Merger regulation in Asia and the EU

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Overview of the merger control regime in Singapore

1. Introduction

Singapore economy

1.1 Singapore is a small open economy with a gross domestic product of US$290 billion. It is part of the 10-nation Association of Southeast Asian Nations ("**ASEAN**") which established the ASEAN Economic Community ("**AEC**") on 31 December 2015.

1.2 The AEC aims to integrate Southeast Asian economies into a single market and production base with a combined gross domestic product of US$2.5 trillion. ASEAN is the fourth largest exporting region in the world, trailing only the European Union, North America and China/Hong Kong. If ASEAN were a single country, it would be the seventh largest economy in the world. Significantly, ASEAN is home to 227 of the world's companies with more than US$1 billion in revenues.

Merger control in ASEAN

Competition law regimes in ASEAN			
Jurisdiction	**Year**	**Competition law regime**	**Enforcement**
Singapore	2007	Yes	Active
Malaysia	2011	Yes (no merger control)	Active
Indonesia	2010	Yes	Active
Vietnam	2004	Yes	Active
Philippines	2015	Yes (2015)	Active
Thailand	1999	Yes	Increasing Activity
Myanmar	2015	Yes (2015)	Not active yet
Brunei	2015	Yes (2015)	Not active yet
Laos	2015	Yes (2015)	Not active yet
Cambodia		Pending (draft regime)	Not active yet

Merger control regime in Singapore as proxy

1.3 Given that the merger control regime in Singapore is relatively more developed among the ASEAN countries, merger parties have also been observed to make merger control filings in Singapore as a proxy for notifications to other ASEAN competition regulators.

1.4 The Competition Act, Chapter 50B, of Singapore (the "**Competition Act**") was enacted in 2004 and is the principal statute governing the competition law regime in Singapore. The objective of the Competition Act is to promote the efficient functioning of Singapore's markets to enhance the competitiveness of the economy.

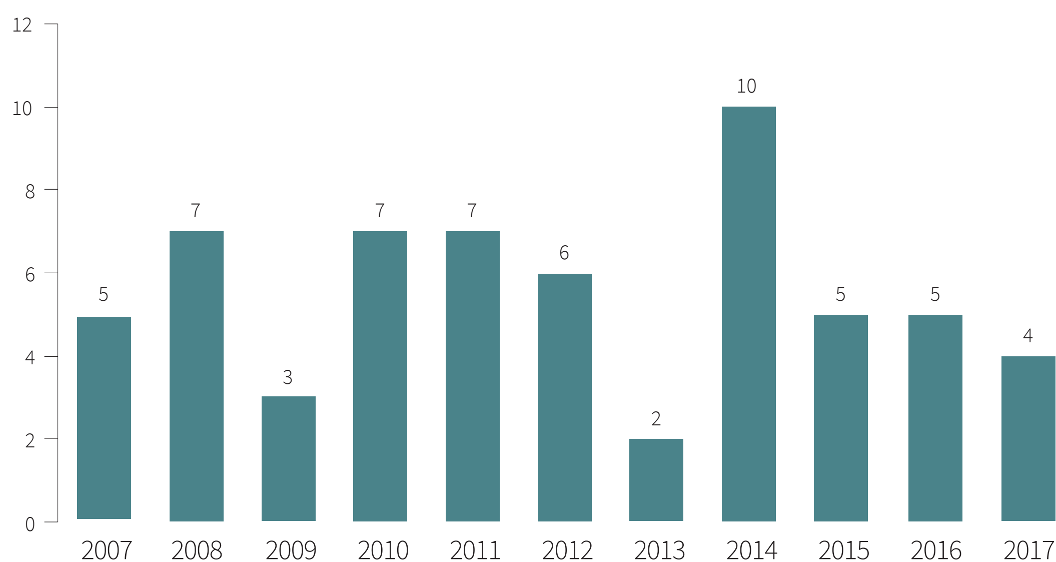
1.5 Section 54 of the Competition Act came into force in 2007, and prohibits mergers (including autonomous full-function joint ventures made on a lasting basis) that have resulted, or may be expected to result, in a substantial lessening of competition ("**SLC**") within any market in Singapore for goods and services (the "**Section 54 Prohibition**"). The Section 54 Prohibition may apply even where the merger takes place outside of Singapore, or where any merger party is located outside Singapore, so long as the merger has effect on any market in Singapore.

1.6 Since the start of the regime, the Competition Commission of Singapore (the "**CCS**") has received 61 merger control notifications, of which the CCS had proposed to move to a Phase 2 review for 11 transactions, and commitments were proposed for 5 transactions. During this period, the CCS had also exercised its powers to prohibit mergers. Apart from notified mergers, the CCS has also been actively investigating transactions which have not been notified. Such investigations may be triggered by the CCS through its horizon-scanning or by third party complaints.

Statistics on merger filings with the CCS: 1 July 2007 to 15 August 2017				
Merger filings lodged with the CCS	**Merger filings which the CCS had proposed to move to Phase 2**	**Merger filings where commitments were proposed**	**Merger filings where CCS took a decision to block**	**Merger investigations by the CCS***
61	11	5	2	Undisclosed

** Where the CCS probes or challenges a merger which has not been notified, such a process is confidential.*

Merger notifications publicly reviewed by the CCS as of 15 August 2017



1.7 In 2012, the CCS published the CCS Guidelines on Merger Procedures 2012[1] which emphasised, among others, that its market intelligence function in triggering investigations is an integral part of its merger notification regime. In order to elicit information about particular mergers, the CCS may publish a notice on its website indicating that it is considering whether or not a completed or anticipated merger that has not been notified may raise concerns under the Competition Act. The CCS also reiterated the risks of divestments and financial penalties for transactions which are not notified (please see section 9 below).

1.8 The CCS had also, in 2014, formed the Policy & Markets ("**PM**") Division for internal advocacy and market monitoring. In addition to advising other government agencies on national competition matters, among others, the PM Division conducts market studies and surveillance, and deploys market investigation tools alongside other sector monitoring tools to identify areas for attention. The conduct of market studies is also employed as a tool for horizon-scanning to identify potential problem areas for possible courses for future action.

1.9 On 25 September 2015, the CCS announced its proposed wide-ranging amendments to its existing guidelines on the enforcement of the Competition Act. The revised guidelines came into force on 1 December 2016. Notable amendments include a new fast-track procedure to expedite the investigative process for infringements under Sections 34 and 47 of the Competition Act, changes to the eligibility and conditions for leniency applications, and expanding the CCS' approach in the substantive assessment of mergers. The key additions with practical impact on the assessment of the antitrust risk for mergers in Singapore, and the need for merger notifications to be made, include clarifications on:

1.9.1 minority shareholdings giving rise to control, in particular, in view of attendance and voting patterns at shareholders' meetings, and the wide dispersion of shares;

1.9.2 a substantial lessening of competition being deemed to arise even if it is not felt across the entire market or all dimensions of competition, which supports a market segmentation approach in the assessment of mergers;

1.9.3 additional evidence required in supporting a failing firm defence;

1.9.4 additional evidence required in supporting a defence on countervailing buyer power of customers; and

1.9.5 additional types of net economic efficiencies to be considered by the CCS, and the supporting documentary and quantitative evidence required.

In particular, the inclusion of additional forms of supporting evidence required by the CCS points towards a materially stricter enforcement stance by the CCS towards mergers, consistent with the trends in remedies and commitments, and increased complex reviews and blocked mergers observed.

Changes to the calculation of relevant turnover of an undertaking were also made in the CCS Guidelines on the Appropriate Amount of Penalty 2016.

[1] This is part of the set of 13 guidelines published by the CCS to help businesses understand how the CCS will administer and enforce infringements of the prohibitions in the Competition Act.

2. Overview of the CCS notification regime

2.1 Under the Singapore merger control regime, a merger notification to the CCS is voluntary, but advisable if the merger may potentially result in a SLC in any relevant market or a market segment (defined in accordance with the rules set out in the gazetted CCS Guidelines on Market Definition).

2.2 In the absence of a filing, parties bear the antitrust risk as there is no limitation period on the timeframe after which the CCS may cease to have the power to investigate a transaction. There is accordingly an evergreen risk of an investigation and subsequent divestments or other remedies to the transaction, even where the transaction has been implemented for some time. The CCS has stated that it will generally not consider the costs of divestment which the parties would have to incur, as it would have been open to the parties to notify the merger to the CCS for a decision. The only way to close off the antitrust risk is to undertake a merger notification and obtain a clearance decision from the CCS.

2.3 Once the CCS has issued a merger clearance decision with respect to the transaction, the CCS will take no further action unless it has reasonable grounds for suspecting that:

2.3.1 information on which the CCS has based its decision (which may include information on the basis of which a commitment was accepted) was materially incomplete, false or misleading;

2.3.2 a party who provided a commitment failed to adhere to one or more terms of the commitment; or

2.3.3 where a favourable decision was given for an anticipated merger to proceed, the merger so effected is materially different from the anticipated merger.

3. Mandatory self-assessment

3.1 The CCS requires all parties to mergers to conduct a self-assessment, in accordance with the methodologies in the guidelines published by the CCS read with its decided cases, on whether a merger filing is necessary. In cases where the CCS investigates a merger which was not notified, the CCS would expect merger parties to explain why the merger was not brought to their attention and why a merger filing was not made. The self-assessment must be documented in customary form which the CCS would accept as documentary evidence, in order for the self-assessment to be accepted by the CCS.

3.2 The CCS has stepped up its market surveillance, and has issued merger probe letters to parties who, in the CCS' view, may need to self-assess if they should notify the CCS of their mergers.[2]

3.3 In the event of a CCS finding that the transaction gives rise to an infringement of the Section 54 Prohibition, the CCS will consider if the infringement was entered into intentionally or negligently in determining if financial penalties should be levied on the merger parties, apart from other directions and remedies. Failure to follow merger control procedures could result in financial penalties of up to 10 per cent. of the turnover of the undertaking in Singapore for each year of infringement, up to a maximum of three years, in addition to remedies that may be imposed by the CCS on parties to the transaction, such as a direction for the merger to be unwound or for divestments to be carried out. A contemporaneous self-assessment documented at the time of the transaction would be considered as a first line of defence to the CCS that the infringement was not entered into intentionally or negligently.

[2] CCS Chief Executive Toh Han Li, in the Singapore chapter of *Global Competition Review*'s Asia-Pacific Antitrust Review 2014.

3.4 In the context of cross-border transactions, the Section 54 Prohibition may apply even where the merger takes place outside of Singapore, or where any merger party is located outside Singapore, so long as the merger has effect on any market in Singapore. In its assessment of the potential impact of mergers, specifically in Singapore, the CCS is concerned with, and considers, Singapore-specific factors. It is accordingly necessary to conduct a Singapore-specific self-assessment as to whether the merger may give rise to a SLC within any market in Singapore.

3.5 In an interview in 2015, the CCS Chief Executive Toh Han Li had raised the example that the small domestic market in Singapore may affect new entry, as large competitors overseas may not enter the market in Singapore due to its size. This was a consideration in requiring commitments from the merging parties in the recent *SEEK/JobStreet* merger.[3]

4. Risks of not filing

Investigative risk

4.1 As part of its statutory remit in the context of merger control, the CCS keeps markets under review to ascertain which mergers and acquisitions are taking place.

4.2 Where the CCS identifies transactions that it considers may potentially raise concerns under the Section 54 Prohibition, the CCS will approach the merger parties to gather further information about the transaction, as well as third parties on the effect on competition. A formal investigation may be triggered under Section 62 of the Competition Act if there are reasonable grounds for suspecting that a merger has infringed, or that an anticipated merger, if carried into effect will infringe, the Section 54 Prohibition. Where the CCS investigates a transaction, the CCS may publish the fact of its investigation on its website.

4.3 The CCS may be prompted to investigate:

4.3.1 following consistent complaints, or one or two substantiated complaints, from third parties;

4.3.2 where there are preliminary indications that the Quantitative Thresholds (as defined in paragraph 6.1 below) are likely to be crossed;

4.3.3 where customers in Singapore appear, post-merger, to have limited choice; or

4.3.4 for vertical mergers, where there is a possibility of competitors being foreclosed.

[3] As disclosed by the CCS Chief Executive Toh Han Li, in an interview with *Global Competition Review* published on 9 February 2015.

4.4 The CCS has previously raised serious doubts as to the compatibility of transactions with Section 54 of the Competition Act even where:

4.4.1 mergers by the same parties, or involving the same industry, had received clearances in other jurisdictions;

4.4.2 there are no significant issues identified within the wider defined relevant markets, but the CCS had reviewed whether there may be competition issues within narrower market segments, on a global or Singapore-specific basis; or

4.4.3 the Quantitative Thresholds (as defined in paragraph 6.1 below) are not crossed.

Closing risk

4.5 A CCS investigation may be triggered at any point pre- or post-closing of the transaction. There is no administrative timetable for an investigation, and can take several months. This may adversely affect the timeline for closing of the transaction or for implementation of the transaction post-closing.

Burden of proof risk

4.6 When merger parties make a filing, the burden of proof is on the CCS to demonstrate why the arguments advanced in the filing are incorrect. The CCS will not generally look beyond the arguments raised unless an apparent area of concern has entirely not been addressed.

4.7 However, where the CCS investigates, the CCS would already have formed its theories of harm and the burden of proof will be on the merger parties to demonstrate why the CCS is wrong. From our experience, this burden of proof is significantly harder to discharge.

4.8 The temperament of the merger review process is also potentially harsher in cases of investigations. The extent and volume of documents requested also tend to be wider. The CCS is likely, in an investigation, to require documents which merger parties would not have included in a merger filing.

4.9 In cases where the CCS investigates a merger which was not notified, the CCS would expect merger parties to explain why the merger was not brought to their attention by the parties, and why a merger filing was not made.

5. Types of transactions caught under the Section 54 Prohibition

5.1 Pursuant to Section 54(2) of the Competition Act, a merger is deemed to occur if:

5.1.1 two or more undertakings, previously independent of each other, merge;

5.1.2 one or more persons or undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or

5.1.3 the result of an acquisition by one undertaking (the first undertaking) of the assets (including goodwill), or a substantial part of the assets, of another undertaking (the second undertaking) is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate, the part concerned of the business in which that undertaking was engaged immediately before the acquisition.

5.2 Section 54(5) of the Competition Act further states that the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity shall constitute a merger falling within Section 54(2)(b) of the Competition Act.

5.3 A joint venture must thus fulfil the following criteria before falling within the definition of a merger under Section 54 of the Competition Act:

5.3.1 **joint control must exist**: where two or more parties have the possibility of exercising decisive influence over that undertaking. Decisive influence in this context includes the power to block actions which determine the strategic commercial behaviour of an undertaking;

5.3.2 **performing all the functions of an autonomous economic entity**: this essentially means that a joint venture must operate on a market and perform the functions normally carried out by undertakings operating on that market, including having a management dedicated to its day-to-day operations and access to sufficient resources, including finance, staff and assets (tangible and intangible); and

5.3.3 **lasting basis**: the joint venture must be intended to operate on a lasting basis.

CCS case example of a *joint venture*

On 2 October 2007, the CCS cleared a decision for the anticipated joint venture between Intel Corporation ("**Intel**") and STMicroelectronics N.V. ("**STM**"), whereby Newco will be engaged in the research and development, manufacture, marketing, and sale of flash memory. Under the agreement, STM will contribute the assets and certain liabilities of its NOR and NAND flash memory business, while Intel will contribute the assets and certain liabilities of its NOR flash memory business, and the financial investor, Francisco Partners ("**FP**"), will contribute cash.

On completion, Intel, STM, and FP will each own 45.1 per cent., 48.6 per cent., and 6.3 per cent. of the share capital of Newco. STM and Intel would each nominate three out of eight directors on Newco's board. As a super majority of six members is required for strategic decisions of Newco, STM and Intel would have the ability to veto decisions relating to the approval of the annual business and financial plan of Newco, and any expenditure, agreement to make expenditure, or any other action inconsistent with an approved annual plan.

Accordingly, the CCS considered that STM and Intel would have joint control of Newco.

Concept of 'control'

5.4 The 'control' test under the Competition Act applies a similar concept of 'decisive influence' as that adopted under the EU merger control regime.

5.5 Section 54(3) of the Competition Act states that 'control' over an undertaking is regarded as existing if decisive influence is capable of being exercised with regard to the activities of an undertaking. The CCS Substantive Merger Guidelines further illustrates that 'control' can be legal or de facto. Legal control arises where there is decisive influence and the CCS considers that decisive influence is deemed to exist if there is ownership of more than 50 per cent. of the voting rights. Where ownership is between 30 per cent. and 50 per cent. of the voting rights of the undertaking, there is a rebuttable presumption that decisive influence exists.

5.6 However, the aforementioned thresholds are only indicative and it is necessary to consider all the relevant circumstances on a case-by-case basis. Control may potentially be established at levels below these thresholds if other relevant factors provide strong evidence of control. De facto control may arise, for example, via financial arrangements, rights to veto strategic and commercial decisions of an undertaking, and/or other agreements such as long-term supply agreements.

5.7 In relation to minority shareholders, it is possible that decisive influence may be capable of being exercised by an undertaking which acquires a minority interest. For example, control may exist where minority shareholders have additional rights that allow them to veto decisions that are essential for the strategic commercial behaviour of the undertaking, such as the budget, business plans, major investments, the appointment of senior management or market-specific rights.

6. Thresholds and substantive analysis

6.1 There are no jurisdictional safe harbours where mergers which do not trigger specified quantitative thresholds are exempted or excluded from Section 54 of the Competition Act. Generally, if a merger results in the following indicative quantitative thresholds being crossed, the CCS is likely to give further consideration to the merger before being satisfied that it will not result in a SLC:

6.1.1 the merged entity has a market share of at least 40 per cent.; or

6.1.2 the merged entity has a market share of at least 20 per cent., and the post-merger combined market share of the three largest firms is at least 70 per cent.

(the "**Quantitative Thresholds**").

6.2 The Quantitative Thresholds are based on the relevant markets defined in accordance with the rules set out in the gazetted CCS Guidelines on Market Definition, and can be broadly defined as local (i.e. Singapore), regional or global.

6.3 As a general rule, mergers involving companies where the turnover in Singapore[4] in the financial year preceding the transaction of each of the parties exceeds S$5 million, or the combined worldwide turnover in the financial year preceding the transaction of all of the parties exceeds S$50 million, are likely to be of more concern (the "**De Minimis Thresholds**").

6.4 The CCS has stressed that it may also investigate transactions that fall below the indicative Quantitative Thresholds and the De Minimis Thresholds. Merger parties should nonetheless conduct a self-assessment to assess if their merger may give rise to a SLC within any market in Singapore, and merger situations should be notified to the CCS if there is a risk that the merger may result in a SLC within any market in Singapore.

Substantive issues

6.5 Apart from market shares, the CCS will also assess how the dynamics of competition are affected by the merger and will examine qualitative factors such as entry and expansion, countervailing buyer power, market volatility, supply-side substitution, market transparency, and cost stability in the market.

6.6 The CCS will also consider whether the SLC may be offset by other factors, such as:

6.6.1 **efficiency gains**: whether such efficiencies may increase rivalry in the market or enhance rivalry among the remaining players in the market; and

6.6.2 **the failing firm/division defence**: in the case of a failing firm, where one of the parties to the merger is genuinely failing and likely to exit the market in the absence of the merger, the counterfactual scenario may need to be adjusted to reflect the likely loss of rivalry which will happen in any event in the market, given the failure of one of the merger parties.

[4] Refers to turnover booked in Singapore as well as turnover from customers in Singapore.

CCS case example of *failing firm defence*

In CCS Case No. *CCS 400/011/14* – SIA/Tigerair Holdings, the CCS issued its first clearance on the basis of the failing firm defence pertaining to the proposed acquisition by Singapore Airlines Limited ("**SIA**") of Tiger Airways Holdings Limited ("**Tigerair Holdings**"). SIA and Tigerair Holdings overlap primarily in the provision of air passenger services.

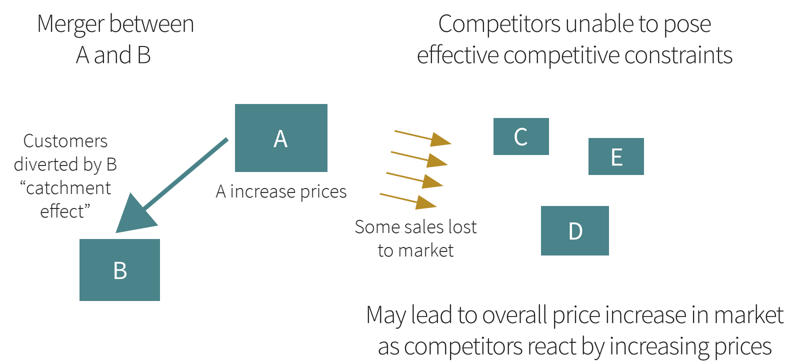
The CCS was of the view that sufficient evidence had been submitted to meet the failing firm defence. The failing firm defence involves stringent requirements and a high legal threshold.

The CCS agreed that the proposed acquisition would be less detrimental to competition in Singapore relative to the scenario where Tigerair Holdings would have exited its operations in the absence of the proposed acquisition. Such an exit would have caused disruptions to passengers and to the connectivity of the Singapore air hub.

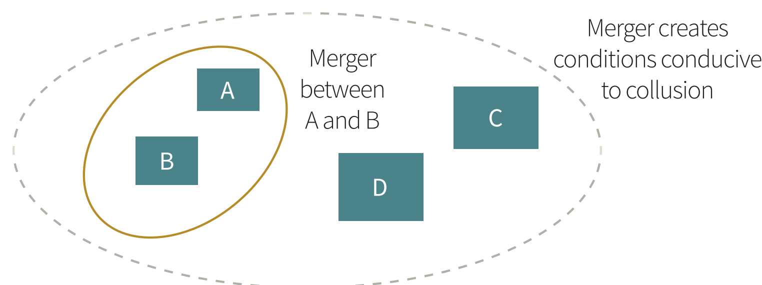
6.7 There are broadly three types of mergers which may give rise to the following concerns:

Horizontal mergers (between undertakings that operate in the same economic market)

6.7.1 **non-coordinated effects**: non-coordinated effects may arise where, as a result of the merger, the merged entity finds it profitable to raise prices (or reduce output or quality) as a result of the loss of competition between the merged entities;



6.7.2 **coordinated effects**: coordinated effects are concerned with the changes to the existing structure of competition brought about by a merger such that it is easier or more likely for firms in the same market to coordinate their competitive behaviour (i.e. to raise prices, or reduce quality, or output);



Non-horizontal mergers (vertical mergers)

6.7.3 **vertical effects**: vertical effects occur between firms that operate at different, but complementary, levels in the chain of production and/or distribution. Vertical integrations may result in a SLC where market power exists at one of the affected functional levels; and

CCS case example of *vertical effects*

Vertical effects, apart from horizontal effects, were of particular concern in the CCS' findings in CCS Case No. *CCS 400/007/07 –Thomson/Reuters*. The merger parties, The Thomson Corporation and Reuters Group PLC, provide financial information products and services, i.e. financial information, analytics, trading capabilities, and software (also referred to as content sets).

In examining the vertical effects of the transaction, the CCS noted that the merged entity could potentially exercise market power by supplying content sets to downstream redistributors at highly unfavourable terms. As there is a lack of alternatives, redistributors would have no choice but to accept these unfavourable terms. The CCS further noted that the merged entity could simply stop its supply to these redistributors, which would foreclose redistributors from the market, and ultimately result in higher prices and narrower choices for end-users.

The CCS eventually cleared the transaction in view of global commitments which the parties agreed to undertake.

Further CCS case example of *vertical effects*

In CCS Case No. *CCS 400/012/14 – Airbus/SIA*, Airbus Asia Training Centre Pte Ltd (the "**AATC**"), which is the proposed joint venture between Airbus Services Asia Pacific Pte. Ltd. ("**Airbus Asia**"), a wholly-owned subsidiary of Airbus S.A.S ("**Airbus**"), and Singapore Airlines Limited ("**SIA**"), was set up to provide Airbus aircraft pilot training services in the Asia-Pacific region.

In its findings, the CCS noted that Airbus is also a supplier of software and data packages, which are necessary to the functioning of the Full Flight Simulators ("**FFS**") used by aircraft pilot training service providers, and that these can only be purchased from Airbus. Airbus supplies the software and data packages to the aircraft pilot training service providers, which include third-party independent service providers, Airbus-related training centres and FFS manufacturers, by way of a licence agreement.

The CCS concluded that the incentives for Airbus to discriminate against fellow competitors who provide Airbus aircraft pilot training services in the downstream market are limited as Airbus has an interdependent relationship with:

(i) airlines, who are also their customers in the purchase of aircrafts, and which is the main bulk of their business; and

(ii) FFS manufacturers, who supply Airbus with the FFS they need to compete downstream for the provision of aircraft pilot training services, although Airbus can choose between multiple FFS suppliers while all FFS suppliers must purchase the software package from Airbus. The only parties who do not have this interdependent relationship would be independent training providers. However, there is no specific example of Airbus having discriminated against such independent training providers.

In particular, the CCS also noted Airbus' commitment, in its stated policy, to license its FFS software and data packages to any provider of aircraft pilot training services requesting it, and in any case on non-discriminatory commercial terms.

Especially having regard to Airbus' stated licensing policy, the CCS eventually concluded that the risk of the transaction giving rise to vertical effects that would raise competition concerns in the relevant markets is low.

Non-horizontal mergers (conglomerate mergers)

6.7.4 **portfolio effects**: portfolio effects involve firms operating in different product markets. A firm may be said to have portfolio power when the market power derived from a portfolio of brands exceeds the sum of its parts.

CCS case example of *portfolio effects*

In CCS Case No. *CCS 400/003/10 – Novartis AG/Alcon*, the CCS noted that the activities of the parties are, to a large extent, complementary. Specifically, Novartis AG is active in contact lenses while Alcon Inc is active in intra-ocular lenses. The CCS further considered whether the transaction will allow the merged entity to exercise its portfolio power, and eventually concluded that there are also other competitors present in a number of markets, who can be regarded to have a certain degree of portfolio power. The merged entity is therefore unlikely to exercise any portfolio power.

6.8 In practice, mergers may involve a combination of elements from the above three types of mergers. The CCS may consider a combination of the above types of effects in its overall assessment.

CCS case example of *a merger involving a combination of horizontal and non-horizontal effects*

In CCS Case No. *CCS 400/010/14 – Parkway/RadLink*, the CCS took a provisional decision to block the proposed acquisition by Parkway Holdings Ltd ("**Parkway**"), through its wholly-owned subsidiary, Medi-Rad Associates Ltd, of RadLink-Asia Pte Limited ("**RadLink**") and its subsidiaries from Fortis Healthcare Singapore Pte. Limited ("**Fortis**"), after making provisional findings that:

(i) post-merger, Parkway would become the only commercial supplier of radiopharmaceuticals in Singapore, through its 33 per cent. shareholding of Positron Tracers Pte Ltd and the acquisition of 100 per cent. of RadLink. The CCS' market inquiries indicated that no potential new entrant would enter the market in the next two to three years to compete with the merged entity;

(ii) in the provision of radiology and imaging services for private outpatients in Singapore, evidence suggests that Parkway and RadLink are each other's closest competitors pre-merger, entry barriers in the market are moderate to high and the bargaining power of customers is weak. Further, the CCS noted that post-merger, the merged entity would have substantial market share; and

(iii) a SLC is also likely to arise from the vertical integration of the Parkway's and Fortis' operations between the upstream market for the supply of radiopharmaceuticals and the downstream market for the provision of radiology and imaging services. The CCS' market inquiries indicated that the merged entity would be able to restrict competition in the market for radiology and imaging services by controlling the supply, the prices and/or the range of radiopharmaceuticals available to its downstream competitors.

This is the second merger in which the CCS has taken a decision to block a proposed transaction.

6.9 In the CCS' decisional practice, the CCS has conducted further review of the above types of effects (where applicable) for transactions even where market shares do not exceed the Quantitative Thresholds. Examples include CCS Case No. *CCS 400/007/14 – Holcim/Lafarge*, CCS Case No. *CCS 400/001/14 – Applied Materials/Tokyo Electron, and, more recently*, CCS Case No. *CCS 400/014/14 – Daifuku/BCS*.

Exclusions

6.10 The following are excluded from the Section 54 Prohibition:

6.10.1 mergers that are:

(i) approved by any Minister or regulatory authority (other than the CCS) pursuant to any requirement imposed by written law;

(ii) approved by the Monetary Authority of Singapore pursuant to any requirement imposed under any written law; or

(iii) under the jurisdiction of another regulatory authority under any written law or code of practice relating to competition;

6.10.2 mergers involving any undertaking relating to any specified activity as defined in paragraph 6(2) of the Third Schedule; and

6.10.3 mergers with net economic efficiencies (e.g. lower costs, greater innovation, greater choice or higher quality).

6.11 Ancillary restrictions which are directly related and necessary to the implementation of the merger (e.g. non-compete clauses, licences of intellectual property and know-how, and purchase and supply agreements) are excluded from the Section 34 Prohibition (against anti-competitive agreements), and the Section 47 Prohibition (against abuse of a dominant position).

6.12 In entering into any agreements, arrangements or provisions ancillary to the merger which impose restrictions on the parties, parties should assess if the restrictions are indeed directly related and necessary to the implementation of the merger, in accordance with the methodologies in the CCS Guidelines and decisional practice. The CCS has, in its recent decisions, investigated ancillary restrictions for potential infringements of Section 34 or Section 47 of the Competition Act, where the duration of the restriction or scope of application were considered excessive or not necessary for the merger, and accepted voluntary settlements in this regard.

7. Pre-notification procedures with the CCS

7.1 There are two separate voluntary pre-notification processes where merger parties may engage with the CCS.

Process for obtaining confidential advice

7.2 The CCS provides for a confidential process for businesses to approach the CCS for advice, typically issued within 14 days of the application. The confidential advice would include whether a merger is likely to raise competition concerns in Singapore, and whether a notification to the CCS is advisable, on the basis that such advice is provided without having taken into account third-party views.

7.3 Following the self-assessment process, merger parties may approach the CCS for confidential advice, if the following conditions are met:

7.3.1 the merger must not be completed, but there must be a good faith intention to proceed with the transaction;

7.3.2 the merger must not be in the public domain. However, in exceptional circumstances, the CCS may consider giving confidential advice in relation to mergers that are no longer confidential. Merger parties must provide good reasons why they wish to receive confidential advice and not proceed with a notification in these situations; and

7.3.3 the merger situation must raise a genuine issue relating to the competitive assessment in Singapore. There must therefore be some doubt, for example, arising from a lack of relevant precedents, as to whether or not the merger situation raises concerns such that notification may be appropriate.

7.4 Confidential advice is not binding on the CCS and does not amount to a decision under Section 57 or Section 58 of the Competition Act. The CCS reserves the right to investigate the merger situation where the statutory test for doing so (i.e. reasonable grounds for suspecting that the Section 54 Prohibition may be infringed) is met.

7.5 This option is generally most useful for foreign-to-foreign mergers with a tangential effect on markets in Singapore. It may also be helpful in cases where parties may not agree on the findings of the self-assessment, and therefore wish to obtain a non-binding guidance from the CCS, on whether a merger notification would be necessary.

Pre-notification discussion

7.6 Where merger parties have decided to file, there is a separate process for a pre-notification discussion ("**PND**") with the CCS prior to the filing, where merger parties discuss the content and timing of their notifications with the CCS. The PND is intended to allow the parties to identify any further information that the CCS may require in assessing the filing. The CCS will also, where possible, indicate gaps in the information provided in the draft notification form.

7.7 In the context of PNDs, the CCS does not give views on whether a merger situation would likely require a Phase 2 assessment, or whether the transaction will result in an SLC.

8. Notification procedures

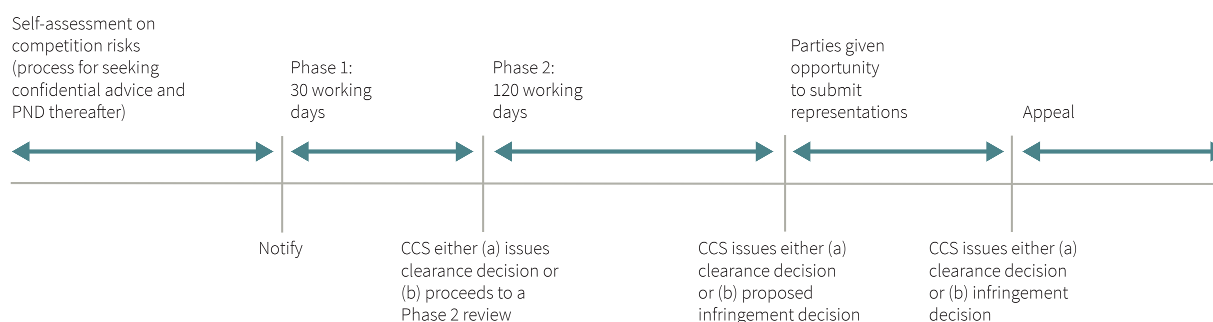
8.1 Applications to the CCS for decisions are made under Section 57 or Section 58 of the Competition Act. Merger parties can apply for a decision as to whether their anticipated merger will, if carried into effect, infringe, or whether their merger has infringed, the Section 54 Prohibition. A merger infringes the Section 54 Prohibition if it has resulted, or may be expected to result, in a SLC within any market in Singapore.

8.2 The process and timeframe for a merger filing to the CCS are as follows:

8.2.1 **Phase 1 review**: this is triggered upon the CCS accepting a complete Form M1. The indicative administrative timeframe is 30 working days; and

8.2.2 **Phase 2 review**: this is triggered if the CCS is not able to conclude during Phase 1 that the transaction is cleared. The indicative timeframe is 120 working days, and the clock will start running only after the CCS has received a complete Form M2.

8.3 A diagrammatic representative of the notification process is set out below.



8.4 The CCS merger control regime, unlike jurisdictions like the EU and China, has no short-form application or fast-track procedure. There is also no provision for the transaction to be deemed to be cleared upon expiry of a waiting period.

8.5 That said, the CCS merger control regime is non-suspensory. Merger parties may complete their transaction prior to a decision having been issued by the CCS. However, pursuant to Section 58A of the Competition Act, the CCS may impose interim measures, i.e. directions that it considers appropriate to prevent the merger parties from taking any action that might prejudice the CCS' ability to consider the merger situation further and/or to impose appropriate remedies. Such interim measures may include, for example, directions to stop the acquiring party from implementing the merger, prohibiting the transfer of staff, or setting of limits on the exchange of commercially sensitive information (e.g. customer lists and prices). The CCS is also empowered under Section 67(1)(a) of the Competition Act to do so for mergers that are not notified, but under investigations.

Phase 1 review

8.6 A Phase 1 review is expected to be completed within 30 working days. In exceptional circumstances, the CCS may also extend the Phase 1 review period upon informing the applicant in writing in advance. Under the Phase 1 review, the CCS case team will gather information about the competitive effect of the merger situation from the applicant and third parties, as well as other regulatory bodies and government departments, where relevant. The CCS case team may also hold meetings with the parties or third parties.

8.7 When the CCS has determined that a merger has not infringed, or that an anticipated merger, if carried into effect, will not infringe, the Section 54 Prohibition, the CCS will issue a favourable decision. The CCS will also give notice of the decision to the merger parties and may publish the favourable decision on the CCS public register available on its website.

8.8 In the case of an anticipated merger, the CCS may also, at the time of issuing a favourable decision, specify the validity period of the decision within which the merger must be carried into effect. The CCS will not take further action if the anticipated merger is effected within the validity period, unless any of the circumstances stated in paragraph 2.3 for the favourable decision to be revoked occurs. The CCS generally considers that a period of one year is sufficient for merger parties to act on the favourable decision and carry the anticipated merger into effect. However, this may be varied depending on the circumstances of each merger situation.

Phase 2 review

8.9 In the event that the CCS case team is unable to form a conclusion during the Phase 1 review that the merger situation does not raise competition concerns under the Section 54 Prohibition, the CCS may proceed with a Phase 2 review, while communicating its concerns that have been identified. The applicant will have an opportunity to respond to the issues identified, and may put forward any commitments if it wishes.

8.10 Phase 2 reviews are more complex and entail a more detailed and extensive examination of the effects of the merger situation. If, towards the end of the Phase 2 review, the CCS reaches a preliminary view that the merger situation is likely to give rise to a SLC, the CCS will issue a Statement of Decision (Provisional) to the applicant, stating the facts on which the CCS relies, as well as the reasons why the CCS has reached the preliminary view. The Statement of Decision (Provisional) will also outline any commitments or directions that the CCS considers may be appropriate.

8.11 Pursuant to Sections 57(3) and 58(3) of the Competition Act, merger parties have an opportunity to apply to the Minister for Trade and Industry for the merger situation to be exempted on public interest considerations. Merger parties also have an opportunity to make written representations to the CCS and to inspect the documents

in the CCS' file relating to the proposed unfavourable decision. Where appropriate, the merger parties may be allowed to make oral representations to the CCS.

8.12 Having taken into account any oral and written representations made by the applicant in response to the Statement of Decision (Provisional), the CCS will make a final decision on the merger, before giving notice of the decision to the merger parties and announcing the decision on the public register.

8.13 There has been an increasing trend in Phase 2 reviews by the CCS. From January 2012 to December 2015, approximately one in every four merger filings had proceeded to a Phase 2 review.

Confidentiality

8.14 In submitting the Form M1, Form M2 or any other submissions to the CCS, applicants are required to provide both confidential and non-confidential versions of the submissions and the supporting documents. The CCS is obliged under Section 89 of the Competition Act to preserve the secrecy of confidential information which it receives.

8.15 The confidentiality claims of the applicants are subject to acceptance by the CCS. The CCS must also consider the extent to which disclosure is necessary for the purpose for which it proposes to make the disclosure. If the confidentiality claims are accepted, the CCS will not generally disclose any confidential information received to any other parties. Instead, the CCS may use the non-confidential version of the submissions and supporting documents both to facilitate its discussion with third parties and to enable the CCS to publish a non-confidential version of its decision without delay.

Appeals

8.16 There is a right of appeal to the Competition Appeal Board ("**CAB**") against any decision by the CCS in respect of a merger situation or any direction (including interim measures) imposed by the CCS. Any merger party may make an appeal against the CCS' decision in respect of a merger situation while an appeal against a direction may be made by the person to whom the CCS gave the direction. An appeal must be brought within the time period specified in the *Competition (Appeals) Regulations*.

8.17 Where the CCS proposes to make an infringement decision, applicants may apply to the Minister for Trade and Industry for the merger to be exempted from the merger provisions on the ground of any public interest consideration.

8.18 As of 15 August 2017, the CAB has received 13 appeals, and issued 10 decisions. The CAB has not received any appeal in respect of a merger situation as of 15 August 2017; the 13 appeals received by the CAB relate to either Section 34 or Section 47 of the Competition Act. In the 10 CAB decisions issued, the CAB had generally upheld the findings and decisions of the CCS. Of these, the CAB reduced the financial penalty that was initially imposed by the CCS in seven decisions.

9. Remedies

9.1 Apart from financial penalties, once the CCS has decided that a merger has infringed, or that an anticipated merger, if carried into effect, will infringe the Section 54 Prohibition, the CCS may impose directions to remedy, mitigate or prevent the SLC or any adverse effects resulting from the SLC. The CCS may also, at any time, accept commitments proposed by the merger parties to remedy the adverse effects of the transaction, up until the CCS issues its final decision on the merger.

9.2 The CCS' starting point would be to choose the remedial action that will restore the competition that has been, or is expected to be, substantially lessened as a result of the merger. There are broadly two types of remedies which the CCS may consider, i.e. structural and behavioural remedies. However, the CCS prefers structural remedies to behavioural ones, as structural remedies tend to address the competition concerns created by the merger more directly, and also require less monitoring.

9.3 The CCS continues to stress that commitments accepted by overseas competition authorities do not, in and of themselves, necessarily imply that the CCS will allow the merger to proceed in Singapore. The CCS has recently formed a commitments and remedies unit to independently assess the suitability of proposed commitments.

Structural remedies

9.4 Typically, structural remedies require the sale of one of the overlapping businesses that have led to the competition concern. The sale should be completed within a specified period, and the CCS must approve the buyer before the sale of any business 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.

9.5 The CCS may also, where appropriate, consider other structural or quasi-structural remedies, for example, divestment of the buyer's existing business (or part of it), or an amendment to intellectual property licences.

CCS case example of *merger cleared with divestment commitments*

In CCS Case No. *CCS 400/002/08 – Manitowoc/Enodis*, the CCS considered the anticipated transaction in which The Manitowoc Company, Inc. ("**Manitowoc**") would acquire Enodis plc. ("**Enodis**"). The businesses of Manitowoc and Endois overlap horizontally in the supply of cold-focused foodservice equipment, specifically, ice machines.

The CCS was of the view that competition concerns were likely to arise from the transaction, given the substantial market share of the merged entity for ice machines, and the corresponding increases in concentration arising from the transaction. However, the CCS eventually cleared the merger in view of the divestment commitments proposed, specifically, the divestment of all of Enodis' global ice machine business that is operated under the Scotsman, Ice-O-Matic, Simag, Barline, Icematic, and Oref brand names, as well as the global commercial refrigeration and other non-ice businesses that are operated under the Tecnomac and Icematic brand names. The CCS considered that the divestment of the entire Enodis ice machine business is sufficient to address any competition concerns arising in Singapore.

Further CCS case example of *merger cleared with divestments*

In the CCS Case No. ***CCS 400/007/07 – Thomson/Reuters***, the CCS had examined divestment commitments proposed by the merger parties to, and subsequently amended and accepted by, the European Commission and the US Department of Justice, in relation to the divestment of certain databases of the merger parties relating to the relevant affected markets. The divestment is expected to allow the purchaser of the divestment databases to rapidly enter the market and compete with the merged entity's offerings.

The CCS concluded that the commitments "ought to place the acquirer of the purchased databases in a position to quickly establish itself as a competitive force". Accordingly, the commitments will, on balance, address any competition concerns that may arise.

Behavioural remedies

9.6 The CCS will consider behavioural remedies in situations where divestments are considered to be impractical, or disproportionate, to the nature of the concerns identified. Where appropriate, the CCS may also implement behavioural remedies to support structural divestment.

CCS case example of *merger cleared with behavioural commitments*

In CCS Case No. *CCS 400/004/14 – SEEK/JobStreet*, the CCS granted conditional clearance of the proposed acquisition by SEEK Asia Investments Pte. Ltd. of certain recruitment business assets of JobStreet Corporation Berhad, including JobStreet.com Pte Ltd., on the basis of Singapore-specific behavioural and divestiture commitments offered. The transaction has impact on the market for the provision of online recruitment advertising services and recruitment solutions in Singapore.

The CCS was of the view that the significant market power possessed by the merged entity may give rise to non-coordinated effects post-merger, such as the ability and incentive to:

- provide loyalty rebates, exclusive contracts, or bundling and tying of its products across its two brands which prevent, or are likely to have the effect of preventing, customers from switching away; and
- impose price increases.

The CCS considered that the commitments by the merged entity to:

- not enter into exclusive agreements with employer and recruiter customers for a period of three years;
- maintain the current pricing of services capped at present day rate cards or current day negotiated prices, subject to Consumer Price Index for a period of three years; and
- divest, as a going concern, the assets of jobs.com.sg, an aggregator site, including the rights, title and interest to use the technology used to crawl websites with job opportunities, receive information on job opportunities via XML feeds, and make such job opportunities searchable on the website in Singapore,

Are sufficient to address any adverse effects arising from the transaction in Singapore.

This is the first conditional clearance by the CCS subject to local commitments, which signals an increasing trend by the CCS towards targeted Singapore remedies.

9.7 The CCS has also increasingly looked to commitments in its recent merger actions with an emphasis on Singapore-specific effects. The CCS' decision to block the proposed acquisition by Parkway through its wholly-owned subsidiary, RadLink, from Fortis in 2015 followed less than five months after the CCS' conditional clearance decision in SEEK/JobStreet. The CCS was cited in media reports on its provisional decision on *Parkway/RadLink*[5] articulating that no commitments were proposed to the CCS for consideration during the review process.

9.8 On 14 August 2015, and within five months of the *Parkway/RadLink* decision, the CCS announced that it had competition concerns on the proposed acquisition by ADB BVBA ("**ADB**") of Safegate International AB ("**Safegate**"). Following the conclusion of a public consultation on a set of commitments offered by ADB, the CCS took into consideration the feedback received and on 3 March 2016 granted approval of the proposed transaction after accepting ADB's commitments to address the CCS' competition concerns. The commitments include:

[5] Please see paragraph 6.8 above for a case summary of the *Parkway/RadLink* decision.

9.8.1 For specified periods, certain ADB and Safegate products and spare parts sold directly or indirectly to any airport operator for use in Singapore will be subject to pre-merger prices, adjusted for inflation.

9.8.2 To supply all required spare parts for specific products sold to any airport operator for use in Singapore for a period of 10 years from the completion of the transaction, and also supply any technical support required for these products to the airport operators.

9.8.3 Not to enter into any agreements with any contractor or supplier in Singapore which expressly prevent or have the effect of preventing contractors or suppliers from carrying, promoting or offering alternative competing products and services, for the period of four years from the completion of the transaction.

9.8.4 To ensure that any contracts or agreements relating to the sale of specific products entered into between ADB, Safegate or another party and an airport operator in Singapore on or before the completion of the transaction shall continue in full force and effect after that.

9.8.5 To provide the CCS an independent audit report on a regular basis.

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Daren Shiau, PBM, is Co-Head of the Corporate & Commercial Department, and also heads the Firm's Competition & Antitrust practice. He is a competition law specialist, and his practice covers antitrust litigation, international cartels, merger control and sectoral competition regimes.

Cited as the "most highly nominated practitioner" and "a real expert, according to rivals" in the inaugural Competition chapter of Who's Who Legal: Singapore (2008), Daren has also been recommended as a leading antitrust practitioner in The International Who's Who of Competition Lawyers and Economists and the Euromoney Guide to the World's Leading Competition and Antitrust Lawyers since 2006 when Singapore's competition law was enacted.

In 2012, Daren was named by Global Competition Review as one of the world's most talented competition lawyers under the age of forty in its 40 Under Forty survey, and is the only South-east Asian lawyer recognised in the history of the list. Who's Who Legal (2013) cites Daren as being "very skilled", and "one of the finest lawyers in the region", and Chambers Asia-Pacific (2014), ranks him in Band 1 as a "star performer". Daren has worked in London and Brussels competition practices on European Commission and Office of Fair Trading matters. He presently sits on the Competition Roundtable of the Competition Commission of Singapore (CCS), and has been appointed Singapore's first non-governmental advisor at the International Competition Network (ICN).

Daren's deal book of groundbreaking competition transactions undertaken with the practice, which is described by Chambers Global (2010) as "market-leading", covers general antitrust as well as sectoral regimes such as media, electricity, gas and airports. He has successfully advised on a significant majority of Singapore's public competition law cases, including Thomson/Reuters, Glencore/Chemoil, Volkswagen/MAN, Johnson & Johnson/Synthes, Nippon Steel/Sumitomo Metal, and close to 75% of merger filings lodged with the CCS. He has also advised parties on the first international cartel investigation by the CCS, and the only abuse of dominance appeal to Singapore's Competition Appeal Board. Daren is also a commissioned trainer of the high-level ASEAN Experts Group on Competition (AEGC), and has unparalleled experience in competition law and policy in South-east Asia.

He is the Principal Examiner (Competition Law) for the Singapore Institute of Legal Education's Foreign Practitioners Examinations, and lectures on competition law for the course leading to Part B of the Singapore Bar Examinations.

Daren graduated on the Dean's List of the National University of Singapore, and is District Councillor of the Central Singapore District.

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Elsa is Partner in the Corporate & Commercial Department, and is Deputy Head of the Firm's Competition & Antitrust practice. She is also Co-Head of the Firm's Public Policy practice.

In 2013 and 2016, Elsa was featured in the 100 elite women globally in the field of competition law by Global Competition Review (GCR) in their Women in Antitrust 2013 and 2016 peer-nominated surveys. Elsa is also regularly recognised as a leading competition economist in Who's Who Legal Competition: Economists since 2010, Who's Who Legal Consulting Experts: Economic Consulting – Competition Economists, Euromoney Guide to the World's Leading Competition and Antitrust Lawyers and Economists, and Expert Guides' Women in Business Law.

Elsa regularly assists clients on complex antitrust matters, including global cartel and abuse of dominance investigations. Her record includes the first and only Provisional Infringement Decision of Competition Commission of Singapore (CCS) to be successfully overturned (Greif/GEP) and the first CCS conditional merger clearance requiring local commitments (SEEK/JobStreet). In 2013, Elsa led the team in a matter which was conferred the GCR Award 2013: Behavioural Matter of the Year (Asia-Pacific, Middle East and Africa).

Elsa's public policy experience ranges from formulating regulatory policies, advocacy to governments and businesses, and assisting on legislative changes, such as the drafting of the Competition Act, Block Exemption Order, and regulations for other sectoral regimes. Elsa was previously Assistant Director at the Ministry of Trade and Industry of Singapore, and was also a pioneer member of the CCS.

A recipient of the Prime Minister's Book Prize, Elsa graduated summa cum laude with a double degree in Economics and International Relations from Tufts University, Massachusetts, and was placed yearly on the Dean's List. She holds a postgraduate degree from the London School of Economics and Political Science, and an LLM with a specialisation in Competition Law.

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India: Shardul Amarchand Mangaldas

Overview of the merger control regime in India

1. Introduction

1.1 Section 6 of the Competition Act, 2002 (Competition Act) prohibits persons or enterprises from entering into a combination which causes or is likely to cause an "appreciable adverse effect on competition" (AAEC) in the relevant market in India and provides that such combinations are void.

1.2 Transactions that cross the jurisdictional thresholds (based on assets and turnover) specified in the Competition Act must be pre-notified to the Competition Commission of India (CCI).

1.3 Importantly, the regime is suspensory and transactions subject to merger control review by the CCI cannot be consummated until merger clearance has been obtained or a review period of 210 calendar days has passed, whichever is earlier.

2. What types of transactions are caught?

2.1 Section 5 of the Competition Act covers three broad categories of combinations.

2.2 First, the acquisition, by one or more persons, of control, shares, voting rights or assets of one or more enterprises, where the parties or the group to which the target will belong post-acquisition, meet specified assets / turnover thresholds (see below). Acquisitions not involving a change of control are also caught in this category.

2.3 Second, the acquisition by a person of control over an enterprise where the person concerned already has direct or indirect control over another enterprise engaged in the production, distribution or trading of similar or identical or substitutable goods, or in the provision of a similar or identical or substitutable service, where the parties, or the group to which the target will belong post-acquisition, meet specified assets/turnover thresholds (see below).

2.4 Third, mergers or amalgamations, where the enterprise remaining, or enterprise created, or the group to which the enterprise will belong after the merger/amalgamation, meets specified assets/turnover thresholds (see below).

3. How is "control" defined?

3.1 As seen above, the acquisition of "control" is one of the events that may trigger a notification. As a starting point, "control" is defined under Explanation (a) to Section 5 of the Competition Act to include "*controlling the affairs or management by- (i) one or more enterprises, either jointly or singly, over another enterprise or group; (ii) one or more groups, either jointly or singly, over another group or enterprise*".

3.2 The CCI, in its decisional practice, has interpreted control to mean, "*the ability to exercise decisive influence over the management or affairs and strategic commercial decisions*"[1] of a target enterprise, whether such decisive influence is capable of being exercised by way of a majority shareholding, veto rights (attached to a minority shareholding), or contractual covenants.

3.3 The CCI has considered cases of negative control by minority shareholders. In contrast to "mere investor" protection rights, having the ability to veto (or cause a deadlock in respect of) strategic commercial decisions could be sufficient to confer at least joint control,[2] the acquisition of which would require notification to the CCI. Such strategic commercial decisions have included annual business plans, budgets, recruitment and remuneration of senior management, and the opening of new lines of business.

3.4 Due to the expansive interpretation accorded to the meaning of "control" and the absence of clear guidance (such as that set out in the EU's Consolidated Jurisdictional Notice), the distinction between genuine minority protection rights and negative control has become blurred. As a result, many purely financial investments and private equity transactions may now be susceptible to review by the CCI.

4. Treatment of joint ventures

4.1 The formation of a joint venture is not specifically covered by Section 5 of the Competition Act as it only covers the acquisition of an "enterprise" and mergers and amalgamations of "enterprises".

4.2 "Enterprise" as defined under the Competition Act, effectively refers to a "going concern" that is already conducting or has previously conducted business. A purely "greenfield" joint venture is unlikely to be considered an "enterprise" and will therefore not fall within the scope of Section 5. Moreover, in a majority of cases, "greenfield" joint ventures are unlikely to meet the thresholds under the Target Exemption (see below).

4.3 By contrast, the establishment or acquisition of a "brownfield" joint venture (where parents are contributing existing assets such as businesses, customers, customer contracts and intellectual property or conferring control over them) would be notifiable where the jurisdictional thresholds are met, as it relates to the acquisition of an enterprise under Section 5 of the Competition Act. However, it is not clear in the light of the Target Exemption as to how the attribution rule (discussed in point 5.4 below) will apply to joint ventures.

4.4 There is presently no clear guidance from the CCI in relation to the treatment of joint ventures or the criteria it would apply in determining if a transaction is greenfield or brownfield, or, for that matter, whether it would treat full function joint ventures differently to non-full function joint ventures.

[1] Independent Media Trust (C-2012/03/47) at paragraph 15.

[2] SPE Mauritius Holdings Limited (C-2012/06/63) at paragraph 10, Century Tokyo Leasing Corporation/Tata Capital Financial Services Limited (C-2012/06/63) at paragraph 3, Caladium Investment Pte. Ltd./ Bandhan Financial Services Ltd. (C-2015/01/243) at paragraph 6, Alpha/ Tata Capital (C-2014/07/192) at paragraph 9, and Cairnhill/ Mankind (C-2015/05/276) at paragraph 5.

5. What are the jurisdictional thresholds under the competition act?

5.1 The jurisdictional thresholds for the Parties and the Group, as well as for the Target, are prescribed in Section 5 of the Competition Act[3] and set out in detail below.[4]

Thresholds

- Parties Test:
  - the Parties have combined assets in India of INR 2,000 crores (approx. US$ 308.52 million) or combined turnover in India of INR 6,000 crores (approx. US$ 925.55 million); or
  - the Parties have combined worldwide assets of US$ 1,000 million including combined assets in India of INR 1,000 crores (approx. US$ 154.26 million) or combined worldwide turnover of US$ 3,000 million including combined turnover in India of INR 3,000 crores (approx. US$ 462.77 million); OR
- Group Test:
  - the Group has assets in India of INR 8,000 crores (approx. US$ 1,234.07 million); or turnover in India of INR 24,000 crores (approx. US$ 3,702.20 million); or
  - the Group has worldwide assets of US$ 4,000 million including assets in India of INR 1,000 crores (approx. US$ 154.26 million) or worldwide turnover of US$ 12,000 million including turnover in India of INR3,000 crores (approx. US$ 462.77); AND
- Target Test:

  The target enterprise (including its subsidiaries, units, or divisions) which is being acquired has:

  - assets in excess of INR 350 crores (approx. US$ 53.99 million) in India; and
  - turnover in excess of INR 1,000 crores (approx. US$ 154.26 million) in India.

[3] The Ministry of Corporate Affairs (MCA) has recently enhanced the value of assets and turnover, on the basis of changes in the wholesale price index, by hundred percent for the purposes of Section 5 of the Competition Act, pursuant to the power conferred on them under the Competition Act.

[4] The exchange rate used is US$1 = Rs.64.83, which is the average of the Reserve Bank of India's spot rate for six months ending on 31 July 2017.

5.2 If: (a) either the Parties Test or the Group Test; and (b) the Target Test are met, the transaction qualifies as a combination and is notifiable to the CCI.

	For the parties (combined)					For the group (combined)			
		(Crore INR)	(Million US$)	(Million Euro)			(Crore INR)	(Million US$)	(Million Euro)
In India	Assets	2,000.00	308.52	279.71		Assets	8,000.00	1234.07	1118.85
					OR				
	Turnover	6,000.00	925.55	839.14		Turnover	24,000.00	3702.20	3,356.56
					OR				
Worldwide	Assets	6482.64	1,000.00	906.64		Assets	25930.56	4,000.00	3,626.57
					Including in India				
	Assets	1,000.00	154.26	139.86		Assets	1,000.00	154.26	139.86
					OR				
	Turnover	19447.92	3,000.00	2,719.92		Turnover	77791.67	12,000.00	10,879.70
					Including in India				
	Turnover	3,000.00	462.77	419.57		Turnover	3,000.00	462.77	419.57
					And for the target				
In India	Assets	350.00	53.99	48.95	AND	Turnover	1,000.00	149.87	136.32

As of 31 July 2017	
US$ Conversion Rate	64.83
Euro Conversion Rate	71.50
EURO-US$ Conversion Rate	1.10

5.3 As a result of the Target Test, if the target enterprise either has assets or turnover in India below the stipulated thresholds, the transaction involving such a target would be exempt from the requirement of pre-approval from the CCI, irrespective of whether the other thresholds are met (the "**Target Exemption**").

5.4 The Government of India, through a notification dated 27 March 2017, has renewed and revised the Target Exemption for five years, valid until 29 March 2022. The notification provides that the Target Exemption applies to acquisitions, mergers and amalgamations. It further provides that for asset acquisitions the value of assets and the turnover attributable to the relevant asset being acquired would be considered for the purposes of the Target Exemption.[5]

[5] Notification issued by the MCA dated 27 March 2017.

Entities to be considered for calculation of the thresholds

5.5 The entities to be considered for the purposes of calculating the thresholds differ according to the type of combination.

5.6 In the case of an acquisition of an enterprise by means of acquisition of its assets, shares, voting rights or control under Section 5(a), the entities are the ***acquirer*** (including its subsidiaries, units, or divisions) and the ***target enterprise*** (including its subsidiaries, units, or divisions); OR the ***Group***[6] to which the target would belong after the acquisition.

5.7 In the case of an acquisition of control over an enterprise, where the acquirer already has direct or indirect control over an enterprise engaged in the production, distribution, trading or provision of similar or identical or substitutable goods or services under Section 5(b), the entities are the ***target enterprise*** and ***other enterprises in the group to which the target enterprise would belong after the acquisition***; OR the ***Group*** to which the target enterprise would belong after the acquisition.

5.8 In the case of a merger or amalgamation under Section 5(c), the entities are ***the enterprise remaining after the merger*** or ***the enterprise created as a result of the amalgamation***; OR the ***Group*** to which the enterprise would belong after the merger or amalgamation.

5.9 In calculating the assets and turnover of the Group, it is necessary to calculate the turnover of the ***Group*** assuming that the combination takes place thus adding the assets and turnover of the target enterprise (in the case of acquisitions), the remaining enterprise (in the case of mergers) and the created enterprise (in the case of amalgamations).

5.10 The CCI is concerned with parties which structure transactions innovatively to avoid filings. The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Regulations**") provide that a notification requirement must be assessed with respect to the "substance of the transaction". Any structuring of a transaction comprising a combination, which has the effect of avoiding a filing requirement, will be disregarded by the CCI. The scope of this anti-avoidance provision is very unclear and it remains to be seen how the CCI will assume jurisdiction over transactions which, strictly speaking, do not trigger a notification obligation, particularly those that are covered by the exemptions. In addition, the Regulations also provide that in the event vendors hive-off assets or unincorporated businesses into a subsidiary in order to avail of the Target Exemption and thus avoid filing, the value of the transferring enterprise's assets and turnover is to be attributed to the transferee enterprise.[7] This rule is particularly important in determining whether joint ventures are notifiable, though the inconsistency with, and the impact of, the revised Target Exemption remains untested.

[6] "Group" is defined under Explanation (b) to Section 5 of the Competition Act; although for the purposes of the jurisdictional analysis, the threshold for including an entity within the "Group" stands altered from 26% to 50% of voting rights pursuant to MCA Notification No. S.O.673(E) dated 4 March 2016.

[7] Regulation 5(9) of the Regulations.

6. Exemptions and exclusions

Combinations involving financial institutions or venture capital funds

6.1 Section 6(4) of the Competition Act provides that acquisitions, share subscription or financing facilities entered into by public financial institutions, registered foreign institutional investors, banks or registered venture capital funds, pursuant to any covenant of a loan agreement or an existing investment agreement, do not need to be pre-notified to the CCI. However, in such cases, the institution concerned will need to notify the CCI of the acquisition, using the prescribed form (Form III) within 7 calendar days of completion. So far, there have been four decisions published by the CCI under this provision on its website.

"Ordinarily exempt" transactions

6.2 In order to prevent the merger control regime from becoming unduly onerous, the CCI has introduced, in Schedule I of the Regulations, categories of transactions that are "ordinarily" not likely to cause an AAEC in the relevant market in India and, therefore, do not "normally" require notification to the CCI. The list of categories of transactions, following the recent amendments to the Regulations, is set out below:

- a direct or indirect acquisition of shares or voting rights, entitling the acquirer to hold less than 25% of the target company (including through shareholders agreement or articles of association) solely as an investment[8] or in the ordinary course of business[9], provided it does not lead to acquisition of control. The acquisition of less than 10%[10] (ten percent) of total shares of voting rights will be treated solely as an investment if:
  - the acquirer is able to exercise only the rights of ordinary shareholders exercisable to the extent of their respective shareholding;
  - the acquirer does not have, or have a right to have, or intend to have a seat on the board; and
  - the acquirer does not intend to participate in the management or affairs of the target.
- an acquisition of the shares or voting rights provided that (a) the acquirer or its group prior to such acquisition holds 25% or more shares or voting rights and less than 50% of the shares or voting rights either prior or post such acquisition; and (b) such acquisition does not result in acquisition of sole or joint control by the acquirer or its group;
- an acquisition of shares or voting rights where the acquirer holds 50% or more shares or voting rights in the target company prior to acquisition except in the case where the transaction results in transfer from joint control to sole control;

[8] In Zuari Fertilisers and Chemicals Limited (C-2014/06/181) and Deepak Fertilisers (C-2014/05/175), the CCI has interpreted "solely as an investment" to mean "passive investment" and any investment in a target enterprise which is done with a strategic intent cannot be treated as "solely as an investment". Therefore, to qualify for "exemption" under Item 1 of Schedule I to the Combination Regulations, an acquisition must not have been made with an intention of participating in the formulation, determination or direction of the basic business decisions of the target.

[9] In Mylan/Abbott (C-2014/08/202), the CCI has held that an acquisition of shares or voting rights, even if it was of less than 25%, can raise competition concerns if the acquirer and the target are either engaged in business of substitutable products/services or are engaged in activities at different stages or levels of the production chain. Such acquisitions need not be termed as an acquisition made solely as an investment or in the ordinary course of business, and thus would require competitive assessment.

[10] In SAAB/Pipavav (C-2012/11/95), the CCI found that the acquisition of a 3.3% shareholding of Pipavav by SAAB, which was in the nature of a strategic technology partnership whereby the parties would jointly bid for projects and where SAAB would be granted certain affirmative rights including the right to nominate one director to preserve its value of investment and prevent misuse of intellectual property rights, was not in the ordinary course of business or solely for the purpose of investment and could not therefore benefit from the exemption.

- acquisition of assets not directly related to the business of the acquirer or made solely as an investment or in the ordinary course of business, not leading to control of the target enterprise, except where the assets represent substantial business operations in a particular location or for a particular product or service of the target enterprise, irrespective of whether such assets are organised as a separate legal entity or not;

- intra-group re-organisations:

  - an acquisition of shares or voting rights or assets by one person or enterprise of another person or enterprise within the same group, except in cases where the acquired enterprise is jointly controlled by enterprises that are not part of the same group;

  - a merger or amalgamation of two enterprises where one of the enterprises has more than 50% shares or voting rights of the other enterprise, and/or a merger or amalgamation of enterprises in which more than 50% shares or voting rights in each of such enterprises are held by enterprise(s) within the same group. This exemption is not available if the transaction results in transfer from joint control to sole control;

- acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business;

- acquisition of shares or voting rights pursuant to a buy back or a bonus issue or a stock split or consolidation of face value of shares or a subscription to rights issue, not leading to an acquisition of control;

- amendment or renewal of a tender offer where a notice has been filed by the party making such an offer;

- acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stock broker on behalf of its clients, in the ordinary course of business and in the process of underwriting or stock broking; and

- acquisition of shares, control, voting rights or assets by a purchaser approved by the Commission pursuant to and in accordance with its order under Section 31 of the Competition Act (for instance, in case of a divesture).

6.3 It is important to note that, where a proposed combination consists of a number of inter-connected transactions, even where one or more of these transactions would, on a stand-alone basis, have been exempt from filing, all such transactions must be filed as a composite whole.

6.4 Separately, pursuant to a Government of India notification dated 8 January 2013, banking companies are exempt from merger notification requirements if a notification of moratorium has been issued in respect of such companies.[11] A notification of moratorium is ordinarily issued to “failing” banks which are financially and operationally weak and are on the brink of insolvency. Recently, on 10 August 2017, the Government of India has also exempted Regional Rural Banks from the application of the merger regime for a period of five years.[12]

6.5 There are currently no other special rules under the Competition Act governing merger control review for specific sectors such as telecoms, the media, oil and natural gas.

[11] Notification No. S.O.93(E) dated 8 January 2013.

[12] Notification No. S.O.2561(E) dated 10 August 2017

7. Procedure

Timing of filing

7.1 There is no strict deadline to file in India. The notifying parties can notify to the CCI any time after signing of the definitive agreements or board resolutions and prior to the combination's closing. The combination cannot come into effect until receipt of the CCI approval or the lapse of the 210 calendar days review period (discussed below), whichever is earlier.

7.2 Previously, the Competition Act prescribed the notifying party(ies) to file a notification with the CCI, for its prior approval, within 30 calendar days of the relevant trigger event. However, the MCA has by way of the Trigger Exemption, i.e. a notification dated 29 June 2017, removed the requirement on parties to file a notification within 30 days of the relevant trigger event.

7.3 It is important to note that the CCI has the power to investigate a non-notified combination on its own initiative, for up to one year from the date on which the combination has taken effect. Off late, the CCI has been issuing notices to the parties involved in non-notified transactions, directing them to submit the asset and turnover figures (worldwide and in India) and the trigger document.

Penalty for a late notification

7.4 The Trigger Exemption however clarifies that notifying parties are still subject to the standstill obligation and require approval of the Combination from the CCI prior to consummation. A failure to obtain such approval, prior to consummation of such Combination, will continue to make parties liable to fines under Section 43A of the Competition Act (see below).

7.5 Whilst the CCI did not impose fines in its first year of merger control, over a period of time, the CCI has started imposing penalties on the parties, with the highest being imposed in GE/Alstom[13] and Piramal/Shriram[14] to the tune of INR 50 million. However, in its most recent penalty orders, the CCI has been imposing significantly lower penalties. For instance, in Eli Lilly/Novartis[15], the CCI levied a lower penalty of INR 10 million; and in SRF/DuPont[16], the CCI levied a significantly lower penalty of only INR 1 million. Recently, the CCI imposed a penalty of INR 500,000 in Cairnhill/CIPF[17], where the CCI held the filing to be late, since the wrong agreement/document was considered as the trigger by the parties.

7.6 Please note that the penalties imposed in the above cases were prior to the Trigger Exemption. With the recent Trigger Exemption, belated/delayed filings will no longer be an issue, as long as notifications are filed prior to closing of the Combination.

Incomplete Notification

7.7 Further, under the Regulations, the CCI can invalidate a notice when it comes to its knowledge that such notice is incomplete and not in conformity with the Regulations.[18] Prior to invalidating a notice, the CCI may give an

[13] GE/Alstom (C-2015/01/241).

[14] Piramal/Shriram (C-2015/02/249).

[15] Eli Lilly/Novartis (C-2015/07/289).

[16] SRF/DuPont (C-2015/12/347).

[17] Cairnhill CIPF (C-2015/05/276).

[18] Regulation 14(2A) of the Regulations.

opportunity of being heard to the parties to the Combination. The CCI may require the parties to file afresh resulting in resetting the review clock. As of March 2016, approximately 25 notices have been withdrawn or invalidated by the CCI.[19]

7.8 Previously, in an attempt to comply with the statutory deadline and avoid penalty proceedings, parties would file notifications with little to no substantive information. The recent Trigger Exemption is a welcome relief for parties, especially those involved in multi-jurisdictional filings. Parties would now be encouraged to ensure submission of a complete filing at the first instance to facilitate the CCI's expeditious review and to end the standstill obligation at the earliest. This move is also likely to result in the substantive pre-filing consultation process of the CCI being used more regularly and robustly, particularly on complex cases.

Penalty for not filing a notification

7.9 The power to impose a penalty under Section 43A extends to consummation of any part of the proposed transaction prior to obtaining CCI clearance. In Etihad Airways/Jet Airways, the CCI imposed a penalty of INR 1 crore (approx. US$ 150,000) on Etihad Airways for completing one limb of the notified transaction before receiving clearance. The CCI has also penalised two fertiliser companies[20] to the tune of INR 2 crores (approx. US$300,000) and INR 3 crores (approx. US$ 450,000) for consummation of strategic open market purchases without the prior approval of the CCI.

7.10 More recently, in Baxter/Baxalta (C-2015/07/297), the CCI imposed a penalty of INR 1 crore (US$ 150,000) on the parties for closing the global limb of the transaction before receiving clearance. Parties therefore need to be conscious that they are not deliberately or inadvertently taking steps to give effect to parts of the transaction or align their commercial behaviour or complete any leg of a notified transaction until approval for the entire transaction has been received.

Responsibility for filing

7.11 In case of acquisitions, the acquirer is required to file the notification. In case of a merger or an amalgamation, all parties to the combination are jointly required to file the notification.

Form of notification

7.12 The Regulations prescribe three forms for filing a merger notification. All notifications are ordinarily required to be filed in Form I (i.e. short form). The CCI has overhauled the entire Form I and has made it very detailed and exhaustive. For the first time, the CCI has provided guidance notes for preparing Form I including tabular formats for information.

[19] Page 10, CCI Annual Report 2015-16.

[20] Zuari Fertilisers and Chemicals Limited (C-2014/06/181) and Deepak Fertilisers (C-2014/05/175).

7.13 The parties, however, remain free to file the merger notification in Form II (i.e. long form). The Regulations "recommend" that Form II be filed for transactions where:

(i) the parties to the combination are competitors and have a combined market share in the same market of more than 15%; or

(ii) where the parties to the combination are active in vertically linked markets and the combined or individual market share in any of these markets is greater than 25%.

7.14 It should be emphasized that Form II requires extremely detailed information – far more than that required by the (long form) Form CO under the EU Merger Regulation or a "second request" pursuant to the US Hart Scott Rodino Act. Such information includes detailed descriptions of products, services and the market as a whole, including the relative strengths and weaknesses of competitors, estimations of the minimum viable scale required to attain cost savings, costs of entry, and the impact of research and development.

7.15 If, in cases where parties have filed a Form I, the CCI believes that it requires information in Form II, it may require parties to file the notification using Form II. This will restart the "clock".

7.16 The Regulations require that the document triggering the notification be submitted along with the filing. In addition, a summary of the combination (nine copies and an electronic version), not containing any confidential information and describing the combination in at least 2000 words, is required to be submitted along with the notification.

7.17 Further, in line with international practice and in the interests of transparency, the CCI now requires the parties to submit a 500 word non-confidential summary of the notified transaction which will be published on the CCI's website for stakeholder comments.

7.18 Form III is required as a post-completion application form which must be filed within 7 days of a share subscription or a financing facility or an acquisition by a public financial institution, registered foreign institutional investor, bank or registered venture capital fund, under a covenant in a loan agreement or an investment agreement (see paragraph 6.4 above).

7.19 The CCI has the power to consider a notification invalid at any time during the review, up to the end of the 210 calendar day statutory time period (after giving reasons) unless the notification is complete. The CCI may give the parties an opportunity to be heard before it invalidates a notification. Although this is beneficial from the perspective of adherence to principles of natural justice, it is unfortunate that giving this opportunity to be heard appears to be discretionary. The time taken for the invalidation proceedings will be excluded from the 210 calendar days' time limit for approval of a combination and the 30 working days' time limit for the CCI to form its prima facie opinion. A successful hearing (which could take place at any stage of the review process and which means that the parties were not in the wrong) may, therefore, result in a delay in receiving clearance.

Filing fee

7.20 The fees vary depending on the form that is being filed and are as follows:

(i) Form I – INR 1,500,000 (approx. US$23,000);

(ii) Form II – INR 5,000,000 (approx. US$75,000); or

(iii) Form III – No fee payable.

7.21 The responsibility for payment of the filing fee lies with the acquirer in case of an acquisition and with all the parties to a merger or an amalgamation, as the case may be. However, where a notification is made jointly, the fee can be paid jointly or severally depending on the agreement of the parties.

Pre-notification consultations

7.22 It is possible to have pre-notification consultations with the CCI. However, such consultations are oral, informal, non-binding and in practice limited to the procedural aspects of filing a notification with the CCI. With the implementation of the Trigger Exemption, it is possible that the CCI will pro-actively engage with the parties to discuss the contents of the notification before it is accepted.

Phase I review

7.23 On receipt of a notification, the CCI is required to form a prima facie opinion on whether a combination causes or is likely to cause an AAEC within the relevant market in India within a period of 30 working days. However, if the CCI requires the parties to remove defects in the notification or to provide additional information, it "stops the clock" until the additional information is provided. If the CCI reaches out to third parties during Phase I, this time period is extended by 15 working days. Further, where modifications are offered in Phase I itself, the time period is further extended by 15 calendar days.

7.24 Since the merger control provisions came into force in June 2011, the CCI has cleared most notifications in the Phase I period. Phase II review has been conducted in four cases (Sun/Ranbaxy (C-2014/05/170), Holcim/Lafarge (C-2014/07/190), PVR/DT (C-2015/07/288) and Dow/DuPont (C-2016/05/400).[21] The CCI is currently conducting a Phase II review of the Agrium/PotashCorp (C-2016/10/443) merger. On 30 March 2017, the CCI invited comments from the public in relation to this transaction.

Phase II investigation

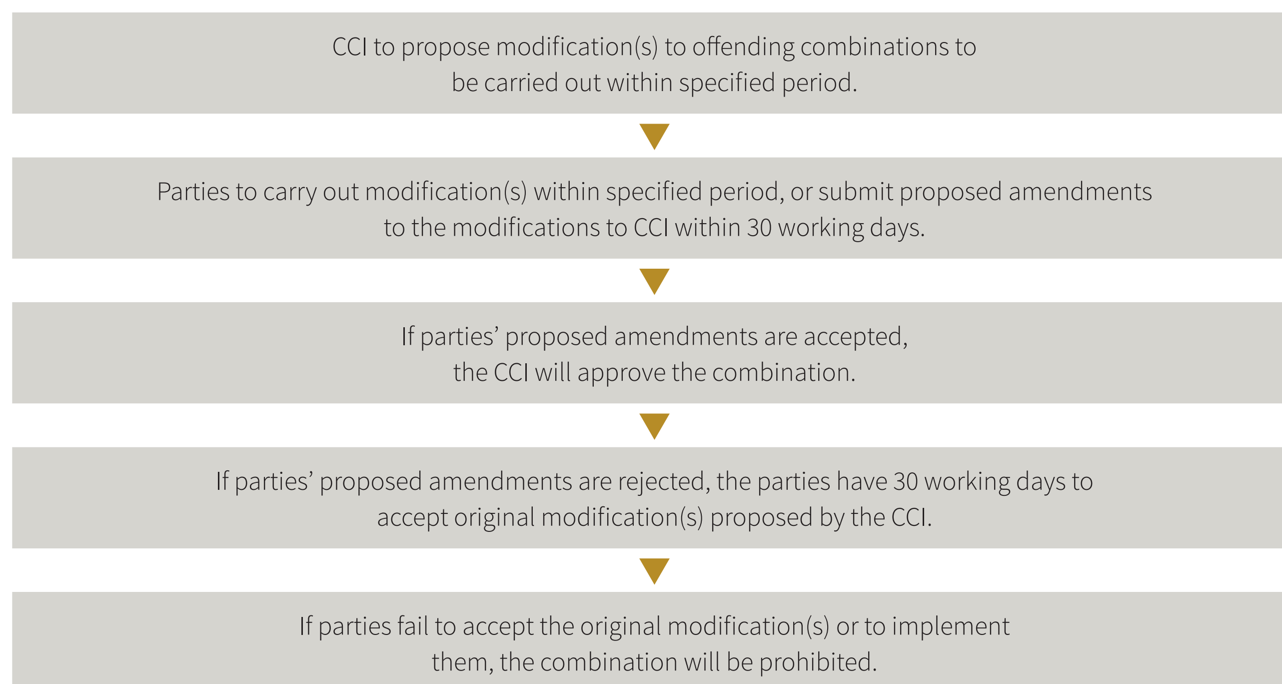
7.25 If the CCI forms a prima facie opinion that a combination is likely to cause, or has caused, an AAEC within the relevant market in India, it shall issue a show cause notice to the parties asking for an explanation as to why an investigation in to the combination should not be conducted. The parties are given 30 calendar days to reply to this notice. After the reply has been filed by the parties, the CCI may either direct the Director General to conduct an investigation or do so on its own. The parties shall also be directed to publish details of the combination in four leading daily newspapers (including at least two business newspapers), the parties' websites and the CCI's website.

7.26 The objective of this publication is to invite comments from the public in relation to the proposed combination. Once the comments are received by the CCI, it may request further information or seek clarifications from the parties in relation to the comments received from the public or stakeholders. At this stage, the CCI may invite any person or member of the public, affected or likely to be affected by the combination, to file their written objections before the CCI within 15 working days from the date on which the details of the combination are published. Thereafter, within the 15 working days from the expiry of the period mentioned above, the CCI may call for additional information from the parties to the combination to be furnished by the parties within a further 15 calendar days. Following the submission of the information and clarifications by the parties, the CCI will proceed to review the transaction and arrive at its final determination, including proposing remedies to the parties, where it is of the view that the transaction causes or is likely to cause an AAEC.

[21] Detailed order is awaited.

7.27 After receipt of all the information, the CCI will pass orders either approving or prohibiting or suggesting modifications to the combination. The CCI initiated Phase II investigations in the recent combination between PVR Limited and DT Cinemas and granted approval on the condition that certain divestitures and freeze in expansions be made in various markets, in order to alleviate competition concerns.

7.28 The process of proposing modifications during the Phase II investigation is set out in the flow chart below:



7.29 The time taken to go through and agree to commitments during a Phase II investigation does not include the time the CCI may take to review the amendments proposed by the parties and, in all likelihood, it will take longer than 60 working days to examine and accept commitments.

7.30 The CCI has up to 210 calendar days from the date of notification to approve or prohibit a notified combination. It should be noted that the 30-working-day periods for the parties to submit amendments to proposed modifications, and for them to accept the CCI's original modifications in case the modifications are not accepted, are excluded from this 210-calendar day time period. Further, the CCI follows a practice of excluding any time extensions sought by parties for responding to the CCI's additional requests for information, from the 210-calendar day time period (although the Competition Act and Regulations is silent on this aspect).

8. Substantive merger review

8.1 Section 6(1) of the Competition Act prohibits any combination which causes or is likely to cause an AAEC in India. While determining whether a particular transaction has an AAEC, the CCI must have regard to all or any of the various factors listed under Section 20(4) of the Competition Act. These factors are:

- actual and potential level of competition through imports in the market;
- extent of barriers to entry in the market;
- level of combination in the market;

- degree of countervailing buyer power in the market;
- likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- extent of effective competition likely to sustain in a market;
- extent to which substitutes are available or are likely to be available in the market;
- market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- nature and extent of vertical integration in the market;
- possibility of a failing business;
- nature and extent of innovation;
- relative advantage, by way of the contribution to the economic development, by any combination having or likely to have an AAEC in India; and
- whether the benefits of the combination outweigh the adverse impact of the combination, if any.

8.2 Although the CCI undoubtedly refers to these factors in assessing whether or not there is an AAEC, it has not always provided detailed reasons for concluding that there was no AAEC.

8.3 In practice, the CCI has focused on horizontal overlaps, where the parties compete in one or more relevant markets, and on vertical relationships. In relation to horizontal overlaps, the CCI will consider the individual and combined market shares of the parties to assess whether they would, post-combination, be able to exercise market power in the relevant market. The higher the individual and combined market shares of the parties, the more likely it is that the combination will cause an AAEC. In markets which have high barriers to entry, such as sunk costs, regulatory barriers, and strong intellectual property rights protection, a combination of two enterprises may result in them being able to increase prices or profit margins sustainably or significantly without being adequately constrained by competitors, customers or suppliers.

8.4 Markets where the parties to the combination are large and have a strong bargaining position compared to their suppliers or buyers, could indicate that the combination would allow them to increase prices and thus warrant further investigation. The CCI will be concerned with combinations which result in competition in the relevant market decreasing appreciably post combination. Markets with fewer competitors, homogenous products and low innovation are likely candidates for further scrutiny, as the CCI is likely to want to ensure competition in the market is not affected post combination.

8.5 An unacceptable reduction in competition could result from the removal of a vigorous and effective competitor or the elimination of a maverick in the market. In addition, the acquisition of a potential competitor that has plans to enter a market could result in a finding of AAEC.

8.6 In relation to vertical relationships, the CCI will examine the extent to which parties to the combination are active at different levels of the production/supply chain or are vertically integrated. AAEC concerns may arise where a combination would result in foreclosure of a market, with suppliers being unable to get their products or services to the market or customers being unable to obtain relevant products or services.

8.7 To assess the appreciability of any adverse effect, the CCI may consider the benefits of the combination as well. Certain combinations may, at first sight, be anti-competitive, but could be cleared where they would result in large efficiencies which would be passed on to the consumers rescue a failing business which would otherwise exit the market, or result in a high degree of innovation. The parties to such combinations would have to highlight such efficiencies up front and display how such benefits would be passed on to consumers.

8.8 In its limited decisional practice to date the CCI has not cleared any transaction that was likely to or caused an AAEC, solely on the grounds that efficiencies outweighed competition concerns. The CCI has taken the prima facie view that a transaction may cause an AAEC only on four occasions, which were cleared on account of modifications and divestments, and not on account of efficiencies.

8.9 Some limited guidance can be drawn from the CCI's clearance decision adopted in Jet/Etihad (C-2013/12/144), Holcim/Lafarge (C-2014/07/190) and PVR/DT (C-2015/07/288) transactions, where the CCI has indicated that the efficiencies (where claimed by the parties) should be merger specific, verifiable, quantifiable and outweigh competition concerns.

8.10 The CCI has adopted a pragmatic approach to market definition; it will not reach a final view on the relevant product or service market, and its precise geographic scope, where it concludes that the combination is unlikely to impact competition, irrespective of the market definition. Since the CCI is looking to determine whether the combination has an AAEC in India, where the relevant geographic market may be wider than India, it has examined the impact of most transactions in India as a whole. Where the relevant geographic market definition is more localised, the CCI examines the smaller markets.

9. Other practical aspects of merger control in India

9.1 Filing formalities: The officials at the CCI have proved to be rigid in terms of filing formalities; each filing is checked extensively before being accepted. The filing process has proved to be a cumbersome one and parties need to prepare filings with the utmost care. In an extremely welcome step in 2015, the CCI now permits

(i) any person authorized by the Company to sign the notification without a specific board resolution; and

(ii) a declaration to be made on behalf of the notifying party (which does not require notarisation and legalisation). Additionally, the declaration makes a specific mention of Sections 44 and 45 of the Competition Act which lay down the penalties applicable for submitting false information or omitting to submit material information.

9.2 The CCI has recently introduced an online system of e-filing through its portal (efilingcci.gov.in) where an electronic version of notification, along with the annexures and ancillary documents, can be uploaded by the parties to the combination.

9.3 Confidentiality: The CCI allows requests for confidentiality by parties, when these requests are specifically made in writing along with the notification. The parties must submit detailed reasons and justifications for confidentiality claims. Once accepted, the CCI will not publish information that the parties have claimed confidentiality over, without first obtaining the permission of the parties. As a general matter, the CCI grants confidentiality for a period of 3 years.

9.4 It is important to note that approval of CCI for a transaction does not provide parties with a blanket clearance/ immunity from investigation under Section 3 (anti-competitive agreements) or Section 4 (abuse of dominance) of the Competition Act for subsequent violations.

9.5 A notable aspect of the Indian competition regime that has recently undergone change is the dissolution of the Competition Appellate Tribunal (COMPAT). The COMPAT has been replaced by the National Company Law Appellate Tribunal (NCLAT). This move may result in a delay in disposal of matters, since it already carries a heavy case load of appeals from the National Company Law Tribunal. Further, as the Bench of the NCLAT is not well versed with competition law matters, it may take some time before it is able to fully appreciate the peculiarities and specificities of the field.

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Mr. John Handoll is the National Practice Head, Competition Law with the Firm. He also works as the Senior Advisor, European and Competition Law. Mr. Handoll is a specialist competition and regulatory lawyer with extensive experience of 35 years. Since arriving in India, John has developed expertise in a wide range of competition matters. Bringing his European and international experience to bear, he has worked with Indian lawyer members of the New Delhi competition team in a number of matters before the Competition Commission of India, the Competition Appellate Tribunal and the Indian courts. This has included working on merger notifications (including multi-jurisdictional filings), antitrust (including cartel investigations and leniency applications), and alleged abuse of dominance. John has also advised a number of Indian and multinational companies on compliance programmes and on preparing for dawn raids.

Over his career, John has worked for a wide range of international clients in a wide spectrum of economic activity. In India, he has worked with household names such as Vodafone (telecommunications) and Maruti Suzuki (motor vehicles). He has worked in a number of European jurisdictions – notably the UK, Belgium and Ireland. In addition to day-to-day practice in a range of national and EU areas, John has also published and lectured widely in the area of EU law. He has also acted as non-governmental adviser in the International Competition Network, working in the areas of mergers, cartels and unilateral behaviour.

Widely acclaimed as a top practitioner of European and Competition Law by a number of international media and legal publications, John is also the author of two full length volumes: Capital, Payments and Money Laundering in the European Union (Richmond Law & Tax, 2006) and Free Movement of Persons in the EU (Wiley Chancery, 1995).

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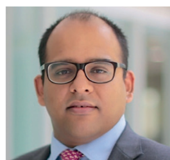

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Naval was recently inducted by Global Competition Review in its list of top "40 under 40" competition lawyers worldwide. He is acknowledged by Chambers & Partners, 2015 as a "master strategist" who is known for his "very sound handle on Indian law" and his "ability to think out-of-the-box and find solutions by balancing the law and commercial considerations". The Indian Lawyer 250 has recognised him as "a very impressive young lawyer", who shows "a great level of responsiveness and client sensitivity", particularly in merger control matters. Naval has also featured in Global Competition Review's *The International Who's Who of Competition Lawyers & Economists* 2012, 2013, 2014 and 2015.

In 2014, Naval instituted a course on competition law at ILS Law College, Pune, where he teaches part time. His article, titled "The Curious Case of Compulsory Licensing in India", was declared as the best article in the business category, unilateral conducts section, at the World Antitrust Writing Awards 2013.

Naval is the author of the India Part of the Global Antitrust and Competition Law Compliance Handbook published by Oxford University Press and the India Part of the Wolters Kluwer publication, Competition and Patent Law in the Pharmaceutical Sector. He has also authored the India Part of the upcoming Private Equity Antitrust Handbook which will be published by the American Bar Association. His other publications include "Merger Control in India: A mixed bag" published in Euromoney, 2013 and "To Dub or Not to Dub" published in FICCI FRAMES Entertainment Lawbook, 2014.

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Ms. Shweta Shroff Chopra is a Partner in the Firm's Competition Law Practice, and has over 12 years' experience in advising on financing, corporate and competition law matters. Shweta has been practicing competition law since its early days in India, having been involved in several high profile cases relating to abuse of dominance, cartels and merger control. Shweta's clients encompass prominent names, including Temasek, Mitsui, BHP Billiton, ExxonMobil, Alstom, Blackstone, Vodafone, JK Group, Coal India, LafargeHolcim, Tata Chemicals, Hiranandani Hospitals and PVR Cinemas.

Shweta has been engaged in leading high profile enforcement cases before the Competition Commission of India (CCI) and the Competition Appellate Tribunal (COMPAT) including representing Hiranandani Hospitals in the Stem Cell Banks case, SpiceJet in the Fuel Surcharge case, Holcim group companies, ACC Limited and Ambuja Cements Limited, in the Cement cartel case, JK Tyre in the Tyres cartel case, Coal India Limited in abuse of dominance and cartel cases in relation to procurement of explosives, Tata Chemicals in the soda ash cartel case and Vodafone India Limited in an anti-competitive tie–in in a case involving the sale of Apple iPhones.

On the merger control front, Shweta was involved in two out of three seminal Phase II merger clearances in India, in relation to Holcim Ltd in its "merger of equals" with Lafarge S. A. and PVR's acquisition of DT Cinemas. Shweta has successfully obtained unconditional merger clearances from the CCI for various big ticket global and Indian transactions, including in relation to GE's acquisition of Alstom's energy business, JK Tyre's acquisition of Kesoram's tyre unit, Blackstone's acquisition of majority shareholding of Mphasis, Zuari (Adventz) Group's open offer for shares of Mangalore Chemicals & Fertilisers Limited, Temasek group's acquisition of majority shareholding in Olam Industries Limited, Huhtamaki Group's acquisition of Positive Packaging group; Beckman Coulter's acquisition of Siemens' Microbiology Technology business, Axiall LLC's joint venture for PVC compounds with DCM Shriram Limited and Nestle's acquisition of Pfizer's infant nutrition business, among others.

In Chambers and Partners Rankings 2016, she was the youngest Indian competition practitioner to be ranked in Band 2 and has been praised by interviewees for her proactive approach, and ability to "take the bull by the horns". According to Chambers and Partners Rankings 2015, Shweta is described by market sources as "a very smart lawyer with an in-depth approach, who has worked on big-ticket cases." She has been consistently "highly recommended" for her "impressive reputation"' as "a bright young legal talent of extraordinary quality". Shweta has also been recognized, based on an international peer review, for her professional achievements in the *International Who's Who of Competition Lawyers and Economists* every year since 2013 (by Global Competition Review and Law Business Research Ltd). She was also profiled in the *Asialaw Leading Lawyers* and the *Euromoney Guide to Leading BRIC Practitioners.* Shweta has also won the *"Young Lawyer of the Year (Female)"* Award at the Legal Counsel Congress & Awards 2014 (Mumbai) and selected by the international in-house counsel community as an outstanding practitioner in the Euromoney Guide to the *World's Leading Competition and Antitrust Lawyers/ Economists* 2014. Recently, in 2016, Shweta was featured by Legal Era in its list of *"Under 40 Rising Stars".*

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Japanese merger control

1. Introduction

1.1 The regulation of mergers in Japan is achieved through the combination of a relatively complex set of legislative and non-legislative rules. Following the amendment in 2010 (2010 Amendment) to the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947), as amended (AMA), effective from 1 January 2010, the enforcement of competition rules in Japan has been strengthened. Following the 2010 Amendment, the Merger Rules[1] and the Merger Guidelines[2] of the Japanese Fair Trade Commission (JFTC) were also amended to correspond with the 2010 Amendment and came into force on the same date. These amendments further align the Japanese merger control review standards with those of the EU, in particular.

1.2 The revised AMA in effect as of April 1, 2015 abolished the JFTC's hearing procedure and introduced a system in which any appeal against the JFTC's order shall be subject to the Tokyo District Court's review.

1.3 In 2015, Japan entered into an agreement in principle on the Trans Pacific Partnership (TPP). The JFTC is proceeding in making necessary amendments to the AMA in order to ensure that the TPP agreement will smoothly take effect in Japan, including through the introduction of a "commitment" system to be potentially used in relation to abuse of dominance cases and mergers. Furthermore, the JFTC has started to consider the introduction of a discretionary surcharge system to enhance the JFTC's investigative capabilities.

1.4 According to the latest merger report published by the JFTC in June 2016, recent years have seen an increase in the number of mergers of foreign firms that have an impact on Japanese markets especially in IT sector. The JFTC emphasised the need to keep a close eye on market changing technological developments beyond Japan's borders. See *Annex 2* for details.

2. The types of transactions caught

2.1 Mergers,[3] business transfers, corporate splits (or demergers), joint share transfers and share acquisitions (including joint ventures) are subject to prior notification under the AMA if they satisfy certain thresholds. M&A transactions whose schemes involve more than one of these transactions (e.g. an acquirer merges with a target after acquiring shares in the target) are separately analysed at each step of the transaction, so separate filings may be required for the various steps. Joint ventures are also analysed in the same way.

[1] Rules on the Application for Approval, Reporting, Notification, etc. Pursuant to Articles 9 to 16 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, available at: http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/raa.pdf (N.B. the amendment to the procedural rules effective 1 July 2011 (2011 Amendment) (see *Chapter 3* below) has not yet been reflected in this English translation).

[2] Guidelines on the Application of the AMA Concerning Review of Business Combination, available at: http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/RevisedMergerGuidelines.pdf (N.B. the 2011 Amendment has not yet been reflected in this English translation).

[3] The JFTC uses the term "merger" in its English translation of the AMA to describe what is called "amalgamation" in many other jurisdictions.

2.2 Generally speaking, no notification is required for transactions which amount to internal reorganisations of companies within the Combined Business Group (as further explained below). It should be noted, however, that the JFTC has a general power to review any M&A transaction for compliance with the substantive test (described below) even where the notification thresholds are not technically met.

2.3 Joint ventures are notifiable as long as they satisfy the thresholds for share acquisitions. Unlike the EU, Japanese law does not make a distinction between full-function and non full-function joint ventures.

2.4 The 2010 Amendment introduced the concept of the "**Combined Business Group**". The Combined Business Group consists of all of the subsidiaries of the ultimate parent company. It should be noted that a company will generally be considered to be part of the Combined Business Group not only when more than 50% of the voting rights of that company are held by another company, but also if its management is "controlled" by the other company.[4] The Merger Rules clarify the concept of "control" and by doing so align the Japanese merger control with the regulations of other jurisdictions, especially those of the EU.

3. The jurisdictional thresholds

"Domestic Sales" as a decisive factor in the thresholds

3.1 The 2010 Amendment has also redefined the concept of "**Domestic Sales**". Domestic Sales is used as a decisive factor in the new thresholds. The same thresholds will be used for both domestic and foreign companies, whereas the old system applied different thresholds to foreign and domestic companies. Domestic Sales is defined as the total amount of the price of goods and services supplied in Japan during the latest fiscal year.[5]

3.2 According to the new Merger Rules, the Domestic Sales of a company include the sales amount accrued through direct exporting into Japan regardless of whether the company has any presence in Japan or not.

The thresholds

3.3 For ***share acquisitions (including joint ventures)***, the thresholds are based on both Domestic Sales and the level of shareholding in the target. First, the aggregate Domestic Sales of all corporations within the Combined Business Group of the acquiring corporation must exceed JPY20 billion and the aggregate Domestic Sales of the target corporation and its subsidiaries must exceed JPY5 billion[6] to meet the filing requirement. Second, such acquisition must result in the acquirer crossing 20% or 50% of the total voting rights of all the stockholders of the target (so that an acquisition that increases a shareholding from 19% to 21% requires a filing, but an acquisition that increases a shareholding from 21% to 49% does not require one).[7]

3.4 For ***mergers and joint share transfers***,[8] the thresholds are based on Domestic Sales. The aggregate Domestic sales of the Combined Business Group of one of the merging companies, or one of the companies intending to conduct the joint share transfer, must exceed JPY20 billion to meet the filing requirement. Furthermore, the aggregate Domestic Sales of the Combined Business Group of one other participating company must exceed JPY5 billion.[9]

[4] Article 10, Paragraph 6 of the AMA.

[5] Article 10, Paragraph 2 of the AMA.

[6] Article 10, Paragraph 2 of the AMA.

[7] Article 16, Paragraph 3 of the Implementation Rules of AMA.

[8] This refers to a specific structure under the Japanese law, which involves two or more companies transferring their stock into a new holding company in exchange of stock from that holding company.

[9] Article 15, Paragraph 2 and Article 15-3, Paragraph 2 of the AMA.

3.5 For *business transfers*, the thresholds are based on Domestic Sales. The aggregate Domestic Sales of all corporations within the same Combined Business Groups of the acquiring corporation must exceed JPY20 billion to meet the filing requirement. Furthermore, separate thresholds are applied for the transferring corporation (i.e. the seller), depending on whether the transfer includes: (i) the whole business; or (ii) a substantial part of the business (or the whole or a substantial part of fixed assets used for the business). In the former case, a threshold of JPY3 billion of Domestic Sales applies to the transferring corporation; in the latter case, a threshold of JPY3 billion of Domestic Sales attributable to the target business applies.[10]

3.6 For *corporate splits,* there are a number of relevant thresholds, but essentially the JPY20 billion and JPY5 billion thresholds described above apply here also (although in some cases the thresholds can be lower).[11]

4. Procedural issues

Recent trend in notifications

4.1 In the fiscal year 2015 (1 April 2015 to 31 March 2016), the JFTC received 295 merger filings and completed Phase II reviews in four cases. The recent trend of a decrease in the number of Phase II cases is partly due to the fact that notifying parties seem to have more widely adopted the practice of "pull and re-file" to avoid a full blown Phase II review. This practice consists of withdrawing the notification if it becomes apparent that the JFTC will not clear the transaction within the initial Phase I review period. Thereafter, a fresh notification is submitted which re-starts the clock for the Phase I review period (it should be noted that this practice is usually agreed in advance with the JFTC). Conditional clearance decisions or decisions to block (and potential judicial review of JFTC decisions) have been very rare in Japan. Rather, the JFTC usually issues a decision not to issue a cease-and-desist order which relies on a "voluntary" amendment of the notification that includes the conditions agreed upon during the informal consultation with the JFTC. Such "voluntarily" agreed conditions cannot be disclosed to the public without the consent of the parties and have proved a popular way to resolve cases which could not be cleared without the implementation of remedies.

Increased levels of due process and transparency

4.2 As mentioned at the beginning of this Chapter, under recent revisions of the AMA (effective as of 1 April 2015), the JFTC's hearing procedure has been abolished and instead appeals against JFTC orders are subject to judicial review (before the Tokyo District Court). In addition, due process has been strengthened through the introduction of a new hearing procedure prior to the issuance of a JFTC order. Finally, under the revised Merger Guidelines, the JFTC will grant the right for outside counsel to be present during JFTC interviews but only in very limited circumstances, such as during interviews with foreign nationals.

[10] Article 16, Paragraph 2 of the AMA.

[11] Article 15-2, Paragraphs 2 and 3 of the AMA.

4.3 Also, in order to increase the transparency of the formal review process, the JFTC published its Policy for Merger Review[12] in June 2011 (effective 1 July 2011) and made clear in the policy that it will provide the notifying parties with an explanation of any issues it has identified during the Phase I or Phase II investigation, when requested by the notifying party and provided the JFTC finds such explanation necessary. Further, the JFTC made clear in the Policy for Merger Review that the notifying parties can submit opinions (including proposed remedies) at any time during the review period.

4.4 Concurrent with the publication of the Policy for Merger Review, the Merger Guidelines were also amended to increase the transparency of the substantive review.

Notification procedure: filing and timing issues

4.5 In the case of a merger, corporate split or joint share transfer, both companies intending to effect such a transaction are jointly responsible for the filing. In the case of a business transfer, the receiving company is responsible for making the filing. In the case of a share acquisition, the acquiring party is responsible for making the filing. There are no filing fees.

4.6 In terms of timing, the standard 30-day waiting period (Phase I period) will apply, during which the JFTC may request additional information in the form of reports, data, etc. In certain cases, the JFTC may shorten the 30-day waiting period. If the JFTC intends to order necessary measures regarding the M&A transaction, it will notify the parties within the 30-day waiting period (or if this period is shortened, within the shortened period); or if the JFTC has requested additional information, within the longer period of either 120 calendar days from the date of receipt of the initial notification or 90 calendar days from the date of receipt of all of the additional information (Phase II period).

4.7 Until the end of June 2011, M&A transactions were usually notified to the JFTC under the voluntary consultation procedure prior to the formal statutory filing of a proposed transaction under the AMA. Under the prior consultation procedure, the JFTC would make up its mind about a particular transaction at this early stage and would usually keep to that opinion in the formal notification procedure. This procedure was abolished as of 1 July 2011. Under the current procedure the parties still have the opportunity to consult with the JFTC, including as to the method of completing the notification form, as well as to the scope of any overlapping products or services (i.e. market definition). Experience indicates that the JFTC is quite flexible in the scope of what can be discussed during the prior consultation but it will not provide any binding guidance as to the substantive review of the case during that initial phase. Consultation with the JFTC at an early stage is critical to a smooth review, even in seemingly uncomplicated cases.

4.8 If a company has completed an M&A transaction in violation of the notification obligations as described above, the JFTC may bring an action to have the M&A transaction declared invalid. If a company fails to submit the notification or submits the notification including false information, it shall be subject to a criminal fine of up to JPY2 million (approximately US$19,000).[13] The JFTC made a recent statement about a notable case regarding this issue. On June 30, 2016, the JFTC approved Canon's acquisition of Toshiba's medical equipment unit named Toshiba Medical Systems, but issued a statement warning about the way the parties carried out the deal, which could be deemed as a circumvention of the law including the prior notification obligation under the AMA.[14] The parties structured the transaction in such a way that Toshiba could obtain the transaction price of JPY665.5 billion (approximately US$6.3 billion) prior to the end of its financial year on March 31, 2016. This meant, however,

[12] Policies Concerning Procedures of Review of Business Combination (14 June 2011).

[13] Using an approximate Japanese yen to US dollar exchange rate of 106 yen for 1 US dollar in this article

[14] http://www.jftc.go.jp/houdou/pressrelease/h28/jun/160630_2.html

that the transaction price was paid prior to the JFTC's clearance. The structure involved the use of a special entity (independent third party owner) and the issuance of an equity warrant to allow Toshiba to receive cash from Canon before the JFTC's clearance. Further, shares with voting rights in Toshiba Medical were acquired and held by the independent third party owner up until the time Canon exercised the equity warrant.

4.9 In its statement the JFTC mentioned that the method used in this transaction may be in violation of the AMA and should not be repeated by any companies in the future. Since there is no public precedent of the JFTC's position as to such a transaction structure, the JFTC decided not to impose any sanctions in this case and approved the acquisition because it would not hurt fair competition in the medical equipment markets in Japan.

5. Notable cases

Nippon Steel/Sumitomo Metal merger[15]

5.1 On 31 May 2011, the JFTC opened a Phase I review in relation to the proposed merger between Nippon Steel Corporation and Sumitomo Metal Industries following a Prior Consultation which had started in March 2011. The JFTC then initiated a Phase II review procedure and requested additional information from the parties on 30 June 2011. The JFTC confirmed receipt of all of the additional information on 9 November 2011, and granted conditional clearance to the proposed merger on 14 December 2011, following the submission of proposed remedies by the parties. The proposed remedies included: an obligation (i) to provide the trading rights for non-oriented electrical steel sheets to a third party at a price equivalent to the production cost; and (ii) to supply a new entrant on reasonable conditions equivalent to those offered to the parties' affiliates in relation to the high-pressure gas pipeline engineering business. These remedies corresponded to the JFTC's concern that the proposed merger would substantially restrain competition in the above two businesses, as the JFTC's investigation found that, post-transaction, the parties would hold market shares of 55% to 60% with only one competitor in each market. It is important to note in relation to the duration of the Phase II proceedings that although the Policy for Merger Review requires the JFTC to notify the parties of its decision within 90 calendar days from the date it receives all the requested additional information, in practice, the 90 calendar-day period may be significantly shortened at the JFTC's discretion. In this particular case, the JFTC cleared the transaction within 5 weeks of the initiation of the Phase II proceedings.

Mergers in the hard disc drive sector[16]

5.2 Other notable transactions notified under the new notification procedure concerned the two proposed mergers in the hard disc drive (HDD) sector: the acquisition of the HDD business of Samsung Electronics Co., Ltd. by Seagate Technology International and the acquisition of the shares of Viviti Technologies Ltd. by Western Digital Ireland, Ltd. (WDI). In relation to the acquisition by Seagate, the JFTC opened a Phase I review on 19 May 2011 and a Phase II review on 17 June 2011. The JFTC confirmed receipt of all the requested additional information on 27 October 2011 and cleared the proposed acquisition unconditionally on 15 December 2011. In relation to the acquisition by WDI, the JFTC opened a Phase I review on 10 June 2011 and a Phase II review on 4 July 2011. The JFTC confirmed receipt of all the requested additional information on 26 August 2011, and granted conditional clearance to the proposed acquisition on 24 November 2011 following the proposal of remedies by the parties.

[15] http://www.jftc.go.jp/en/pressreleases/uploads/2011_Dec_14.pdf.

[16] http://www.jftc.go.jp/en/pressreleases/uploads/2011_Dec_28.pdf.

5.3 Importantly, the JFTC expressly stated that because the transactions were planned to take place at around the same time, the JFTC's review of each transaction would take into account the other transaction. In this regard, the JFTC expressed concern that the proposed mergers would substantially restrain competition with regard to 3.5-inch HDDs for PCs and consumer electronic devices because post-transaction there would remain only two competitors having market shares of approximately 50% each. The remedies offered by WDI included the divesture of manufacturing facilities representing approximately 10% of its market share in 2010 for 3.5-inch HDDs to a new entrant, together with the use of IP rights required for the manufacture and sale of such HDDs. The JFTC considered that the above remedies would ensure sufficient competition in the market so that not only unilateral but also coordinated behaviour were not likely to substantially restrain competition in the market post-transactions. No remedies were offered by Seagate.

Business combination regarding lithography systems[17]

5.4 The business combination between ASML Holdings N.V. (ASML) and Cymer Inc is also a notable transaction under the new notification procedure. ASML US Inc. (ASML US) (headquartered in the United States) manufactures and sells lithography systems used in the frontend process of semiconductor manufacturing. Cymer manufactures and sells light sources that compose an important part of lithography systems. ASML procures light sources from Cymer for the manufacture of lithography systems. The JFTC opened a Phase I review of the combination on 30 January 2013 and a Phase II review on 28 February 2013. The JFTC confirmed receipt of all the requested additional information on 11 April 2013 and cleared the proposed combination on 2 May 2013 (with attached conditions).

5.5 During the Phase I review, ASML US asked the JFTC to explain its potential objections to the combination in order to enable the review process to proceed smoothly. The JFTC disclosed its potential objections and the parties proposed measures to resolve those issues. The JFTC found a market for the manufacture and sale of light sources, which it defined as the upstream market, and a separate market for the manufacture and sale of lithography systems, which it defined as the downstream market. Cymer and ASML were the top manufacturers in the upstream market and the downstream market respectively. Prior to the combination, Cymer had only one competitor while ASML had only two competitors. The JFTC's main concerns related to potential input or customer foreclosure issues that could arise from the closed nature of the market following the proposed combination. The parties offered the following main remedies which the JFTC accepted: (i) Cymer would continue to do business with competitors of ASML under fair reasonable and non-discriminatory terms of trade; and (ii) ASML would continue to select its suppliers of light sources on non-discriminatory terms. In addition, the parties agreed to keep confidential from each other any information they held prior to the combination as to each other's customers (competitors of the other party to the combination). Finally, the JFTC requested that the parties report the status of their compliance with the agreed remedies once a year for a period of five years.

5.6 Even though the JFTC launched a Phase II review, it took the measures ASML US proposed into consideration and concluded that allowing the proposed combination would not substantially restrain competition in the relevant fields of trade. The Antitrust Division of the US Department of Justice, the Korea Fair Trade Commission and other competition authorities also reviewed this case and cooperated with the JFTC by exchanging information from their respective investigations.

[17] http://www.jftc.go.jp/en/pressreleases/yearly-2013/may/130507.html.

Integration of Zimmer and Biomet[18]

5.7 Regarding the integration of the US company, Zimmer, Inc. and the US company Biomet, Inc., including their corporate groups, the JFTC found that the post-transaction market shares of the parties would be approximately 90% in the Unicompartmental Knee Arthroplasty (UKA) market, and 60-70% in the artificial elbow joints market, which would create a significant gap from those of competing enterprises. Additionally, competition previously conducted between the parties would be lost, and competitive pressure (entry pressure, competitive pressure from users, competitive pressure from adjacent markets) in the UKA market and the artificial elbow joints market is limited. Therefore, the JFTC concluded that the transaction would substantially restrain competition.

5.8 After consultation with the JFTC, the parties voluntarily submitted the following proposed remedies as to the UKA and artificial elbow joints markets:(1) Tangible assets (e.g. inventory, design history, experimental and clinical data) and intellectual property rights (e.g. patents, trademarks and know-how) pertaining to the parties' leading brands corresponding to an approximately 50% share of the UKA market and an approximately 20% share of the artificial elbow joints market in FY2012 are to be divested; (2) Buyers of the divested assets are to be enterprises which have adequate experience and capability in the orthopaedics and artificial joints business and are to be independent of and financially unrelated to the parties. Furthermore, buyers must be selected in light of criteria such as possessing the funds, specialty and incentive to maintain and develop the business subject to the divestitures. The possible buyers are to be notified to and obtain clearance from the JFTC after concluding contracts with the parties to procure the divested assets; (3) If the parties do not conclude contracts with buyers within a certain period of time, an independent third party (the divestiture trustee) will carry out the disposal of the business listed in (1) above after obtaining approval from the JFTC; and (4) The time limit to execute the divestitures is three months from the day the JFTC approved the suitability of the potential buyers.

5.9 On the premise that the remedies described above would be enforced, the parties' combined market share and position in the UKA market after the Transaction would be approximately 40% and second in the market; and in the artificial elbow joints market approximately 40% and first or second in the market. In both of the UKA market and artificial elbow joints market, the parties' market share after the transaction would be lower than the market share of the parties before the transaction. Regarding the suitability of the buyers, it is considered that buyers who satisfy the requirements described in (2) above would become independent competitors influential in the UKA and artificial elbow joints markets. Therefore, on the premise that the remedy would be enforced, the JFTC concluded that the transaction would not substantially restrain competition in the UKA and artificial elbow joints markets. The JFTC exchanged information and cooperated extensively with the United States Federal Trade Commission and the European Commission during its investigation of the transaction.

6. Substantive issues

6.1 The substantive test for clearance is whether the proposed merger, business transfer, corporate split, joint share transfers, share acquisition, shareholding or interlocking directorate (M&A transaction) may result in a "substantial restraint of competition in a particular field of trade". The Merger Guidelines suggest that the JFTC will be open to economic concepts in its competition assessment.

[18] JFTC press release of 25 March 2015, available at: http://www.jftc.go.jp/en/pressreleases/yearly-2015/March/150325.html

Transactions not meeting the jurisdictional thresholds

6.2 As mentioned above, it is important to note that the JFTC can theoretically review any M&A transaction under the substantive test, regardless of whether or not the jurisdictional thresholds described above are met. In this regard, the JFTC issued a reporting order in relation to the proposed acquisition of all the issued shares of Rio Tinto Limited and Rio Tinto plc by BHP Billiton Limited, which was announced on 6 February 2008 (the transaction was ultimately abandoned). The JFTC opened a formal investigation into the proposed acquisition at the end of July 2008 on suspicion that the proposed acquisition, if implemented, would have substantially restrained competition in some fields of trade in which iron ore and coal (coking/metallurgical coal) were supplied by seaborne trade. The JFTC conducted its investigation based upon information provided by BHP Billiton following the issuance of JFTC's reporting order, as well as based on information provided by competitors and customers inside and outside Japan in response to the JFTC's requests.

6.3 This case is noteworthy because the JFTC had never previously commenced a formal investigation of a share acquisition, especially a foreign-to-foreign share acquisition, until after the closing of the transaction. Although the JFTC had consistently stated that it has the power to review any merger which could substantially restrain competition in a particular field of trade in Japan, this was the first high profile case in which it in fact used that power officially in relation to a purely foreign-to-foreign transaction. The BHP Billiton/Rio Tinto case therefore demonstrates that the JFTC is willing to take a more aggressive approach in asserting its competence to review mergers which it believes will have a substantial effect on competition in Japan.

Geographic market definition

6.4 The Merger Guidelines clarify the categories of M&A transactions whose impact on competition should be reviewed. Detailed rules are provided for market definition (often referred to as a "particular field of trade"). Importantly, the 2007 revisions to the Merger Guidelines (2007 Merger Guidelines) clarify that the geographic market may be wider than the territory of Japan, depending upon the international nature of the relevant business. This means that it is now much more likely that consolidation within certain sectors of the Japanese economy which face competition from foreign imports, for example, will be easier since the widening of the actual geographical market may dilute market shares which would otherwise have been looked at as being national in nature. Following implementation of the 2007 Merger Guidelines, there have been several JFTC merger decisions in which the JFTC defined the relevant geographic market as wider than Japan. One example involved TDK Corporation's acquisition from Alps Electric Co., Ltd. of assets used for the manufacturing of magnetic heads. The JFTC ultimately determined under Article 16 of the AMA that the proposed merger "would not substantially restrain competition in any particular field of trade". This decision was reached on the basis of a number of factors, including the consideration that TDK would not be able to control prices because of the presence in the relevant market of a number of other significant competitors with excess supply capacity. Significantly, the JFTC decided that the relevant market consisted of the global market for magnetic heads, based on its finding that magnetic head manufacturers sell their products at similar prices regardless of geographic origin. It is likely that the JFTC will continue to define geographic markets that extend beyond Japan when assessing future merger transactions, depending upon the nature of the product or services involved.

6.5 In addition, the Merger Guidelines explain the factors that will be taken into account when assessing whether a certain M&A transaction substantially restrains competition. The substantive test to be applied is analysed in the context of horizontal, vertical and conglomerate M&A transactions. Another indication of the sophistication of the Merger Guidelines is that they provide that the JFTC will closely analyse market conditions both before and after the transaction with a view to establishing the actual impact on competition of the transaction, including by analysing whether it is likely that such transaction may facilitate cooperation between market players (actively or tacitly).

6.6 Perhaps the most interesting feature of the Merger Guidelines is the use of 'safe harbours' for each of the three categories of M&A transactions identified above (specific harbours apply to each category), as part of the substantive test analysis. These are cases where the JFTC normally considers that there is no possibility that there may be a substantial restriction of competition or that such possibility is small and, accordingly, it is not necessary to conduct a detailed examination of the M&A transaction. Each case is, however, reviewed on its own merits, and the application of the harbours (see below) needs to be analysed carefully within the specific context of each transaction.

The substantive test for horizontal M&A transactions

Safe harbours

6.7 First, for horizontal M&A transactions, the 2007 Merger Guidelines identify three common safe harbours. If any of these safe harbours is met (and there are no other competitive restrictions) the JFTC is likely to consider that the M&A transaction does not substantially restrain competition, namely:

- the Herfindahl-Herschmann Index (HHI) (a commonly accepted measure of market concentration that is calculated by summing the squares of the individual market shares of all the firms in the market) after the M&A transaction is not more than 1,500;

- the HHI after the M&A transaction exceeds 1,500 but not more than 2,500, and the HHI does not increase (the so-called delta) by more than 250; or

- the HHI after the M&A transaction exceeds 2,500 and the delta is not more than 150.

6.8 Importantly, the companies' market shares (which are the basis of the HHI calculation) will be determined by aggregating the market shares of the merging parties and other companies that are in the same group relationship.

6.9 If none of the above safe harbours are met, the JFTC will proceed with the (separate) analysis of the non-coordinated (unilateral) and coordinated effects of the horizontal M&A transaction. However, the Merger Guidelines clarify that based on the JFTC's past experience, if the HHI after the completion of the M&A transaction is not more than 2,500 and the combined market share does not exceed 35%, it is generally considered that there is a low possibility that the M&A transaction will substantially restrain competition.

6.10 Second, for vertical (and conglomerate) M&A transactions, the Merger Guidelines' general approach is to consider that such M&A transactions have less of an impact on competition than horizontal M&A transactions. There are two safe harbours, namely:

- the merging parties' market share after the M&A transaction is not more than 10%; or

- the merging parties' market share after the M&A transaction is not more than 25% and the HHI is not more than 2,500.

6.11 See *Annex 1* for a schematic summary of the JFTC's approach to the substantive assessment of qualifying merger transactions in Japan.

7. Remedies

7.1 The JFTC will, on a case-by-case basis, grant conditional clearance to a proposed transaction if, for example, one or both of the parties undertake to make certain divestments or take other measures to promote competition in the relevant market. Broadly speaking, the Merger Guidelines, although less analytical and detailed in their content, are in line with the EC's 2008 Notice on Remedies and in particular the general objective to ensure competitive market structures through appropriate remedies to particular competition issues.

7.2 The Merger Guidelines list the following types of remedies:

- remedies to restore or minimise a change in market structure: divestiture of a part of business, reduction in the shareholding ratio, dissolution of joint ventures etc.;
- remedies to enhance competition: requiring access to essential inputs for import or entry, licensing know-how or intellectual property rights etc.; and
- remedies to exclude or limit actions by the merged entity aimed at taking advantage of its increased market power: a commitment to non-discriminatory behaviour, obligation to refrain from information exchange (which may lead to collusion among firms) etc.

7.3 As to the JFTC's preference for remedies, the Merger Guidelines state that structural commitments are preferred. A good example of the JFTC's policy regarding remedies can be found in its decision on 19 December 2008 with regard to the capital alliance between Kirin group and Kyowa Hakko including the share acquisition by Kirin Holdings Company, Limited of Kyowa Hakko Kogyo Co., Ltd. The JFTC considered that this capital alliance would create a substantial restraint of competition in the pharmaceutical market, and more particularly in the Granulocyte-colony stimulating factor product market. However, the parties agreed to divest their rights for research and development as well as for the manufacture and sale of Neu-up, one of their products, to a third party. The JFTC considered that this divestment remedy would allow for a new competitor to enter the market thereby maintaining the conditions of competition in the market. However, the JFTC can also show flexibility in this regard; for example, in the Nippon Steel / Sumitomo Metal merger, it recognised that, given the nature of the parties' businesses, behavioural remedies would be more appropriate.

8. Statistics

8.1 As stated above, according to the JFTC the total number of merger notifications for fiscal year 2015 (1 April 2015 to 31 March 2016) was 295. Out of these, 281 notifications were cleared under a Phase I review. The JFTC initiated Phase II reviews in six cases. The JFTC completed Phase II review in four cases including ones initiated during the preceding fiscal years. Among them, one case was cleared with conditions while in the remaining cases the JFTC did not issue a cease and desist order (either because no conditions were imposed or because the parties withdrew their notification). See *Annex 2* for details.

Annex 1: JFTC's approach to the assessment of M&A transactions

Decision as to whether a merger review will be made
To be decided for each M&A transaction, i.e., shareholding, interlocking directorates, merger, corporate split, joint share transfer or business transfer

Will be Reviewed
Example:
- Voting rights of the Combined Business Group exceeds 50%
- Voting rights of the highest single shareholder exceeds 20%
- Concurrently serving directors mutually hold representative positions in the other company (interlocking directorates)

Will not be Reviewed
Example:
- Holding voting rights of 10% or less and no interlocking directorates
- Mergers and business transfers between companies in the Combined Business Group

Will be Reviewed → Will not be Reviewed

Determination of the "Particular Field of Trade" (Relevant Markets)
With respect to all business in which the subject companies' group (merging parties) are engaged, the range of relevant products and services and the geographic scope thereof etc. are determined. The relevant market is determined from the perspective of demand substitutability, and, if necessary, also from the perspective of supply substitutability.

Determine whether competition would substantially be restrained in each particular field of trade

Horizontal M&A (1) HHI ≤ 1,500, (2) 1,500 < HHI ≤ 2,500, and Delta ≤ 250, or (3) 2,500 < HHI and the Delta ≤ 150

Vertical/Conglomerate M&A Market share is ≤ 10%, or HHI ≤ 2,500 and market share is ≤ 25%

Safe Harbour Not Applicable

Safe Harbour Applicable

To be reviewed (separately) from two perspectives

No coordinated effects
Status and ranking of the merging parties
- Market share and ranking
- Circumstances of pre-merger competition between the subject companies
- Difference in share between the competing companies and the merging parties
- Competitors' supply capacity and degree of differentiation

Imports
Degree of institutional barriers, degree of import-related transportation costs and the existence of problems in distribution, the degree of substitutability between the imported product and the company group's product, possibility of supply from overseas
Entry
Degree of institutional entry barriers and barriers in practice, degree of substitutability between entrants' products and company group products, degree of entry possibility
Other factors to be considered
- Competitive pressure from related markets or users
- Overall business capabilities
- Efficiency
- Financial condition etc.

Coordinated effects
Status and ranking of the merging parties
- Number of competitors
- Circumstances of pre-merger competition between the subject companies
- Competitor's supply capacity

Actual circumstances of transactions
Conditions for transactions, changes in demand, changes in technology innovation, past competition, etc.
Other factors to be considered
- Pressure of competition from imports, entry, related markets or users
- Efficiency and financial condition of the company group etc.

Each factor shall be reviewed comprehensively

Concerns | No Concerns

Each factor shall be reviewed comprehensively

Concerns | No Concerns

Where there are no problems from the perspective of non-coordinated effects and coordinated effects

Decision that the merger will substantially restrain competition in a particular field of trade

Decision that the merger, etc. will not immediately substantially restrain competition in a particular field of trade (Clearance)

Remedial actions to solve the concern(s)

Prohibition of the relevant merger

Annex 2

The table below shows the number of accepted notifications of Mergers, Corporate Splits (Demergers), Joint Share Transfers, Business Transfers (Acquisitions of Businesses) and Share Acquisitions for the last four published years.

	FY2012	FY2013	FY2014	FY2015
Number of merger notifications	14	8	12	23
Number of demerger notifications	15	14	20	17
Number of joint share transfer notifications	5	3	7	6
Number of acquisition of business notifications	30	21	19	27
Number of share acquisition notifications	285	218	231	222
Total	349	264	289	295

The table below shows the status of notifications received for the last four published years.

	FY2012	FY2013	FY2014	FY2015
Number of notifications	349	264	289	295
Number of cases closed at Phase I review	340	257	275	281
Number of cases where the waiting period was shortened	127	80	119	145
Number of cases where the notification was withdrawn prior to completion of Phase I review	3	3	11	8
Number of cases that went to Phase II review	6	4	3	6

The table below shows the status of Phase II review for the last four published years.

	FY2012	FY2013	FY2014	FY2015
Number of cases closed at Phase II review	5	3	2	4
Number of cases cleared with conditions	3	1	2	1
Number of cases where a cease and desist order was issued	0	0	0	0

The table below shows the status of cases involving foreign firms for the last four published years.

	FY2012	FY2013	FY2014	FY2015
Number of notifications for M&A transactions between a Japanese firm and a foreign firm	12	7	7	8
Number of notifications for M&A transactions between foreign firms	14	18	41	45
Total	26	25	48	53

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Etsuko Hara is a partner at Anderson Mori & Tomotsune, and her practice focuses on the areas of antitrust law, mergers and acquisitions, and corporate transactions.

Ms Hara has extensive experience advising on inbound and outbound transactions, including mergers and acquisitions, joint ventures, cross-border distribution, and licence and franchise agreements. She regularly handles multi-jurisdictional merger filings and advises on various antitrust issues with regard to the transactions, including complex contract arrangements such as alliances between competitors, and vertical antitrust issues.

Ms Hara also advises on international or domestic cartel cases, and has assisted clients on cartel investigations by the JFTC and foreign competition authorities, leniency applications and private actions.

Ms Hara is a graduate of Columbia Law School (LLM) and the University of Tokyo (LLB, 1998), and is admitted as a lawyer in Japan and New York. She teaches antitrust law at Hitotsubashi University School of Law. She recently co-authored Extraterritorial Application of Foreign Laws: A Primer for Japanese Companies (Kinzai, 2013) and two chapters ("Japan: Cartels" and "Japan: Merger Control") of the GCR Asia-Pacific Antitrust Review (2015).

Practice Areas
Competition, Corporate and Commercial Law

Practice Groups
Corporate Transaction
Competition Law
Asia and Emerging Countries Practice

Education
The University of Tokyo (LL.B., 1998)
The Legal Training and Research Institute of the Supreme Court of Japan, 2000-2001
Columbia University School of Law (LL.M., 2006)
Associated with Allen & Overy, Brussels, Belgium, September 2006 - March 2007

Admissions
Japan (2001)
New York (2007)

Professional and Academic Associations
Dai-ni Tokyo Bar Association
Member of the Japanese Law Translation Council, Ministry of Justice (April 2012-March 2016)
Adjunct Lecturer, Hitotsubashi Law School (April 2013-)

Languages
Japanese (first language)
English

Publications/Lectures

- "Leniency Regimes" (Japan chapter) (European Lawyer Reference, 2015) (co-author)
- "Japanese Anti-monopoly Act - Annotated" (Koubundou, 2014) (co-author)
- "Introduction to Japanese Business Law & Practice Second Edition" (LexisNexis Japan, 2014) (co-author)
- Enthusiasm for IBA Tokyo "Network is especially necessary for lawyers specialized in Antitrust Law to catch up the trends in each country," The Lawyers (August 2014)
- "Commentary on Anti-Monopoly Act" (Dai-ichi Hoki, 2014) (co-author)
- "Extraterritorial Application of Foreign Laws: Application to Japanese Companies," lectured at the seminar held by Corporate Management Forums, Inc. (March 2014)
- "Legal Practice regarding Act Concerning Special Measures for Pass-on of Consumption Tax" a lecture at the monthly meeting of The Association of Corporate Legal Departments (January 2014)
- "Extraterritorial Application of Foreign Laws: A Primer for Japanese Companies" (Kinzai, 2013) (co-author)
- "Q&A: Strategies for Corporate Law Practice in Asia and Emerging Countries" (Shoji Homu, 2013) (co-author)
- "Japan: Cartels" (The Asia Pacific Antitrust Review 2013, 2014 and 2015)(Global Competition Review)(co-author)
- "Japan: Merger Control" (The Asia Pacific Antitrust Review 2013, 2014, 2015, 2016 and 2017)(Global Competition Review)(co-author)
- "Introduction to Japanese Business Law & Practice" (LexisNexis Hong Kong, 2012) (co-author)
- "Practical Issues of Petition for Determination of Share Purchase Price or Share Transfer Price," lecture presented at AM&T Legal Business Strategy Seminar (July and August 2012)
- "Japan's new caselaw on dominant position bargaining," The 2012 Guide to Competition and Antitrust (Edited by IFLR) (co-author)
- "The importance of consultation," The 2011 guide to Competition & antitrust (Edited by IFLR)(co-author)
- "Review of US & EU Competition Law Cases," (Shoji Homu, March 2011) (co-author)

- “Are Franchisees categorized as “workers”?,” Business Houmu (May 2011) (co-author)
- “Items to consider when commencing or terminating a franchise agreement to avoid disputes,” Business Houmu (April 2011) (co-author)
- “Non-compete clauses and liquidated damages in franchise agreements,” International Law Office (October 2010) (co-author)
- “Telling it like it is: a franchisor’s disclosure obligations,” International Law Office (July 2010)
- “The 2010 guide to Mergers and Acquisitions,” (Japan chapter) (International Financial Law Review, 2010) (co-author)
- “Legal Affairs and Practice of Business Reconstruction - Examining Legal Issues Accompanied with “Selection and Concentration”, lecture presented at a seminar organized by Shoji Houmu (December 2009)
- “ANALYSIS Take Over Bid” (Shoji Homu 2009) (co-author)
- “Japanese Business Law and Practice” (Anderson Mori and Tomotsune, Law Press China, May 2009)
- “Recent trends in EC competition law,” lectured at the seminar held by Japan Pharmaceutical Industry Legal Affairs Association/Economic Law Research Department (12 March 2009)
- “IFLR The 2008 guide to Competition and antitrust,” (Japan chapter) (International Financial Law Review, 2008) (co-author)
- “Franchise 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016 and 2017 (Getting the Deal Through, Law Business Research)
- Guide to Japan’s New Corporation Law: An analysis of the new corporate >system based upon a review of the new provisions >(Kinzai Institute for Financial Affairs, Inc., 2005) (co-author)
- “Merger control in Japan” (The Asia Pacific Antitrust Review 2004)(Global Competition Review)(co-author)

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Shigeyoshi Ezaki is a partner at Anderson Mori & Tomotsune with a general corporate practice, which includes advising and assisting Japanese and foreign clients with respect to Japanese competition law, trade regulation, intellectual property law and corporate law. He represents many companies involved in cross border mergers and acquisitions as well as joint venture arrangements. He also assists many clients in regulatory investigations with respect to price fixing and similar serious alleged violations before the Japan Fair Trade Commission as well as overseas regulatory authorities such as the US Department of Justice and the European Commission. He also represents many companies in the area of distribution agreements and license agreements.

Practice Areas

General Corporate Legal Affairs (concerning Corporate Law and Antimonopoly Law)

Practice Groups

Corporate Transactions Intellectual Property Law Competition Law

Education

Tokyo University (LL.B., 1992)
Columbia University School of Law (LLM., 1998)
Trained at a law firm in the United States

Admissions

Japan (1994)
New York (1999)

Professional and Academic Associations

Dai-ni Tokyo Bar Association
Inter-Pacific Bar Association
Competition Law Forum

Languages

Japanese (first language)
English

Publications/Lectures

- "Parallel Importation and Patent Protection," International Commercial Litigation (Euromoney, Publishers)
- PLC Cross-border Competition Handbook 2006/07 Volume 2: Leniency (Practical Law Company, 2006) (co-author)
- "Leniency Regimes," (Japan Part) (European Lawyer Reference, 2007, 2010) (co-author)
- "Getting the Deal Through – Private Antitrust Litigation 2009," Getting the Deal Through, Japan Part, October 2008 (co-author)
- "Recent Developments in Merger Review: New Jurisdictions, New Rules, New Challenges" (Speaker) (IBA, April, 2009)
- "Recent Trends in Private Antitrust Litigation in Japan," Global Competition Litigation Review(GCLR), Volume 3 Issue (January 2010) (co-author)
- "Japan: Merger control" (The Asia Pacific Antitrust Review 2010) (Global Competition Review) (co-author)
- Global Legal Insights – Cartels (1st Edition)," Global Legal Group, Japan Part, November 2012 (co-author)
- "Introduction to Japanese Business Law & Practice," LexisNexis Hong Kong, December 2012 (co-author)
- Q&A: Strategies for Corporate Law Practice in Asia and Emerging Countries," Shoji Homu, 2013 (co-author)
- "Introduction to Japanese Business Law & Practice Second Edition" (LexisNexis Japan, 2014)(co-author)
- "Japanese Anti-monopoly Act – Annotated," Koubundou, 2014 (co-author)
- "2014 Antitrust Year In Review," ABA International Law Section, International Antitrust Committee, Japan Part, May 2015 (co-author)

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Vassili Moussis

Dr. Vassili Moussis is an English qualified lawyer. Prior to joining Anderson Mori & Tomotsune, he practiced in London, Brussels and Tokyo with a particular emphasis on EU competition law. He studied law in Belgium and the UK and holds a Ph.D. on comparative EU and Japanese competition law. Mr. Moussis also worked at the European Commission's Directorate General for Competition for one year as an administrative trainee.

At Anderson Mori & Tomotsune his practice focuses on EU law and in particular EU and international competition law with a particular emphasis on merger control and cartel matters. He also advises on distribution arrangements, intellectual property issues and other commercial matters, which often include an international element.

Practice Areas

Competition law, general corporate and energy practice

Practice Groups

Competition Law
Energy Practice

Education

European School, Brussels I (European Baccalaureate (EB), 1989)
Catholic University of Louvain (Licence en Droit, 1994)
University College London (LL.M., 1995)
Internship at the European Commission's Directorate General for Competition (1995-1996)
College of Law, London (Common Professional Examination, 1997 / Legal Practice Course, 1998)
University College London (Ph.D., 2003)

Admissions

Solicitor, Senior Courts of England and Wales (2000)
Dai-ni Tokyo Bar Association as a Gaikokuho Jimu Bengoshi (foreign registered lawyer) (2010)

Professional and Academic Associations

The Law Society of England and Wales
European Lawyers Group
The Belgium-Japan Association and Chamber of Commerce
Dai-ni Tokyo Bar Association

Languages

English (working language)
Greek (first language)
French (first language)
Japanese (fluent)
Spanish (intermediate)
Italian (intermediate)

Recent Publications/Lectures

- "An unlikely union: a Greek lawyer in Japan" Asahi Online (Asahi Judiciary), July 2015
- "International Licensing and Technology Transfer: Practice and the Law (ILTT) #12", Competition Law, Japan Part, Kluwer Law International, June 2015 (co-author)
- "The Merger Control Review, Sixth Edition," Japan Part, Law Business Research, July 2015 (co-author)
- "World trends in enforcement of antitrust/competition law – recent developments in the EU and US and increased enforcement activity in Asia," The Lawyers (December 2014)(co-author)
- "Private Enforcement and Leniency in Japan: Towards a "European" Model for Reform?" , Global Competition Litigation Review (GCLR), Volume 7 (Issue 1, 2014) (co-author)
- "EU Competition Law," lectured at the seminar held by EUIJ Kansai and Osaka University Law Faculty (28 May 2014)
- Took part at a hearing of the Cabinet Office of the Government of Japan on the investigative procedures of the Japan Fair Trade Commission and made a comparative presentation with the applicable procedures at EU level (11 April 2014)

China: JunHe LLP

Merger control filing under the AML

1. Introduction

1.1 The Anti-Monopoly Law of the People's Republic of China (AML) was enacted by the National People's Congress on 30 August 2007, and came into effect on 1 August 2008. The Chinese Ministry of Commerce (MOFCOM) is the authority responsible for merger control review under the AML.

2. What types of transactions are caught?

2.1 Under the AML, any of the following will be deemed a "concentration of business operators": (i) a merger, (ii) an acquisition of control of another party through an asset or equity acquisition, and (iii) possession of control or "decisive influence" over another party by contract or otherwise.

3. How is control or decisive influence defined?

Definition of control and "decisive influence"

3.1 Under the Guiding Opinions on Notification of Concentration of Business Operators (promulgated in 2009 and revised in 2014) (MOFCOM 2014 Guidelines), "control" and "decisive influence" are interpreted collectively (for that reason "control" together with "decisive influence" are hereinafter collectively referred to as "control"). To determine whether a business operator obtains control over another business operator through a transaction, factors to be considered generally include but not limited to the following:

- purpose of the transaction and future plan;
- equity structure of another business operator prior to and subsequent to the transaction and changes thereof;
- voting matters and the voting mechanism of the shareholder's meeting of another business operator as well as the historical record with regard to attendance of and voting in such meeting;
- composition of the board of directors or the board of supervisors of another business operator and the voting mechanisms thereof;
- appointment and dismissal of the senior executives of another business operator;
- the relationship among the shareholders and directors of another business operator, including the existence of voting by proxy or acting in concert, etc.; and
- whether there is any material business relationship or cooperation agreement between the business operator with another business operator.

3.2 Notwithstanding the above, there is no express and clear standard provided by the 2014 MOFCOM Guidelines as to exactly what elements under 3.1 above will constitute control of a business operator over another business operator.

3.3 Based on our previous experience in dealing with merger control filings with MOFCOM, an entity may be regarded as having gained "control" of another business operator if it:

- acquires more than 50% of all voting shares or assets of another business operator; or
- acquires 50% or less of all voting shares or assets of another business operator, but through acquiring shares or assets or by means of contracts, it has the power to appoint/nominate half or more of the board members or if it otherwise has the power to make or block the following strategic decisions (including through veto right, super majority requirement and/or quorum requirement):
  - the adoption of the financial budget and/or business plan;
  - the hiring and firing of key management or supervisory personnel (e.g., CEO, CFO);
  - strategic operations and marketing matters, pricing, or material investments of the company; or
  - other important management and operation strategies of such other business operator that are market-specific to the company.

3.4 It is important to note, however, that in assessing whether an acquirer has gained control, MOFCOM will review the above factors as a whole. For instance, suppose a shareholder has only a minority stake in a company, if it has gained veto right(s) in respect of some of the matters set forth above in the second item of paragraph 3.3, it may still be treated as having "control" or "joint control" over the target company.

3.5 Based on our experience, merely granting a minority shareholder veto rights with respect to the following matters, either individually or in aggregate, would normally not be deemed as conferring such shareholder with "control":

- amendment to the articles of association and/or other constitutional document of the target company;
- increase, reduction or cancellation of the authorized or issued share capital of the target company;
- merger and division of the target company;
- suspension, dissolution or alteration of the form of the target company; or
- entering into agreements with the shareholder or the affiliated company of the shareholder.

3.6 Veto rights in respect of other matters may or may not be treated as controlling rights in some scenarios and must be analysed on a case by case basis. For example, veto rights over profit distribution and loss recovery in a joint venture transaction, or veto rights over the company's financial targets such as EBITDA may not be deemed to confer "control". In some cases, other veto rights such as a veto over the issuance of new shares and IPO rights may also not be sufficient to trigger a change of control, but this will depend on the overall facts and circumstances.

4. Are JVs included?

4.1 Before the MOFCOM 2014 Guidelines came into effect, the AML and related regulations are silent as to whether or not the establishment of a joint venture constitutes a "concentration" of business operators within the regime of the AML, although based on consultations with MOFCOM, a joint venture jointly controlled by two or more business operators may constitute "concentration of business operators" under Clause (3) of Article 20 of the AML (i.e. "acquiring control over other undertakings by contract or any other means").[1]

4.2 Under the MOFCOM 2014 Guidelines, it clearly states that "control" includes sole control and joint control. For any newly-established joint venture, in the event that at least two business operators jointly control such joint venture, a concentration of business operators is constituted; where only one business operator controls such joint venture independently and other business operators share no control, no concentration of business operators is constituted and therefore no notification is required.

4.3 Unlike the European Commission's practice in relation to JVs under the EU Merger Regulation, MOFCOM does not differentiate between a full function and a non-full function JV, such that, for example, a holding company would not necessarily be exempt from the notification obligation.

5. What are the jurisdictional thresholds?

5.1 It is mandatory for business operators to obtain merger clearance from MOFCOM in relation to their proposed concentration if they meet either of the following turnover thresholds:

- the combined worldwide turnover of all the business operators concerned in the preceding financial year is more than RMB10 billion (approximately US$1.6 billion), and the nationwide turnover within China of each of at least two of the business operators concerned in the preceding financial year is more than RMB400 million (approximately US$64 million); or

- the combined nationwide turnover within China of all the business operators concerned in the preceding financial year is more than RMB2 billion (approximately US$320 million), and the nationwide turnover within China of each of at least two of the business operators concerned in the preceding financial year is more than RMB400 million (approximately US$64 million).

5.2 In July 2009, six ministries including MOFCOM, the People's Bank of China, the China Banking Regulatory Commission, the China Securities Regulatory Commission, and the China Insurance Regulatory Commission jointly issued the Measures for Calculating Turnover of Financial Institutions in Concentration of Undertakings, under which only 10% of their turnover after sales tax and other charges is taken into account for the turnover tests.

[1] In addition, "joint venture" remains a type of concentration in the revised notification form released by MOFCOM on 6 June 2012. Furthermore, "business operators participating in the concentration" under JV scenario is also specified in the footnotes to the notification form, which clearly shows MOFCOM's interpretation at the time that a joint venture can constitute a notifiable concentration under the AML.

6. Notification and review procedure

Pre-notification discussions

6.1 Based on our experience, whether a client should approach MOFCOM for a pre-notification consultation meeting depends very much on the complexity of the proposed transaction, with regard to factors such as the nature of the relevant industries involved, the scope of the overlapping products, the scale of the proposed transaction and the market shares of the parties.

6.2 If the parties are fairly clear on the major issues to be covered in the filing, such as the filing procedure, definition of relevant markets etc., usually we would not advise clients to have pre-notification discussions with MOFCOM as such meetings may delay the filing process and clearance of the case. However, if the proposed transaction is complex and there are issues related to the preparation of the filing report that would benefit from early clarification, it might be advisable for the client and its counsel to have a pre-notification consultation meeting with MOFCOM, so that the parties can have a better understanding of the issues concerned, and the likely attitude and interpretation that may be adopted by MOFCOM. Generally speaking, it may take about one to two weeks for MOFCOM to confirm its schedule for the pre-notification consultation meeting with the parties, the timing of which will depend on the nature and complexity of the transaction and the availability of the relevant MOFCOM officials.

6.3 Please note that, any guidance given by MOFCOM in the pre-notification process is only on case-by- case basis, not legally binding and can be used as guidance only.

Review timeline

6.4 The AML provides for a 30-calendar day Phase I review period followed by a 90-calendar day Phase II review period (if deemed necessary by MOFCOM). The review period may be extended for another 60-calendar days (Phase III) under certain circumstances.

6.5 MOFCOM will not stop the clock during the review period.

Filing requirements and timing

6.6 In practice, it is likely that MOFCOM will require the notifying parties to comply with the large majority (if not all) of the information requirements (by taking a "checklist approach") in the Guidelines on the Notification Documentation related to the Concentration of Business Operators (promulgated in January 2009) (Documentation Guidelines).

6.7 As the information required in the Documentation Guidelines is rather extensive, the notifying parties may encounter difficulties in completing the filing report in various aspects, such as information about the scale and competitive capabilities of the parties in "other markets outside the relevant markets" as well as non-competition-related factors (e.g. industry policies, state-owned assets, bankruptcy issues, famous brands or issues that concern the competition authorities of other jurisdictions that are relevant to the transaction). Furthermore, MOFCOM may require the notifying parties to provide all market data of related products even if there is no overlap or there is negligible overlap between the products of the notifying parties. MOFCOM is also rather strict in the requirements set out in the Guidelines for Defining the Relevant Market (promulgated in May 2009), e.g. it is unacceptable for MOFCOM to leave the definition of relevant product and geographic markets open, which may be acceptable to the European Commission in certain circumstances.

6.8 The submission of the filing report to MOFCOM does not mean that the formal review period starts immediately. It is only after MOFCOM is satisfied with the information contained in the filing report and documents, and confirms that no further information or document is required, that the formal review period starts. Currently, it will usually take about three to five weeks (for simple cases it may be shorter) for MOFCOM to conduct a preliminary review of the documents after receipt of the filing report and advise whether it requires supplementary information and documents to be submitted. After the first round of supplementary information requests, there may still be several rounds of information requests (both oral and in writing) before formal acceptance and therefore this preliminary review process can take a long time. The exact timing required for MOFCOM to complete a preliminary review for the purpose of confirming acceptance of filing and commencement of the formal review period depends on the complexity of the case and the workload of MOFCOM officials at the time of the filing.

Simple cases and simplified procedures

6.9 On 11 February 2014 MOFCOM published the Interim Provisions on the Standards Applicable to Simple Cases of Concentration of Business Operators (Interim Provisions).

6.10 According to the Interim Provisions, a concentration of business operators shall be considered a simple case if it falls within any of the following categories:

- in the same relevant market, the combined market share of all business operators participating in the concentration is less than 15%;
- where an upstream-downstream relationship exists among the business operators participating in the concentration, the market share of such business operators in both the upstream and the downstream markets is less than 25%;
- the business operators participating in the concentration are neither in the same relevant market nor have any upstream-downstream relationship, and their market share in each market relevant to the concentration is less than 25%;
- the business operators participating in the concentration intend to establish a joint venture outside the territory of China, and the joint venture will not engage in any economic activities within the territory of China;
- the business operators participating in the concentration intend to acquire the equity or assets of an overseas enterprise, and the overseas enterprise does not engage in any economic activities within the territory of China; or
- the joint venture is jointly controlled by two or more business operators and will continue to be controlled by one or more of the existing business operators after the concentration.

6.11 However, a concentration of business operators that meets the above-mentioned requirements shall not be considered as a simple case if any of the following applies:

- a joint venture jointly controlled by two or more business operators will be controlled by one of the existing business operators after the concentration, and this business operator and the joint venture are competitors in the same relevant market;
- it is difficult to define the relevant market involved in the concentration of business operators;

- the concentration of business operators may have adverse effect on market entry or technological progress;
- the concentration of business operators may have adverse effect on consumers and other business operators; the concentration of business operators may have adverse effect on national economic development; or
- MOFCOM is of the opinion that the concentration of business operators may otherwise have adverse effect on market competition.

6.12 A shortened notification form can be used for concentrations that are treated as simple cases. A summary of the simple case will, after being received by MOFCOM, be published on the website of MOFCOM (http://fldj.mofcom.gov.cn) for 10 days, disclosing certain information including the transaction name, overview and purposes, a simple introduction of the parties participating in the concentration, and the reason for applying for the simple case review, etc. During the aforesaid 10 days, any third party could comment on whether the case should be eligible for simple case review. If there are no comments from third parties or the comments do not affect the qualitative assessment that the concentration is a simple case, the matter will be reviewed as a simple case, and it is likely that clearance will be granted by MOFCOM within Phase I (maximum 30 days). Therefore, generally the total timeline required for a filing under simple case procedure is about 2 to 3 months after submission.

7. Published cases approved with conditions and prohibited by MOFCOM

Summary of cases approved with conditions

7.1 In the published approvals with conditions, the remedies include both structural remedies and behavioural remedies. A summary of these cases is set out below:

No.	Case	Remedies	Review period (initial submission to approval)
1	InBev NV/SA's acquisition of Anheuser-Busch Companies Inc.	Behavioural remedies	10 September 2008 – 18 November 2008
2	Lucite International Group Limited's acquisition of Mitsubishi Rayon Co., Ltd.	Structural remedies/ Divestitures	22 December 2008 – 24 April 2009
3	General Motors' acquisition of Delphi	Behavioural remedies	18 August 2009 – 28 September 2009
4	Pfizer's acquisition of Wyeth	Structural remedies/ Divestitures	9 June 2009 – 29 September 2009
5	Panasonic's acquisition of Sanyo	Structural remedies/ Divestitures	21 January 2009 – 30 October 2009
6	Novartis's acquisition of Alcon	Behavioural remedies	20 April 2010 – 13 August 2010
7	Uralkali's merger with Silvinit	Behavioural remedies	14 March 2011 – 2 June 2011
8	Penelope S.r.l./ Alpha Private Equity Fund V's acquisition of Savio Macchine Tessili S.p.A.	Structural remedies/ Divestitures	14 July 2011 – 31 October 2011

No.	Case	Remedies	Review period (initial submission to approval)
9	Formation of joint venture between General Electric (China) Co., Ltd and China Shenhua Coal to Liquid and Chemical Co., Ltd.	Behavioural remedies	13 April 2011 – 10 November 2011
10	Seagate's acquisition of Samsung Electronic's hard disk drive business	Behavioural remedies	19 May 2011 – 12 December 2011
11	Joint Venture between Henkel Hong Kong Holding Limited and Tiande Chemical Holdings Limited	Behavioural remedies	8 August 2011 – 9 February 2012
12	Western Digital Corp.'s acquisition of Hitachi's hard disk drive business	Structural remedies/ Behavioural remedies	2 April 2011 – 2 March 2012
13	Google's acquisition of Motorola Mobility	Behavioural remedies	30 September 2011 – 19 May 2012
14	United Technologies Corporation's acquisition of Goodrich Corporation	Structural remedies/ Divestitures	12 December 2011 – 15 June 2012
15	Wal-Mart's acquisition of a 33.6% shareholding in Newheight Holding Co. (Yihaodian)	Behavioural remedies	16 December 2011 – 14 August 2012
16	Joint venture between ARM Holdings PLC, Giesecke & Devrient GmbH and Gemalto NV	Behavioural remedies	4 May 2012 – 6 December 2012
17	Acquisition of Xstrata by Glencore International AG	Structural remedies/ Behavioural remedies	1 April 2012 – 29 March 2013 (withdrawal and resubmission)
18	Acquisition of Gavilon Holdings, LLC by Marubeni Corporation	Behavioural remedies	19 June 2012 – 23 April 2013 (withdrawal and resubmission)
19	Acquisition of Gambro AB by Baxter International Inc.	Structural remedies/ Behavioural remedies	31 December 2012 – 13 August 2013
20	Acquisition by MediaTek Inc. of MStar Semiconductor, Inc. (Cayman)	Behavioural remedies	6 July 2012 – 27 August 2013 (withdrawal and resubmission)

No.	Case	Remedies	Review period (initial submission to approval)
21	Acquisition of Life Technologies Corporation by Thermo Fisher Scientific Inc.	Structural remedies/ Behavioural remedies	3 July 2013 – 15 January 2014
22	Acquisition of Nokia's Devices and Services Business by Microsoft	Behavioural remedies	13 September 2013 – 8 April 2014
23	Acquisition of AZ Electronic Materials S.A. by Merck KGaA	Behavioural remedies	15 January 2014 – 30 April 2014
24	Establishment of a Joint Venture by Corun, Toyota China, PEVE, Sinogy and Toyota Tsusho	Behavioural remedies	31 December 2013 – 2 July 2014
25	Acquisition of the Equity of Alcatel Lucent by Nokia Oyj	Behavioural remedies	21 April 2015 – 19 October 2015
26	Acquisition of 100% of the Equity of Freescale Semiconductor, Inc. by NXP Semiconductors	Structural remedies	3 April 2015 – 25 November 2015 (withdrawal and resubmission)
27	Acquisition of SABMiller by Anheuser-Busch InBev	Structural remedies	8 March 2016 – 29 July 2016
28	Acquisition of St. Jude Medical by Abbott Laboratories	Structural remedies	29 July 2016 – 30 December 2016
29	Merger between Dow Chemical and DuPont	Structural remedies and Behavioural remedies	21 March 2016 – 2 May 2017 (withdrawal and resubmission)
30	Acquisition of Brocade Communications Systems Inc. by Broadcom Limited	Behavioural remedies	13 January 2017 – 22 August 2017

7.2 From the above thirty cases, it seems that for high-profile cases MOFCOM has taken a much longer review period (more than 12 months in a few cases). In addition, although MOFCOM has imposed behavioural remedies on a large majority of cases with competition concerns, we understand that recently MOFCOM has been trying to impose structural remedies rather than behavioural remedies to address the relevant competition concerns due to the difficulty for MOFCOM of monitoring full compliance with behavioural remedies. Going forward, it can be reasonably anticipated that MOFCOM may continue to be reluctant to accept behavioural commitments suggested by the parties to address competition concerns.

Breakdown of cases approved with conditions by industrial classification

Industry	Number
Manufacturing	17
Information transmission, computer services and software industry	6
Wholesale and retail	2
Chemicals	1
Pharmaceuticals	1
Power, gas and water production and supply	1
Mining	1
Scientific research, technical services and geological survey	1
Total	30

Noteworthy cases

Joint venture setup between GE and China Shenhua Coal to Liquid and Chemical Co., Ltd.

7.3 This is the first conditional decision involving a Chinese stated-owned enterprise (SOE) and it took about seven months for MOFCOM to review.

7.4 It is also the first conditional clearance of a joint venture project. This decision officially affirmed MOFCOM's position in treating joint ventures as a type of notifiable transaction under the AML.

7.5 Furthermore, this is the first time MOFCOM defined a technology licensing market.

Penelope S.r.l./ Alpha Private Equity Fund Vs acquisition of Savio Macchine Tessili S.p.A.

7.6 This is the first conditional clearance involving a private equity (PE) fund, which reflects that MOFCOM treats PE fund and other industry investors equally in reviewing merger cases and does not distinguish them due to certain characteristics of PE funds.

7.7 The definition of the market for electronic yarn clearers for automatic winder as the single market has further shown MOFCOM's tendency to define a much smaller product segment as the relevant market in its review and thus considers the competition effect in the context of a smaller product market.

7.8 Another notable issue in this case is MOFCOM's reading of Alpha V's potential influence over the only other competitor, Uster, by virtue of its 27.9% holding of the shares in Uster. Even if Alpha V believed it did not have control or decisive influence over Uster as a minority shareholder, MOFCOM thought otherwise and required a divestiture of Alpha V's entire interest in Uster. The case reflects MOFCOM's broad interpretation of "control" or "decisive influence".

Google's acquisition of Motorola Mobility

7.9 MOFCOM approved this case subject to conditions on 19 May 2012, the last day of Phase 3 of the merger control review period, while the EU and the US had approved the case unconditionally three months earlier.

7.10 It was stated in the announcement that Google has a share of 73.99% in the Chinese market of operating systems for smart mobile handsets and therefore was judged by MOFCOM as having a dominant market position in this market.

7.11 Therefore, the following conditions were imposed by MOFCOM:

- Google shall permit Android platform to be available on a free and open basis, which is consistent with its current business practice. This obligation does not affect the right of Google to keep the software related to Android platform closed or make it closed. The obligation also does not affect the right of Google to demand payment or other consideration for the provision of its products and services (in relation to Android platform).

- Google shall treat all the Original Equipment Manufacturers (OEMs) indiscriminately in respect of Android platform. This obligation only applies to OEMs that have agreed not to separate or enhance Android platform. The obligations shall not be applicable to the ways that Google will provide, license or distribute products or services related to Android platform.

- Google shall continue to observe the obligations of fair, reasonable and non-discrimination (FRAND) in respect of the patents of Motorola Mobility.

7.12 An independent trustee shall be retained by Google to supervise its performance of its obligations. For the first two conditions of paragraph 7.11 above, the obligation will be effective for 5 years from the date of MOFCOM's decision. If the market or competition conditions change, Google may apply to MOFCOM to amend or terminate these obligations. If Motorola Mobility is no longer controlled by Google, the obligations mentioned in (i) and (ii) shall be voided.

Acquisition of Life Technologies Corp. by Thermo Fisher Scientific Inc.

7.13 In its first clearance decision of 2014, MOFCOM granted a conditional clearance following a review period of only 6.5 months. Clearance was subject to global commitments to divest certain businesses as well as China-specific behavioural commitments to apply for a ten-year period with respect to certain products, including commitments to decrease prices, and supply relevant products to OEM customers at a certain discount or license certain technologies to interested third parties.

7.14 Though MOFCOM's decision came after the European Commission's conditional decision, it was notably issued two weeks before the US Federal Trade Commission's conditional decision. This case has demonstrated that MOFCOM will investigate proactively without waiting for other major jurisdictions when approving a global concentration which may raise competition concerns in China.

Acquisition of 100% of the Equity of Freescale Semiconductor, Inc. by NXP Semiconductors

7.15 In this clearance decision, MOFCOM granted a conditional clearance following a "fix-it-first" approach, in which the parties identify a purchaser for the divestment business and enter into a binding agreement already during MOFCOM's review procedure. This is the first time a fix-it-first approach was adopted in MOFCOM's conditional approval.

Merger between Dow Chemical and DuPont

7.16 In this case, MOFCOM adopted an “upfront buyer” approach in its conditional decision, where the parties are not allowed to complete the notified transaction before the purchaser for the divestment business is approved by MOFCOM. This means that the completion of the main transaction may be significantly delayed by the approval of the divestment transaction.

Prohibited transactions

7.17 Since the AML came into force in August 2008, MOFCOM has prohibited only two proposed transactions.

Coca-Cola’s proposed acquisition of Huiyuan Juice Group

7.18 On 18 March 2009, MOFCOM published its decision to block Coca-Cola’s proposed acquisition of a Chinese fruit juice producer, Huiyuan Juice Group.

7.19 The published decision indicates that MOFCOM blocked the acquisition because it would have the effect of “eliminating or restricting competition” and would “have negative influences on effective competition in the juice market in China”. In the decision, MOFCOM identified the following antitrust concerns:

- Leveraging of a dominant position: According to MOFCOM, the proposed transaction would give Coca-Cola the ability to leverage its dominant position in the carbonated soft drinks market into the juice market. In the press release statement (although this did not appear in the prohibition decision itself), MOFCOM referred to the potential for tying, bundling, or other exclusive practices that could lead to higher prices and reduced choice.

- Control over important brands: MOFCOM identified brand recognition as the key factor that impacts effective competition in the beverages industry. It saw Coca-Cola’s position in the juice market as being significantly increased through control over the juice brands ‘Minute Maid’ and ‘Huiyuan’. According to MOFCOM’s findings, the entry barriers for potential competitors would have been significantly increased.

- Potential squeeze of domestic medium and small-sized juice producers: MOFCOM also stated that the proposed transaction would have squeezed the ability of domestic medium and smallsized juice producers to compete and innovate effectively.

Establishment of a Network Center by Maersk, MSC and CMA CGM

7.20 On 17 June 2014, MOFCOM published its decision to block the establishment of a Network Center by Maersk, MSC and CMA CGM.

7.21 The published decision indicates that MOFCOM blocked the transaction because the establishment of the Network Center may lead to the formation of a compact association by Maersk, MSC and CMA CGM, and have effects of excluding or restricting competition on the container liner shipping market for the Asia-Europe route. In the decision, MOFCOM identified the following antitrust concerns:

- To enhance the market control power of the transaction parties: According to MOFCOM, capacity share is an important indicator reflecting the market power of the container liner shipping companies. As of January 1, 2014, the capacity shares of Maersk, MSC and CMA CGM on the Asia-Europe route were 20.6%, 15.2% and 10.9%, ranking the first, second and third respectively. The capacity share of any of the transaction parties is larger than that of other competitors. The total capacity share of the Transaction Parties amounted to 46.7%, and the market control power of the transaction parties after the integration has been significantly enhanced.

- To significantly increase the concentration of the relevant market: MOFCOM's review indicates that before the transaction, many competitors exist in the market including the transaction parties in the case. Herfindahl-Hirschman Index (HHI) of the international container liner shipping market for the Asia-Europe route was approximately 890. After the transaction, since the Transaction Parties formed a compact association which led to the reduction in the number of major competitors in the market, the HHI index increased to about 2,240, and the HHI variable was approximately 1,350. The container liner shipping services market for the AsiaEurope route changed from "relatively segmented" to "highly concentrated", and the market structure will change significantly.

- To further increase the entry barriers for the relevant market: International container liner shipping is a capital-intensive industry with the scaled economy effect; however, a necessary condition to maintain market competition is to have a certain number of market players with effective competitions. The transaction integrates the strength of the transaction parties and their operating networks, and eliminates effective competitions among the major competitors in the relevant market, which may further increase the entry barriers for the international container liner shipping market and lead to the difficulty in generating new competitive constraints against the transaction parties.

- Negative impact of the transaction on other relevant operators: Upon the completion of the transaction, the transaction parties, by integrating the routes and capacity resources, will further strengthen their market power, which may squeeze the development space for other competitors and place them in a disadvantageous position with regard to future competition. It is found through investigation that the shippers have comparatively weak bargaining power concerning the container shipping. The transaction parties may jeopardize the interests of the shippers by using their increased market power. The case will also strengthen the bargaining power of the transaction parties against the ports. To strive for the business opportunities from the transaction parties, ports may be forced to accept lower prices for port services, causing negative impacts on the development of ports.

7.22 From the decisions published by MOFCOM, it is clear that MOFCOM's preference is to clear transactions while attaching conditions which are sufficient to eliminate the anti-competitive effects in limited cases if necessary. It takes a cautious approach in prohibiting transactions.

7.23 Furthermore, as shown in the Google/Motorola case, as well as other cases we have dealt with, it is expected that MOFCOM will treat IP rights as a key factor in its competition analysis.

8. Statistics: merger control filings

8.1 According to the case materials issued by MOFCOM, MOFCOM has reviewed a total of 1,674 cases during the period between 1 August 2008 (the effective date of AML) and December 30, 2016.

8.2 From 1 May 2014, MOFCOM has published its penalty decisions on its website for both violations of commitments to MOFCOM and transactions failing to obtain merger control clearance prior to the closing of the transactions. Up till now, MOFCOM has published 19 decisions. A summary of these cases is set out below:

No.	Case	Date	Reasons	Fine
1	Acquisition of Hitachi's hard disk drive business by Western Digital Corp.	2 December 2014	Punishment imposed on Western Digital Corp for dissolving the business development department of Viviti/HGST, which is a violation of one of the restrictive conditions imposed by MOFCOM in its approving the acquisition	RMB300,000
2	Acquisition of Hitachi's hard disk drive business by Western Digital Corp.	2 December 2014	Punishment imposed on Western Digital Corp for its transferring the employees of HGST to Westin Digital, which is a violation of one of the restrictive conditions imposed by MOFCOM in its approving the acquisition	RMB300,000
3	Acquisition of 100% shares of RDA Microelectronics by Tsinghua Unigroup	2 December 2014	Failure to notify transactions	RMB300,000
4	Acquisition of 100% shares of Shenzhen Zhongnuo Communication Co., Ltd. by Fujian Electronics & Information (Group) Co., Ltd.	16 September 2015	Failure to notify the acquisition of 35% shares in step one of the transaction	RMB150,000
5	Acquisition of 65% shares of Suzhou Erye Pharmaceutical Co., Ltd. by Shanghai Fosun Pharma	16 September 2015	Failure to notify the acquisition of 35% shares in step one of the transaction	RMB200,000
6	Establishment of joint venture by CRRC Nanjing Puzhen Co., Ltd. and Bombardier Transportation Sweden Co., Ltd.	16 September 2015	Failure to notify transactions	RMB150,000 for each shareholder
7	Establishment of joint venture by BesTV New Media Co., Ltd and Microsoft	16 September 2015	Failure to notify transactions	RMB200,000 for each shareholder
8	Acquisition of 50% shares of Jilin Sichang Pharmaceutical Co., Ltd. by Dade Holding Co., Ltd.	21 April 2016	Failure to notify transactions	RMB150,000
9	Establishment of joint venture by New United Group and Bombardier Transportation Sweden Co., Ltd.	21 April 2016	Failure to notify transactions	RMB300,000 for New United Group and RMB400,000 for Bombardier Transportation Sweden Co., Ltd.

No.	Case	Date	Reasons	Fine
10	Establishment of joint venture by Beijing CNR Investment Co., Ltd. and Hitachi, Ltd	21 April 2016	Failure to notify transactions	RMB150,000 for each shareholder
11	Acquisition of 72.76% shares in Prestolite Electric (Beijing) Ltd. by Zhongshan Broad-Ocean Motor Co., Ltd.	31 August 2016	Failure to notify transactions	RMB 150,000 for Broad-Ocean
12	Establishment of joint venture by Continental AG and HUAYU Automotive Systems Company Limited	31 August 2016	Failure to notify transactions	RMB 200,000 for each shareholder
13	Acquisition of 100% shares in Toshiba Medical Systems Corporation by Canon Inc.	16 December 2016	Failure to notify the transaction before the first step of the transaction was implemented	RMB 300,000 for Canon
14	Establishment of joint venture by Cummins (China) Investment Co., Ltd. and Xiangyang Kanghao M&E Engineering Co. Ltd.	9 January 2017	Failure to notify transactions	RMB 150,000 for each shareholder
15	Acquisition of 100% shares in Tokuyama Malaysia Sdn. Bhd. by OCI Company Ltd.	21 April 2017	Failure to notify the transaction before its first step was implemented	RMB 150,000 for OCI
16	Acquisition of 100% shares in PanAust Ltd. by Guangdong Rising H.K. (holding) Limited	5 May 2017	Failure to notify transactions	RMB 150,000 for Rising H.K.
17	Acquisition of 100% shares in Ciming Health Checkup Management Group Co., Ltd. by Meinian Onehealth Healthcare (Group) Co., Ltd. and its affiliates	5 May 2017	Failure to notify transactions	RMB 300,000 for Meinian Onehealth
18	Establishment of joint venture by Wuhu Construction Investment Co., Ltd., Chery New Energy Automotive Technology Co., Ltd. and Yaskawa Electric Corporation	11 July 2017	Failure to notify transactions	RMB 150,000 for each shareholder
19	Establishment of joint venture by Svitzer Asia Pte. Ltd. and Binhai County Binhai Port Investment Development Co., Ltd.	11 July 2017	Failure to notify transactions	RMB 150,000 for each shareholder

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Yingling Wei

Ms. Wei has extensive experience in financial institutions, real estate, energy, telecommunications, retail, automobile, Hi-Tech and traditional manufacturing industries and represents various multinational companies, Chinese companies, investment banks, and private equity funds in their merger and acquisition transactions. She has provided advice on various aspects of such projects including design of transaction structure, due diligence investigation, drafting and negotiation of complicated legal documents in connection with such projects. She has also advised many domestic and international clients from different industries in corporate financing, commercial transactions and general corporate matters since she joined the firm in 1994. Ms. Wei also has extensive experience in the private fund formation area and has represented various fund managers or investors in such deals.

Since the effectiveness of the PRC Anti-Monopoly Law, Ms. Wei has represented various multinational companies and Chinese companies in their merger control filings, AML advice on cartel, RPM as well as AML compliance issues. Ms. Wei has also been invited by the PRC AML enforcement agencies for the formulation of a variety of regulations so as for Ms. Wei to be aware of broadly and deeply both the agencies' rules and practice.

In 2011, Ms. Wei has been honored with the awards of the "Beijing Excellent Lawyers Returning from Overseas Study". In 2012 and 2013, Ms. Wei was nominated as a China leading lawyer in the Mergers and Acquisitions by EuroMoney Legal Media Group. In 2015, Ms. Wei was highly recommended by Legal 500 in the fields of Anti-trust and anti-unfair competition. In 2015, Ms. Wei was elected as one of the top lawyers by Asialaw Profiles and IFLR 1000.

Ms. Wei worked at the Hong Kong office of Mallesons Stephen Jaques from 2002 to 2003 where she advised clients on investment projects in China as well as international transactions.

Ms. Wei is currently the head of the International Trade and Anti-trust & Competition Group of JunHe.

Practice Areas
Antitrust & Competition law
Mergers and Acquisitions
Private equity investment

Education
LL.B., China University of Political Science and Law, 1993.
LL.M., University of Michigan Law School, 2002

Admissions
Member of the All-China Bar Association, Beijing Bar Association and New York State Bar Association.

Languages
Fluent in English and Mandarin

Representative Cases - Competition and Antitrust Law

- Represented Broadcom in a SAIC investigation
- Represented Cypress Technology in a MOFCOM investigation
- Represented various multinational or Chinese companies in their ongoing NDRC investigation cases
- Represented Glodon Software Company Limited (as the third party) in China's first administrative monopoly lawsuit of Shenzhen Sware vs. the Education Department of Guangdong Province
- Advised tens of multinational companies in antitrust compliance issues
- Represented Wuthelam Holdings Limited in its merger control filing for its acquisition of Nippon Paint Co., Ltd.
- Represented NXP Semiconductors N.V. (Netherland) in its merger control filings for the establishment of its joint venture with Datang Telecom

- Represented Zhejiang Futong Scientific Technology in its merger control filings for acquisition of Shanghai Hitachi Cable
- Represented Ericsson in its merger control filing for its acquisition of certain assets of CDMA business and LTE assets of Nortel
- Represented Lenovo in its merger control filing for the establishment of a joint venture with EMC
- Represented Broadcom in the merger control filing for its merger with Avago Technologies
- Represented PAG Asia Capital in its merger control filing for its acquisition of Inner Mongolia Yili Animal Farming.
- Represented Nippon Paint in its merger control filing for its acquisition of Guangzhou Supe Chemical

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Yung Yung Janet Hui

Ms Hui is a partner at JunHe's Hong Kong office and is based in Beijing. She is an antitrust and M&A lawyer, specializing primarily in cross border antitrust and mergers and acquisitions, foreign investment and general corporate matters.

Ms Hui has more than 25 years experience in providing legal services to clients in different industries, particularly in areas such as telecommunications and media, hotels and real estate related legal practice.

Ms Hui has extensive experience in handling complicated merger control filings (for example, Thermo Fisher's acquisition of Life Technologies, and Shell's acquisition of the BG Group), and compliance work in China, including:

- Defending antitrust investigations on alleged anti-competitive practices in China;
- Applying for leniency for certain infringement actions under the Anti-Monopoly Law;
- Providing compliance advice and training to multinational companies in different industries including automobiles, semi-conductors, electrical appliances, luxurious goods, pharmaceuticals, medical devices, hotels and food and beverage packaging.

Practice Areas
Competition Law
M&A
Corporate

Education
Second Chinese Law Degree, Tsing Hua University, Beijing, PRC, 2004.
Master of Business Administration, University of Hull, United Kingdom, 1995.
Postgraduate Certificate of Laws, University of Hong Kong, 1988.
LL.B., University of Hong Kong, 1987.

Languages
Fluent in English, Mandarin, Cantonese and Taiwanese dialects.

Representative Cases – Competition and Antitrust

- Acted merger control filing for acquisition of the displays business of Philips by TPV Technology Limited
- Acted merger control filing for acquisition of Times Ltd. by Lotte Shopping Holding (Hong Kong) Co., Limited
- Acted merger control filing for acquisition of Yangtze Delta Manufacturing Co. Ltd., Hangzhou and Hangzhou Jisi
- Steel&Alumium Co. Lts by Siemens
- Acted merger control filing for acquisition of ADC Telecommunications, Inc. by Tyco Electronics Ltd.
- Acted merger control filing for acquisition of Nu Horizons Electronics Corp. by Arrow Electronics Inc.
- Acted merger control filing for acquisition of 50% shares in LG-Dow Polycarbonate by LG Chemical
- Acted merger control filing for establishment of joint venture by BASF and Jining Hock Mining & Engineering Equipment Co., Ltd
- Acted merger control filing for establishment of joint venture by BASF and INEOS
- Acted merger control filing for acquisition of 50% share in JM Energy Co., Limited by Mitsui & Co. Ltd.
- Acted merger control filing for establishment of joint venture by Samsung and Sumitomo
- Acted merger control filing for establishment of joint venture by Siemens China and RXPE
- Acted merger control filing for acquisition of Solutia, Inc. by Eastman Chemical Company
- Acted merger control filing for acquisition of Synthes Inc. by Johnson & Johnson
- Acted merger control filing for establishment of joint venture by Siemens China and Shanghai Electricity Group

- Acted merger control filing for establishment of joint venture by Anqing Zhongchuan.and Caterpillar
- Acted merger control filing for acquisition of Oerlikon Solar by Tokyo Electron Limited
- Acted merger control filing for acquisition by Caterpillar (China) Investment Co., Ltd. of 34% of the Equity Interest of Suzhou Liaoan Machinery Co., Ltd.
- Acted merger control filing for acquisition of Invensys plc by Schneider Electric
- Acted merger control filing for acquisition by Carlsberg Brewery Hong Kong Limited of equity interest of Chongqing Beer (Group) Asset Management Co., Ltd.
- Acted merger control filing for acquisition of Covedien by Metronic
- Represented several multinational companies handling of antitrust investigations/review in China.
- Represented many multinational companies in-house compliance antitrust training in China.

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Jiangang Wang

Since Mr. Wang started his legal career in 1999 he has represented clients in a broad range of industries, including infrastructure, energy, real estate, manufacturing, media, internet, etc. and he has developed an extensive practice with several Fortune 500 corporations and top players in relevant industries, advising clients on a variety of regulatory and transactional matters with respect to due diligence, project structuring, financing and other general corporate issues. In the past years Mr. Wang has also represented several Chinese state-owned enterprise and private enterprises in their overseas projects.

In particular, Mr. Wang has substantial experience in infrastructure investment, including water supply and waste water treatment; sea water desalination, municipal solid waste incineration and treatment. Mr. Wang also has extensive experience in representing both purchasers and sellers in complex M&A transactions in such sectors.

In recently years Mr. Wang also Involved in the antitrust area. He has represented multinational corporations in PRC merger-control notifications, and also provided the clients with counseling on antitrust compliance.

In addition to enterprise clients, Mr. Wang has worked with government agencies in various cities including Beijing, Qingdao, Jinan, Lanzhou. In the past a few years, Mr. Wang had been acting as lead lawyer of the team serving Beijing Transportation Commission, Beijing Water Bureau and Beijing Municipal Commission of City Administration and Environment.

Before Joining JunHe, Mr. Wang worked as a partner at Junyi Law Office. In 2011, Mr. Wang worked in Fenwick & West LLP in California as a visiting lawyer.

Mr. Wang has been recognized by the Asia Law & Practice as a leading practitioner in China in the field of Project Finance and Real Estate in 2016.

Practice Areas
Corporate
M&A
Antitrust

Education
LL.B., Peking University Law School
B.A. in Economics, Peking University CCER
LL.M, University of California, Berkeley

Admissions
Mr. Wang is a member of the All-China Lawyers Association and the Beijing Lawyers Association.

Languages
Fluent in Mandarin Chinese (native) and English.

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Mingfang Gong

Ms. Gong joined JunHe Beijing Office in May 2010. Prior to joining JunHe, Ms. Gong worked for the Ministry of Commerce (Treaty and Law Dept. and Anti-monopoly Bureau) from August 2007 to April 2010. Ms. Gong worked at Slaughter and May, London Office as a secondee from JunHe for six months in 2013.

Ms. Gong has extensive experience in merger control filings and was deeply involved in dozens of high-profile cases, including Marriott's acquisition of Starwood, Dell's acquisition of EMC, Abbott's acquisition of St. Jude Medical, Thermo Fisher's acquisition of Life Technologies, merger between Nippon Steel and Sumitomo Metal, merger between Applied Materials and Tokyo Electron, joint venture between INEOS and BASF, etc.

In addition to the rich experience in applying for clearances for complicated merger control filings, Ms. Gong is also expert at handling filing complaints against transactions under merger control review, and dealing with MOFCOM's inquiry and investigation over un-notified transactions.

Ms. Gong also provides compliance advice and training to multinational companies in different industries including paper manufacturing, pharmaceuticals, medical devices, and car manufacturing, as well as advice in defending antitrust investigations on alleged anti-competitive practices and applying for leniency for certain infringement actions in China.

Practice Areas
Antitrust

Education
2002-2006, University of International Business and Economics, LL.B.

Professional Qualification
Member of the All-China Bar Association

Languages
Mandarin, English

Representative Transactions in Merger Control Filings

- Represented Abbott Laboratories in its acquisition of St. Jude Medical
- Represented BASF in its acquisition of Chemetall Surface Treatment Business
- Represented Dell Inc. in its acquisition of EMC Corp.
- Represented FMC Corporation in its acquisition of DuPont Divestment Business
- Represented Johnson & Johnson in its acquisition of Synthes Inc.
- Represented Marriott International in its acquisition of Starwood Hotels & Resorts
- Represented Newheight in Walmart's acquisition of shares of Newheight
- Represented Nippon Steel Corporation in its merger with Sumitomo Metals Inc.
- Represented Rolls-Royce Holdings Plc. in its acquisition of Rolls-Royce Power Systems
- Represented Thermo Fisher Scientific in its acquisition of Life Technologies
- Represented Tokyo Electron Limited in its acquisition of Oerlikon Solar
- Represented Tokyo Electron Limited in its merger with Applied Materials Inc.
- Represented Toyota Tsusho Corporation in its acquisition of shares in Scholz AG
- Represented Wuthelam Holdings Limited in its acquisition of shares in Nippon Paint Co., Ltd
- Represented both parties in the joint venture between Samsung LED and Sumitomo Chemical
- Represented both parties in the joint venture between INEOS Holding Inc. and BASF SE
- Represented both parties in the joint venture between Siemens and Shanghai Electricity Group
- Represented both parties in the joint venture between GlaxoSmithKline and Novartis

Korea: Kim & Chang

Overview of the Korean merger control filing regime

1. Introduction

1.1 Mergers and acquisitions[1] are regulated by the Korea Fair Trade Commission (KFTC) pursuant to the Monopoly Regulation and Fair Trade Act (MRFTA), the Enforcement Decree of the MRFTA, the Merger and Acquisition Review Guidelines (Merger Guidelines),[2] and the Merger Acquisition Reporting Guidelines.[3] Article 7(1) of the MRFTA prohibits anyone, whether directly or indirectly or through a person with a special interest,[4] from substantially restricting competition in a particular business area; in line with this, Article 12 of the MRFTA sets forth the requirements and procedures for the business combination report filed with the KFTC.

1.2 As of 30 June 2015 the latest amendments to the Merger and Acquisition Review Guidelines (New Guidelines) took effect. The New Guidelines aimed to clarify that mergers previously reviewed and assessed by the KFTC to have no anti-competitive effects through a voluntary pre-filing review process in accordance with Article 12(9) of the MRFTA, would be subject to a simplified review process during the formal review of the merger. Under a simplified review process, the KFTC's review period is, in principle, 15 calendar days, and the scope of the review concerns only the facts contained in the notification (and not an assessment of the competitive effects of the merger), since it is presumed that there is no anti-competitive effect.[5]

2. What types of transactions are caught?

Types of transactions required to file a business combination report

2.1 Only certain business combinations that meet specific turnover and/or asset thresholds must be reported to the KFTC. More specifically, for the following types of transactions, a business combination report is required to be filed with the KFTC if the transaction satisfies the size-of-the parties thresholds set forth below. For an off-shore business combination, there is an additional third criterion regarding the parties' Korean turnover.

Acquisition of all or an important part of a business or assets

- Acquisition of shares: 20% (15% if listed in Korea) or more of the voting shares, or acquisition of additional shares by which the acquirer becomes the largest shareholder;
- Merger with another company;

[1] Mergers and acquisitions are referred to as "business combinations" in the MRFTA.

[2] KFTC, Merger and Acquisition Review Guidelines (KFTC Notification No. 2015-3, June. 30, 2015).

[3] KFTC, Merger and Acquisition Reporting Guidelines (KFTC Notification No. 2012-59, Oct. 4, 2012).

[4] Under Article 11 of the Enforcement Decree, "specially-related persons" or "persons with a special interest" refer to persons (including corporations) that (i) control the concerned company, (ii) are related, and (iii) engage in a business combination for the joint purpose of controlling management.

[5] Mergers qualifying for a simplified filing are subject to a shortened review period as they are presumed to raise no anti-competitive effects.

- Interlocking directorship (only for a "large-scaled company", i.e. a company that has total assets or sales of KRW2 trillion (approximately US$1.7 billion) or more);[6]

- Participation in the creation of a joint venture as the largest shareholder; and

- Acquisition of a business by transfer or lease of all or a substantial part of that business, its management or its fixed operating assets.

Size-of-the parties test

2.2 This test requires that one party has total assets or annual sales of KRW200 billion (approximately US$172 million) or more and the other has total assets or annual sales of KRW20 billion (approximately US$17 million) or more. In this context, the assets or sales of the companies remaining as affiliates of the relevant party both before and after the transaction (in the case of acquisition of a business, the entity being transferred only) must be included.

Local turnover test for offshore transactions

2.3 In foreign-to-foreign mergers, a business combination report must be filed if the total sales of each of the parties in or into Korea are KRW 20 billion (approximately US$17 million) or more (as determined by the total sales of all affiliated companies in Korea, not necessarily limited to the company at issue).

2.4 It should also be noted that generally a pre-closing filing is required if: (i) at least one party to the transaction is a large-scale company, i.e. a company with total assets or sales of KRW2 trillion (approximately US$1.7 billion) or more; and (ii) the other party has total assets or sales of KRW20 billion (approximately US$17 million) or more.[7] In all other cases, a post-closing filing requirement will be triggered. The deadline for a post-closing filing is 30 calendar days from the closing date.

Definition of control under the Merger Guidelines

2.5 For the purposes of the Merger Guidelines, "control" is recognised when: (i) one entity owns at least 30% of the outstanding equity, and is the largest shareholder, of another entity; or (ii) one entity has "de facto" control over another entity. An entity has de facto control over another entity where it exercises a "controlling influence" over the management of that other entity. An entity will be deemed to exercise such a controlling influence over another entity where it:[8]

- has the right to appoint the Representative Director (i.e. the Chief Executive Officer) or 50% or more of the board of directors of that other entity;

- has the right to make important decisions in relation to that other entity, such as institutional changes or investment decisions;

6 Excluding interlocking directorship appointments between affiliates.

7 It is important to note that there are certain exceptions available to the pre-closing filing obligation, including in particular, tender offer transactions, which are always subject to a post-closing filing obligation.

8 Enforcement Decree Article 3(2).

- has in the past reshuffled certain personnel of that other entity;[9] or
- acts as a single economic entity with that other entity, e.g. because their trading, funds, assets, goods or services, guarantor or guarantee relationship falls outside the scope of ordinary business dealings.

Treatment of joint ventures

2.6 The formation of a joint venture company may be subject to regulation under merger filing review for "participation as the largest shareholder in the joint establishment of a new company."

2.7 If the joint venture is not a newly-established company, but instead is being formed through an acquisition of shares, it may be notifiable as a form of share acquisition if the acquiring party is acquiring 20% or more of the voting shares or becomes the largest shareholder as a result of the acquisition.

2.8 On the other hand, the establishment of a joint venture can also be treated as a collusive activity. Paragraph 7 of Article 19(1) of the MRFTA provides that jointly performing, managing or establishing a company jointly to perform or manage a material portion of the operations of the parties may also constitute a type of collusion. While the MRFTA fails to provide distinct guidelines as to whether the formation of a given joint venture will be treated as a business combination or collusive behaviour, it will be determined by the purpose of the parties, and the nature and significance of the operations performed by the joint venture.

2.9 It should also be noted that MRFTA does not recognise the distinction between full-function joint ventures and non-full-function joint ventures for the purposes of merger notification or assessment of collusion.

3. Jurisdictional thresholds

3.1 With respect to the jurisdictional thresholds, only certain business combinations that meet specific turnover and/or asset thresholds must be reported to the KFTC. As previously noted above, except in cases of filings triggered by an interlocking directorship (where different filing thresholds and rules apply), a filing obligation will be triggered only if the following thresholds are met: (i) either the acquiring or acquired party has worldwide assets or annual turnover of KRW200 billion (approximately US$172 million) or more; (ii) the other party has worldwide assets or annual turnover of KRW20 billion (approximately US$17 million) or more; and (iii) in the case of an offshore transaction (i.e. where the target is a non-Korean entity), each of the acquiring and acquired parties has turnover in or into Korea of KRW20 billion (approximately US$17 million) or more.

3.2 Moreover, in order for a transaction to be notifiable in Korea, it must have some material connection with Korea, i.e. a Korean nexus. In the case of an off-shore transaction (i.e. where the acquired party is a non-Korean entity), both the acquirer and the acquired party must achieve a minimum level of turnover in or into Korea (i.e., turnover of KRW20 billion or more).

3.3 There are no special merger notification rules for any specific industry under the MRFTA, although for mergers involving entities in the telecommunication and financial sector, a regulatory filing made to another government agency such as the Ministry of Information and Communication or the Financial Supervisory Service of Korea, made be submitted in lieu of a filing to the KFTC.

[9] Enforcement Decree Article 3(2)(c). An entity's reshuffling of the personnel of another entity will demonstrate control where it: (i) controls one or more interlocking directors of that other entity; (ii) appoints the officers or employees of an entity (E1) to another entity and subsequently reappoints them to E1.

4. Procedure

Pre-notification discussions

4.1 There is no mandatory pre-notification process provided under the MRFTA, nor does the KFTC officially require or recommend pre-notification discussions. However, voluntary procedures, both formal and informal, are open to the parties to discuss merger filings with the KFTC before the official notification. In practice, since the KFTC tends to be relatively lenient in accepting notifications, even if such filings do not contain full details pursuant to the KFTC's Merger Guidelines (in which case, the KFTC will then request further information during the review period in the form of requests for information, which toll the review period). As such, in most cases, there will be less of a need for the parties to initiate pre-notification consultation.

4.2 The MRFTA does, however, provide a formal pre-notification review process: even before the filing obligation arises, the party may voluntarily seek pre-clearance by petitioning for a preliminary review of whether the contemplated transaction gives rise to any anti-competitive effect. This is available for transactions subject to both pre- and post-closing filings. The KFTC is required to notify its decision within 30 calendar days, which is renewable for 90 calendar days at the sole determination of the KFTC.[10] It should be noted that the submission of the voluntary application for pre-clearance does not exempt the party from the obligation of an official notification, and an official notification must be submitted when the filing requirements are met. However, insofar as there has been no material change of circumstances between the pre-clearance and the time of the official filing, the official filing consists of re-submitting the information previously provided on the appropriate form and attaching the executed version of the transaction documents, and the official filing will be subject to an expedited, simplified review, pursuant to the recent amendment of the Merger Guidelines.

4.3 Outside of the pre-clearance scheme under the MRFTA, there is vast room for informal consultations with the KFTC on the contemplated transaction before the filing obligation arises in practice. This type of informal pre-notification contact may cover technical issues (such as whether filing requirements are met), the amount and range of information required for official filings as well as more substantial matters, including preliminary findings following competitive analysis.

4.4 In general, whether parties should initiate formal pre-notification discussions with the KFTC will depend on the complexity of the competitive analysis and the anticipated timeline of the transaction. Applicants subject to the notification obligation may choose to adopt a formal voluntary pre-clearance procedure when the contemplated transaction is expected to attract the KFTC's regulatory attention due to potential anticompetitive concerns. It provides the applicants with an opportunity and the time to identify the relevant competitive issues and to take necessary measures in advance. There have been several transactions involving anti-competitive concerns in which the applicants utilised the procedure; some of these ultimately resulted in prohibition or corrective orders (remedies) issued by the KFTC. This procedure will be especially meaningful in transactions that trigger a post-closing filing obligation and involve potential anti-competitive effects because it could minimise the risk and uncertainty of having to deal with the KFTC's regulatory scrutiny and potential remedies after the transaction has closed.

4.5 In other cases, initiation of the pre-clearance procedure can be a useful method of expediting the review period for the official filing.[11] Applicants with tight closing timelines may therefore find it beneficial, from a practical perspective, to make pre-clearance filings. Due to these advantages, according to the KFTC, there appears to have been a recent increase in the number of pre-clearance applications.

[10] This review period is identical to the review period for transactions that trigger a formal filing obligation.

[11] There is no formal mechanism under the MRFTA to speed up the review process, even though in practice the KFTC may choose to do so at its discretion.

Timing

4.6 Under the MRFTA, in cases of a "General Review" by the KFTC, there is an initial waiting period of 30 calendar days from the date of the official filing; this waiting period can be extended at the KFTC's discretion by up to 90 calendar days, resulting in a total waiting period of 120 calendar days. This should not be confused with a Phase I / Phase II distinction as in other jurisdictions such as the EU. There is no standard to be met for the KFTC to extend the waiting period beyond the 30 initial calendar day review period, although a common reason for such extension is the complexity of the case.

4.7 Certain categories of transactions fall within the scope of the so-called "Simplified Review" procedure; such transactions[12] are presumed to give rise to no anti-competitive effect. Simplified Reviews involve an initial waiting period of 15 calendar days from submission of the merger notification, with no provision for a second stage review. Recently, the KFTC expanded the types of transactions that may qualify for a Simplified Review to include certain types of conglomerate mergers.

4.8 The KFTC may make a formal request to the parties for additional information or materials if it finds the information provided in the filing to be incomplete or further data is needed to reach a final decision. Its review period will be suspended from the date of that formal request and will not resume until the parties have complied fully with the request.

4.9 In general, most cases that do not raise any anticompetitive concerns are cleared within 30 days (excluding the suspended period due to KFTC's request for information or materials). The KFTC declared that it had cleared 669 cases within 2015.

Commitments

4.10 Remedies are normally recommended or issued by the KFTC. During the investigation and review period, the parties will discuss the competitive analysis and negotiate anticipated remedies with the KFTC. In post- closing filing cases, the discussion will centre on the scope and nature of possible remedies; in pre-closing cases or when a pre-clearance application is made, it may even include modification of the transaction. Pursuant to the KFTC's Guidelines for Remedies, there is a stated preference for structural remedies.

4.11 After the discussion between the parties and the KFTC, there are two ways that the KFTC can apply remedies against anti-competitive mergers. First, it may decide on a corrective measure and recommend that the business entity comply with it. An entity receiving such a recommendation must notify the KFTC within 10 days of receipt of whether it chooses to accept the recommendation. If an entity accepts the recommendation, a corrective measure will be deemed to have been issued under the MRFTA.

4.12 Second, the KFTC may issue a formal corrective order. The MRFTA includes the following types of corrective orders as a remedy: (i) cessation of the practice concerned; (ii) disposal of all or part of the stocks; (iii) resignation of officers; (iv) transfer of business; (v) cancellation of debt guarantees; (vi) publication of the fact that the entity is ordered to take corrective measures; (vii) restrictions on business methods or business scope, which will prevent the negative effects of restricted competition pursuant to the proposed merger; and (viii) other necessary corrective measures to remove the anticompetitive concerns raised by a proposed transaction.

[12] These include transactions between affiliates of a single business group.

Consent decree system

4.13 The KFTC introduced a consent decree system, pursuant to which parties may formally offer commitments to address potential anticompetitive concerns. The system was introduced in November 2011, and applied not only to merger cases but to general competition cases (except cartel cases).

4.14 The consent decree system was established for competition cases where an investigation by the KFTC has been initiated but the violation is deemed to be relatively minor or where the underlying behaviour is not a clear violation of the law.[13] Respondents (including respondents in merger filing cases) may proactively propose a corrective measure to the KFTC. The KFTC will, following review of the proposed measure in consultation with other interested parties, decide whether to close the case without making a determination of liability. Similar systems are already in place in other jurisdictions, such as the US and the EU.

4.15 However, unlike similar systems in other jurisdictions, the consent decree system will operate under strict conditions and within a limited scope. Notably, the consent decree system may only be used for relatively minor violations of the law, or where there is no clear violation of the law, and the KFTC must first consult with the Prosecutor General in writing and include a public consultation period (of between 30 and 60 days) before the consent decree is issued. Finally, the consent decree does not mean that liability has been found against the relevant party(ies), and the consent decree cannot be used as evidence of liability in a legal proceeding.

4.16 The KFTC utilized the consent decree system to resolve the merger filing submitted by Microsoft for its acquisition of Nokia's mobile device business in 2015. This was the first time that the consent decree system was utilized in a merger filing matter after review had been pending for two years.

5. Recent developments

5.1 In February 2016 the KFTC's newly-appointed Chairperson, Mr. Jae-Chan Jeong, reported the KFTC's 2016 business plan under the title, "Establishment of Fair and Active Market".

5.2 Among others, the focus of the plan with respect to merger control can be seen as a continuation of the KFTC's 2015 enforcement plan to encourage voluntary preliminary review applications while strengthening the review of major global mergers that have a significant effect on the Korean market, particularly in sectors related to intermediate goods in IT and electronics industries.

5.3 This plan also includes sustained emphasis on heightened review and international cooperation with other competition agencies in review global mergers.

5.4 Interestingly, the KFTC's plan discussed large-scale mergers not only in the IT and electronics industries, but also in the chemicals industry. Of note, the plan discussed the significant structural impact of these large-scale mergers on their respective industries, and added that the KFTC may need to proactively address any issues by undertaking preliminary review even before any merger filing is submitted. This statement is indication that the KFTC plans to engage in monitoring of global merger activity, and may also indicate a more expansive review by the KFTC.

5.5 The KFTC also announced on 4 April 2016 proposed additional amendments to the Merger & Acquisition Reporting Guidelines. The proposed amendment seeks to exempt or narrow the scope of certain information to be included in the merger notification, which is not deemed to be critical to the KFTC's assessment, or is publicly available (such as affiliates/shareholders' status for Korean-listed companies).

[13] The consent decree system is not applicable to cartel cases or cases where the degree of the violation is objectively clear and severe (and the KFTC can refer the relevant party(ies) to the prosecutor's office).

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Member of Public Information Review Board under Office of Prime
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Admissions

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New York, 2001

Publications

- 2011 Antitrust Year in Review: "Korea" Part (Co-author, ABA, 2012) Competition Laws outside the United States (Korea Part) (American Bar Association, 2011)
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Publications

- Chambers Legal Practice Guides: Corporate M&A 2015 (2nd Edition): “Korea” Part (Co-author, Chambers & Partners, 2015)
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Languages

English and Korean

European Union: Slaughter and May

Overview of the European merger control rules

1. Introduction

1.1 The EU Merger Regulation provides a mechanism for the control of mergers and acquisitions at the European level. The original Merger Regulation was adopted in 1989.[1] It was revised and replaced by the current version of the Merger Regulation which came into force on 1 May 2004.[2]

When does the Merger Regulation apply?

1.2 The Merger Regulation applies to any "concentration" that has, or is deemed to have, an "EU dimension":

- "**concentration**": This is a concept that is widely defined to cover mergers, acquisitions of control and the creation of full-function joint ventures. The concept is considered further at *Chapter 2* below;
- "**EU dimension**": A transaction has an EU dimension where certain turnover thresholds are met, as described at *Chapter 3* below.

What happens if the Merger Regulation applies?

1.3 **Jurisdiction**: The Merger Regulation lays down the conditions under which the European Commission or the National Competition Authorities (NCAs) have jurisdiction over concentrations. Generally, concentrations with an EU dimension fall to be investigated by the Commission, whereas those without an EU dimension fall to be investigated by the NCAs in accordance with their domestic merger control rules; summaries of those national rules in the 28 EU Member States (plus the three EFTA states party to the EEA Agreement[3] – Iceland, Liechtenstein and Norway) are included at *Annex 1*. As an exception to this general rule, there are procedures under which parties can engage in pre-notification contacts with the authorities with a view to reallocating jurisdiction between the Commission and the NCAs, as considered at *Chapter 4* below. Procedures also exist for the post-notification reallocation of cases between the Commission and the NCAs, and in certain limited circumstances Member States may still apply their national laws to concentrations with an EU dimension (as considered at *Chapter 6* below).

1.4 **Mandatory notification and waiting period**: Concentrations falling under the Merger Regulation must in principle be notified to the Commission and generally cannot be implemented unless and until the Commission declares them compatible with the internal market. The Implementing Regulation includes the forms to be completed when notifying concentrations under the Merger Regulation.[4] The Commission has also issued a number of Notices (the current versions of which are referred to in this publication) explaining how it applies various aspects of the Merger Regulation regime.

[1] Council Reg. (EEC) 4064/89 (OJ 1989 L395/1, 30.12.1989), as amended by Council Reg. (EC) 1310/97 (OJ 1997 L180/1, 9.7.1997; corrigendum OJ 1998 L40/17, 13.2.1998).

[2] Council Reg. (EC) 139/2004 (OJ 2004 L24/1, 29.1.2004).

[3] Agreement on the European Economic Area (OJ 1999 L1/3, 3.1.1999), as amended.

[4] Commission Reg. (EC) 802/2004 (OJ 2004 L133/1, 30.4.2004), as amended by Commission Reg. (EC) 1033/2008 (OJ 2008 L279/3, 22.10.2008) and Commission Implementing Reg. (EU) 1269/2013 (OJ 2013 L336/1, 14.12.2013).

1.5 **Commission investigations**: Concentrations notified under the Merger Regulation are investigated by the Commission to determine whether or not they are compatible with the internal market (see *Chapter 7* below). Once a concentration is formally notified to the Commission, in most cases the investigation is completed within a "Phase I" period of 25 working days. If the Commission opens a further in-depth "Phase II investigation", this will typically take a further six months or so. A chart illustrating the various timetables for the handling of cases under the Merger Regulation is included in *Chapter 4*. All significant Merger Regulation decisions are published (subject to removal of business secrets), providing useful insights into how the Commission has defined markets in previous cases.

1.6 Since the implementation of the first Merger Regulation in 1990, the Commission has received over 6,000 notifications. In recent years it has handled around 300 notifications a year. This is down from a record high of 402 in 2007. For statistics on cases notified under the Merger Regulation, see *Annex 2*.

2. Concentrations

2.1 The concept of "concentration" includes:

- the **merger** of two or more previously independent undertakings;
- the **acquisition of direct or indirect control** (whether by purchase of securities or assets, by contract or otherwise) of the whole or parts of one or more other undertakings; or
- the establishment of a joint venture where this involves the acquisition of **joint control** of a **full-function joint venture undertaking**.

When is there "control"?

2.2 **"Control"** is widely defined and is constituted by rights, contracts or any other means that, either separately or in combination, confer the possibility of exercising **decisive influence** over an undertaking.[5] Decisive influence arises where a party acquires the ability to determine an undertaking's commercial strategy.

2.3 There is no defined shareholding level at which decisive influence arises. Depending on the circumstances (including the size of other shareholdings and the existence of veto rights and other powers granted to shareholders), the acquisition of a minority shareholding in another undertaking may confer the possibility of exercising decisive influence, in particular if the minority shareholder acquires the ability to block strategic commercial decisions (e.g. the adoption of annual budgets or business plans) or the appointment of key management.[6]

2.4 A transaction gives rise to "**sole control**" where it results in a single undertaking having the possibility of exercising decisive influence over the whole or part of another undertaking. Where two or more undertakings together acquire the ability to exercise decisive influence over another undertaking, there is said to be **"joint control"**.

[5] For further guidance, see the Commission's 2007 Consolidated Jurisdictional Notice (OJ 2008 C95/1, 16.4.2008).

[6] In July 2014 the Commission published a White Paper entitled *Towards more effective EU merger control*, outlining proposals to amend the EU Merger Regulation to bring minority shareholdings that fall short of control within its scope. In March 2015 it published the results of a public consultation, but currently no legislative changes have been introduced and it is not currently a priority for the Commission.

Full-function joint ventures

2.5 The establishment of a JV undertaking will give rise to a concentration where the following conditions are met:

- **joint control**: Two or more parents must together exercise decisive influence over the JV undertaking, e.g. through rights of veto over strategic matters such as the adoption of annual budgets or the appointment of senior management;

- **autonomy**: The JV must have sufficient personnel, facilities and resources to enable it to perform the functions normally carried out by other undertakings operating on the same market. If the JV is required to take most of its raw material requirements from its parents or to sell its production mainly to its parents, this will generally indicate that the JV is not sufficiently autonomous; and

- **durability**: The JV must be established on a "lasting basis".

2.6 Joint ventures that do not fall within the Merger Regulation – because they are not "full-function" in this sense (or because they lack an "EU dimension") – may be subject to review by the NCAs under national merger control rules. In some cases, they may also be subject to investigation (by the Commission or the NCAs) under Article 101 and/or 102 TFEU.[7]

Changes in the nature of control

2.7 A concentration will also arise where there is a durable change in the quality or nature of control of an undertaking. Thus, there will be a concentration where a party with joint control of an undertaking moves to a position of sole control.

2.8 Similarly, there may be a concentration as a result of changes in the number of shareholders that jointly control a JV undertaking following the withdrawal or entry of one or more controlling shareholders.

3. EU dimension

3.1 The Merger Regulation applies to concentrations with an "EU dimension". Whether a transaction has an EU dimension depends on whether it satisfies certain turnover thresholds. These thresholds are purely **jurisdictional** in nature. They are applied without regard to substantive competition issues, to the nationality of the parties, to the country where the transaction takes place or to the law applicable to the transaction. As a result, the Merger Regulation can apply to transactions with little or no EU connection.

Turnover thresholds

3.2 There are two **alternative** sets of thresholds (as illustrated by the flowchart on page 10):

- **Original thresholds**: The original thresholds (which date back to 1989) remain in force. They apply the concept of "one-stop shopping" at the European level to any deal that meets the following tests:

[7] Paragraph 91 of the Consolidated Jurisdictional Notice also states: "... a transaction involving several undertakings acquiring joint control of another undertaking or parts of another undertaking... from third parties will constitute a concentration... without it being necessary to consider the full-functionality criterion."

- **Worldwide turnover test**: The combined worldwide turnover of all the undertakings concerned is more than **€5,000 million**;

- **EU-wide turnover test**: Each of at least two of the undertakings concerned has EU-wide turnover of more than **€250 million**; and

- **Two-thirds rule**: There is no "EU dimension" if each of the undertakings concerned achieved more than **two-thirds** of its EU-wide turnover in one and the same Member State.

• **Alternative thresholds**: When the operation of the original Merger Regulation was reviewed in the mid-1990s, there was broad support for the "one-stop shop" principle to be extended to deals that would otherwise be subject to merger control by three or more NCAs in the EU. There was considerable debate about how this might be achieved. Eventually some fairly complex changes were introduced in 1998 and these remain in place under the current Merger Regulation. Deals that do not meet the original thresholds nevertheless have an "EU dimension" if they meet all the following tests:

- **Lower worldwide turnover test**: The combined worldwide turnover of all the undertakings concerned is more than **€2,500 million**;

- **Lower EU-wide turnover test**: Each of at least two of the undertakings concerned has EU-wide turnover of more than **€100 million**;

- **Additional three Member States test**: In each of at least **three EU Member States**:

  > the combined national turnover of all the undertakings concerned is more than **€100 million**; and

  > each of at least two of the undertakings concerned has national turnover of more than **€25 million**; and

- **Two-thirds rule**: There is no "EU dimension" if each of the undertakings concerned achieved more than **two-thirds** of its EU-wide turnover in one and the same Member State.

Undertakings concerned

3.3 In general, the "undertakings concerned" for these purposes are the undertaking(s) acquiring sole (or joint) control and the undertaking over which control is being acquired.[8] For the purpose of calculating the turnover of the undertaking(s) acquiring control, the turnover relating to all entities belonging to the group must be considered. This is wider than the concept of legal control, and may result in the inclusion of companies that would not in other contexts be considered as part of the group.

3.4 Where an acquisition is made by a **joint venture**, the Commission looks at the economic reality of the operation in determining whether or not to lift the corporate veil. If the JV is simply an acquisition vehicle for its parent companies, the Commission looks through it and treats each parent as an undertaking concerned. On the other hand, where the acquisition is carried out by a pre-existing full-function JV undertaking, the Commission usually treats the JV as a single acquiring undertaking.

[8] Accordingly, for the purpose of calculating the vendor's turnover, only the turnover attributable to the parts that are the subject of the transaction is to be taken into account.

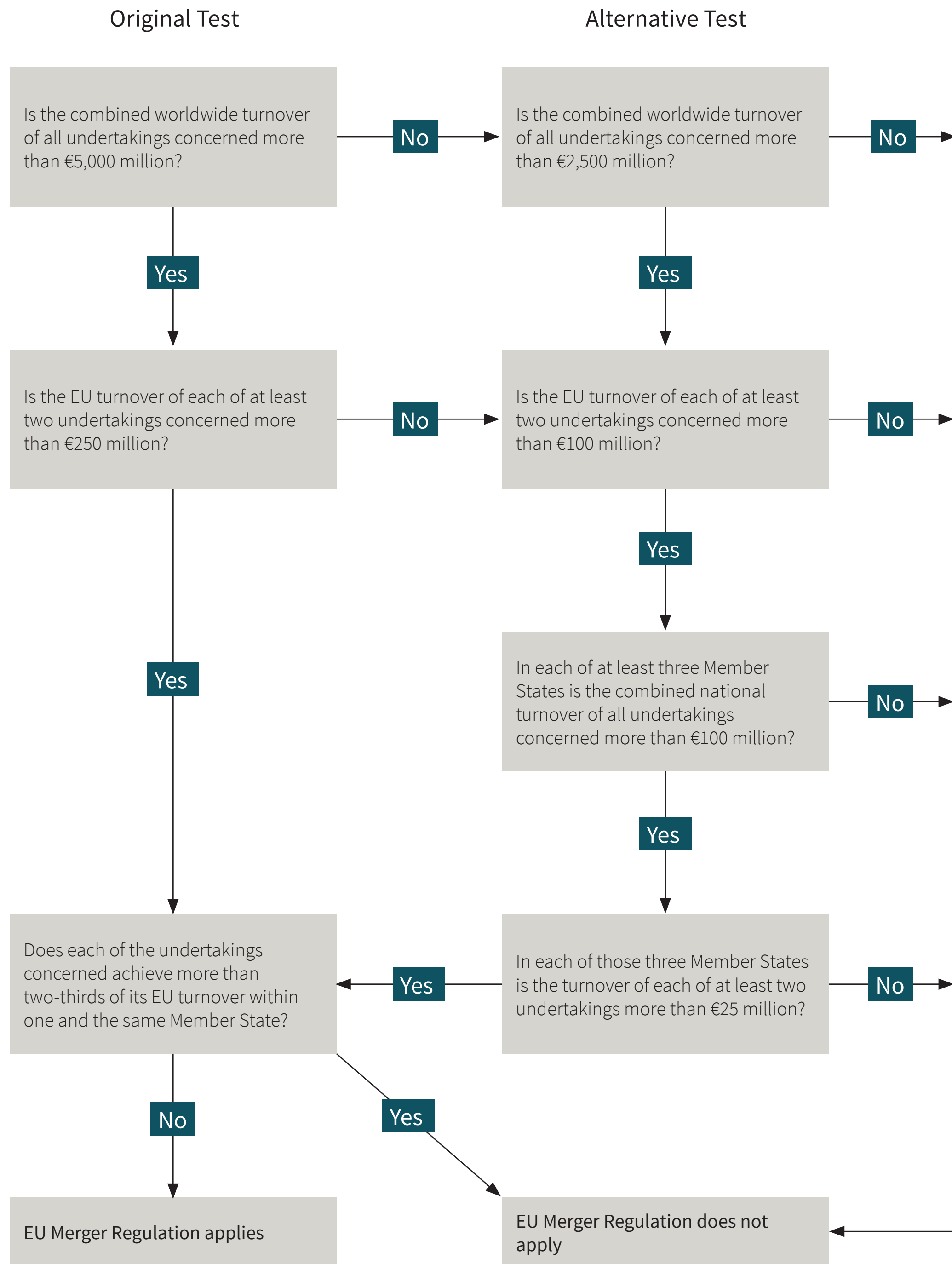
Calculation of turnover

3.5 The turnover to be considered is the amount derived from the sale of products and the provision of services. Turnover must be allocated according to where the goods/services are delivered; this is generally the geographic location of the customer. It must correspond to the ordinary activities of each undertaking concerned in its previous audited financial year, adjusted to account for acquisitions and divestments that occurred after the date of the audited accounts. The turnover considered is "net" turnover, after sales rebates, value added tax and other taxes directly related to turnover; intra-group turnover should be disregarded.[9]

3.6 The whole turnover of all companies under the sole control of an undertaking concerned must be aggregated. For JV undertakings jointly controlled by an undertaking concerned and third parties, the JV's turnover is attributed equally between its controlling parents, irrespective of the size of their financial or voting interests.

[9] There are special rules for calculating the turnover of banks (and other financial institutions) and insurance companies.

EU Merger Regulation thresholds



4. Pre-notification allocation of cases between the Commission and NCAs

4.1 Concentrations with an EU dimension must in principle be notified to the Commission, which has exclusive jurisdiction to investigate, without the NCAs being able to apply their national merger control rules. By virtue of the EEA Agreement, the Commission's exclusive jurisdiction is also extended to cover the three EFTA contracting states if such an "EU dimension" is established.[10] Conversely, the NCAs are in principle competent to investigate mergers that do not have an EU dimension (subject to their national rules, summarised at *Annex 1*, being applicable), without the Commission having any jurisdiction to investigate.

4.2 This simple allocation of jurisdiction is, however, subject to a number of exceptions (as illustrated on page 11).[11] For these purposes, it is convenient to distinguish:

- pre-notification reallocation of jurisdiction: The Article 4(4) and 4(5) referral procedures allow for the possibility of cases to be reallocated at the initiative of the parties. These procedures are considered below;

- post-notification reallocation of jurisdiction: The Article 9 and 22 referral procedures allow for notified cases to be referred from the Commission to the NCAs or vice versa. These procedures are considered at *Chapter 6* of this publication.

Article 4(4) pre-notification referrals from the Commission to a NCA

4.3 There may be some circumstances in which parties to a proposed concentration with an EU dimension conclude that it would be simpler or more advantageous if their transaction could be reviewed (either in whole or in part) at the Member State level rather than by the Commission under the Merger Regulation. This might be the case, for example, if the only competition issues of any significance are limited to one Member State (particularly if they are issues over which the relevant NCA would likely seek to assert jurisdiction under Article 9 – see *Chapter 6* of this publication).

4.4 For such cases, a voluntary procedure exists under which the parties may opt to have the case referred to the NCA in question instead of notifying it to the Commission. To use this procedure, the parties must submit a reasoned submission (using Form RS)[12] to the Commission, which will then forward copies to all the NCAs.[13] The identified NCA then has 15 working days from receipt of the Form RS in which to agree or object to the proposed referral. If the NCA agrees, the Commission must then decide (within a maximum of 25 working days from the submission of the Form RS) whether or not to make the referral.[14]

4.5 If the Commission refers the case in whole, it will then only be necessary for the parties to notify the case to the NCA in question (which will review the case under its applicable national merger control rules). If the Commission agrees to a partial referral, the aspects concerned will be reviewed by the NCA in question and the parties will need to make a notification to the Commission under the Merger Regulation in respect of the remaining aspects of the concentration. In either case, the concentration continues to have an "EU dimension" such that the other

[10] See Art. 57 of the EEA Agreement: the turnover thresholds applied relate to the activities of the undertakings concerned in the EU only. However, the parties' turnover in the EFTA States will be relevant to establishing the degree of involvement of the EFTA Surveillance Authority and EFTA NCAs under Protocol 24 of the EEA Agreement.

[11] For further guidance, see Commission Notice on case referral in respect of concentrations (OJ 2005 C56/2, 5.3.2005).

[12] Form RS is annexed to the Commission's 2004 Implementing Regulation, as amended. The Form RS and explanatory notes published by the Commission (available on DG Competition's website) include information on the extension of the procedure to the EFTA contracting states.

[13] The Commission is obliged to do this "without delay".

[14] In its White Paper of July 2014 entitled *Towards more effective EU merger control* (see *footnote 6* above), the Commission proposed reforms to make the case referral system more efficient.

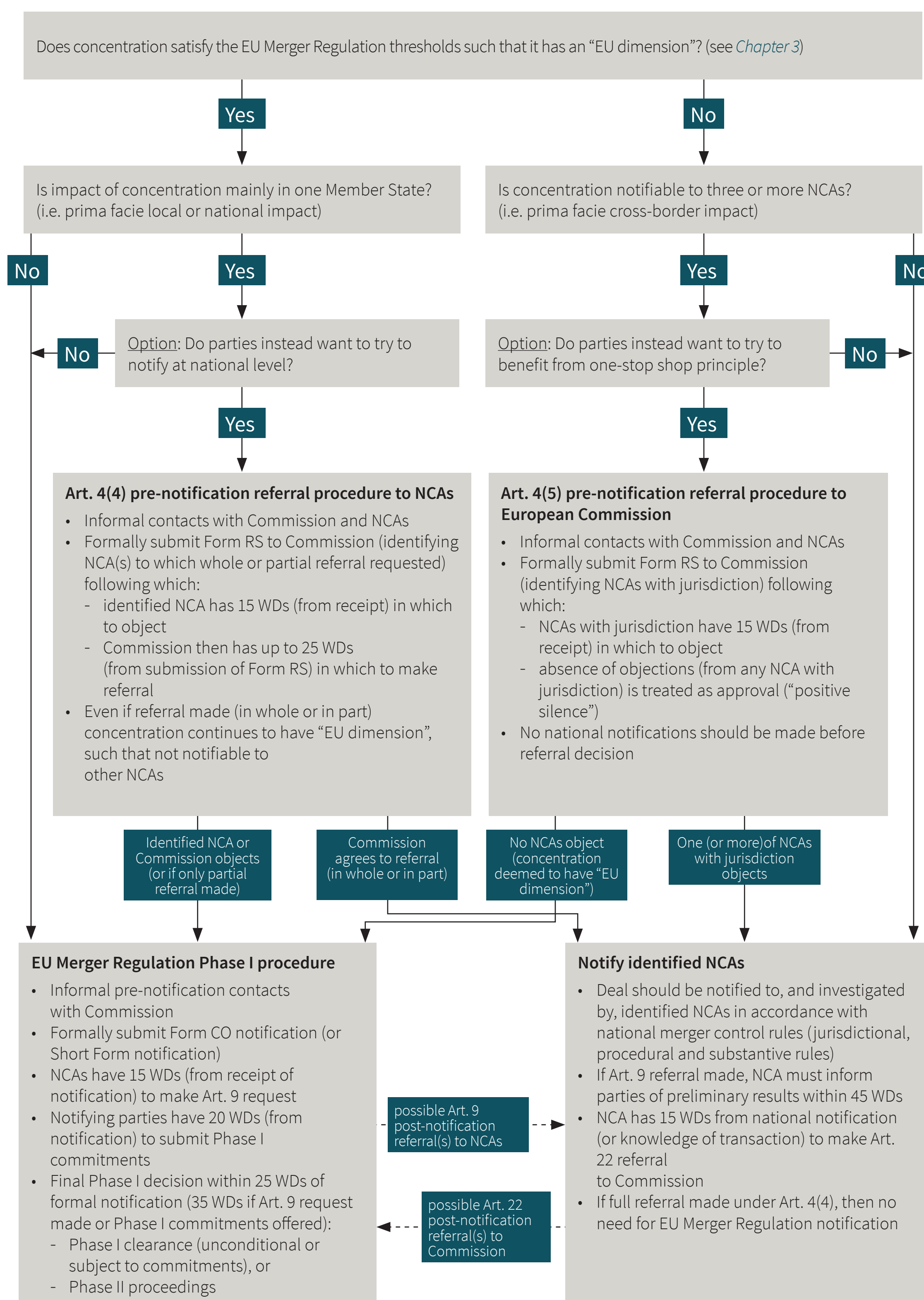
NCAs will not be able to apply their national merger control rules (unless the Commission were to agree to a subsequent Article 9 request).

Article 4(5) pre-notification referrals to the Commission

4.6 Many cross-border mergers that fall below the Merger Regulation's thresholds will instead be subject to notification and review by a number of NCAs within the EEA. Recognising that there could be advantages to business if some of these transactions could benefit from the one-stop shop principle, a voluntary procedure exists under which parties may seek to have cases handled by the Commission if they would otherwise have been subject to investigation by the NCAs in at least three EU Member States.

4.7 To take advantage of these pre-notification procedures, before notifying to any of the NCAs, the parties must prepare and submit a reasoned submission to the Commission (using Form RS), which will then be forwarded to all the NCAs. Each of the NCAs that would, in principle, have jurisdiction to investigate under its national merger control rules then has 15 working days from receipt of the Form RS in which to object. If no NCA objects, the transaction is deemed to have an EU dimension and must be notified to the Commission. But if any of the Member States objects (even if only one of them) then jurisdiction is not transferred and the deal remains subject to notification and review at the Member State level.

Pre-notification and post-notification referral procedures (and Phase I procedure)



Note: "WD" indicates working days, i.e. excluding official Commission holidays.

5. Procedure for the notification of cases to the Commission

5.1 A concentration with an "EU dimension" should be formally notified to the Commission before its implementation (unless it has been referred in whole to a NCA pursuant to the Article 4(4) procedures considered at *Chapter 4*). The notification should be made following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. The notification can also be made at an earlier stage:

- if the parties demonstrate to the Commission a **good faith intention** to conclude an agreement, for example on the basis of a memorandum of understanding or letter intent; or
- in **public bids**, if the bidder has publicly announced an intention to make the bid.

5.2 The Commission has extensive powers of investigation under the Merger Regulation. In particular, it can seek information from the parties and third parties, either by simple requests or by formal decision. It can also conduct inspections at premises and examine books and records (but not conduct searches at private homes). Furthermore, it can interview any natural or legal person who consents, in order to collect information in relation to an investigation.

Pre-notification discussions

5.3 Within the Directorate-General for Competition, each operational Directorate has a mergers unit with officials who focus on handling Merger Regulation cases (including a number of officials seconded from the NCAs). In addition, there is some staff operating under the Deputy Director-General for Mergers with responsibility for allocating new cases and ensuring that they are adequately resourced.[15]

5.4 The Commission strongly encourages parties and their advisers to have pre-notification contacts with the Commission.[16] Such contacts usually begin by providing the Commission with an outline of the terms of the proposed transaction with a view to the early allocation of a Commission case team and discussions by reference to draft notifications. However, in particularly straightforward cases, which do not give rise to horizontal overlaps or vertical relationships[17] between merging parties in the EEA, the Commission acknowledges that notifying parties may prefer to notify immediately without first submitting a draft notification.[18]

15 Currently, the operational Directorates' prime areas of responsibility are as follows: Directorate B – Energy and environment; Directorate C – Information, communication and media (including telecommunications and media, information technology, internet and consumer electronics); Directorate D – Financial services; Directorate E – Basic industries, manufacturing and agriculture (including pharma and health services, consumer goods, basic industries, agriculture and manufacturing) and Directorate F – Transport, post and other services. The Deputy Director-General for Mergers (currently Carles Esteva Mosso) is responsible for the work undertaken by those Directorates as regards Merger Regulation cases and reports to the Director-General (currently Johannes Laitenberger). New cases are generally allocated to case teams at DG Competition's Merger Management Meetings, usually held on Monday afternoons.

16 For further guidance, see the Commission's Best Practices on the conduct of EU merger control proceedings (the 2004 Best Practices Guidelines), available on DG Competition's website. For cases with a strong transatlantic element, see also the EU-US Best Practices on cooperation in merger investigations also available on DG Competition's website.

17 "Horizontal" overlaps arise between competitors at the same level of the production or distribution chain while "vertical" relationships exist between companies that operate at different levels of the chain (e.g. between manufacturer and distributor).

18 Commission Notice on a simplified procedure for treatment of certain concentrations under Council Reg. (EC) 139/2004 (OJ 2013 C366/4, 14.12.2013); Corrigendum (OJ 2014 C11/6, 15.1.2014).

5.5 These pre-notification discussions are confidential and sometimes begin before the transaction is announced (in general at least two weeks before notification and in some cases many months in advance). These discussions can be helpful to the parties for a number of reasons, including:

- they enable the parties to obtain informal advice on jurisdictional issues such as the calculation of turnover or whether a JV undertaking is "full-function";
- in some cases, they can be used to discuss whether it may be appropriate to use the pre-notification referral procedures of Article 4(4) or 4(5) (see *Chapter 4* above);
- they allow the parties to discuss waivers from the requirements of the Form CO questionnaire, thereby minimising the risk of a formal notification being subsequently declared incomplete;
- they assist in identifying any special concerns officials may have, thereby enabling the parties to address these in the notification and, if appropriate, to consider changes to the transaction; and
- if the parties consent, the Commission may start the process of third party consultation before formal notification.

The notification forms

5.6 The Implementing Regulation (as amended) includes the forms to be used.[19] Form RS is to be used by parties requesting use of the pre-notification referral procedures (see *Chapter 4* above). For formal notifications, the forms are as follows:

- Form CO specifies the information that notifying parties must generally provide when submitting a full-form notification. It requires extensive information on the parties, the transaction and the relevant markets, as well as contact details for customers, competitors, trade associations and potentially suppliers, whom the Commission will consult as part of its investigations; and
- the alternative Short Form CO may be used when notifying concentrations that are unlikely to raise competition concerns, i.e. those that are likely to qualify for the Commission's simplified procedure (for which only a short-form clearance decision will be issued).[20]

[19] As part of its package to simplify its merger review procedures, the Commission amended these forms in 2014 to reduce the amount of information required to complete the form (although in practice more pre-existing internal documents may need to be provided than was previously the case). In addition, the Form CO and Short Form CO now clearly identify categories of information that may be good candidates for waiver requests.

[20] The simplified procedure is available for: (a) joint ventures with EEA turnover and assets below €100 million; (b) concentrations where there is no horizontal market overlap or vertical relationship between the parties; (c) concentrations where there is a horizontal overlap but with combined market shares below 20% or where there is a vertical relationship but market shares are below 30%; and (d) concentrations involving a move from joint to sole control of a pre-existing joint venture. The Commission may also apply the simplified procedure to combinations where the combined market share of the undertakings concerned is less than 50% and the increase in market share resulting from the merger is *de minimis* (i.e., where the Herfindahl-Hirschman Index (HHI) delta is less than 150). In addition, transactions that fail to give rise to any reportable markets in the EEA (including joint ventures that have no activity in the EEA) are exempted from the need to provide the market information and data requested at Sections 6 and 7 of the Short Form CO. For further guidance, see Commission Notice on a simplified procedure for treatment of certain concentrations under Council Reg. (EC) No 139/2005 (OJ 2013/C 366/04, 14.12.2013).

5.7 The notification must also include supporting documentation, such as copies of the agreements bringing about the concentration, relevant board meeting minutes, reports and accounts and various analyses, reports, studies, surveys and comparable documents that assess or analyse the concentration or the affected markets with respect to market shares, competitive conditions, rationale for the deal, etc. The complete notification and supporting documents must be submitted to the Commission in hard copy together with three paper copies and two CD or DVD copies (to facilitate electronic transmission *inter alia* to the NCAs).

Suspension of the transaction

5.8 A concentration falling under the Merger Regulation cannot be implemented unless and until the Commission declares it compatible with the internal market (Article 7) except:

- in a **public bid** (or a series of transactions in securities listed on a stock exchange) – provided the concentration is notified to the Commission without delay and the acquirer only exercises voting rights attached to the securities to maintain the full value of its investment; or
- where the Commission has granted a **derogation** following a reasoned request from the parties (which may be made before the formal notification of the deal). Such derogations are very rare and depend on the Commission's view of the effect of the suspension and the threat to competition posed by the concentration. The Commission may attach conditions and obligations to such derogations.

5.9 The validity of a transaction completed in breach of the standstill obligation will depend on the Commission's decision as to its compatibility with the internal market. The Merger Regulation enables the Commission to dissolve a concentration that has already been implemented if it concludes that the deal is incompatible with the internal market.

Formal Phase I investigations

5.10 Following receipt of the formal Form CO notification, subject to being satisfied that the notification is complete, the Commission has an initial period of 25 working days to undertake a formal investigation. This time period can be suspended if the Commission adopts a decision pursuant to Article 11 formally asking for more information (having failed to receive the information under a previous request under Article 11). The Commission's review in Phase I usually involves sending detailed requests for information to the parties and to third parties, including customers and competitors; it may also hold meetings as part of this process.[21]

5.11 At the end of the Phase I process the Commission will reach one or more of the following decisions (see *Annex 2* for statistics):

- **clearance**: The deal may proceed because it does not give rise to serious doubts about its compatibility with the internal market;
- **clearance subject to commitments**: Even where a deal raises serious competition concerns, it may nevertheless be cleared subject to conditions, e.g. that the parties must divest certain businesses within a certain period following completion or must give commitments regarding their future behaviour. If parties wish to secure a Phase I clearance subject to such conditions, they must offer appropriate commitments no

[21] The parties must provide correct information that is not misleading. On 18 May 2017 the Commission fined Facebook €110 million for providing misleading information during the Commission's investigation about its acquisition of WhatsApp. For further guidance, see the Commission's Best Practices for the submission of economic evidence and data collection in cases concerning the application of Art. 101 and 102 TFEU and in merger cases (available on DG Competition's website).

later than 20 working days following notification – in which event the Phase I period is extended to a total of 35 working days;

- **no jurisdiction**: The deal does not fall within the Merger Regulation because it is not a "concentration" or because it lacks an "EU dimension";
- **Article 9 referral**: The deal "threatens to affect significantly competition" in a distinct market within a Member State and can be more appropriately investigated at a national level. A referral will be made only if a NCA has made a formal request to that effect, whether on its own initiative or because it was invited by the Commission to do so (see *Chapter 6* below for more information). Deals may be referred to NCAs in whole or in part: in the case of a partial referral, the Commission will assess the non-referred part of the deal; or
- **launch of Phase II investigation**: The deal raises "serious doubts" as to its compatibility with the internal market such that a more detailed Commission investigation is necessary.

Formal Phase II investigations

5.12 Phase II proceedings involve detailed in-depth investigations that place significant burdens on the parties, the Commission and interested third parties involved in the process. They involve a number of formal steps:

- Following further investigations, if the Commission still retains concerns it will issue a formal written **Statement of Objections** to which the parties will generally respond in a written **Reply**. On issuing the Statement of Objections, the Commission is under a formal obligation to grant the parties **access to the file**. At this stage the parties are entitled to obtain copies of information submitted to the Commission by third parties (subject to removal of business secrets) during the course of the Commission's investigation, so as to assist them in preparing their Reply to the Statement of Objections.[22]
- Following the Statement of Objections and the Reply, a formal **Oral Hearing** can take place in Brussels should the parties request one. This is chaired by a Hearing Officer who is responsible for overseeing the proceedings. The Oral Hearing is attended by the DG Competition case team and various other Commission officials (including from the Legal Service and the Chief Economist's team). Interested third parties (usually complainants) may be permitted to attend. It is also attended by representatives from the NCAs (for whom this can be the first opportunity to focus on the arguments of all sides).
- Before adoption of the final Phase II decision, whether or not there has been a Statement of Objections, the Commission must consult the **Advisory Committee** (made up of representatives of the NCAs), which issues an opinion on the draft decision. The EFTA states may also be invited to present their views.
- There is also the possibility of **"State of Play"** meetings between the parties and the Commission staff (in addition to less formal meetings), which may be held at certain points in the process. It would be normal for the parties to have the opportunity of such a meeting during the course of Phase I if the case looks likely to raise "serious doubts" (so that the parties have the opportunity to table Phase I commitments before the expiry of the 20 working-day deadline). State of Play meetings may also take place during Phase II investigations. The 2004 Best Practices Guidelines provide for these at the following stages:

[22] In accordance with the 2004 Best Practices Guidelines, the Commission may give parties access to non-confidential versions of key documents received from third parties (notable substantiated submissions running counter to the parties' own submissions) earlier in the Phase II proceedings (and even in some cases at Phase I).

- within a couple of weeks of the opening of Phase II proceedings (to facilitate the parties' understanding of the Commission's concerns, and the Commission's understanding of the parties' reactions, as well as to discuss the likely time frame for the Phase II proceedings);
- shortly in advance of the Statement of Objections (to help clarify certain issues and facts);
- following the Reply to the Statement of Objections and the Oral Hearing (which may serve as a basis for discussing the scope and timing of any remedial commitments); and
- in advance of the Advisory Committee meeting (which should enable a discussion of the market-testing of any commitments tabled by the parties and possible final improvements).

• DG Competition also generally establishes a **Peer Review Panel** comprising three or so Commission officials with no prior involvement in the case under review. These officials are given access to the file and scrutinise the draft Statement of Objections prepared by their colleagues, acting as a "fresh pair of eyes" or "devil's advocates", with a view to improving the quality of the Statement of Objections and the prospect of the final Phase II decision standing up to challenge before the Court (e.g. in the event of a subsequent appeal by the parties or by third parties). These are internal checks within the Commission, so the parties do not have formal contact with the Panel.

5.13 The Merger Regulation provides for a standard Phase II investigation period of 90 working days. If the parties offer commitments, this Phase II time period is automatically extended to 105 working days, unless the parties offer commitments less than 55 working days from the start of Phase II. The general deadline for offering commitments is 65 working days from the start of Phase II. The Phase II timetable may also be extended by up to 20 working days in complex cases at the request of the parties (if requested within 15 working days of the start of Phase II) or, at any time, by the Commission with the consent of the parties.[23] There are also procedures for the Commission to **stop the clock** if the parties have not supplied information required by the Commission for its investigations. In some cases, this can result in a significantly lengthier review process.

5.14 The Commission may be able to clear a case (conditionally or unconditionally) sooner than the standard 90 workings days, subject to resolving all outstanding issues rapidly, usually as a result of the party offering satisfactory remedies, so circumventing some of the intermediate formal steps in the Phase II proceedings. In some cases, clearance can be secured without the Commission issuing a Statement of Objections.

5.15 Following a Phase II investigation, the Commission will either clear the deal (often subject to conditions) or prohibit it (unless the deal has already been abandoned by the parties). Phase II decisions are formally adopted by the full College of Commissioners.

Compliance with commitments

5.16 Where the Commission's final clearance decision (at Phase I or Phase II) is made subject to conditions, compliance with those commitments is vigorously enforced by the Commission. This almost invariably involves the parties appointing a **monitoring trustee** to monitor compliance. Furthermore, a **divestiture trustee** may be appointed to divest the identified divestment package (at no minimum price) if the parties are unable to find an acceptable purchaser within the specified period.[24] Failure to comply with remedial commitments can

[23] Thus it would not be unusual for Phase II proceedings to extend to 125 working days plus Commission holidays, which can equate in total to six to seven months, and potentially longer if the Commission "stops the clock".

[24] For further guidance on remedies acceptable to solve competition problems, see the Commission Notice on remedies acceptable under Council Reg. (EC) 139/2004 and under Council Reg. (EC) 802/2004 (OJ C 2008 C 267/1, 22.10.2008), and the Commission's Best Practice Guidelines for Divestiture Commitments (available on DG Competition's website).

be punishable by a fine of up to 10% of turnover. In the case of concentrations that have been implemented in contravention of a condition attached to the clearance decision, the Commission has the power to take measures necessary to ensure that the concentration is dissolved and to restore the pre-concentration market position and conditions of effective competition.

6. Exclusive jurisdiction and exceptions (including post-notification reallocation of cases)

6.1 Concentrations with an "EU dimension" generally fall under the exclusive jurisdiction of the European Commission, to the exclusion of the NCAs throughout the EEA.[25] Member States may, however, intervene in the following exceptional cases:

- under the **Article 9** procedure, a Member State can request that a concentration notified to the Commission under the Merger Regulation be referred to it (in whole or part) if the deal (a) threatens to affect significantly competition in a market within that Member State that presents all the characteristics of a distinct market, or (b) affects competition in a market within that Member State that presents all the characteristics of a distinct market and does not constitute a substantial part of the internal market. The Member States have 15 working days (from receipt of their copy of the notification) in which to make such a request. If such a request is made, the Phase I timetable is extended from 25 to 35 working days. The Commission must then accept or reject the request. If the Commission accepts the request and the case is referred to the Member State, the NCA has no fixed time frame within which to reach its final decision; however, it must inform the parties of its preliminary assessment and proposed future actions within 45 working days (and must reach a final decision without undue delay);

- Member States can also intervene to take appropriate measures to protect legitimate interests other than competition, e.g. **public security**, **plurality of the media** and **prudential rules for financial services** such as in the banking and insurance sectors (Article 21(4) of the Merger Regulation); and

- in the **defence** sector, the Member States may prevent parties from notifying military aspects of merger deals to the Commission (Article 346 of the TFEU).

6.2 **Article 22** of the Merger Regulation provides that one or more NCAs may request the Commission to review a concentration **without an EU dimension** provided the concentration affects trade between Member States and threatens to affect significantly competition within the territory of the Member State or States making the request. The Article 22 procedure includes time limits for the consideration of cases: a request must be made to the Commission within 15 working days of the concentration being notified to the Member State.[26]

7. Substantive appraisal of concentrations

7.1 In appraising the compatibility of a concentration with the internal market under the Merger Regulation, the Commission must make a prospective analysis of whether the concentration would "significantly impede effective competition, in the internal market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position" (Articles 2(2) and (3)).

[25] Transactions falling within the Merger Regulation may also raise issues in jurisdictions outside the EEA. In international merger cases, the Commission seeks to cooperate with the competition authorities in relevant third country jurisdictions. See also *Chapter 4* above, which describes the possibility for a concentration with an EU dimension to be referred to a NCA under Art. 4(4).

[26] If no notification is required in a particular Member State, the time limit will run from when the concentration was otherwise made known to the Member State concerned. In 2002 the NCAs agreed a number of principles on the application of Art. 22 (available on several of the NCAs' websites). See also *Chapter 4* above, which describes the possibility for a concentration without an EU dimension to be referred to the Commission under Art. 4(5), in which case it will be deemed to have an EU dimension.

The SIEC test

7.2 This substantive test is sometimes referred to as the "**SIEC**" test (to distinguish it from the earlier "dominance" test, which existed under the original Merger Regulation). It is similar to the "**SLC**" (substantial lessening of competition) test, which exists in a number of other jurisdictions including the UK and the USA. The Courts have interpreted the notion of "dominance" to include collective dominance, including mergers in oligopolistic markets giving rise to "coordinated effects" (or "tacit collusion"). Recital 25 to the Merger Regulation explains the rationale behind the SIEC test in terms of a desire to ensure that the non-coordinated effects of a merger in an oligopolistic market can be caught. It states that the notion of a significant impediment to effective competition should be extended beyond the established concept of dominance "only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the markets concerned."

7.3 If the concentration involves the establishment of a cooperative joint venture undertaking, the Commission must also determine whether it is compatible with the provisions of Article 101 TFEU (Articles 2(4) and (5)) (see *paragraph 7.19* below).

7.4 There was much discussion and debate over whether the introduction of the SIEC test would have a significant effect on the standards applied by the Commission in deciding whether to open Phase II proceedings or whether to seek commitments from the parties or even to prohibit deals. Much of this debate focused on whether there was a "gap" under the old dominance test, in particular if a merger raised serious competition concerns but resulted neither in a firm enjoying a strong No. 1 position of around 40-50% or more in a market (indicative of **single-firm dominance**) nor in the creation or strengthening of an oligopolistic market structure conducive to tacit collusion between a small group of players (indicative of **collective dominance**). Some of these concerns were driven by the fact that in 2002 the General Court annulled three Phase II prohibition decisions on the basis that the Commission had failed to prove that the deals were caught by the old Merger Regulation's dominance test.[27]

7.5 The Commission has continued to apply an economics-focused approach, indicating that its policy towards mergers has not changed as a result of the move to the SIEC test; however, it is generally perceived that the SIEC test gives a wider degree of discretion to the Commission. For any prohibition cases that are the subject of appeal proceedings, the Court will continue to require the Commission to put forward convincing evidence that the merger would be incompatible with the maintenance and development of effective competition – and it can be expected that the standards will be particularly high if the case does not involve the creation or strengthening of single-firm dominance or the likelihood of tacit coordination between the members of an oligopoly. This ultimate check imposed by the possibility of an appeal to the Court may provide some comfort to notifying parties; however, the Commission does not need to go to Court to prohibit a deal.

7.6 The Commission has sought to allay concerns about the exercise of its wide powers by introducing a number of procedural checks and balances to its administrative process.[28] It has also published guidelines providing a sound economic framework for the application of its merger control policy: the Horizontal Merger Guidelines[29] and the Non-Horizontal Merger Guidelines (the latter covering vertical mergers and conglomerate mergers).[30]

[27] Judgments regarding the Commission's Phase II prohibitions of *Airtours/First Choice*, *Schneider/Legrand* and *Tetra Laval/Sidel*: Case T-342/99, *Airtours v Commission*, judgment of 6 June 2002; Case T310/01, *Schneider v Commission*, judgment of 22 October 2002; Case T-5/02, *Tetra Laval v Commission*, judgment of 25 October 2002.

[28] These have included the creation of a Chief Economist position in 2003, with a staff of qualified economists who can be called upon to assist the DG Competition case teams; the current Chief Economist is Tommaso Valletti. Other checks and balances involve the introduction of Peer Review Panels for more challenging Phase II cases and various other procedural improvements outlined in its 2004 Best Practices Guidelines (see *Chapter 5* above).

[29] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2004 C31/5, 5.2.2004).

[30] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2008 C265/6, 18.10.2008).

Horizontal mergers

7.7 The Horizontal Merger Guidelines set out the factors that the Commission generally considers when appraising whether a merger is likely to have anti-competitive effects. This substantive appraisal involves a dynamic approach, in which the Commission compares the likely post-merger market structure with the "counterfactual", i.e. the market structure that would be likely to develop if the merger did not proceed. The Guidelines identify two main ways in which horizontal mergers result in a SIEC:

- in the case of **non-coordinated** (or "unilateral") effects, the Commission examines whether the merger will eliminate important competitive constraints on one or more firms, which consequently would enjoy increased market power. These concerns can arise in situations of "**single-firm dominance**" or potentially in some mergers in oligopolistic markets; and/or

- in the case of **coordinated effects**, the Commission examines whether the pre- and/or post-merger market structure is oligopolistic (e.g. limited to say only three or four major players) and whether the merger will facilitate "tacit collusion" between the members of that oligopoly with the consequence of prices being raised, output being reduced or other harmful effects on competition. In making this assessment, the Commission examines the structure of the market and the past behaviour of firms on the market (notably whether there is a stable economic environment conducive to tacit collusion, whether it is possible to monitor compliance with the terms of tacit coordination and whether there is a form of deterrent mechanism to prevent deviation).

Non-coordinated effects

7.8 **Dominance** equates to a position of market power that allows a party (or parties) to behave to a considerable extent independently of other competitors, customers and ultimately consumers. In the context of a merger or acquisition, the critical factor tends to be the extent to which the merged entity may, as a result of the merger, be able to raise prices (or reduce choice or levels of innovation) without losing customers. In making this assessment, the Commission places considerable reliance on the parties' market shares on markets affected by the merger.[31] Traditionally, market share figures of more than 40% may be regarded as indicative of **single-firm dominance**. There is a tendency for the Commission to define product markets narrowly for these purposes. However, depending on the products or services concerned, the Commission may be prepared to define the relevant geographic market as EU-wide or even global. In other cases the Commission will look at markets at the Member State level or even locally.

7.9 The Commission also envisages situations in oligopolistic markets where, despite the absence of single-firm dominance, a merger may result in the elimination of important competitive constraints that the parties previously exerted on each other. This, combined with a reduction of competitive pressure on the remaining undertakings may result in non-coordinated (or unilateral) effects, so giving rise to a SIEC even if there is little likelihood of coordination between the members of the oligopoly.

7.10 In defining relevant markets and appraising the parties' market positions for these purposes, the Commission also takes account of factors such as:

- **Closeness of competition**: If the parties' products are particularly close substitutes (compared with those of other competitors), this will generally increase the risk of significant price rises following the merger as rivals' products are less likely to act as a constraint on pricing.

[31] For further guidance on market definition, see the Commission Notice on the definition of the relevant market for the purposes of EU competition law (OJ 1997 C372/5, 9.12.1997). The Commission's Horizontal Guidelines also refer to the use of tests such as the HHI as an indicative measure of concentration levels.

- **Entry and expansion conditions**: If barriers to market entry or expansion by other players are low (and such entry or expansion is realistic) a substantial increase in market share and concentration may nevertheless not raise competition concerns.

- **Actual or potential competition**: The ability of the merged group to raise prices may be constrained by actual or potential competition from other undertakings (within or outside the EU), including their ability to increase output (e.g. if they have spare capacity) and increase sales if the merged group were to seek to increase prices.

- **Buyer power**: The merged group may also be constrained by countervailing power of customers (including their ability to switch to other suppliers).

- Other relevant supply and demand considerations: These may include whether the merging parties are **vertically integrated** or otherwise control or exercise influence over the supply of inputs or demand for outputs, e.g. through ownership of **intellectual property rights**.

- Whether the merger eliminates an important **competitive force**: Some firms may have more of an influence on the competitive process than their market shares may suggest, e.g. a recent new entrant that may have innovative new products or may be expected to play the role of a **maverick** in a concentrated market.

7.11 In effect, the Commission tends to apply the "dominance" and "unilateral effects" assessments in parallel to any given case. This increases the scope for intervention by the Commission under unilateral effect theories in cases where the parties' pro forma combined market share falls short of single-firm dominance but is above the 25% safe harbour provided by the Guidelines. It also increases the scope for the Commission to have "serious doubts" that warrant an in-depth Phase II investigation.

Collective dominance and coordinated effects

7.12 An oligopolistic market is one that is dominated by a relatively small number of major players, even if none enjoys a position of **single-firm dominance**. The term "duopoly" may be used to describe a two-firm oligopoly; "oligopolies" may be found to exist even where three or more substantial players are active in the relevant market. In 1999 the General Court upheld the Commission's view that a position of **collective dominance** can occur "where a mere adaptation by members of the oligopoly to market conditions causes anti-competitive parallel behaviour whereby the oligopoly becomes dominant. Active collusion would therefore not be required for members of the oligopoly to become dominant and to behave to an appreciable extent independently of their remaining competitors, their customers and, ultimately, the consumers".[32]

7.13 An oligopolistic market may provide opportunities for "tacit collusion" by the members of the oligopoly where "cheating" (i.e. deviations from the tacitly coordinated pricing or output levels) can be "monitored" (because of market transparency) and "punished" (through some form of deterrent mechanism or retaliation measures). Thus the Commission takes the line that it can prohibit a concentration in an oligopolistic market if it would result in or reinforce a market structure where it would be economically rational (or more rational) for members of the oligopoly, in adapting themselves to market conditions, to act in ways that will substantially reduce competition between them.

7.14 Accordingly, where a concentration may raise oligopoly concerns, the parties need to demonstrate that it will not result in a market structure that would create incentives for the remaining major players on the relevant markets to constrain capacity, discourage market entry or otherwise distort competition – to the detriment

[32] Case M.619 *Gencor/Lonrho*, Commission Decision of 24 April 1996, upheld in Case T-102/96, *Gencor v Commission*, judgment of 25 March 1999.

of customers (e.g. higher prices) or of smaller competitors or "mavericks" outside the oligopoly (e.g. reducing their competitiveness or even driving them out of the market in the longer term). For these purposes, historical analyses of the past level of competition in the relevant market (including variations in market shares and prices) may assist. While cautioning against adopting a mechanical "checklist" approach, the Commission typically expects to find some of the following characteristics in an oligopolistic market:

- **product homogeneity** (e.g. "commodity" markets) with limited differentiation in the nature and pricing of the products. Oligopoly concerns are less likely to arise where suppliers offer differentiated product ranges and/or different distribution methods and associated services with different customers having different requirements (e.g. in terms of product quality, reliability of supply, contract terms);
- **high market transparency** regarding key competitive parameters (e.g. production capacities, output or prices);
- **stagnant and inelastic demand growth**, given that volatile demand will generally make coordination less likely;
- **low levels of technological change**, recognising that in markets where innovation is important it will be possible for one firm to gain a major advantage over its rivals, so it will not be attractive to seek a tacitly coordinated outcome;
- substantial **entry barriers**;
- interdependence and extensive commercial links, giving rise to **multi-market contacts** between the major suppliers;
- **symmetries or similarities** between the major suppliers' business activities in terms of:
  - cost structures;
  - market shares;
  - capacity levels;
  - levels of vertical integration; and
- **insignificant buyer power**.

Efficiencies defence

7.15 In appraising concentrations under the Merger Regulation, the Commission will also consider any **efficiencies** that the parties expect to flow from the merger. Thus, if the parties can put forward substantiated and verifiable evidence of cost-savings or other merger-specific efficiencies, the Commission may rely on these to find that the merged entity will be better placed to act pro-competitively for the benefit of consumers (thereby counteracting the adverse effects on competition that the merger might otherwise have). With regard to the merger-specific aspect, it is necessary to demonstrate that there are no less anti-competitive, realistic and attainable alternatives to achieve the claimed efficiencies, i.e. alternatives of a non-concentrative nature (e.g. a licensing agreement or a cooperative joint venture) or of a concentrative nature (e.g. a concentrative joint venture or a differently structured merger). In general, there is greater scope for non-horizontal mergers to offer demonstrable efficiencies, e.g. in the form of synergies arising from the combination of complementary assets.

Failing firm defence

7.16 In very exceptional circumstances the Commission may conclude that an otherwise problematic merger is nevertheless compatible with the internal market if one of the merging parties is a **failing firm**.[33] For these purposes, however, it is necessary to demonstrate that:

- the failing firm would soon be forced out of the market because of financial difficulties;
- there is no less anti-competitive alternative deal (as may be verifiable by the fact that various other scenarios have been explored without success); and
- without the deal, the failing firm's assets would inevitably exit the market (which may, for a merger between the only two players in a market, justify such a merger-to-monopoly on the basis that the market share of the failing firm would in any event have accrued to the other merging party).

Vertical mergers and conglomerate mergers

7.17 **Vertical mergers**: Vertical mergers are mergers between firms that operate at different, but complementary, levels in the chain of production and/or distribution. They may give rise to competition concerns, in particular if they could have the effect of foreclosing market access by, for example, limiting competitor access to upstream raw materials or components ("**input foreclosure**"), or to downstream distribution channels ("**customer foreclosure**"), or by making such access more expensive, thereby increasing rivals' costs. The focus should be on whether, post-transaction, competitors will have sufficient access to alternative suppliers or outlets and on whether the notified concentration is likely to change the incentives of the parties to continue to deal with third parties, or whether vertical integration is likely to facilitate collusion among competitors. Serious competition concerns should only arise if the parties to the concentration have a substantial level of market power in one or more relevant markets in the supply chain, in circumstances where consumers may be adversely affected by the concentration.

7.18 **Conglomerate mergers**: Conglomerate mergers involve firms that operate in different product markets. In general, they do not raise competition issues. However, in circumstances where the products acquired are complementary to the acquirer's own products, such a merger may give rise to concerns about "portfolio power". This may occur when the market power deriving from a portfolio of brands exceeds the sum of its parts, thereby enabling the merged group to exercise market power in individual markets more easily. For these purposes, the Commission has in the past assessed the risk of market foreclosure through "bundling", "tying" and, in respect of consumer goods, "category management"; however, it faces a high evidentiary burden when seeking to develop theories of harm based on conglomerate effects.

[33] For example, in 2013 the Commission cleared both the acquisition of Shell's Harburg refinery assets by Nynas AB of Sweden and the acquisition of Olympic Air by Aegean Airlines on the basis of the failing firm defence.

Ancillary restraints

7.19 The Merger Regulation also provides that a decision approving a merger (whether at Phase I or Phase II) shall be deemed to cover any restrictions that are "ancillary" to the concentration, i.e. "directly related and necessary to the implementation of the concentration" such that they will not be caught by Article 101(1) TFEU. This may cover, for example, typical vendor non-compete clauses, interim purchase and supply agreements or technology licences between the parties, etc. The Commission is not required to rule on such issues as part of its Merger Regulation appraisal; only in exceptional circumstances, where a case raises novel and unresolved questions giving rise to genuine uncertainty, will the Commission consider such issues if requested by the notifying parties.[34]

7.20 Where restrictions are not ancillary to a concentration, they may be caught by Article 101(1) TFEU if they have an appreciable effect on competition in the EU and on trade between Member States. Any such agreements will be subject to scrutiny under the general competition rules (including whether they may satisfy the exemption criteria of Article 101(3) TFEU).

Judicial review

7.21 The EU's General Court has the power to review the legality of all Commission decisions, including decisions under the Merger Regulation. An appeal can be brought not only by the merging parties, but also by third parties "directly and individually concerned" by the decision.[35] The filing of an appeal does not suspend the application of the decision, but parties may apply to the General Court for an order that the application of the decision be suspended and for any necessary "interim measures".

7.22 The General Court also has jurisdiction to review decisions imposing penalty payments or fines and, where appropriate, it may increase, reduce or cancel any such sanction.

7.23 Appeals from the General Court to the EU's Court of Justice (ECJ) may only be made on points of law. The only possible grounds for appeal are: lack of competence of the General Court; breach of the General Court's procedure, adversely affecting the appellant; or breach of EU law.

[34] For further guidance, see the Commission Notice on restrictions directly related and necessary to concentrations (OJ 2005 C56/24, 5.3.2005).

[35] Relatively few Merger Regulation decisions have been subject to appeal. Subject to some notable exceptions (e.g. case *T-194/13 United Parcel Service v Commission*), in which in 2017 the General Court annulled the Commission's decision to prohibit UPS's takeover of TNT), the Commission has a good record of successfully defending its decisions.

Annex 1: Outline of national merger control regimes in the EEA

This list is for indicative purposes only. Special rules may apply for certain sectors, e.g. banks, insurance, media and regulated utilities. National rules and exchange rates are subject to change; for countries not in the eurozone, the approximate euro figures below are calculated by reference to average 2016 exchange rates.

A. The 28 EU Member States

Jurisdiction	Jurisdictional criteria	Notification requirements
Austria	• Combined worldwide turnover of €300m; and • Combined turnover in Austria of €30m; and • At least two parties each have worldwide turnover of €5m However, even if above thresholds are met, transaction is not notifiable (*de minimis* exemption) if: • Only one of the parties has turnover of €5m within Austria; and • All other parties have combined worldwide turnover of less than €30m Alternative size of transaction (from 1 November 2017): • Combined worldwide turnover of €300m; and • Combined turnover in Austria of €15m; and • Value of consideration for concentration exceeds €200m, and target is active in Austria to a considerable extent	Mandatory prior notification to Bundeswettbewerbsbehörde (Federal Competition Authority)
Belgium	• Combined turnover in Belgium of €100m; and • At least two parties each have turnover in Belgium of €40m	Mandatory prior notification to l'Autorité belge de la Concurrence/ Belgische Mededingingsautoriteit (Belgian Competition Authority)
Bulgaria	• Combined turnover in Bulgaria of BGN25m (c. €12.8m); and • Either (1) at least two parties each have turnover in Bulgaria of BGN3m (c. €1.5m); or (2) target has turnover in Bulgaria of BGN 3m (c. €1.5m)	Mandatory prior notification to Commission on Protection of Competition
Croatia	• Combined worldwide turnover of HRK1,000m (c. €131m); and • At least two parties each have turnover in Croatia of HRK100m (c. €13.1m)	Mandatory prior notification to Agencija za Zaštitu Tržišnog Natjecanja (Croatian Competition Agency)

Jurisdiction	Jurisdictional criteria	Notification requirements
Cyprus	• At least two parties each have worldwide turnover of €3.5m; and • At least two of the participating undertakings have turnover in Cyprus; and • Combined turnover in Cyprus of €3.5m	Mandatory prior notification to Commission for the Protection of Competition
Czech Republic	• Combined turnover in Czech Republic of CZK1,500m (c. €55.4m); and • At least two parties each have turnover of CZK250m (c. €9.2m) in Czech Republic; or • At least one party (which must be the target in case of share or asset acquisition) has turnover in Czech Republic of CZK1,500m (c. €55.4m); and • At least one other party has worldwide turnover of CZK1,500m (c. €55.4m)	Mandatory prior notification to Úrad pro Ochranu Hospodárské Souteže (Office for the Protection of Competition)
Denmark	• Combined turnover in Denmark of DKK900m (c. €120.9m); and • At least two parties each have turnover in Denmark of DKK100m (c. €13.4m) or • At least one party has turnover in Denmark of DKK3,800m (c. €510.3m); and • At least one other party has worldwide turnover of DKK3,800m (c. €510.3m)	Mandatory prior notification to Konkurrence – og Forbrugerstyrelsen (Competition and Consumer Authority)
Estonia	• Combined turnover in Estonia of €6m; and • At least two parties each have turnover in Estonia of €2m	Mandatory prior notification to Konkurentsiamet (Competition Authority)
Finland	• Combined worldwide turnover of €350m; and • At least two parties each have turnover in Finland of €20m	Mandatory prior notification to Kilpailu-ja Kulluttajavirasto (Competition and Consumer Authority)
France	• Combined worldwide turnover of €150m; and • At least two parties each have turnover in France of €50m Special thresholds for concentrations in the retail trade sector or in the French Départements or Collectivités d'Outre-Mer	Mandatory prior notification to l'Autorité de la concurrence (Competition Authority)

Jurisdiction	Jurisdictional criteria	Notification requirements
Germany	• Combined worldwide turnover of €500m; and • At least one party has turnover in Germany of €25m; and Either a. at least one other party has turnover in Germany of €5 m (“turnover test”); or b. value of consideration exceeds €400m; and the target is “significantly active” in Germany (“size of transaction test”)	Mandatory prior notification to Bundeskartellamt (Federal Cartel Office)
Greece	• Combined turnover of €150m worldwide; and • At least two parties each have turnover in Greece of €15m Special threshold for concentrations in the media sector	Mandatory prior notification to Hellenic Competition Commission
Hungary	• At least two groups of parties have turnover in Hungary of HUF1000m (c. €3.2m); and • Combined turnover in Hungary of all the parties is HUF15,000m (c. €48.4m) NB: *Authority has power to review transactions below the thresholds if parties' combined turnover of HUF5000m (c. €16m), and it is not obvious that transaction does not significantly restrict competition*	Mandatory prior notification to Gazdasági Versenyhivatal (Office of Economic Competition)
Ireland	• Combined turnover in Ireland of €50m; and • Each of at least two parties has turnover in Ireland of €3m	Mandatory prior notification to Competition and Consumer Protection Commission
Italy	• Combined turnover in Italy of €492m; and • Each of at least two undertakings involved in the transaction has turnover in Italy of €30m *(Thresholds are revised annually to take account of inflation; above figures were effective from September 2017)*	Mandatory prior notification to Autorità Garante della Concorrenza e del Mercato (Competition Authority)
Latvia	• Combined turnover in Latvia of €30m and turnover of each party exceeds €1.5m in Latvia	Mandatory prior notification to Konkurences Padome (Competition Council)
Lithuania	• Combined turnover (worldwide for Lithuanian companies, in Lithuania for foreign companies) of €14.481m; and • At least two parties each have turnover (worldwide for Lithuanian companies, in Lithuania for foreign companies) of €1.448m	Mandatory prior notification to Konkurencijos Taryba (Competition Council)

Jurisdiction	Jurisdictional criteria	Notification requirements
Luxembourg	No specific merger control regime	Not applicable
Malta	• Combined turnover in Malta of €2,329,373; and • Each party has turnover in Malta equivalent to at least 10% of parties' combined turnover	Mandatory prior notification to Director General of the Office for Competition
Netherlands	• Combined worldwide turnover of €150m and • Each of at least two parties has turnover in the Netherlands of €30m	Mandatory prior notification to Autoriteit Consument en Markt (Authority for Consumers and Markets)
Poland	• Combined worldwide turnover of €1,000m; or • Combined turnover in Poland of €50m *De minimis* exemptions: • In the case of both mergers and joint ventures, the domestic turnover of each of the parties does not exceed €10m in each of the two financial years preceding the transaction; and • In the case of the takeover of control or acquisition of assets, the €10m threshold applies to the turnover of the target in the two financial years preceding the transaction	Mandatory prior notification to the Prezes Urzędu Ochrony Konkurencji i Konsumentów (President of the Office of Competition and Consumer Protection)
Portugal	• Combined turnover in Portugal of €100m; and • At least two parties each have turnover in Portugal of €5m; or • Concentration results in the acquisition, creation or increase of a market share in Portugal equal to or greater than 50%; or • Concentration results in the acquisition, creation or increase of a market share in Portugal equal to or greater than 30% and less than 50%, provided that at least two parties each have turnover in Portugal of €5m	Mandatory prior notification to Autoridade de Concorrência (Competition Authority)
Romania	• Combined worldwide turnover of €10m; and • At least two parties each have turnover in Romania of €4m	Mandatory prior notification to Consiliul Concurentei (Competition Council)

Jurisdiction	Jurisdictional criteria	Notification requirements
Slovakia	• Combined turnover in the Slovak Republic of €46m; and • At least two parties each have turnover in the Slovak Republic of €14m; or • Turnover of at least one party in the Slovak Republic of €14m; and • Worldwide turnover of at least one other party of €46m	Mandatory prior notification to Protimonopolny úrad (Antimonopoly Office)
Slovenia	• Combined turnover in Slovenia of €35m; and either • Target has turnover in Slovenia of €1m; or • In the case of the creation of a joint venture, at least two parties, including affiliated companies, have turnover in Slovenia of €1m NB: If thresholds are not met, but parties and affiliated companies have more than 60% market share in the Slovenian market, the parties are obliged to inform the CPA of the concentration (but need not submit a formal notification)	Mandatory prior notification to Javna agencija Republike Slovenije za Varstvo Konkurence (Competition Protection Agency)
Spain	• Combined turnover in Spain of €240m; and • At least two parties each have turnover in Spain of €60m; or • Creation or strengthening of combined market share in Spain of 30%, or acquisition of target that has 30% market share (even if no overlap) NB: The market share threshold will not apply when target's turnover in Spain was under €10m in the last financial year, provided that the parties' individual or combined market share is under 50%	Mandatory prior notification to Comisión Nacional de los Mercados y la Competencia (National Competition and Markets Commission)
Sweden	• Combined turnover in Sweden of SEK1,000m (c. €106.7m); and • At least two parties each have turnover in Sweden of SEK200m (c. €21.3m) NB: Where there are particular substantive competition concerns, the Swedish Competition Authority may require notification even if the second threshold is not met	Mandatory prior notification to Konkurrensverket (Swedish Competition Authority)

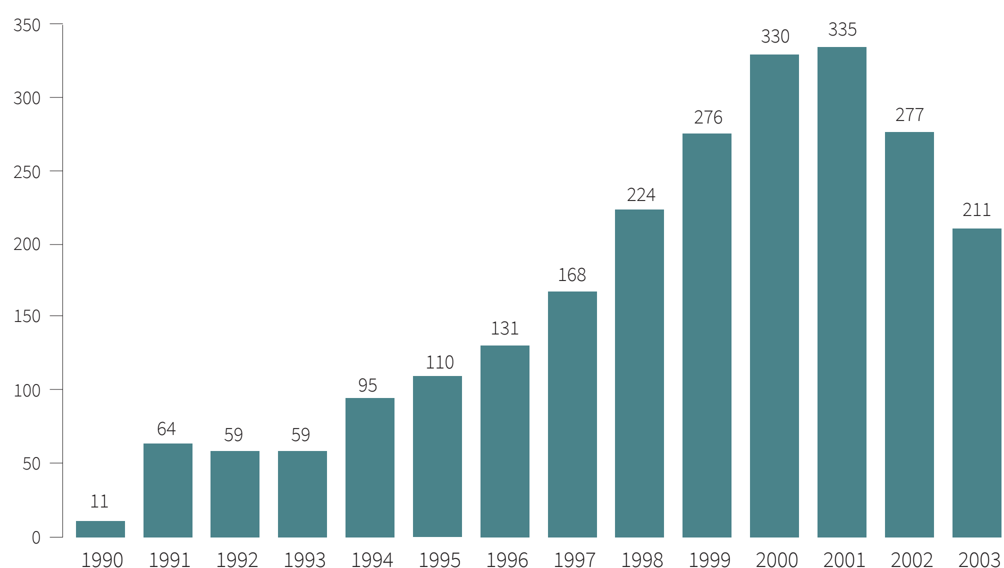
Jurisdiction	Jurisdictional criteria	Notification requirements
United Kingdom	• Target has UK turnover of £70m (c. €86.8m) ("turnover test"); or • As a result of the transaction, parties have a share of supply of goods or services of any description of 25% or more in UK (or a substantial part of the UK) ("share of supply test")	Voluntary notification to the Competition and Markets Authority

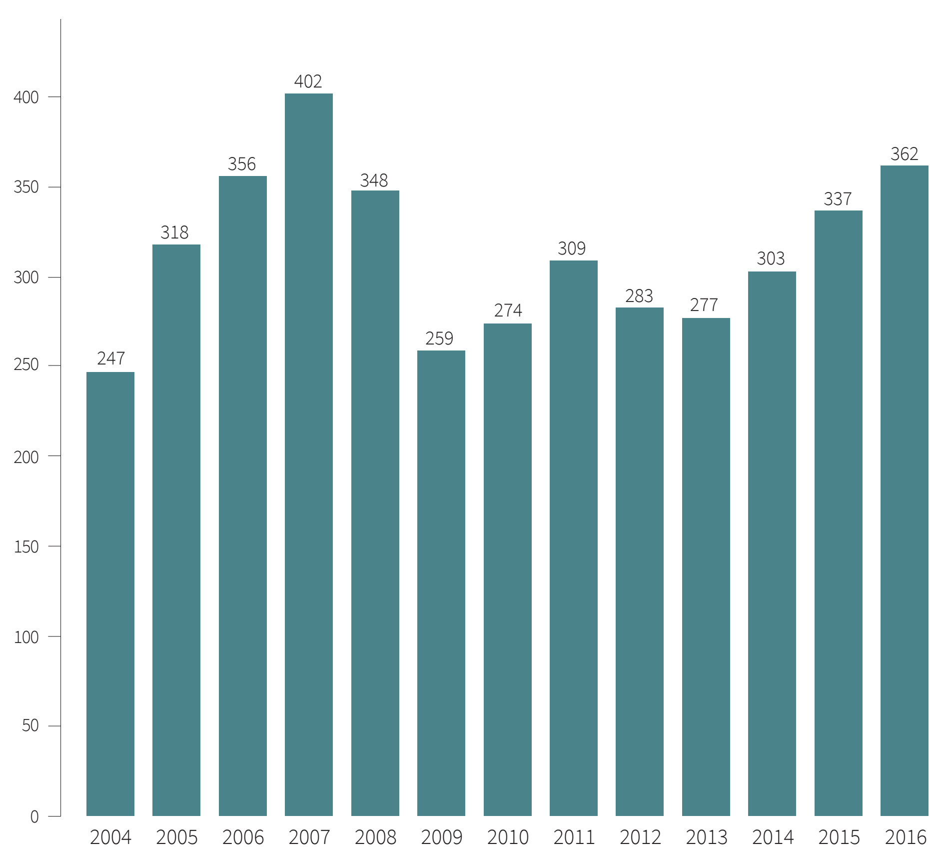
B. The three contracting EFTA States

Jurisdiction	Jurisdictional criteria	Notification requirements
Iceland	Prior notification if: • Combined turnover in Iceland of ISK2,000m (c. €14.2m); and • At least two parties each have turnover in Iceland of ISK200m (c. €1.4m) Post-merger notification may be required for mergers not meeting the above thresholds if the Competition Authority believes that there is a significant probability that the merger will substantially reduce competition. This is subject to the parties having combined turnover in Iceland of ISK1,000m (c. €7.1m)	Mandatory prior or post-merger notification to Samkeppniseftirlitið (Competition Authority)
Liechtenstein	No specific merger control regime	Not applicable
Norway	• Combined turnover in Norway of NOK1,000m (c. €103.8m); and • At least two parties each have turnover in Norway of NOK100m (c. €10.4m)	Mandatory prior notification to Konkurransetilsynet (Competition Authority)

Annex 2: Merger Regulation statistics (1990-2016)

A. Total number of notifications by year

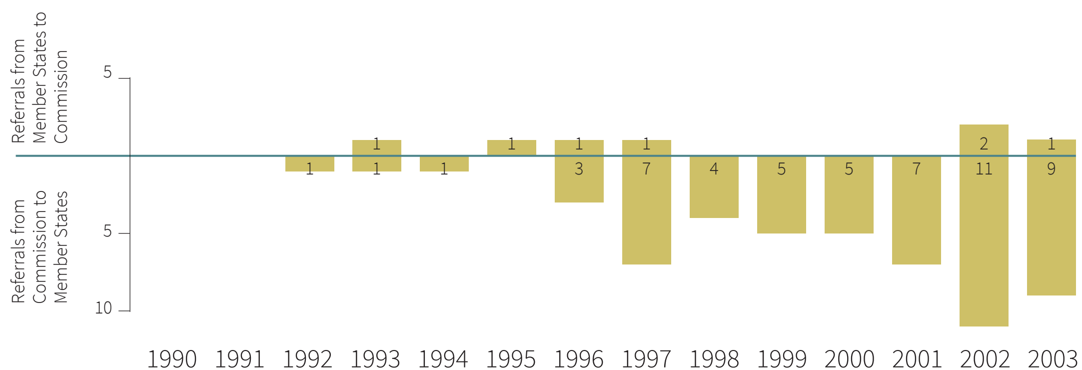


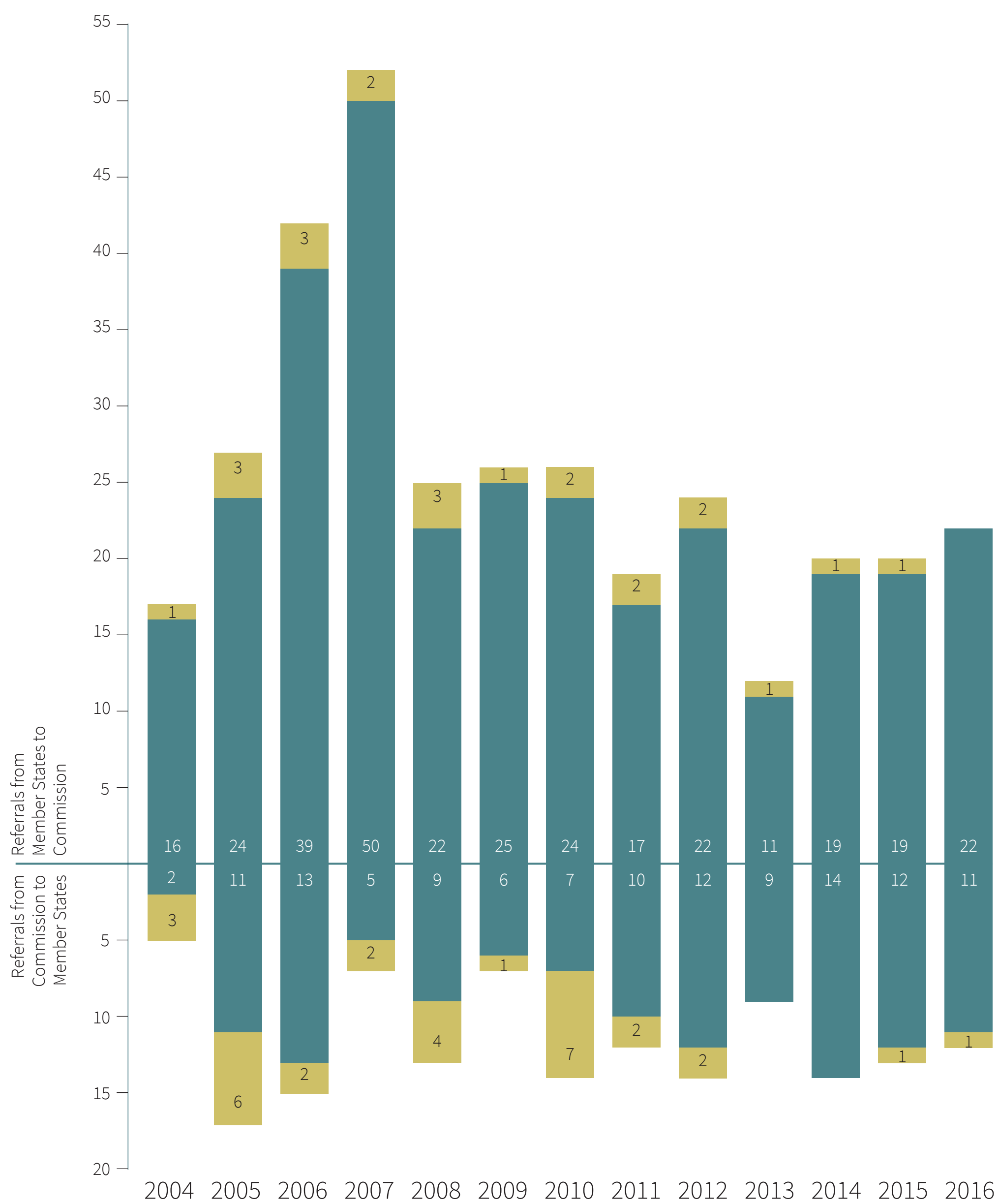


B. Total number of referrals by year

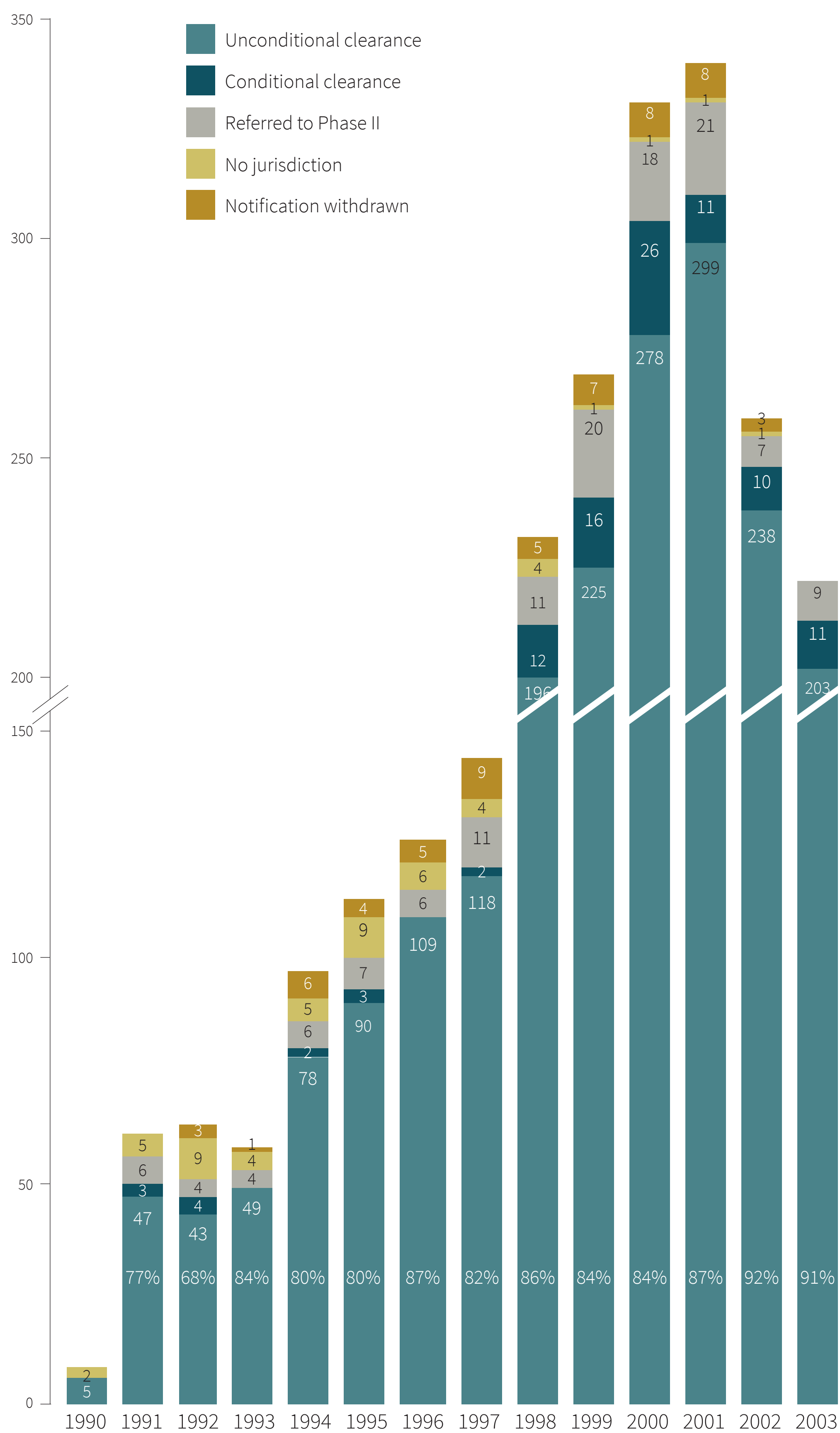
Post-notification

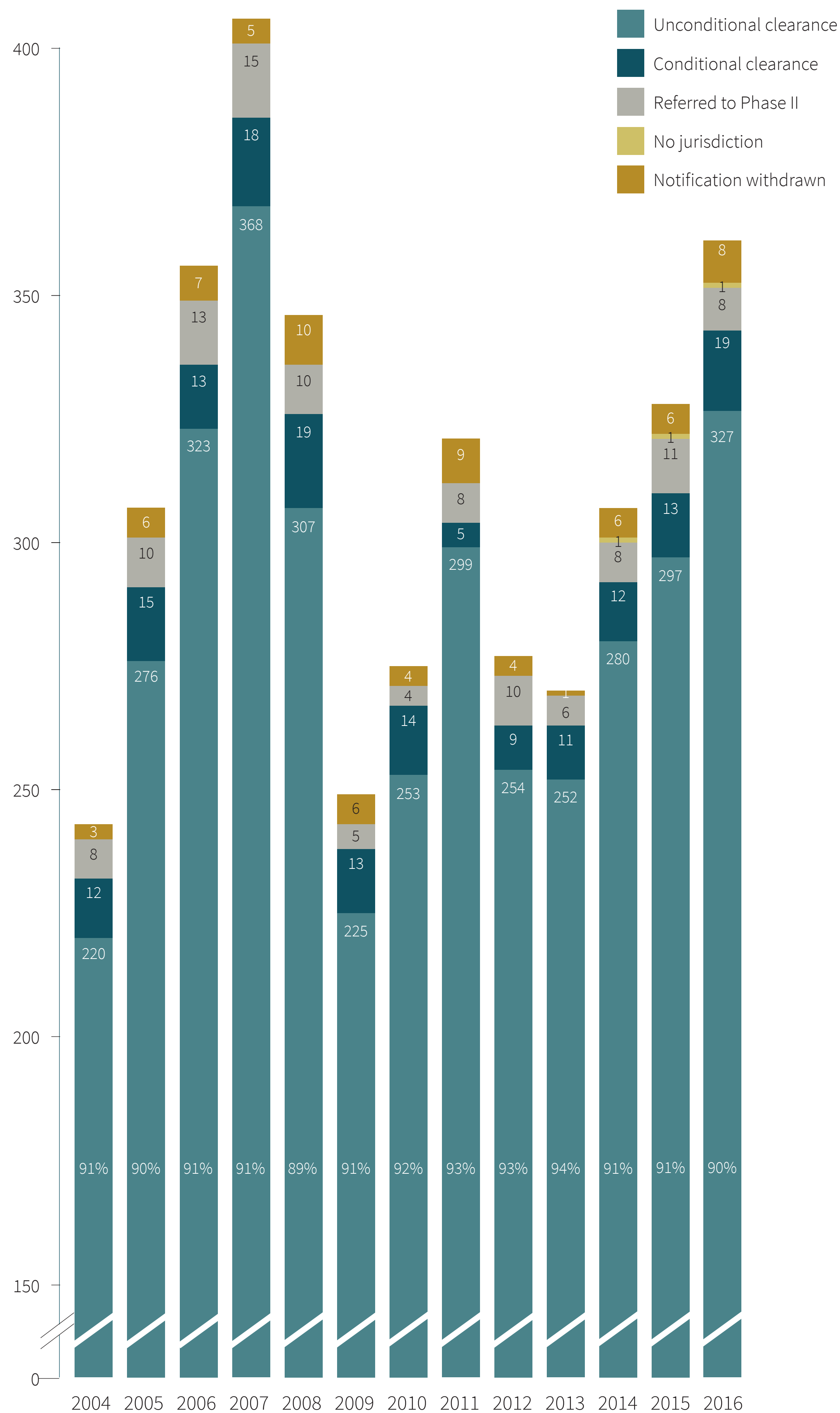
Pre-notification





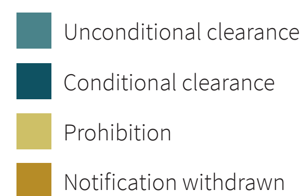
C. Different Phase I outcomes by year

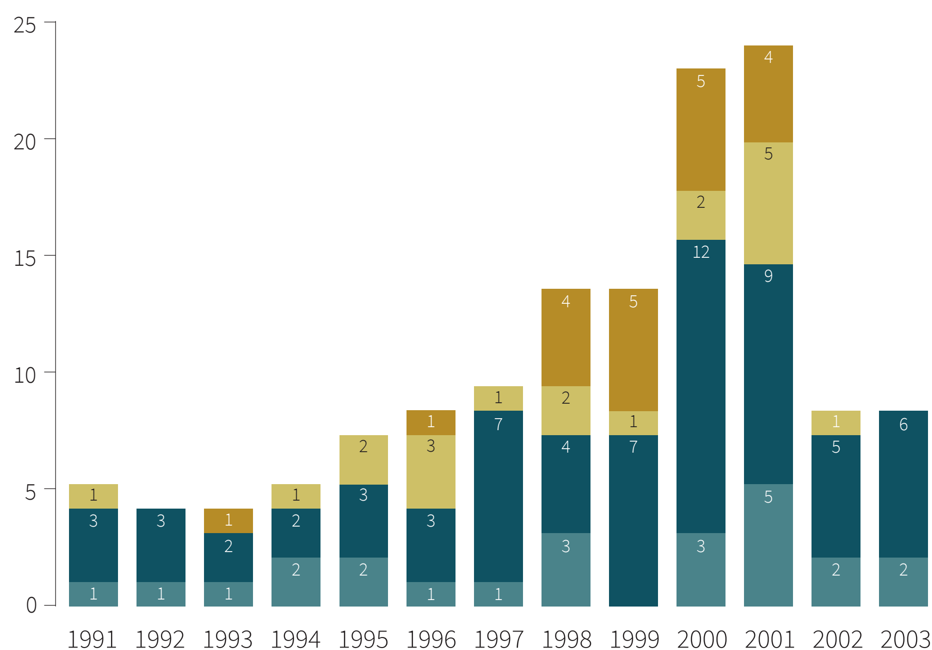


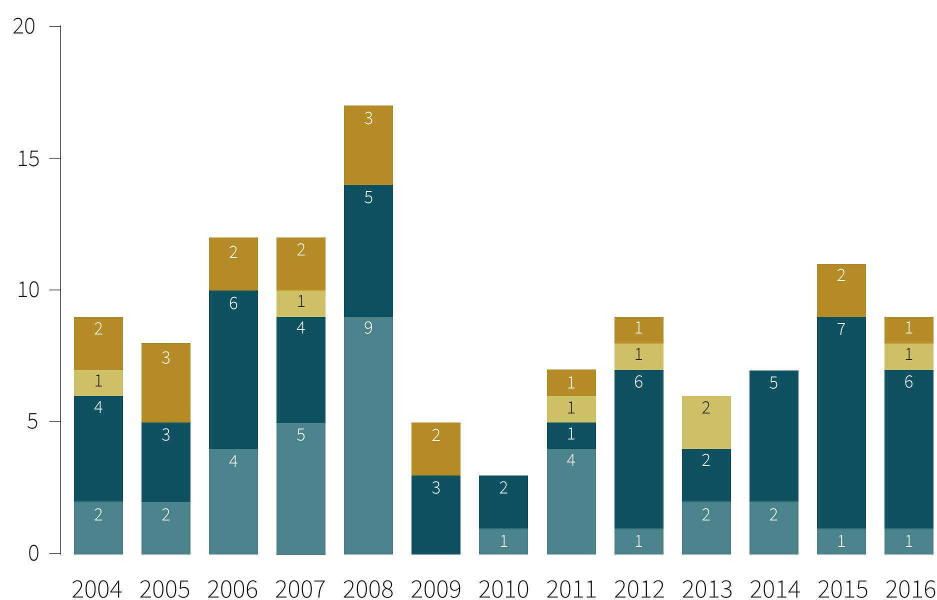


Unconditional clearance
Conditional clearance
Referred to Phase II
No jurisdiction
Notification withdrawn
400
350
300
250
200
150
0
2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016
220 12 8 3 91%
276 15 10 6 90%
323 13 13 7 91%
368 18 15 5 91%
307 19 10 10 89%
225 13 5 6 91%
253 14 4 4 92%
299 5 8 9 93%
254 9 10 4 93%
252 11 6 1 94%
280 12 8 1 6 91%
297 13 11 1 6 91%
327 19 8 1 8 90%

D. Different Phase II outcomes by year







Slaughter and May profiles

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He is resident in our London office, but also spends a proportion of his time in Brussels. He is responsible for the running and development of the firm's global competition practice, including through our Beijing and Hong Kong offices and "best friend" firms.

Philippe has extensive experience of both EU and UK competition law with expertise in merger, cartel, behavioural and competition litigation cases in both jurisdictions.

Highlights include advising:

- INEOS in relation to its PVC joint venture with Solvay JV, combining Europe's two largest PVC producers. The European Commission issued a conditional clearance following an in-depth Phase II review
- Equinix on its acquisition of Telecity and its disposal of assets to Digital Realty Trust
- Ericsson in relation to its acquisition of Red Bee Media, combining two of the leading linear playout service providers in the UK, which was cleared unconditionally by the UK Competition Commission after an in-depth review
- BHP Billiton on its proposed iron ore production joint venture with Rio Tinto (subject to a detailed investigation by the European Commission)
- Bertelsmann in connection with the merger of its recorded music business, BMG, with Sony Music (unconditionally cleared twice after two detailed Phase II investigations by the European Commission) and on its successful appeal to the ECJ against the General Court's judgment in the Impala case
- Chi-X Europe on its merger with BATS (cleared unconditionally after a detailed investigation by the UK Competition Commission) and on its representations to the European Commission regarding the proposed Euronext / Deutsche Boerse merger
- Global Radio in the Office of Fair Trading (OFT) merger investigation into the GMG Radio deal (only the second case to involve a fast track reference application to the UK Competition Commission and one of the few media cases to involve a Public Interest Intervention notice on media plurality grounds)
- Ericsson on its Article 102 complaint to the European Commission concerning Qualcomm's patent licensing practices, on its acquisition of Nortel's patent portfolio (Rockstar transaction) and of Nortel's multi-service switching business (cleared by the European Commission after concessions)

Philippe is listed as a leading individual in the "Competition Law" section of Chambers UK, 2016 (Band 1) and for "EU and Competition" and "Competition litigation" in The Legal 500 UK, 2015. He is also listed for "Competition Law" and "Competition/European Law (Foreign Experts)" in Chambers Global, 2016.

Philippe is the President of the European Competition Lawyers Forum (which is used as a sounding board on policy and practice-related issues by the European Commission's Competition Directorate General).
He is fluent in French and has a reasonable knowledge of German.

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Bertrand studied at the London School of Economics (MSc Economics). He joined Slaughter and May in 1992 and became a partner in 2001. He works in both our London and Brussels offices.

Bertrand's practice spans merger control, competition litigation, market inquiries and competition investigations. He has extensive experience of representing clients before the European Commission and the UK Competition and Markets Authority (CMA).

Current and recent matters include advising:

- Royal Dutch Shell on its acquisition of BG Group, and on the disposal of its Danish downstream business to SFR
- ITV on its acquisitions of Talpa Media and UTV
- Spirit Pub Company on its acquisition by Greene King
- Regus on its acquisition of Avanta
- British Airways in relation to:
  - cartel investigations by the European Commission and the OFT, respectively, into air freight (cargo) services and passenger fuel surcharges on long-haul flights
  - private actions relating to the cargo and passenger investigations
- A major financial institution on the investigation into trading on the foreign exchange market
- Platts on the European Commission's investigation into the manipulation of published prices for a number of oil and biofuel products
- Japan Tobacco (Gallaher) on litigation arising out of the OFT's investigation into the retail pricing of tobacco products
- Nationwide on the CMA's retail banking investigation

Bertrand is fluent in French. He is listed as a leading individual for "EU and Competition Law" in The Legal 500, 2015 and for "Competition Law" (Band 1) in Chambers UK, 2016.

Experience
Slaughter and May: 1992-Present
Partner since: 2001

Practice Areas
Competition
Competition Litigation
Global Investigations

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Natalie Yeung

Natalie joined the firm in 2005 and moved to our Hong Kong office in 2009. She is an experienced competition and regulatory lawyer who represents clients in relation to cross-border M&A and the new Hong Kong competition legislation.

She has worked on a number of matters involving Hong Kong, EU and UK competition law, and her experience covers a range of sectoral regulation, anti-trust and merger control work.

Natalie has been responsible for coordinating the PRC and Asian merger notifications on a number of global transactions.

Her recent advice on cross-border transactions in Asia includes:

- Shell on its £47 billion acquisition of BG Group. The transaction triggered merger control and foreign investment approvals across the world
- Starwood on its US$13 billion acquisition by Marriott
- Tencent on its US$8.6 billion acquisition of a majority stake in Supercell Oy
- Rolls Royce on its acquisition of the 50% remaining stake in Rolls-Royce Power Systems joint venture from Daimler (being the first filing in the PRC under the simplified procedure) and various subsequent transactions
- Thermo Fisher Scientific on its takeover of Life Technologies Corporation and its US$44.2 billion takeover of FEI company
- Bertelsmann on its combination with Pearson of their respective trade-book publishing businesses
- Aegis plc on the recommended cash offer by Dentsu Inc.
- CIMB Group on its acquisition of Asian businesses from RBS
- INEOS on the creation of a 50/50 oil refining joint venture with PetroChina and the formation of Styrolution with BASF

Natalie is listed as a leading lawyer for “Competition/ Antitrust (International Firms - China)” in *Chambers Asia-Pacific 2017* and in the *IFLR 1000 Asia Pacific 2017* for Competition in Hong Kong. She is also recommended in the *Legal 500 Asia Pacific 2017* for Antitrust and Competition and listed in the 2016 edition of *Who’s Who Legal Competition: Lawyers* and referred to as “*one of the standout lawyers in Hong Kong*” and “*one of the world’s foremost experts on Hong Kong’s competition legislation*”.

Natalie is the co-author of the Hong Kong chapter of Getting the Deal Through’s “Cartel Regulation” publication.

Natalie speaks Chinese and English, and splits her time between the Hong Kong and Beijing offices. She is admitted as a solicitor in England and Wales and Hong Kong.

Experience
Slaughter and May: 2005-Present
Partner since: 2014

Practice Areas
Competition
Corporate and Commercial
Global Investigations
Mergers and Acquisitions

Hong Kong Practice Areas
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