint that the proposed divestitures were insufficient to preserve competition. In particular, the FTC maintains that the divested assets are "a hodgepodge of unconnected stores, banners, brands, and other assets" that "are not a standalone business". As a result, the FTC argued that the proposed divestiture buyer (which currently operates only 23 supermarkets and one retail pharmacy) "would face significant obstacles stitching together the various parts and pieces from Kroger and Albertsons into a functioning business – let alone a successful competitor against a combined Kroger and Albertsons". Further, the FTC argues that the proposed divestitures do not address many geographic markets where Kroger and Albertson compete.

Litigation will most likely resolve whether the parties' proposed divestitures effectively remedy

the transaction's potential effect to substantially lessen competition.

Takeaways

There is still a place for negotiated remedies in some deals – particularly while litigation is pending. The FTC agreed to a negotiated behavioural remedy to settle litigation against the merger of pharmaceutical companies Amgen and Horizon Therapeutics less than three months after the FTC filed its complaint. Likewise, the DOJ reached a divestiture remedy eight months after filing suit to enjoin Assa Abloy's acquisition of Spectrum Brand's Hardware and Home Improvement Division. As a result, purchase agreement provisions obligating a party to consent to divestitures or other remedies remain a critical point of negotiation for practitioners.

Nevertheless, parties cannot expect collaborative engagement from the agencies in reaching an agreeable remedy. Largely, the parties are on their own in crafting a divestiture proposal or behavioural commitment that will dissuade a regulator from filing suit – or, more likely, that will survive scrutiny in litigation.

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