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Merger Control

2021

10th Edition

Contributing Editors: **Nigel Parr & Steven Vaz**

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GLOBAL LEGAL INSIGHTS – MERGER CONTROL

2021, 10TH EDITION

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PREFACE

We are delighted to introduce the 10th edition of *Global Legal Insights – Merger Control*.

As in previous editions, the 18 country chapters each concern a particular jurisdiction and offer comment and strategic insights into merger control laws around the world, as well as their enforcement in practice. This year there is specific consideration of how merger control regimes interact with the increasingly prevalent and interventionist national security/foreign direct investment review processes in many jurisdictions. This edition also contains an additional chapter assessing the loss of potential and dynamic competition under UK and EC merger control. This work, together with the other titles in the now well-established *Global Legal Insights* series, goes beyond the basic letter of the law and adds important colour and texture to the core topics under discussion.

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

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

Nigel Parr & Steven Vaz
Ashurst LLP

Assessing the loss of potential and dynamic competition under UK and EC merger control: Prediction is difficult – especially if it's about the future

Ben Forbes, Mat Hughes & Camelia O'Brien
AlixPartners UK LLP

Introduction

This chapter considers developments in how the European Commission (EC) and UK Competition and Markets Authority (CMA) assess mergers that may lead to a loss of potential and/or dynamic competition between the parties.

These issues are topical globally, with the Organisation for Economic Co-operation and Development's (OECD) 2021 report on global merger control trends highlighting an increased focus on how to protect potential and dynamic competition,[1] and the CMA adding an entirely new section on dynamic competition to its revised Merger Assessment Guidelines (the CMA Guidelines) of 2021.[2] In addition, in April 2021, the CMA, the Australian Competition and Consumer Commission, and the German Bundeskartellamt issued a joint statement on merger control, which emphasised the importance of effective merger control, including specifically as regards mergers "*where incumbents seek to protect their market position by acquiring potential competitors in the form of smaller firms or potential entrants in adjacent markets*".[3]

These issues are consequentially highly topical for firms (and their advisors) contemplating mergers. In short, not only do they need to consider whether the parties are important existing competitors pre-merger – which may be highly visible – but also whether they might become important rivals or competitive threats in the future, which may be much harder to ascertain.

The OECD's report focuses on two key theories of harm associated with so-called "killer acquisitions" and protecting potential competition more generally. First, killer acquisitions concern the loss of potential competition through the acquisition by a currently dominant firm of an emerging or start-up firm, which might have otherwise developed into an important rival. Moreover, the acquisition of a start-up firm may lead to the loss of not just a competitive constraint, but also of an innovative new product.[4] Second, there may also be "reverse" killer acquisitions where an incumbent forgoes its own innovation (i.e. organic growth) to pursue a start-up, thereby lowering overall innovation in the market. Such a strategy can also weaken an incumbent's innovation incentives prior to entry occurring if the impeding threat of entry dynamically incentivises it to make investments and innovate.

These concerns also raise wider issues as to the design of merger control thresholds (to ensure that competition authorities have the legal power to intervene in situations where an incumbent acquires a start-up with little or no turnover), and the standard and burden of proof to find that a merger is anti-competitive.

Whilst these issues are of general relevance, certain sectors are a particular focus for authorities given the number of acquisitions made by incumbents. For example, in the digital sector, between 2015 and 2020, Amazon made 42 acquisitions, Apple 33, Facebook

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21, Google (Alphabet) 48 and Microsoft 53. Many of these have flown under the "radar" of merger control thresholds, and the few that were assessed have been approved (e.g. *Google/Waze*, *Facebook/Instagram*, and *Microsoft/LinkedIn*, with the latter being cleared subject to commitments).[5] Similar issues have arisen in the pharmaceutical sector, reflecting that in these markets firms compete in innovating to develop new drugs.

However, applying these theories of harm poses some obvious issues. First, if they relate to future competitive harm, they are inherently based on predictions. To quote Niels Bohr, a Nobel laureate in Physics and the inspiration for this chapter's title, "*Prediction is very difficult, especially if it's about the future!*"[6] Indeed, the OECD notes that "*an over-focus on dynamic effects creates risks for enforcement errors, and challenges for agencies in meeting requisite evidentiary burdens and standards*".[7] Second, the tools and evidence required to assess the loss of potential and dynamic competition are not the same as those applied to assess existing rivalry between the parties (although analogous evidential issues should be considered). We consider that all theories of harm – whether in merger control or antitrust more generally – should be tested carefully against evidence and the focus should be on assessing harm to consumers.

This chapter assesses these issues in three main sections. Section 2 outlines a simple economic model presented by Motta and Peitz (2020)[8] to assess the competitive effects of a monopolist incumbent acquiring a potential entrant. This model usefully highlights why such mergers may be anti-competitive. Section 3 then considers the merger policy issues raised, and the evidence required to assess specific mergers. Section 4 comments on three cases where the CMA and EC assessed theories of harm in which the elimination of potential or dynamic competition was central, namely *Bauer Media* (2020), *Amazon/Deliveroo* (2020) and *Novartis/GlaxoSmithKline Oncology* (2015). Section 5 concludes.

An economic theory of harm

Motta and Peitz (2020) present a model in which an incumbent monopolist buys a potential entrant. This model helps bring alive the concerns competition authorities have and the key evidential factors that are important to distinguish between pro- and anti-competitive mergers. The key elements of this model are as follows:

- A start-up faces entry costs of K and its probability of success is P. For entry to be profitable, the expected profits (its expected duopoly profits with only two firms post-entry, allowing for the probability of success) must be greater than the cost K. (Motta and Peitz assume that the incumbent's and start-up's entry costs would be identical, but acknowledge that the incumbent's may be lower if it benefits from efficiencies/synergies or higher if its costs are greater.)
- The start-up must have the necessary resources (R) in order for the project to be successful. These could be financial resources, but Motta and Peitz envisage the resources required more widely, such as including data or expertise in terms of human capital or marketing. The start-up may have insufficient resources, particularly as finance providers or key staff may be reluctant to commit to projects where there is uncertainty as to whether they will be successful.
- In deciding whether to purchase the start-up, there are two possible sources of profit to the monopolist incumbent. First, if the start-up enters, the increase in competition will cut the incumbent's profits – this gives the incumbent a strong incentive to purchase the start-up to preserve its monopoly profits. This source of profit is unique to incumbents – it is not a benefit for other prospective, non-incumbent purchasers of the start-up. Second, the incumbent may upgrade its own product range with help from the entrant. However, this would only happen if this would increase the incumbent's overall profits post-merger.

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Applying this model, Motta and Peitz present four possible outcomes from the acquisition, with the outcome observed depending on what would happen absent the merger (i.e. the counterfactual) and following the merger:

(a) ***Dead project*** – This arises where, absent the merger, the start-up's expected costs of entry outweigh the expected profits and it has insufficient resources. In this scenario, any acquisition will be competitively neutral and consumers would not be harmed, as in the counterfactual the start-up would not have entered.

(b) ***Killer acquisition*** – Absent the merger, the start-up would have had sufficient resources to profitably develop the project and enter, yet, following the merger, the incumbent is not incentivised to develop the product. In this scenario, the expected addition to the monopolist's total profits from developing the new product (i.e. taking account of the cannibalisation of its existing sales) is insufficient to cover the costs of doing so. This is clearly anti-competitive and the worst outcome for consumers of the four considered, because the start-up would otherwise have entered and competed by offering the new product.

(c) ***Monopolist upgrade but suppressed competition*** – In this scenario, the start-up had the necessary resources and would have profitably entered, but the incumbent purchases the start-up and upgrades its existing product with the start-up's help. This outcome is still anti-competitive, because, absent the merger, the start-up would have increased competition to the benefit of consumers by competing directly with the incumbent.

(d) ***Efficient upgrade*** – Absent the merger, the start-up would not have developed the project and entered as it lacked sufficient resources. However, the acquisition allows the incumbent to upgrade its own product, enhancing efficiency and increasing consumer welfare. This is an efficient outcome.

This model highlights the key evidence to assess the effects of start-up acquisitions, but it is appropriate to address first the wider policy issues.

Implications for merger policy

Merger control thresholds

From the previous section, there is a clear theory of harm based on incumbents having a strategic incentive to prevent entry that would undermine their monopoly profits. More generally, the threat of such entry might incentivise dominant firms to invest and innovate.

In these circumstances, merger control thresholds that are purely turnover-based risk under-enforcement as start-ups may have little or no turnover. Several solutions have been advanced to address this.

First, Motta & Peitz suggest that notification thresholds based on deal value can be a useful complementary screening device, and several countries have adopted such thresholds (such as Austria and Germany).[9] These could be particularly focused at big tech mergers, where deal valuations for start-up companies have often borne little relation to revenues. The CMA itself notes that Facebook's acquisition of Instagram (purchased for US$300 million cash plus 23 million shares of Facebook common stock) may have been a signal for projected expansion in the future.[10] The Furman review also suggested: "*[D]rawing attention to the evidential relevance of the transaction value relative to the market value and company turnover, and the importance of understanding the rationale for valuations which appear exceptionally high.*"[11] A high start-up valuation might reflect expected fast growth and a dominant firm might be willing to pay a substantial sum to preserve its profits by eliminating this threat.

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Second, competition authorities could have the discretion to investigate mergers, even if they do not meet standard turnover thresholds. Indeed, on 21 March 2021, the EC announced a new policy that it will encourage and accept more referrals under Article 22 of the EC Merger Regulation where the turnover of one of the parties does not reflect its actual or future competitive potential. Crucially, this policy applies even where the transaction does not meet the Member State's national merger control thresholds. Referrals are expected to include mergers involving nascent competitors and innovative companies, including in (but not limited to) the digital, pharma, biotech, and certain industrial sectors. The EC's press release suggested that such discretion could be applied in a targeted way and that "*[w]hile informative, the value of the transaction may not always be sufficiently correlated with the transaction's potential competitive significance*".[12]

However, the EC's guidance suggests this discretion could be applied widely, and not just where the mergers involve recent or new entrants, including:

> "*[T]he creation or strengthening of a dominant position of one of the undertakings concerned; the elimination of an important competitive force, including the elimination of a recent or future entrant or the merger between two important innovators; the reduction of competitors' ability and/or incentive to compete, including by making their entry or expansion more difficult or by hampering their access to supplies or markets; or the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices.*"[13]

Moreover, this policy change creates legal uncertainty as to whether a merger will be investigated, and M&A merger control conditions may need to address the possibility of such reviews.

The third alternative could be to require certain firms to notify their proposed mergers prior to completion, with the Furman report and the CMA's Digital Markets Taskforce recommending this for designated digital firms.[14,15]

A fourth alternative would be to have jurisdictional thresholds based on shares of supply, rather than solely based on turnover. In the UK, the CMA can review mergers involving a target business with low or even no revenues if the "share of supply" test is satisfied, which merely requires that a share of supply or acquisition of goods or services of a particular description of 25% or more is created and enhanced in the UK as a whole or a substantial part thereof. The CMA emphasises that it "*could define the share of supply using metrics such as: value, cost, price, quantity, capacity, number of workers employed, or any other appropriate criterion to determine whether the 25% threshold is reached*".[16] Indeed, the flexibility of this test is emphasised in its publication of December 2020, "*Mergers: Guidance on the CMA's jurisdiction and procedure*".[17]

This permits the CMA to investigate mergers involving companies at an early stage in their lifecycle,[18] but the CMA adds that the share of supply test does not enable it to look at mergers where there is no increment in market share on any "*reasonable*" measure, such as in relation to purely vertical mergers.[19]

The extent of the CMA's discretion to apply the share of supply test has been considered by the Competition Appeal Tribunal (CAT) in the appeal of the CMA's prohibition decision in *Sabre/Farelogix* (2020),[20] with Sabre disputing the CMA's approach to capturing mergers with little direct connection to the UK.

The CAT dismissed the appeal based on the specific facts of the case, but the judgment emphasised the CMA's discretion to define a relevant description of goods and services and the criteria applied to quantify whether a share of 25% is created or enhanced.[21] The CAT

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indicated that the purpose of the share of supply test was to identify those smaller mergers which are "*worthy of consideration*", i.e. warrant the devotion of time and resources by the CMA and the parties.[22] The judgment also affords the CMA considerable discretion in identifying whether the parties "*do a sufficiently similar thing*" or have "*common functionality*" (and regardless of whether one party provides a wider range of services/goods), and that there is no requirement for the description of goods/services to be commercially recognisable.[23] In addition, the CAT accepted that Farelogix's contractual right to payment can be treated as value (despite BA making no payment) for the purpose of assessing whether there was some (very small) increment in share to over 25%.[24]

While merger control is important to prevent anti-competitive mergers that harm consumers, administrative efficiency is also important. Merger control regimes should be business friendly, providing firms and their advisors with as much legal certainty as possible as regards the risks they face.

The standard and burden of proof and efficiencies

The above discussion naturally leads to questions of the standard of proof required to find that a merger is anti-competitive following a detailed Phase 2 review.

In the UK, at Phase 2, the CMA needs to establish that a SLC is expected – i.e. it is more likely than not.[25] The position is more complex under the EC Merger Regulation, with the General Court's 2020 judgment in *CK Telecoms v Commission*, which quashed the EC's prohibition decision, emphasising that "*the more a theory of harm advanced in support of a significant impediment to effective competition put forward with regard to a concentration is complex or uncertain, or stems from a cause-and-effect relationship which is difficult to establish, the more demanding the Courts of the European Union must be as regards the specific examination of the evidence submitted by the Commission in this respect*". The General Court also considered that, in the case in question, that "*the Commission is required to produce sufficient evidence to demonstrate with a strong probability the existence of significant impediments following the concentration*". The General Court thus concluded that the standard of proof is higher than "*more likely than not*" (as argued by the EC), but lower than "*beyond all reasonable doubts*".[26] One of the EC's grounds of appeal relates to whether it must show that there is a "*strong probability*" of a significant impediment to effective competition, which the EC considers is a stricter test than that set by case law and in the EC Merger Regulation, which merely require the EC to identify the "*most likely*" outcome.

Accordingly, legal standards focus on the expectation that the merger would cause harm. However, Motta and Peitz's model seeks to capture *expected* anti-competitive harm from an incumbent acquiring a start-up, even if the probability of harm arising is low. The magnitude of the expected harm depends on both the probability that successful entry by the start-up would otherwise occur *and* the extent to which consumer welfare increases in this event. Following the logic of this approach, Motta and Peitz argue that the burden of proof should be reversed for all horizontal mergers between competitors. In other words, rather than the onus being on the competition authority to prove that a merger is anti-competitive, instead the parties should be required to demonstrate that there are pro-competitive efficiencies that offset any anti-competitive effects. In short, they are in favour of adopting a "balance of harms" approach, as advocated in the Furman report in connection with powerful digital platforms, such that "*the relevant criterion should be that the expected gains in consumer welfare from competition are larger than the gains that would come from the upgraded offer of the merging firm*".[27] Motta and Peitz further argue that this should be the standard applied for dominant firms' mergers, particularly as there may be a lack of documentary evidence as to the future competitive plans of start-ups.

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In our view, these debates are all questions of balance. The first is querying whether this is still a material enforcement gap given the jurisdictional developments described above and the policy focus on mergers leading to a loss of potential and dynamic competition. Indeed, such mergers have been a particular focus of a number of recent UK Phase 2 references, including *Facebook/Giphy* (2021), *Sabre/Farelogix* (2020), *Amazon/Deliveroo* (2020), *Bauer Radio* (2020), and *PayPal/iZettle* (2019).

Second, does uncertainty preclude an adverse finding being reached? The CMA's revised Guidelines emphasise that uncertainty is an inherent feature of dynamic markets but that this will not preclude it from reaching adverse findings, even where certain evidence does not and cannot be expected to exist:

> "*As with uncertainty, the absence of certain types of evidence such as historical data will not in itself preclude the CMA from concluding that the SLC test is met on the basis of all the available evidence assessed in the round*."[28]

In particular, as regards the counterfactual, the Guidelines state that:

> "*Uncertainty about the future will not in itself lead the CMA to assume the pre-merger situation to be the appropriate counterfactual. As part of its assessment, the CMA may consider the ability and incentive (including but not limited to evidence of intention) of the merger firms to pursue alternatives to the merger, which may include reviewing evidence of specific plans where available.*"[29]

In addition, the Guidelines add that uncertainty as to the outcome of a dynamic competitive process in terms of what services/products will ultimately be available to consumers does not prevent the CMA from assessing the impact of the merger.[30] In making this point the CMA also refers to the EC's decision in *Novartis/GlaxoSmithKline Oncology* (2015), which is one of the case studies discussed below. Nonetheless, in our view, it is important that adverse findings are not based on unevidenced speculation.

Third, there are two important premises behind Motta and Peitz's model: the merger involves a monopolist (1) acquiring the only credible potential entrant (2). On the first premise, they observe that killer acquisitions are less likely if there is more competition among incumbents. This is intuitive because the smaller the market share of the incumbent acquirer, the less likely the acquisition will be motivated by the threat of the start-up cannibalising its market share and profits (as opposed to that of rivals). To put the point differently, one might expect the greatest competitive threats to incumbent firms to come from other incumbents with track records of success. This rather suggests that merger control should focus on mergers between important *existing* rivals. On the second premise, a specific start-up may be the only credible or important entrant, but at least this begs the question of why.

Fourth, over-enforcement risks some unintended consequences and foregone efficiencies. Mergers between firms offering complementary products/services may yield material efficiencies. Efficient gains from an improvement in an incumbent's offering may justify an acquisition of a potential competitor, particularly when the probability of the potential entrant becoming an effective competitor is small.

In addition, such acquisitions may also allow entrepreneurs to exit and grow their businesses with additional resources, and competition from incumbent firms to acquire start-ups may increase their exit value and thus the start-up's initial investment incentives.

Lastly, rather than revising overall merger control, a more proportionate approach might be to focus on markets where it is most important to preserve potential and dynamic competition. The CMA's Digital Markets Taskforce has recommended that in UK Phase 2 merger cases involving designated digital firms, a substantial lessening of competition may

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be found where this is a "*realistic prospect*", rather than expected. However, this would be a low bar for intervention, and it is far from clear how this would be applied in practice such that an adverse finding at Phase 2 is not a foregone conclusion (since the CMA's Phase 1 reference decision must have already reached this conclusion).

The key economic evidence

The Guidelines indicate that mergers involving potential competitors can have two anti-competitive effects. First, they can reduce future competition, as the CMA describes: "*[A] merger involving a potential entrant may imply a loss of the future competition between the merger firms after the potential entrant would have entered or expanded.*"[31] Second, they can reduce dynamic competition, where "*existing firms and potential competitors can interact in an ongoing dynamic competitive process, and a merger could lead to a loss of dynamic competition*".[32]

This sub-section considers the key evidence to assess these issues, drawing on Motta and Peitz's model, the Guidelines, and an interesting article by a number of CMA staff entitled "*Merger control in dynamic markets*" (which is based on the UK's submission to the OECD in its roundtable on Merger Control in Dynamic Markets).[33] In our view, the key evidence required can be distilled down to covering four key issues.

How competitive is the market pre-merger?

A natural starting point is to consider actual competition pre-merger. This is because – as emphasised above – a core premise of such theories of harm is either that pre-merger competition is not effective, and/or that the threat of entry by one of the merging parties is already an important competitive constraint or would become so.

Accordingly, any assessment of whether the elimination of such competition is appreciable thus needs to start from understanding existing competitive rivalry and how firms compete pre-merger. As the CMA observes: "*[I]t may be that in a heavily fragmented and competitive market, and/or a market with low barriers to entry, the loss of a potential competitor is not a competition concern, whereas in a highly concentrated market with high barriers to entry, it may be considered problematic.*"[34] The Guidelines make the point in similar terms, namely that the loss of a potential entrant is likely to be more significant where there are fewer strong existing competitive constraints on the other merger firm or if it otherwise already has market power. Similarly, if the theory of harm is that the potential entrant is already constraining an incumbent merger party, it would be relevant to assess any direct response by that firm to threatened entry or its incentives to do so.[35]

The merger counterfactual – would one of the parties become an important competitive constraint?

The second key point, which naturally follows from the four very different outcomes to start-up acquisitions identified by Motta and Peitz, is that the merger counterfactual is vitally important. If a potential entrant would not have entered or would have been too small to have any appreciable competitive impact, then the transaction is at worse competitively neutral and could be welfare enhancing.

Motta and Peitz rightly observe that qualitative information may include internal documents, business plans, financial analysis, and an analysis of likely scenarios if the merger were not to go ahead (including the sufficiency of the start-ups resources and whether there would be other purchasers). Consistent with this, the Guidelines make extensive reference to internal documents as being key evidence. However, as we observed in our joint comments with Addleshaw Goddard on the CMA's draft Guidelines,[36] caution should be applied in relying on a microscopic focus on the parties' documents for a number of reasons. In particular,

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it is important to understand the context of such documents (including their authors, their specific purpose, and whether they were acted on), third parties' views should be tested as well (for example, the parties may be unaware of rivals' competitive plans), and internal documents may not be an accurate guide to the underlying facts (for example, a start-up's plans may be unrealistic or over-optimistic, and so may valuations).

Given the importance of the counterfactual, the Guidelines consider entry or expansion by one of the merger firms as an explicit counterfactual scenario, noting specifically that this could include an acquisition of a start-up company, or where an established firm enters a new market by acquisition (where it may have developed its own product and entered organically).[37] The Guidelines indicate that the CMA may consider:[38]

(a) Direct evidence of intentions to enter or expand, but noting that such plans may have been supplanted by the merger.
(b) History of entry in closely related markets.
(c) Responses by existing competitors to the threat of entry or expansion by the merging parties.
(d) The ability and incentive of the parties to enter/expand and compete with each other. In our view, any such assessments should be carried out with care. As the law firm CMS observes in its feedback on the draft updated Guidelines: "*The technical ability to enter a market (even if such an opportunity might prove profitable) is not a sufficient basis to conclude that a firm 'would' enter. Businesses may theoretically be able (and even incentivised) to enter a great number of markets, but ultimately not do so for any number of commercial or strategic reasons. It appears tenuous to infer that a merger party "would" do something in the complete absence of any actual evidence suggesting that it had explored or even contemplated such entry.*"[39]
(e) The timeliness, likelihood and strength of any entry or expansion (including accounting for any markets with lengthy but prescribed processes to develop new products). In this regard, the CMA indicates that it may consider the likely nature of the future product/service, or any reasons why it might be particularly well placed as a rival.[40]

The CMA's article on merger control in dynamic markets highlights a number of points from recent cases assessing dynamic counterfactuals.[41] In particular, in *eBay/motors.co.uk*, the CMA considered whether eBay was expanding into online vehicle advertising, but ultimately decided against a more competitive counterfactual because eBay's proposed investment was not over and above what was needed to compete. Similarly, in *PayPal/iZettle*, the CMA examined PayPal's internal documents to determine whether they would invest in an "*offline product*" to complement its online payments product. The CMA found that: "*PayPal had a very strong incentive to develop its offline payment service and enhance its omni-channel offer and was satisfied that it could and would have achieved this through one or more measures.*" The CMA balanced this against the time it would have taken to achieve, ultimately deciding that PayPal would have been a stronger competitor absent the merger (but with some limitations in the short term).

In addition, the acquirer's rationale for the acquisition and the factors driving deal valuation may be highly relevant. On the one hand, these documents might highlight the potential for rivalry-enhancing efficiencies if the merger leads to a better overall customer proposition. On the other, if the acquirer has no plans to use the start-up to develop new offerings or enhance their own, then this may raise killer acquisition flags. The acquirer's deal rationale and valuation of a start-up may provide evidence on its likelihood of success absent the merger. High deal prices may indicate that the entrant's funding is sufficiently large and therefore the entrant is well positioned for entry. However, and alternatively, it may reflect the scope for synergies between the merger parties.

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The CMA Guidelines indicate that it may need to investigate a wider timeframe for the relevant counterfactual when considering mergers with dynamic markets, depending on the characteristics of the market in question. For example, in *PayPal/iZettle*, the CMA concluded that nascent omni-channel services were at a very early stage of development with rapid growth and significant product development and innovation. Therefore, a point-in-time "snapshot" may not capture the competitive constraints posed by the firm in question, which forced the CMA to gather evidence on the likely competitive constraints over several years.[42]

Are there other viable entrants?

When analysing what would happen absent the merger, the authorities should consider not just whether existing rivalry is limited and the target would enter or expand materially (such that the loss of potential or dynamic competition is a concern). They should also consider whether other viable and credible entrants would likely emerge, such that there would, in any case, be significant competition to the merged entity. However, it is striking that the Guidelines downplay the role of entry and expansion as a countervailing constraint, noting: "*The CMA considers that entry and/or expansion preventing an SLC from arising would be rare.*"[43] This view reflects an *ex post* evaluation of a selection of its own merger decisions, which found that in some cases where it had relied on entry/expansion to clear the merger, such entry/expansion did not in fact materialise. However, by the same measure, unexpected entry may have occurred in other cases.

Moreover, the CMA applies no such presumption to entry/expansion by one of the merging parties. If the ability of a third party's entry/expansion to mitigate a SLC is assumed rare, why should a different standard apply to the entry/expansion of the merger parties? The American Bar Association makes a valid point in relation to "*why the acquisition of a small potential entrant by a large incumbent firm would give rise to an SLC, but the continued existence of a small potential entrant after a merger is not also a similar potent competitive constraint*".[44]

In this regard, it is welcome that the CMA's article on merger control in dynamic markets emphasises that it may also request documents from the parties' current and future competitors in order to assess their plans, according to "*how developed the plans are, how likely these plans are to succeed, and how ambitious they are relative to the merging parties and to other competitors in the market*".[45]

Merger efficiencies and innovation incentives

As discussed above, mergers involving start-ups may lead to various efficiencies, and one additional point is worthy of emphasis. When discussing the loss of dynamic competition from potential entrants, the CMA's Guidelines fail to identify the "appropriability" effect. Appropriability relates to the extent an innovator can protect the competitive advantage from that innovation, and thus higher appropriability creates greater incentives to innovate. In other words, a firm will only invest in innovation if its expected reward exceeds the cost. Therefore, mergers that enhance appropriability (e.g. by preventing knowledge spill-overs) may encourage or increase innovation.[46] The CMA's analysis of innovation should therefore not merely presume that innovation reduces post-merger, but instead that such assessments require a detailed understanding of the key drivers of innovation, including the process in which it takes place (i.e. timing/lifecycle/whether innovation can be protected effectively by patents), the size of any impact, the certainty of such impact, and the underlying market structure that could itself affect the prospect for entry.[47]

In the next section, we discuss three recent cases in which the analysis of potential or dynamic competition was central to the authorities' findings of theories of harm, including our views on the key issues and takeaway lessons from these cases.

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Case studies

Bauer Media

This case related to the acquisitions by Heinrich Bauer Verlag KG (Bauer) of a number of local radio stations across the UK (the Acquired Stations) (*Bauer Media*). The CMA's reference decision was based on several theories of harm, and all but one were dismissed at Phase 2. By way of background, besides Bauer and its main competitor Global (who together represented 83% of the UK radio market in terms of pre-merger listening share[48]), there are a number of small independent local radio stations with a very low share of listening (including the Acquired Stations and other Third-Party Stations) who need representation in order to sell national advertising. Pre-merger, these independent radio stations mainly used a sales agency called First Radio Sales (FRS) to sell to national advertising to media buying agencies (MBAs).

The CMA found that the merger would lead to substantial lessening of competition in the market for representation of independent local radio stations to national advertisers, because the CMA considered that, absent the merger, FRS would have remained in the market and Bauer would have entered for reasons discussed below.[49]

The CMA's assessment

Pre-acquisition, the Acquired Stations and Third-Party Stations were mainly represented by FRS, and some were represented by Global. Bauer did not represent any of these stations pre-merger so was not an actual competitor in this market – the CMA largely agreed with this.[50]

Post-acquisition, it was clear that once the Acquired Stations left FRS to be represented by Bauer, FRS's financial viability would be jeopardised, and FRS would exit the market. Post-acquisition, Bauer would have started representing Third-Party Stations. This is because, having bought the Acquired Stations, Bauer would be able to gain the step change in listening it needed in order to get better deals with MBAs. This was the rationale for its simultaneous acquisition of all the Acquired Stations in the first place, as demonstrated by internal strategy documents. Accordingly, post-acquisition, the Third-Party Stations would be limited to being represented by Bauer or Global.[51]

However, the CMA and Bauer disagreed on the counterfactual. In Bauer's view,[52] absent the merger, it had no intention of representing the Third-Party Stations. The Acquired Stations would likely have been acquired by another radio group in the counterfactual and they would have left FRS, threatening its viability. Even if the Acquired Stations did not leave FRS, in Bauer's view, FRS would have exited the market in the counterfactual.[53] Bauer submitted financial modelling to support its view on FRS' viability – FRS' revenues were declining and further decline was likely, as FRS had been unable to keep up with recent trends in radio, such as changing listener habits (including IP listening).[54] Bauer's view about FRS struggling to retain clients was also shared by third parties interviewed by the CMA.[55] Therefore, in Bauer's view, in the counterfactual Third-Party Stations' only representation option would be Global, which would have been a less competitive counterfactual than pre-merger.

Nonetheless, the CMA considered that absent the Acquisitions, FRS would remain in the market. This was because FRS was profitable at the time and the CMA could not conclude with sufficient certainty if any of FRS' customers would leave FRS in the counterfactual.[56] Moreover, the CMA concluded that Bauer would actually start representing the Third-Party Stations in the counterfactual, such that the representation options for the Third-Party Stations would have been FRS, Global and Bauer – a more competitive situation than the pre-merger scenario.

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The CMA reached its conclusion notwithstanding Bauer not providing representation at the time and refusing to do so in the past when it was approached by some independent stations.[57] Third-party evidence corroborated this.[58] Bauer also submitted internal documents to show that representation was not in line with Bauer's commercial strategy, since representation does not provide certainty that Bauer could increase its audience share and thereby secure better MBA deals.[59] In addition, Bauer emphasised that piecemeal representation of small radio stations would not make commercial sense but for the acquisition, as it would not give Bauer the step change it needed to achieve better deals with MBAs. There was no point having just a little more share of listening if Bauer could not secure better deals and sell that inventory. It was only after the acquisition that representing the Third-Party Stations would make commercial sense, since the acquisition would give Bauer the critical mass it needed to renegotiate its MBA deals.[60]

The CMA disagreed, despite the absence of any evidence in internal documents that Bauer would start representing the independent radio stations in the future but for the acquisition.[61] However, similar to *Amazon/Deliveroo* (discussed below), the CMA considered that Bauer's pre-merger position was not reflective of its future intentions.[62]

To reach its conclusions, the CMA conducted a largely theoretical assessment of Bauer's ability and incentive to start representing the Third-Party Stations but for the acquisition. The CMA referred to the lack of significant barriers to representation and the fact that some Third-Party Stations were open to being represented by Bauer as evidence of Bauer's ability to represent.[63] Moreover, the CMA considered that absent the acquisitions, Bauer would still have the incentive to increase its scale and representation would contribute to this goal.[64] This was notwithstanding the fact that Bauer had not engaged in representation pre-acquisition despite having the same overarching goal of increasing scale, as discussed above.

As a result, the CMA concluded that the acquisition would reduce the choice for national representation of the Third-Party Stations from three in the counterfactual (Bauer, FRS and Global) to two in the post-merger scenario (Bauer and Global).

The CMA was concerned that post-acquisition, Bauer, after causing the exit of FRS, could harm the Third-Party Stations through higher commission rates and/or worsening other terms. The merger was cleared with behavioural remedies[65] requiring Bauer to provide representation services for 10 years to independent radio stations on at least the same or better terms than they currently have with FRS.[66]

This case highlights the potential risks of a competition authority finding that one of the merging parties was likely to enter a market even where there was no evidence that this was planned or even considered.

Amazon/Deliveroo

This case related to Amazon.com NV Investment Holdings LLC (Amazon) acquiring certain rights and a 16% minority shareholding in Roofoods Ltd (Deliveroo). The CMA took the view in Phase 1 that the transaction could reduce the likelihood of Amazon re-entering the online restaurant platform market[67] and might adversely affect competition in the supply of online convenience grocery platforms in the UK. This case study focuses on the online restaurant platform market where the concerns about the loss of potential competition were greatest.

The CMA's Phase 2 assessment also considered the application of the failing firm defence in the context of the impact of the COVID-19 pandemic on the UK online restaurant platform market. On 17 April 2020, the CMA provisionally cleared the merger in light of a significant deterioration in Deliveroo's financial position as a result of COVID-19. However, the

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CMA subsequently concluded that the defence did not apply since a detailed assessment of Deliveroo's finances showed considerable improvement in its financial position, which had not been anticipated in the early stages of the pandemic.

In Phase 2, the CMA considered Amazon's potential re-entry into the online restaurant platforms market. In considering the counterfactual, the CMA went beyond looking at Amazon's existing plans to considering Amazon's incentive and ability to re-enter based on internal strategy documents and evidence from third parties.

The parties' arguments and the CMA's assessment

The parties submitted that restaurant delivery was not part of Amazon UK's commercial strategy, with Amazon's failed entry being key evidence. Amazon launched a restaurant delivery business in the UK, Amazon Restaurants, in 2016, but it was closed in 2018 before Amazon embarked on the Deliveroo investment round in May 2019.[68] The parties observed that there are material entry barriers, including significant technological and logistical barriers and investment needed to develop a three-sided network by attracting restaurants, couriers and consumers. The parties submitted that Amazon was not well placed to overcome these barriers.[69] One example of such as barrier was the need to develop a point-to-point logistics network where the driver delivers from the restaurant to the customer and gets paid per delivery. This is very different to the logistics for its other businesses that are generally point-to-multipoint, with drivers paid per block of time. Its inability to develop such a logistics network was a reason for Amazon Restaurants' failure.[70] The parties also submitted that Amazon's general interest in online food delivery does not support the conclusion that Amazon would have re-entered in the UK and there was no actual documentary evidence of its intention to re-enter.

However, the CMA's view was that it was not necessary for it to have internal documentary evidence setting out an "*explicit, concrete intention to enter within a defined timeframe*".[71] Rather, it was sufficient to undertake an "*in-the-round assessment*" that reflected all of the available evidence with respect to a party's intention, incentive and ability to enter.[72] The CMA also reviewed a financial model that was prepared by Amazon as part of its due diligence exercise when investing in Deliveroo. This was a "*build vs. buy*" analysis that compared the net present value (NPV) of building an equivalent footprint to Deliveroo's UK/EU business to the returns from investing in that business over a number of years. Amazon attempted to show that building a restaurant delivery platform would have lower NPV than buying and thus that it had no intention to re-enter organically, but the CMA concluded that the model had inconsistencies and was too simplistic, and therefore gave it no weight.

Apart from reviewing a wide range of Amazon's internal documents,[73] the CMA also gathered evidence from numerous third parties including restaurants, competitors both in the UK and overseas and professional analysts to support its findings.

Counterfactual assessment

The CMA found that growing Prime was an important aspect of Amazon's commercial strategy. The ability to offer Prime across more categories was important – consumers looking across broader categories shop more as they feel like they are getting better value for their Prime membership – "*it really is a flywheel*".[74] Internal strategy documents showed that food is an area Amazon sees of value to its Prime customers and restaurant delivery is seen as a useful benefit for Prime.[75] Much of these documents related to Amazon's expectations from Amazon Restaurants, but they were considered to be representative of Amazon's general commercial interest in this market. The CMA also relied on the fact that the UK is an important geography for Amazon Prime and it is also an attractive country for online restaurant platforms.[76]

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According to the CMA, the fact that Amazon Restaurants had been closed was not evidence that Amazon was no longer interested in this market. The CMA found that there were specific reasons for the failure of Amazon Restaurants since it was not well or fully executed in the UK,[77] and agreed with third parties that Amazon would likely use this as a learning experience to re-enter. This was in line with Amazon's business model in which "*Amazon regularly tests propositions, learns from these and innovates in this manner*".[78]

However, a counterview would be that Amazon would have to win back the customers lost, which would not be simple given that there are already three operators (Just Eat being the market leader), and persuade restaurants and logistics providers that they should invest in supporting Amazon's re-entry when Amazon did not prove to be committed to the market in the past.

Further, the CMA relied on internal strategy documents and emails discussing the rationale for the Deliveroo investment, which set out Amazon's view on the attraction and benefit of the restaurant delivery business. In the CMA's view, "*by investing significantly in Deliveroo … Amazon has clearly revealed an interest in restaurant delivery in the UK*".[79] The difficulty with this CMA statement is that it will always apply (no firm will invest in another if it has no interest in the underlying market it serves) and it does not reveal whether the firm would instead have entered organically.

The CMA considered that its conclusion was also supported by Amazon launching an online restaurant platform business in India (Prime Food India). Amazon argued that the regulatory and commercial situation in India was very different, which the CMA accepted. However, the CMA considered that this was nevertheless relevant evidence in assessing Amazon's broader global strategy around growing Prime membership and its intention to expand its position in the online restaurant platforms market, including in the UK.[80]

Although the CMA did not find explicit discussion about restaurant delivery in the UK in Amazon's global food strategy documents, it did find references to restaurant delivery in its grocery strategy.[81] It also found several internal emails from within its food strategy division that referred to the importance of offering restaurant delivery as part of Amazon's food strategy. The evidence showed that Amazon's food strategy division, including the most senior executives, was interested in the restaurant delivery market.

The CMA considered that the barriers to entering this market were lower for Amazon compared to overseas competitors who had submitted that it would be hard to enter the UK market. This was because Amazon could benefit from having existing relationships with millions of customers in the UK, including engaged customers through Prime. It therefore had one of the three sides of the market well developed. Moreover, Amazon is also a patient operator and investor and so it may have a different time horizon for profitability compared to other potential entrants, which makes its entry more plausible.[82]

The CMA found that there were multiple possible routes for entry by Amazon, including organic entry, acquisitions, and partnerships. There was evidence of interest in alternative providers as targets or partners, which could facilitate Amazon's entry into the UK market in the short to medium term (i.e., within five years). Amazon has done this in other markets, such as partnering with Morrison's in the grocery market in the UK. There exist a number of potential partners and/or targets, including non-UK restaurant platforms as well as UK-based logistics specialists, that could help Amazon overcome the barriers to entry to supplying a restaurant platform in the UK, including those that hampered its previous attempt in this market (such as developing a point-to-point logistics network). Evidence from third parties showed that companies are interested in partnering with Amazon.[83]

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The CMA briefly considered the impact of COVID-19 on Amazon's ability to enter the market and concluded that the impact was uncertain.[84] In fact, it noted that COVID-19 may even have increased Amazon's ability to re-enter as struggling businesses may need a large investor like Amazon or look to partner with someone.[85] Even if COVID-19 did have a negative impact on Amazon's ability to enter this market, the CMA concluded that such an impact would be quite short term. In the medium to long term, Amazon was likely to re-enter the market for restaurant delivery.[86]

Ultimately, the CMA cleared the merger, because Amazon only had a 16% minority shareholding. In this regard, it concluded that a minority shareholding would have a limited impact on Amazon's incentives to re-enter this market. Similarly, Amazon's ability to influence Deliveroo to compete less strongly against it would be relatively limited (compared to, for example, a scenario in which Amazon acquired a controlling interest).

There are similarities and differences between *Amazon/Deliveroo* and *Bauer Media*. As regards similarities, in both cases there was no actual evidence of plans to enter (or re-enter) the relevant market. As regards differences, the CMA attached much weight to Amazon's strategic interest in expansion (based on Amazon Prime and the interest of Amazon management in restaurant deliveries), its entry in another geographic market (India, despite market differences), and that future re-entry could be more successful. In *Bauer Media*, the CMA's counterfactual assessment rested on both entry by Bauer and no exit by FRS. If in the counterfactual, Bauer would have entered but FRS would have exited in any event, then there would only have been two suppliers of representation services with and without the merger, namely Bauer and Global.

Novartis/GlaxoSmithKline Oncology business

In 2014, Novartis AG (Novartis) acquired a portfolio of oncology products from GlaxoSmithKline plc (GSK).[87] The portfolio consisted of 10 marketed products and two pipeline products (which are in clinical development for cancer treatment). This case focused on the impact of a merger on potential future competition in developing particular types of drugs, and assessments of how the merger will impact on the parties' incentives to invest/innovate. The EC reached three different adverse findings, and it is clear that these reflected extensive market testing with physicians, competitors, and a market expert.

First, the EC considered that the transaction would reduce potential competition for the market for B-Raf and MEK inhibitors for the treatment of advanced melanoma by reducing the number of competitors in the future from three to two, with Roche being the only existing competitor. Novartis only had products in Phase III trials, but no other competitor had products in Phase III trials as rivals' products were at earlier stages of development. The EC considered that Novartis would be likely to abandon its products to the benefit of GSK's products that were at a more advanced stage in the Phase III trials.[88]

Second, the EC considered that the transaction would also reduce potential competition in relation to the treatment of low-grade serous carcinoma (LGSC), where they both have products in Phase III trials. There are no other actual competitors, and AstraZeneca was the only other competitor with a pipeline product, but it was only in Phase II. The EC also concluded that Novartis would have reduced incentives to incur the costs of launching two products with similar characteristics.[89]

Third, the EC concluded that the transaction would reduce competition in innovation as regards the clinical development of B-Raf and MEK inhibitors aimed at treating other cancers, where the parties represented two of only three clinal programmes aimed at serving the same unmet needs (Roche was the only competitor identified, which had only a single Phase II trial).[90]

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The EC considered evidence on products at an early stage of their lifecycle, to understand incentives to innovate. In particular, the EC noted that these early-stage products should be assessed by reference to "*the products' characteristics and intended therapeutic use, in particular by reference to their mechanism of action and to the cancer types for which they are being investigated*"[91] (emphasis added). The EC found that the parties would have two MEK and B-Raf inhibitors that are based on the same mechanism of action, would address similar unmet demand and are at similar stages of development.[92]

The EC concluded that: "*Pre-transaction each party's incentive to invest in its clinical research program was driven by the future sales that the programme was expected to generate, without consideration of the fact that it could also be expected to reduce future sales of competing clinical research programs. Post-transaction, the Notifying Party will internalise that investing in one of the clinical research programs can be expected to cannibalise future sales of its other clinical research program*."[93] Thus, the EC concluded that, with few other competing research programmes, the parties would have less of an incentive to continue investing in R&D on both the MEK and B-Raf programmes; and, in particular, Novartis is likely to deprioritise its programme as this is less advanced than GSK's.[94] The EC added that the abandonment of Novartis' programme was likely to adversely affect areas where the parties do not compete.[95]

The key takeaway from this case is that the merger parties and their advisers need to consider carefully how a merger affects incentives to invest and innovate, and whether they might be blunted (due to cannibalisation effects, which may be reduced if the parties' R&D programmes also generate non-overlapping products) or sharpened (due to R&D efficiencies, or the appropriability effect that increase incentives to innovate).

Conclusions

It is right that competition authorities consider carefully the risk of mergers adversely affecting consumers by eliminating potential and dynamic competition. Merging parties and their advisors should consider the issues that competition authorities could raise regarding: (i) how the market would develop absent the merger; and (ii) the nature of innovation in these markets and how incentives to innovate are impacted by the merger. With this in mind, they should consider the evidence base regarding market developments and the nature of innovation processes in those markets. This will help the merger parties to consider the theories of harm that competition authorities may put forward regarding the elimination of potential and dynamic competition.

All three of the case studies highlight the challenges associated with assessing these risks, particularly given the contradictory evidence in *Bauer Media* of Bauer declining to represent independent radio stations and Amazon's recent closure of its UK restaurants business. Assessments of the parties' intentions, ability and incentives to enter markets where they have no actual plans to do so are inherently difficult, whereas in pharma mergers, the issue is more whether clinical trials will be successful (particularly early-stage clinical trials). In these cases, the parties' internal documents will often be key – and the breadth of the documents reviewed in *Amazon/Deliveroo* is also noteworthy (including US documents, Indian entry, and other business lines).

In any event, the merger counterfactual is only one element in assessing whether such mergers are anti-competitive. The intensity of rivalry from other existing competitors and other potential competitors is also of crucial importance. The CMA notably cleared the *PayPal/iZettle* merger because iZettle's planned expansion in omni-channel payments would not lead to greater competition given its small scale, the existence of significant competitors, and the likelihood of future entry.[96]

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* * *

Endnotes

1. *Global Merger Control (2021) – OECD Competition Trends*, Volume II, section 4.3.2.
2. Nonetheless, it should be noted that the EC's Horizontal Merger Guidelines (despite dating back to 2004) also contain the key elements of these theories of harm:
   "*60. For a merger with a potential competitor to have significant anti-competitive effects, two basic conditions must be fulfilled. First, the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force. Evidence that a potential competitor has plans to enter a market in a significant way could help the Commission to reach such a conclusion. Second, there must not be a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger*." (Emphasis added.)
3. https://www.gov.uk/government/publications/joint-statement-by-the-competition-and-markets-authority-bundeskartellamt-and-australian-competition-and-consumer-commission-on-merger-control/joint-statement-on-merger-control-enforcement.
4. Caffarra, C., G. Crawford and T. Valletti (2020), "'How Tech Rolls': Potential competition and 'reverse' killer acquisitions", https://voxeu.org/print/65628.
5. Motta and Peitz (2020), "Big tech mergers", *Information Economics and Policy 54 (2021) 100868.*
6. https://blogs.cranfield.ac.uk/leadership-management/cbp/forecasting-prediction-is-very-difficult-especially-if-its-about-the-future#:~:text=Niels%20Bohr%2C%20the%20Nobel%20laureate,model%20out%2Dof%2Dsample.
7. *Global Merger Control (2021) – OECD Competition Trends*, Volume II, page 27.
8. Motta and Peitz (2020).
9. Motta and Peitz (2020), page 13.
10. CMA (2020), "Merger control in dynamic markets", CMA Focus, page 38.
11. Furman Report (fn 3), Box 3.A.
12. https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1384.
13. https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf, paragraph 15.
14. Furman Report, page 9.
15. https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf.
16. CMA (2020), "Merger control in dynamic markets", CMA Focus, page 34.
17. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/977486/Mergers_-_Guidance_on_the_CMA_s_jurisdiction_and_procedure__2020_-_revised_-_guidance__--.pdf, paragraphs 4.62–4.63.
18. Examples emphasised by the CMA include:
    - *Google/Waze* (2013) – The parties argued that as turn-by-turn navigational services are free, there is no economic activity and thus the UK Office of Fair Trading (OFT) did not have jurisdiction. However, based on application downloads on mobile devices, the OFT found that the parties had a share of supply greater than 25%.

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- *Facebook/Instagram* (2012) – At the time of the transaction, Instagram had no revenue and did not satisfy the UK turnover test. However, the OFT found that the parties' share of supply of virtual social networking services was greater than 25%.
- *PayPal/iZettle* (2019) – Despite a deal value of US$2.2 billion, iZettle's UK turnover was less than UK's £70 million turnover test. However, the parties' share of supply of mPOS (point of sale) on the basis of total payment volumes and number of customers meant that the share of supply test was met.
- *Roche Holdings/Spark Therapeutics* (2020) – The CMA relied on the number of patents procured by the parties and also the number of UK employees to satisfy the share of supply test. This was despite the fact that Spark has no UK revenues and would not have for many years to come.
- *Mastercard/Nets* (2020) – The CMA considered that the share of supply test would be met based on the number of suppliers bidding to supply certain services, despite the target having no assets or business activities in the UK.

19. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/977486/Mergers_-_Guidance_on_the_CMA_s_jurisdiction_and_procedure__2020_-_revised_-_guidance__--.pdf, paragraph 4.63(e).
20. https://www.catribunal.org.uk/sites/default/files/2021-05/1345_Sabre_Judgment_210521.pdf (the CAT judgment).
21. CAT judgment, paragraphs 139–145.
22. CAT judgment, paragraph 143.
23. CAT judgment, paragraphs 150–155.
24. CAT judgment, paragraphs 310–311.
25. CMA Merger Assessment Guidelines (CMA129), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/986475/MAGs_for_publication_2021_-.pdf (CMA Guidelines), paragraph 2.36. At Phase 1, the CMA merely assesses whether there is a realistic prospect of a SLC (CMA Guidelines, paragraphs 2.33–2.34).
26. *CK Telecoms UK Investments v Commission*, [2020] EUECJ T-399/16 (28 May 2020), paragraphs 106–118.
27. Motta & Peitz (2020), page 14.
28. CMA Guidelines, paragraph 2.28.
29. CMA Guidelines, paragraph 3.14.
30. CMA Guidelines, paragraph 5.20.
31. CMA Guidelines, paragraph 5.2.
32. CMA Guidelines, paragraph 5.3.
33. CMA (2020), "Merger control in dynamic markets", CMA Focus.
34. CMA (2020), "Merger control in dynamic markets", CMA Focus, page 36.
35. CMA Guidelines, paragraph 5.2.
36. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/969878/Addleshaw_Goddard_LLP_and_AlixPartners.pdf.
37. CMA Guidelines, paragraph 3.17.
38. CMA Guidelines, paragraph 3.18.
39. CMS Response to the CMA's Draft Merger Assessment Guidelines, paragraph 3.3.
40. CMA Guidelines, paragraphs 5.10, 5.11, and 5.15.
41. CMA (2020), "Merger control in dynamic markets", CMA Focus, pages 35–36.
42. CMA (2020), "Merger control in dynamic markets", CMA Focus, page 36.
43. CMA Guidelines, paragraph 8.29.

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44. American Bar Association's response to the CMA's Draft Merger Assessment Guidelines, page 18.
45. CMA (2020), "Merger control in dynamic markets", CMA Focus, page 39.
46. See also RBB's response to the CMA's Draft Merger Guidelines, page 21.
47. See also KPMG's response to the CMA's Draft Merger Guidelines, paragraph 2.16.
48. This can be thought of as a measure of market share in the radio market. CMA Final Report on completed acquisitions by Bauer Media Group of certain businesses of Celador Entertainment Limited, Lincs FM Group Limited, Wireless Group Limited, and the entire business of UKRD Group (Bauer Media), Figure 1. AlixPartners acted for Bauer Media.
49. *Bauer Media*, paragraph 32.
50. The CMA considered that Bauer was perceived as a potential competitor by FRS but recognised that any constraint exercised was limited. *Bauer Media*, paragraph 34.
51. *Bauer Media*, paragraphs 32–33.
52. *Bauer Media*, paragraph 6.64.
53. *Bauer Media*, paragraph 6.67.
54. *Bauer Media*, paragraph 6.71.
55. *Bauer Media*, paragraph 6.72.
56. Bauer had previously represented a station called Orion between 2014 and 2016, but it took that station on from its main competitor Global and eventually acquired it.
57. *Bauer Media*, paragraph 8.13.
58. *Bauer Media*, paragraph 8.11.
59. *Bauer Media*, paragraph 8.29.
60. *Bauer Media*, paragraph 8.20.
61. *Bauer Media*, paragraphs 8.19–8.20.
62. *Bauer Media*, paragraph 36.
63. *Bauer Media*, paragraph 38.
64. *Bauer Media*, paragraph 42.
65. The CMA considered full divesture but concluded that full divesture would not be able to remedy the substantial lessening of competition and adverse effects arising out of it. This was because there was inherent uncertainty regarding the incentives, likely appetite, and strategic focus of any alternative purchaser in relation to maintaining FRS as an active competitor to represent independent stations.
66. Details of the remedy are set out in *Bauer Media*, paragraph 14.82.
67. This includes logistics-enabled marketplaces (such as Deliveroo and Uber Eats) and food ordering marketplaces, that do not primarily provide logistics (such as Just Eat). See CMA Final Report on the anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo, dated 4 August 2010 (*Amazon/Deliveroo (2020)*), paragraph 5.105.
68. *Amazon/Deliveroo* (2020), paragraph 6.83.
69. *Amazon/Deliveroo* (2020), paragraph 6.85.
70. *Amazon/Deliveroo* (2020), paragraph 6.135.
71. *Amazon/Deliveroo* (2020), paragraph 33.
72. *Amazon/Deliveroo* (2020), paragraph 33.
73. *Amazon/Deliveroo* (2020), paragraph 6.95.
74. *Amazon/Deliveroo* (2020), paragraph 6.89.
75. *Amazon/Deliveroo* (2020), paragraph 6.96.
76. *Amazon/Deliveroo* (2020), paragraph 6.102.
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Belgium

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Overview of merger control activity during the last 12 months

In 2020, the Belgian Competition Authority ("BCA") received 26 merger notifications and reviewed 30 concentrations. Typically, the BCA reviews the vast majority of merger filings under the simplified procedure. In 2020, the BCA reviewed and cleared 25 out of 30 concentrations under the simplified procedure. The BCA referred two concentrations to the second stage investigation: *Dossche Mills/Ceres*; and *Delorge/Coox*. However, only *Delorge/Coox* was actually reviewed under the second-stage procedure, as the parties in *Dossche Mills/Ceres* abandoned the transaction and withdrew their notification. So far in 2021 (mid-May), six concentrations have been notified and five clearance decisions taken, all on the basis of the simplified procedure.

As was expected, a high number of merger filings in 2020 were reviewed under the simplified procedure (more than 80%). The extension of the application of the simplified procedure, which entered into force at the beginning of 2020, had an impact on the high number of simplified procedures (see below, "New developments in jurisdictional assessment or procedure").

Compared to previous years, the number of merger notifications and decisions taken by the BCA has not changed significantly. In light of the COVID-19 outbreak, the BCA invited companies to delay any project of concentration that was not urgent.[1] However, this did not result in a significant drop in the number of notifications in 2020 when compared with earlier years. Belgium's jurisdictional thresholds are relatively high, which explains why the BCA receives a lower number of merger filings compared to other European countries.

In 2020, the BCA cleared one transaction subject to conditions, namely *Delorge/Coox*. This transaction concerned a second-stage procedure regarding the acquisition of Group Coox by Group Delorge, both active in automotive retail.[2] The competitive analysis mainly focused on local markets for the maintenance and repair of Audi, Skoda and Volkswagen vehicles. Interestingly, the Public Prosecution Service organised a confidential data room procedure concerning Car-Pass data. The data room procedure provided that a non-confidential report would be drawn up by external advisers at the end of the data room opening period. The report contained the analyses and conclusions of the external consultants' conclusions regarding their evaluation of the data consulted and which were relevant for the exercise of the rights of defence of the notifying party. In light of the BCA's competition concerns, the transaction was approved subject to behavioural commitments (see below, "Approach to remedies (i) to avoid second stage investigation, and (ii) following second stage investigation").

Other non-simplified concentrations reviewed in 2020 concerned an acquisition in the sector of automotive retail (*Maurin/JAM*),[3] an acquisition in the sector of petrol stations after a

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referral by the European Commission ("EC") upon request of the parties (*Kuwait Petroleum/Uhoda*)[4] and an acquisition in the sector of media and press (*IPM/Editions de l'Avenir*).[5]

The BCA also took a decision with regard to the lifting of conditions imposed in an earlier merger clearance decision. In 1997, the Competition Council approved a merger resulting in the creation of the Kinepolis cinema group, subject to a number of restrictions. The decision of the BCA entails that as of 12 August 2021, Kinepolis is free to operate new cinema complexes in Belgium without prior approval by the BCA.[6]

New developments in jurisdictional assessment or procedure

If a certain concentration exceeds the jurisdictional thresholds set out in Article IV.7, §1 Belgian Code on Economic Law ("BCEL"), parties are under the obligation to notify the transaction to the BCA. Parties are furthermore encouraged to contact the BCA at least two weeks before notification to engage in pre-notification discussions. However, the pre-notification phase often lasts longer than two weeks, even in cases eligible for a simplified procedure. In *Delorge/Coox* (*supra*), the pre-notification phase even took one-and-a-half years. The parties may not implement the concentration if the BCA has not taken a decision concerning its admissibility. Therefore, parties are subject to a notification obligation and a stand-still obligation.

An interesting new development concerns the exclusion of locoregional hospital networks from Belgian merger control rules. In 2019, a new federal law was passed (the Law of 28 February 2019 amending the coordinated Law of 10 July 2008 on hospitals and other care institutions, as regards clinical hospital networks) and required hospitals to be part of a locoregional clinical hospital network. As the BCA received questions about this new law, the BCA published a paper outlining its position on the application of merger control rules to locoregional hospital networks on 22 July 2020, which contained no surprising statements and was in line with regular merger control practice.[7] According to the BCA, the establishment of a hospital network could qualify as a concentration and there would be no reason to exclude hospitals from merger control rules. However, on 29 March 2021, a new law was adopted which excludes the establishment of locoregional clinical hospital networks and any subsequent changes in its composition from the application of merger control rules, without prejudice to the competence of the European Union. Therefore, European merger control rules could still apply. One of the drivers behind this legislative intervention was the perception that the BCA would slow down the entire process, and that, therefore, it would be better to exclude locoregional clinical hospital networks from Belgian merger control altogether.

Another development impacting procedure is the Commission's Guidance on the application of the referral mechanism set out in Article 22 of the European Union Merger Regulation ("EUMR") to certain categories of cases, which was published on 26 March 2021. Belgium has already joined two Article 22 referral requests, demonstrating its enthusiasm towards the Commission's policy change. On the one hand, Belgium supported France's referral request concerning the acquisition of GRAIL by Illumina. On the other hand, Belgium joined Austria's referral request regarding the acquisition of Kustomer by Facebook.

With regard to the issue of gun-jumping, an offence can result in a fine of up to 10% of the parties' consolidated worldwide turnover. An interesting decision in this respect concerns a decision of 2015 with regard to the Cordeel Group.[8] The group was fined €5,000 for implementing a transaction without prior notification. The BCA proactively contacted the Cordeel Group itself to alert them of the notification requirement. Subsequently, the Cordeel Group filed a request for exemption of the stand-still obligation, which was granted

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retroactively to the takeover date. Ultimately, the transaction was cleared under the normal procedure, even though the concentration was eligible for the simplified procedure. For the purpose of setting the fine, the BCA took into account the absence of negative effects on competition and also the time constraints associated with the transaction.

As mentioned above, the BCA reviews the vast majority of transactions under the simplified procedure. Parties can request the application of the simplified procedure at the beginning of the merger control procedure. The Competition Prosecutor must take a decision within 15 working days as of the day following receipt of the complete notification, and takes such decision by means of a letter sent to the notifying parties. If the Competition Prosecutor does not send such a letter to the notifying parties within the period of 15 working days, the transaction is deemed approved.

On 20 January 2020, the BCA adopted new rules to extend the scope of the simplified merger procedure.[9] In addition to the BCA Communication relating to the specific rules for the simplified notification of mergers from 8 June 2007, the BCA can decide to follow a simplified procedure to review transactions that fulfil certain conditions. Firstly, the simplified procedure can be applied where the cumulative market share of all parties "having horizontal relationships" remains below 50%, and where the Herfindahl-Hirschman Index delta (*i.e.*, a method of measuring market concentration) resulting from the transaction is below 150. Secondly, the BCA can also apply the simplified procedure to horizontal mergers where the parties' combined market share remains below 50% and the transaction results in a less than 2% increment in market share. Finally, the BCA can apply the simplified procedure "when it considers, in view of all relevant circumstances, that there is no doubt on the admissibility of the concentration and that it does not raise any objections", in two cases: (i) in horizontal mergers, when the parties are active on the same (product and geographic) market and their cumulative market shares are above 25% but below 40%; and (ii) in vertical mergers, when the parties operate at different levels of the supply chain and their individual or combined shares on vertically related markets are above 25% but below 40%.

With regard to minority shareholdings, the BCA follows the EU approach. In case a minority shareholding results in a lasting change of control and meets the jurisdictional thresholds, they will be subject to notification. Shareholders that have special rights allowing them to veto decisions which are essential for the strategic commercial behaviour of another undertaking are considered to have the possibility of exercising decisive influence. An example in this respect concerns the BCA's decision of 21 October 2013 concerning *Picanol NV/Tessenderlo Chemie NV*.[10] Whereas Picanol NV purchased 27.6% of the shares of Tessenderlo Chemie NV, the BCA found it acquired *de facto* control over Tessenderlo Chemie as the remaining shares were dispersed among a large number of shareholders.

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

In 2020, the BCA reviewed concentrations in a variety of sectors, such as automotive distribution, insurance, energy, and travel. Given that only a limited number of transactions are not dealt with under the simplified procedure, a specific approach concerning particular industry sectors can hardly be distinguished. Moreover, approval decisions following a simplified procedure do not provide much detail on the assessment of the merger.

In 2020, a large number of transactions were notified in the automotive distribution sector (more than one in three). With regard to this sector, the BCA has developed a constant decision-making practice regarding market definition.

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With respect to online and digital markets, the BCA issued a joint memorandum with the Dutch and Luxembourg competition authorities on the challenges faced by competition authorities in a digital world. The memorandum specifically deals with the issue of mergers in a digital environment (see below, "Key policy developments").

Overall, in reviewing mergers, the BCA pays particular attention to precedents of the EC and other competition authorities. It also closely cooperates with other competition authorities in the European Competition Network, European Competition Authorities and the International Competition Network.

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

The economic appraisal techniques in Belgian merger control are closely aligned with the techniques under the EUMR. Article IV.9 §3 BCEL stipulates, in line with Article 2 §2 EUMR, that concentrations that do not "significantly impede effective competition" in the Belgian market or in a substantial part of it must be cleared (the "SIEC test"). Concentrations that would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, will be declared non-permissible (Article IV.9 §4 BCEL).

In its assessment, the Competition College of the BCA generally takes into account factors such as the effectiveness of actual or potential competition as well as barriers to entry, alternative sources of supply, the economic and technical level of the market, the maturity of the market and the bargaining power of customers and suppliers. Pursuant to Article IV.66 §2, 2° BCEL, the Competition College must clear concentrations where the parties' share on the relevant market in Belgium does not exceed 25%, irrespective of whether it concerns horizontal or vertical relationships.

Generally, an economic appraisal under the SIEC test includes an examination by the Competition College of the various types of harm that result from a merger (single dominance, unilateral effects, coordinated effects, conglomerate effects and vertical foreclosure). So far, the BCA has mainly focused on single dominance principally based on a market share analysis. Nevertheless, the BCA increasingly takes an economic approach based on the effects of the merger on competition, not only taking into account market shares. For instance, the dynamic process of bidding markets and heterogeneous, two-sided markets requires an assessment of the actual effect of the merger on the competitive dynamics rather than a market share analysis.

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

As is the case under European competition law, the Competition College of the BCA may clear a concentration subject to structural or behavioural remedies. The concentration may be prohibited if the notifying party does not adequately address the competition concerns by proposing a suitable remedy. Remedies can be offered during both phase I and phase II proceedings. In phase I, the notifying party has five working days from the day they are informed of the Prosecutor's objections (which must be raised at the latest on working day 20) to formally offer remedies (Article IV.63 §2 BCEL). In phase II, the notifying party has 20 working days from the opening of phase II to offer such remedies (Article IV.67 §1 BCEL). The Public Prosecutor can also decide to extend the period of 20 working days. In 2020, with regard to the *IPM/Éditions de l'Avenir* transaction (*supra*), the notifying party

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offered commitments even before the Public Prosecution Service filed its proposal for a decision. The commitment entailed that the merged entity would maintain the editorial independence and titles of the target for a period of at least five years.

The decisional practice of the BCA shows that it is not uncommon to clear a merger subject to remedies. As said, both behavioural and structural remedies can be accepted. Although the BCA seemed to be more inclined to impose behavioural remedies in the past, in recent decisions structural remedies have also been imposed. For example, in 2018, the BCA approved the acquisition by Volvo Group Belgium NV of authorised retailer Kant NV subject to the closure of one of Volvo's points of sale and the authorisation of another retailer.

However, the BCA does not rely solely on structural remedies to address concerns; behavioural remedies remain a common practice. In 2020, the BCA accepted behavioural remedies in *Delorge/Coox* (*supra*). For a period of three years, Delorge committed: (i) to maintain the current opening hours of the Coox concessions; (ii) not to impose any closures of the Coox concessions during holiday periods; (iii) to have the same proportional number of replacement vehicles available at the Coox concessions as at the Delorge locations; and (iv) to introduce the Fleetback system (a system that allows for live video chat communication with customers during car maintenance or repair) in the Coox concessions. Another example concerned a merger between Telenet and Coditel, which the BCA cleared in 2017 subject to the condition that Telenet grants a third party (Orange) access to the Coditel network. Access was granted based on well-defined technical terms, a price-setting mechanism and the commitment not to offer any new quadruple-play services in the Coditel area during a certain period.

Key policy developments

In October 2019, the BCA launched a public consultation to extend the existing rules on the simplified procedure on concentrations. This policy consideration was prompted by the need for administrative efficiency and to avoid an unnecessary burdensome merger review procedure. As discussed earlier, this resulted in the amendment which entered into force on 20 January 2020.

On 2 October 2019, the BCA published a joint memorandum together with the Dutch and Luxembourg competition authorities on the challenges faced by competition authorities in a digital world.[11] The joint memorandum concerns, *inter alia*, the appropriate policy actions in relation to merger control. It focuses primarily on the ability to control the growth of platforms in a winner-takes-all environment and the current jurisdictional thresholds for merger control in the digital sector.

The Autoriteit Consument & Markt, the Conseil de la Concurrence and the BCA note that the existing merger control mechanisms and rules are inadequate as far as the digital sector is concerned. In case of a so-called "killer acquisition", the transaction often does not trigger the turnover thresholds, although it could be harmful from a competition law point of view. Furthermore, the idea of a broader assessment framework for competition authorities was introduced. Currently, only the likelihood of harm to competition is used as a yardstick, while competition authorities could also take the scale of harm to competition into account. Consequently, the assessment of merger control in cases where technology giants hold a dominant position would be stricter than in other cases.

Other issues raised in the joint memorandum include a call upon the EC to issue more *ex ante* guidance to reduce the administrative hurdles of an infringement decision and to keep pace with fast-moving markets, and an *ex ante* instrument providing for imposed remedies without the establishment of an infringement.

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Furthermore, the BCA cooperated with the Belgian Institute for Postal Services and Telecommunications ("BIPT") with regard to the mobile network sharing agreement that Orange Belgium and Proximus signed on 22 November 2019. The BCA advised the BIPT on three draft decisions of the BIPT on the capital costs of telecom operators with a strong market position.

The BCA also maintained its contribution to the activities of the European Competition Network – which brings together the national competition authorities of EU Member States and the EC – and various other international forums.

In terms of advocacy and policy support work, the BCA mainly focused in 2020 on measures to be taken following the revision of Book IV of the BCEL, proposals on the introduction of the infringement for abuse of economic dependency and the screening of foreign investments.

On 5 March 2021, the BCA published its annual enforcement priorities.[12] In this respect, several priority sectors have already been on the radar of the BCA for consecutive years, such as distribution and relations with suppliers, telecommunications, pharmaceuticals and the digital economy. The annual enforcement priority policy also provides an indication of sectors which are important within the Belgian economy and which can be scrutinised in the context of merger control. For 2021, the BCA considers the following sectors to be enforcement priorities:

- Digital economy – the BCA considers that, due to the specific characteristics of digital businesses (e.g. significant economies of scale, direct and indirect network effects that enhance their possible market power, capacity to improve their services and algorithms through access to personal data), it will be particularly alert to possible abuses of dominant position and infringements of competition law facilitated by the use of algorithms or data. This fits within the focus of the EC and National competition authorities on competition in digital markets and is in line with the joint memorandum as discussed above.
- Provision of services to businesses and consumers (in particular, regulated professions) – according to the BCA, the regulation of professions can result in reduced competition and price increases. The BCA will (i) apply competition law to the professional associations when they violate competition rules, and (ii) advocate for the revision of professional regulations which contain restrictions regarding the access or the exercise of the profession and which go beyond what is necessary to ensure general interest objectives.
- Distribution and relations with suppliers – the distribution sector has long been a focus of attention for the BCA. Belgian consumers pay more for their products in supermarkets compared to the main neighbouring countries, and the COVID-19 crisis has further exacerbated food inflation. The BCA will focus on distribution agreements leading to anti-competitive effects across chains or between suppliers, as well as territorial restrictions on supply.
- Energy – the COVID-19 crisis resulted in a decrease of companies active in the energy sector. Therefore, the BCA will ensure that the remaining suppliers do not pursue anti-competitive policies.
- Pharmaceuticals – the pharmaceutical sector is once more one of the BCA's principal targets for action and, as the BCA indicates, this is also the same for competition authorities around Europe. The COVID-19 crisis has only reinforced the importance of this sector. In particular, the BCA will pay attention to all operators in the value chain.
- Logistics – the logistics sector represents a significant number of jobs and added value in Belgium. The BCA will be vigilant that healthy competition develops in the areas of ports, road networks, railway networks and inland waterways.

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- Public procurement – public tenders are of great importance to the Belgian economy, representing approximately EUR 60 billion worth of contracts a year and 10–15% of GDP. It is no surprise that the BCA continues to focus on this regulatory area as these contracts are highly susceptible to cartels.
- Telecommunications – the BCA indicates that the increased reliance on bundled offers in the telecom retail markets has the effect of increasing consumer loyalty. The BCA will safeguard competition between operators, as well as market entry. The inclusion of telecommunications in the BCA's list does not come as a surprise; it reflects the ongoing debate in Belgium regarding the creation of a fourth telecoms operator, to remedy the perceived lack of competition in the market and the difficulties regarding the allocation of 5G spectrum.

The BCA indicates that it will try to seek a balance between enforcement against evident infringements and more complex and innovative cases.

Reform proposals

Every three years, the BCA must conduct a review of the notification thresholds, taking into account the economic impact and the administrative burden for undertakings (Article IV.7, §2 BCEL). During the last review in 2017, the BCA concluded that the jurisdictional thresholds are relatively high and should not be raised. On the other hand, the BCA considered that if a reduction should be envisaged, it would opt for a threshold reduction in specific sectors with a local catchment area, as is the case in France. A new review of the thresholds may take place in 2021.

No further reform proposals relating to Belgian merger control are expected in the near future.

* * *

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Brazil

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Overview of merger control activities in the last 12 months

Despite the several challenges brought by the COVID-19 pandemic in 2020 and so far in 2021, the Brazilian antitrust authority (the Administrative Council for Economic Defense – CADE) has been up to the task. The most recent numbers, released in the annual yearbook published by CADE on its performance in the previous year, exhibit a stable workflow of merger submissions: in 2020, 471 mergers were submitted to CADE, the highest number since 2012, when the pre-merger notification system was adopted. This number represents an increase of 6% when compared to 2019, when 442 mergers were notified, and an increase of 13% in relation to 2018, when there were 405 operations notified.

In 2020, of the 471 mergers notified, CADE's General Superintendence (responsible for the instruction of all mergers) completed the analysis of 454. Of those, 423 were approved without restrictions and 31 were approved conditional to the negotiation of an agreement (Economic Concentration Control Agreements) with CADE's Tribunal. CADE's Tribunal approved agreements in seven mergers and did not accept the agreements proposed in 22 cases; two cases were withdrawn by the parties.

CADE's analysis of mergers in 2020 and in 2021 included several important and interesting cases from an economic standpoint, from the perspective of CADE's interpretations of competition rules and from the perspective of the challenges faced by CADE in defining appropriate remedies for the approval of complex transactions, including the following mergers: *Boeing/Embaer*; *Disney/Fox*; *Liquigás/Copagaz/Itaúsa/Nacional Gás Butano (NGB)/Fogás*; *Nike/SBF*; *Prosegur/Sacel*; *Kepler/Siros*; and *Innova/Videolar.*

In *Boeing/Embraer*, a US$4.2 billon transaction also submitted to the antitrust authorities in China, the US and Europe, CADE analysed the markets of commercial aircraft and military transport aircraft production. The first of the transactions consisted of the acquisition, by Boeing, of 80% of Embraer's assets related to the company's commercial aircraft business, which includes the production of regional airlines and large commercial aircraft. The second transaction consisted of a joint venture between Boeing and Embraer focused on the production of military transport aircraft. CADE concluded that, with respect to the first transaction, there would be no negative impacts on the levels of market rivalry, despite the unfavourable entry conditions. With respect to the second transaction, there would be no possibility of exercising market power, since the operation would not consist of merging the companies' portfolios. Therefore, the operation was approved without restrictions. The Federal Prosecution Services appealed against the decision of the Tribunal twice, but the Tribunal maintained its stance.

In *Disney/Fox*, CADE dealt with the pay-TV market. The operation consisted of the acquisition of Twenty-First Century Fox by The Walt Disney Company, and its approval

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was conditional to the application of structural and behavioural remedies. The operation was notified in 25 jurisdictions and required collaboration between antitrust authorities from different countries around the world. This was an interesting case due to the structural remedies negotiated that required the divestiture of the Fox Sports channel. Such sale would maintain competition in the pay-TV market for sports, which already included other two relevant channels. However, Fox did not manage to find a buyer for the Fox Sports channel. This case illustrates the challenges in the adoption of remedies based on divesting assets, since this remedy will necessarily depend on third parties (that is, a buyer). CADE and Fox managed to renegotiate a new set of behavioural remedies in this case, including the obligation to maintain the transmission of sports events.

In *Liquigás*, the national distribution market of liquified petroleum gas (LPG), also known as cooling gas, was evaluated by CADE. In its analyses, CADE decided that the sale of Liquigás, a subsidiary of Petrobrás and a market leader, would actually consist of three different mergers, involving the companies Copagaz, Itaúsa, Nacional Gás Butano (NGB) and Fogás. The operation was cleared conditional to a set of remedies provided by a merger control agreement, which included mitigating solutions for the anti-competitive effects that could arise from the deal (fix-it-first remedies) and the establishment of a trustee responsible for overseeing the fulfillment of the remedies negotiated with CADE.

In *Nike/SBF*, CADE analysed the acquisition of Grupo SBF S.A. of the totality of Nike Brasil quotas. The SBF Group operates in the retail of sports goods in Brazil, through Centauro, a retailer of sport goods, while Nike Group operates in the design, marketing and distribution of sports goods. The merger, therefore, would result in the exclusive distribution of Nike products by Centauro, raising concerns of anti-competitive effects of a vertical nature. This was an interesting case, as the General Superintendence approved the transaction without any restriction. After an appeal of a third interested party, the case was considered complex and the operation was cleared by CADE's Tribunal conditional to the negotiation of a merger control agreement. Since this was a case of vertical restraints (due to the exclusivity of distribution), the remedies negotiated were different from the cases mentioned before, and included the separation of business unities and employees and restrictions in the sharing of information.

In *Prosegur/Sacel*, CADE dealt with the private security market. The operation did not meet the notification criteria and the notification was required by CADE (the law allows CADE to require the submission of any non-notifiable transactions for a period of one year after it is concluded). The transaction consisted of the acquisition, by Prosegur, a company that offers private security services in several countries, of tangible and intangible assets from Sacel, a company that operated in the securities transportation and custody and armed surveillance market. The transaction was approved after the negotiation of a merger control agreement that established a prohibition of further acquisitions by Prosegur for a period of four years.

As the mergers above show, the adoption of remedies and restrictions is ever more frequent. An interesting case rediscussed in 2021 concerned the *Innova/Videolar* merger (both of which are petrochemical industries). This merger was approved in 2014, subject to compliance with a merger control agreement, which established, among other obligations, the duties to maintain minimum rival levels of polystyrene production and the presentation of an efficiency transfer plan to consumers. In 2019, however, CADE decided that the parties did not comply with the merger control agreement, which resulted in the review of the merger. In April 2021, when the merger review was finalised, CADE decided that the companies, in addition to not complying with the merger control agreement, did not

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demonstrate the benefits to consumers which would arise from the operation. The decision was to disapprove the merger, resulting in the separation of the assets of the companies involved. Besides that, a BRL 9 million fine was also applied for non-compliance with the agreement.

All of these cases demonstrate CADE's willingness to both negotiate and seriously enforce remedies.

In *Kepler/Siros*, CADE scrutinised the acquisition by Siros DIA IE, an investment fund, of shares of Kepler Weber, a company that operates in the agribusiness market. The operation was approved without restrictions, but it was important to raise discussions regarding the interpretation of CADE Resolution No. 02/2012 as modified by Resolution No. 09/2014, which determined the exclusion of the investment fund manager from the definition of "economic group" (therefore, the economic group would be limited, for purposes of calculating the turnover, to the qualified shareholders and to the fund's portfolio). However, in this case, CADE understood that the investment fund manager should indeed be included in the economic group of the party involved in the transaction. In this case, the manager had a greater degree of autonomy and control over the fund's investments, similar to a controlling entity, a characteristic that would justify considering it as part of the economic group.

As the mergers above show, 2020 was a challenging year for CADE, with complex cases that required different types of remedies. So far in 2021, two cases that are still under analysis by CADE have stood out due to their complexity, these being the deals between *WhatsApp/Cielo* and *Unidas/Localiza*.

In *Unidos/Localiza*, CADE is dealing with the acquisition of Unidas shares by Localiza, both market-leading companies. Localiza operates in the car rental, fleet management and franchising markets, while Unidas operates in the outsourcing of light vehicle fleets and vehicle rental for individuals. So far, several competitors have asked to be admitted as third interested parties and raised concerns about the transaction. CADE has declared the operation complex due to the possibility of it resulting in a high concentration in the vehicle rental and fleet management markets nationwide.

In *WhatsApp/Cielo*, CADE is monitoring the partnership agreement between Facebook and Cielo for the inclusion of a direct payment service system through WhatsApp. CADE argues that one of the main risks of the operation would be the possibility of exclusivity, contractual or *de facto*, which could result in the exclusion of competitors and a reduction in the choices of end users. CADE even issued an injunction that determined the suspension of the payment service system. This decision was subsequently lifted after the parties provided clarifications and the authority understood that there would be no incentives for either Facebook or Cielo to operate without the participation of other agents in the sector. Despite the lifting of the injunction, the investigation is still being carried out.

It is important to highlight that, in recent years, there has been an increase in the number of adjudications (the mechanism by which a commissioner may request the submission of merger cleared by the General Superintendence to the Tribunal). Another development seen in recent years is a growing number of decisions by CADE's Tribunal with divergences between commissioners.

Approach to remedies

In 2020, the Department of Economic Studies published the study "*Antitrust remedies at CADE: an analysis of the Jurisprudence*", which analysed the application of antitrust remedies in the period of 2014 to 2019 from the perspective of the recommendations of

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the Antitrust Remedies Guide. The study showed that 22% of the remedies adopted by CADE were structural, while the adoption of structural and behavioural remedies combined represented 25% of the cases. On this point, the study concludes that there is room for greater application of structural remedies, which are the remedies most recommended by the Guide, considering that 59% of mergers represent horizontal overlaps or horizontal overlaps together with vertical overlaps.

Regarding the application of behavioural remedies, there was a high application of measures that involved curbing the activities of parties (around 44% of the behavioural remedies applied between 2014 and 2019). The study draws attention to the excessive cost of monitoring that this type of remedy requires, recommending more caution to the authority when choosing them.

The study also highlights the emergence of a trend, in recent years, to create giant companies, especially in the technology sector, with the authorisation of antitrust authorities. Considering that these new conglomerates have a considerable portfolio (in the sense of controlling several companies with activities in different markets), there is a new challenge for traditional antitrust analyses, which will need to include new approaches to antitrust remedies.

Key industry sectors reviewed

In 2020, the main sectors that notified deals were: electricity generation, transmission, and distribution; manufacture of allopathic medicines for human use; incorporation of real estate projects; and human healthcare activities.

In addition, two studies were published by the Department of Economic Studies specifically analysing the markets of agricultural inputs and free-to-air and pay-TV. In the study on agricultural inputs, an analysis is made of the economic importance of the sector and of important aspects of its dynamics, including aspects related to the effects of competition for innovation in this market. In addition, the study analyses the definitions that were consolidated in mergers in the agricultural sector made by CADE in recent years, as well as changes in CADE's formed interpretations. Finally, the study is also dedicated to analysing three major recent mergers that took place in input industries (*Dow/Dupont*, *ChemChina/Syngenta* and *Bayer/Monsanto*) and compares the approaches taken in Brazil, Europe and the United States.

In the study on the free-to-air and pay-TV market, CADE aimed to demonstrate the evolution of the cases analysed by it between 1995–2020. In this period, 103 cases related to this market were submitted to CADE, of which 94 are merger and nine are administrative procedures. The study, in addition to presenting an overview of the market, addresses its importance for the country's economy and possible competitive issues that will be faced by the sector in the future, such as the emergence of new technologies and new models of consumption of audiovisual content.

Measures adopted due to the COVID-19 pandemic

In June 2020, Law No. 14,010/20 was enacted, establishing the so-called "Legal Emergency and Transitory Regime" during the coronavirus pandemic. This temporary legal regime remained valid until the end of 2020. In addition to establishing rules on anti-competitive conducts, the law determined that associative contracts, consortia, or joint ventures, during the state of public calamity, would be exempted from the mandatory notification to CADE. It is important to note that the antitrust immunity established by the Law must have been related to the crisis and be justified in this context. Furthermore, all the deals negotiated during this period are subject to a subsequent analysis if they are considered not essential to mitigate the pandemic or its economic consequences.

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In addition to the changes introduced by Law No. 14,010/20, CADE released, in June 2020, a temporary information notice on the collaboration of competing companies to fight the COVID-19 crisis. The notice establishes the parameters recommended for the elaboration of joint strategies to combat the pandemic and on the procedures available for economic agents to obtain CADE's approval. In the information notice, CADE points out that the analysis of collaboration between competitors will be guided by Organisation for Economic Co-operation and Development (OECD) guidelines and recommendations.

The first collaboration agreement analysed and approved by CADE was submitted by *Ambev*, *BRF*, *Coca-Cola*, *Mondelez*, *Nestlé* and *Pepsico*, key companies in the Brazilian food sector. The agreement establishes aid measures for the recovery of small retailers operating in the food and beverage sectors, distribution of sanitary equipment and the adoption of differentiated commercial conditions.

In what regards its internal organisation, CADE managed to react quickly to the challenges imposed by the COVID-19 pandemic. CADE amended its statutory rules to allow the Tribunal's judgment sessions to take place on virtual platforms and published an Ordinance establishing that staff should work from home. From the standpoint of the lawyers and economists who work directly with CADE, the experience has been surprisingly satisfying. Staff are usually available at short notice for virtual meetings to discuss mergers under CADE's analysis, something that required substantial effort prior to the COVID-19 crisis, as it necessitated a presidential meeting in the capital, Brasília.

The impact of these changes on clearance time has not been substantial. Mergers submitted through the fast-track procedure (which must be analysed within 30 days from the date of its notification) represented, in 2020, 96% of the mergers submitted to CADE and were cleared in an average period of 17.5 days, as compared to 16.8 days in 2019. Cases submitted to CADE's analysis through the non-fast-track procedure in 2020 were cleared in an average time of 104 days, a slight increase when compared to the 89.4 days needed in 2019. Overall, the average time remained virtually the same: 29 days in 2019; and 29.5 days in 2020.

Key policy developments

In the second half of 2020, CADE published a study suggesting that the National Data Protection Authority (ANPD), responsible for supervising and regulating various sections of the General Data Protection Law (LGPD), should be incorporated into its structure. In the study, CADE argued that incorporating the ANPD would reduce costs for the Federal Government and allow the authority to start functioning in January 2021.

The proposal was not accepted, but it is very illustrative of CADE's ambitious agenda, which has been increasingly addressing complex issues. On that same topic, in September 2020, the Department of Economic Studies published a study entitled "Competition in digital markets: a review of specialized reports", which aimed to review the main documents and research already published in the world by authorities and research centres, seeking foundations for the improvement of CADE's performance in the analysis of concentration acts and anti-competitive conduct involving digital markets.

Another important development is that, in 2019, CADE became part of the Executive Management Committee (GECEX) of the Chamber of Foreign Trade (CAMEX). CAMEX is the body of the Ministry of Economy responsible for formulating policies related to foreign trade in goods and services, foreign investments and export financing. Through its participation in the GECEX, CADE started to participate more actively in matters related to trade remedies, including the elaboration of opinions suggesting the suspension of

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anti-dumping duties in public interest analysis (it should be noted that both the drafting of opinions with recommendation of decisions to be taken by government bodies responsible for foreign trade and the public interest analysis itself are rarely found in other jurisdictions). Although at first glance it does not seem to be related to merger control, CADE has been actively suggesting the suspension of anti-dumping duties due to, among other reasons, the potential effects of these measures in the internal market's concentration, also a main concern of merger analysis.

CADE has also seen recent advances in the areas of national and international cooperation. Regarding national cooperation, in 2020 nine agreements were signed, with an emphasis on the Technical Cooperation Agreement signed with the Public Prosecution Office establishing a partnership for joint actions in analysing mergers and investigating conduct that causes repression of the economic order.

As to international cooperation, CADE, in 2020, worked together with antitrust authorities from 10 countries. Currently, there are initiatives to exchange information with 76 other competition authorities and international associations, in addition to 20 international cooperation agreements. In October, the report "CADE OECD Notebook" was published, which presents the history of cooperation between Brazil and the OECD, especially with regard to CADE's performance as an associate member of the OECD Competition Committee. Also, within the scope of the OECD, the projects "Fighting bid rigging in Brazil" and "Competitive assessment of port and airport sectors in Brazil" are underway, which aim to reflect CADE's commitment to improve its performance and meet international guidelines and standards.

Challenges ahead

Recently, CADE established a working group to review Resolution No. 02/2012, the most relevant normative act which regulates the procedures for the notification of acts of economic concentration. At the time of writing, however, there is little public information regarding the work that has been carried out by the group.

In addition, a challenge to be faced by CADE this year concerns the composition of the Tribunal (usually comprising a President and six Commissioners). This year, the terms of the President (Alexandre Barreto), the Commissioner Maurício Oscar Bandeira Maia and the General Superintendent (Alexandre Cordeiro Macedo) come to an end.

Furthermore, 2020 and 2021 have been marked by the voluntary departure of several career employees of CADE with many years of experience, for various reasons, which has also resulted in changes in technical staff.

Still on this subject, there is currently a bill in the Chamber of Deputies that aims to reduce the number of CADE's Commissioners from seven to five (there would be, therefore, four Commissioners and the President). The argument presented to justify the bill is that all regulatory agencies in the country have only five representatives.

However, it is too early to try to predict the outcome of the bill, the departure of staff members and the new composition of CADE's Tribunal.

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Overview of merger control activity during the last 12 months

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

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

Pre-merger notification is required under the Act if both the "size of transaction" and "size of parties" thresholds are met. The "size of transaction" threshold is generally satisfied if the target has assets in Canada, or revenues in or from Canada generated by assets in Canada, in excess of C$93 million (for amalgamations, at least two of the amalgamating corporations, together with their affiliates, must have assets or revenues that exceed the threshold).[3] The "size of parties" threshold is satisfied if the parties to the transaction, including all affiliates,[4] combined, have assets in Canada or revenues in, from or into Canada in excess of C$400 million. For share transactions, the notification requirement is triggered by the acquisition of more than 20% of the votes attached to all of the outstanding voting shares of a public company, or more than 35% of the votes attached to all of the outstanding voting shares of a private company (or, in each case, more than 50% of the votes attached to all of the outstanding voting shares if the acquirer already owns the percentages stated above).[5]

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

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

Since *Tervita*, the efficiencies defence has been relied on in several transactions, including *Superior Plus Corp./Canexus Corporation* ("Canexus") in June 2016,[6] *Canexus/Chemtrade Logistics Fund* in March 2017,[7] *Superior Plus LP/Canwest* in September 2017,[8] and *Canadian National Railway Company/H&R Transport Limited* in November 2019.[9]

The Act also allows for clearances of transactions more expeditiously or with fewer obstacles when a party is experiencing financial difficulty. While the Act still applies, where a merger involves a firm that is bankrupt or insolvent, the Bureau's analysis can accommodate a transaction which would not be approved under ordinary circumstances. However, the Bureau will apply a strict test to determine if the target is truly insolvent, and consider whether there was a competitively preferable alternative, which may include an acquisition by another purchaser that does not raise competition law concerns, restructuring that enables the failing firm to survive as a meaningful competitor, or a liquidation process that creates increased competition (e.g., by facilitating entry or expansion). Even if a target was only "flailing" as opposed to truly insolvent, the Bureau may take account of the diminished competitive role it would have played in the future.

In challenging a merger, the Bureau may apply to the Tribunal to seek an interim order under section 104 of the Act, enjoining the parties from closing the transaction (in whole or in part) pending a final resolution on the merits.[10] The test applied by the Tribunal in determining whether to issue an order is the standard Canadian test for interlocutory or injunctive relief as set out in *RJR-Macdonald Inc. v. Canada (Attorney General)*:[11] (i) is there a serious issue to be tried; (ii) will irreparable harm result if the requested relief is not granted; and (iii) does the balance of convenience favour granting the order? In *Parkland/Pioneer*, the Bureau did not seek to enjoin the transaction as a whole but proposed a limited hold separate; the Bureau's approach suggests it may be possible for parties to close a global transaction in the face of a challenge in Canada.[12]

In the six months ending September 30, 2020, the latest period for which the Bureau has published statistics, the Bureau concluded 72 merger reviews, issuing 33 no-action letters,[13] 27 ARCs and registering two consent agreements.[14] As a result of decreased merger activity during the COVID-19 pandemic, the Bureau's activity level was significantly below its preceding fiscal year, in which the Bureau concluded 234 merger reviews and issued 116 no-action letters, 103 ARCs and registered two consent agreements.[15]

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The Bureau has continued to solicit public comments regarding proposed transactions by inviting Canadian consumers and industry stakeholders to share their views online, including, most recently, in Superior Plus LP's proposed acquisition of Canwest Propane.[16] The Bureau may also signal to stakeholders that it will review certain high-profile deals, as it did on March 15, 2021, when the Bureau announced it would review the proposed acquisition of Shaw Communications by Rogers Communications Inc., which was announced that same day.[17]

New developments in jurisdictional assessment or procedure

Pre-merger notification thresholds under the Act are reviewed annually by the Minister of Innovation, Science and Industry, who may revise the thresholds using an indexing mechanism, prescribe a different amount, or leave the thresholds unchanged. In 2021, the "size of transaction" threshold for pre-merger notification decreased to C$93 million.[18] The threshold was previously set at C$96 million for 2019 and 2020.

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

Over the last 12 months, the Bureau has reviewed transactions in a range of sectors including animal health products, data communications and other electrical products, oil and gas, manufacturing, real estate, and finance and insurance.

<u>Mergers approved via consent agreements</u>

On July 14, 2020, the Bureau announced that it had entered into a consent agreement with Elanco Animal Health Incorporated ("Elanco") to address concerns related to Elanco's proposed acquisition of Bayer Animal Health ("BAH"), a business unit of Bayer AG. Following an extensive review, the Bureau determined that the proposed transaction would result in a substantial lessening of competition in three Canadian markets related to the supply of animal health products: the supply of low-dose canine otitis treatments; feline dewormers that include tapeworm coverage; and poultry insecticides that include darkling beetle coverage. To resolve these concerns, Elanco agreed to divest its canine otitis product, *Osurnia*, as well as BAH's feline dewormer, *Profender*, and forego acquiring the Canadian distribution rights to Bayer's *Tempo*, *Credo*, *QuickBayt* and *Annihilator Polyzone* poultry insecticides. The consent agreement also prevents Elanco, without the Commissioner's approval, from acquiring Bayer's retained poultry insecticides with darkling beetle coverage for a period of 10 years, and from acquiring a significant interest in any poultry insecticides with darkling beetle coverage for a period of two years without providing advance notice to the Bureau and waiting for a prescribed period of time to complete the acquisition. Given the global nature of the parties' businesses, the Bureau coordinated extensively with its counterparts in other jurisdictions, including the U.S. Federal Trade Commission, the European Commission and the Australian Competition and Consumer Commission.[19]

On August 6, 2020, the Bureau and WESCO International Inc. ("WESCO") registered a consent agreement to address the Bureau's concerns related to WESCO's acquisition of Anixter International Inc. ("Anixter"). Following a four-month review, including an SIR, the Bureau concluded that the parties were one another's closest rivals for certain electrical products and competed vigorously for relationships with manufacturers and customers, which included close competition on price, delivery times, and the provision of other value-added services, and significantly benefitted Canadian customers. As a result, the Bureau found that the transaction would likely result in the substantial lessening of competition in the distribution of data communications ("Datacom") products and pole line hardware ("PLH") in numerous

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markets across Canada.[20] The consent agreement required WESCO to sell its WESCO Utility division in Canada, as well as its Canadian business associated with the distribution of Datacom products, to independent purchaser(s) to be approved by the Commissioner.[21]

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

Economic analysis is a fundamental component of the Bureau's merger review process. The Bureau rarely considers economic models determinative but uses such models as either an initial screening mechanism, or for guidance as the merger review progresses. Economic models have gained importance since the SCC's decision in *Tervita*,[22] in which the Court held that the Commissioner has the obligation to quantify all quantifiable anti-competitive effects if the merging parties have raised the efficiencies defence.[23] For example, the Bureau retained an external economic expert to model the likely effects, including deadweight loss, of the *Superior/Canexus* transaction – a transaction that the Bureau ultimately cleared on the basis of efficiencies.[24] The Bureau also performed a deadweight loss analysis with respect to the *Superior/Canwest* transaction.[25]

The Bureau uses a broad variety of economic analyses in the course of its merger reviews. For example, in the retail sector, the Bureau may use diversion ratio analyses, critical loss analyses, price correlation/cointegration analyses, and regression analyses in order to define a relevant market, and it may use the empirical examination of natural experiments, upward pricing pressure analyses, and merger simulation models in analysing unilateral competitive effects.[26]

In its position statements, the Bureau often references the economic models it has used during its review. In the *Dow/DuPont* and *Couche-Tard/CST* transactions, for example, the Bureau undertook a diversion analysis and estimated the mergers' likely price effects.[27] In *Superior/Canwest*, the Bureau specifically mentioned the use of the Bertrand model of competition with Logit demand, to help analyse the merger and quantify its likely anti-competitive effects.[28] In *Metro/Jean Coutu*, the Bureau conducted a horizontal merger simulation and regression analysis;[29] in *LCF/Cargill*, the Bureau conducted a hypothetical monopolist test and pricing pressure and merger simulation analyses;[30] and in *Evonik/PeroxyChem*, the Bureau conducted upward pricing pressure and merger simulation analyses.[31]

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

Supplementary Information Requests

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

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

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

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

Remedies

Remedies may be required where a merger is likely to prevent or lessen competition substantially in one or more relevant markets. The guiding principle in determining an appropriate remedy was set out by the SCC in *Canada (Director of Investigation and Research) v. Southam Inc.*, where the Court stated that the "appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger".[32] The Court also noted that: "If the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former option must be preferred. At the very least, a remedy must be effective. If the least intrusive of the possible effective remedies overshoots the mark, that is perhaps unfortunate, but from a legal point of view, such a remedy is not defective."[33]

As a matter of practice, the Bureau will first seek to negotiate a remedy with the parties prior to resorting to litigation, and has also shown a willingness to obtain a remedy through mediation prior to completion of the litigation.[34] In seeking a remedy, the Bureau prefers structural remedies, such as divestitures, over behavioural remedies, "because the terms of such remedies are more clear and certain, less costly to administer, and readily enforceable".[35] Structural remedies are also preferred by the courts, as noted by the Tribunal in *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*,[36] where the Tribunal stated: "[O]nce there has been a finding that a merger is likely to substantially prevent or lessen competition, a remedy that permanently constrains that market power should be preferred over behavioural remedies that last over a limited period of time and require continuous monitoring of performance."

Voluntary remedies are implemented through consent agreements. The Tribunal's decision in *Rakuten Kobo Inc. v. Canada (Commissioner of Competition)* clarified the elements that must exist for a consent agreement to secure approval from the Tribunal: (i) the consent agreement must be sufficiently detailed in order for the Tribunal to conduct its review; (ii) the Commissioner must set out in the consent agreement the conclusions arrived at with respect to there being a substantial lessening or prevention of competition; and (iii) there must be a link between the remedy contained in the consent agreement and the Commissioner's conclusion of a substantial lessening or prevention of competition.[37]

As a general matter, where a consent agreement includes either structural or behavioural remedies, or a combination of the two, the Bureau will require that a monitor be appointed to ensure that the merging parties abide by the terms of the consent agreement. Further, to facilitate the implementation of structural remedies, the Bureau generally requires the use of interim hold separate arrangements to "ensure the merging parties do not combine their operations or share confidential information before the divestiture occurs".[38] Pursuant to a

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hold separate agreement, the parties are required to hold separate the assets to be divested pending the completion of the divestiture. Hold separates have been utilised in several recent mergers, including in *Superior/Canwest*, *Metro/Jean Coutu*, *LCF/Cargill*, *Linde/Praxair*, *TMR/AIM*, and *WESCO/Anixter*. While the Bureau's preference is for structural remedies, this is not to say that, in cases where both the respondents and the Commissioner consent, behavioural remedies cannot be effective.[39]

Indeed, the Bureau has been open to using behavioural remedies as a means of addressing competitive concerns in connection with certain mergers. This is somewhat of a recent shift, as historically the Bureau has been concerned with the potential difficulty in monitoring behavioural remedies, determining the appropriate duration for the remedy, and the direct and indirect costs associated with monitoring the remedy and its effect on market participants.[40] In recent years, the Bureau has accepted behavioural remedies in a number of matters, including *Bell/Astral*, *Agrium/Glencore*, *Telus/Public Mobile* (2013), *Transcontinental/Quebecor* (2014), *BCE/Rogers*' acquisition of GLENTEL, *Parkland/Pioneer* (2015), and *Superior/Canwest* (2017).

Further, where behavioural remedies "would not, on their own, be effective alternatives to a successful structural remedy", the Bureau has recognised that, "[i]ncluding behavioural components in a remedy may be useful if such components provide a buyer and/or other industry participants with the ability to operate effectively and as quickly as possible".[41] In that respect, the Bureau has negotiated combination remedies including both structural and behavioural aspects in various matters, including remedies in a number of recent transactions, notably *Superior/Canwest*, *Metro/Jean Coutu*, *LCF/Cargill*, and *Praxair/Linde*.

Post-closing investigations and challenges

Under the Act, the Commissioner can challenge a transaction for up to one year post-closing and seek an order from the Tribunal to dissolve the merger or require the sale of assets to remedy the harm to competition. The Bureau has recently demonstrated a willingness to both review and challenge mergers after closing. On December 19, 2019, the Bureau challenged the non-notifiable acquisition of a primary grain elevator in Virden, Manitoba, by Parrish & Heimbecker ("P&H"). Following the acquisition, P&H controlled the only two grain elevators along a 180 km stretch of the TransCanada Highway, which the Bureau alleged would result in a loss of competitive rivalry. To address its concerns with respect to market power for grain-handling services, the Bureau filed an application with the Tribunal for an order requiring P&H to sell either is existing elevator or its newly acquired elevator to preserve competition.[42] A hearing in front of the Tribunal was held in early 2021, where economic expert witnesses for the Commissioner and the parties testified in a concurrent evidence session, also known as "hot-tubbing", which was the first such use of the process since it was set out in the Tribunal's Rules in 2002. As of the time of writing, the hearings are complete, and the Commissioner and the parties are awaiting the Tribunal's decision.

Criminal merger investigations

On January 7, 2021, the Bureau announced it had closed its investigation into allegations that Torstar Corporation ("Torstar") and Postmedia Network Canada Corp. ("Postmedia") reached an agreement contrary to the conspiracy provisions of the Act. Following a review of the available evidence, the Bureau concluded that no further action was warranted.[43] The Bureau's investigation began in November 2017, following the announcement by Torstar and Postmedia of the completion of a transaction involving the swap of 41 community newspapers.[44] On the same day that the transaction closed, the parties announced that 36 of the papers would be closed with staff of each paper dismissed by the paper's original owner.

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As part of its investigation, the Bureau obtained warrants to search the parties' offices in March 2018, and in December 2018, the Bureau obtained a court order requiring former and current employees of Torstar to be interviewed under oath.[45]

Key policy developments

The SCC's decision in *Tervita* has led the Bureau to reconsider its approach to efficiencies in the merger review process. On May 21, 2020, the Bureau released the final version of its *Model Timing Agreement for Merger Reviews involving Efficiencies* ("Model Timing Agreement"), following the release of a draft of the Model Timing Agreement for public consultation in July 2019.[46] The Model Timing Agreement will require merging parties, who agree, to delay closing if they wish the Bureau to assess whether the efficiencies defence applies prior to initiating any challenge (interim or permanent) to the transaction. Under the Model Timing Agreement, the Bureau effectively extends its review period beyond the statutory timeline by over 100 days, and potentially much longer depending on how quickly certain information can be provided and whether the Bureau concludes it has been provided with complete information.

On March 16, 2021, the Bureau announced that is has joined its counterparts in the United States, the United Kingdom and the European Union in launching an international working group to develop updated approaches for analysing the effects of pharmaceutical mergers. The working group will examine a variety of issues related to mergers in the pharmaceutical industry, including potential updates and expansion of current theories of harm, the evaluation of the full range of effects of a merger on innovation, as well as potential remedies to resolve emerging concerns.[47] On May 11, 2021, the Bureau released a statement encouraging stakeholders, including health policy experts, economists, attorneys, scientists, healthcare practitioners, academics and consumers to share ideas with the working group to inform its review of a variety of issues related to mergers in the pharmaceutical industry, including potential new or refreshed theories of harm, the evaluation of the effects of a merger on innovation and potential remedies to resolve competition concerns.[48]

On April 1, 2021, the Bureau announced two important updates related to its filing fees for merger reviews in accordance with the *Service Fees Act*. First, the Bureau's filing fee for merger reviews was decreased from C$75,055.68 to C$74,905.57, effective immediately. The filing fee applies to companies seeking pre-merger review from the Bureau through submission of a pre-merger notification filing or by requesting an ARC. Second, Innovation, Science and Economic Development Canada's new Remission Policy, which applies to filing fees for pre-merger notifications and/or ARC requests, also comes into effect.[49]

In Canada, foreign investment review (including potential national security review) is governed by the *Investment Canada Act* ("ICA"). Most investments subject to the ICA only require the submission of a short notification filing, which does not require an approval and can be made post-closing. However, the acquisition of control by a non-Canadian over a Canadian business above certain monetary thresholds must be approved before closing on the basis that the investment is of "net benefit to Canada". In addition, all investments, regardless of size, can be reviewed on national security grounds. The Innovation Minister and the Investment Review Division ("IRD") of Innovation, Science and Economic Development Canada are responsible for overseeing the ICA, except for cultural investments, which are overseen by the Canadian Heritage Minister. While the decisions made by the Commissioner under the Act and by the relevant Minister under the ICA are taken independently and in accordance with each organisation's respective statute,

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the Bureau and IRD have a mutual interest in exchanging certain information for purposes of the administration and/or enforcement of their respective legislation.[50] For example, the effect of a proposed investment on competition is a relevant factor in determining whether a foreign investment is of "net benefit" to Canada under the ICA. The ICA's enumerated "net benefit" factors also assess efficiency, which is a guiding purpose of the Act. Given the interplay between the substantive factors under the ICA and the Act, merging parties should be cognisant about how arguments made for securing clearance under one regulatory regime can support – or contradict – arguments made for securing clearance under the other.

* * *

Endnotes

1. See section 65(2) of the Act.
2. See section 123.1 of the Act.
3. The size of transaction threshold is subject to adjustment for inflation, and annual adjustments are published in the *Canada Gazette*.
4. Affiliation rules under the Act are complex but generally prescribe a legal control test (i.e., more than 50% ownership of voting interests).
5. See section 110(3)(b) of the Act.
6. Bureau, *Competition Bureau statement regarding Superior's proposed acquisition of Canexus* (June 28, 2016), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04111.html.
7. Bureau, *Acquisition of Canexus by Chemtrade will not be challenged* (March 8, 2017), available at: https://www.canada.ca/en/competition-bureau/news/2017/03/acquisition_of_canexusbychemtradewillnotbechallenged.html.
8. Bureau, *Competition Bureau statement regarding Superior Plus LP's proposed acquisition of Canwest Propane from Gibson Energy ULC* (September 28, 2017), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04307.html.
9. Bureau, *Competition Bureau statement regarding Canadian National Railway Company's proposed acquisition of H&R Transport Limited* (April 22, 2020), available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04527.html.
10. In addition to seeking an interim order where it has already commenced an application challenging a merger, the Bureau can, under section 100 of the Act, apply for an interim order prohibiting the completion or implementation of a proposed merger where: (i) the Commissioner is conducting an inquiry under section 10(1)(b) of the Act and asserts that more time is required to complete the inquiry, and the Tribunal finds that in the absence of the order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition because that action would be difficult to reverse; or (ii) the Tribunal finds that there has been a violation of the merger notification provisions.
11. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117, available at: http://canlii.ca/t/1frtw.
12. Bureau, *Statement from the Commissioner of Competition: Tribunal issues interim order in the Parkland/Pioneer merger* (June 3, 2015), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03925.html.
13. A "no-action letter" is a letter from the Commissioner indicating that the Commissioner is of the view that he or she does not, at that time, intend to make an application to the Tribunal under section 92 of the Act challenging the transaction. See section 123(2) of the Act.

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14. The Commissioner and a merging party or parties may enter into a consent agreement to remedy the Commissioner's concerns with a transaction or proposed transaction. Consent agreements may be filed with the Tribunal; doing so provides the consent agreement with the same force and effect as an order of the Tribunal. See section 105(4) of the Act. The Bureau has published a template consent agreement which largely reflects recent consent agreements. The template is available on the Bureau's website at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02310.html.
15. Bureau, *Competition Bureau Performance Measurement & Statistics Report For the period ending September 30, 2020*, available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04567.html.
16. Bureau, *Bureau welcomes input on Superior's proposed acquisition of Canwest* (April 24, 2017), available at: https://www.canada.ca/en/competition-bureau/news/2017/04/bureau_welcomes_inputonsuperiorsproposedacquisitionofcanwest.html.
17. Bureau, *Competition Bureau to review the proposed acquisition of Shaw by Rogers* (March 15, 2021), available at: https://www.canada.ca/en/competition-bureau/news/2021/03/competition-bureau-to-review-the-proposed-acquisition-of-shaw-by-rogers.html.
18. Bureau, *Pre-merger notification transaction-size threshold decreases to $93M in 2021* (February 11, 2021), available at: https://www.canada.ca/en/competition-bureau/news/2021/02/pre-merger-notification-transaction-size-threshold-decreases-to-93m-in-2021.html.
19. Bureau, *Competition Bureau statement regarding the acquisition by Elanco of Bayer Animal Health* (July 14, 2020), available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04541.html.
20. Datacom products, which include fibre optic cable, connectors, patch cords, racks, and cabinets, are generally used to provide the passive infrastructure for public communications networks and private enterprise networks or datacenters. PLH includes a variety of high or medium voltage equipment installed on an electrical transmission or distribution line, such as fuses, insulators and grounding equipment.
21. Bureau, *Competition Bureau statement regarding WESCO's acquisition of Anixter* (September 11, 2020), available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04554.html.
22. *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3.
23. For an overview of the efficiencies defence, see the "Overview of merger control activity during the last 12 months" section, above.
24. See *supra* note 6.
25. See *supra* note 8.
26. Bureau, *Economic analysis of retail mergers at the Competition Bureau* (September 15, 2014), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03796.html.
27. Bureau, *Competition Bureau statement regarding the merger between Dow and DuPont* (June 27, 2017), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04247.html; and Bureau, *Competition Bureau statement regarding Couche-Tard's acquisition of CST and divestiture of certain assets to Parkland* (July 6, 2017), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04252.html.
28. See *supra* note 8.
29. Bureau, *Competition Bureau statement regarding METRO Inc.'s acquisition of The Jean Coutu (PJC) Group Inc.* (May 16, 2018), available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04363.html.

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30. Bureau, *Competition Bureau statement regarding La Coop fédérée's proposed acquisition of Cargill Limited's grain and retail crop inputs businesses in Ontario* (November 14, 2018), available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04403.html.
31. Bureau, *Competition Bureau statement regarding Evonik's proposed merger with PeroxyChem* (January 28, 2020), available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04519.html.
32. [1997] 1 SCR 748, at para. 85, available at: http://canlii.ca/t/1fr34.
33. *Ibid.*, at para. 89.
34. Bureau, *Competition Bureau statement regarding Parkland's acquisition of Pioneer* (April 1, 2016), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04053.html.
35. Bureau, *Information Bulletin on Merger Remedies in Canada* (September 22, 2006), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02170.html.
36. 2001 Comp. Trib. 34, CT-2000-002, available at: https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/464545/1/document.do.
37. 2016 Comp. Trib. 11, available online: https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/462945/1/document.do. Brian A. Facey and Cassandra Brown, "Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations", 2nd ed., LexisNexis Canada: 2017 at p. 369.
38. See *supra* note 39.
39. *Ibid.*, at para. 110.
40. *Ibid*.
41. *Ibid.*, at para. 47.
42. Bureau, *Competition Bureau challenges P&H's acquisition of grain elevator from Louis Dreyfus in Virden, MB* (December 20, 2019), available at: https://www.canada.ca/en/competition-bureau/news/2019/12/competition-bureau-challenges-phs-acquisition-of-grain-elevator-from-louis-dreyfus-in-virden-mb.html.
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44. Globe and Mail, *Postmedia, Torstar to swap and shutter dozens of local newspapers* (November 27, 2017), available at: https://www.theglobeandmail.com/report-on-business/torstar-postmedia-swap-community-papers-many-to-close/article37092456/.
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46. Bureau, *Competition Bureau releases model timing agreement for mergers involving claimed efficiencies* (May 21, 2020), available at: https://www.canada.ca/en/competition-bureau/news/2020/05/competition-bureau-releases-model-timing-agreement-for-mergers-involving-claimed-efficiencies.html.
47. Bureau, *Competition Bureau joins multilateral working group on analysis of pharmaceutical mergers* (March 16, 2021), available at: https://www.canada.ca/en/competition-bureau/news/2021/03/competition-bureau-joins-multilateral-working-group-on-analysis-of-pharmaceutical-mergers.html.
48. Bureau, *Interested parties encouraged to share views with task force examining effects of pharmaceutical mergers* (May 11, 2021), available at: https://www.canada.ca/en/competition-bureau/news/2021/05/interested-parties-encouraged-to-share-views-with-task-force-examining-effects-of-pharmaceutical-mergers.html.

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49. Bureau, *New fee remission policy and 2021 adjustment to filing fees for Competition Bureau merger reviews come into effect* (April 1, 2021), available at: https://www.canada.ca/en/competition-bureau/news/2021/04/new-fee-remission-policy-and-2021-adjustment-to-filing-fees-for-competition-bureau-merger-reviews-come-into-effect.html.
50. Bureau, *Administrative Note on Communication between the Competition Bureau and the Investment Review Division of Innovation, Science and Economic Development Canada* (April 6, 2018), available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04348.html.

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China

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Overview of merger control activity during the last 12 months

In 2020, the State Administration for Market Regulation ("**SAMR**") cleared a total of 458 merger cases, a slight decline compared to 465 in 2019, most likely caused by the COVID-19 pandemic. In addition, no cases were blocked, and four cases were conditionally approved in 2020 in the automobile, electronics, computer and pharmaceutical industries. This brings the total number of clearance decisions issued from 2008–2020 to 3,358.

Faced with an increasing workload, SAMR continued to expedite the review process for simplified-review transactions while focusing on the more complicated and competition-threatening deals. In 2020, more than 80% of filings were reviewed under the simplified procedure, and the average period for these simplified reviews lasted less than 20 days from case acceptance to approval.

By contrast, the review period for the four conditionally approved cases lasted on average approximately 291 days, with two of them being pulled and refiled to avoid expiration of the statutory time limit for review. Of the four conditionally approved cases, one involved both structural and behavioural remedies, and the other three cases were cleared with behavioural remedies imposed.

There were also certain legislative activities related to China's merger control regime. Specifically, SAMR put considerable effort into drafting the amendment to the *Anti-Monopoly Law* ("**AML**") in 2020. On 2 January, SAMR published the first draft amendment to the *AML* ("**AML Amendment**") to solicit public opinions, and in this draft, there were a number of changes related to the merger review regime. On 20 October 2020, SAMR officially issued *Interim Provisions on the Review of Concentration of Undertakings* (经营者集中审查暂行规定) ("**Interim Provisions**"), which consolidate six existing regulations related to merger filing.

In February 2021, SAMR officially released *Anti-Monopoly Guidelines for the Platform Economy Industries* (平台经济领域反垄断指南) ("**Platform Guidelines**"). These guidelines concern the concentration of operators in the platform economy sector, where the calculation of turnover may be different depending on the different business models of undertakings.

New developments in jurisdictional assessment or procedure

Three notable developments occurred with respect to jurisdictional assessment and procedure in 2020:

- First, SAMR continued to strengthen its enforcement efforts against gun-jumping behaviour, whereby the merging parties implement the transaction before obtaining approval from SAMR. SAMR investigated and handed out 13 gun-jumping penalty

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decisions, with fines totalling CNY 565 million. It is worth noting that SAMR fined Alibaba Investment, China Literature and Shenzhen Hive Box Network Technology ("**Hive Box**") CNY 500,000 each for completing three separate acquisition deals without notifying the regulator on 21 December 2020. This is the first time that SAMR has imposed administrative fines on the completion of deals involving the variable interest entity ("**VIE**") structure, as reported. It has become clear that deals involving the VIE structure can no longer be ruled out from the merger control review.

- Second, according to the Interim Provisions, the investigation period of gun-jumping has been reduced; an undertaking under investigation shall, within 30 days of serving a notice of filing a case, submit the related documents and materials to SAMR. SAMR shall, within 30 days of receipt of the documents and materials, 30 days less than what is stipulated in the *Interim Measures for Investigating and Handling Failure to Legally Declare the Concentration of Business Operators* (未依法申报经营者集中调查处理暂行办法), complete the preliminary investigation into whether the transaction is an illegally implemented concentration between undertakings. If further investigation is needed, SAMR shall complete such investigation within 120 days (previously 180 days) of receipt of the documents and materials. This shows the increasing efficiency of SAMR and the growing importance placed on illegally implemented concentrations.

Third, the Platform Guidelines emphasise for those that do not meet the notification thresholds, but have or may have the effect of excluding or restricting competition, that the enforcement agency shall, nevertheless, conduct an investigation. This may be the case when a start-up or an emerging platform is involved, where the turnover of such party of the concentration may be relatively low due to its free or low-price model while the concentration in the relevant market is high and the number of competitors is relatively small. Furthermore, for platform operators that only provide information-matching services and collect commissions, turnover can be calculated based on the service fee charged by the platform and other income; for platform operators that specifically participate in market competition on the platform side, the turnover can be calculated based on the transaction amount on the platform and other income from the platform.

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

Taking the 375 cases published in 2020 by SAMR as the sample, the top 10 key industry sectors reviewed in 2020 are as follows:

Rank	Industries	Case Number
1	Automobiles & Parts	44
2	Oil & Gas and Chemicals	35
3	Technology, Hardware & Electronics	28
4	Mining & Metals and Materials	26
5	Commercial Support & Professional Services	20
6	Transportation and Logistics	19
7	Healthcare	18
8	Electricity Supply and Equipment	16
9	Real Estate and Hotel	15
10	Food Manufacture and Supply	12

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Looking ahead, given the growing interest of antitrust enforcement in the internet economy, it is expected that the internet will soon become an additional sector with a large number of merger filing cases.

The notifying party shall define the relevant market based on businesses with horizontal overlaps, vertical relationships (referring to upstream or downstream relationships) and with adjacent relationships (referring to a series of products that are complementary or have the same customer base).

As observed in the merger review practice in China, demand-side substitutability is the major consideration in defining the relevant market. When supply-side substitutability produces the same restriction in competition as demand-side substitutability, supply-side substitutability shall also be taken into consideration. The market definition includes two dimensions, i.e., the relevant product market and the relevant geographic market.

In defining the relevant product market from the demand-side substitutability perspective, the factors to be considered include:

- Evidence that consumers will turn to or consider turning to other products due to price changes or other competition elements.
- The appearance, nature, quality, technical features and other overall characteristics as well as the utility of the products.
- Difference in pricing.
- Marketing channels.
- Other essential factors, such as the preference of consumers, the dependence of consumers upon the product, barriers, risks and costs faced by the majority of consumers when they turn to substitutes, whether there is price discrimination, etc.

In defining the relevant product market from the supply-side substitutability perspective, the following basic factors will be considered:

- Evidence to prove the way that other producers respond to the changing of price or other competition elements.
- The competitors' manufacturing process and techniques, difficulties, time to be consumed, extra costs and risks in changing the line of production, the competitive ability of the products produced after changing the line of production, and marketing channels, etc.

In defining the relevant geographic market from the demand side, factors to be considered include:

- Evidence that consumers will turn to or consider turning to other geographic areas to buy products because of a price change or other competition elements.
- Transportation costs and the nature of transportation.
- The geographic scope within which consumers actually buy the relevant product and the product distribution of the major competitors.
- Geographic trade barriers, including customs tariffs, local regulations, environmental protections, and technical elements, etc.
- Other essential factors, e.g., specific preference of the customers in a specific geographic area and the inbound and outbound flows of the relevant product.

In defining the relevant geographic market from the supply side, basic factors to be considered include:

- Evidence that proves the way undertakings in other geographic areas respond to the change of price or other competition elements.
- Instantaneity and feasibility of the supply from other regions, for example, the cost for costumers to turn to producers located in other regions.

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When defining the relevant market in a certain industry, it is necessary to factor in the industrial characteristics coupled with individual cases. In the *Platform Guidelines*, *Anti-Monopoly Guidelines for Automobile Sector* (关于汽车业的反垄断指南), and *Anti-Monopoly Guidelines for Intellectual Property Rights* (关于知识产权领域的反垄断指南) issued by the Anti-Monopoly Commission of the State Council ("**AMC**"), the AMC has separately guided the applicable approach and industrial characteristics to be considered when defining the relevant market in the platform economy, automobile and intellectual property rights ("**IPRs**") sectors.

a. In defining the relevant market of the platform economy industry:
   - For the definition of a relevant product market, demand-substitution analysis can be conducted based on factors such as platform functions, business models, application scenarios, user groups, multilateral markets and offline transactions. Supply-substitution analysis can be conducted based on factors such as market entry, technical barriers, network effect, lock-in effect, cost transfer, and cross-border competition when supply-side substitution creates a similar competitive constraint on operators' conduct as demand-side substitution.
   - For the definition of a relevant geographic market, substitution analysis can be conducted based on factors such as actual regions where most users choose products, language preference and consumption habits, provisions of relevant laws and regulations, the degree of competition constraints in different regions, and online and offline integration. Based on the platform characteristics, the relevant geographic market is usually defined as the Chinese market or a specific regional market, or a global market on a case-by-case basis.

b. In defining the relevant market of the automobile sector:
   - For the definition of a relevant product market, demand-substitution analysis can be conducted based on the characteristics, usage, and commodity price, and supply-substitution analysis can be conducted when necessary.
   - For the definition of a relevant geographic market, substitution analysis is also the basic method for defining the relevant geographical market for the automobile sector.
   - *The Anti-Monopoly Guidelines for Automobile Sector* specifically advise on the following potential approach to market definition, although divergence from such approach is possible considering specific situations in individual cases:

Steps	Relevant Product Market	Relevant Geographic Market
Manufacturing	Passenger Vehicle Manufacturing	National Market
Distribution	Passenger Vehicle Wholesale	National Market
	Passenger Vehicle Retail	Provincial or Regional Markets
After-sales	After-sales Parts Dealership	
	After-sales Maintenance	

In defining the relevant market of IPRs:

For the definition of a relevant product market, where it is difficult to comprehensively assess the effect on competition from the exercise of IPRs only by defining the relevant product market, the relevant technology market may need to be defined. The following factors can be considered to define the relevant technology market: attributes; uses; licensing fees; compatibility; the lifetime of concerned IPRs; likelihood and costs for technology users to switch to alternative technologies; and others.

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For the definition of a relevant geographic market, the regional natures of IPRs shall be considered. Where the transaction involves multiple countries and regions, the impact of the transaction terms on the definition of the relevant geographic market shall also be considered.

When conducting the competitive analysis, the case handler may consider the offsetting effect produced by a potential competitor entering the market. If the relevant market entry is effortless, potential competition concerns may be relieved to some extent, subject to specific situations in individual cases.

When judging the degree of difficulty in entering the relevant market, factors such as the total cost of entry, legal or factual restraints on entry, limitations due to IPRs, importance of the scale economy for production and distribution of the products as well as the availability of raw materials and infrastructure are usually taken into consideration so as to fully evaluate the possibility, timeliness and adequacy of the market entry.

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

With regard to merger review in China, the Ministry of Commerce ("**MOFCOM**")/SAMR attaches particular importance to economic analysis in the review of concentrations of undertakings in the normal filing procedure. Especially in the review of cases incurring competition concerns, economic analysis is even more important. In practice, both the filing parties and MOFCOM/SAMR have resorted to economic experts for specific competition analysis in high-profile or complex cases. For instance, in *MTK/MStar*, *Thermo Fisher/Life Tech*, *Merck/AZ Electronic Materials*, *ASE/Silicon Precision*, *UTC/Rockwell Collins*, *Photop/Finisar*, *Danaher/GE Medical & Life Sciences Biopharmaceutical*, *Nvidia/Mellanox Technologies*, *ZF Friedrichshafen AG/Wibco Holdings*, and *Cisco Systems/Acacia Communications*, MOFCOM/SAMR retained economists to analyse the relevant competition issues of the concentrations. In particular, in *Thermo Fisher/Life Tech*, *ZF Friedrichshafen AG/Wibco Holdings* and *Cisco Systems/Acacia Communications*, MOFCOM/SAMR announced its engagement of economic experts focusing on quantitative economic analysis. Although MOFCOM/SAMR did not further publicly disclose this, it is not rare in practice for filing parties to seek specific economists to help relieve or resolve their competition concerns.

Article 5 of the *Guiding Opinions of the Notification of the Concentration of Business Operators* (关于经营者集中申报文件资料的指导意见), provided that economic analysis could be applied in the market definition if necessary, is observed as the fundamental statutory provision, among others. Although the AML and relevant regulations have no further provisions elaborating on economic evaluation techniques, in practice, it is common for the authority to use quantitative methods of economic analysis, including the Herfindahl-Hirschman Index ("**HHI**") and market share figures.

For example, SAMR imposed restrictive conditions on five merger cases from 2020 to February 2021, with tailored remedies in each transaction to address different competition concerns, and, when assessing the competitive effects of the concentrations, the authority particularly specified in its announcements that both quantitative methods and non-quantitative methods were applied.

To be more specific, on the one hand, it is observed that the HHI is one of the most significant factors used to analyse the competition landscape of the relevant market both before and after the transaction. For instance, although the five remedies cases from 2020

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to February 2021 did not disclose the HHI, the previous *Cargotec/TTS*, *Photop/Finisar*, *Zhejiang Garden Bio-chemical/DSM/JV* and *Novelis/Aleris* cases all cited the HHI to support the conclusion that the market power of the merged entities or undertakings to the concentration would be significantly enhanced after the transaction. On the other hand, the authority also regards the market shares of each undertaking to the concentration in each relevant market and the combined market shares of such undertakings after the transaction as the very core indications in their reviews to assess whether the transaction would lead to the elimination or restriction of market competition. No matter how exceptional a deal may be, we would still expect to see SAMR pay the most attention to market share data.

In addition to the above, SAMR also relies on figures, statistics, percentages, increments and other quantitative economic analyses due to their relative accuracy, high objectivity and operability. However, this does not mean to say that, in practice, non-quantitative economic factors do not play an important role in a merger review process. These factors can include market entry barriers, upstream and downstream foreclosure, consumer welfare, the capability and incentive of bundling and tying that may result from the transaction, etc. In fact, such aspects were all comprehensively examined in five conditionally approved cases published by SAMR from 2020 to February 2021.

In cases relating to horizontal overlap, various non-quantitative economic factors may be considered, such as whether the entry barrier may impede the entry of any effective competitor into a relevant market in the short term, or whether manufacturers restrict the expenditure capability and procurement quantity of bidders. For example, in the cases of *Infineon/Cypress Semiconductor* and *ZF Friedrichshafen AG/Wibco Holdings*, SAMR concluded that the transaction would eliminate the competitive relationship between the undertakings to the concentration, strengthen the market power of the merged entity and weaken the relevant market competition.

Where there is a vertical relationship, SAMR usually also focuses on certain indexes to enhance the effectiveness of economic analysis in the merger review, such as the countervailing power of the upstream buyer or downstream customer influenced by the transaction. In *Nvidia/Mellanox Technologies*, *ZF Friedrichshafen AG/Wibco Holdings*, and *Cisco Systems/Acacia Communications*, SAMR cited the adhesiveness of a user as an indication of the buyer's bargaining power and capability of switching suppliers. Foreclosure effect analysis would be relatively significant for merger review of transactions with vertical relationships.

Moreover, SAMR also frequently examines whether the transaction may increase the incentive and the capability of the concentration parties to violate the AML, i.e. by implementing monopolistic conducts such as bundling and tying. For example, in *Infineon/Cypress Semiconductor*, SAMR deemed that the concentration parties would have the capability of tying in the relevant semiconductor markets, given that the merged entity had solid market power. SAMR may also focus on whether post-concentration, the parties would have the incentive to cross-subsidise among different markets through conditional bundling and tying by leveraging their market power to other markets, so as to exclude and marginalise their competitors and even force them to be delisted from the market. Similarly, in *Nvidia/Mellanox Technologies*, *Infineon/Cypress Semiconductor* and *Cisco Systems/Acacia Communications*, SAMR imposed the restrictive condition that the concentration parties must not impose unreasonable trading conditions on Chinese customers after the transaction.

Regardless of which economic techniques the authority adopts in an individual merger review process, the protection of consumer welfare is the ultimate goal in eliminating

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competition concerns. Following major development of worldwide industries and changeable trends in M&A, we expect that the AML and China's antitrust enforcement may embrace a new era in economic techniques used in the merger review process.

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

According to Articles 25 and 26 of the AML, the antitrust authority – i.e., SAMR – may decide to conduct a further investigation of no more than 90 days in duration after the initial 30-day review period of the case. However, unlike its European counterparts, the authority in China does not need actual competition concerns as a trigger to enter into such a phase; deficiency of time is sufficient.

The parties may, therefore, offer a commitment plan at any stage of the investigation if the authority has competition concerns in the case. The new Interim Provisions have abandoned the previous timeframe of plan submission under the *Rules on Restrictive Conditions on the Concentration of Undertakings (for Trial Implementation)* (关于经营者集中附加限制性条件的规定（试行）) ("**Rules**"), as in practice, filing parties often fail to submit their commitment plans within 20 calendar days before the statutory deadline of the Phase II review process in response to the SAMR's competition concerns.

Generally, the filing parties could undertake to provide the following remedies to the project that would guarantee continued competition in the market: (i) structural remedies, such as the divestiture of intangible assets such as tangible assets, IPRs, or related rights and interests (the "divestiture of business"); (ii) behavioural remedies, such as the opening of their network or platform and other infrastructure, licensing essential technologies (including patents, proprietary technologies or other IPRs), and terminating exclusive agreements, or of divesting assets or business; or (iii) a combination of both.

From the effectiveness, feasibility and timeliness of the commitment plan, SAMR will then analyse whether the proposed remedies are viable and sufficient to eliminate competition concerns. According to Articles 5–9 of the Rules, the commitment plan should: (i) be effective enough to eliminate the potential anticompetitive effects on the relevant market; (ii) be practically feasible for operation; and (iii) promptly solve the competition concerns caused by the concentration.

It is often difficult to accept plans with restrictive conditions, which require repeated consultations and adjustments before they can be finalised; the Interim Provisions left room for this by stipulating merely a "reasonable period" for negotiation. During this negotiation process, SAMR may consult with other governmental agencies, trade associations and related stakeholders through various approaches, such as questionnaires, seminars and hearings. If the commitment plan cannot relieve or resolve the related competition concerns, SAMR is entitled to block the deal under the AML.

In 2020, SAMR imposed remedies on four merger cases (see the chart below). In *GE/Danaher*, involving 25 relevant markets, structural remedies were imposed along with behavioural remedies; Danaher was required to divest several of its businesses and provide the buyer of its divested businesses with relevant tangible assets, proprietary tech and trade secrets. For the remaining three cases, behavioural remedies were imposed instead.

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Filings Cleared with Restrictive Conditions in 2020 by SAMR				
No.	Date of Decision	Case Name	Filing/Re-filing	Types of Restrictive Conditions
1	28 February 2020	*GE/Danaher*	Initial filing accepted on 24 June; re-filing accepted on 24 December 2019	Structural conditions and behavioural conditions
2	8 April 2020	*Cypress/Infineon*	Initial filing accepted on 9 October 2019	Behavioural conditions
3	16 April 2020	*Mellanox/Nvidia*	Initial filing accepted on 15 August 2019; re-filing accepted on 12 February 2020	Behavioural conditions
4	15 May 2020	*WABCO/ZF*	Initial filing accepted on 25 November 2019	Behavioural conditions

It is also worth noting that the pull-and-refile practice of SAMR is no longer a fixed procedure even for complex transactions of such kind, which suggests an improvement in SAMR's enforcement ability and efficiency.

However, for filing parties, the following suggestions may help expedite the review process where competition concerns arise:

- First, prepare remedy schemes during the filing preparation. In this regard, filing parties should be able to promptly adjust commitment proposals in response to SAMR's potential competition concerns.
- Second, observe SAMR's theory of harm/competition concern in the early stage of the Phase II review process.
- Third, obtain consent/positive feedback from related stakeholders regarding the proposed commitments.

Key policy developments

On 2 January 2020, SAMR began to solicit comments on the draft amendment to the AML. This is a notable landmark for the AML, as the first revision to the basic law since it was implemented in 2008. From a merger control perspective, this draft amendment brings some significant upgrades in the following aspects:

- The draft amendment supplemented the identification factors of the dominant market position of competitors in the internet field, namely network effect, economies of scale, lock-in effect and the ability of enterprises to grasp and process relevant data. This modification was also demonstrated in the publication of the Platform Guidelines and strengthened by antitrust enforcement in the internet sector in 2020.
- In the review process of merger control, the draft amendment establishes a "stop the clock" mechanism. Specifically, when (a) the filing parties agree to suspend the review process, (b) the filing parties are required to submit supplementary materials by SAMR's Request for Information, or (c) SAMR negotiates with the filing parties on possible restrictive conditions. Under any of these circumstances, the review process will pause, and the period of suspension will not be counted towards the review period limited by law.
- The draft amendment to the AML significantly increases the maximum penalty for failure to file for merger control, from the current CNY 500,000 (approximately USD 72,000) to 10% of the parties' turnover in the preceding year.

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On 18 September 2020, SAMR released the revised *Draft Oversea Anti-Monopoly Compliance Guideline for Enterprises* (企业境外反垄断合规指南（征求意见稿）) based on the comments collected. This guideline includes the introduction of antitrust enforcement in several important jurisdictions and especially highlights the obligation of merger filing in different jurisdictions for enterprises.

On 18 October 2020, SAMR started to solicit comments on the *Draft Anti-Monopoly Guidelines for APIs Sector* (关于原料药领域的反垄断指南（征求意见稿）). In this draft, the similarity of the quality of active pharmaceutical ingredients is mentioned as an important factor in terms of defining the relevant product market. It also points out that competition concerns may occur in a highly concentrated market even if the concentration does not meet merger filing criteria. Notably, violation of the AML may subject undertakings in the application programming interface ("**API**") sector to severe punishment.

However, the above three draft pieces of legislation are still far from being finalised as articles of law, and some specific details may be revised in future versions.

In order to mitigate the impact of the COVID-19 pandemic, on 5 April 2020 SAMR announced antitrust enforcement measures aimed at preventing the spread of COVID-19 and towards the resumption of work and industrial production. This announcement proclaimed two critical policy modifications regarding merger review. Firstly, the merger filing documents shall continue to be submitted online. Secondly, SAMR has established a green channel to fast-track the review process of concentrations in the economic sector closely related to the prevention and control of the pandemic and to basic livelihoods, and also to industries heavily affected by the pandemic.

As previously mentioned, four sets of 2019 draft antitrust guidelines were published by SAMR in 2020: the *Anti-Monopoly Guidelines for Automobile Sector*; the *Anti-Monopoly Guidelines for Intellectual Property Rights*; the *Guidelines on the Application of Leniency System in Horizontal Monopoly Agreement Cases* (横向垄断协议案件宽大制度适用指南); and the *Guidelines on Companies' Commitments in Antitrust Cases* (垄断案件经营者承诺指南).

Another important development in antitrust enforcement for the digital economy was the publication of the Platform Guidelines on 7 February 2021. These guidelines, together with the AML, provide a general principle for defining the relevant market when it comes to internet platform cases.

- Definitions regarding the platform economy, in particularly circumstances under which the whole platform can be defined as one relevant product market, are listed in the guidelines. Specifically, the relevant product market can be defined based on the products on one side of the platform; multiple related markets can be defined separately based on multiple products related to the platform, with the intention, interrelation and influence of products between the relevant product markets taken into consideration. When the cross-platform network effects of the platform can impose sufficient competition constraints on platform operators, the whole platform can be defined as a relevant product market.
- The threshold of filing for platform economy industries is more detailed and modified in accordance with platform operators' business models and market conditions. It is also clarified in the guidelines that mergers involving VIE structures also fall under merger control review.
- These guidelines illustrate the competition concerns regarding concentrations among platforms that do not meet notification criteria, such as emerging platforms, free or low-price model platforms and high-concentration platforms. *Ex officio* investigations could be triggered in the circumstances mentioned above.

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- The guidelines also provide detailed factors to consider when assessing the competitive effects of concentrations in the platform economy sector, which include the number of active users, click number, network effects, the ability to process data and leveraging power.

Furthermore, the Interim Provisions were approved on 20 October 2020 and entered into force on 1 December 2020. The most significant provisions and changes in this regulation include:

- SAMR has the discretion to, in accordance with work needs, entrust the market supervision departments at the level of provinces, autonomous regions, and municipalities directly under the central government with the review of concentrations of undertakings.
- Article 18 stipulates that the simple case review process cannot apply when a joint venture ("**JV**") controlled by two or more operators – through the concentration – is to be controlled by one operator who competes with the JV in the same relevant market, and has a combined share of more than 15% together with the JV in the market.

The national security review reached a new stage as the *Measures for the Security Review of Foreign Investment* (外商投资安全审查办法) ("**Measures**") came into effect on 18 January 2021. Any foreign investment, including direct and indirect investment, that affects or may affect national security shall be subject to security review under the Measures. The foreign investment security review working mechanism is responsible for the foreign investment security review work under the leadership of the National Development and Reform Commission ("**NDRC**") and MOFCOM. The office of the working mechanism is located in MOFCOM.

Article 4 of the Measures lists the scope of the national security review that enterprises should proactively report on before investing, e.g. when investing in the arms industry, important agriculture, important energy resources and key technology.

However, foreign investment that affects national security or may affect national security related to securities trading in a stock exchange or any other trading venue is subject to specific application measures based on the Measures. These specific application measures have yet to be unveiled.

Reform proposals

In 2021, SAMR will continue to push forward the amendment of the AML. The work report of the Standing Committee of the National People's Congress reported that the AML amendment is a priority of the legislation plan in 2021. The number of merger control cases may rise sharply seeing as there has been an increased call for enhancement of antitrust regulation, particularly in the platform industry.

From a practical perspective, a few reform proposals have been put forward, as follows:

- First, for foreign transactions that do not affect the Chinese market, that less information should be required for review in order to reduce the filing parties' burden of information collection.
- Second, there should be more detailed rules or explanations regarding the assessment of control in order for undertakings to make a better self-assessment in practice.
- Third, it is necessary that an exemption application system be established in order to ensure a more operatable exemption mechanism against the economic repercussions of the COVID-19 pandemic.

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As the pioneer competition lawyer in the PRC, Dr. Zhan Hao has extensive experience in the fields of concentration filing, antitrust private litigation, government investigation and corporate compliance. Dr. Zhan has successfully represented hundreds of enterprises in merger control filings with SAMR and MOFCOM, all of which were successfully cleared. His clients range from large state-owned enterprises to renowned multinational companies and medium-sized domestic or foreign companies. Dr. Zhan has served multiple industries, including automobile, shipping, chemical, energy, finance, pharmaceutical, transportation, machinery, electronics, textile, aviation, consumer goods and software. For example, Dr. Zhan filed the concentration notification for the *ChemChina/Syngenta* deal with MOFCOM, the biggest deal of state-owned enterprises in 2016, and successfully obtained unconditional clearance for the clients.

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Denmark

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Overview of merger control activity during the last 12 months

The number of mergers reviewed by the Danish Competition and Consumer Authority (DCCA) has seen an overall increase in the past few years, with 39 mergers in 2016, 49 in 2017, 52 in 2018 and 48 in 2019. However, in 2020, the DCCA reviewed only 34 mergers, which likely can be attributed to the market-dampening effects of COVID-19. Of the 34 mergers under review, the DCCA approved 32, with one application for review withdrawn by the applicants and one merger referred to the European Commission (EC). The latter concerned MasterCard and Nets A/S, a Danish payment services company, and it is the first instance of the DCCA referring a merger review to the EC. The EC approved the merger with conditions in August 2020.

The majority (70%) of the merger reviews in 2020 were based on simplified notifications (24 out of the total of 34). A simplified procedure differs from a standard procedure in that the DCCA requires less information from the parties, no real investigation is conducted, and the filing fee is limited to DKK 50,000 (approx. EUR 6,700). The remaining approx. 30% of the cleared mergers were based on full-form notifications. Out of these mergers, none were cleared in Phase II, and only one was subject to conditions.

New developments in jurisdictional assessment or procedure

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

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

In recent cases, there has been a tendency towards a longer and more thorough pre-notification procedure. For example, the public hearing was previously conducted during the Phase I investigation, although recently, it has been conducted as part of the pre-notification process. In fact, we have recently seen examples where Phase I did not commence until the DCCA had no more questions and had conducted most of the market investigation and case analysis. The consequence of these developments is that the DCCA has a large timeframe with no legislative time limits to assess the merger. However, the final result may be similar

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(or even faster) in terms of time spent from that of a procedure that followed the black-letter-law timetable more closely. In our experience, a timeframe of approx. two months between the submission of the first draft notification and the approval is not unusual in simplified notifications, i.e. cases with relatively small overlaps or vertical links. However, the clearance of more complex mergers may require a timeframe of six months or more, even in Phase I cases.

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

Even if the thresholds for a full-form notification are not met, the DCCA has a very wide margin of appreciation and is always entitled to require a full-form notification. This was confirmed in a recent ruling (January 2020) by the High Court of Western Denmark. The case concerned the DCCA's review of a merger between Dansk Supermarked A/S (now Salling Group) and Wupti.com A/S. The DCCA had asked Dansk Supermarked to submit a full-form notification with the consequence that the parties had to pay a filing fee of DKK 1.5m rather than DKK 50,000. The merger was approved, but Dansk Supermarked subsequently complained to the Competition Appeals Tribunal (Appeals Tribunal). Dansk Supermarked stated that the DCCA had not been entitled to require a full-form notification since the undertaken market investigation was very limited in scope, and since the DCCA had found that the merger would not give rise to any competition concerns. The High Court did not find reason to set aside the DCCA's assessment that it needed further information to analyse the merger, since this information could only be obtained by performing a limited market investigation, which is usually not possible within the framework of simplified procedures.

As the notification of a merger exceeding the legal thresholds is compulsory in Denmark, gun-jumping (implementing a merger prior to approval) constitutes an infringement of Danish competition law. In accordance with the EU Merger Regulation, gun-jumping can result in fines of up to 10% of the annual group turnover.

There were no cases of gun-jumping in 2020.

In 2019, Circle K accepted a fixed-penalty notice of DKK 6m from the State Prosecutor for Serious Economic and International Crime for failing to notify a merger. In October 2018, Circle K notified the DCCA of a transfer to Circle K of inventory, employees and goodwill relating to 72 service stations from 12 different lessees under the Shell brand. Circle K had already signed the transfer agreements in May 2016 following the EC's approval of Circle K's acquisition of Danish Fuel, which comprised some of Shell's Danish activities. The transfer of inventory, employees and goodwill relating to the 72 service stations was, however, not covered by the EC's merger approval and should have been separately notified by Circle K to the DCCA. The merger was approved by the DCCA in November 2018, but the imposed fine shows that failure to notify a merger is deemed to be a serious criminal offence under Danish competition law.

Another recent Danish gun-jumping decision was initially adopted by the Danish Competition Council (the DCC) in 2015 and concerned a merger from 2013 between

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the two accounting firms KPMG and Ernst & Young. The parties were accused of pre-implementing the merger as KPMG had terminated the cooperation agreement with the international KPMG network prior to obtaining merger clearance. In December 2016, the Danish Maritime and Commercial Court referred the case to the European Court of Justice (ECJ), seeking guidance on how to interpret the EU merger control rules on implementation of mergers. On 31 May 2018, the ECJ ruled in the case (*C-633/16 Ernst & Young v Konkurrencerådet*) and found, unlike the DCC, that the termination of the cooperation agreement did not constitute a partial implementation of the merger and, as such, that the merging parties had not pre-implemented the merger. Despite the effect the termination was likely to have on the market, the ECJ found that the measure did not contribute to the change of control of the target undertaking. In light of the ECJ's ruling, the DCC has acknowledged Ernst & Young's claim that the parties did not pre-implement the merger, and, accordingly, the DCC's decision has been set aside.

In 2017, two Danish utility companies, SEAS-NVE Holding A/S and Syd Energi Holding A/S, were each fined DKK 4m by the State Prosecutor for Serious Economic and International Crime for a failure to notify the DCCA of the joint acquisition of the e-mobility company ChoosEV, and for implementing the merger before the DCCA had approved it. It was the parties themselves that informed the DCCA of their failure to notify the merger, which was reflected in the smaller size of the fine. The merger was approved by the DCCA later in August 2017.

Fines for failure to notify a merger have only been imposed on the buyer(s).

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

Prior to 2017, merger control was handled within the ambit of the relevant sectoral divisions in the DCCA. However, in January 2017, the DCCA established a specific division, which deals with all notified mergers. In our experience, the creation of the new division has resulted in significantly improved case processing in terms of timing, cooperation and overall transparency. Further, the new division is notably more inclined to provide a conclusive opinion in cases of doubt concerning the DCCA's own jurisdiction.

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

The DCCA directs considerable attention towards markets that are characterised by few competitors, which has led to several Phase II investigations (*cf.* most recently the mergers *HusCompagniet/eurodan-huse* (2020) (withdrawn), *SE/Eniig* (2019), *Royal Unibrew/CULT* (2019), *Tryg/Alka* (2018), *Molslinjen/Danske Færger* (2018), *Danica/SEB* (2018), *Global Connect/Nianet* (2018), *Imerco/Inspiration* (2017) and *JP/Politiken/Dagbladet Børsen* (2017) (withdrawn)). Aside from this observation, the limited number of full-form procedures makes it difficult to identify trends in enforcement priorities.

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

In May 2019, the DCCA established the "Centre for Digital Platforms" as a separate entity within the authority with the intent of strengthening the enforcement of competition law

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when applied to digital platforms. Furthermore, the centre analyses digital platforms to identify how they affect competition, the conditions of growth for smaller undertakings and the circumstances of consumers. The centre will also serve as a junction for the DCCA's analysis and use of big data, machine learning, AI and algorithms.

In September 2020, the Nordic Competition Authorities of Denmark, Finland, Iceland, Norway and Sweden released a joint memorandum on digital platforms and the potential changes to competition law at the European level. The memorandum sets out the Nordic perspective on competition in digital markets. This is in many ways a valuable and forward-looking perspective, since, as noted in the memorandum, the Nordic countries are some of the most digitally progressive countries in the EU. Pertaining to the subject of mergers, the memorandum notes the challenge of large digital platforms leveraging their market power to increasingly expand both vertically and horizontally; for example, by the takeover and acquisition of smaller start-ups. Further, the high-speed nature and dynamic evolution of digital markets presents a challenge in relation to merger control since it makes it more difficult to predict counterfactual scenarios. The competition authorities are thus forced to predict counterfactual scenarios with a higher degree of uncertainty than usual.

Further, the memorandum discusses the complex issues associated with data-sharing agreements; that is, agreements where companies cooperate on the sharing of data. The memorandum proposes certain solutions in response to these digital challenges. First, it recommends that further guidelines be developed on how to design data-sharing remedies in relation to problematic mergers. Second, it recommends that more guidance be developed on theories of harm in relation to big tech mergers, so that authorities can better predict counterfactual scenarios. Lastly, the memorandum highlights that many acquisitions of smaller start-ups often will not be notified under the standard notification thresholds based on turnover rates, which in some cases is problematic for competition. Although Danish law does not yet include these tools, the memorandum recommends two potential solutions to this problem: 1) the power to order notification of *specific transactions* even if the turnover thresholds are not fulfilled; and 2) the power to impose disclosure requirements on *individual companies*, meaning that a duty can be imposed on a company to notify all mergers and acquisitions it is involved in, regardless of whether the turnover thresholds are fulfilled.

In January 2021, the DCCA released a comprehensive report of much public interest on competition in the legal profession. Although the report does not focus on the subject of mergers, it is possible that this increased focus on competition in the legal industry may affect mergers involving larger law firms in the future.

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

The Danish competition authorities are in general convergent with the EC in regard to the substantive test of the effects of a merger. Thus, the Danish merger regime takes account of case law from EU courts and the Commission's practice and guidelines.

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

During the past year, the DCCA assessed and approved several mergers involving high market shares, illustrating the development of a more nuanced approach to the question of such shares.

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This is demonstrated in the *Royal Unibrew/CULT* case, which was a merger between two undertakings active in the Danish on-trade and off-trade markets for the production, distribution, and sale of energy drinks, "Ready-to-Drink" beverages and ciders. The merger underwent Phase II investigations as the DCC was concerned that the parties' post-merger market shares of 30–40% would result in price increases. However, factors such as low entry barriers, low brand loyalty and the constant introduction of new products led the DCC to conclude that the merger would not significantly impede competition on the market. Consequently, the DCC approved the merger unconditionally.

In *Tibnor/Sanistål*, the DCCA assessed Tibnor A/S's acquisition of Sanistål A/S's distribution of steel. As the parties would obtain a post-merger market share of 30–40% on the market for long carbon steel, the DCCA had initial concerns that the merger could lead to unilateral effects, coordinated effects or input foreclosure. However, the market investigation did not show any real merger-specific concerns and, as Tibnor's market shares were low, the merger would not alter the market structure significantly. Further, the merged entity would not be able to or have any incentive to exert input foreclosure. Consequently, the DCCA approved the merger unconditionally in Phase I.

In *JPPOL/Saxo*, the DCC assessed JP/Politikens Hus A/S's (JPPOL) acquisition of 70% of the shares in Saxo A/S. The parties would obtain a market share of 40–50% on the market for online sales of physical books to end users, but there was no overlap, and the market was only vertically affected. Further, the merged entity would obtain a 20–30% market share on the horizontally affected market for online sales of e-books to end users. As regards the vertically affected market, the DCCA assessed the risk of input foreclosure (in relation to the upstream market for book publishing) or customer foreclosure, but found that the merged entity would not have the incentive to exert such foreclosure. As regards the horizontally affected market, the DCCA did not find any competition concerns, as there were several viable competitors, and the market was characterised by low entry barriers. Consequently, the merger was approved unconditionally in Phase I.

In *Orkla/Easyfood*, Orkla had a market share of 80–90% on the market for bakery fat. Easyfood was not active in the sale of bakery fat, but the market was vertically affected, as Easyfood purchased bakery fat. The DCCA approved the merger unconditionally, as Easyfood only purchased 5–10% of the market.

In September 2019, the DCC approved CRH Denmark A/S's acquisition of 100% of the shares in RC Beton A/S. One of the affected markets was the production and sale of prefabricated concrete sections, in relation to which the parties would obtain a post-merger market share of 40–50%. However, the delta was below the Commission's thresholds under which horizontal competition issues are likely to arise.

In *Nykredit Realkedit/LR Realkredit*, the parties were both active on the market for lending mortgage loans to business customers with a post-merger market share of 30–45%. However, as LR Realkredit's market shares were low, and as LR Realkredit was, according to the Danish Financial Supervisory Authority, the smallest mortgage bank in Denmark, the merger would not lead to any significant changes in the market structure. The DCCA also investigated the market for mortgage loans to subsidised housing construction. After the merger, the undertaking would have a market share of 25–40% if calculated from gross loans and a market share of 35–50% if calculated from bond debt. However, the market investigation showed that LR Realkredit was a small player on the market and, as such, the merger would not lead to any competition concerns. Consequently, the merger was approved unconditionally in Phase I.

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

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

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

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

As a general rule, remedies should be offered as early as possible. Remedies offered late in the Phase II investigation will extend the time limit, as the Danish competition authorities are entitled to at least 20 business days to assess such remedies. The competition authorities will usually perform market tests of the proposed remedies.

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

In 2020, the DCC required remedies in relation to only one merger. The case concerned SEAS-NVE Holding A/S's acquisition of parts of the Ørsted A/S group, including 100% of the shares and voting rights in Radius Forsyningsnet A/S, Ørsted City Light A/S, Ørsted Privatsalg El & Gas A/S and Ørsted Varmeservice A/S (Ørsted B2C). Ørsted A/S is the largest energy company in Denmark, focused on green and renewable energy. SEAS-NVE is one of Denmark's largest energy companies. The DCC found that the parties' activities overlapped in the markets for: i) distribution of electricity; ii) retail supply of electricity; iii) street lighting; iv) retail supply of natural gas; and v) servicing of natural gas boilers. The DCC's main concern was the effects of the merger on the market for retail supply of natural gas to private individuals and small and medium-sized companies (SMEs). The DCC estimated that, post-merger, SEAS-NVE would have a 60–70% market share in the market for private individuals (the narrow market) and a 40–50% market share in the market including both private individuals and SMEs (the broad market), while the remaining competition in the market would mainly consist of two companies with approx. 10–20% market shares each. The DCC considered SEAS-NVE's ability to raise the prices on natural gas after the merger by, *i.a.*, applying different economic tools. It assessed the diversion ratio and found that SEAS-NVE and Ørsted B2C were mutually each other's biggest competitors, as approx. 70–80% of SEAS-NVE's customers transfer to Ørsted B2C and 30–40% of Ørsted B2C's customers transfer to SEAS-NVE. No other companies exerted similar competitive pressure.

Further, the DCC performed an Illustrative Price Rise (IPR) assessment, which showed that the reduced competitive pressure would provide an incentive to increase prices. The DCC also utilised a Compensating Marginal Cost Reductions test (CMCR) to assess how large a decrease in marginal costs would be needed to offset the incentive provided by the reduced competition. Large decreases in marginal cost would be needed, and the DCC did not find it likely that the merger would result in such a decrease. Further, the DCC found that the customers had a low degree of countervailing buyer power, the level of potential competition was low, since it was an unattractive market for newcomers, and the actual competitors did

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not have much competitive effect. Considering all of these factors, the DCC found that the risk of a price increase to the detriment of consumers was high, and thus it concluded that the merger would impede effective competition in the natural gas retail supply market. In order to meet these concerns, a simple structural remedy was proposed: SEAS-NVE would divest the natural gas customer base of 107,000 customers that it received from Ørsted B2C. The DCC found that this remedied the competition impediment and approved the merger in Phase I.

In 2019, the DCC similarly only required remedies from merging undertakings once. This case involved behavioural remedies, which, as explained above, the authorities generally prefer less to structural remedies, but which are also increasingly being accepted.

The case concerned the merger of SE a.m.b.a. and Eniig a.m.b.a. into the joint company Nordlys. SE was a cooperative society in the southern part of Jutland, primarily active within the energy sector, but also offering retail and wholesale supply of fixed broadband connections and retail provision of TV services. Eniig was a cooperative society, active in the middle and northern part of Jutland, supplying energy and natural gas, and was also active in the retail and wholesale supply of fixed broadband connections and retail provision of TV services. The DCCA found that the parties' activities overlapped in nine markets in Denmark: i) wholesale of fixed broadband connections; ii) retail supply of fixed broadband connections; iii) acquisition of TV channels; iv) retail provisions of TV services; v) generation and wholesale supply of electricity; vi) distribution of electricity; vii) retail supply of electricity; viii) wholesale supply of natural gas; and ix) retail supply of natural gas. The DCCA only had concerns regarding the market for wholesale of fixed broadband connections through high-speed infrastructure. The DCCA found that the merged company Nordlys would have the ability to exercise input foreclosure towards service providers wanting to service the parties' fibre network. The possibility of foreclosure arose because the merger caused i) a vertical connection on the market concerning wholesale of internet access, and ii) an increase in the parties' activities on the upstream and downstream markets, as both parties had activities within retail sale of broadband connection and TV packages. Competitors had only, to a limited extent, constructed high-speed infrastructure in the same areas as the merging parties. Furthermore, the DCCA found that the merger would bring about an incentive for Nordlys to foreclose the market for retail sale of broadband and TV packages. In order to meet these concerns, the merging parties proposed four behavioural remedies: i) to ensure the opening of Eniig's fibre optic infrastructure and offer wholesale internet access services to service providers on reasonable and non-discriminatory terms, making it possible for customers to choose between several providers; ii) to offer access to the fibre network on commercial, fair and non-discriminatory terms; iii) to set up a Chinese wall between Nordlys and OpenNet (a wholesale company through which Danish fibre-companies can hire out their fibre network to service providers owned by Eniig); and iv) further initiatives which were kept confidential. The commitments satisfied the DCC's concerns, and the merger was approved in Phase II.

Key policy developments

On 1 January 2020, an amended executive order on the calculation of turnover in the Competition Act came into force. The DCCA further issued complementary updated guidelines in January 2020.

Among other things, the order harmonises the rules for calculating public undertakings' turnover with the rules in the EC Merger Regulation. Further, it contains technical changes

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in relation to the identification of the undertakings concerned in a merger as well as calculation of turnover attributable to Denmark.

On 1 July 2020, an amended executive order on the notification of mergers came into force. It was accompanied by updated DCCA guidelines on notification of mergers in June 2020. Most importantly, the order sets higher and more detailed requirements for information that must be provided in full-form notifications. Among other things, these notifications shall now include information on the merging parties' assessment of the counterfactual scenario; that is, what they expect to happen if the merger is not carried out, including whether the parties will resume their previous business activities. Further, the notification shall contain information on affected markets and data that can clarify the supply and demand-substitution to the extent that the parties have such information. Finally, the order specifies which documents must be submitted along with the notification.

As the first of its kind, in August 2020, the DCCA released guidelines on remedies in relation to mergers. The guidelines contain a number of recommendations on how to produce a streamlined and successful remedy. The main guidelines are: i) make proactive preparations regarding the need for remedies and their potential design; ii) use early dialogue to help the process; iii) seek thorough understanding of the competition issue at hand through communication with the DCCA, before proposing any remedies; iv) make remedies as clear and precise as possible; v) ensure sufficient communication and collaboration between legal advisors and the merging parties, as this produces the best results; and vi) consider structural remedies before behavioural remedies, as the DCCA usually prefers structural remedies to behavioural ones.

In implementation of the ECN+ Directive, on 9 February 2021, a comprehensive amendment to the Danish Competition Act was passed. It came into force on 4 March 2021, implementing a range of new rules of enforcement. Of most relevance for merger control is the new civil fine regime. The Competition Act now sets out that the competition authorities may request the courts to impose fines for intentional or negligent infringements of competition rules in civil proceedings. Beforehand, fines were imposed solely in criminal proceedings, led by the State Prosecutor for Serious Economic and International Crime. Other changes include alignment with EU competition law on parental company liability, and extended investigatory powers for the competition authorities in terms of dawn raids and interviews.

Regarding national security and foreign direct investment (FDI), on 10 March 2021, the Danish Business Authority submitted a Draft Act on the Screening of Foreign Investments for consultation in the Danish Parliament. It is anticipated that the act will enter into force on 1 July 2021. The act enacts two different screening mechanisms, which are overseen by the Danish Business Authority. One is a sector-specific mechanism with a mandatory notification obligation, and the other is a general (cross-sector) mechanism with a voluntary notification option. The obligatory mechanism specifies that when foreign investors invest in particularly sensitive sectors and activities, such as defence, the investor must apply beforehand to the Danish Business Authority for permission to invest. Although this legislation is not overseen by and thus does not directly implicate the DCCA, it still affects the outlying framework surrounding the Danish merger system.

Reform proposals

No further changes in Danish merger control regulation are currently expected in 2021, other than the implementation of the new Act on the Screening of Foreign Investments.

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Finland

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Overview of merger control activity during the last 12 months

Merger control is based on both national statutory law and EU law. At the national level, merger control is regulated by the Finnish Competition Act (*kilpailulaki*, 948/2011). At the EU level, Council Regulation No 139/2004 on the control of concentrations between undertakings is applied. Pursuant to the Competition Act, a concentration must be notified to the Finnish Competition and Consumer Authority ("FCCA") if:

- the combined worldwide turnover of the parties exceeds EUR 350 million; and
- the turnover of each of at least two of the parties accrued from Finland exceeds EUR 20 million.

Once a concentration has been notified to the FCCA, it has 23 working days to investigate and either clear the concentration or initiate a Phase II investigation. If a Phase II investigation is opened, the FCCA has an additional 69 working days (the Finnish Market Court may extend the deadline by a maximum of 46 working days) to approve the concentration with or without conditions, or to request the Market Court to prohibit it. If the FCCA requests such a prohibition, the Market Court must make its decision either to clear the concentration with or without conditions, or to prohibit it within three months.

The applicable substantive test is the significant impediment to effective competition ("SIEC") test, which should be equivalent to the SIEC test provided in the EU Merger Regulation. Other substantive merger control rules, including the definition of a concentration, are mostly in line with European Union rules.

During the calendar year 2020, the FCCA issued approximately 25 merger decisions. This number is roughly less than the typical yearly number of notifications, which has been around 30 over the past few years. For instance, in 2019 more than 30 concentrations were notified to the FCCA. A majority of the concentrations investigated in 2020 were cleared unconditionally during the Phase I investigation, and Phase II investigations were initiated in four cases:

- *Kesko Oyj/Heinon Tukku Oy*. In February 2020, the Market Court prohibited the merger between Kesko Oyj and Heinon Tukku Oy. Both companies operate in the wholesale trade of daily consumer goods and provide services for food service customers, such as restaurants, hotels, and catering businesses. The prohibition decision was the first ever to be adopted in Finland. The FCCA opened Phase II investigations in June 2019, the deadline for which was later extended twice by the Market Court. According to the FCCA, the acquisition would have led to a dominant position with a market share of up to 60–70%, which would have impeded effective competition. The FCCA held that the remedies submitted by Kesko were inadequate to address the competition concerns related to the acquisition, and proposed prohibition to the Market Court in November 2019. Kesko contested the FCCA's views.

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- *Donges Teräs Oy/Ruukki Building Systems Oy*. In April 2020, the FCCA conditionally approved the acquisition of Ruukki Building Systems Oy by Donges Teräs Oy. Both companies operate in the provision of steel structures and their product portfolios include steel bridges and steel frame structures for commercial and industrial buildings. The FCCA launched a Phase II investigation in January 2020 based on the view that the merger would harm competition in the market of steel frame structures for business premises and industrial buildings, as well as on the market of turnkey deliveries of steel bridge structures. According to the FCCA, the market of steel structure provision is rather concentrated in Finland, and the combined market share of the parties is remarkably high, especially in the market of steel bridge structures. Eventually, Donges Teräs undertook to sell the business of one of Donges Group's manufacturing plants to a party that had the prerequisites for maintaining and developing the business; the FCCA considered this an adequate commitment to eliminate the competition concerns.
- *Mehiläinen Oy/Pihlajalinna Oyj*. The FCCA proposed the Market Court to prohibit the acquisition of Pihlajalinna Oyj by Mehiläinen Oy in September 2020 after exceptionally lengthy investigations. The transaction was transferred from the European Commission to the FCCA in February 2020, and the Market Court extended the deadline for the decision twice following the FCCA's requests. The FCCA also applied a so-called "stop the clock" procedure in accordance with Section 26 of the Competition Act.

Both parties provide private healthcare services, and they compete in several segments of the healthcare market. In its proposal, the FCCA stated that the Finnish healthcare market has concentrated rapidly over the last decade. According to the FCCA's investigations, if approved, the merger would have further concentrated the health services market by reducing the number of large national players from three to two. The FCCA identified competition concerns in several healthcare segments, leading to significant price increases and poorer choice for customers. The FCCA did not consider the remedy proposals submitted by Mehiläinen to address the competition concerns. Mehiläinen withdrew the public tender offer in November 2020, and the Market Court declared in December 2020 that it no longer had grounds to investigate the merger as the case had ceased to be in effect.

Loomis AB/Automatia Pankkiautomaatit Oy. The FCCA approved the acquisition of Automatia Pankkiautomaatit Oy by Loomis AB with conditions in October 2020. Loomis provides cash transition and cash handling services in Finland, whereas Automatia offers cash supply services for bank branches and, among other things, operates the largest ATM network in Finland. The FCCA's in-depth investigation focused on the vertical effects of the transaction. The FCCA concluded that Loomis' most relevant competitor, Avarn Cash Solutions Oy ("Avarn"), would be excluded from the market if the deal were unconditionally approved. Consequently, competition would be further weakened in the already highly concentrated markets for cash in transit and cash handling services. To address the competition concerns, Loomis and Automatia committed to provide access to Automatia's cash infrastructure for existing and new cash management service providers for the next five years. In addition, Loomis and Automatia committed, among other things, to continue to purchase cash management services from Avarn on current terms for the next two years and for the following three years, in accordance with a staggered minimum purchase obligation. One interesting aspect in this case is the fact that Avarn appealed to the Market Court, stating that the given commitments were inadequate. The case is still pending, and it is yet to be seen whether Avarn even has status as a party with the right to appeal.

During 2020, the FCCA did not carry out any proceedings for failure to notify a concentration ("gun-jumping"). Only one concentration (the above-mentioned *Mehiläinen/Pihlajalinna*)

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was referred to the FCCA by the European Commission. In addition, one application to amend the given commitments was made regarding the acquisition of Atkos Printmail Oy by Posti Oyj in 2018. Moreover, at the beginning of 2021, the FCCA approved amendments to the given commitments in the case *Caverion Industria Oy/Maintpartner Group Oy*.

New developments in jurisdictional assessment or procedure

The FCCA has noted that the need for reform of the Finnish merger control provision should be investigated. There has also been a significant change in the length of review periods. Whereas the average amount of days spent on Phase I investigations in 2012 was 15, at present this seems to be at least 20 working days. In addition, the FCCA has been increasingly requesting the Market Court to extend the deadline of Phase II investigations. In light of the FCCA's latest decisions, it also seems that even simple merger clearances are not granted in any materially quicker period of time.

Due to the COVID-19 pandemic and other market developments, the FCCA has started to prefer rather long pre-notification periods. The FCCA expects that prior to the actual filing, the notification will first be provided as a draft to the FCCA. Even though the FCCA's Guidelines on Merger Control describe this only as a "best practice", and it is not specifically required by the relevant regulation, such procedure is highly recommended. Pursuant to the Competition Act, the FCCA may always decide that the notification does not meet the required standard and it is significantly incomplete, in which case the time period for the investigation will not begin. Due to this, it is advisable to begin pre-notification with the FCCA well in advance. Especially if the proposed concentration concerns very complicated markets and the concentration is likely to raise any competition concerns, it is likely to take a long time for the authorities to "accept" a merger notification as "complete".

The FCCA has started to demand quite comprehensive information regarding the proposed concentration when filed, regardless of the nature and extent of the competition concerns that the concentration might raise. It seems that when there is even the slightest possibility that the notified concentration will raise competition concerns, the FCCA prefers the parties to the concentration to provide more comprehensive information than would necessarily be needed. Overall, it appears that the FCCA is increasingly directing the national merger control process towards the Commission's equivalent process.

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

The FCCA does not have any predefined key sectors or key policy areas in merger control. The Competition Act itself includes sector-specific rules for concentrations in the employee pension insurance, pension funds and insurance funds sectors, pursuant to which a concentration in those sectors must first be approved by the Financial Supervisory Authority ("FSA"). A separate notification to the FCCA is not required if the FSA has asked for the FCCA's statement during its investigations and the FCCA has found that no impediment for the approval of the concentration exists.

Based on the FCCA's strategic and operational focuses agreed with the Ministry of Employment and the Economy, the FCCA has noted that there is a need to assess the existing turnover thresholds. According to the FCCA, there would be a need to consider whether certain concentrations that do meet the said threshold could be investigated.

Finland is slightly isolated from the rest of Europe and the effects that the proposed concentration might have on cross-border trade are defined slightly differently than in the

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Commission's practice. The FCCA tends to take national markets as a starting point, and in some cases extensive economic and statistical evidence on wider markets is required to convince the FCCA that the relevant markets are wider than national. Usually, mere reliance on EU cases that indicate EU- or EEA-wide or broader markets is not sufficient in this respect. However, the FCCA has considered in its more recent decisions that the relevant market might be wider than the national market, for instance in the case *Alfa Laval AB/Neles Oyj*.

The Competition Act does not include a provision similar to Article 3(5) of the EU Merger Regulation, according to which notification is not required in certain temporary arrangements where credit institutions or other financial institutions or insurance companies hold, on a temporary basis, securities they have acquired in an undertaking with a view to selling them. Since the Competition Act does not include provisions that exempt temporary ownership arrangements, these transactions must be notified in Finland if the obligation will otherwise be met.

The FCCA may grant waivers to the obligation to notify if the competition effects are likely to be minor, or if the information to be given is unnecessary for the assessment of a concentration. A short-form notification is available in such cases. The pre-notification procedure is of great value in such a case, since the notifying party may ask the FCCA to approve the use of the said shortened notification. If the concentration is notified by using the short-form notification without any prior discussion with the FCCA, the FCCA is likely to request the normal detailed notification, which must then be provided.

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

A proposed concentration's competitive effects are assessed on the relevant product markets and geographic markets. In the FCCA's investigations, it assesses whether the presented market definition and third parties' answers to the Authority's request for comments and information differ from each other. After the market definition has been finalised, the competitive effects are assessed. In most cases, the precise market definition is left open as the concentration did not raise any competition concerns. The above-mentioned definition includes an assessment of the current market situation, market entry and possible barriers to entry, as well as other factors which may balance the market power of the merging entity. Efficiency gains resulting from the concentration may also be considered if the notifying parties are able to demonstrate these efficiencies and that they benefit consumers.

The purpose of the assessment is to estimate the effects of the merger on a future market situation. The assessment focuses more strongly on competitive effects and less on market shares and structural considerations. Nevertheless, the market definition and market shares still remain important factors, but in some instances the market definition has been left open even when competition concerns have occurred, since the negative effect on competition has been distinctive. In its latest decisions, the FCCA has assessed the effects on competition with highly developed econometric modelling and analysis. Therefore, it is not surprising that half of the FCCA Merger Control team are specialised in competition economics and educated accordingly.

When issuing its decision in *Mehiläinen Oy/Pihlajalinna Oyj*, the director of the Merger Control team stated that the economic analysis carried out by the case team was the most extensive in the merger control history of the FCCA. The economic analysis focused on the reduction of potential and future competition and how it would affect the relevant market.

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The FCCA also conducted extensive economic analysis in *Kesko Oyj/Heinon Tukku Oy* by carrying out a comprehensive questionnaire survey. This method was also used in *Donges Teräs Oy/Ruukki Building Systems Oy* and appears to be one of the FCCA's most frequently used means to gather relevant information.

The decision *Donges Teräs Oy/Ruukki Building Systems Oy* provides a recent example of a case where the market shares of the parties did not raise serious concerns at first sight. However, with the help of econometric modelling, the FCCA was able to detect that the proposed concentration did raise serious competition issues in a very specific market sector. Overall, it appears that extensive econometric techniques are used frequently by the FCCA. Due to this, notifying parties should always consider whether they would need an economic advisor of their own in a case where competition concerns appear.

Regarding recent vertical mergers, the FCCA performed its first extensive economic analysis concerning vertical mergers in its decision *Loomis AB/Automatia Pankkiautomaatit Oy*. Even though the FCCA states in its Guidelines on Merger Control that non-horizontal mergers often provide substantial scope for efficiencies and are generally less likely to significantly impede effective competition than horizontal mergers, the FCCA was able to find negative effects on competition (see above).

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

The notifying parties may propose commitments to the FCCA in order to resolve the competition concerns that could significantly impede effective competition. The FCCA will consider these remedies and, if they are deemed sufficient to eliminate the competition concerns, the parties are asked to commit to them. The FCCA is responsible for ensuring that the remedies are implemented as agreed. The FCCA cannot ask the Finnish Market Court to prohibit the merger if the remedies are deemed sufficient, and most of the time, the FCCA is willing to meet the parties and discuss informally the proposed concentration and possible commitments. It is also noteworthy that pursuant to the Competition Act, the FCCA cannot make binding commitments that the parties have not proposed or agreed on. However, in practice the FCCA may suggest certain remedies that could resolve the competition concerns, but the actual commitment proposal must come from the notifying parties.

The Competition Act presupposes that structural remedies should primarily be used in merger control cases. The FCCA has also stated in the past that it favours structural remedies over behavioural ones. One could assume that this is because it is often easier and more efficient to fulfil and ensure the implementation of structural remedies. The implementation of behavioural remedies tends to require more resources, and the time frame is also often longer. However, in the recent decisions that have included conditions, the FCCA has accepted behavioural remedies where they are deemed necessary. For instance, behavioural remedies were accepted in the *Loomis AB/Automatia Pankkiautomaatit Oy* case and in the *MB Equity Fund v Ky/A-Katsastus Holding Oy, A-Test & Consulting Oy, Suomen Vahinkotarkastus SVT Oy and Incar Invest Oy* case in 2019. Even though behavioural remedies are deemed a secondary option, it is clear that they can be applied in a case where structural remedies are not available. This appears to be the case especially with vertical concentrations that are considered to impede effective competition.

In terms of structural remedies, the FCCA often accepts remedies that include the divestment of a certain business to resolve competition concerns. The upfront buyers of such divestments have not been required by the FCCA, but in its most recent conditional decision, *Altia Oyj/*

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Arcus ASA, an upfront buyer was required in terms of the offered remedies to be effective. This is the first time the FCCA has required an upfront buyer, and one can only assume that this is because the latest divestment processes have not been very successful. The FCCA's said decision and approach indicate that upfront buyers may also be required in the future in similar cases. However, this possible change of policy has not been tested before the Market Court from a proportionality perspective.

Key policy developments

In March 2020, during the current COVID-19 pandemic, the FCCA announced that there may be some delay in the merger control process since obtaining vital information from third parties had become more difficult. In addition, the preferred filing method was changed to an electronic form. Due to the said situation, an amendment to the Competition Act regarding the timetable of the Phase II investigation was also made, extending the Phase II deadline to 92 working days. This amendment was in force temporarily and can no longer be applied.

The FCCA has stated unofficially that it will assess the Guidelines on Merger Control in the near future, but it is yet to be seen when this assessment will take place. It is not the FCCA Merger Control team's duty to address public policy/non-competition issues, even if they arise in the merger cases it investigates. Therefore, the FCCA's approach to such issues may be described as neutral.

The foreign direct investment ("FDI") review process is completely separate to the FCCA's merger control process. The Finnish Act on the Monitoring of Foreign Corporate Acquisitions (172/2012, as amended, "MFCA") requires that certain acquisitions carried out by a foreign purchaser either require the approval of the Ministry of Economic Affairs and Employment of Finland ("MEAE"), or may be voluntarily notified with such Ministry. The purpose of the MFCA is to monitor and, if key national interest so requires, restrict the transfer of influence to foreigners or foreign corporations and foundations. Since the MFCA's entry in force in 2012, no transaction has been subject to a negative decision.

Reform proposals

No significant developments are expected to take place in Finnish merger control in the immediate future. According to the FCCA strategy paper for 2018–2021, problematic transactions will occur and they are likely to have serious effects on competition.

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France

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Overview of merger control activity during the last 12 months

In France, merger control carried out by the "Autorité de la Concurrence" (the "Authority") is defined by Articles L. 430-1 to L. 430-10 of the French Commercial Code. Certain provisions of the European Council Regulation n° 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("EC Merger Regulation") are also directly applicable, in particular: Article 1, which specifies the limits of the competence of the European Commission (the "Commission") according to the turnover of each undertaking concerned by the merger: Article 5, which specifies the method of calculation of turnover; and Articles 4, 9 and 22, which provide the mechanisms for the referral of a merger between the Commission and the Authority.

Despite the COVID-19 crisis, the Authority was active in 2020 and issued 196 decisions. In two of these cases, the Authority initiated Phase II proceedings, and only in one case[1] was the merger prohibited. Finally, two notifications have been withdrawn.[2]

The number of cases that entered into Phase II proceedings in 2020 remained stable, reflecting the Authority's exceptional application of such proceedings. However, for the first time in its history, the Authority exercised its "prohibition power" in a case concerning a contemplated joint acquisition by Soditroy and the "Association des Centres Distributeurs E. Leclerc" of a food retail store operated under the Géant Casino brand. At the end of the Phase II proceeding, which included a consultation of operators in the area (hypermarkets, supermarkets, discounters, etc.) and surveys of Géant Casino's and E. Leclerc hypermarket's customers located in the area, the Authority considered that the merger would have led to the creation of a duopoly. This analysis was reinforced by the presence of regulatory barriers to entry making the entry of a new competitor in the area highly unlikely. The Authority's reasoning was based on three main concerns: (i) risk of a significant loss of diversity for customers; (ii) risk of price increases through unilateral effects; and (iii) risk of coordinated effects. The commitments submitted by the parties to remedy the competition law issues identified were not considered by the Authority to be adequate to eliminate such risks. This decision is being appealed. With this first prohibition decision, we note that the Authority has confirmed its willingness to regulate transactions more strictly.

This statement of the Authority is shared by the Commission with the renewal of its reading of the policy of referring strategic operations based on Article 22 of the EU Merger Regulation (EUMR).[3] From this perspective, the Commission has published new guidelines[4] and has at the same time accepted the request submitted by France, Belgium, Greece, Iceland, the Netherlands, and Norway to assess the proposed acquisition of the innovative biotech company Grail by Illumina under the EUMR. The Authority's request was contested before the French "Conseil d'Etat" ("CE"), but the appeal was unsuccessful

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since the CE had stated having no jurisdiction to assess such a decision of referral before the Commission, based on Article 22 of the EC Merger Regulation.[5] Therefore, this is the first time that the Commission will assess and review a contemplated transaction which does not trigger national thresholds.

This remarkable policy shift can be explained by the urgent need to regulate killer acquisitions.

Killer acquisitions are described as an acquisition where the acquirer's strategy is "*to stop the development of the target's innovation projects and to block future competition*".[6] These horizontal operations most often take place in the pharmaceutical and digital industries – particularly by GAFAM (Google, Amazon, Facebook, Apple, and Microsoft) – which are highly innovative and, by nature, very competitive environments. These transactions are becoming increasingly frequent and can cause a significant restriction of competition while stifling innovation. Killer acquisitions are often characterised by a very low takeover price compared to the value of the absorbed company, which means that those transactions are rarely subject to merger control, as they do not exceed the European or national thresholds for mandatory notification. It was therefore necessary for the Commission to regulate these transactions.

From now on, the Commission will thus agree to examine requests for referral under Article 22 EUMR submitted by any national competition authority, including transactions falling below the national thresholds for mandatory notification, as soon as the substantive conditions set out in Article 22 are met. Thus, on April 20, 2021, the Commission accepted the first Article 22 referral.[7]

We are thus witnessing a return to the historical purpose of the "Dutch clause", which exists to implement an instrument enabling the control and potentially the prohibition of killer acquisitions that would not fall below EU and national thresholds.

On the other hand, in 2020, two European proposed acquisitions were referred to the Authority due to their potential national impact. These were: (i) the Conforama acquisition, owned by the Steinhoff group, by Mobilux, in the retail distribution area; and (ii) the acquisition by Aldi of 567 Leader Price stores and three warehouses, specialised in hard discount. The first proposed acquisition is still under the Authority's investigation, while the second has been cleared with conditions.[8]

New developments in jurisdictional assessment or procedure

Simplification in the notification procedure

The Authority published its first guidelines in 2009. These guidelines were amended in 2013 and updated on 23 July 2020 ("2020 Guidelines").[9] The 2020 Guidelines highlight a strategy of simplification which had been already initiated several years ago.

The 2020 Guidelines contain useful clarifications concerning the application of the derogation from the standstill obligation in merger proceedings. For example, the potential purchaser of a company facing insolvency proceedings, which is unable for practical reasons to have access to key information such as the turnover generated by the target and is therefore unable to rule out that the proposed transaction falls within the French merger control regime, is entitled to file a notification that does not include the target's revenue. If necessary, at a later stage the notification may be withdrawn.[10] In such circumstances, the Authority may nevertheless indicate in its exemption letter the existence of anticipated potential competition risks. In addition, the Authority reiterates that despite the application of the exemption procedure regarding the suspensive effect of a merger control proceeding,

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the derogation does not exclude a substantive assessement by the Authority; this was seen in the *Cofigeo/Agripole* decision, where the Authority considered that, although Cofigeo had been granted a derogation from the standstill condition, the transaction would finally have anti-competitive effects.[11] This information is important to note at a time where, in the coming months, the Authority could face an increase in such type of request for the takeover of undertakings in difficulty due to the COVID-19 crisis.

The 2020 Guidelines also introduce the possibility for companies, on an optional basis, to request the designation of a case handler to anticipate the notification, as per the same model that is applicable before the Commission.[12] This is a measure of procedural efficiency welcomed by practitioners.

For the first time, the 2020 Guidelines also identify transactions that are not, *a priori*, likely to give rise to competition concerns and for which the notification filing can therefore be streamlined.[13]

Finally, the 2020 Guidelines endorse the dematerialised procedure introduced by the Authority in October 2019 for certain transactions in the retail sector, and for transactions that do not involve any or residual overlap of activities.[14]

Sanctions criteria

The sanction for a failure to notify

The 2020 Guidelines list expressly the criteria taken into account by the Authority in setting the amount of the penalty for failure to notify.[15] Notably, the criteria highlight the mitigating circumstances resulting from the action of the defaulting party which spontaneously brings the failure to notify to the Authority's attention. In this respect, the Authority recalls the CE decision of 15 April 2016 which reduced the amount of the fine after having considered that, in its decision n° 13-D-22 of 20 November 2013, the Authority had not provided sufficient evidence of the intention to circumvent the rules of competition and had not sufficiently taken into account the fact that the company in default of notification had finally notified the transaction.[16]

The offence of early implementation of a merger, or "gun jumping"

The 2020 Guidelines specifically point out the issue of gun jumping.[17] This is new compared to the previous guidelines of 2013 ("2013 Guidelines"), which merely recalled the principle outlined in Article L. 430-8 II of the French Commercial Code.

The purpose of these new developments is to explain the analysis grid used by the Authority to assess the existence of such an infringement and, notably, the behaviours requiring particular vigilance from companies before any merger. In this respect, the Authority indicates that the parties must ensure that the memorandum of understanding governing the relationships between the undertakings concerned until the merger, even in practice, do not lead the acquirer to take control of all or part of the target. Similarly, the parties must be vigilant regarding the information they communicate to each other. Finally, the parties' commercial behaviour must not deviate from normal market practice.

However, these new developments appear to be relatively general and vague, given the difficulties faced by companies and practitioners in implementing such guidelines in practice between signing and closing. In addition, the Authority remains unclear on the relationship between Articles L. 430-8 II and L. 420-1 of the French Commercial Code relating to sanctions for anti-competitive practices, and merely states that "*the early implementation of a merger may also lead to the sanctioning of the companies involved under the prohibition of anti-competitive practices*".[18]

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Finally, the 2020 Guidelines remain rather general on the question of sanctions and the determinants applied by the Authority, which contrasts with the approach taken regarding the sanction for failure to notify.

This generality may be explained by the fact that the "gun jumping" regulation has only been applied in one case[19] to date by the Authority; in this context, there is still great uncertainty about its application under French law.

The sanction for a failure to comply with commitments

The 2020 Guidelines contain a new section on the sanctions for failure to comply with commitments.[20] The Authority specifies that it will take into account "*the nature of the remedies undertaken, their importance in the overall scheme of the clearance decision, or the time elapsed since the merger and the duration of the remedies remaining at the date of the decision*", as well as "*if established, any particular difficulties which the parties allege to have encountered in fulfilling their obligations*",[21] as stated by the CE in the *Altice Luxembourg/SFR Group* decision of 28 September 2017.[22]

As regards the financial penalty, the 2020 Guidelines only stress that it must be "*proportionate to the circumstances of the case*", and that "*the particular nature of the breach*" must be taken into account. However, the 2020 Guidelines state that due to the specific nature of the infringement which relates to the failure to comply with remedies in the context of a merger authorisation, it is important that the penalty is "*set at a level sufficient to deter the undertakings concerned from failing to comply with their commitments or from knowingly offering commitments which are difficult to implement*".[23]

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

In 2020, the Authority reviewed mergers in a variety of sectors, but mainly in service and retail:

Market	Total number	Clearance decisions	Clearance decisions with remedies	Decisions	Inapplic-ability decisions	Prohibition decisions
Telecom	6	4	1	1		
Transport	2	2				
Tourism	2	2				
Services	40	37	2		1	
Health	11	8	3			
Press/media	3	3				
Overseas	1	1				
Digital	4	4				
Industry	5	5				
Energy	2	2				
Retail	105	100	3		1	1
Banking/ insurance	6	6				
BTP	2	2				
Agriculture	6	5	1			

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The exhibits to the 2020 Guidelines have been expanded to set out the Authority's methodology for analysing certain recurring issues in the retail sector (new exhibit C) and for assessing the competitive effects of a transaction on local markets, taking into account the competitive pressure exerted by online sales (new exhibit D).

The Authority identifies various indicators that may be taken into account – in light of its decision-making practice[24] – to assess the existence of substitutability between online sales and sales in physical shops, such as the penetration rate of online sales, the integration of the behaviour of online operators in the determination of the commercial and pricing strategy of traditional operators, etc. The Authority's methodology assessment, which includes online sales, is based on the assumption that the competitive pressure exerted by online sales is homogeneous throughout the physical sales concerned.

The Authority had the opportunity to analyse a shop-in-shop project in 2020. On 22 May 2020, the Fnac-Darty group notified to the Authority its plan to deploy sales areas dedicated to retail distribution, under the Darty brand, in some shops operated under the Carrefour brand. In the case of the Fnac-Darty project, the shops-in-shops were supposed to be managed exclusively by Carrefour's staff. The Authority has specified that when assessing takeover of companies through contractual relationships, it proceeds to the analysis of all legal and factual issues which have the effect of limiting the autonomy of the contracting party. In the present case, the Authority found that the shop-in-shop project did not constitute a concentration because no acquisition of stakes was concluded, no economic dependance between the parties was demonstrated, and eventually no element in the agreement itself could lead to the conclusion that one party would have taken control of the other party within the meaning of Article L. 430-1 of the French Commercial Code (control over the strategic decision of the undertaking). As a result, the transaction was not subject to notification.[25]

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

The method applied by the Authority is defined in Article L. 430-6 of the French Commercial Code. This includes verifying that the transaction is not likely to "*harm competition, in particular by creating a dominant position or by creating a purchasing power which places suppliers in a situation of economic dependence*". The Authority also assesses whether the transaction may bring sufficient economic progress compared to the restrictions on competition identified.

As a matter of fact, Article L. 430-6 of the French Commercial Code specifies that the Authority "*shall assess whether the transaction contributes to economic progress to an extent sufficient to offset the harm to competition*". Indeed, the objective of merger control is to verify whether transactions will contribute to economic progress, which should translate into economic efficiency gains. In its new Guidelines, the Authority confirms its analysis based on the CE and its own case law that these economic efficiency gains "*must be quantifiable and verifiable*", "*must be specific to the merger*" and that "*a share of these gains must be transferred to consumers*".[26]

In the 2020 Guidelines, the Authority states that its analysis "*takes into account current or anticipated developments over a reasonable timeframe, which depends on the specificities of the sector*".[27] Thus, it includes "*in its analysis anticipated changes in the structure of the market, where these are sufficiently certain*".[28]

The 2020 Guidelines do not change the traditional criteria for analysing the horizontal effects of a merger. These criteria are still based on market shares and the degree of market

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concentration (Herfindahl-Hirschman Index), the competitive pressure exerted by the remaining competitors, the potential competition which depends on possible barriers to entry, the level of product differentiation and competitive proximity between the different operators, and the buying power of customers.

In contrast, the 2020 Guidelines describe at greater length the analysis of horizontal effects in two-sided markets. The recent case law of the Authority is shown to determine whether the strengthening of a player on one side of the market is likely to be transmitted to the other side.[29]

As regards the criteria for analysing vertical effects, the 2020 Guidelines clearly indicate that (i) the regulatory context, (ii) the characteristics of the products concerned, and/or (iii) the contracts concluded between the parties and the key commercial partners may also be used to measure the market power of the new entity.[30]

Finally, for conglomerate effects, it should be pointed out that the 2020 Guidelines recognise that such effects may be data related when companies are present in separate markets, if the data collected in each market is useful in determining the commercial policy pursued in another market.[31]

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

In the 2020 Guidelines, corrective remedies are grouped in a new specific section.[32] Whether they are initiated by the parties (structural or behavioural commitments) or, more rarely, by the Authority (injunctions or prescriptions), corrective remedies are the subject of longer developments, including elements of the practice implemented in the Authority's latest decisions.

Flexibility in the selection of remedies

The Authority shows flexibility in its developments. It specifies that commitments may be proposed at any time – from the pre-notification stage, during Phase I or Phase II, to even during a possible evocation of the transaction by the Minister; in the latter case, it could therefore be adapted to the general interest reasons other than the maintenance of competition, on which the Minister intends to base its decision.[33] Furthermore, the 2020 Guidelines detail the alternatives that may be used to ensure the effectivity of behavioural remedies. Thus, parties are allowed to propose alternative structural measures in case the notifying party does not achieve the desired results with their initial behavioural commitments. In the same vein, behavioural commitments may be proposed as preliminary measures of enforcement of structural measures, in particular when a divestiture commitment is difficult to envisage in the short term after the transaction.[34]

Nevertheless, the 2020 Guidelines confirm the Authority's preference, like the Commission, to give priority to structural commitments aimed at ensuring competitive market structures through the divestiture of businesses or assets to a suitable purchaser capable of exercising effective competition or achieving the elimination of a capital link between competitors in a defined market.[35] The Authority remains one of the most extensive users of behavioural commitments in the European Union.

In its study on "*Behavioural commitments*" in competition law, published in February 2020, the Authority lists the decisions issued subject to commitments between 2009 and 2018.[36]

The table is as follows.

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Year	2009*	2010	2011	2012	2013	2014	2015	2016	2017	2018
Clearance decision	88	192	214	184	201	200	192	230	233	235
Decisions subject to commitments	3	7	7	10	7	10	6	6	8	4
As %	3.4%	3.6%	3.3%	5.4%	3.5%	5%	3.1%	2.6%	3.4%	1.7%
Of which decisions subject to behavioural remedies	2	2	2	3	2	3	3	3	3	3
Share of behavioural remedies in relation to total commitments accepted	67%	29%	29%	30%	29%	30%	50%	50%	38%	75%

* As jurisdiction of merger control was transferred to the Authority on 2 March 2009, only the decisions issued after this date have been analysed.

It can be seen from this table that behavioural commitments are an important practice of the Authority, with the last row showing the share of such commitments in the total number of commitments accepted.

The different commitments that can be implemented by the Authority are the following:[37]

Structural commitments *(do not require long-term monitoring by the Authority, rapidly implemented, irreversible effects)*	**Behavioural remedies** *(require long-term monitoring by the Authority, most often with the assistance of a trustee, limited duration)*
• Divestiture of tangible assets: subsidiaries, stores, plants, warehouses, branches • Divestiture of intangible assets: contracts, brands, operating licences • Breaking or termination of franchise agreement • Non-acquisition of an asset included in the initial scope • Definitive modification of statutory or contractual clauses • Breaking of ties with a competitor • Divestiture of minority capital stake	• Procurement agreement • Licensing a brand to a competitor • “Chinese wall” • Access to essential infrastructure (network, good or service, technology, patent, know-how, intellectual property rights) • Temporary modification of statutory or contractual clauses • Non-discrimination in a competitive bidding procedure • Non-opposition to entry on the market • Prohibition on bundling several services or products • Arrangement of pricing relations (prohibition on modifying agreed financial conditions, price controls, prohibition on product range discounts) • Renunciation of certain customers or activities • Limitation of quota shares

Corrective remedies in 2020 decisions

In 2020, 10 decisions were issued with remedies and one merger was prohibited, despite proposed commitments with a majority of structural commitments:

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Decision	Phase	Remedies
20-DCC-191, 22 December 2020, Telecom	Phase I	**Behavioural**: maintaining existing contracts, equivalent offers, multi-network services
20-DCC-164, 17 November 2020, Distribution	Phase I	**Structural**: divestiture of tangible assets – nine stores
20- DCC-132, 23 September 2020, Transport	Phase I	**Structural**: divestiture of tangible and intangible assets – stores, cars, and contracts
20-DCC-126, 18 September 2020, Service	Phase I	**Behavioural**: no favouritism and confidentiality for seven years
20-DCC-116, 28 August 2020, Retail	Phase II	**Prohibition**: no remedy found
20-DCC-92, 23 July 2020, Health	Phase I	**Structural**: divestiture of tangible assets – seven laboratories
20-DCC-90, 17 July 2020, Health	Phase I	**Structural**: divestiture of tangible assets – three laboratories
20-DCC-82, 30 June 2020, Agriculture	Phase I	**Structural and behavioural**: divestiture of tangible assets – five facilities and sunrise clause
20-DCC-72, 26 May 2020, Distribution	Phase I	**Structural and behavioural**: fix-it-first commitment regarding seven stores, maintaining the current level of supplies
20-DCC-28, 3 March 2020, Distribution	Phase I	**Structural**: divestiture of tangible assets – one store
20-DCC-38, 28 February 2020, Health	Phase II	**Behavioural**: maintaining activities and prices for 10 years

Lack of sufficient precision regarding remedies

The 2020 Guidelines remain general on different subjects. For example, the Authority does not specify in detail the procedure for reviewing the remedies after the end of the first period of the correcting measures, or because the review is deemed necessary based on new circumstances. The 2020 Guidelines include new elements addressing the procedure to be followed to use a third party and a trustee, and to develop the fact that the parties must be informed of the trustee's conclusions and the subsequent analysis of the Authority for further transparency. The 2020 Guidelines also expressly mention the need to update the competitive analysis at the time of the review and the possibility of using a "*clause de rendez-vous*", although the Authority does not set out in detail the procedure for doing so. The 2020 Guidelines only state that the parties must send "*a reasoned request*" to the President of the Authority, without giving any further details on the procedure followed by the Authority and the guarantees offered, such as the possibility of responding to the Authority's arguments or the possibility for interested third parties to be heard, which undoubtedly should have been clarified. The Guidelines also do not specify in which cases the use of a "*clause de rendez-vous*" will be considered appropriate, or the criteria taken into account for accepting renewable commitments.[38]

Key policy developments

Overseas territories

In 2020, the Authority continued to keep a close eye on mergers in overseas and insular territories. The Authority has made recommendations that it would like to generalise to

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the territories subject to a competition deficit due to specific geographic and economic characteristics which are linked, for example, to insularity, the presence of mountains, or constraints resulting from the preponderance of tourism activities in the local economy. Notably, the Authority recommends the review of the scope of its control in order to empower it to examine economic mergers which, while remaining below the current controllability thresholds set in terms of turnover, appear likely to raise substantial competition concerns. These recommendations have not yet been the subject of a real reform proposal.

Digital economy

As mentioned above, the Authority's action will remain firmly focused on the digital economy this year. In 2020, the Authority created a dedicated department specifically to develop in-depth expertise on all digital issues. This service was put in place in January 2020. Considering the importance of data and the creation of large user communities, the Authority will pay particular attention to this sector in the future. Notably, it is considering the introduction of a systematic notification mechanism for all merger operations carried out by structuring digital platforms.

COVID-19

The Authority will be attentive in 2021 to the context of the economic crisis, in particular in relation to the health crisis. In 2020, the Authority examined many transactions involving retail chains in economic difficulty. The trend is expected to continue in 2021. In addition, the Authority will ensure that certain transactions do not artificially escape its control due to the decrease of revenues in 2020 of the companies involved. It will also consider the context in which these transactions will take place while maintaining vigilant control over the impact of these transactions on competition.

Reform proposals

Law n° 2020-1508 of 3 December 2020 (DDADUE) includes new provisions relating to merger control. In particular, since the adoption of the new law, the President of the Authority may on its own initiative (*ex officio)* launch a detailed review of potential gun-jumping practices.[39]

No major merger control reforms are expected in 2021.

* * *

Endnotes

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15. Aut. Conc., Merger Control Guidelines, 23 July 2020 § 163 *et seq*.
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26. Aut. Conc., Merger Control Guidelines, 23 July 2020, § 770.
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28. Aut. Conc., Merger Control Guidelines, 23 July 2020, § 504.
29. Aut. Conc., Merger Control Guidelines, 23 July 2020 § 664, Aut. Conc., Decision n° 18-DCC-18, 1 February 2018 and Aut. Conc., Decision n° 13-DCC-46, 16 April 2013.
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33. Aut. Conc., Merger Control Guidelines, 23 July 2020 § 358.
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35. Aut. Conc., Merger Control Guidelines, 23 July 2020 § 414.
36. Aut. Conc., Behavioural remedies study, February 2020, p. 59.
37. Aut. Conc., Behavioural remedies study, February 2020, p. 291.
38. Aut. Conc., Merger Control Guidelines, 23 July 2020 § 442 *et seq*.
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Germany

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Overview of merger control activity during the last 12 months

Germany's Federal Cartel Office (*Bundeskartellamt*, the "**FCO**") in 2020 reviewed around 1,200 merger filings, of which less than 1% (eight out of 1,200) entered into an in-depth review in Phase II.

In comparison to 2019, there were about 200 fewer merger filings and only about half the number of Phase II proceedings (2019: 14). In particular, the following stands out – no Phase II proceedings were prohibited in 2020, but approximately 29% were prohibited in 2019 (four out of 14). In 2020, the parties withdrew their application in about 24% of Phase II proceedings, in contrast to 43% of the applications having been withdrawn in 2019 (six out of 14). In 2020, mergers were cleared *without* conditions and obligations in about 38% of the Phase II proceedings and were cleared *with* conditions and obligations in about 38% of the proceedings. In 2019, only approximately 14% (two out of 14) were cleared *without* conditions and obligations, and the same applies to clearance *with* conditions and obligations (also two out of 14).

New developments in jurisdictional assessment or procedure

10th ARC-Amendment

Merger control

As of 19th January 2021, the 10th Amendment to the German Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, the "**ARC**") – formally known as the "*Act Amending the Act against Restraints of Competition for a Focused, Proactive and Digital Competition Law 4.0 and Amending Other Competition Law Provisions – ARC Digitalisation Act*" – came into effect. With it, major changes became applicable to merger control filings. Since then, mergers will only be subject to merger control if one undertaking concerned generated domestic turnover in Germany of more than EUR 17.5 million (instead of the previous EUR 5 million) and another undertaking concerned generated domestic turnover of more than EUR 50 million (instead of the previous EUR 25 million) in the last full financial year. The threshold for the combined aggregate worldwide turnover – generated together by all of the undertakings concerned – remains unchanged, i.e. more than EUR 500 million in the last full financial year.

The alternative size of transaction test, which was introduced in 2017, was changed accordingly. If an undertaking concerned generated domestic turnover of more than EUR 50 million in the last full financial year, but neither the company to be acquired nor another undertaking concerned generated domestic turnover of more than EUR 17.5 million, the transaction will still be subject to merger control if the transaction value threshold of EUR 400

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million is exceeded. Furthermore, the company to be acquired must (as before) be active to a significant extent in Germany. The threshold for the combined aggregate worldwide turnover generated by all of the undertakings concerned remains unchanged (EUR 500 million). The implementation of this test was a direct reaction to mergers like *Facebook/WhatsApp* that did not fall under the German merger control regime, as the domestic turnovers were not met.

Another change, which will likely reduce the cases notified to the FCO, related to mergers in the media industry. Turnover generated by print media need only be multiplied by a factor of four (instead of the previous factor of eight) to determine the turnover thresholds.

In the context of these changes, the FCO estimates that, on the one hand, several hundred merger control reviews each year will no longer be necessary; yet on the other hand, there will be an increase in the number of proceedings with regard to abusive behaviour (see next section). Further, another change introduced by the 10th ARC-Amendment was the increase from four to five months as of the notification submission date for the assessment of mergers in Phase II proceedings.

In addition – as a further "counterbalance" to the increased thresholds – the German legislature added a new instrument to section 39a of the ARC, under which the FCO can oblige companies by administrative act to provide notification of mergers that would not otherwise have to be notified under the threshold values (also referred to as the "*Remondis* clause"). Such administrative act requires that, *inter alia*, the FCO previously investigated the relevant industry sector pursuant to section 32e of the ARC.

Lastly, on 21st December 2020, the FCO submitted the "*Evaluation of the Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law*". The FCO stated that the fundamental principles of market definition as described in the "*1997 Notice*" (Regulations No. 17 and No. 4064/89) remain correct and of top priority, but that there remains room for improving the role of the market definition notice. Therefore, the FCO suggested that the new notice should reflect digitalisation, explain the role of market definition, deprioritise the small but significant and non-transitory increase in price (SSNIP) test and align the definition of geographic market with the principles behind the definition of product market.

Protecting competition in the digital economy

The changes concerning merger control under the 10th ARC-Amendment should be interpreted in light of the FCO's role in controlling and investigating abusive behaviour. The revised ARC creates a new type of mechanism that especially targets certain types of conduct of large platforms and similar companies with "paramount cross-market significance for competition".

With the recently implemented measures, the FCO may prohibit at an early stage certain types of conduct by large digital companies with the most significant influence on competition across markets, if competition in the respective market is threatened by their actions (section 19a of the ARC). As of 18th May 2021, there have already been two proceedings under this new provision; one directed against Facebook; and the other against Amazon.[1]

Further changes include (i) specifying provisions regarding the control of abusive conduct in general, (ii) the addition of internet-specific criteria, (iii) granting of access to specific market relevant data in return for adequate compensation of third-party companies that depend on access to such data, as well as (iv) the means to intervene in cases where a platform market threatens to "tip" towards one large player (also known as market tipping).

The President of the FCO, Andreas Mundt, noted that these changes are the first of their kind internationally and have positioned Germany as a global pioneer in this regard.[2] In

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addition to that, the 10th ARC-Amendment serves to implement the European Competition Network (ECN) Plus Directive, as well as changes regarding administrative proceedings in competition contexts.

Amendments in German foreign trade law

As discussed in our chapter to the previous edition of *Global Legal Insights – Merger Control*, the German foreign trade law has also seen several amendments in the last year that have strengthened the foreign direct investment ("**FDI**") review process concerning the acquisition of German companies by foreign investors (especially non-EU investors).

First, the German parliament approved amending the German Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*, the "**AWG**") by implementing the EU Screening Regulation, which for the first time set up a framework for screening FDI from non-EU countries that may affect security or public order in Germany.

Second, the German Federal Cabinet approved the 17th Ordinance amending the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*, the "**AWV**"). A core objective of the new regulations is to identify – based on the provisions of the EU-Screening Regulation – critical technologies that would give rise to reporting obligations under German FDI review regulations.

Regular revisions of the AWG and the AWV have led to a growing number of business acquisitions being reviewed in the last few years. This shows the increased pertinence of German foreign trade law to non-EU purchasers, including the United Kingdom in the current post-Brexit era. Hence, it is important to keep in mind that a FDI filing could be mandatory if the merger is classified as subject to FDI control under these new regulations. With regard to the timeline involved, the parties to an acquisition should keep in mind that in some cases, an FDI filing may take even longer than the merger control filing itself as both obligations exist parallel to one another and each imposes separate requirements.

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

Concentrations involving food retail and wholesale of daily consumer goods – *Real/Kaufland/Edeka*

Case summary

Several cases of major interest in 2020 revolved around the acquisition of more than 270 Real supermarket stores from SCP Retail S.àr.l. by three of its competitors. Two of them, namely the Edeka Group ("**Edeka**") and Kaufland (part of the Schwarz-Group, which also includes Lidl), already hold significant market shares alongside two other competitors, Rewe and Aldi. Edeka is Germany's largest food retailer with a turnover of EUR 55.7 billion (2019).[3]

On 22nd December 2020, the FCO announced that Kaufland was allowed to acquire 92 Real stores subject to conditions (originally intended: 101 stores),[4] whilst the third competitor, the Globus Group, could acquire up to 24 Real stores.[5] On 17th March 2021, the FCO issued a clearance decision allowing Edeka to acquire 45 Real stores without conditions. In this case, either six additional retail store spaces had to be carved out and given up to competitors, or other Edeka stores in the market area had to be closed (also referred to as the "piggyback remedy").

Case relevance

With regard to developments in merger control, this case is of particular interest when considered in the broader context of the steady concentration of the retail and wholesale of daily consumer goods market in Germany.[6]

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In 2015, the FCO prohibited the acquisition of approximately 450 Kaiser's Tengelmann stores by Edeka. The case made prominent headlines in German (competition) news, as a ministerial approval for the acquisition was subsequently granted by the then Minister for Economic Affairs, Sigmar Gabriel, which effectively overruled the FCO's decision. However, upon an appeal by competitor Rewe against the approval of the merger, the Higher Regional Court of Duesseldorf upheld the FCO's prohibition of the merger in a preliminary ruling, rendering the ministerial approval (temporarily) invalid. In the end, Rewe and Edeka divided the stores between each other, following negotiations and re-evaluations. This was then approved by the FCO.

In view of previous concentration tendencies and judicial escalation in the *Tengelmann* case, the number of Real stores that competitors were allowed to acquire was surprising to some. However, the FCO noted that apart from a "highly concentrated procurement market", the fact that there was competition in procurement between the four leading retail chains also had to be considered in the assessment under competition law, as well as indications that the procurement markets – even though still largely national in scope – were developing into cross-border markets.[7]

Further, the EDEKA and the Kaufland clearance decisions are also noteworthy as the FCO cleared both acquisitions not only under conditions precedent, but also under conditions subsequent. If the condition subsequent was not met, the approval of the decision would lapse retroactively. In such a case, the merger would be deemed prohibited and any steps already implemented would have to be reversed. Since dissolution of a merger is very difficult to implement in practice, the FCO in general only accepts conditions precedents as remedies. The cases show, however, that the FCO is prepared to accept and find workable remedies to avoid a prohibition decision.

Agricultural trade – *RWZ/RaiWa* and *Beiselen/ATR*

Case summaries

The first merger control case relating to agricultural trade that we want to elaborate on for the purpose of this legal update concerns the acquisition of 19 retail locations of the Raiffeisen Waren-Zentrale Rhein-Main eG ("**RWZ**"), Cologne, by Raiffeisen Waren GmbH ("**RaiWa**"), Kassel, as well as the launch of a joint venture to market agricultural products and a further purchasing agreement.[8]

Both companies supply farmers and other customers with agricultural products and services in Germany, with a focus on Hesse, Thuringia and Saxony. Hence, the merger especially affected the purchase of respective agricultural products in the various regional markets.

The merger was in the end approved in a fix-it-first decision, as the parties were able to mitigate the former competition concerns of the FCO by remedies. One of these remedies was the splitting of a location at the Hanau port in Hesse between RWZ and RaiWa, creating new competition as a result. Also, RWZ sold its shares in Raiffeisen Vogelsberg GmbH in favour of a new and additional competitor.

The second merger was between ATR Beteiligungsgesellschaft mbH, Ratzeburg ("**ATR**") and Beiselen Holding GmbH, Ulm ("**Beiselen**"), which intended to pool their activities under a joint holding company for the purchase of grain and oil seeds and the sale of seeds, plant protection products and fertilisers to farmers. Whilst ATR is a company with a focus on agricultural retail trading in Schleswig-Holstein, Mecklenburg Pomerania and Brandenburg, Beiselen is a private agricultural trading company that is active throughout Germany at the wholesale level and on the retail level via a network of locations in the states of Mecklenburg Pomerania, Thuringia, Saxony and Saxony-Anhalt.[9]

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According to the investigation of the FCO, the market is characterised by intense competition not only between the parties, but also by strong competitors such as HaGe Nord and Ceravis. Moreover, these competitors were – in contrast to ATR – already integrated in or closely linked with the wholesale trade. Accordingly, although the notifying parties already had a strong or even leading market position in the sale of plant protection products to farmers (in some locations), their actual market power was limited by effective competition. Furthermore, the FCO found that the crop protection demand had shrunk in the last few years, resulting in respective overcapacities. The FCO concluded that there were no indications that the existing level of competition would be significantly restricted by the merger and therefore cleared it in the first phase of merger control.

Case relevance

The first case illustrates the effectiveness of the approach of first withdrawing a merger notice and subsequently re-notifying it. The parties amended their original plans before the FCO cleared the merger – the first notification in July 2020 was directed towards launching three joint ventures. However, the parties withdrew the notification, as the concept of joint control was incompatible with the main legal principle of a registered cooperative to support its members. A restructured project was notified, but the notification was again withdrawn when the FCO initiated in-depth Phase II proceedings and informed the parties of its competition concerns. Thereafter, the parties entered into discussions with the FCO and found the fix-it-first solution as described above. The case further illustrates the benefits of contacting the FCO at an early stage to start discussions regarding the potential outcome of a merger.

The second case – in connection with the first case – further illustrates the attempts of undertakings in the agricultural trade sector to combine their influence (e.g. via joint ventures) to strengthen their market position – especially concerning global players at manufacturer level (the same applies to the *Unamera* case). There are a number of reasons for these attempts, such as pressure from customers for cheaper or at least constant prices, or pressure from manufacturers.

Digital platforms – The new normal

As stated above, digital platforms are of major interest for the FCO, in particular since the acquisition of WhatsApp by Facebook that was technically not subject to notification obligations (i.e. WhatsApp's turnover did not exceed the thresholds) and the implementation of the new EUR 400 million transaction value threshold.

Case summaries

Besides the two proceedings against Facebook and Amazon (see above), the FCO handled (amongst others) two interesting cases in this segment.

The first case concerned the acquisition of Lovoo (part of the Meet Group Inc. (USA)) by Parship and Elite Partner (in the portfolio of ProSieben Sat.1 group since 2016). The FCO cleared this merger in Phase I, which was legally extended to two months due to the COVID-19 pandemic. The FCO saw a further concentration in the online dating sector but did not find a considerable impairment of competition as a result of the acquisition, as the market is characterised by dynamic growth, market entries and competition from other strong competitors such as Tinder. Further, users in general often use several dating platforms at the same time (multi-homing).

The second case – which was not a merger case – concerned the set-up and implementation of the online trading platform Unamera, an online trading platform for agricultural products.

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Some of the financing partners were large companies in the agricultural sector, such as BayWa AG, Getreide AG and ATR Landhandel. The FCO in this regard stated that online platforms can make trade much more efficient, but always bear the risk of resulting in price-fixing agreements or acting in a discriminative way. Therefore, the FCO gave guidance for set-ups preventing the exchange of sensitive information and to guarantee the set-up of "Chinese walls".

Case relevance

The first case was of interest, as the Phase I proceeding was extended to two months due to the COVID-19 pandemic. COVID-19 disrupted the FCO's workflow and ability to act within normal timeframes. In order to lessen this effect, the German legislator introduced changes that came into force at the end of May 2020 and extended the merger control review periods for merger notifications that were received by the FCO between 1st March and 31st May 2020.

The second case, the set-up of the Unamera platform, was of most interest as it was not notified as a merger filing to the FCO. Under German competition law, companies are able to approach the FCO to clarify any competition law issues (e.g. whether digital platforms are a tool) – besides the merger control regime – to guarantee compliance with German competition law.

Furniture retailers

Case summary

On 26th November 2020, the FCO cleared the merger of XXXLutz and the Tessner group (including Roller, tejo's, Schulenburg) after a Phase II examination, subjecting the merger only to conditions. Clearance was granted for the sales side of the planned merger, which affected the relationship between furniture retailers and end customers.

The planned merger covers 155 outlets of the Tessner group. According to the FCO's decision, 22 of the Tessner outlets cannot be acquired and one XXXLutz outlet must be sold. The parties were by far the leading suppliers in the discount sector, in particular with regard to their sales lines POCO, Mömax and Roller. The merger therefore created Germany's overall largest furniture retailer (followed by Ikea).

Case relevance

This case was of some interest as the FCO and the European Commission examined different parts of the merger.

As an exception, this merger project was not examined by one single competition authority, but by the FCO in Germany (with regard to its effects on the sales side) and the European Commission as the European competition authority (with regard to the procurement markets). Due to the turnover of the parties, the overall merger project would have to be notified to the European Commission. As the planned concentration mainly affects Germany, the parties to the merger filed an application with the European Commission to have the case examined by the FCO (request for referral). However, since the procurement markets can be expected to cover an area beyond Germany's borders, as, e.g., furniture can also be purchased by the parties outside of Germany, the European Commission's referral of the merger control case to the FCO in late January 2020 only concerned the retail markets affected (relationship between furniture retailers and end customers). The European Commission's proceeding is still ongoing.

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

Official guidance issued by the FCO

The FCO has published official guidance on merger control; the first document was published in 2012 ("Guidance – Substantive Merger Control"), and explains the analytical approach taken by the FCO in assessing whether mergers create or strengthen a dominant position.[10] The second document, published in 2017 ("Guidance on Remedies in Merger Control"), illustrates the requirements that need to be met for the FCO to clear an otherwise problematic concentration subject to conditions and obligations (remedies).[11]

Pre-notification discussion/fix-it-first

As already discussed in the previous editions of this guide, the FCO is always available for prior discussions of a merger where complex legal or circumstantial issues may occur. In our experience, the FCO is always ready to work with the parties and clarify uncertainties in order to speed up the proceedings. Thus, it is usually helpful to have informal contact with the FCO prior to the official notification of the merger, if the concentration raises serious competition concerns or involves open legal questions.

In some cases, this may even result in fix-it-first solutions. An example of this is the above-mentioned *RWZ/RaiWa* case. In such cases, the merging parties conclude a legally binding agreement with the purchaser and might even transfer the divestment business before the FCO issues the decision. If the FCO subsequently clears the merger, the purchaser does not need to be approved by the authority again. Fix-it-first solutions are only accepted if they are tailored to solve the competition issues identified in the merger proceedings.

Withdrawing a merger notification and subsequent re-notification

Another approach is to withdraw the notification when it is necessary for the parties and/or the FCO to further investigate the relevant markets, then to notify the merger once again when the investigation has been completed. Parties have more time to prepare their legal and financial arguments without immediately entering into Phase II. This approach also provides an opportunity for the parties (at least temporarily) to avoid the involvement of interested third parties. It is in particular for this reason that the withdraw-and-file-again approach is challenged by academics. In some cases, it might even be indicated that the parties should or might restructure their mergers (see the *RWZ/RaiWa* merger above).

Key policy developments

On 20th April 2021, the FCO, the UK Competition and Markets Authority and the Australian Competition and Consumer Commission agreed on a joint statement on merger control,[12] highlighting that "*there is a common understanding across competition agencies on the need for rigorous and effective merger enforcement*" – also in times of a pandemic.[13] The agencies met virtually to discuss joint challenges for merger control in their countries. Based on their mutual understanding, these challenges can be seen particularly in connection to the digital economy, continuous globalisation and impact of the COVID-19 pandemic. The overall agreement regarding the purpose and the intensity of merger control is that consistent merger enforcement is the key to preserving competition and diversity, especially in times of growing concentration in several markets. Furthermore, the agencies' heads agreed that the circumstances caused by the pandemic should not result in a weakening of the standards against which mergers are assessed. However, it was commonly acknowledged that it might be necessary to take the short-term impacts of the pandemic into account when assessing the merger, given that businesses claim such circumstances in a substantiated way.

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Reform proposals

There are currently no known further proposals to reform merger control procedures after the 10th ARC-Amendment (and after the aforementioned amendments of the German foreign trade law).

However, as September 2021 will not only see the next federal elections for the German parliament and government but also the end of the era of government under Angela Merkel's leadership, the new government and parliament may see the need to further adapt German economic and legal politics and frameworks, including for merger control.

* * *

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Greece

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Overview of merger control between 2016–2021

This chapter presents certain highlights of the practice of the Hellenic Competition Commission ("**HCC**") concerning the control of concentrations during the period 2016–2021, and is up to date as at 14 May 2021.

Greek merger control rules

The Greek rules concerning the control of concentrations are laid down in Articles 5–10 of Law 3959/2011 on the protection of free competition, as amended ("**Competition Law**"). Law 3592/2007 on concentration and mass media enterprises also contains specific provisions concerning the control of concentrations in the media sector, including in relation to the calculation of turnover and market share.

The HCC is the competent authority for reviewing concentrations in all economic sectors, save for the electronic communications and postal services sectors. Under Law 4070/2012, the responsibility for applying the Competition Law with regard to the review of concentrations in the electronic communications and postal services sectors has been assigned to the Hellenic Telecommunications and Post Commission (which is known and referred to here with its Greek initials as "**EETT**").

As is the case at the EU level, the review of concentrations is divided into two investigative phases, commonly referred to as "Phase I investigation" and "Phase II in-depth investigation", respectively. A Phase II in-depth investigation is initiated in respect of any transaction giving rise to competition concerns during the Phase I investigation.

A more detailed outline of the Greek merger control rules can be found in the Greek chapter of *ICLG – Merger Control 2021*.

Overview of the HCC's merger control activity

According to the HCC's website, a total of 91 transactions were notified to the HCC during the period 1 January 2016–14 May 2021, of which one was also notified to the EETT simultaneously.

The table below shows the number of decisions issued by the HCC under the Greek merger control rules in each of the last five-and-a-half years.

Table 1: Activity of the HCC in respect of the control of concentrations

	2016	2017	2018	2019	2020	2021**	Total
No-concentration decisions	3	3	1	-	*	*	8
Phase I approvals	7	4	9	14	11	4	49

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	2016	2017	2018	2019	2020	2021**	Total
Phase II approvals without remedies	–	–	1	1	1	1	4
Phase II approvals with behavioural remedies	1	1	1	1	–	–	4
Phase II approvals with structural remedies	–	1	1	–	–	–	2
Blocking decisions	–	–	–	–	–	–	–
Review of remedies	–	–	–	1	3	1	5
Total number of decisions	11	9	13	18	15	6	72

Notes: * Information not available on the HCC's website.
** As at 14 May 2021.

The following observations can be made with regard to the above table:
(i) out of the 59 HCC decisions approving concentrations, the great majority (49 cases) represented approvals issued through a Phase I investigation. The remainder (10 cases) concerned approvals through a Phase II in-depth investigation, of which four cases represented approvals without remedies;
(ii) the HCC approved a total of six transactions subject to remedies, two of which were approved subject to structural remedies and four subject to behavioural remedies;
(iii) the structural remedies (divestments) accepted by the HCC in one of the two cases were accompanied by behavioural remedies (in *Sklavenitis/Marinopoulos* (Case 637/2017));
(iv) the HCC's approval decisions involving the acceptance of remedies do not refer to the market testing of the remedies offer, which seems to indicate the absence of market testing, certainly in those cases in which the remedies offer was stated to have been submitted and accepted on the date when the HCC's decision was issued. As will be explained below, it emerges from its decisions that the HCC sent requests to competitors when it reviewed modification of or compliance with remedies;
(v) the HCC has carried out *ex-post* reviews of remedies in five cases; and
(vi) the HCC has not prohibited any concentration during the above period. In fact, the HCC has prohibited a concentration only once: the *Kamari/Vossinakis* transaction in 1996 (Case 40/1996) (but this prohibition was subsequently superseded by a ministerial decision approving the transaction).

Timeline

The duration of the HCC's proceedings in cases approved through a Phase II in-depth investigation with remedies during the period 2016–2021 has ranged from two-and-a-half to eight months, as can be seen from the table below.

Table 2: Duration of proceedings in cases approved with remedies through a Phase II in-depth investigation

Case	Date of notification	Date of complete notification	Date of Phase II initiation	Date of remedies offer	Date of issuance of HCC decision	Duration
Mitilineos/ EPALME (Case 682/2019)	20/11/2018	18/12/2018	18/1/2019	1/3/2019	3/4/2019	Four-and-a-half months

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Case	Date of notification	Date of complete notification	Date of Phase II initiation	Date of remedies offer	Date of issuance of HCC decision	Duration
Masoutis/ Promitheftiki (Case 665/2018)	15/5/2018	30/5/2018	29/6/2018	13/7/2018	26/7/2018	Two-and-a-half months
Attica Group/ Hellenic Seaways (Case 658/2018)	11/09/2017 and 27/11/2017	22/12/2017	22/1/2018	25/4/2018	25/4/2018	Seven months
Delta/Mevgal (Case 650/2017)	15/2/2017	11/4/2017	12/5/2017	17/7/2017 and 18/10/2017	18/10/2017	Eight months
Sklavenitis/ Marino-poulos (Case 637/2017)	10/10/2016	10/11/2016	9/12/2016	16/1/2017 and 26/1/2017	26/1/2017	Three months
COSCO/ OLP (Case 627/2016)	26/2/2016	–	Not mentioned	26/6/2016	26/6/2016	Four months

In all of the cases in Table 2 above, save for *COSCO/OLP*, the HCC considered the notification as incomplete and requested the parties to submit additional information, which resulted in a delay in the HCC proceedings by a maximum period of up to three-and-a-half months (in *Attica Group/Hellenic Seaways* (Case 658/2018)).

Such requests are not unusual or do not concern only complex cases, and thus the risk of the ensuing delay might well justify an effort by notifying parties to ensure a notification is as complete as possible.

As can be seen from Table 2 above, once the HCC accepted the notification as complete, its examination of the transaction was concluded within a maximum period of four months, even in those cases involving significant overlaps between the activities of the undertakings concerned. The HCC required a total of eight months to examine the *Delta/Mevgal* transaction in 2017 (Case 650/2017), but two of these months represented the delay caused by the need for the notifying party to address the HCC's requests for the completion of the notification, and two further months were due to the postponement of the oral hearing at the notifying party's request.

Similarly, a delay of three-and-a-half months occurred in *Attica Group/Hellenic Seaways* up until the HCC accepted as complete the notification of each of the two transactions that Attica Group had filed, with a two-month interval between them, upon the basis that each of them would result in the acquisition of sole control over Hellenic Seaways (namely, the notification of its proposed acquisition of the shares of Piraeus Bank in Hellenic Seaways and the notification of its (alternative or supplementary) proposed acquisition of the shares of Minoan Lines in Hellenic Seaways).

Sectors

During the period 2016–2021, the trend of consolidation in the supermarket sector continued in the context of which the HCC approved six transactions and the modification of remedies in another transaction approved previously. The HCC's latest decision in this sector concerned the acquisition of sole control over Galaxias and Markato by the supermarket

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chain SYN.KA, which the HCC approved through a Phase I investigation (see *SYNKA/Galaxias/Markato* (Case 701/2020)). HCC's decisions concerning the supermarket sector represented approximately 10 per cent of its total merger control practice during the above period. The HCC's final report on the supermarket sector, which was published in March 2021, noted that, despite the consolidation achieved hitherto, the market for the retail supply of daily consumer goods was not characterised by high concentration levels.

Other cases reviewed by the HCC during that period concerned transactions in:

- the media sector, in which the HCC approved the following transactions through a Phase I investigation: *Alpha/Star/Green Pixel Productions* (Case 728/2021); *Motor* O*il/Alpha Radiofoniki/Alpha Kronos* (Case 700/2020); *Motor* O*il/Alpha/Media Group* (Case 679/2019); *Vodafone/Cyta* (Case 656/2018); *Dimera/Pigasos* (Case 655/2018); and *Dimera/Radiotileoptiki* (Case 652/2017) and *Alter Ego/DOL* (Case 659/2018) through a Phase II in-depth investigation;
- the hospitality sector, in which the HCC approved through a Phase I investigation the following transactions: *Blackstone Group/LOUIS* (Case 699/2019); *Touristikes Epicheiriseis Messinias/Fidevunes/Ioniki* (Case 683/2019); *Evergolf/Golf Residencies* (Case 661/2018); and *Home Holdings/Ioniki* (Case 633/2016);
- the chemicals and plastics sector, in which the HCC approved through a Phase I investigation the following transactions: *Ravago/Delis* (Case 681/2019); *Ravago Distribution/Pentaplast* (Case 634/2016); and *Ravago/Delta* (Case 629/2016);
- the hospital sector, in which the HCC approved through a Phase I investigation the following transactions: *Farallon/Piraeus Bank/Euromedica* (Case 718/2020); *Hellenic Healthcare/Ygeia* (Case 667/2018); and *Hellenic Healthcare/Iaso* (Case 654/2018);
- the energy sector, in which the HCC approved the following transactions: *Teforto/Aiolika* (Case 735/2021); *DEPA/North Solar* (no case number as yet); *PPCR/Volterra* (Case 694/2019); *Motor Oil/NRG* (Case 666/2018); *ENI/Promitheas* (Case 662/2018) through a Phase I investigation; and *DEPA/EDA/EPA* (Case 672/2018) through a Phase II in-depth investigation;
- the gaming sector: *OPAP/Kaizen Gaming* (case number and decision not yet available); and *OPAP/GML* (Case 693/2019) through Phase I investigations;
- the banking and insurance sectors: *Generali/AXA* (Case 732/2021); *DoValue/Eurobank FPS* (Case 709/2020); IREON INVESTMENTS (Case 678/2019); and *AIG/AIG Hellas* (Case 677/2019) through Phase I investigations; and
- the agriculture/crop protection sector: *PIONEER SID/PIONEER HI* (Case 684/2019) through a Phase I investigation; and *Adama/Alfa* (Case 712/2020) through a Phase II investigation.

In addition, Greece's privatisation programme resulted in three concentrations during the 2016–2021 period. The HCC approved Fraport's acquisition of sole control over 14 regional airports through the award of a concession (Case 626/2016) and the *TRAINOSE/EESSTY* transaction (Case 680/2019) through a Phase I investigation, and the *COSCO/OLP* transaction (Case 627/2016) through a Phase II in-depth investigation and subject to behavioural remedies.

Developments in jurisdictional assessment or procedure

Calculation of the turnover of undertakings active in the gaming/betting industry

According to its past practice, in order to calculate the turnover of undertakings active in the gaming/betting industry, the HCC would take into account the so-called "Total Gaming

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Revenue" ("**TGR**"), that is to say, the total amount of the bets placed (see, for example: *OPAP/National Lotteries* (Case 573/2013); *OPAP/Payzone* (Case 597/2014); and *OPAP/Ippodromies* (Case 611/2015)).

The HCC initially followed the above approach in *OPAP/GML* (Case 693/2019) and found that the acquisition of joint control over GML by OPAP, Deep Investments and Padian had an EU dimension. Upon this basis, the HCC concluded that it did not have jurisdiction to review the above transaction.

However, the HCC consulted with the European Commission as regards the latter's approach to the calculation of turnover, which suggested that, instead of the TGR, turnover should be determined on the basis of the "Gross Gaming Revenue", i.e. "*the money kept after the winning bets are paid and before taxes*", and that, upon this basis, the above transaction was not caught by the EU Merger Regulation.

Following this, the HCC decided to revoke its initial decision and to review the concentration itself, and finally approved it through a Phase I investigation.

Calculation of the turnover of State-owned undertakings – jurisdiction of the HCC

The HCC has followed the European Commission's approach to the calculation of the turnover of State-owned undertakings.

In *DEPA/EPA/EDA* (Case 672/2018), the HCC examined whether the calculation of the turnover of DEPA (a company active in the natural gas sector in which the Hellenic Republic's Asset Development Fund ("**HRADF**") owned 65 per cent of the shares) ought to take into account the turnover of the undertakings in which the HRADF participated.

In accordance with the European Commission's Consolidated Jurisdictional Notice, "*where a State-owned company is not subject to any coordination with other State-controlled holdings, it should be treated as independent for the purposes of Article 5 [of the EU Merger Regulation], and the turnover of other companies owned by that State should not be taken into account. Where, however, several State-owned companies are under the same independent centre of commercial decision-making, then the turnover of those businesses should be considered part of the group of the undertaking concerned for the purposes of Article 5 [of the EU Merger Regulation]*".

The HCC concluded that, although it was an "*undertaking*" for the purposes of the Competition Law, the HRADF was not a "*controlling entity*" whose turnover should be taken into account. According to the HCC, the HRADF should rather be regarded as a public authority which pursued activities in the public interest. In reaching that conclusion, the HCC relied, *inter alia*, upon the object of the HRADF, its limited duration and the fact that it did not consolidate the financial results of the companies in its financial statements, in which it participated. The HCC also took into account the European Commission's conclusion in *EDISON/HELLENIC PETROLEUM/JV* (Case COMP/M.5249) that DEPA and Hellenic Petroleum were to be regarded as separate economic units, despite the fact that the Greek State exercised control over each of them.

The jurisdiction of the EETT

As noted under "Greek merger control rules" above, the EETT's remit includes the review of concentrations in the electronic communications and postal services sectors, which reflects the legislative choice made at the time of the creation of that authority in 1992. The legislative choice of EETT's remit was maintained upon the subsequent creation of the HCC in its current form as an independent administrative authority, and thus came to represent a clear departure from the administrative efficiency paradigm warranted by a so-called "one-stop-shop" regulatory approach to the enforcement of competition law adopted by the great majority of EU Member States.

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However, it appears that the HCC has remained responsible for the review of concentrations involving the provision of certain services which have been in the process of increasing technological convergence with various types of electronic communications service, and this HCC responsibility could potentially give rise to jurisdictional uncertainty. The HCC laid down the criteria determining its jurisdiction in respect of such concentrations in its decision approving the *Vodafone/CYTA* transaction (Case 656/2018).

The *Vodafone/CYTA* transaction was notified for pre-merger clearance to both the HCC and the EETT, upon the basis that it was unclear whether the affected markets involved (which included the market for the retail supply of fixed multiple play bundles and the market for the retail supply of fixed-mobile multiple play bundles) fell within the jurisdiction of one or both of these authorities. The HCC considered that the pay-TV service element of those bundles fell within its exclusive remit pursuant to Law 4070/2012, whereas the remainder of each service bundle (i.e. fixed and mobile telephony services, broadband services) fell within the exclusive remit of the EETT. However, without prejudice to its position as regards similar transactions in the future, the HCC decided that all of those affected services markets should be assessed by the EETT in their entirety, on the grounds that:

- 78 per cent of the constituent elements of those bundles of services fell within the exclusive remit of the EETT; and
- it was confirmed that the EETT had already initiated review proceedings in respect of that transaction.

Gun-jumping

In accordance with the Competition Law, a concentration may be implemented lawfully only upon its approval by the HCC (the so-called "standstill obligation").

In 2018, the HCC examined the *Masoutis/Promitheftiki* transaction (Case 665/2018), which concerned the acquisition by Masoutis, a supermarket chain, of sole control over another such chain, Promitheftiki. In that case, the HCC found that the transfer of shares in Promitheftiki to Masoutis had been completed on the date of the notification of the transaction to the HCC, together with the payment of the greatest part of the purchase price and the access by Masoutis to the management and financial information of Promitheftiki (through the resignation of the members of the latter's Board of Directors). Although these events had taken place prior to the HCC's clearance of the transaction, the HCC decided by a majority of its members that these elements were not *per se* sufficient to establish that the transaction had been implemented in violation of the standstill obligation. The HCC decision took into account that the parties had expressly stipulated that: (a) the implementation of the transaction was subject to the condition that the HCC did not prohibit the transaction; (b) Masoutis had not exercised actual control over Promitheftiki; and (c) Masoutis had notified the transaction to the HCC within the prescribed time limit (and thus it had no intention to conceal the transfer of the shares and/or to circumvent the standstill obligation). However, the dissenting opinion of a minority of the HCC's members (consisting of the HCC's President and another member) considered that the condition in (a) above could not be considered such that could have ruled out a possible violation of the standstill obligation, and that only a condition precedent to that effect (i.e. that the transaction could not be put into effect prior to the HCC's approval) could have secured such an outcome.

The HCC majority's conclusions in that transaction seem to be at odds with the precedent, according to which even the possibility of exercising the acquired control rights prior to the regulatory clearance of a concentration is sufficient to establish that a violation of the standstill obligation has occurred.

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The HCC also imposed a fine of EUR 50,000 on Alter Ego for the early implementation of its acquisition of *de facto* control over DOL, prior to the HCC's clearance of the transaction through a Phase II in-depth investigation (*Alter Ego/DOL* (Case 659/2018)). The HCC is also currently investigating two other possible gun-jumping cases, i.e. the failure to notify and the early implementation of the creation of a joint venture between PPC Renewables and TERNA Energy, and the late notification of the acquisition of sole control over the Greek and Cypriot business of Kaizen Gaming by OPAP, which the HCC cleared in 2021.

Approach adopted to market definition

Market for the retail supply of daily consumer goods

In its decisions concerning supermarket sector transactions, the HCC refined its approach to the definition of the geographic scope of local markets.

In its past cases concerning the retail supply of daily consumer goods, the HCC had considered each prefecture as a distinct geographic market and left open the possibility of a narrower geographic market definition (see, for example, *Sklavenitis/Doukas* (Case 572/2013)).

During the period 2016–2021, in its examination of the market for the retail supply of daily consumer goods, the HCC focused on the examination of the impact which the concentration would have upon consumers and defined the geographic market upon the basis of a radius of a 10-minute car drive from the stores of the target company in urban areas and a radius of a 30-minute car drive in rural areas. In calculating this radius, the HCC followed the European Commission's example and used the "Google Maps" application (see, for example, *Masoutis/Promitheftiki* (Case 665/2018)).

Market for pay-TV and free-to-air TV

The HCC has developed its approach to the definition of the market for the provision of TV broadcasting services by distinguishing this market into two distinct segments: the provision of pay-TV services; and the provision of free-to-air TV services.

In *Dimera/Radiotileoptiki* (Case 652/2017) and *Motor Oil/Alpha/Media Group* (Case 679/2019), the HCC found that pay-TV services and free-to-air TV services had different content. In particular, pay-TV services did not include the broadcasting of informative content (i.e. news programmes, and programmes with analysis of the current political and economic situation). Upon this basis, the HCC concluded that the provision of each of these types of service constitutes a distinct services market and proceeded with the assessment of the market for the provision of pay-TV services under the Competition Law (see *Motor Oil/Alpha Radiofoniki/Alpha Kronos* (Case 700/2020)) and with the assessment of the market for the provision of free-to-air TV services under Law 3592/2007 (see *Dimera/Radiotileoptiki* (Case 652/2017), *Motor Oil/Alpha/Media Group* (Case 679/2019) and *Motor Oil/Alpha Radiofoniki/Alpha Kronos* (Case 700/2020)).

Assessment of concentrations

Economic appraisal techniques applied

During the period 2016–2021, the HCC considered theories of harm regarding horizontal (coordinated and non-coordinated), vertical and conglomerate effects.

The HCC assessed horizontal effects in eight Phase II cases (*Adama/Alfa* (Case 712/2020), *Olympia/Media Saturn* (Case 695/2019), *Mitilineos/EPALME* (Case 682/2019), *DEPA/EPA/EDA* (Case 672/2018), *Masoutis/Promitheftiki* (Case 665/2018), *Attica Group/Hellenic Seaways* (Case 658/2018), *Delta/Mevgal* (Case 650/2017), *Sklavenitis/Marinopoulos* (Case 637/2017) and *COSCO/OLP* (Case 627/2016)).

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The HCC assessed vertical effects in five Phase II cases (*Adama/Alfa* (Case 712/2020), *Mitilineos/EPALME* (Case 682/2019), *DEPA/EPA/EDA* (Case 672/2018), *Delta/Mevgal* (Case 650/2017), and *COSCO/OLP* (Case 627/2016)).

Moreover, the HCC assessed conglomerate effects in two Phase II cases (*Adama/Alfa* (Case 712/2020) and *DEPA/EPA/EDA* (Case 672/2018)).

In its assessment, the HCC did not appear to rely solely upon the market shares and the concentration levels in the markets concerned.

For example, in *Adama/Alfa* (Case 712/2020), the HCC approved unconditionally through a Phase II in-depth investigation the acquisition by ADAMA Agriculture of sole control over Alfa, both active in the crop protection product sector. According to the HCC, the transaction would result in the merged entity having a high market share in certain sub-markets. However, in assessing the effects of the concentration, the HCC took into account, *inter alia*: (i) the presence of strong competitors on the market; (ii) the fact that the market shares of the parties had been decreasing in the years preceding the transaction; (iii) the fact that high market shares were linked to temporary marketing authorisation of certain products, which was not renewed and would thus lead to a reduction of market shares; and (iv) the considerable bargaining power of the customers.

Further, in the *TRAINOSE/EESSTY* transaction (Case 680/2019), the HCC approved through a Phase I investigation the privatisation of EESSTY, the incumbent rolling stock maintenance operator, through the acquisition of sole control over it by TRAINOSE (a subsidiary of the Italian railways). Despite the fact that each of TRAINOSE and EESSTY held a market share of 100 per cent in their respective markets of rail transport and rolling stock maintenance, the HCC concluded that the concentration was not likely to give rise to any vertical effects (e.g. foreclosure of the market for the provision of freight rail transport and rolling stock maintenance services, respectively), given that the applicable regulatory framework provided for equal access of all railway operators to the market for rolling stock maintenance services and that an independent authority for railways was entrusted with the enforcement of that regulatory framework.

Ancillary restraints

The HCC does not assess ancillary restraints individually as a matter of standard practice, in line with the approach set out in the "Commission Notice on restrictions directly related and necessary to concentrations", which "*introduces a principle of self-assessment of such restrictions. This reflects the intention of the legislature not to oblige the Commission to assess and individually address ancillary restraints*".

In recent cases, the HCC has assessed ancillary restraints in its decisions. For example, in *Adama/Alfa* (Case 712/2020), the HCC cleared two ancillary restraints, a non-compete clause (of a non-renewable three-year term) and a services and supply agreement between the merging parties (of a transitional three-year term, renewable for a further two years). Further, in *SIDMA/BITROS* (Case 716/2020), the HCC approved the acquisition of sole control over parts of BITROS by SIDMA, both active in the market for the distribution of flat steel and long steel products. The HCC found that a non-compete clause stipulated in the shareholders' agreement could not be accepted for an undetermined period of time (as the parties had suggested), and cleared that clause only for as long as BITROS would continue to hold a stake in the target company (i.e., BITROS) and not after its exit from the company. The HCC's clearance relied upon and applied by analogy the Commission's Notice on ancillary restraints mentioned above, which states that "*non-competition obligations between the parent undertakings and a joint venture can be regarded as directly related and necessary to the implementation of the concentration for the lifetime of the joint venture*".

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Approach to remedies and the appointment of trustees

Offer of remedies – market testing

The Competition Law does not expressly provide for the submission of remedies during the Phase I investigation and there is no procedure for the approval of a concentration subject to remedies in Phase I; nor has the HCC issued a Phase I approval with remedies to date.

However, remedies may be submitted by the participating undertakings voluntarily during the Phase I investigation of a concentration in order to address any competition concern of the HCC and to avoid the opening of a Phase II in-depth investigation.

As can be seen from Table 2 above, in several cases the HCC issued its approval on the date of the submission of the remedies offer.

In none of the cases listed in Table 2 above has the HCC stated that it exercised its discretion to carry out the market testing of remedies put forward by the parties. By contrast, the HCC proceeded with a market test of remedies in the following (published) Phase II in-depth investigation cases which concerned modification of or compliance with remedies accepted previously: *Sklavenitis/Marinopoulos* (Case 664/2018); *Delta/Mevgal* (Case 697/2019); and *Masoutis/Promitheftiki* (Case 713/2020).

Choice of appropriate remedies

In its Remedies Notice, the European Commission stated that the question of "*which type of remedy is suitable to eliminate the competition concerns identified, has to be examined on a case-by-case basis*". However, the European Commission has further emphasised that "*[d]ivestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps*", as opposed to behavioural remedies which "*will generally not eliminate competition concerns resulting from horizontal overlaps*".

As shown in Table 1 above, during the 2016–2021 period the HCC did not demonstrate any particular preference for structural remedies over behavioural remedies, but has accepted in each case those remedies that it considered to be appropriate, even in cases with significant overlaps or near-monopoly situations.

In *Delta/Mevgal* (Case 650/2017), the HCC approved the acquisition of joint control by Delta and the Chatzakos family over Mevgal subject to behavioural remedies. The HCC accepted only behavioural remedies, despite the significant overlaps in the dairy products market between the undertakings concerned and the fact that it had previously accepted a mix of structural and behavioural remedies in order to approve a similar transaction between the same undertakings (which had subsequently been abandoned).

In *Attica Group/Hellenic Seaways* (Case 658/2018), the HCC approved the acquisition by Attica Group, a ferry operator, of sole control over another ferry operator, Hellenic Seaways, subject only to behavioural remedies. The HCC considered that the proposed behavioural remedies were appropriate to address the competition concerns arising from the transaction, despite the fact that Attica Group and Hellenic Seaways were, respectively, the first- and second-largest players on the market for the provision of Ro-Ro mixed freight/passenger ferry services, and that the new entity would hold a monopoly on certain routes and a super-dominant position on several others.

Waiver and modification of divestiture remedies

The HCC has followed the approach of the European Commission with regard to the waiver or modification of remedies.

In its Remedies Notice, the European Commission has stated that "*waivers or … modifications or substitutions of the commitments*" could be accepted only in "*exceptional circumstances*", and that "*[t]his will very rarely be relevant for divestiture commitments*",

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on the ground that changes in market circumstances are not likely to arise in the very short timeframe in which such divestments are to be carried out.

In *Sklavenitis/Marinopoulos* (Case 664/2018), the HCC decided to accept the modification of certain remedies that it had accepted in its decision which had cleared a previous transaction between the same parties (Case 637/2017). Following the HCC's initial approval of Sklavenitis's acquisition of Marinopoulos, Sklavenitis filed a request with the HCC for the modification of its commitment to divest a total of 22 stores in certain areas on the grounds that the divestment of all of those stores was not possible and/or necessary. In light of Sklavenitis's request, the HCC decided:

- to waive the divestment remedy in respect of 12 stores, on the grounds that the conditions of competition in the respective local markets had changed (e.g. as was evidenced by the market entry by new competitors and the increase in the turnover of existing competitors) and that there were no objections by competitors;
- to require that Sklavenitis close down two stores, on the ground that the absence of any interested buyer indicated that there was no prospect for competition on the respective local markets; and
- to accept the divestment of only eight stores.

In 2020, the HCC announced the adoption of its decision to accept the modification of the divestment remedy undertaken by the parties in *Masoutis/Promitheftiki* (Case 665/2018) in light of the absence of interested buyers (an absence which was likely to continue due to the adverse impact of the COVID-19 outbreak) (Case 713/2020). In particular, the HCC accepted the substitution of a certain store of Promitheftiki's on the island of Andros for the latter's different store which the parties had undertaken to divest in the same island.

Ex-post evaluation of compliance with behavioural remedies

During the period 2019–2021, the HCC actively pursued the evaluation of commitments that it had previously accepted by undertakings in order to approve concentrations.

In 2019, following an *ex officio* examination, the HCC decided to modify one of the remedies that it had accepted in its previous clearance of the *Delta/Mevgal* transaction (Case 650/2017), namely the commitment of both Delta and Mevgal to purchase fresh milk from certain producers at a so-called "minimum guaranteed price" calculated through a prescribed formula during a period of two years. The HCC decided to extend the application of that remedy for one more year (with the possibility of a further annual extension subject to market conditions) and to monitor the parties' compliance with that remedy. According to its press statement of 18 March 2021, by its decision in Case 726/2021, the HCC decided to extend the application of the above remedy for one more year (up until October 2021), save for organic milk, which was no longer subject to the minimum guaranteed price.

In 2020, the HCC announced that it was examining whether certain remedies relied upon in its clearance of the *Attica Group/Hellenic Seaways* transaction (Case 658/2018) were respected by the parties. By its decision in Case 702/2020, the HCC imposed a fine of EUR 27,792 upon Attica Group for breaching one of those remedies, and decided to extend the application of that remedy by one more year. Further, by its decision in Case 734/2021, the HCC reviewed once again the compliance of Attica Group with the remedies that it had undertaken in 2018, and decided to lift one of those remedies and to extend other remedies by a period of three years.

Appointment of trustees

In its Remedies Notice, the European Commission emphasised that trustees are "*the Commission's 'eyes and ears'*" and that they should report to the Commission "*in periodic compliance reports and shall also submit additional reports upon request by the Commission*". During the period 2016–2021, the HCC appointed a monitoring and divestment trustee

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in four of the six Phase II in-depth investigation cases, in which it accepted remedies (*Masoutis/Promitheftiki* (Case 665/2018), *Delta/Mevgal* (Case 650/2017), *Attica Group/ Hellenic Seaways* (Case 658/2018), and *Sklavenitis/Marinopoulos* (Case 637/2017)). In the preceding period (2011–2015), following the adoption of the Competition Law, the HCC had also appointed a monitoring and divestment trustee in three out of the five Phase II cases published on its website.

In all of its decisions concerning modification of or compliance with remedies (see above), the HCC set out a detailed summary of its exchanges with the appointed trustee.

The HCC published the identity and contact details of the appointed trustee on its website in respect of three out of the four cases in which a trustee was appointed.

Key policy considerations

Greek competition law no longer provides for any public policy considerations in the enforcement of competition and merger control laws, but over a long period it included express provisions providing the Minister for Development with the power to decide to override an HCC decision prohibiting a merger, if such overriding was "*regarded as being indispensable for the public interest, especially where it contributes to the modernisation and rationalisation of production and economy, the attraction of investments, the strengthening of competitiveness in the European and International market and the creation of new employment positions*".

In 2020, the HCC published a Staff Discussion Paper on Competition Law and Sustainability, which, *inter alia*, addressed the extent to which environmental and sustainability concerns might be taken into account in its assessment of a concentration. In January 2021, the HCC published the "Technical Report on Sustainability and Competition", which it had commissioned jointly with the Authority for Consumers and Markets of the Netherlands. The report addressed the issue of the forms of quantitative assessment, which could be applied in the competitive assessment of transactions, in order to take into account the broader social benefits in a green circular economy.

In a recent case (*Mitilineos/EPALME* (Case 682/2019)), the notifying party raised an argument to this effect, namely that the notified concentration would result in a reduction of its environmental footprint and in a material saving of natural resources. However, the HCC approved that concentration without expressly addressing this argument in its decision. Similarly, in *PPC Renewables/Volterra* (Case 694/2019), in its assessment of the effects of the concentration, the HCC did not take into account the parties' argument that the transaction would contribute towards the achievement of the climate targets set out in Greece's National Energy and Climate Plan through the promotion of electricity produced from renewable energy sources.

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Japan

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Overview of merger control activity during the last 12 months

Chapter 4 of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Law No. 54 of 1947, as amended) (the Antimonopoly Act, and hereinafter referred to as the "AMA"), along with the relevant provisions of the Cabinet Ordinance and Regulations for the AMA, provide merger control rules and a filing requirement for certain transactions. The AMA is enforced by the Japan Fair Trade Commission (the "JFTC"). The JFTC issues guidelines for merger control, entitled the Guidelines to Application of the AMA Concerning Review of Business Combination (31 May 2004 (as amended)) (the "Merger Guidelines"), which provide guidance as to substantive tests for relevant transactions. In addition, the JFTC issues guidelines for merger control, entitled the Policies Concerning Procedures of Review of Business Combination (14 June 2011 (as amended)) (the "Merger Procedure Policies"), which provide guidance as to procedures for merger control review.

Mergers and acquisitions meeting certain thresholds are subject to prior notification and waiting period requirements (Phase I: 30 days, although the JFTC may clear the transaction in less than 30 days if the JFTC can reach an early conclusion; and Phase II: the later of 120 days from the date of the JFTC's acceptance of the notification, or 90 days from the date of receipt of all additional material requested by the JFTC after Phase I). With respect to Phase II, it would normally take at least one or two months in practice for the parties to submit to the JFTC all the materials requested by the JFTC, and the latter examination period would likely be applied. In such case, the JFTC may clear the transaction in less than 90 days if the JFTC can reach an early conclusion.

According to the statistics released by the JFTC, the JFTC received 310 merger filing notifications in fiscal year 2019 (from April 2019 to March 2020). Out of those cases, the JFTC cleared 300 in the Phase I review, one case was sent to the Phase II review, and nine cases were withdrawn during such review. Further, the JFTC cleared four of those cases on the basis of the remedies proposed by the relevant parties. The JFTC did not make any formal prohibition decisions in 2019. In comparison, in 2018 the JFTC received 321 merger filing notifications in 2018, out of which 315 cases were cleared in the Phase I review, two cases were sent to Phase II review, and four cases were withdrawn during the Phase I review.

While most cases are unconditionally cleared in the Phase I review period, in practice the JFTC carefully reviews and scrutinises the competitive concerns of each case, consequently extending the review period. The parties will generally address any substantive issues prior to and during the Phase I review period by undertaking the pre-filing consultation process, and while the JFTC appears flexible as to whether it approves in the Phase I or Phase II period. In this regard, some of the largest or most complex transactions are occasionally approved in Phase I, should the parties effectively take advantage of the pre-filing consultation.

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The numbers of notifications accepted and reviewed during the past three years are as follows:

	FY 2017	FY 2018	FY 2019
Cases cleared in Phase I review	299	315	300
Among those cleared in Phase I, cases in which the waiting period was shortened	(193)	(240)	(217)
Cases withdrawn prior to the conclusion of Phase I	6	4	9
Cases sent to Phase II review	1	2	1
Total	306	321	310

The numbers of cases sent to the Phase II review in the past three fiscal years are as follows:

	FY 2017	FY 2018	FY 2019
Cases cleared in Phase II review	1	3	0
Cases found to have no problematic issues given the implementation of remedies	0	2	0
Cases where a cease and desist order was issued	0	0	0

(Note: The above table indicates the number of notifications processed in each fiscal year regardless of whether they were received during the same fiscal year.)

The JFTC must be notified of foreign-to-foreign mergers (meaning mergers between non-Japanese entities) if they exceed the thresholds, but there are no specific rules on the local effects or nexus test. The JFTC exchanges information with competition authorities in other jurisdictions and cooperates very actively with other major jurisdictions in certain cases. In particular, the JFTC has worked closely with its counterparts in the United States, the European Union, and Korea.

	FY 2017	FY 2018	FY 2019
Merger plans between Japanese and foreign enterprises	12	6	12
Merger plans between foreign enterprises	31	34	39
Total	43	40	51

New developments in jurisdictional assessment or procedure

On 17 December 2019, the JFTC amended the Merger Guidelines and the Merger Procedure Policies. The amended guidelines and policies are expected to have a material impact on the substantive and procedural aspects of merger filing review. Please see below for these amendments, among other points.

Amendment to the Merger Guidelines

Under the amended Merger Guidelines, the JFTC clarifies its position to review merger filing cases by taking into account what is called the "potential competitiveness" of the parties, even if the proposed transaction would not cause substantive competitive concerns based on the market

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shares of the parties. As is the case with most jurisdictions, market shares are calculated based on, for instance, revenues or volumes of certain products/services, and in general, whether the transaction would cause substantive concerns will be mainly reviewed based on such market share figures. However, the JFTC will also take into account matters that could "potentially" restrain competition as a result of the proposed transaction. While the concrete factors are not entirely clear, a party's "potential competitiveness" is determined based on certain material assets it may have, including data and intellectual property rights. Another major factor is the status of research and development ("R&D") conducted by the parties. The idea of the amended Merger Guidelines is that, even if the actual market share figures do not increase to a certain critical level, depending on the status of the R&D, the parties could ultimately retain a dominant position in the market after the merger transaction. Conventionally, it has been understood that R&D is a factor that can competitively impact the future, but not the current market. However, even if a product is currently in the R&D stage and has not been commercialised, the transaction may restrain competition if the parties conduct R&D that can eventually lead to competition in the relevant market, which they may take issue with.

Further, the amended Merger Guidelines also have an impact on "safe harbour transactions". The existing Merger Guidelines stipulate certain types of transactions that do not raise market shares to a certain level as "safe harbour" transactions, and the JFTC would not conduct a substantive review of such transactions. The JFTC uses the Herfindahl-Hirschman Index to measure market concentration and assess whether transactions fall under the safe harbour. However, even if a proposed transaction is a safe harbour, the JFTC will conduct an in-depth review if the parties have "potential competitiveness" in the market that is not reflected in the market share figures.

The main reason for this amendment is the existence of the digital market, which includes digital platformers. Particularly for those platformers, data collection and intellectual property are crucial for them to have a dominant position in the markets, since concrete market share figures do not typically reflect the market position that the parties to a transaction may have. However, the JFTC has neither clarified in detail how it will review the transaction, nor how it can impact its review procedure as a whole. For a more detailed analysis of the JFTC's review on integration between digital platformers, see "*Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.*" below.

Amendment to the Merger Procedure Policies

Under the AMA and relevant regulations, the JFTC must be notified of business combination transactions (such as share acquisitions, mergers, or business acquisitions) that meet the following thresholds.

For share acquisitions by which the total voting rights held by the acquiring group will exceed 20% or 50%, notification is required when the (i) annual domestic consolidated turnover of the acquirer exceeds JPY 20bn, and (ii) annual domestic consolidated turnover of the target exceeds JPY 5bn.

For mergers, notification is required when the (i) the annual domestic consolidated turnover of any merging parties exceeds JPY 20bn, and (ii) annual domestic consolidated turnover of any other parties exceeds JPY 5bn.

For business acquisitions, notification is required when the (i) annual domestic consolidated turnover of the acquirer exceeds JPY 20bn, and (ii) annual domestic consolidated turnover of the target business exceeds JPY 3bn.

Even if the transaction does not meet any of these thresholds (the "non-notifiable transaction"), the amended Merger Procedure Policies indicate that the JFTC may review

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the non-notifiable transactions and request relevant materials (including meeting minutes and officers and employee emails) when (i) the transaction volume is significant, and (ii) the transaction itself is expected to impact domestic customers.

In addition, the amended Merger Procedure Policies indicate that it is desirable for the transaction parties to consult with the JFTC even for "non-notifiable transactions" due to any possible failure to meet the threshold of the annual domestic consolidated turnover of the acquired company (i.e., the target company for share acquisition, the merged company in a merger, or the target business in a business acquisition), if (i) the transaction value is expected to exceed JPY 40bn, and (ii) the transaction itself meets any of the following criteria:

- the acquired company has offices or conducts R&D in Japan;
- the acquired company conducts sales activities targeting domestic customers, such as providing its website or pamphlets in Japanese; or
- the annual consolidated turnover of the acquired company exceeds JPY 100m.

This amendment indicates that the JFTC may review certain cases in which the parties have relatively small turnover but also have substantial market share, causing substantial restraint in competition. The typical targets of the amendment are start-up companies, but may include companies for which the amended thresholds do not apply.

Among the cases reviewed by the JFTC in Fiscal Year 2019, six were business combination plans that did not require notifications (the relevant parties consulted with the JFTC, or the JFTC reviewed the business combinations voluntarily).

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

Overview

With respect to reviewed cases by industry, apart from the "Other sectors" category, "Manufacturing" accounted for the highest number of cases, followed by "Wholesale and retail trade" and "Transportation, communications, warehousing", which continue to be the top three industries reviewed in Japan for the past three years. The following table breaks down the overall filed cases by sector.

Sector	FY 2019
Manufacturing	62
Wholesale and retail trade	51
Transportation, communications, warehousing	19
Services	17
Finance and insurance	13
Real estate	9
Construction	9
Electricity, gas, heat supply and water	2
Agriculture, forestry, and fisheries	0
Mining	0
Other sectors	128
Total	321

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Emerging market (digital platform market)

One of the notable cases reviewed in 2020 was the integration of Z Holdings Corporation[1] ("ZHD") and LINE Corporation[2] ("LINE") (the "ZHD/LINE Case"). The integration garnered attention given that it was a major case in Japan, in which the JFTC carefully reviewed the product markets concerning digital platform services, so it is a suitable case for defining the market as follows.

Market definition

The JFTC has focused on three major areas of services: (i) news distribution services; (ii) digital advertising services; and (iii) code payment services.

News distribution services. The JFTC separates these services into two markets: (a) *chargeable* news distribution services; and (b) *free* news distribution services. From the perspective of demand substitutability, customers may choose market (a) to pay subscription fees to read exclusive content produced by chargeable news distribution service providers, or opt for market (b) to read freely available content provided by free news distribution service providers that earn advertising revenue. From the perspective of supply substitutability, free news distribution service providers do not produce but instead purchase news articles from other media companies for distribution on their own websites, whereas chargeable news distribution service providers themselves produce and distribute their own news articles, which means that switching between these two markets would require substantial changes in the company's business models. In the ZHD/LINE Case, both companies are engaged in *free* news distribution services.

Digital advertising services. The JFTC has determined that these services mainly comprise two separate markets: (a) search-linked ad services;[3] and (b) non-search-linked ad services.[4] From the perspective of demand substitutability, advertising clients/advertising agents consider the search-linked ad service as a way to prompt consumers to purchase goods/services, whereas they consider the non-search-linked ad service as a way to raise consumers' awareness about goods/services. From the perspective of supply substitutability, in the case of search-linked ad services, companies must have a search engine system in order to carry out the service, thus switching from a non-search-linked to a search-linked ad service requires substantial time and investment in building a search engine. In the ZHD/LINE Case, the JFTC defined non-search-linked ad services as the relevant horizontal product market between the parties.

Further, the JFTC also focused on the parties' digital ad agency services, defining these services as a separate market from digital advertising services. Digital ad agency services are businesses in which a company acts as an agent in the sale of digital ad spots, working between an advertiser and the ad medium. Given that the parties provide digital ad agency services to both the advertisers/advertising firms on the one hand, and the ad mediums on the other, these services are classified as a "two-sided market", resulting in the JFTC defining two separate markets for a single type of service: (a) digital ad agency services provided to advertisers; and (b) digital ad agency services provided to ad mediums. Both ZHD and LINE are engaged in digital ad agency services which are provided to both advertisers and ad mediums.

Code payment services. While there are a variety of cashless payment services, ZHD and LINE are both engaged in code payment services (ZHD operates "PayPay" and LINE operates "LINE Pay"). Code payment services provide a payment method to consumers and merchants in which they electronically read payment information written under bar codes or QR codes. These services are also classified as a "two-sided market", since companies provide a free cashless payment method to consumers on the one hand, while providing a

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JFTC-based cashless payment method to merchants on the other hand. Incidentally, the JFTC has stated that code payment and other cashless services (e.g., credit card, debit card, e-money payment services) belong to different markets since, among other things, the method of reading the payment information and the payment systems are completely different, whereby the supply substitutability is limited.

Substantive review

Free news distribution services. In the ZHD/LINE Case, the JFTC concluded that the ZHD/LINE integration will not raise substantive competition concerns. Although the parties' combined market share of free news distribution is more than 60%, the integration will not raise competitive concerns considering, among other things, that: (i) other distributors can easily enter the market by purchasing news articles from the media companies and thus the barrier to entry is limited; (ii) the parties are exposed to competitive pressure from customers who can easily switch between news distribution services by simply installing the different distributors' apps onto their devices; and (iii) the parties are exposed to competitive pressure from the adjacent market (i.e., chargeable news distribution services).

Non-search-linked ad services/digital ad agency services. The JFTC was unable to calculate the combined market shares of these two services for ZHD and LINE. However, the JFTC concluded that the integration will not raise substantive competition concerns in these markets, given that there are strong competitors who are also engaged in ad services, such as video-sharing websites and other forms of social media. Indeed, based on the JFTC's independent interview with competitors, it appeared that the ratio of advertisers/advertising firms using services other than those provided by ZHD and LINE was high.

In relation to these services, notably, the vast data collected in the parties' daily course of business was raised as an issue by third-party competitors, since the integration of ZHD and LINE, armed with that data, may highly strengthen their market power in digital ad services. However, the JFTC denied such concerns, noting that, among other things, the scope of data collection was limited to basic user information (i.e., names and phone numbers) which is not necessarily useful when providing digital ad services.

Code payment services. In addition to the fact that the parties' combined market share reaches 60%, the JFTC raised concerns that the "two-sided market" of code payment services is "interlinked" (i.e., an increase in market share of code payment services provided to *consumers* will eventually lead to an increase in the market share of code payment services provided to *merchants*). Further, although the market share of LINE is merely 5%, the JFTC raised further concerns that: (i) the size of code payment services itself is rapidly growing, implying that cash and credit cards may not necessarily act as effective competitive pressure; (ii) the amount and number of payments made using LINE Pay are steadily growing; and (iii) the total number of LINE Pay users far exceeds that of PayPay, which makes it possible for LINE to further expand its market share considering that the total 84 million users of the LINE app itself could potentially become LINE Pay users. As such, the JFTC noted that the market share does not necessarily reflect the actual market power of the parties. This is important, because the JFTC considered the characteristics of the code payment market as a whole and LINE's potential competitiveness in the future market, rather than its current market share. This analysis shares the same concept with the amendment to the Merger Guidelines.

Although the JFTC raised concerns that the ZHD/LINE integration may restrain competition in the code payment market, it ultimately cleared the transaction, subject to the parties complying with their proposed remedial measures (for details, see "*Approach to remedies (i) to avoid second stage investigation, and (ii) following second stage investigation*" below).

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

Economic analysis has been widely used in merger control review in Japan, which the JFTC now tends to employ when it reviews complex cases or large transactions. There are multiple cases where the economic analysis had a material influence on the JFTC's determination of whether remedies were necessary. Therefore, it is important for merging parties to prepare their own economic analyses simulating the JFTC's analytical process. In the acquisition of Sanyo Special Steel Co., Ltd ("Sanyo") shares by Nippon Steel & Sumitomo Metal Corporation ("Nippon Steel") (date of clearance: 18 January 2019), the JFTC used an economic appraisal technique to analyse competitive pressure from the neighbouring market. In this case, one of the relevant product markets defined by the JFTC was that of small-diameter seamless steel pipes. To evaluate substantial restraint on competition in this market, the JFTC analysed whether switching from small-diameter seamless steel pipes to special steel bar (or *vice versa*) is practicable. The JFTC analysed the impact of sales quantity and price of steel pipes during the three-month period after a heating furnace exploded at one company, reducing the production volume of special steel pipes. While the parties insisted that seamless steel pipes may be substituted for special steel bars, this test did not indicate any data that supported the parties' claim. As such, the JFTC indicated that competitive pressure from neighbouring markets is limited.

In the ZHD/LINE Case, not only the JFTC but also the two parties used the economic appraisal technique by relying on an outside economic appraisal firm. In this case, the parties used the technique to measure a "switching ratio" from LINE Pay to PayPay, when the latter launched a price reduction campaign, in an attempt to indicate the limited competitive relationship between ZHD and LINE. The economic appraisal technique was also used to measure competitive pressure from other cashless payment services (e.g., credit card companies) against code payment services.

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

Parties are able to propose remedies to the JFTC during both Phase I and II review. The JFTC will then review the transaction on the basis that the proposed remedies will be implemented. In practice, during the review process, the JFTC often implies to the parties that it is difficult to clear the transaction without certain remedies. Thereafter, the parties submit proposed remedies to discuss them with the JFTC. Depending on the complexity of the cases, it is not rare for the discussion with the JFTC to take several months.

The Merger Guidelines provide structural remedies (such as divestiture of business, disposal of shareholdings, and abolition of interlocking directorships) as the most effective remedies, but behavioural remedies may also be accepted under certain circumstances. The JFTC has shown willingness to accept behavioural remedies that effectively resemble structural remedies. Examples include: (i) supply of relevant products to a new or existing competitor at prices that break even with the production costs; (ii) measures to promote imports or new entries into the relevant market; (iii) licensing technology to a competitor; (iv) prohibiting the purchase of raw materials from a communal seller; and (v) setting up an information firewall, often in the case of vertical or conglomerate relationships.

In the ZHD/LINE Case, the parties proposed to take two types of behavioural remedial measures:

1. For three years after the transaction, once a year, the parties will report to the JFTC the following: (a) the market size of code payment services, the parties' market position and

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competition environment; (b) certain matters relating to commission paid by merchants; and (c) matters relating to the use of data in relation to code payment services. Further, should the JFTC raise any concern regarding competition in the code payment market, the parties will consider necessary countermeasures to resolve such concern.

2. The parties will amend and delete exclusive contractual terms under the current agreement with merchants with respect to the code payment services, and will not impose any exclusive contractual terms against merchants with respect to code payment services for three years after the transaction. The parties will also report such status when making the report set forth in measure 1.

However, since compliance with these behavioural remedies is difficult for the JFTC to monitor, often requiring long-term measures, the JFTC accepts such remedies in a relatively limited set of circumstances. There is one publicly disclosed case where the JFTC did not accept the remedies proposed by the parties due to the difficulty in monitoring their compliance, and the parties suspended the transaction as a result (Major Business Combination Cases in Fiscal Year 2016, Case 8: Integration of Lam Research Corporation and KLA-Tencor Corporation). In addition, to ensure strict compliance with behavioural remedies under which the parties set up an information firewall, they tend to be constricted by other thoroughgoing measures, including separation of work locations or prohibition of personnel transfers.

Parties usually discuss possible remedies with the JFTC after the JFTC review. In order to expedite the review process, the parties propose remedies to the JFTC in advance of the JFTC exhibiting its impression of whether remedies are required for clearance. However, if the parties propose remedies to the JFTC at an earlier stage, the range of remedies tends to be broad and may cover areas that the JFTC is not concerned about, or may be broader than what it would regard as the minimum. If it is necessary to expedite the process considering such risks, the parties need to discuss this deliberately with the JFTC.

As provided above, the JFTC appears flexible as to whether it approves in the Phase I or Phase II review. As a clearance strategy, in order to avoid Phase II review, where the JFTC requests a massive amount of information from the parties, they can hold discussions with the JFTC at a pre-filing consultation. They may discuss the necessity and content of remedies. Since pre-filing consultation is voluntary, the period of applicability is not limited under any laws or regulations.

On the other hand, if a case is likely to be sent to Phase II review, it may be more efficient for the parties not to spend a significant amount of time on the pre-filing consultation. In such case, the parties would promptly submit an official notification to and discuss with the JFTC during the Phase II review period.

Key policy developments

Ride sharing and regional banking business

"The Act on special provisions of the AMA to maintain providing basic services for general ride-sharing passenger automobile transportation business (the "Ride-Sharing Bus Business") and regional banking business" (the "Act on Basic Services") was promulgated on 27 May 2020 and enforced on 27 November 2020. The Act on Basic Services provides exemptions for applying the AMA to certain Ride-Sharing Bus Business operators and regional banking business operators in certain circumstances in order to maintain the services provided by these business operators, which are "fundamental services" that form the basis of people's livelihoods and economic activities, especially in rural areas. While these business operators are sometimes non-replaceable in certain geographic markets where

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they sometimes enjoy a monopoly, it is becoming more difficult for them to sustainably provide these services, mainly due to the population decline in rural regions.

In relation to this, in the JFTC's review of the acquisition of shares of The Eighteenth Bank, Ltd. by Fukuoka Financial Group, Inc., the JFTC noted that the scale of the relevant market is not substantial and that it is difficult for the parties to maintain competition individually among multiple firms due to their unprofitability, leading the JFTC to clear the transaction. However, it took more than two years from the commencement of the initial review for the parties to obtain clearance in this case.

Under the Act on Basic Services, the application of the AMA may be excluded under certain situations, but is expected to accelerate the process of business combinations that may have been blocked or would have taken much longer to complete under the current regime.

Under the law, subject to the party whose business is a regional banking business or Ride-Sharing Bus Business (or its parent company) submitting an application to the relevant government authority (i.e., either the Financial Services Agency (the "FSA") or Ministry of Land, Infrastructure, Transport and Tourism ("MLIT")), the AMA will not be applied to the merger (or relevant business integration) relating to the party if it is approved as a "special local-based enterprise". In summary, the party may be approved as such a "special local-based enterprise" by the relevant government authority on the conditions that:

1. there is a risk that it will be difficult for the party to provide its fundamental services due to the worsening of its financial conditions;
2. as a result of the contemplated merger, the business of such fundamental services is expected to improve and, in response to the improvement, the provision of the fundamental services is expected to be sustained; and
3. the contemplated merger will not unduly cause any increase in the price of the fundamental services.

The FSA or MLIT is obliged to consult with the JFTC in advance of approving the party as a "special local-based enterprise". The agency or ministry will issue an order to comply with the AMA if requirement 1 or 3 is no longer satisfied.

Foreign investment regulation

Under the Foreign Exchange and Foreign Trade Act of Japan (the "FEFTA"), foreign investors are required to file a prior notification before the transaction if they acquire (i) 1% or more (on a shareholding or voting rights ratio basis) of the shares in a Japanese listed company engaging in certain designated business sectors (*shitei-gyoushu*) (the "Designated Businesses"), or (ii) any number of shares in a non-listed Japanese company engaging in certain Designated Businesses. Such Designated Businesses include businesses relating to national security, nuclear power, aircraft, manufacturing of products that are subject to the Export Trade Control Order, cyber-security, infrastructure, and software and IT-related services. Given that software and IT-related services were added to the Designated Businesses category under the amendment to the FEFTA in May 2019, many foreign investors are currently being forced to submit a pre-filing under the FEFTA. If a pre-filing is made, the proposed acquisition may not be consummated until 30 days have elapsed since the filing of the notification, although such waiting period may be shortened to two weeks or less. In addition, foreign investors will often receive inquiries from the relevant ministry regarding filings after the pre-filings have been made.

However, under the abovementioned amendment to the FEFTA, even if the target company is engaging in Designated Businesses, in case the target company's business does not fall

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under any of certain designated core business sectors within the Designated Businesses, the foreign investor acquiring the shares is eligible for an exemption from the pre-filing requirement if it complies with all of the conditions, as described below. These conditions are ongoing obligations with which the foreign investor must continuously comply. Further, such exemptions are not eligible for certain government-related foreign investors such as state-owned enterprises or sovereign wealth funds, or any foreign investors who have breached the FEFTA and have thus been subject to certain punishments over the past five years. Please see the conditions as follows:

1. the foreign investor or its closely related persons as defined in the relevant regulations must not become directors or corporate auditors of the target company;
2. the foreign investor must not make certain proposals at general meetings of shareholders of the target company (such as proposals to transfer or discontinue the Designated Business of the target company, as specified under the relevant regulations); and
3. the foreign investor must not access any non-public technical information in relation to the Designated Business of the target company or take certain other actions that may lead to leakage of such information (as specified under the relevant regulations).

Once the foreign investor acquires the shares in a Japanese company,[5] the foreign investor will also be required to file a post-acquisition report within 45 days from such acquisition. As a side note, if the foreign investor acquires shares in a Japanese company (including a share acquisition by setting up a new subsidiary in Japan) that does not operate any Designated Business, the foreign investor will be required to submit a post-notification.

Reform proposals

As mentioned in "Key policy developments" above, while none of the merger filing cases have yet applied for the exemption, the enforcement of the Act on Basic Services will likely expedite merger transactions concerning local banks and bus operators. Further, relevant ordinances and cabinet orders are currently being prepared by the relevant ministries.

* * *

Endnotes

1. ZHD's ultimate parent company is SoftBank Group Corporation.
2. LINE's ultimate parent company is NAVER Corporation.
3. A "search-linked ad service" refers to a type of advertisement that appears on a search result screen when internet users input a certain word into a search engine which relates to the content of the advertisement.
4. A "non-search-linked ad service" refers to a type of advertisement other than a search-linked ad service, for instance advertisements that appear on the screen of hardware users browsing internet websites in the form of videos, banners, pop-ups or the like.
5. The share acquisition does not require a post-acquisition report if the foreign investor acquires (i) less than 10% of the shares in a non-listed Japanese company that does not conduct nor plan to conduct Designated Businesses, or (ii) less than 1% of shares in a listed Japanese company.

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Korea

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Introduction

In Korea, the primary law that governs antitrust issues, including mergers, is the Monopoly Regulation and Fair Trade Act (the "Fair Trade Act" or the "Act"). Pursuant to this Act, the Korea Fair Trade Commission (the "KFTC") oversees and controls mergers that may interfere with or limit fair and free competition in the market. Article 7 of the Act lays out the types of business transactions that may be restricted or controlled by the Act and the KFTC, such as share acquisition, interlocking directorate, merger, transfer of business, and participation in the establishment of a new company, which are collectively referred to as a "business combination". The phrase "**business combination**" is an official legal term of art used in Korea that corresponds to the word "merger", as commonly used in the business world. For ease of reading, these terms will be used interchangeably in this chapter. Article 12 of the Fair Trade Act imposes a merger reporting obligation on certain types of business combinations, and this requirement functions as the primary means of oversight over mergers in Korea.

Overview of merger control activity during the last 12 months

The trend of business combination activities in 2020

According to the statistics announced by the KFTC on February 18, 2021, the KFTC reviewed 865 business combinations in 2020, the total monetary values of which amounted to KRW 210.2 trillion (these are the statistics of the business combinations that were subject to the reporting obligation under the Fair Trade Act and thus were reviewed by the KFTC, not the statistics of the total business combinations that occurred in 2020). The number of business combinations increased by 12.9% from 2019 (766 business combinations reported), and the total monetary value decreased by 53.1% from 2019 (KRW 448.4 trillion).

Despite the increase in the number of business combinations, their total monetary value decreased. Business combinations by domestic companies increased both in number and scale. Business combinations among domestic affiliates increased in number but decreased in scale, while business combinations among non-affiliates increased both in number and scale. Business combinations by domestic conglomerates increased in number but decreased in scale. Meanwhile, business combinations by foreign companies decreased in both number and scale. Companies from the European Union and China were the most active in acquiring domestic corporations.

The trend of the KFTC's business combination reviews in 2020

Among the 865 business combinations reviewed in 2020, the KFTC issued conditional approvals for three of them, holding that such business combinations could possibly interfere

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with fair and free competition in the market. It also imposed penalties totaling KRW 110 million on 12 business combinations for violations of merger reporting requirements, such as delayed reporting and failure to report.

The number of conditional approvals by the KFTC and the amount of penalties it imposed over the past five years are as follows:

Conditional approvals by the KFTC

Year	2016	2017	2018	2019	2020
Number of conditional approvals	4	4	3	5	3

Number of penalties imposed by the KFTC

Year	2016	2017	2018	2019	2020
Number of cases in which penalties were imposed	19	28	25	12	12

To provide a better understanding of the types of mergers the KFTC deals with, below are three business combinations for which the KFTC granted conditional approval:

1. A delivery app is an online intermediary service between consumers and restaurants for food orders through a smartphone app. Delivery Hero SE ("DH") is a German global delivery app company with two subsidiaries which operate delivery apps in Korea: Delivery Hero Korea LLC ("DHK")'s "Yogiyo" (the second-largest delivery app in Korea); and Baedaltong LLC's "Baedaltong". Woowa Brothers Corp. ("WB") operates the largest delivery app in Korea, "Baedal Minjok". Yogiyo and Baedal Minjok combined control over 90% of the market, with Baedal Minjok holding over 60% of the market and Yogiyo holding over 30% as of 2020. DH entered into an agreement on December 13, 2019 to acquire approximately 88% of WB's shares and reported the business combination to the KFTC on December 30, 2019. After investigating, the KFTC determined that there was a high chance that competition would be restricted in all directions for various interested parties in the multi-faceted market for delivery apps, such as restaurants, consumers, and delivery workers, and imposed a corrective measure requiring DH to sell 100% of its shares in DHK within six months. During this period, the KFTC also imposed several behavioural corrective measures, such as: (1) requiring separate and independent operations of DHK and WB; (2) prohibiting any changes to the actual commission rates applied to restaurants; (3) requiring at least the same number of promotions each month as was offered in the previous year for that month; (4) prohibiting any transfer or sharing of data; (5) prohibiting any disadvantageous changes to the working conditions of Yogiyo riders; and (6) prohibiting solicitation of Yogiyo riders to WB.
2. Danaher Corporation ("Danaher") and General Electric Company ("GE") are global companies that manufacture and sell products related across the board to the bio process (research, development, and manufacturing of biopharmaceuticals). Danaher entered into a contract with GE to acquire the BioPharma business unit that manufactures equipment and supplies related to the production of biopharmaceuticals medical supplies and other life sciences products ("biopharmaceutical process products") and reported the business combination to the KFTC on May 13, 2019. The KFTC judged that it was highly likely that in eight of the 32 biopharmaceutical products markets in

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which it competes, the business combination would use its superior bargaining position in the market to unilaterally select a strategy that would restrict competition, such as raising the price of products. To alleviate concerns about the limited competition in the eight biopharmaceutical products markets and protect the biopharmaceutical medical suppliers' right to choose, the KFTC decided to impose corrective measures and required Danaher to sell all assets of one of the combined companies related to the business operation of the eight biopharmaceutical products market within six months of the completion of the business combination.

3. Borealis AG ("Borealis") is an Austrian manufacturing company which manufactures polyolefin compounds, basic chemical materials, and fertiliser. DYM Solutions Inc., ("DYM") is a Korean manufacturing company which manufactures polyolefin compounds for power cables. Borealis entered into an agreement to acquire 90.52% of DYM shares and reported the business combination to the KFTC on October 20, 2018. After dividing the semi-conductor market by voltage ranges into medium, high, and extra-high, the KFTC judged that there was a risk that competition would be restricted in the relevant market by the acquisition of DYM (number two in the high voltage market and on the verge of developing extra-high-voltage semi-conductors) by Borealis (number one in all the semi-conductor markets). Accordingly, the KFTC imposed the following on the combined companies: (1) the obligation to supply semi-conductors on fair, reasonable, and non-discriminatory terms in accordance with normal industry practices; and (2) the obligation to provide extra-high-voltage semi-conductor manufacturing technology to joint development partners.

As demonstrated by the above statistics and examples of conditional approvals of business combinations, there are not many instances in which the KFTC completely denied a business combination. Because the focus of the KFTC's review is on whether a business combination restricts fair competition in the market, the KFTC has been approving business combinations with conditions to be satisfied, such as ordering companies to transfer certain businesses, limiting price increases, etc., rather than denying the business combination in its entirety. The KFTC's stance is to conduct thorough reviews and investigations on business combinations that may interfere with fair and free competition and attach appropriate conditions, and at the same time promptly approve business combinations that do not raise anti-competition concerns.

New developments in jurisdictional assessment or procedure

Revision of merger filing thresholds

Like other countries, Korea determines which business combinations should be subject to the filing requirement of the merger notification by the size of the companies, which can indicate the impact of a merger on the Korean market. Through its enforcement decree, the Fair Trade Act imposes an obligation to file a business combination notification with the KFTC if the revenue or total assets of a company exceed a set threshold. On October 19, 2017, the KFTC raised the threshold that triggers the merger filing. To adjust the notification filing standard to reflect the economic growth of the country, the threshold amounts of the total assets or revenue of the companies that are subject to the notification obligation (hereinafter referred to as "acquiring companies") increased from KRW 200 billion to KRW 300 billion, and the threshold amounts of the total assets or revenue of target companies increased from KRW 20 billion to KRW 30 billion. The threshold amount in terms of revenue from a domestic sales basis when both the acquiring company and

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the target company are foreign companies, or when the acquiring company is a domestic company and the target company is a foreign company, also increased from KRW 20 billion to KRW 30 billion.

Change in the filing obligation thresholds	Before	After
Total assets or revenue of acquiring company	KRW 200 billion	KRW 300 billion
Total assets or revenue of target company	KRW 20 billion	KRW 30 billion
Revenue from domestic sales for foreign company	KRW 20 billion	KRW 30 billion

It is worth noting that, when calculating the total assets or revenue of an acquiring company, also included are the total assets or revenue of companies that have maintained the status of subsidiaries or affiliates to the acquiring company before and after the business combination. However, according to Article 12 (2) of the Act, the total assets or revenue of subsidiaries or affiliates are not included when calculating the total assets or revenue of the acquiring company if the form of the business combination is a transfer of business. Therefore, one might consider planning a merger using a form of transfer of business to avoid triggering the filing requirement.

Strategic issues for review period

According to Article 12 (7) of the Act, the KFTC must examine whether a business combination interferes with fair and free competition and notify the company of the result within 30 days of the filing of the business combination notification. However, if the KFTC deems it necessary, the review period can be extended by 90 days from the date following the expiration of the 30-day period. That is, at the discretion of the KFTC, the review period may be extended to 120 days. Furthermore, according to Article 18 (5) of the Enforcement Decree of the Act, the KFTC may order an amendment of the documents if the submitted notification report or relevant materials are incomplete, and in that case, the time that it takes for the amendment is not included in the above periods. This means that an amendment order from the KFTC could further extend the review period. The prolonged period of review can be very burdensome as parties to the business combination will be in a position of uncertainty during the review period. For business combinations that are subject to pre-event notification, the companies can be exposed to the uncertainty that the deal may be broken off for external reasons during the period the KFTC's review is pending; the burden of financing may increase as the review is delayed and it is not possible to engage in post-merger integration during the pending review, which is a critical part of an M&A deal. Also, for business combinations subject to post-event notification, the companies are left with the uncertainty that the KFTC might order corrective measures that can damage the original purpose of the deal. Therefore, it is desirable to contact the KFTC before submitting the notification form and confirm the details of the information to be included in the notification and relevant supporting materials to be attached. It is also recommended that the parties of the business combination submit as much relevant material and information as possible to reduce the review period and avoid potential amendment requests from the KFTC.

Another strategic move parties to a business combination can take to reduce the hassle related to the review period is to apply for discretionary advance review by the KFTC before the filing period. Pursuant to Article 12 (9) of the Fair Trade Act, companies can request that the KFTC review potential anti-competition issues from the proposed business combination in advance. If the KFTC reviews and determines that the proposed business

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combination does not have any potential anti-competitive effects, then such pre-approved business combination becomes eligible for the Streamlined Review process at the time of the official filing period, in which case the companies can be notified of the result of the review within 15 days from the date of filing. Any companies seeking speedy completion of the business combination are recommended to actively implement this procedure.

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

Although the KFTC reviews all business combinations and examines whether they limit market competition regardless of sector, there are certain sectors in which business combinations need approval under the relevant statutes from other regulating bodies in addition to the KFTC. These specific industries include:

1. **Banks:** According to the Banking Law, if a bank wants to merge or transfer business, it must be approved by the Financial Services Commission (the "FSC").
2. **Financial providers:** Under the Capital Markets Act, a financial investment company must obtain approval from the FSC when it intends to merge or transfer business.
3. **Insurance companies:** Under the Insurance Business Act, insurance companies must be approved by the FSC for mergers.
4. **Financial institutions:** A merger between financial institutions, such as banks and insurance companies, must be approved by the FSC in advance under the Act on the Structural Improvement of the Financial Industry.
5. **Business operators under the Collective Energy Business Act:** In case of merger or acquisition of businesses licensed under the Collective Energy Business Act, the acquiring company must notify the Minister of Trade, Industry and Energy within 30 days from the merger or transfer of business.
6. **Business operators under the Electricity Business Act:** For merger or acquisition of businesses licensed under the Electricity Business Act, the acquiring company must obtain the approval of the Minister of Trade, Industry and Energy.
7. **Business operators under the Broadcasting Law:** In the case of merger or acquisition of businesses, broadcasters, cable broadcasters, music cable broadcasters, and electronic display broadcasters should obtain approval from the Korea Communications Commission (the "KCC") for any changes.
8. **Corporations subject to the Special Act for Enhancing Corporate Viability (the "One Shot Act"):** In the case of industries that are expected to continuously decline considering domestic and global market conditions (e.g. the steel industry and shipbuilding industry), the procedure for business combinations can be shortened with the government's approval.

Although the KFTC reviews and examines business combinations regardless of industry, as noted below, according to Article 12 (3) of the Fair Trade Act, there are certain types of business combination that are exempt from the merger filing obligation:

1. **Business combinations under the Support for Small and Medium Enterprises Establishment Act:** Under this Act, if an investment company for the establishment of a small- or medium-sized enterprise, or a small- or medium-sized enterprise establishment investment association, owns 20% or more of the shares of a business starter or a venture business (15% in the case of a listed company) or becomes the largest shareholder by participating in the establishment of the business starter or the venture business jointly with another company, it is excluded from the reporting obligation.
2. **Business combination under the Specialized Credit Finance Business Act:** If a new technology venture capitalist or a new technology venture capital fund established

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under this Act holds 20% or more of the shares of a new technology business entity (15% for listed companies), or becomes the largest shareholder by participating in the establishment of the business starter or the venture business jointly with another company, it is excluded from the reporting obligation.

3. **Business combination of investment companies:** If a company subject to the business combination reporting obligation owns 20% or more of the shares of the following companies, or if a company becomes the largest investor by jointly participating with other companies in the establishment of the following companies, it is excluded from the reporting obligation: (1) an investment company defined in the Financial Investment Services and Capital Markets Act; (2) a company designated as a concessionaire of a public-private partnership project for infrastructure pursuant to the Act on Public-Private Partnerships in Infrastructure; (3) an investment company established for investing in a company under the Corporate Tax Act; or (4) a real estate investment company subject to the Real Estate Investment Company Act.

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

In general, the KFTC investigates the market dominance (market share) of companies and the concentration ratio of the market when determining whether a business combination will interfere with fair and free competition in the market. It typically determines that it is possible that the business combination could be anti-competitive in the following situations: (1) one company's market share is 50% or more; (2) three companies' combined market shares are 75% or more; (3) the parties of a business combination become first in rank in terms of market share; and (4) the difference between the combined market shares of the parties to a business combination and the market share of the second dominant player in the market is more than 25%. It also determines that there is a possibility of an anti-competitive business combination when a large corporation enters into a business combination in a market in which small to medium-sized companies have more than two-thirds of the market shares, and goes on to own more than 5% of the market share as a result of the business combination.

In addition to the market share and concentration ratio analysis, the KFTC also uses the Herfindahl-Hirschman Index ("HHI"), which is a measure of the market concentration that is calculated by squaring the market share of each firm competing in the market and summing the resulting numbers. HHI points range from 0 to 10,000. For horizontal business combinations in which competing companies in the same market merge, the KFTC determines that there is no anti-competitive effect if the: (1) HHI is less than 1,200; (2) HHI is less than 2,500 and the increase in the HHI after the business combination is less than 250; or (3) HHI is 2,500 or more and the HHI increase is less than 150. For vertical business combinations, combinations of companies in adjacent stages in the process of production and distribution of goods, and (for hybrid business combinations) combinations of companies that have no relationship between their products, the KFTC determines there is no anti-competitive effect when the HHI is less than 2,500 and the market share is less than 25%, or when each of the parties to a business combination is ranked lower than fourth in terms of market share.

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

There is no second-stage KFTC investigation in Korea. To cure the anti-competitive effect of a business combination and make the transaction healthy, the KFTC orders various types

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of corrective measures, such as suspension of the anti-competitive acts, disposal of certain stocks, resignation of executives, transfer of business, and any other actions necessary to prevent an anti-competitive method of business and limit the scope of such a business.

It is KFTC policy that such corrective measures must be able to remedy the anti-competitive effect, be as narrowly tailored as possible, and be clear, specific, and implementable.

The types of corrective measures ordered by the KFTC are as follows:

Type	Measures
Structural Corrective Measures	Measures that change the assets or the ownership structure of the transacting companies, such as prohibition, sale of assets, or intellectual property measures. • Prohibition: Prohibiting or nullifying a business combination and requiring restoration to its original state. • Sale of assets: Requiring transacting companies to separate certain assets and sell to third parties. • Intellectual property measure: Imposing restrictions on ownership and use of IP by forcing transacting companies to sell or assign their IP rights to third parties.
Behavioural Corrective Measures	Measures that restrict business conditions, methods of operation, scope of business, internal management, etc. of transacting companies for a certain period of time.

According to the Standard for Imposing Corrective Measures on Business Combinations announced by the KFTC, the KFTC's preference is to order structural corrective measures, and by principle, the KFTC orders behavioural measures only where structural measures cannot remedy the anti-competitive effects. It is the KFTC's position that, unlike behavioural corrective measures that necessitate continued monitoring and costs, structural measures can create a sounder market structure, which enables more efficient restoration and maintenance of competition.

Key policy developments

In the KFTC's work plan announcement on January 21, 2021, the chairperson of the KFTC, Joh Sung-wook, announced that the KFTC would reorganise the discipline system for large business groups to rationalise regulations and establish a competitive market structure through effective review of M&As. Specifically, the KFTC: (1) stated that it would quickly and effectively review M&As in the aviation, shipbuilding, and machinery industries that are expected to be restructured, and actively respond to M&As in the broadcasting, telecommunications, and semi-conductor sectors, which are expected to take an active role in the transition to a contact-free economy; and (2) announced that it would rationalise M&A review by strengthening the review of potential competitors' acquisitions that may strongly cause concerns with regard to hindering innovation, and exempt from reporting requirements M&As for the purpose of investment, which are less likely to cause concerns with regard to restricting competition.

Sang-jo Kim, the former Commissioner of the KFTC, said in his announcement of the KFTC's Work Plan for 2019 on March 6, 2019 that the KFTC will support technological innovation in the new industry sectors by establishing an effective M&A regulatory system.

For decades, the KFTC's key policy for large corporations has been to restrict their reckless diversification of businesses, and the KFTC has been focusing on suppressing the concentration of economic powers by large corporations in the market. It is thought that this change in the

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position of the KFTC was largely influenced by rapid developments in the field of the 4th Industrial Revolution, and that the KFTC expects large corporations to secure core competencies and improve corporate structure through active M&As that are necessary to survive in this global market/period of industrial change. Mr. Kim also stated that the KFTC will expedite its review process for business combinations that have a lower risk of an anti-competitive effect, and promote M&As of small- to medium-sized companies and venture companies.

The KFTC's previous amendment to the standard for the business combination reporting requirement, dated December 20, 2017, seems to be connected with this policy change. The amendment enables a joint venture company established in a foreign country that does not affect the domestic market to go through the Streamlined Review process, which is significantly faster and easier than the regular review process, which can take up to 120 days. In the Streamlined Review process, the subject business combinations are deemed to have no anti-competitive effect, and the review results are released within 15 days.

In the same spirit, the KFTC further amended the standard for the business combination reporting requirement on February 27, 2019. The new standards were offered to determine: (1) whether the contemplated M&A would hinder innovation or competition in innovation-based businesses such as those involving IT devices or semi-conductors; and (2) in industries dealing with information assets, whether the contemplated M&A would block access to information assets, in addition to the existing criteria of restriction on competition.

As a side note, the KFTC also released the amended Business Combination Reporting Guidebook on July 1, 2019 (in Korean). The amended Guidebook includes past amendments to the relevant laws, case reviews, interpretations of the laws, etc. The KFTC expects that this new Guidebook will provide companies with more detailed information relating to the KFTC regulations and reporting obligations so that they can be better prepared when considering a business combination in Korea.

Reform proposals

A major reform of the Act was introduced on December 29, 2020 and is expected to be implemented on December 30, 2021. The KFTC announced that when the revised Act goes into effect, it would suppress large business groups' unfair abuse of their economic power and actions in pursuit of their own interest, and provide prompt relief to companies injured by unfair business practices. It is also expected to strengthen industrial competitiveness by promoting innovation by companies.

The amendment to the Act is largely divided into revisions that seek to (1) improve disciplinary legislations for large companies, (2) reform the KFTC's enforcement system, and (3) promote innovation. Among these, a revision was introduced based on the transaction amount to the standard for reporting a business combination. According to the KFTC, if an acquired company's sales (or total assets) are more than KRW 30 billion, it is currently under a reporting obligation. However, this created an issue by omitting from examination business combinations that could restrict competition in the future, for example, by large companies acquiring small companies with high growth potential. However, the revised law imposes a reporting obligation even if the current sales (or total assets) are below the reporting threshold (KRW 30 billion) if the transaction amount (acquisition amount) is large. It is intended to prevent concerns regarding the harmful effects of restrictions on competition resulting from business combinations.

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Russia

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Overview of merger control activity during the last 12 months

The authority that is responsible for state control over economic concentration in Russia is the Federal Antimonopoly Service ("*FAS*"). The legal grounds and review process regime of merger control in Russia is regulated by the Federal Law "On Protection of the Competition"[1] ("*Competition Law*"). Generally, there are two main types of procedures of merger filings – pre-transaction clearances and post-transaction clearances (e.g. intra-group transactions) of M&A and joint venture ("*JV*") transactions. Such pre-closing and post-closing filings are required in case the thresholds (e.g. value of assets, turnover, etc.) and the triggering events (e.g. assets and/or subsidiaries in Russia, etc.) listed in the Competition Law are met.

It should be noted that the merger control procedure for obtaining clearance for M&A/JV transactions as well as the thresholds and the triggering events have remained unchanged over the past few years, and over the past 12 months in particular. At the same time, in recent years, the practice of applying the Competition Law has led to the constant decreasing of the number of transactions considered by the FAS. When in previous years, this number exceeded tens of thousands, in 2020 the FAS considered only 1,015 transactions,[2] including both pre-closing and post-closing applications. Meanwhile, the FAS considered 1,196 transactions in 2019,[3] 1,275 transactions in 2018, 1,231 in 2017 and 1,462 in 2016.[4]

Meanwhile, from the FAS's point of view, about 1,000 transactions per year is a feasible volume of administrative burden for market participants, as well as an acceptable volume for the quality consideration of transactions by the FAS; therefore, the current practice is almost completely in line with the FAS's expectations. In addition, it should be noted that the decrease in the number of transactions over the past 12 months is insignificant.

This maintenance of the number of transactions at a stable level indicates that, despite all the problems associated with the coronavirus pandemic ("*COVID-19*"), including such technical problems as the collection and provision to the FAS of properly notarised and apostilled documents and information in paper form from the Acquirer and the Target, the pandemic was an obstacle for companies in making transactions. Moreover, the total value of transactions has increased. According to the official statistics of the Central Bank of the Russian Federation,[5] the total amount of foreign investment to Russia in 2020 is estimated at more than USD 183,448 million in Russian non-financial companies, whereas in 2019, this amount was only USD 162,549 million. Therefore, the amount of foreign investment increased by USD 20,899 million.

The timeline and description of the clearance stages also remain the same. Phase I of the merger review lasts 30 days (starting from the next date after the submission). During the initial five days of Phase I, the case handler checks the completeness of the filing, and after

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that the substantial review is conducted. When Phase I comes to an end, the FAS may either clear the transaction (unconditionally or with remedies) or extend the review period for an additional two months (Phase II) for in-depth analysis.

It is important to mention that the FAS usually extends the review period for two months to proceed with in-depth analysis, even for transactions with no competition concerns. Furthermore, the FAS has begun to request information on the market shares of the parties to the transaction, competitors, and the market situation, even though under the Competition Law it is not obligatory to provide such information within the initial application. However, such requests for documents/information do not stop the clock.

The prolongation of the review period for an additional two months has become more and more frequent also because of substantial organisational changes in the FAS. On November 11, 2020, the Head of the authority (who served for 16 years) resigned, and a new Head of the FAS has since been appointed. As a result, internal procedures for the approval of drafts of merger clearance decisions by FAS senior officials became more time-consuming and cumbersome. All clearance decisions are reviewed by the Head of the FAS, and because he takes additional measures to reduce the risks of mistakes in the FAS's decisions, approval requires more scrutiny and time.

New developments in jurisdictional assessment or procedure

New mechanisms to protect competition

The challenges associated with COVID-19 have greatly strengthened the role of digital platforms; namely, in 2020 the share of e-commerce, payments and the amount of accumulated personal data have increased. At the same time, the issues of antimonopoly regulation of digital markets and information circulation remain unresolved.

Therefore, more attention is paid to the Draft Law "On amendments to the Federal Law 'On Protection of the Competition' and other legislative acts of the Russian Federation" ("*fifth antimonopoly package*").[6] This Draft Law has not yet been adopted; however, in April 2021, the Public Council under the FAS, a permanent consultative and advisory body of public control, supported the fifth antimonopoly package.[7] This support does not entail any formal legal consequences, although it is one of the prerequisites for the nearest consideration of the Draft Law.

The Draft Law still contains the new criteria to trigger merger control clearance, namely the: transaction's volume, which amount should exceed RUB 7 billion (approximately EUR 100 million/USD 113 million); provision of voluntary commitments aimed at ensuring competition in the relevant markets; and new legal grounds for the prolongation and suspension of the review period (the prolongation term is determined by the Russian Government on a case-by-case basis). The Draft Law also introduces the concept of the "authorised person", which may be considered an analogue of the European "trustee", and the ability to engage experts to offer expertise, among others.

The situation in which a digital platform can influence the demands and needs of society, impacting on sellers and buyers, has already become a reality. Technological progress provides not only a large number of advantages, but also an opportunity for manipulation in the market, which, as a result, can negatively affect the consumer ("network effects", the use of price algorithms). For instance, in February 2021, the media reported that Yandex announced the purchase of the taxi aggregator Vezet. The FAS analysed the transaction and noted that the purchase by Yandex of the Vezet taxi aggregator could negatively affect the level of economic concentration.[8] However, the transaction does not require approval from

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the antimonopoly authority, since the value of the assets of the target companies is less than the amount required for approval. Only the adoption of the fifth antimonopoly package could resolve this situation.

In addition, the FAS has used the mechanism of non-confidentiality (waivers) to exchange information between antimonopoly authorities from various jurisdictions and provide a complex analysis of cross-border transactions.

Another instrument is the technological transfer, a remedy imposed by the FAS as a result of consideration of the transaction. The aim of the technological transfer is to provide negotiations between Russian state authorities and the applicants on the possible transfer of certain technologies to Russian producers as a condition for clearance.

In cooperation with BRICS countries, the Center for Technology Transfer ("*Technology Transfer Center*") at the Higher School of Economics[9] was established in Moscow. The Technology Transfer Center is already active in implementing the instructions of the FAS. Thus, 13 Russian companies applied to obtain germplasm of agricultural plants within the first stage of technology transfer from Bayer, of which the Supervisory Board of the Technology Transfer Center selected seven private breeding companies for the transfer of germplasm of corn, soybeans, wheat and oilseed rape. The transfer of germplasm is planned for the coming months. In addition, the transfer of molecular breeding agents for corn, soybeans, rapeseed, wheat, tomato, cucumber and cabbage with up-to-date protocols for their use within the second stage of technology transfer is expected. The selection of applicants for recipient companies has already been made, pending approval by the Supervisory Board. The third area of the transfer includes the transfer of a digital database of historical agronomic data, applications for which are still being accepted.

Impact of COVID-19 on the merger control review process

One year and several months have passed since the COVID-19 crisis was declared a pandemic by the World Health Organization. The quarantine measures in Russia still did not affect the formal requirements for the package of documents for applicants. Furthermore, the FAS is working as per its normal regime.

The terms for consideration of transactions also remained within the framework of the legislation and did not exceed three months. In addition, COVID-19 was not listed among the reasons for extending the consideration terms for Phase II.

Key strategic and policy issues in the merger control regime

Apart from merger control clearance, the acquisition by a foreign investor of shares (participatory interest) or other forms of control (both direct and indirect) in respect of a Russian company having strategic importance may be subject to clearance with the Russian state authorities under the Federal Law "On procedures for foreign investments in companies having strategic importance for the national security and defence" ("*Strategic Investments Law*").[10] The Strategic Investments Law provides an exhaustive list of strategic activities, including activities involving infectious agents subject to licensing according to Russian Federation legislation, except for activities performed by entities whose main business activity relates to food production.

Although theoretically, the Russian Prime Minister has a right to bring any acquisition of the Russian company by a foreign investor to the review of the Government Commission (so there is a risk that the transaction still could have been transferred to strategic investment review even if the licence was formally terminated), this right is not used often in practice[11] (in practice, this right is used for significant transactions that may impact Russian national

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defence and security, but which do not formally fall within the list of "strategic industries"). If the transaction requires clearances under both the merger control and strategic investments regimes upon the request of the Prime Minister, the FAS shall postpone the merger control review until clearance under the strategic investments legislation is obtained. Getting clearance from the Government Commission may require between three months up to a year, depending on the complexity of the deal and schedule of the Commission members.

On March 20, 2021, certain amendments to the Strategic Investments Law came into force. As a result of this, there is now another possible way of reviewing such transactions if certain conditions are met. Namely, if a private foreign investor that has disclosed information on its beneficiary owners decides to invest in a "strategic" company that has only a small (no more than 1%) strategic asset in the form of a water supply facility, wastewater disposal or a product quality control laboratory with the appropriate licence, then it is in the FAS's competence to review such transaction.

This simplified procedure will require conclusions of the Federal Security Service of Russia, the Ministry of Defense of Russia and other relevant authorities on the significance of the reviewed transaction for Russia's security and defence. If one of these governmental bodies did not provide a conclusion or has any concerns, the transaction is reviewed by the Governmental Commission. If there are no concerns, the transaction is reviewed by the FAS while the Commission is simply notified of the FAS's decision.

Another key issue is the prevention of an increase in market concentration and thus the stimulating of innovation by tracking and blocking "killer acquisitions". A huge number of companies are gobbling up startups and small businesses that develop innovative solutions in order to eliminate competitors, in what are known as "killer acquisitions".[12] Such practices are most often observed in such sectors of the economy as information technology, pharmaceuticals, bioengineering and agricultural technology.

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

There are several markets that attract special attention from the FAS. The first category concerns large transactions in high-tech and digital industries.

So, in May 2021, the FAS considered the application of PJSC Rostelecom, PJSC VimpelCom and PJSC MegaFon to give preliminary consent to the conclusion of a limited scope JV between three federal operators-competitors aiming at the joint development and use of 5G radiofrequencies in Russia.[13] The case relates to joint activity on conversion of the radiofrequencies to facilitate each operator to build its own 5G network in Russia.

This JV is of great importance for Russia in general, and for the federal operators in particular, as it forms a legal ground for further activities in the conversion and use of 5G radiofrequencies. The transaction was under the close scrutiny of the antimonopoly authority as joint activities could form a new innovative market, and the market itself and these activities are of high importance for Russia.

The second category is pharmaceutical markets. The focus of regulation of M&A/JV transactions was on a specific product market and on not allowing individual companies to gain dominance. The new approach suggests focusing on how M&A/JV transactions affect technology development and industry innovation.

A separate, third market within the pharmaceutical industry is the COVID-19 vaccine and drug market. On the one hand, companies are actively creating new vaccines and drugs and

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attracting investment in various forms, which may lead to the restriction of competition. On the other hand, such transactions certainly have important global social significance and contribute to the fight against COVID-19 all over the world. The toolkit of doctors in the treatment of patients with COVID-19 and limiting its negative consequences for the body will also be expanded. Therefore, the FAS needs to find a reasonable balance in the regulation of such transactions in order to stimulate the fight against COVID-19.

Finally, social spheres are also under special control; namely, transport, energy, education, fast-moving consumer goods and healthcare, among others.

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

The key economic appraisal techniques are defined in Decree No. 220 "On Approval of the Procedure for Analyzing the Competition in a Product Market".[14] Under this Decree, the FAS conducts complex market assessment, gathering the opinions of other market players on whether the proposed transaction could result in harm for competition in Russia. Even where there are no horizontal or vertical overlaps between the parties and no competition concerns are found, the FAS still usually conducts market analysis.

Over the last 12 months, the FAS has increasingly begun to request information on the market shares of the parties, competitors and other market parameters, using requests to obtain information for their general analysis of the competitive environment in the market, barriers to entering the market, analysis of the dynamics of the market and other information for its further purposes. The FAS even extends the consideration process for Phase II for the above reasons. Therefore, the importance of the market assessments prepared by the parties has increased.

Meanwhile, the main features of an economic analysis usually depend on the economics of the industry. For instance, there is still no established market for COVID-19 vaccines, thus the FAS is trying to obtain as much information as possible from the parties and from public sources. As for digital markets, the FAS assesses digital platforms and network effects in considering transactions.

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

The FAS may issue remedies in merger control cases if, after considering the application, it establishes that the transaction may have an anticompetitive effect on competition in Russia. For instance, the creation or strengthening of the dominant position of an entity and its group of persons, the creation of the possibility for an entity to unilaterally define the terms for product sale and purchase in the market, and the possible unjustified increase of prices for products, may lead to such remedies.

Remedies may be issued by the FAS at Phase I as well as Phase II. There are two possible options for issuing decisions with remedies. Firstly, the FAS has a right to issue a decision to prolong the review period for nine months in order for defining conditions to be fulfilled by the parties to the transaction, within the period of time set by the authority. Upon submission to the FAS of the evidence of such fulfilment, the FAS within 30 days checks the fulfilment and grants clearance to the transaction. However, the issuance of conditions and prolongation of the consideration process for up to nine months is quite rare.

Secondly, the FAS may issue a decision on approval of the application with a prescription defining the remedies. Thus, the transaction is cleared by the authority, but the parties to

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the transaction are obliged to fulfil the remedies before the closing of the transaction. The FAS is entitled to impose both structural and behavioural remedies. The Competition Law does not provide for special procedures for determining the type of remedies to be imposed, and the decision to use a specific type of remedy is taken by the FAS at its own discretion.

Usually, upon consideration of merger control applications, the Russian competition authority imposes the following types of behavioural remedies: to inform the FAS about current sale (purchase) prices, volumes of production and supply of products on a regular basis; to inform the FAS in advance on price increase (or decrease) for more than, usually, 5–10% (with possible economic reasoning); to refrain from discriminatory actions aimed at limiting access to the market, from establishing discriminatory price conditions, and from economically or technologically unjustified refusal in the production supply; to refrain from limiting sales upon territory, range and volume of products; and to guarantee the execution of all agreements, which are effective as of the date of the transaction implementation and relate to the subject market, etc.

This list of possible behavioural remedies is not exhaustive. As has been mentioned, the FAS imposes specific types of remedies at its own discretion. The above-mentioned types of remedies are the most common types in practice. For instance, in August 2020, the FAS approved the conclusion of an agreement on joint activities between Philip Morris Products S.A. and the Korean company KT&G Corporation, with behavioural remedies.[15] The conditions include a ban on the prolongation of the LIV action, the development of commercial policy, and the submission to the FAS of an economic analysis of the reasons for price changes, etc.

As for structural remedies, the most common types are the following: divestiture of an entire ongoing business; or partial divestiture (possibly a mix and match of assets and activities of the different firms involved in the merger project). For example, in March 2021, the FAS approved a deal on the acquisition of 86.5% of the Chelyabinsk Pipe-Rolling Plant by the Pipe Metallurgical Company, issuing a behavioural remedy to prevent price increases, and also issuing a structural remedy, namely to sell part of the business[16] (for the first time in merger control of steel markets).

In addition, there is the possibility to appeal remedies in court. However, there are no new examples of this occurring over the last 12 months.

Key policy developments

As stated above, the role of market assessment is becoming increasingly prominent in merger control review, and the FAS market analysis is becoming more sophisticated and detailed. Consequently, parties to transactions should be ready to provide the FAS with extensive and detailed information on their market standing and the possible effects of a proposed transaction on competition, even if the transaction may not raise any competition concerns. Risks of prolongation of the review process are also high.

National security/foreign direct investment review processes

On March 20, 2021, certain amendments to the Strategic Investments Law came into force. The purpose of the amendments is to improve the procedure for foreign investment in Russian legal entities that carry out strategic activities related to the provision of water supply (wastewater disposal) services and the performance of work using pathogens of infectious diseases; however, these activities are not the main ones. According to the amendments, in order for the activity to be recognised as not the main one, the book value of the property used to carry out the above types of activity, according to the financial statements for the last three years, should be no more than 1% of the total book value of the property.

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The amendments set up partial changes in the current procedure for the approval of transactions in relation to these companies, which in practice most often include the following: legal entities performing work using infectious agents, including meat processing plants (producers of animal fats, meat offal, animal feed), poultry factories, breeding factories (producers of wool, skins and down); canteens, enterprises for the production of perfumery and cosmetic products, as well as those providing disinfection services; legal entities included in the register of natural monopolies in the field of water supply (wastewater disposal); enterprises relating to the glass, ceramic, textile, metallurgical, cement-brick and woodworking industries; enterprises engaged in the construction or production of plastics; agricultural enterprises; and resort organisations.

The amendments also set up the removal of the ban on transactions involving the establishment of control by an organisation under the control of a foreign state over the said companies or non-strategic organisations that control these strategic companies. These transactions will be subject to mandatory prior approval by the Government Commission on Control over Foreign Investments headed by the Russian Prime Minister in the order prescribed for other categories of investors.

Furthermore, the amendments establish a simplified procedure for making a decision on the preliminary approval of a transaction (or approval of the establishment of control) made by a foreign investor, if the investor meets certain requirements as specified in the amendments. Under the simplified procedure, the decision on preliminary approval of the transaction (or approval of the establishment of control) is made by the FAS if, at its request, the conclusions of the Russian Ministry of Defense and the Russian Federal Security Service are submitted in the absence of a threat to the country's defence and state security as a result of the transaction (establishing control over the company), as well as the Russian Federal Service for Supervision of Consumer Rights Protection and Human Welfare (*Rospotrebnadzor*), the Russian Ministry of Economic Development and the Russian Ministry of Construction – in the absence of the necessity for the Government Commission to consider the planned transaction (a request for approval of the establishment of control).

Finally, the amendments expand the list of obligations imposed by the Government Commission on Control over Foreign Investments on applicants for the preliminary approval of transactions (approval of the establishment of control), including the following: the continuation of the company's strategic activities; the provision of utilities at fixed prices (tariffs); and the transfer of rights to carry out activities for water supply and sanitation and/or activities related to the use of pathogens of infectious diseases, subject to licensing, and/or rights in relation to property necessary for these activities, to another person in compliance with the requirements of the law, or to state or municipal ownership.

Reform proposals

On July 6, 2020, the FAS announced that clarifications to the Competition Law will be introduced subject to final approval by the FAS Presidium.[17] The full text of the proposed clarifications is not yet available, but the FAS's announcement suggests changes or clarifications to the interpretation of threshold values, third-party access to notifications, methodology for calculating asset values, and conditions for extending the review period. The clarifications would also indicate the grounds of the regulator's requests to the applicant, approaches to market analysis, parties to the transaction and other interested parties, involvement of the related FAS departments in the consideration process, and the decision-making procedure. Moreover, the legal consequences of the failure to comply

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with the remedies imposed by the FAS and the procedure for challenging the transaction in court will be disclosed. However, it is still not yet clear when these changes will be published or come into force, due to the substantial organisational changes in the FAS.

The FAS also announced clarifications to the Strategic Investments Law.[18] The proposed clarifications will reflect the relevant issues on exemptions from said Law, rules on disclosure of public foreign investors' beneficiary owners, description of applicable rules on indirect control over strategic companies, and acquisition of rights to give binding decisions/instructions to strategic companies. The exact date of when the clarifications will come into force has not yet been defined for the same reason as mentioned above.

Finally, the fifth antimonopoly package is also pending official approval not only by the Public Council under the FAS, but by the State Duma, Federation Council and President of Russia. It is largely devoted to the introduction into antitrust legislation of tools and mechanisms for subtle and effective regulation of high-tech digital markets.

* * *

Endnotes

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4. The FAS's Report on the State of the Competition 2019 (available in Russian only) – https://fas.gov.ru/documents/685117.
5. According to the official statistics available on the website of the Central Bank of the Russian Federation (available in Russian only) – http://www.cbr.ru/statistics/.
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12. *FAS in the media: FAS plans to track and block "killer acquisition" of startups* (available in Russian only) – https://fas.gov.ru/publications/21137.

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15. *Remedy on joint activities between Philip Morris Products S.A. and the Korean company KT&G Corporation* (available in Russian only) – https://br.fas.gov.ru/ca/kontrolno-finansovoe-upravlenie/81a96531-682b-4409-aa28-4c498841fb71/.
16. *FAS exposed Pipe Metallurgical Company after the purchase of the Chelyabinsk plant structural conditions* (available in Russian only) – https://www.interfax.ru/business/755570.
17. *FAS prepares clarifications on control over mergers and acquisitions* (available in Russian only) – https://fas.gov.ru/news/30065.
18. *FAS has prepared clarifications on foreign investment legislation* (available in Russian only) – https://fas.gov.ru/news/30417.

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South Africa

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Overview of merger control activity during the last 12 months

Despite the fact that, in March 2020, a state of national disaster was declared and South Africa was placed into a nationwide lockdown as a result of the COVID-19 pandemic, the Competition Commission (**Commission**), the Competition Tribunal (**Tribunal**) and the Competition Appeal Court (**CAC**) (together the **Competition Authorities**) continued to consider merger notifications throughout this period. The nationwide lockdown in practice resulted in a move to more electronic processes for the Competition Authorities, including electronic merger filings being accepted by the Commission, as well as online hearings for merger proceedings by the Tribunal and the CAC.

A merger is notifiable to the South African Competition Authorities if it falls within the definition of a "merger" in terms of the Competition Act (**Act**), and if it meets the monetary thresholds for compulsory notification.

In terms of the Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect "control" over the whole or part of the business of another firm. A person controls a firm if that person:

- beneficially owns more than one half of the issued share capital of that firm;
- is entitled to a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes;
- is able to appoint or to veto the appointment of a majority of the directors of that firm;
- is a holding company, and that firm is a subsidiary of that company as contemplated in terms of the Companies Act, 1973;
- in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of that trust;
- in the case of a close corporation, owns the majority of members' interest or controls directly or has the right to control the majority of members' votes in that close corporation; or
- has the ability to materially influence the policy of that firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in the sub-paragraphs above.

Only mergers which equal or exceed certain financial thresholds are required to be notified in terms of the Act. These are so-called intermediate and large mergers. Small mergers are not required to be notified, although parties can voluntarily notify a small merger at any time.

The Commission issued a practice note in April 2009 indicating that small mergers should be notified in circumstances where either party to the merger, or firms within their group,

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are the subject of a complaint investigation or a complaint referral by the Commission. The Commission can, however, require a small merger to be notified within six months of it having been implemented if the Commission is of the view that the merger will give rise to a substantial prevention or lessening of competition or public interest concerns.

The financial thresholds for mandatory notification of mergers are currently set out in Government Gazette Notice No. 41124 of 15 September 2017 (**Merger Threshold Notice**). Mergers are determined based on a combined asset or turnover value of both the acquiring and the target firm's asset value or turnover for the preceding financial year, as well as the target firm's turnover or asset value for the preceding financial year. Both the combined and the target thresholds must be met. According to the Merger Threshold Notice, an intermediate merger is one where:

- the combined asset value or annual turnover in, into or from South Africa of the acquiring and target firms amounts to R600 million or more; and
- the asset value or annual turnover in, into or from South Africa of the target firm amounts to R100 million or more.

A merger is classified as a large merger if it meets the following thresholds:

- the combined asset value or annual turnover in, into or from South Africa of the acquiring and target firms amounts to R6.6 billion or more; and
- the asset value or annual turnover in, into or from South Africa of the target firm amounts to R190 million or more.

In other words, if the acquiring firm has a turnover of R550 million and the target has a turnover of R110 million, both the combined and the target thresholds for an intermediate merger will be met. However, if the acquiring firm has a threshold of R550 million, but the target firm only has a turnover of R50 million, despite the combined threshold being met, the target threshold will not be met, and the transaction will not amount to a notifiable merger.

Filing fees are payable to the Commission for their assessment of a transaction. The filing fee payable for an intermediate merger is R165,000, and the filing fee payable for a large merger is R550,000.

The Commission investigates and makes a final decision in relation to intermediate mergers, while it only investigates and makes a recommendation in relation to large mergers. The Tribunal makes a final decision in relation to large mergers after convening a public hearing.

When considering a transaction, the Competition Authorities will consider a number of factors, such as ease of entry into the market and the level of import competition in the market. In addition to these existing factors, a number of additional factors have been included in the Act, including:

- whether the business or part of the business of a party to the proposed transaction has failed or is likely to fail;
- whether the merger will result in the removal of an effective competitor;
- the extent of ownership by a party to the merger in another firm(s) in related markets;
- the extent to which a party to the merger is related to another firm(s) in related markets, including through common members or directors; and
- any other mergers engaged in by a party to a merger for such period as may be stipulated by the Commission.

The Competition Authorities in South Africa will consider a number of factors, including cross directorships, cross shareholding and public interest. The amendments to the Act have confirmed the position that both the competition test and the public interest test used when

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considering a merger are equal in status. As noted above, the amendments also seek to explicitly create public interest grounds in merger control that address ownership, control and the support of small businesses and firms owned or controlled by historically disadvantaged persons (**HDPs**). In particular, in determining whether a merger can or cannot be justified on public interest grounds, the Commission or Tribunal must also consider the effect that the merger will have on: "*the ability of small and medium businesses, or firms controlled or owned by HDPs, to effectively enter into, participate in or expand within the market*"; and "*the promotion of a greater spread of ownership, in particular to increase the levels of ownership by HDPs and workers in firms in the market*". On 13 February 2019, the President of South Africa signed the Competition Amendment Act, 2018 (the **Amendment Act**) into law. A number of the amendments to the Act in respect of mergers were brought into effect in July 2019, with further amendments being brought into effect in February 2020. The amendments brought into effect in February 2020 relate to the disclosure of confidential information, and essentially allow the Commission to determine whether information submitted by the parties is confidential. This would include, for instance, information submitted to the Commission in respect of a merger notification or during a merger investigation.

From a pure competition perspective, in terms of the July 2019 amendments, the amendments to the merger regime have codified the practice of the Commission to consider "*the extent of ownership by a party to the merger in another firm or other firms in related markets*" and "*the extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors*".

In this regard, a notable amendment is the section that deals with what is considered when a merger is analysed. Section 12A deals with the consideration of mergers and has added an extra factor of whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in the Act. It has also been provided that despite its determination, the Commission or Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in the Act.

In addition to the above, the amendments to the Act include the following factors when considering a merger's effect in a market:

- whether the business of a merging party has failed or is likely to fail;
- whether the merger will result in the removal of an effective competitor;
- the extent of ownership by a party to the merger in another firm or other firms in related markets;
- the extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors; and
- any other mergers engaged in by a party to a merger for such period as may be stipulated.

The amendments to the Act confirmed the position that both the competition test, as detailed above, and the public interest test are equal in status. When determining whether a merger can or cannot be justified on public interest grounds, the Competition Authorities only previously had to consider whether the proposed merger would have a negative effect on employment or on a particular industrial sector or region. Following the implementation of the amendments, the Competition Authorities must now also consider: the effect that the merger will have on the ability of small- and medium-sized businesses (**SMEs**), or firms controlled or owned by HDPs, to effectively enter into, participate in or expand within the market; the ability of national industries to compete in international markets; and the promotion of a greater spread of ownership, in particular to increase the levels of ownership by HDPs and workers in firms in the market.

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In addition, section 18 of the Act now provides that in order to make representations on any public interest ground referred to in section 12A(3), the Minister of the Department of Trade, Industry and Competition (**Minister of the DTIC**) may participate as a party in any merger proceedings before the Commission, Tribunal or CAC. This has allowed the Minister of the DTIC extended powers to analyse a merger.

Perhaps the most significant amendment to the Act in relation to mergers, although it is still not yet in effect, is the introduction of a presidential approval process for foreign investment that may have an impact on national security in terms of section 18A of the Act. This section has not yet come into effect, but it will have an impact on all foreign entities acquiring local firms. This section of the Act requires the President of South Africa to constitute a Committee responsible for considering whether the implementation of a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic of South Africa. The Committee is required to make a decision within 60 days of receipt of notification and to decide whether the merger involving a foreign acquiring firm may have an adverse effect on the national security interests identified by the President. The 60-day period can, however, be extended. Furthermore, the Competition Authorities are precluded from making a decision on the merger transaction until a decision approving the transaction with or without conditions has been made by the Committee.

The President is required to determine what constitutes national security interests by taking into account all relevant factors, including the potential impact of a merger transaction on, amongst others, the Republic's defence capabilities and interests, the supply of critical goods or services to citizens, the Republic's international interests and the economic and social stability of the Republic.

There is no procedure provided for in the Amendment Act which permits participation by the merging parties and there is no mechanism to appeal a decision of the Committee. The President must, however, issue regulations governing the notification processes and access to information. As noted above, this provision has not yet been issued and, as such, it remains to be seen how this section will be enforced in practice. This section will only relate to transactions involving a foreign acquiring firm which could have adverse effects on South Africa's national security or fall within the definition of national security. The list of national security industries must still be issued by the Government. It is not yet clear when this section will come into effect, but regulations will need to be drafted and following this, there will be an opportunity for public engagement. It is likely that this could take a number of months to finalise.

During the 2019/2020 financial year (the most recent reported information), 302 mergers were filed with the Commission. Of these, 82 were large mergers, 217 were intermediate and three were small. During this period, the Commission finalised its investigation in relation to 319 transactions. This represents a mere 5% decrease from the 336 mergers received in the 2018/2019 financial year. This decrease is significantly lower than what was initially anticipated at the start of the national lockdown, as a result of COVID-19. It is, however, unclear at this stage how many of these merger notifications related to distressed business.

Of the finalised mergers, 84 were large, 230 were intermediate and four were small. The majority of mergers therefore continue to be intermediate in size. During this period, 278 mergers were approved without conditions, while 33 mergers (10.3%) were approved subject to conditions. This is a decrease in the percentage of mergers that were approved subject to conditions from the 41 mergers (14%) approved in the 2018/2019 financial year. There were seven mergers prohibited in the 2019/2020 financial year, a slight increase from the four mergers that were prohibited in 2018/2019.

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New developments in jurisdictional assessment or procedure

Control is a once-off affair

The question of whether or not a party is required to notify the acquisition of control where it already has a form of control is a vexed question in South African competition law. The question was answered on 30 October 2017 by the CAC and confirmed by the Constitutional Court on 1 February 2019 in the matter between Hosken Consolidated Investments Ltd (**HCI**), Tsogo Sun Holdings Ltd (**Tsogo Sun**) and the Commission (Case No. 154/CAC/Sept17).

In the HCI case (30 October 2017), the CAC considered whether the acquiring firm, HCI, having obtained prior approval from the Commission to acquire sole control of an entity over which it exerts control, must still obtain merger approval when it crosses a so-called "bright line" (i.e. when its shareholding increases to more than 50%).

Prior to 2014, Tsogo Sun was jointly controlled by HCI and SABMiller plc (**SABMiller**). In 2014, SABMiller announced that it was divesting itself of its shareholding in Tsogo Sun, which would have the effect of leaving HCI the sole controller of Tsogo Sun. In the same year, HCI sought merger approval from the Competition Authorities for the acquisition of sole control of Tsogo Sun. The Tribunal unconditionally approved the merger on the basis of sole control even though HCI only owned 47.61% of the shares.

HCI then sought to increase its shareholding from 47.61% to more than 50%. The Commission issued an advisory opinion to HCI in which it expressed the view that the proposed transaction was notifiable as the proposed transaction would result in the crossing of a "bright line", because HCI would increase its shareholding in Tsogo Sun from 47.61% to more than 50%, resulting in HCI beneficially owning more than half of the issued share capital, a form of control specified in section 12(2)(a) of the Act.

HCI did not agree and ultimately appealed to the CAC, contending that the acquisition of sole control is a once-off affair and, accordingly, that once they had received approval for HCI to acquire sole control over Tsogo Sun, there was no requirement for HCI to obtain any further permission to increase its shareholding in Tsogo Sun over 50%.

The CAC confirmed its finding in previous cases where it held that a change of control is a once-off affair. This principle was confirmed by the Constitutional Court on appeal in early 2019, where it noted that for a transaction to be notifiable, it must first constitute a "merger" as contemplated in section 12(1) of the Act, and in terms of section 12(2) of the Act that one form of control (notably *de jure* control) is not more significant than any other form of control. Each of the instances of control listed in section 12(2) of the Act is freestanding and each, on its own, constitutes a "bright line". As such, the Constitutional Court confirmed than an acquisition of control is a once-off affair for which notification is only required upon the initial acquisition.

It is important here to note that the Constitutional Court only considered the position of firms moving from one form of sole control to another form of sole control, i.e. from *de facto* sole control to *de jure* sole control. The Constitutional Court did not consider whether a move from joint control to sole control would trigger merger notification requirements. There are differing views on how this judgment should apply in instances where a party's control is mitigated by some veto powers of other shareholders and it acquires unfettered sole control; here, the move from joint control to sole control may be a notifiable merger.

Notably, in October 2019, in the matter of *Brookfield Asset Management Inc/Oaktree Capital Group, LLC Open-end investment funds*, the Tribunal imposed a condition that if the acquiring firm in this matter acquires sole control over the target firm within two years

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from the implementation, no new merger notification would be required. However, after this two-year period, a merger notification for the acquisition of sole control of the target firm will require a full merger notification. As such, a move from joint to sole control is still notifiable, unless the Competition Authorities indicate otherwise in the remedies.

Jurisdiction of the South African Competition Authorities

Although not specifically a merger-related case, in the matter of *Competition Commission v Bank of America Merrill Lynch International Limited and Others* (175/CAC/Jul19), the CAC confirmed that the Act has broad jurisdiction and that section 3(1) of the Act, which reads "*this Act applies to all economic activity within or having an effect within the Republic except …*", applies to all entities, even if such entities are outside of South Africa, or if the conduct has an effect within South Africa. This matter is relevant for the purposes of determining whether a merger is caught by the Act, and as such, even if the parties to a merger are located outside of South Africa, if the merger has an effect within South Africa, the South African Competition Authorities will have jurisdiction over it if the thresholds for notification are met.

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

The last 12 months have seen a steady flow of mergers being notified to the Competition Authorities. Along a similar vein to the previous financial year, the Competition Authorities continued to be confronted with several large, complex transactions which gave rise to significant competition and public interest concerns. In response, the Competition Authorities have taken an increasingly interventionist approach in order to ensure that mergers are not implemented or that the issues arising from these mergers are appropriately addressed subject to conditions.

Priority sectors

The Commission has emphasised its commitment to focus on its previously identified priority sectors and has conducted several market inquiries, concluded several settlement agreements and reviewed and conditionally approved mergers in certain priority sectors. These priority sectors illustrate the areas that are of particular interest to the Competition Authorities and include:

- food and agro-processing;
- infrastructure and construction;
- healthcare;
- banking and financial services;
- energy;
- transport;
- intermediate industrial inputs; and
- information and communication technology, including digital platforms (which are dealt with in further detail below).

Although the Commission identified the above areas as its focus, it also receives a number of complaints from many sectors in the economy. In 2020, as a result of the regulations relating to COVID-19, the Commission received 201 COVID-19-related complaints, which pertained to essential products for the COVID-19 pandemic, as well as 235 non-COVID-19-related complaints. These non-COVID-19-related complaints were not merger-related, but should be noted as areas where the Commission may scrutinise the conduct of merging parties. The sectors with the most complaints for 2019/2020 were:

- healthcare;

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- manufacturing;
- information and communication technology;
- automotive;
- logistics and storage;
- wholesale and retail;
- food and agro-processing;
- construction;
- real estate;
- education;
- banking and financial services; and
- energy.

Digital markets and online platforms

In May 2020, the Commission released Draft Guidelines on Small Merger Notification (**Draft Guidelines**) for public comment. In terms of the Draft Guidelines, the Commission identified that there is a risk that small mergers by digital companies, which do not meet the financial turnover thresholds for automatic notification as set out above, may have a detrimental impact on innovation in the market.

In terms of the new Draft Guidelines, in addition to the small mergers that must be notified under the April 2009 practice note set out above, the Commission has proposed in the Draft Guidelines that parties must voluntarily inform the Commission of all small mergers where the acquiring firm, target firm or both operate in a digital market, and one of the following criteria is met:

- the consideration for the acquisition or investment exceeds R190 million and the target firm has activities in South Africa;
- the consideration for the acquisition of a part of the target firm is less than R190 million but effectively values the target firm at R190 million (for example, the acquisition of a 25% stake at R47.5 million). The target firm must also have activities in South Africa and, as a result of the acquisition, the acquiring firm must gain access to commercially sensitive information of the target firm or exert material influence or control over the target firm;
- one of the parties to the transaction has a market share of 35% or more in at least one digital market; or
- the proposed merger results in a combined post-merger market share at which the merged entity gains or reinforces dominance in a market.

If a party to a proposed transaction meets any of the above criteria, parties are advised to voluntarily inform the Commission of the small merger. As at the time of writing, the Draft Guidelines were still subject to public consideration. The Draft Guidelines raise a number of issues; for instance, that a "digital market" is not defined. It will be interesting to see what the final version of the guidelines that are published following the engagement with industry stakeholders will look like, as the established financial thresholds for automatic merger notification, which are set out above, are based on the turnover and asset values of the merging parties, whereas the Draft Guidelines for small mergers set out new tests which are based on the consideration of the acquisition and the market shares of the merging parties.

In addition, on 19 February 2021, the Commission announced its market inquiry into online intermediation platforms (**Online Market Inquiry**) to address potential concerns regarding regulating competition in digital economies. The Online Market Inquiry was officially launched on 19 May 2021, and the Commission indicated that it will take 18 months to complete the process, broadly focusing on market features that may:

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- hinder competition amongst the platforms themselves;
- give rise to discriminatory or exploitative treatment of users; and
- negatively impact on the participation of SMEs and/or HDP firms.

In particular, the Online Market Inquiry will focus on platforms that intermediate transactions between business users and consumers, including:

- eCommerce marketplaces;
- online classifieds;
- travel and accommodation aggregators;
- short-term accommodation intermediation;
- food delivery;
- application stores; and
- any other platforms identified in the course of the inquiry.

The Online Market Inquiry will specifically exclude data privacy issues, e-hailing services, pure gig economy platforms (intermediating a customer with an individual service provider), and search and social media, as well as the broader digital advertising ecosystem, except for digital advertising that poses a barrier to competing platforms expanding or business users participating in the online economy, or if digital advertising platforms offer online intermediation services themselves. The Online Market Inquiry will also not focus on Fintech platforms except in respect of the role of payment services in facilitating transactions on the online platforms.

It is clear from the Draft Guidelines for small mergers, as well as the Online Market Inquiry, that the Commission is focusing on digital markets and online platforms as a whole. This can be seen from the conditional approval of the merger between Google LLC (USA) and Fitbit Inc. (USA) in December 2020. This was a global merger, notified in several jurisdictions, including the EU, USA, Australia, Canada and Japan. The conditions imposed by the Competition Authorities are for a period of 10 years and are in line with the conditions in other jurisdictions. The conditions focus on the rapidly changing market, particularly for large global technology firms that operate across multiple jurisdictions.

Public interest

On 2 June 2016, the Commission published its final Guidelines on the Assessment of Public Interest Provisions in Merger Regulation (the **Public Interest Guidelines**). The Public Interest Guidelines provide guidance on how the Commission will assess public interest factors when considering a merger.

As noted above, the amendments to the Act seek to explicitly include public interest grounds in merger decisions. The aim is to address ownership and control, and to ensure that small businesses and firms owned or controlled by HDPs are supported. In particular, the Competition Authorities must consider the effect that the merger will have on the ability of SMEs, or firms controlled or owned by HDPs, to not only effectively enter into or expand in the market, but also to participate in a market. "Participate" relates to the ability or opportunities for firms to sustain themselves in the market. The Competition Authorities must also consider increasing the spread of ownership and, in particular, increase ownership by HDPs and workers in firms in a market.

During the financial year 2019/2020, the Commission recommended and/or imposed public interest conditions on 30 merger cases. Most of these merger cases raised a combination of public interest issues including, for instance, employment and the impact on HDPs and the development of SMEs. The Commission's intervention in mergers also resulted in the prevention of retrenchments for 45,027 employees. This is a substantial increase

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from the 7,092 potential retrenchments that were avoided as a result of the Commission's intervention in the 2018/2019 financial year. It is clear from this that employment is an extremely important factor in merger considerations for the Competition Authorities. The existing public interest conditions that we have seen for a number of years in South African law are employment-related conditions, which include: moratoriums on retrenchments for a fixed period after the approval or implementation of the merger; an obligation to restrict retrenchments; an obligation on merging parties to continue sourcing products from one of their suppliers under the terms of their current supplier agreement for a period of five years from implementation of the merger, in order to preserve jobs within the supplier; an obligation to provide in-house portable skills to the retrenched employees; and an obligation to fill any vacancies within the merged entity with the retrenched employees who have the required qualifications, skills, know-how and experience.

Behavioural conditions

In addition to the extensive public interest conditions imposed in the previous year, a number of behavioural conditions were imposed on merging parties in the 2019/2020 financial year. In the merger between the South African Breweries Proprietary Limited and the licensed brands and related assets currently held by Diageo South Africa Proprietary Limited, SAB, the largest beer manufacturer in South Africa, was required to ensure that any outlets that were solely supplied with beverage coolers or refrigerators by SAB or Diageo continue to be free to provide 10% of the capacity of such beverage cooler or refrigerator to competing third parties. In addition, SAB must not engage in tying, bundling and/or incentive strategies that would require or induce a customer to purchase any Diageo products on condition that the customer also purchase clear beer from SAB, or *vice versa*.

In the acquisition by Kwande Capital Proprietary Limited of the Glass Division of Nampak Products Limited, the merged entity was required to ensure that a material portion of its output be made available to third-party customers, with preference being given to firms that are owned or controlled by HDPs or SMEs.

Conditions relating to SMEs were also imposed in the *Marinvest S.r.I/Ignazio Messina & C. S.p.A*. merger, in terms of which for a period of three years post-transaction, the target firm will continue to use the services of their existing South African SME suppliers on the same terms and conditions that existed pre-transaction.

In terms of conditions relating to suppliers, in the *ASK Chemicals GmbH/SI Group South Africa Proprietary Limited* merger, the merged entity is required to conclude an amended licensing agreement with an existing third-party supplier which will endure for at least one year from the implementation date of the transaction.

In addition to the above, many of the behavioural remedies imposed on parties included conditions relating to prohibitions on the exchange of competitively sensitive information and the requirement to ring-fence certain portions of the merging parties' businesses.

Prohibitions

In the 2019/2020 financial year, the Competition Authorities prohibited seven mergers, which was an increase from the four transactions prohibited in the financial year ended March 2019. No transactions have been prohibited on public interest grounds alone in South Africa to date.

The following transactions represent some of the mergers that were prohibited largely due to concerns that arose as a result of the horizontal and/or vertical overlaps between the activities of the parties.

In the *JSE Ltd/Link Market Services South Africa (Pty) Ltd* matter, the Commission prohibited the transaction as it was concerned that it would allow the JSE to further entrench its dominance in the exchange market.

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In the *ASF/Vuka* merger, the Commission prohibited the transaction due to vertical foreclosure concerns in respect of transmission poles. The Commission found that the overall effect of the merger would likely result in higher prices of transmission poles to customers.

Hospital merger

In January 2019, the Tribunal prohibited the merger between Mediclinic Southern Africa (Pty) Ltd (**Mediclinic SA**) and Matlosana Medical Health Services (Pty) Ltd (**MMHS**) on the basis that the transaction would likely substantially prevent or lessen competition in the relevant market, that the tariffs of the target hospitals would increase significantly as a result of the merger for both insured and uninsured patients, and that the merger was also likely to significantly affect uninsured patients by limiting their ability to negotiate and switch to cheaper private hospitals, particularly the MMHS hospitals.

The merging parties neither tendered appropriate pricing remedies, nor provided appropriate remedies with regard to uninsured patients and the non-price factors such as quality and patient experience. The merging parties appealed to the CAC in February 2019, and when the appeal was heard in February 2020, the CAC upheld the appeal by Mediclinic SA of its proposed acquisition of MMHS, and found that the Tribunal erred in holding that the relevant local market included both Klerksdorp and Potchefstroom as these are separate geographic markets, and as such the merger will not give rise to a significant lessening of competition. The CAC further held that the prohibition of the merger in the public interest was not justified, based on the evidence. In February 2020, the Commission filed an application for leave to appeal at the Constitutional Court, and is awaiting the outcome.

Market inquiries

Data Services Market Inquiry

The Commission's Data Services Market Inquiry (**Data Inquiry**) was initiated in 2018. The purpose of the inquiry was to understand the factors or features of the market that may cause high prices for data services, and to make recommendations that would result in lower prices for data services. Public hearings were held to draw in more public participation and, in addition to operators and market participants, important submissions were received from consumer rights and research organisations. Submissions focused on four aspects identified by the Data Inquiry team:

i. whether data prices are higher than they ought to be;
ii. what factors result in prices being higher than they ought to be;
iii. how these factors can potentially be remedied; and
iv. the impact of data prices and access to data on lower-income customers, rural customers, small businesses and the unemployed.

In terms of the recommendations, the country's two largest mobile operators were required to independently reach an agreement with the Commission on substantially reducing data prices within two months of the release of the Data Inquiry report, and both agreed to mobile data price reductions with the Commission.

Grocery Retail Sector Market Inquiry

The Grocery Retail Market Inquiry (**GRMI**) commenced in 2016, seeking to examine if there are any features or a combination of features in the sector that may prevent, distort or restrict competition in the grocery retail sector. The inquiry focused on the following areas:

i. the impact of the expansion, diversification and consolidation of national supermarket chains on small and independent retailers;
ii. the impact of long-term exclusive leases on competition in the sector;

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iii. the dynamics of competition between local and foreign-owned small and independent retailers;
iv. the impact of regulations, including municipal town planning and by-laws, on small and independent retailers;
v. the impact of buyer groups on small and independent retailers; and
vi. the impact of certain identified value chains on the operations of small and independent retailers.

The GRMI has been completed and recommendations were published on 25 November 2019. Three keys areas of concern were identified in the final report:
i. long-term exclusive lease agreements and buyer power;
ii. competitiveness of small and independent retailers; and
iii. the regulatory landscape.

The GRMI had initially recommended that certain conduct must be undertaken within six months of the publication of the final report. In this regard, the GRMI recommended the following in its report:
i. exclusive leases limit consumer choice and also prevent small/new retailers from entering into or expanding in the grocery retail market. As result of this, the Commission has recommended steps be taken to remove exclusive leases over a five-year period. National supermarket chains must conclude agreements with the Commission to cease the enforcement of exclusivity provisions (and clauses with a substantially similar effect) in long-term lease agreements. Certain national supermarket chains have already committed to doing so;
ii. suppliers of grocery and household goods, through a facilitator appointed by the Minister of the DTIC, must commit themselves, in the form of a code of conduct, to ensure equal treatment (especially in respect of the granting of rebates) of retail and wholesale customers; and
iii. retail property landlords, through a facilitator appointed by the Minister of the DTIC, must commit themselves, in the form of a code of conduct, to ensure equal treatment of tenants.

It should be noted that as a result of the COVID-19 pandemic and national lockdown in South Africa, which had a material impact on the South African economy and the retail sector in particular, the Commission extended the period for engagement and reaching agreement in respect of all the GRMI recommendations. Parties had until 28 August 2020 to engage with the Commission in respect of the GRMI recommendations.

In October 2020, two of the largest fast-moving consumer goods (**FMCG**) retailers in South Africa, Shoprite Checkers (Pty) Ltd and Pick n Pay Retailers Proprietary Limited, took steps in respect of the GRMI recommendations. In this regard, Shoprite Checkers agreed to stop enforcing exclusivity provisions in its long-term exclusive lease agreements with its landlords against SMEs and speciality and limited-line stores. Separately, the Commission announced that it had concluded a consent agreement with Pick n Pay in respect of its exclusive lease agreements. At the time of writing, the consent agreement has not yet been confirmed by the Tribunal.

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

As noted above, the *ASF/Vuka* merger was prohibited due to the vertical foreclosure concerns in relation to transmission poles. The ASF Group supplies transmission pole logs

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and building and fencing pole logs, which are used as inputs by downstream manufacturers, including Vuka. The Commission prohibited the merger as it was of the view that the merged entity would have the ability to engage in input foreclosure strategies against rivals of Vuka, as the ASF Group is the single largest producer of transmission pole logs available to independent downstream players in Limpopo, Mpumalanga and eSwatini.

The Commission found that barriers to entry and expansion in the upstream market are high, and downstream competitors of Vuka are dependent on the ASF Group for supply of transmission pole logs. The Commission further found that the merged entity would have an incentive to foreclosure input in respect of transmission pole logs. The Commission also found that the proposed transaction would result in a negative public interest outcome in respect of the broader forestry industry in South Africa. The merging parties were unable to propose workable remedies to the Commission, and the proposed transaction was prohibited.

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

From the merger decisions discussed above, it is clear that in South Africa, the merger conditions imposed by the Competition Authorities are innovative and far-reaching, with a focus not only on employment concerns but also on engagements with SMEs and HDPs.

As such, the scope for merger transactions to involve lengthy negotiation is increased when the proposed transaction involves public interest considerations, including but not limited to employment, local procurement, broad-based black economic empowerment and SMEs. This is particularly so, given the involvement of Government departments and trade unions.

It is therefore recommended that, where it is anticipated that competition or public interest concerns may arise, the parties consider upfront the remedies that they are willing to commit to. Such consideration of the remedies can assist in shortening the timeframe and allowing for approval of a transaction which may otherwise have been prohibited.

Key policy developments

The key policy developments for South Africa relate to the amendments to the Act as well as the Draft Guidelines for small mergers, which are both set out in detail above.

Reform proposals

A number of amendments and proposed amendments, as well as the introduction of Draft Guidelines in respect of small mergers, have been made to the merger provisions of the South African Act. These have been set out in detail above. It is unclear when the remaining amendments to the Act will come into effect, but this is likely to be in the near future.

As many of the amendments are currently untested by the Competition Authorities, it is likely that we will only be able to see in the coming years the substantial effect that the amendments to the Act will have on all businesses operating in South Africa. The amendments will increase the complexity associated with complying with the Act, and are likely to radically change the way that mergers, as well as prohibited practices, are investigated and prosecuted by the Competition Authorities.

It will also be interesting to see the developments on the Draft Guidelines for small mergers in respect of digital markets, particularly in light of the Online Market Inquiry. The Draft Guidelines will have a substantial impact on digital markets, and will change the approach for any proposed transactions in this sector.

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Switzerland

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Key features of the Swiss merger control regime

The Swiss merger control regime is distinct from other regimes in mainly three aspects: (1) high thresholds regarding the filing obligation, which leads to a relatively small number of merger control cases; (2) high thresholds for the intervention of the Competition Commission ("ComCo"), which is the reason for only a few prohibited mergers to date; and (3) the relationship with the EU merger control regime.

Thresholds for filings

Article 9 Cartel Act ("CartA") provides for the mandatory notification of a merger or, more broadly speaking, a concentration, if certain thresholds are met. There are two alternative sets of thresholds:

a. Turnover thresholds: an aggregate turnover of all undertakings concerned of at least 2 billion Swiss francs worldwide or an aggregate turnover in Switzerland of at least 500 million Swiss francs; and additionally, individual turnover in Switzerland of each of at least two of the undertakings concerned, of at least 100 million Swiss francs.
b. Dominance threshold: if, in a previous investigation, ComCo found that a specific undertaking holds a dominant position in a certain market, every concentration involving that undertaking in that market, or in a neighbouring, upstream or downstream market, is subject to the notification requirement. The Federal Administrative Court specified, in a decision in April 2014, that a neighbouring market includes: (i) markets concerning products that are to some extent substitutes; or (ii) markets concerning products with parallel demand.

Substantive test

The substantive merger test which allows ComCo to fully prohibit a transaction or to approve a transaction on certain conditions is rather limited. The merger review is based on a dominance test. ComCo may prohibit a transaction if it:

a. creates or strengthens a dominant position which could eliminate effective competition; and
b. does not strengthen competition in another market, which outweighs the negative effects of the dominant position.

This limited test is interpreted by the courts in a narrow way. For example, the Federal Court found that ComCo has to demonstrate a causal link between a notified transaction and the elimination of effective competition. This means that in a situation of pre-existing dominance (which already eliminated effective competition), the merger control regime does not provide for the possibility of intervention. This limited test is subject to a current revision project which aims at introducing the "significant impediment to effective competition" ("SIEC") test (see the section below on "*Reform proposals*").

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Two of ComCo's prohibition decisions are worth mentioning. In 2010, ComCo prohibited the planned concentration between Orange and Sunrise, which would have reduced the number of competitors from three to two on the mobile communication market. According to ComCo, the merger between Orange and Sunrise would have created a collectively dominant position with Swisscom in the mobile telephony market. The parties' argument, that the merger was needed to challenge the dominant position of Swisscom (the former monopolist in the market, whereas the Swiss Federal State still is the majority shareholder), did not convince ComCo.

In a ruling dated 22 May 2017, ComCo refused to clear the planned merger between Ticketcorner and Starticket. These companies sell tickets for the promoters of concerts, shows, etc. Their services include the physical and online sale of tickets (primary ticketing) and the marketing of events (such as advertising in the media and a presence on social networks). In addition, Ticketcorner and Starticket provide promoters with software that allows them to sell tickets themselves (direct sales). The detailed review carried out by ComCo revealed that although the market for direct sales did not present any problems, in the market for primary ticketing there was evidence that Ticketcorner already had a dominant position. The merger would have allowed the two companies to control the Swiss market for primary ticketing and to eliminate effective competition. Ticketcorner has appealed ComCo's decision. The appeal is still pending.

Relationship with EU regime

The Swiss competition authorities may communicate with the EU authorities based on the agreement between Switzerland and the EU on cooperation and exchange of information between their respective competition authorities. This agreement allows them to mutually exchange specific case-related confidential information. The scope of this information-exchange agreement is broader than in previous EU cooperation agreements with non-EU Member States, and is therefore called a "Second Generation Agreement" in the EU. The crucial point in this new generation of agreements is that confidential information can be transmitted without the parties' consent, subject to exceptions. ComCo frequently makes use of the opportunity to informally exchange information on specific cases, such as merger control cases.

This information exchange enables the authorities to make a faster evaluation of the concentration as well as to coordinate with the proceedings of the EU. Generally, a simplified notification procedure may be discussed with the authorities if the EU filing form is attached to the Swiss filing form. ComCo is committed to avoiding inconsistencies in relation to EU merger proceedings, which are conducted in parallel. Where the EU decision imposes remedies, ComCo tends to request that such remedies are also applied to the Swiss market.

Overview of merger control activity during the last 12 months

Statistics

In the past year, 35 merger projects were notified to ComCo (total amount of filings in 2019: 40). Thirty-four mergers were cleared in Phase I (one-month review after confirmation of completeness of the draft filing) and one transaction was cleared in Phase II (after an additional four-month review subsequent to Phase I). ComCo did not prohibit any merger projects, nor were any conditions requested in a clearing decision in the year under review.

Phase II investigations

In October 2020, ComCo cleared the planned merger between Liberty Global (with its affiliate UPC) and Sunrise in a Phase I investigation. Although ComCo identified competition

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concerns, which could have been investigated in more detail in a Phase II proceeding, ComCo stated that this merger project was very similar to the merger cleared in 2019 in which Sunrise intended to take over UPC. That merger was cleared after a Phase II investigation. However, this planned transaction was not closed, because Sunrise's shareholders did not approve the deal. The 2020 merger was structured in reverse order: UPC (i.e. Liberty Global) purchased Sunrise, whereas in 2019, Sunrise intended to purchase UPC. ComCo refrained from opening a Phase II investigation this time round, since the markets concerned and the merger project were essentially similar to the already approved deal. Therefore, the Phase II clearance decision of September 2019 is noteworthy: with the takeover of UPC and its cable network infrastructure, Sunrise would have become the second-largest telecommunications company in Switzerland. Like Swisscom (market leader), Sunrise would have been able to offer fixed network, broadband internet and mobile telephony services, and digital television through its own infrastructure in Switzerland. ComCo examined the planned merger in detail to determine whether there was potential for joint market dominance with Swisscom. It concluded that there would not be any collective dominance and that coordination between the two companies was unlikely, because the parties to the mergers and Swisscom are differently positioned. ComCo took the view that the merger would not lead to the creation or consolidation of a dominant position in any of the markets analysed.

This decision is particularly interesting for two reasons: firstly, as stated above, in 2010 ComCo prohibited the planned concentration between Orange and Sunrise, which would have reduced the number of competitors from three to two in the mobile communication market. According to ComCo, the merger between Orange and Sunrise would have created a collectively dominant position with Swisscom in the mobile telephony market. Since UPC is mainly active on its cable network and not in the mobile communication market, the current merger project arguably would not have resulted in a three-to-two merger. The companies were able to convince ComCo that the merger was needed to challenge the strong position of the market leader, Swisscom. Secondly, ComCo did not require conditions. This may be seen against the background that remedies against the merged undertaking would have most probably weakened the merged undertaking in its competition with Swisscom. Since Swisscom was not party to the merger, remedies against the collective dominance could obviously not be imposed on Swisscom.

In March 2020, ComCo cleared the merger of Planzer and Camion-Transport (both logistics providers) with SBB Cargo (the branch of the state-owned railway company providing transportation services for goods). According to the published decision, the merger leads to a collectively dominant position in relation to handling services in combined transport in a local area (north-east Switzerland). This market constituted only a small part of the turnover of the merger. Still, in this geographically narrow relevant market for handling services in combined transport, the merger resulted in a combined market share of around 80 to 90%. However, ComCo stated that the elimination of effective competition had not been proven to the required legal standard. This is surprising, since merger control has a future-oriented focus. It is not evident that a negative effect of the dominant position may be ruled out *ex ante*. It is conceivable that ComCo wanted to avoid any discussion of efficiencies, which were criticised in a recent case of an infrastructure project concerning logistics (the case of *Gateway Basel North*, decided in 2019). Moreover, conditions were not discussed in the 2020 decision, possibly because conditions would have been difficult to implement in this case.

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New developments in jurisdictional assessment or procedure

Joint ventures

Corporate joint ventures are subject to merger control if the joint venture performs all the functions of an autonomous economic entity on a lasting basis. If two or more undertakings establish an undertaking that they intend to control jointly, this constitutes a concentration of undertakings if the joint venture performs the aforementioned functions and if business activities from at least one of the controlling undertakings are transferred to the joint venture.

According to an update of the merger guidelines regarding merger notifications dated October 2019, in the case of a joint venture purchasing the target company, generally only the joint venture (not its holding companies) is considered as involved companies. Therefore, the turnover of the holding companies is irrelevant in relation to the notification thresholds. However, the holding companies of a joint venture purchasing a target have to be taken into account if: (i) the joint venture is established specifically for the acquisition of the target company or has not yet commenced its business activities; (ii) the existing joint venture is not a full-function joint venture; (iii) the joint venture is an association of undertakings; or (iv) the parent companies are the actual actors in the operation.

The Secretariat of ComCo decided in one case that a merger is exempted from notification, even if the parties involved meet the turnover thresholds, if the following two conditions are both met: firstly, the joint venture neither has activities in Switzerland nor generates any revenue in Switzerland; and secondly, that such activities or revenues in Switzerland are neither planned nor expected in the future.

De facto joint control

In line with European competition law, control may be attributed to certain minority shareholders even in the absence of specific veto rights. This may be the case where the minority shareholdings together provide the means for controlling the target undertaking. Exceptionally, collective actions can also occur on a *de facto* basis where strong common interests exist between the minority shareholders, to the effect that they would not act against each other in exercising their rights in relation to the joint venture.

In the recent decision regarding the *SBB Cargo* case (merger of Planzer and Camion-Transport with SBB Cargo, see section above on "*Overview of merger control activity during the last 12 months*"), ComCo stated that the corresponding EU guidelines only contain indications for *de facto* control, and that the list in the EU guidelines is by no means comprehensive from a Swiss law perspective. ComCo explained that based on the shareholders' agreement, the joint interest of minority shareholders was emphasised and that, according to the situation as described in the merger control filing, the joint interests were strong between all shareholders (including such minority shareholders without veto rights or other controlling powers). While case specific, these statements may be interpreted as a stricter approach in relation to minority shareholdings; at least, the arguments put forward by ComCo in relation to potential *de facto* control apply to many minority shareholdings. In particular, minority shareholdings of competitors should be reviewed even more carefully in relation to potential merger control filing obligations in the future.

Key industry sectors reviewed

ComCo has no specific focus in relation to its enforcement policy in merger cases.

In relation to mergers in the digital economy, there have been no changes to law, process or guidance. However, in ComCo's 2016 annual report, it was stated that the turnover-based

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thresholds in merger control could lead to a situation wherein mergers are not controlled, even though in relation to customer data, a dominant position exists. Following this statement, the Swiss Government explained, in the 2017 report on the legal framework of the digital economy, that it may be necessary and useful to adapt the merger notification criteria so that the authorities can examine mergers or acquisitions of young internet platforms that could possibly impact competition. The introduction of a SIEC test when examining mergers could also help to consider the improved efficiency of merged platforms according to the Government (see section below on "*Reform proposals*").

While various legal tests and reform proposals are discussed in legal commentaries on the digital economy, the Swiss Government is generally reluctant to take the lead in relation to new legal concepts. Generally, the approach is to leave it up to the authorities and courts to concretise the existing legal provisions in view of new technological developments.

Key economic appraisal techniques applied

In its assessment of the effects of a concentration, ComCo generally relies on well-established concepts. However, economic appraisal techniques are not always used in a detailed way. For example, when reviewing coordinated effects, ComCo relies on the following factors: number of companies involved; market shares of the companies involved; market concentration; symmetries; market growth; market transparency; multimarket relations; market position of the demand side; and potential competition. Of particular interest are often symmetries between the merging undertakings, i.e. characteristics of the companies, which ultimately lead to extensive symmetry with regard to the market appearance and the available market parameters concerning the offered products and services. For example: technology; number of products in the product portfolio; market shares; capacities; or costs are considered. However, these factors are generally not reviewed and balanced in a systematic economic framework, but rather in a legal assessment based on various factual assumptions.

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

Parties may propose remedies for potential competition issues at any stage of the merger control proceedings. The most appropriate moment for the commencement of remedy negotiations should be assessed in each case depending on the specific circumstances at hand.

Should parties want to discuss remedies in Phase I, corresponding proposals should be included in the draft filing, because otherwise the risk is that ComCo may enter into a Phase II investigation to gain more time to assess the likely effects of such remedies. Then again, by including remedies in the draft filing, ComCo most likely would ask for further information in relation to the effects of remedies proposed before confirming the completeness of the draft filing. Therefore, starting negotiations in a Phase I investigation involves the risk that the Phase I investigation may be delayed, while the opening of a Phase II investigation may not be avoided for certain. Consequently, to date, proposals for remedies have only rarely been offered by the parties in a Phase I investigation.

Another reason why parties generally wait until Phase II for introducing proposals for remedies is that ComCo's report outlining the reasons for the opening of a Phase II investigation may be specifically addressed by the proposed remedies. ComCo sends its Phase I report within the one-month deadline of Phase I to the parties involved. Issues

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which are not raised in the report do not need to be addressed by remedies. Moreover, the parties may invest more time and energy in the reasoning for the remedies addressing the specific arguments outlined by ComCo in its Phase I report.

Key policy developments

According to the CartA, ComCo is obliged to refrain from considering public policy arguments. Corresponding arguments may be heard by the Government which may clear a proposed merger after a prohibition decision by ComCo, should public interest be considered more important than the negative effects on competition. ComCo's understanding of its role is focused on the economic effects of a merger. Non-industrial economic reasons, such as the protection of jobs or the easing of the negative effects of structural changes, are therefore not taken into account.

An exception to this rule may be the merger case regarding the infrastructure project Gateway Basel North, decided in 2019. In this case, it seems that public policy consideration might have influenced the clearance decision, because ComCo apparently was not intending to prevent a large infrastructure project of national significance of the state-owned railway company SBB.

Reform proposals

After the Swiss Parliament rejected the revision project of the CartA in 2014, which proposed significant changes strengthening merger control, ComCo repeatedly stated that mergers were only cleared because of the currently high thresholds. It appears that ComCo would prefer to intervene more rigorously; however, it is not willing to do so without a revision of the CartA.

In February 2020, the Government mandated the competent governmental department to draft a legislative project regarding the revision of the CartA, in which the modernisation of merger control will be a key element. The Government stated that it intends to change the substantive test from the current dominance test to the SIEC test. This revision aims to align the Swiss intervention threshold with the international standard in merger control. The current revision project is based on two studies conducted by economists which show that positive effects on competition in Switzerland are to be expected from such a change.

The Government has announced that it will shortly start the consultation on this proposal. At this time, all interested parties will be able to comment on the revision project before Parliament deliberates on the matter.

The Swiss regime in relation to foreign direct investment is rather liberal. Certain relations apply across sectors, such as restrictions on foreign persons purchasing real estate in Switzerland, whereas certain regulations concern specific sectors, such as the financial and telecom sector. However, no foreign direct investment review process has been established to date. In 2020, Parliament instructed the Government to draft a proposal for such legislation. We expect the corresponding draft to be published and debated next year. Based on this proposal, potential dependencies with the merger control procedures may be evaluated.

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Turkey

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Overview of merger control activity during the last 12 months

The Turkish merger control regime is primarily regulated by the Law on Protection of Competition No. 4054 ("Law No. 4054") dated December 13, 1994, which was recently amended on June 24, 2020 ("Amendment Law"), and Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("Merger Communiqué") published on October 7, 2010. The Merger Communiqué entered into force as of January 1, 2011 and was amended on February 1, 2013. Subsequently, on February 24, 2017, Communiqué No. 2010/4 was amended by Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 ("Communiqué No. 2017/2").

According to the annual statistics of the Mergers and Acquisitions Status Report for 2020, the Competition Board ("Board") reviewed 220 transactions in total, including: 190 mergers and acquisitions that were approved unconditionally; one decision that was approved conditionally; and one decision that was not approved. Twenty-eight were out of the scope of merger control (i.e. they either did not meet the turnover thresholds or fell outside the scope of the merger control system due to a lack of change in control).

New developments in jurisdictional assessment or procedure

The major development in the Turkish competition law regime is the Amendment Law. The draft law was officially approved by the Turkish Parliament on June 16, 2020. The Amendment Law entered into force on June 24, 2020 – on the day it was published in the Official Gazette. The Amendment Law aims to achieve further compliance with the EU competition regime, on which it is closely modelled. The Amendment Law continues to set out the main rules under Article 4 (concerning agreements, concerted practices and decisions restricting competition), Article 6 (concerning abuse of dominant position) and Article 7 (concerning mergers and acquisitions) of Law No. 4054, yet the amendments: (i) introduce efficient enhancing procedures and mechanisms; and (ii) clarify mechanisms to sustain legal certainty in practice, to a certain extent. To this extent, new mechanisms adopted in relation to a selection of cases include the following: (i) the substantive test applicable to merger control analysis; (ii) behavioural and structural remedies applicable to anticompetitive conduct; and (iii) procedural tools enabling the Board to end its proceedings in certain cases without going through the whole procedure when the parties opt for a commitment or settlement mechanism. Below are the key changes introduced by the Amendment Law:

- *De minimis* principle: The Board can decide not to launch a fully fledged investigation for agreements, concerted practices and/or decisions of association of undertakings which do not exceed the market share and/or turnover thresholds that will be determined by the Board.

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- Significant impediment of effective competition ("SIEC") test: In parallel with EU competition law, the current dominance test is replaced by the SIEC test. Accordingly, M&A transactions significantly impeding competition can also be prohibited. On the other hand, the SIEC test is regarded to reduce over-enforcement as focus is placed on whether and how much the competition is impeded as a result of a transaction.
- Behavioural and structural remedies: In cases where the behavioural remedies have failed, structural remedies may be applied for anticompetitive conducts. Application of the remedy mechanism has been newly introduced to Articles 4 and 6, and the mechanism previously applicable under Article 7 has changed. Accordingly, the new mechanism applicable for all anticompetitive conduct assessments sets application/proof of ineffectiveness of behavioural remedies as a precondition for structural remedies.
- Settlement: The Board, *ex officio* or on the parties' request, can initiate a settlement procedure. Parties that admit to an infringement can apply for the settlement procedure up until the official notification of the investigation report.
- Commitment: Undertakings or associations of undertakings can voluntarily offer commitments during a preliminary investigation or fully fledged investigation to eliminate the Competition Authority's ("Authority") competitive concerns in terms of Articles 4 and 6. Depending on the sufficiency and the timing of the commitments, the Board can decide not to launch a fully fledged investigation following the preliminary investigation or to end an ongoing investigation without completing the entire investigation procedure. In any event, the commitments will not be accepted for violations such as price-fixing between competitors, territory- or customer-sharing or restriction of supply.
- On-site inspections: This amendment confirms the current practice of the case handlers, who inspect and make copies of all information and documents in companies' physical and electronic records.
- Self-assessment procedure: The amendment provides legal certainty to the individual exemption regime as it is sets forth that the "self-assessment" principle applies to certain agreements, concerted practices and decisions that potentially restrict competition.
- Time extension for the additional opinions: The 15-day time period for submission of the Authority's additional opinion can be now doubled if deemed necessary.

The Authority recently published its Guidelines on Examination of Digital Data during On-Site Inspections on October 8, 2020, which set forth the general principles regarding the examination, processing and storage of data and documents held in electronic media and information systems during on-site inspections. Furthermore, the secondary legislation regarding the commitment mechanism and the *de minimis* mechanism (Communiqué No. 2021/2 on Remedies for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position; and Communiqué No. 2021/3 on *De Minimis* Applications for Agreements, Concerted Practices and Decisions of Associations of Undertakings) came into force on March 16, 2021.

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

Traditionally, the Authority pays special attention to transactions which take place in sectors where infringements of competition are frequently observed and the concentration level is high. Concentrations that concern strategic sectors important to the country's economy (such as automotive, construction, telecommunications, energy, etc.) also attract the Authority's special scrutiny. The sector reports published annually by the Authority might also be an indicator of the sectors that attract the attention of the Authority.

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The last three sector reports examined the expo, nut and television broadcasting sectors, respectively. The Authority's case handlers are always extremely eager to issue information requests (thereby cutting the review period) in transactions relating to these sectors, and even transactions that raise low-level competition law concerns are looked into very carefully. In some sectors, the Authority is also statutorily required to seek the written opinion of other Turkish governmental bodies (such as the Turkish Information Technologies and Communication Authority, pursuant to Section 7/2 of the Law on Electronic Communication No. 5809). In such instances, the statutory opinion usually becomes a hold-up item that slows down the review process of the notified transaction.

The consolidated statistics regarding merger cases in 2020 show that the transactions in the chemical and mining sector took the lead with 39 notifications, followed by the vehicle and transportation sector with 28 notifications.

The Board adopted many **significant decisions** in the past year, examples of which are summarised below.

The transaction concerning the combination of the two automotive companies Fiat Chrysler Automobiles N.V. and Peugeot S.A., through the merger of Peugeot S.A. with and into Fiat Chrysler Automobiles N.V. ("Fiat"), had been taken to Phase II (July 17, 2020; 20-34/441-M). The short-form decision indicates that the notified transaction would not result in the significant impediment of effective competition in the market for manufacturing and sales of passenger cars and the market for manufacturing and sales of light commercial vehicles between the gross weight of 3.5–6 tonnes. However, pursuant to Article 7 of Law No. 4054, the notified transaction would result in the significant impediment of effective competition in the market for manufacturing and sale of light commercial vehicles up to the gross weight of 3.5 tonnes. Accordingly, the transaction has been approved within the scope of the commitments submitted to the Authority by Fiat and Koç Holding A.Ş. (December 30, 2020; 20-57/794-354). The reasoned decision has not yet been published.

In another Phase II decision related to the transaction concerning the acquisition of sole control over Gülçiçek Kimya ve Uçan Yağlar Sanayi ve Ticaret A.Ş. by Fragar (Europe) SA, the unconditional approval decision rendered in this regard is prominent in the sense that even though the combination of the undertakings in question would give rise to significant market power in Turkey, the Board cleared the transaction by taking into account the parties' and their competitors' Turkish and global market shares and the competitive dynamics of the market both globally and in Turkey (June 25, 2020; 20-31/388-174). The Board determined that the parties' activities (i) horizontally overlap with respect to the sale and production of fragrances, and (ii) vertically overlap with respect to the sale and production of fragrances and aromatic chemicals. In terms of the assessment of other players within the market, the Board found that there are many global competitors who are active in the Turkish markets via imports. Therefore, the Board decided that these players and the global market conditions should also be taken into consideration for the assessment of the transaction. Thereby, upon its assessment of the parties' Turkish and global market shares and the global market dynamics, the Board found that the parties' competitors hold significant market power in Turkey. The Board has also assessed that the "aroma chemicals" product used as an input for the perfume market where Gülçiçek operates globally and in Turkey is sold to customers in Turkey by Firmenich through its affiliate. Ultimately, the Board decided that the transaction would not give rise to anticompetitive effects due to the: (i) dynamic nature of the market; (ii) homogenous structure of the retail level; (iii) lack of or very limited entry barriers; (iv) existence of and the ease of switching between local and global suppliers; and (v) level of countervailing buyer power. Therefore, the Board unconditionally cleared the transaction within the scope of the Phase II review.

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Another interesting decision rendered in 2020 was the acquisition of sole control over the business solutions branch of Johnson Controls International plc by Brookfield Asset Management Inc. ("Brookfield") (April 30, 2020; 20-21/278-132). In this decision, the Board imposed two separate administrative fines on Brookfield after finding that: (i) Brookfield closed the acquisition of the power solutions business of Johnson Controls International plc without notifying the Board and waiting for its approval; and (ii) Brookfield submitted false and misleading information regarding its Turkish turnover.

In its assessment of violation of the suspension requirement, the Board compared the closing and notification dates, and consequently found that Brookfield notified the transaction approximately five months after its closing. The Board also acknowledged that the contemplated transaction was notified before the Commission and was unconditionally approved on February 14, 2019.

As a result, while the Board ultimately approved the transaction, it imposed an administrative monetary fine of 0.1% of Brookfield's annual turnover for gun-jumping. Furthermore, the Board imposed a separate monetary fine due to misleading information, as Brookfield provided its Turkish turnover without including the turnover of one of its recently acquired subsidiaries.

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

The Turkish merger control regime currently utilises a SIEC test in the evaluation of concentrations. In line with EU law, the Amendment Law replaces the dominance test with the SIEC test. Based on the new substantive test, mergers and acquisitions that do not significantly impede effective competition in a relevant product market within the whole or part of Turkey would be cleared by the Board. This amendment aims to allow a more reliable assessment of the unilateral and cooperation effects that might arise as a result of mergers or acquisitions. The Board will be able to prohibit not only transactions that may result in the creation of a dominant position or strengthen an existing dominant position, but also those that can significantly impede effective competition.

On the other hand, the SIEC test may also reduce over-enforcement as it focuses more on whether and how much competition is impeded as a result of a transaction. Thus, pro-competitive mergers and acquisitions may benefit from the test even though a transaction leads to significant market power based on, for instance, major efficiencies. Likewise, dominant undertakings contemplating transactions with *de minimis* impact may also benefit from this new approach.

As the amendments to Law No. 4054 have only recently come into force, although the Board has started to apply the relevant SIEC test in its decisions, it has not published detailed assessments pertaining to the implementation of such test. However, as the guidelines and secondary legislation have not been revised and new guidelines have not been introduced as a result of the changes in the primary legislation, how the SIEC test will be incorporated remains unclear.

Within the previous implementation of the Law, pursuant to Article 13/II of the Merger Communiqué, mergers and acquisitions which do not create or strengthen a sole or joint dominant position, and which do not significantly impede effective competition in a relevant product market within the whole or part of Turkey, shall be cleared by the Board. Article 3 of Law No. 4054 defines a dominant position as: "[T]he power of one or more undertakings in a particular market to determine economic parameters such as price, supply,

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the amount of production and distribution, by acting independently of their competitors and customers." The Guideline on the Assessment of Horizontal Mergers and Acquisitions ("Horizontal Merger Guideline") states that market shares higher than 50% may be used as an indicator of a dominant position, whereas aggregate market shares below 25% may be used as a presumption that the transaction does not pose competition law concerns. In practice, market shares of about 40% and higher are generally considered, along with other factors such as vertical foreclosure or barriers to entry, as an indicator of a dominant position in a relevant market. However, a merger or acquisition can only be blocked when the concentration not only creates or strengthens a dominant position, but also significantly impedes competition in the whole territory of Turkey or in a substantial part of it, pursuant to Article 7 of Law No. 4054.

On the other hand, there were a couple of exceptional cases where the Board discussed the coordinated effects under a "joint dominance test" and rejected some transactions on those grounds. For instance, transactions for the sale of certain cement factories by the Savings Deposit Insurance Fund were rejected after the Board evaluated the coordinated effects of the mergers under a joint dominance test and blocked the transactions on the ground that they would lead to joint dominance in the relevant market. The Board took note of factors such as "structural links between the undertakings in the market" and "past coordinative behaviour", in addition to "entry barriers", "transparency of the market" and the "structure of demand". It concluded that certain factory sales would result in the creation of joint dominance by certain players in the market whereby competition would be significantly impeded. Nonetheless, the High State Court overturned the Board's decision and decided that the dominance test does not cover joint dominance. This has been a very controversial topic ever since, as the Board has not prohibited any transaction on the grounds of joint dominance following the decision of the High State Court.

In terms of joint venture transactions, to qualify as a concentration subject to merger control, a joint venture must be of a full-function character, satisfying two criteria: (i) existence of joint control in the joint venture; and (ii) the joint venture being an independent economic entity established on a lasting basis (i.e. having adequate capital, labour and an indefinite duration). If the transaction is a full-function joint venture, the standard dominance test is applied. Additionally, regardless of whether the joint venture is full function, it should not have as its object or effect the restriction of competition among the parties or between the parties and the joint venture itself.

On the other hand, economic analysis and econometric modelling has been seen more often in the last years. For instance, in the *AFM/Mars Cinema* case (11-57/1473-539, November 17, 2011), the Board used the OLS and 2SLS estimation models in order to define the price increases expected from the transaction. It also employed the *Breusch/Pagan*, *Breusch-Pagan/Godfrey/Cook-Weisberg*, *White/Koenker* NR2 tests and the Arellano-Bond test on the simulation model. Such economic analyses are rare, but increasing in practice. Economic analyses which are used more often are the HHI and CRN indices to analyse concentration levels. In 2019, the Board also published the *Handbook on Economic Analyses Used in Board Decisions*, which outlines the most prominent methods utilised by the Authority (e.g. correlation analysis, SSNIP test, Elzinga-Hogarty test).

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

Pursuant to Article 10 of Law No. 4054, once the formal notification has been made, the Board, upon its preliminary review (Phase I) of the notification, will decide either to approve

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or to investigate the transaction further (Phase II). The Board notifies the parties of the outcome within 30 calendar days following a complete filing. Regarding the procedure and steps of a Phase II review, Law No. 4054 makes reference to the relevant articles which govern the investigation procedures for cartel and abuse of dominance cases.

The Board may grant conditional clearances to concentrations. In the case of a conditional clearance, the parties comply with certain obligations such as divestments, licensing or behavioural commitments to help overcome potential competition issues. The Guidelines on Remedies that are Acceptable by the Authority in Merger/Acquisition Transactions provide guidance regarding remedies. The parties can close the transaction after the clearance and before the remedies have been complied with; however, the clearance becomes void if the parties do not fully comply with the remedy conditions.

As is evident from the above, the Merger Communiqué enables the parties to provide commitments to remedy substantive competition law issues that may result from a concentration. The parties may submit to the Board proposals for possible remedies either during the preliminary review (Phase I) or the investigation period (Phase II). If the parties decide to submit the commitment during the preliminary review period (Phase I), the notification is deemed filed only on the date of the submission of the commitment. The commitment can also be submitted together with the notification form. In such a case, a signed version of the commitment that contains detailed information on the context of the commitment should be attached to the notification form.

The Authority does not have a clear preference on any particular type of remedies. The assessments are made on a case-by-case basis in view of the specific circumstances surrounding the concentration. Nevertheless, divestitures are the most common commitment procedure in the Turkish merger control regime.

Key policy developments

The major development in the Turkish competition law regime is the Amendment Law, which changes the substantive test by replacing the dominance test with the SIEC test. Accordingly, M&A transactions significantly impeding competition are prohibited. Having said that, the secondary legislation which should be providing further insight into the application of the new SIEC test is yet to change. Apart from the Amendment Law, the following guidelines promulgated prior to the Amendment Law are still in effect and serve as the most important documents in relation to the assessment of concentrations: (i) the Guideline on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions ("Guideline on Undertakings Concerned"); (ii) the Horizontal Merger Guideline; and (iii) the Guideline on the Assessment of Non-Horizontal Mergers ("Non-Horizontal Merger Guideline"). These Guidelines are in line with EU competition law regulations and seek to retain harmony between EU and Turkish competition law instruments.

The approach of the Board to market shares and concentration levels is similar to the approach taken by the European Commission and enumerated in the Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2004/C 31/03). As the first factor discussed under the Horizontal Merger Guideline, market shares above 50% can be used as evidence of a dominant position. If the market share of the combined entity remains below 25%, this would not lead to a need for further investigation into the likelihood of harmful effects resulting from the combined entity. Although a brief mention of the Board's approach to market shares and HHI levels is provided, the Horizontal Merger Guideline's emphasis on

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an effects-based analysis (coordinated/non-coordinated effects), without further discussing the criteria to be used in evaluating the presence of dominant position, indicates that the dominant position analysis still remains subject to Article 7 of Law No. 4054.

Other than the market share and concentration level discussion, the Horizontal Merger Guideline covers the following main topics: the anticompetitive effects that a merger would have in the relevant markets; buyer power as a countervailing factor to anticompetitive effects resulting from the merger; the role of entry in maintaining effective competition in the relevant markets; efficiencies as a factor counteracting the harmful effects on competition which might otherwise result from the merger; and conditions of the failing company defence. The Horizontal Merger Guideline also discusses coordinated effects in the market that might arise from a merger of competitors via increasing concentration in the market, and may even lead to collective dominance. In its discussion of efficiencies, it indicates that the efficiencies should be verifiable and should provide a benefit to customers. Significantly, the Horizontal Merger Guideline provides that the failing firm defence has three conditions: (i) the allegedly failing firm will soon exit the market if not acquired by another firm; (ii) there is no less restrictive alternative to the transaction under review; and (iii) it should be the case that unless the transaction is cleared, the assets of the failing firm will inescapably exit the market.

The Non-Horizontal Merger Guideline confirms that non-horizontal mergers, where the post-merger market share of the new entity in each of the markets concerned is below 30% and the post-merger HHI is below 2,000 (except where special circumstances are present), are unlikely to raise competition law concerns, similar to that set out in the Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2008/C 265/07). Other than the Board's approach to market shares and concentration levels, the other two factors covered in the Non-Horizontal Merger Guideline include the effects arising from vertical mergers, and the effects of conglomerate mergers. The Non-Horizontal Merger Guideline also outlines certain other topics, such as customer restraints, general restrictive effects on competition in the market, and restriction of access to the downstream market.

Apart from the foregoing, the below communiqués and guidelines are the recent key legislative developments:

- The Guidelines on Examination of Digital Data during On-Site Inspections were accepted on October 8, 2020.
- Communiqué No 2021/2 on Remedies for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position.
- Communiqué No 2021/3 on *De Minimis* Applications for Agreements, Concerted Practices and Decisions of Associations of Undertakings came into force on March 16, 2021.

Reform proposals

Recently, on March 18, 2021, the Authority began the public consultation process on the Settlement Regulation, which is set to end on April 19, 2021.

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Overview of merger control activity during the last 12 months

Key policy developments

The last 12 months have witnessed a number of key developments in UK merger control activity, including:

1. The expiry of the Brexit Transitional Period, meaning that the "*one stop shop*" notification regime under the EU Merger Regulation will no longer apply as regards the UK. In practical terms, this means that the UK Competition and Markets Authority ("**CMA**") may have jurisdiction to review transactions which are being investigated in parallel by the European Commission ("**EC**"). The CMA has expanded its resources in anticipation that Brexit will increase its case load by around 30 to 40 transactions per year and it has already launched Phase 1 investigations into the *NVIDIA/Arm* and *AstraZeneca/Alexion* transactions, both of which are being considered in parallel by the EC.
2. The publication by the CMA of updated guidance on its jurisdiction and procedure ("**Updated J&P Guidance**" – CMA2 revised) in December 2020 to streamline the CMA's review process and introduce more flexibility in order to accommodate parallel merger reviews. See *New developments in jurisdictional assessment or procedure* below for details of the key features of the Updated J&P Guidance.
3. The adoption in March 2021 of revised guidelines on how the CMA assesses mergers (CMA Merger Assessment Guidelines ("**Revised MAGs**" – CMA129)), which take account of developments in the market and in the CMA's merger control assessment of potential theories of harm since the previous guidance was published in 2010. See *Key economic appraisal techniques applied* below for further details of the impact of the Revised MAGs.
4. A continuing expansive approach to asserting jurisdiction in merger cases (both in terms of the broad application of the 25% "share of supply" test and the material influence threshold which applies under the UK merger control regime when determining whether enterprises "cease to be distinct") – see *New developments in jurisdictional assessment or procedure* below.
5. The continued use of initial enforcement orders ("**IEOs**") for completed mergers (and in one anticipated merger in 2020), with the Court of Appeal endorsing the approach adopted by the CMA in its investigation into the completed *Facebook/Giphy* merger, and confirming the broad discretion which the CMA has in this regard in order to prevent the possibility of pre-emptive action which might frustrate its ability to impose an effective remedy. See *New developments in jurisdictional assessment or procedure* below.
6. The imposition of penalties for procedural infractions, including for failure to provide accurate responses to information requests and penalties for breaching the terms of IEOs. See *New developments in jurisdictional assessment or procedure* below.

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Merger intervention rates and outcomes

The CMA has continued to adopt a comparatively interventionist stance to merger reviews over the last 12 months (including its assessments of so-called "killer acquisitions"). The CMA's statistics show that: (i) approximately 20–25% of all Phase 1 cases over last two years have been referred to (in-depth) Phase 2 investigations, compared to just 8–10% around five years ago;[1] and (ii) since January 2019, approximately 70% of transactions referred to Phase 2 have been abandoned, unwound or blocked.

See *Key industry sectors reviewed* below for details of some of the key cases which the CMA has considered over the last 12 months.

The following table provides an overview of Phase 2 investigations which the CMA has concluded in 2020 and to date in 2021, together with an analysis of the outcomes in those cases.

Year	No. Phase 2 Decisions	Cleared	Cleared with remedies	Prohibited	Abandoned
YTD 2021	5	0	1	2	2
2020	11	2	0	3	6

This has led to a debate about whether there may have been under-enforcement in previous cases, and whether parties and their advisers should expect a tougher climate for merger control going forward. In a speech to Policy Exchange in early 2020, Lord Tyrie (then Chairman of the CMA) noted that "*we have become tougher on mergers*".[2] Andrea Coscelli, the CMA's CEO, has also defended higher intervention rates by reference to the CMA's use of richer evidence sources (primarily deal valuation and other internal documents) and the particular challenges of dynamic markets, having previously cited the *Facebook/Instagram* case as a decision that "*does look a bit naive*".[3]

The Revised MAGs make only a discreet reference to under-enforcement (paragraphs 1.7 and 1.8 mention "*under-enforcement*" particularly in relation to digital markets in the context of the Furman and Lear reports), but do not explicitly endorse that finding. However, the Revised MAGs reflect in many instances the significant policy shift seen in recent years and capture the way in which the CMA assesses evidence and the close scrutiny which it gives to the parties' internal documents during merger reviews.

Impact of the coronavirus pandemic

Over the last 12 months, the CMA has also had to grapple with the impact of COVID-19 on its substantive assessment of mergers. In April 2020, the CMA published guidance on merger assessments during the COVID-19 pandemic, which included an annex summarising the CMA's position on mergers involving failing firms.[4] The CMA confirmed that, on substance, the coronavirus pandemic had not brought about any relaxation of the standards by which mergers are assessed, but that it would "*carefully consider the available evidence in relation to the possible impacts of coronavirus on competition in each case*". The guidance went on to note that "*even significant short-term industry-wide economic shocks may not be sufficient, in themselves, to override competition concerns that a permanent structural change in the market brought about by a merger could raise*". The guidance is consistent with the CMA's statement in its Annual Plan that "*faced with businesses weakened by the recession, it is even more important for the CMA to carefully assess mergers which could weaken competition*".[5]

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The CMA has considered the impact of COVID-19 in a number of cases over the last 12 months, most notably in its Phase 2 investigations into *Amazon/Deliveroo* and *JD Sports/ Footasylum*.

In *Amazon/Deliveroo*, the CMA provisionally cleared Amazon's proposed acquisition of a 16% stake in Deliveroo, accepting that the seriousness and urgency of Deliveroo's financial situation meant that Deliveroo met the criteria for a "failing firm", and that its exit from the market would have been worse for competition and customers than allowing the investment to go ahead. However, following a rapid and significant turnaround in Deliveroo's financial position, the CMA concluded in its final report that Deliveroo could no longer be considered a failing firm, but cleared the case on the basis that Amazon's 16% investment would not adversely affect its incentives to compete independently with Deliveroo, in both restaurant delivery and online convenience grocery delivery, in the future.

In *JD Sports/Footasylum*, the CMA concluded that the parties were close competitors and that the merger would lead to a substantial lessening of competition to the detriment of consumers. However, the first national lockdown took place in the final weeks of the CMA's inquiry, meaning that the CMA's assessment of likely future effects of the merger was undertaken in the context of material uncertainty about the longer-term impact of COVID-19 on the retail sector. Against that backdrop, the CMA decided in early April 2020 that asking suppliers, and Footasylum's bank, for updated forecasts would not be fruitful because it would have been speculative and unreliable evidence on how COVID-19 would affect the retail sector over the longer term. On appeal to the Competition Appeal Tribunal ("**CAT**"), JD Sports was partially successful against the CMA's prohibition decision, establishing that the CMA had not sought to inform itself sufficiently on the impact of COVID-19 on the relevant market, the merging parties and their competitors and suppliers. This case is discussed in *Key industry sectors reviewed* below.

New developments in jurisdictional assessment or procedure

CAT confirms that the CMA has wide discretion when applying the 25% share of supply test

The CMA's investigation into the *Sabre/Farelogix*[6] merger confirms that the CMA has considerable discretion regarding the application of the 25% share of supply test. In that case, the CMA concluded that the test was satisfied based on a relevant description of services comprising "*the indirect distribution of airline content to travel agents in the UK for flights*" to various international destinations from a single UK airline customer, British Airways. The CMA rejected the parties' argument that Farelogix had no UK travel agent customers, finding instead that it operated in a two-sided market where its technology meant that "*the Parties in practice compete to distribute content to travel agents (including UK travel agents)*". The CMA emphasised in its final report that it was entitled to apply the rules relating to a UK-specific link "*in a flexible and purposive way*" having regard to "*the commercial realities and results of transactions, focussing on the substance rather than the legal form of the relevant arrangements*". The CMA prohibited the transaction in April 2020.

Sabre Corporation appealed the decision on six grounds, four of which related to the CMA's assertion of jurisdiction over the merger. The CAT dismissed Sabre's claims that the CMA's decision was unlawful in asserting jurisdiction, confirming that the CMA has broad (or rather the broadest possible) discretion to apply the share of supply test as it sees fit to identify mergers where the turnover thresholds are not met but which are "*worthy of consideration*", provided that there is evidence of common functionality between the

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relevant goods or services and perception of them as commercial alternatives. In reaching this conclusion, the CAT noted that "…*the application of the share of supply test…does not involve the determination of a matter of primary fact on which the Tribunal may substitute its judgment for that of the CMA*". The CAT also confirmed that the CMA can refine its view on jurisdiction during its Phase 2 inquiry, and that there is no *de minimis* threshold for the increment to share of supply under the test.

The CAT's judgment will lend support to the CMA's current focus on transactions involving innovative, fast-paced markets – reinforcing the CMA's ability to intervene in deals involving targets with very low (or even no) turnover, which can be the case where valuable R&D or technology is being acquired.

<u>Application of material influence threshold to review acquisitions of minority stakes</u>

The CMA has again demonstrated the flexibility it has in relation to whether a "relevant merger situation" has been created in its assessment of Amazon's acquisition of a minority shareholding (16% equity stake) in Deliveroo.[7] Despite the fact that Amazon would not have been in a position to block special resolutions, would not have been the largest single shareholder, would only have been able to appoint one of eight board members (seven voting) and, the parties argued, did not have any greater operational expertise than other major shareholders, the CMA nevertheless concluded that Amazon would be in a position to exert material influence over Deliveroo.

The CMA based its assessment on a number of factors, including Amazon's substantial expertise in areas such as the operation of online marketplaces, logistics networks and subscription services, which might give it the ability to influence other shareholders and Deliveroo's policy formation. The CMA also pointed to the existence of additional rights, including board representation and a higher liquidation preference and ranking, which the CMA considered could allow Amazon to exert influence over any potential sale and enable it to influence other Deliveroo shareholders and board members.

Although not commonplace, this is not the first time a shareholding slightly above 15% has led to a finding of material influence. For example, BskyB's acquisition of a 17.9% shareholding was considered to give it material influence over ITV. Similarly, in *E.ON/RWE*, the CMA found that a shareholding of 16.67% was sufficient to give RWE material influence over E.ON, with the CMA emphasising that the RWE's shareholding compared to others, combined with its industry status and expertise, would be sufficient to give it an influence over E.ON's commercial policy.

<u>More flexibility introduced in the Updated J&P Guidance to accommodate parallel merger reviews</u>

In its Updated J&P Guidance, the CMA has included a new section on multi-jurisdictional mergers. Here, the CMA notes the "*substantial benefits (to merging parties and competition authorities, and therefore, in turn, to consumers) from communication and cooperation*" between authorities. The CMA confirms that it will ask parties to confirm whether they have notified (or intend to notify) the transaction in other jurisdictions and, if so, it will usually ask parties to grant a waiver to enable it to discuss the case with the other authorities involved. The CMA has introduced changes to align the timetables of parallel investigations, encouraging merging parties to engage with it at an early stage to discuss timing. The Updated J&P Guidance also suggests various ways for parties to help achieve alignment (e.g. by signalling during pre-notification that they wish to engage in early remedies discussions or pursue a "fast-track" process, enabling the parties to forgo certain procedural steps in order to move the review along to Phase 1 remedies or a Phase 2 investigation).

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Interestingly, the Updated J&P Guidance also confirms that the CMA may decide not to open an investigation on its own initiative where any remedies agreed in merger control proceedings in another jurisdiction are likely to address any UK concerns. This fits with a wider trend for authorities to coordinate on international remedies packages to address anti-trust concerns, ensuring consistency of outcomes. The recent *Stryker/Wright Medical* case is a good example of this: in that case, the CMA worked closely with the U.S. Federal Trade Commission to align both timing and the remedy package.

The CMA's use of formal information-gathering powers and penalties for non-compliance

The CMA is increasingly adopting a tougher stance and imposing administrative fines on companies for failure to comply with information requests issued under section 109 of the Enterprise Act ("**EA**") 2002. Fines for non-compliance or non-provision of requested documents within the deadline set by the CMA are becoming more prevalent. For example, in September 2020, the CMA fined Amazon £25,000 and £30,000 for the failure to provide, without reasonable excuse, complete responses to two sets of statutory information requests. These failures resulted in 189 documents, which included a significant amount of information relevant to the CMA's Phase 2 *Amazon/Deliveroo* merger investigation, being produced after the initial deadline. Although Amazon did ultimately provide all of the information required, the CMA considered that Amazon's behaviour caused unnecessary delays to the CMA's investigation, with some documents being provided almost two months late within the course of a six-month investigation.

The CMA noted in its 2019 reform proposals that it might seek greater power to impose fines for non-compliance with information requests (above the current £30,000 maximum penalty).

The CMA has also recently started to use its compulsory interview powers during the course of its investigation to question directors on the contents of internal documents and their interpretation.[8]

The CMA's use of interim measures and penalties for non-compliance

The CMA has continued to implement IEOs in all completed mergers it chooses to investigate. These prevent integration that might prejudice its investigation or any remedies required; and, while the merging parties can request derogations, the CMA will scrutinise all such requests carefully. In November 2020, the CMA announced that it had imposed an IEO in a merger in the motor vehicle sector, which was later abandoned, confirming the CMA's powers to apply IEOs in both anticipated (as well as completed) mergers.

The CAT and Court of Appeal have also recently confirmed, in dismissing an appeal brought by Facebook against the CMA's decision not to consent to a request for a derogation from the IEO applied to both companies in the *Facebook/Giphy* merger, that the CMA has broad powers to prevent merging parties from further integrating their businesses while its merger investigation is ongoing. The CMA argued successfully that it was unable to grant the derogation request because it believed it did not have the necessary information from Facebook to reach a decision. The Court approved of the CMA's use of IEOs, which are intended to "*hold the ring*" while the CMA obtains the information it needs from businesses requesting derogations. The Court noted that "*this process breaks down if those against whom Initial Enforcement Orders are made refuse to cooperate as happened in this case*".

The CMA has continued to impose penalties for breaches of IEOs, following on from its first penalty in 2018. The CMA can impose a maximum of 5% of global group-wide turnover for failure to comply with interim measures and, in August 2020, the CMA imposed a

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fixed penalty of £300,000 on JD Sports and Pentland under section 94A of the EA for failure to comply with the IEO implemented in May 2019 in respect of the *JD Sports/Footasylum* transaction. The CMA's penalty was based on failure to obtain the CMA's prior written consent before serving a Break Notice to close Footasylum's Wolverhampton store (which the parties argued was part of Footasylum's ordinary course of business and had been determined pre-merger). The IEO stipulated that JD Sports/Pentland should procure that each of their subsidiaries (including Footasylum) comply with the IEO. The penalty decision was later withdrawn by the CMA following an appeal by the parties (without any reasoning being published by the CMA).

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

A key focus for the CMA over the last 12 months has been in relation to the digital markets sector and, in particular, how to deal with acquisitions by large technology firms of start-ups/potential rivals which may not otherwise fall within the CMA's jurisdiction.

Parties	Sector	Issues	Outcome
2021			
Crowdcube Limited/Seedrs Limited	Financial services	Overlaps in supply of crowdfunding platforms	Abandoned
viagogo/Stubhub	Recreation and leisure	Overlaps in the supply of secondary ticketing exchange platforms	Cleared subject to remedies (effectively prohibited in the UK/permitted in the US)
FNZ (Australia) Bidco Pty Ltd/GBST Holdings Limited	Financial services	Overlaps in solutions involving software and/or servicing to retail investment platforms	Prohibited Remitted back following appeal to CAT
Tronox Holdings plc/TiZir Titanium and Iron A.S.	Mineral extraction and mining	Overlaps for the supply of input materials for production of titanium dioxide	Abandoned
TVS Europe Distribution Limited/3G Truck & Trailer Parts Limited	Motor industry	Overlaps in wholesale supply of commercial vehicles and trailer parts	Prohibited
2020			
Yorkshire Purchasing Organisation/Findel Education Limited	Distribution and service industries	Overlaps in the supply of educational resources	Abandoned
Taboola.com Ltd/Outbrain, Inc.	Communications	Overlaps in supply of content recommendations to publishers	Abandoned
Hunter Douglas/247 Home Furnishings Ltd	Household goods and furnishings	Overlaps in supply of window furnishings	Prohibited
Amazon/Deliveroo	Online food ordering and delivery	Overlaps in markets for online restaurant food delivery and online convenience grocery delivery	Cleared

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Parties	Sector	Issues	Outcome
2020			
Kingspan Holdings (Panels) Limited/ Building Solutions (National) Limited	Building and construction	Overlaps in supply of standard foam panels and single skin construction sheets	Abandoned
JD Sports Fashion/ Footasylum	Clothing, footwear and fashion	Overlaps in retail of sports fashion footwear and clothing	Prohibited Remitted back following appeal to CAT
McGraw-Hill Education, Inc./Cengage Holdings IL, Inc.	Paper printing and packaging	Overlaps in supply of higher education textbooks	Abandoned
Sabre/Farelogix	Distribution and service industries	Overlaps in supply of IT systems used by airlines and travel agents to sell airline tickets	Prohibited Upheld on appeal to CAT
Bottomline Technologies/Experian Limited	Financial services	Overlaps in payment software	Cleared
Bauer Media Group	Communications	Overlaps in supply of representation for national advertising to independent radio stations	Cleared subject to remedies
Prosafe/Floatel International	Distribution and service industries	Overlaps in supply of semi-submersible offshore accommodation support vessels to oil and gas companies	Abandoned
Illumina, Inc./Pacific Biosciences of California, Inc.	Healthcare and medical equipment	Overlaps for DNA sequencing systems	Abandoned

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

Revised MAGs – unilateral effects

The Revised MAGs, which were adopted in March 2021, capture what the CMA has learned from its own experiences in merger control since 2010, as well as developments from recent case law and recommendations from external reviews (e.g. the Lear report on digital mergers and the KPMG report on entry and expansion analysis) and other studies into digital markets (e.g. the Furman report).

Whilst the statutory test the CMA applies to mergers has not changed, the Revised MAGs provide an opportunity to set out in writing its current approach to the assessment of mergers (including digital markets), emphasise the discretion which the CMA has in assessing mergers and remove a number of presumptions and thresholds.

Important points to note from the Revised MAGs include:

- Definition of SLC: when assessing mergers, the CMA considers whether a transaction has resulted or may be expected to result in a "substantial lessening of competition" (or "**SLC**"), which is the test set out in the relevant legislation (with different legal thresholds for this assessment for "Phase 1" and more in-depth "Phase 2" reviews). The Revised MAGs:

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    - clarify that "*substantial*" does not necessarily mean "*large*" or "*considerable*" in absolute terms and that it will depend on "*the facts of the case*". Accordingly, a lessening of competition in a market may be considered substantial even if that market is small in total size or value and, in considering whether a lessening of competition is substantial, the CMA may also take into account whether the market to which it applies is "*large*" or "*otherwise important to UK customers*", or whether there is only limited competition in the market to begin with; and
    - provide further clarity and examples of mergers that are more likely to raise competition concerns, such as where the merger involves the market leader and the number of significant competitors would be reduced from four to three, or where the products offered are differentiated between competing firms and the merger firms are close competitors. The smaller the number of significant players, the stronger the *prima facie* expectation that any two firms are close competitors.
- Non-price theories of harm (including innovation): the Revised MAGs place more emphasis on competition over elements of a product which are not the price, such as service, quality or innovation. The range of possible non-price competition which may take place is wide, and terms such as "*quality*" will be interpreted broadly by the CMA and can cover staffing levels in stores, levels of privacy offered to users of digital services, the reassurance afforded by a well-known brand or good reputation or the environmental sustainability of a product or service. Similarly, the CMA will look closely at where competition may be driving firms to innovate and produce new or better products for customers, which may be lost as a result of a merger.
- Potential and dynamic competition: the Revised MAGs provide for a more dynamic approach to assessing mergers, taking account of "*dynamic counterfactual*" scenarios in which the CMA has considered how competition can be expected to develop in the future and whether the parties would have become closer rivals. The Revised MAGs make it clear that this could involve, for example, examining the merger firms' internal documents in order to assess the likely strategies of the parties. If one party had plans to enter a market to compete with the other party, or had the clear ability and incentive to do so, the CMA is likely to factor this into its assessment.
- Internal documents: the Revised MAGs set out how the CMA assesses evidence and the weight which it places on internal documents (when assessing the likely competitive impact of a transaction "in the round"). The CMA closely scrutinises the parties' internal documents as part of its investigation, including evidence on deal valuation, strategic rationale for and synergies arising from the transaction.
- Market definition: the Revised MAGs downplay the importance of market definition. Although the CMA is still required to identify the market in which a competition concern may exist, the revised guidelines set out a more flexible approach to how the CMA defines markets in its merger assessments. According to the CMA, this is not an end in itself, but a tool that can be helpful in allowing the CMA to understand the market and how competition within it works. The CMA will therefore focus its energy on what is constraining the merging parties, and the closeness of competition between the parties and their competitors.

Revised MAGs – coordinated effects

Section 6 of the Revised MAGs discusses the conditions under which it is possible for a merger to lead to coordinated effects.[9] One example of a SLC would be "*when some of the conditions for coordination are not met pre-merger, but all of them are expected to*

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be met post-merger", and that "*[w]here the CMA has not found evidence of pre-existing coordination, it will consider to what extent the merger may make future coordination more likely*". This suggests that if the merger strengthens at least some conditions of coordination and all are met after the merger, then the CMA will find a SLC.

Coordinated effects have been considered by the CMA relatively infrequently in the past, but there are indications that the CMA will seriously consider this as a theory of harm in concentrated markets. In *Yorkshire Purchasing Organisation/Findel Education Limited*, the CMA found at Phase 1 that there were few external constraints which could destabilise coordination due to high barriers to entry and expansion. However, at Phase 2, the CMA's provisional conclusion was that coordination was unlikely to be internally sustainable. Similarly, in *J Sainsbury's Plc/Asda Group Ltd*, the CMA found that the merger would impact on two of the three conditions for coordination and that all three conditions are likely to be met post-merger, making coordination over delivery pricing in online delivered groceries more likely than not.

Revised MAGs – vertical[10] and conglomerate effects

The Revised MAGs consider the CMA's approach to assessing the three main foreclosure theories of harm: (i) input foreclosure; (ii) customer foreclosure; and (iii) conglomerate effects, and adopts a similar analytical framework to the previous MAGs. In particular, under all three theories of harm, the CMA will consider both the ability and incentive for the merged firm to engage in any anti-competitive foreclosure based on these theories of harm (and the impact of the merger in this regard) as well as the likely impact on competition in the relevant (upstream, downstream or adjacent) market.

Paragraph 7.3 of the Revised MAGs also discusses how vertical mergers may allow the merged entity to "*gain access to commercially sensitive information*", e.g. "*data on specific sales and bids, overall pricing strategies and algorithms…*". The CMA says that it may assess this concern (i.e. access to commercially sensitive information) as a separate theory of harm or as part of a broader foreclosure theory of harm.

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

Phase 1 remedies

If the CMA concludes that a transaction would give rise to a realistic prospect of a SLC in one or more markets at the end of its Phase 1 investigation, then it has a duty to refer the transaction to a Phase 2 investigation unless it decides to exercise its discretion to accept remedies offered by the parties. These must be clear-cut, i.e. "*there must be no material doubts about the overall effectiveness of the remedy*", and readily capable of implementation.[11]

Notable Phase 1 remedy decisions over the last 12 months have included:

- *Stonegate Pub Company/Ei Group*,[12] where the CMA found a realistic prospect of a SLC in relation to 51 local areas, and Stonegate agreed to divest pubs in the overlap areas.
- *Ardonagh/Bennetts Motorcycling Services Limited*,[13] where (unusually) Ardonagh offered to divest the entirety of the Bennetts motorcycle insurance business following an adverse finding by the CMA at Phase 1.
- *Circle Health/BMI Healthcare*,[14] where the CMA accepted undertakings to divest Circle Bath Hospital and Circle Birmingham Hospital to address concerns identified in these areas.

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The CMA rejected the remedies offered in *Tronox/TiZir*[15] (subsequently abandoned), where the CMA concluded that Tronox intended to use all of TTI's chloride slag in its own production of titanium dioxide, leaving Rio Tinto, TTI's main chloride slag competitor, with a sole supplier. Tronox offered a behavioural undertaking to supply minimum annual volumes via fixed contracts and an auction mechanism. The CMA rejected these (amongst other things) on the basis that the volumes would fall significantly short of the capacity that would be removed from the market and there was no guarantee that the supply would be made on competitive terms.

Phase 2 remedies

As the table above indicates, the CMA has only accepted divestment remedies at Phase 2 over the last 12 months (and had prohibited a high proportion of Phase 2 transactions).[16]

Key policy developments

The new National Security and Investment Act is due to come into force later in 2021 and will introduce a mandatory notification scheme for certain transactions which fall within 17 sensitive sectors. Any transaction which came into effect on or after 12 November 2020 may be subject to review if the Department for Business, Energy and Industrial Strategy considers that national security may be threatened. Currently, the UK government expects around 1,800 transactions to be notified each year.

Reform proposals

Enhanced merger regime for digital mergers

In December 2020, the CMA issued its advice to government on the design and implementation of the UK's new pro-competition regime for digital markets.[17] This proposes a new mandatory merger regime, which would enable the CMA to apply closer scrutiny to transactions involving the most powerful tech firms – those with "strategic market status" ("**SMS**"). This proposed regime has not yet been introduced.

Penrose report

In his report into the state of competition policy in the UK – *Power to the People* – John Penrose MP made a number of recommendations dealing with the CMA's powers and procedures under the merger control regime. This included a proposal enabling the CMA to accept legally binding undertakings from parties at any stage in Phase 1 or Phase 2 without having to wait for the conclusion of each phase of the process. The report also advocates for a much faster process.

* * *

Endnotes

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9. See *Yorkshire Purchasing Organisation/Findel Education Limited*.
10. Recent examples of cases where the CMA has assessed vertical mergers in detail include: *Thermo Fisher Scientific/Roper Technologies* (Gatan) (Provisional Findings); *Tobii AB/Smartbox Assistive Technology Limited and Sensory Software International Ltd*; *BT Group plc/EE Limited*; *Tesco plc/Booker Group plc*; *Intercontinental Exchange Inc/Trayport*; and *LN-Gaiety Holdings/MCD Productions*.
11. See Remedies Guidance at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764372/Merger_remedies_guidance.pdf, paragraph 3.28.
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13. https://assets.publishing.service.gov.uk/media/5fc0d0638fa8f559df0b6793/Ardonagh_Bennetts_-_Final_UILs_-_CMA_-_20112020_-_webteam_-.pdf – divestment of the target in its entirety, effectively unwinding the deal.
14. https://assets.publishing.service.gov.uk/media/5ef1d8dd86650c113a46e2a0/Circle_BMI_-_UILs_22.6.20__004_.pdf – divestment of operations in two UK locations.
15. https://assets.publishing.service.gov.uk/media/6038c39de90e070559938bb5/Decision_on_UILs_Tronox_-_web_-_PDF.pdf.
16. See *Viagogo/Stubhub* https://assets.publishing.service.gov.uk/media/60702d63d3bf7f400a6b2feb/Final_undertakings_.pdf, which effectively prohibited the transaction in the UK, enabling only the North American acquisition to go ahead.
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Overview of merger control activity during the last 12 months

In a year in which COVID-19 dominated the news, U.S. antitrust investigations and challenges to mergers and acquisitions continued unabated. Although the number of notifications under the Hart-Scott-Rodino Act ("HSR Act") was down for six months in 2020 due to COVID-19, the level of enforcement activity remained intense. In fact, an October 2020 U.S. Federal Trade Commission ("FTC" or "Commission") blog indicates that the number of merger challenges brought by the agency in 2020 was "nearly precedented".[1]

Specifically, the FTC and the U.S. Department of Justice ("DOJ") continued to pursue court challenges in the five cases pending at the beginning of 2020. The FTC initiated court challenges to block an additional seven proposed, and two consummated, transactions and the DOJ brought two additional merger challenges. In addition, the FTC and the DOJ required remedies in 22 proposed transactions during 2020. Companies also abandoned a number of transactions due to antitrust agency opposition, including three transactions abandoned after the agency filed its court challenge but before the court rendered its decision. Transaction party assertions of financial distress, particularly based on COVID-19 shutdowns, were rarely successful in altering agency enforcement decisions. In May 2020, the FTC published a blog indicating that, despite the pandemic's effect on many companies' financial conditions, the agency would not relax its stringent conditions for a "failing firm" defence.[2] Indeed, in November 2020, the FTC challenged CoStar's acquisition of competitor RentPath, even though RentPath had filed for bankruptcy.[3] The parties abandoned the transaction shortly after the FTC filed its complaint. The DOJ did, however, recognise the failing firm defence in part in one transaction to permit part of the proposed acquisitions by Dairy Farmers of America and Prairie Farms Dairy of fluid milk processing plants from Dean Foods out of bankruptcy, recognising the unprecedented challenges faced by the dairy industry, "with the two largest fluid milk processors, Dean and Borden Dairy Company, in bankruptcy, and a pandemic causing demand for milk by schools and restaurants to collapse", and with Dean faced with imminent liquidation. While the DOJ requested divestiture of certain plants being acquired by Dairy Farmers of America, it closed its investigation into Prairie Farms' proposed acquisition of processing plants from Dean after concluding that the plants at issue likely would be shut down if not purchased by Prairie Farms because of Dean's distressed financial condition.[4]

New developments in jurisdictional assessment or procedure

In 1976, the United States became the first jurisdiction with a mandatory pre-merger notification requirement when Congress promulgated the HSR Act to enhance enforcement of Section 7 of the Clayton Act. The HSR Act provides both a "size-of-transaction" test

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and a "size-of-person" test for determining whether a filing is required. Subject to certain exemptions, for 2021,[5] the size-of-transaction test is satisfied if the acquirer would hold an aggregate total amount of voting securities and assets of the target in excess of US$92 million (down US$2 million from the prior year). Transactions in which holdings post-acquisition will be valued between US$92 million and US$368 million are reportable only if the size-of-person threshold is also met: either the acquiring or acquired person must have total assets or annual net sales of at least US$184 million, and at least one other person must have total assets or annual net sales of US$18.4 million. Transactions valued over US$368 million are not subject to the size-of-person test, and are reportable unless otherwise exempt. Failure to file can result in civil penalties of up to US$43,792 for every day that the person does not comply with the HSR Act.

The non-reportability of a transaction under the HSR Act does not preclude either the FTC or the DOJ from reviewing, and even challenging, a transaction under Section 7 of the Clayton Act.[6] Nor does the expiry or termination of the HSR Act waiting period immunise a transaction from post-consummation challenge under Section 7.[7] In addition, even in reportable transactions, state attorneys general may review and challenge transactions, typically, but not always, in conjunction with the federal enforcement agency handling the transaction.[8] Certain industries also require pre-merger approval from other federal regulatory agencies. For instance, the Federal Energy Regulatory Commission will review electric utility and interstate pipeline mergers; the Federal Communications Commission will review telecommunications and media mergers;[9] the Board of Governors of the Federal Reserve System will review bank mergers;[10] and the Surface Transportation Board will review railroad mergers.

State public utilities commissions may have separate authority to review telecommunications and utilities mergers. Finally, under the Exon-Florio Act, the Committee on Foreign Investment in the United States may review acquisitions by foreign persons to determine if they raise national security issues.

The FTC uniquely possesses the ability to seek a preliminary injunction to block completion of a proposed merger in federal district court and to challenge both proposed and completed mergers in its own administrative proceeding. In addition, the FTC can enter into a binding consent decree with the transaction parties without judicial intervention. In contrast, the DOJ must bring its challenges (and file any consents) in federal district court, with a judge ultimately deciding the case. The duration of the administrative process is sufficiently long that rarely will a pending transaction survive the appeals process; most of the litigated administrative cases instead involve consummated mergers. For instance, in the *Otto Bock/ Freedom Innovations* transaction, the FTC brought its administrative challenge in December 2017, the administrative law judge ruled in May 2019 that the transaction violated the law, and the full Commission unanimously affirmed the decision on 30 December 2019. Otto Bock petitioned the D.C. Circuit to review the Commission's decision, but pending the D.C. Circuit's decision, agreed to settle with the FTC by divesting Freedom's MPK business to Proteor on 9 October 2020 (almost three years after the FTC had commenced its challenge).[11] The FTC brought two additional post-consummation challenges in 2020, both of which are in pre-trial stage as of the time of writing.[12]

In a very unusual procedural move, in the DOJ's district court case challenging Novelis Inc.'s proposed acquisition of Aleris Corporation, the DOJ and defendants agreed to refer the matter to binding arbitration pursuant to the Administrative Dispute Resolution Act of 1996 (5 U.S.C. § 571) to resolve the issue of product market definition.[13] As contemplated in the plan to refer the matter to arbitration, fact discovery proceeded

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under the supervision of the district court. Following the close of fact discovery, the arbitration proceeding began. Eleven fact witnesses and three expert witnesses testified in the proceedings over a 10-day period. The parties dispensed with the need for post-trial briefing and agreed that the arbitrator would render a short decision of no more than five pages by 13 March 2020. Under the arbitration terms, if the DOJ prevailed, the DOJ was authorised to file a proposed final judgment that required Novelis to divest all of Aleris's North American aluminum ABS operations; if the defendants prevailed, then the DOJ agreed to seek to dismiss the complaint voluntarily. On 9 March 2020, the arbitrator agreed with the DOJ's narrower market definition. As a result, once the judge entered the Hold Separate Agreement, the transaction could proceed, conditioned on the previously specified divestitures and the payment of the DOJ's fees and costs incurred in connection with arbitration.

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

The industry sectors covered by enforcement activity included the entire gamut of industries – from mature and declining industries, such as coal mining, dairy and beer, to new medical innovations, such as biopharmaceuticals, life sciences and prosthetics, and new two-sided platforms, such as for airline booking services, rental apartments, and money movement payment networks. In fact, healthcare, pharma and consumer products and services continued to account for a large percentage of enforcement activity at both agencies. Partly in response to recent criticism of "under-enforcement" in the technology industry, the agencies also continued to closely scrutinise high-tech mergers.

Further evidencing this trend, in February 2020, the FTC announced that it would conduct a retrospective review of past acquisitions made by Alphabet, Amazon, Apple, Facebook and Microsoft between 2010 and 2019 that were not reported to the antitrust agencies under the HSR Act. And in December 2020, the FTC sued Facebook, alleging that the company engaged in an illegal course of conduct – including its 2012 acquisition of Instagram and 2014 acquisition of WhatsApp – to maintain its personal social networking monopoly. Among other things, the FTC's lawsuit seeks the divestiture of Instagram and WhatsApp.

Both the FTC and the DOJ also continued to be focused on adverse effects on innovation or nascent or potential competition concerns as a basis for many of their court challenges.[14] Both agencies lost cases they brought on these theories.

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

The U.S. agencies remain at the forefront in the use of economic data and sophisticated analytical tools in their merger reviews. Many cases the agencies brought in the last few years were premised on narrow market definitions and a focus on unilateral effects. In the few cases the agencies lost, the court invariably concluded that the economic evidence and testimony did not support the market definition asserted by the government's economists. Parties are well advised to hire economists for any transaction expected to receive scrutiny from the agencies.

Vertical theories of harm were investigated in a number of matters and formed the basis for several settlements requiring remedies. The agencies jointly issued new Vertical Mergers Guidelines to replace 35-year-old outdated guidance, reaffirming their commitment to scrutinise vertical transactions, in line with recent enforcement trends. At the FTC, though,

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the Commissioners split on partisan grounds on the appropriate treatment of vertical transactions. (As discussed below, this is one area of enforcement that may change during the Biden Administration.)

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

On September 3, 2020, the DOJ released a new Merger Remedies Manual (the "Manual")[15] outlining how it will structure and implement remedial relief in merger challenges. The Manual is the culmination of a two-year process that started when the DOJ withdrew the Obama Administration's merger remedies policy guidance in 2018.

The Manual articulates a default preference for structural remedies (*e.g.*, divestiture) over conduct or behavioural remedies. Reflecting then-Assistant Attorney General Makan Delrahim's public statements, the Manual claims that behavioural remedies do not "effectively redress persistent competitive harm" and "substitute central decision making for the free market".[16] The Manual left open the possibility of behavioural remedies only to facilitate structural relief, or where a divestiture would sacrifice significant merger-specific efficiencies, and a behavioural remedy both "completely cures the anticompetitive harm" and "can be effectively enforced".[17] For instance, conduct relief, such as temporary supply agreements, is appropriate to facilitate structural relief; however, restrictions on the merged company's right to compete in the final output markets or against the divestiture buyer, even as a transitional term, will not be accepted. Firewall provisions to prevent information from being disseminated within a firm are also to be infrequently used, the DOJ asserted, because "no matter how well crafted, the risk of collaboration in spite of the firewall is great".[18] In weighing the benefits of a firewall, the Manual indicates that the DOJ will work to ensure that it fully walls off information and to establish a carefully designed enforcement mechanism.

The Manual discussed the DOJ's approach to consummated merger remedies, identifying and approving upfront buyers, and collaborating with other agencies when structuring remedies. In doing so, the Manual memorialises existing agency practice, including a preference for "divestiture of an existing standalone business" and an expectation "in most merger cases" that parties must negotiate, finalise, and execute a divestiture agreement with an approved "upfront" buyer before closing.[19] Contrary to recent agency experience, however, the Manual puts strategic and private equity divestiture buyers on an equal footing, even noting that "in some cases a private equity purchaser may be preferred". The Manual also embraces the possibility, in certain cases, of "fix-it-first" remedies that would avoid formal proceedings under the Tunney Act.

It is unclear to what extent the FTC approach will differ from the DOJ, particularly in its concerns with regard to conduct remedies in vertical transactions[20] and private equity buyers.[21] Nor is it clear what additional concerns and requirements the Biden Administration leadership might impose on parties seeking to resolve merger concerns in order to obtain approval of their transaction.

Key policy developments

During the last year of the Trump Administration, the agencies continued to memorialise their views regarding merger enforcement and remedies and commenced several initiatives:

Vertical mergers

On 30 June 2020, the DOJ issued new Vertical Merger Guidelines (the "Guidelines")[22] that outline how the federal agencies will evaluate the likely competitive impact of mergers

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involving firms operating at different levels of the supply chain, and determine whether to challenge those mergers. The Guidelines, which represent the first major revision to guidance on vertical mergers in over 35 years, more accurately reflect the agencies' current enforcement approach.

The Guidelines describe the agencies' approach to defining one or more relevant markets for the purpose of evaluating a vertical merger. This approach largely conforms with the agencies' Horizontal Merger Guidelines, but also includes identification of one or more "related products" that are "supplied or controlled by the merged firm and are positioned vertically or are complementary to the products and services in the relevant market".[23]

In a significant departure from a draft published in January 2020, the Guidelines no longer suggest that vertical mergers involving companies with shares of less than 20% in their respective markets are unlikely to be anticompetitive. This quasi-safe harbor had drawn significant criticism from the FTC's two Democratic Commissioners.[24] As revised, the Guidelines state more generally that the agencies "may consider measures of market shares and market concentration" in analysing competitive effects without making reference to any specific market share or concentration threshold. This decision likely reflects a compromise, as some had argued the 20% threshold was too low and others had argued it was too high. Both Democratic Commissioners nevertheless continued to oppose the issuance of the Guidelines, taking particular issue with their emphasis on the potential benefits of vertical mergers.[25]

The new Guidelines primarily focus on unilateral theories of harm that the agencies commonly consider in their review of vertical mergers, including the ability and incentive of a combined firm to raise its rivals' costs or foreclose their access to essential inputs, distribution channels, or complementary products (referred to as "diagonal mergers"). Vertical mergers may also raise unilateral concerns when they provide the combined firm with access to competitively sensitive information about its upstream or downstream rivals, or make entry by a potential competitor more difficult by requiring entry at different levels of the supply chain or by foreclosing access to a necessary asset. Similarly, non-horizontal mergers may eliminate nascent competition by combining complementary products or an established firm with an emerging player in an adjacent market. The inclusion of these theories of harm in the Guidelines signals a convergence with other jurisdictions, such as the European Commission, where such theories are often considered by antitrust regulators. In addition, the Guidelines discuss the ways in which a vertical merger may make coordinated interaction among firms more likely.

The Guidelines expressly recognise that, while "vertical mergers are not invariably innocuous", they may create significant efficiencies that "often benefit consumers". Accordingly, the Guidelines indicate that efficiencies are an important part of the agencies' review of vertical mergers, with a particular emphasis on the analysis of the elimination of double marginalisation ("EDM") and contracting frictions between independent firms. The Guidelines also specify that the agencies will consider "the likely net effect" of the merged firm's unilateral conduct on competition and will consider countervailing effects, including EDM.[26] The agencies will balance each of these potential harms against any offsetting benefits, including evidence that the merged firm will achieve EDM and pass through some of the resulting cost savings. The Guidelines clarify that the transaction parties bear the burden of proof for any efficiencies claims.

The FTC augmented the Guidelines with a vertical merger commentary that expands on the principles of the Guidelines.[27] As mentioned above, the Democratic Commissioners

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have called for some significant changes in vertical merger theories and enforcement. This is one area of enforcement that could change after the new Administration's nominees are approved by Congress and assume their leadership roles at the agencies.

Remedies

As mentioned above, the DOJ released its remedies manual.[28]

M&A retrospective study

The agencies have been very focused on the prior conduct (including M&A) activity of the large high-technology companies. On February 11, 2020, the FTC ordered five large high-technology companies – Alphabet, Amazon, Apple, Facebook and Microsoft – to produce information about potentially hundreds of acquisitions consummated between January 2010 and December 2019 that were not reportable under the HSR Act because they did not meet the applicable monetary reporting thresholds.[29] This initiative follows the FTC's 2018–2019 public hearings and the creation of a technology task force dedicated to monitoring competition in technology-related sectors, and is separate from the FTC's continuing antitrust investigations into big tech companies, but could inform those investigations.

If, during this study, the FTC uncovers transactions it believes substantially lessened competition, then it could initiate enforcement actions to challenge those deals. On 5 August 2020, then-FTC Chairman Joseph Simons testified before the U.S. Senate Committee on Commerce, Science, and Transportation that the FTC had made great progress in its investigations into potentially anticompetitive acquisitions in the tech industry.[30] FTC Chairman Simons added that enforcement action is something that is definitely on the table, with staff at the FTC's Technology Enforcement Division being "incredibly busy" in investigating past and current antitrust conduct and acquisitions in the tech industry. Although, in his testimony, Simons did not confirm specific enforcement actions that the agency planned to take against the industry, he listed as a possibility a potential breakup of these past takeovers. Later, in the Fall of 2020, the FTC sued Facebook, alleging, among other things, that consummated mergers of Facebook violated federal antitrust laws and should be unwound.

Whether the FTC's inquiry results in other challenges to consummated transactions, the FTC will likely refine its approach to evaluating the competitive effects under a variety of substantive theories of harm, including, among other things, "killer acquisition" and "serial acquisition" concepts – *i.e.*, acquisitions pursued by leading technology companies of smaller rivals to eliminate potential or nascent competition. In addition, the FTC's findings could have implications beyond the technology sector. It is too early to tell what enforcement action, if any, will follow from this study.

In addition, on 17 September 2020, the FTC Bureau of Economics announced its plans to expand its revamped merger retrospective programme.[31] The new initiatives include evaluating the tools that may be used to screen and assess the competitive effects. Specifically, the review will include whether mergers create monopsony power in the labour markets.

Pharmaceutical mergers

The FTC recently announced the creation of a multilateral working group to update the antitrust analysis of pharmaceutical mergers. The work group presently includes the DOJ, several state attorneys general, and competition agencies from Canada, the European Union, and the United Kingdom. The working group will explore new theories of harm that go beyond the established paradigm of reviewing marketed product and pipeline overlaps, and those new theories could implicate non-traditional merger remedies. In particular, the work group will consider how to evaluate a merger's effects on innovation. The FTC's two Democratic Commissioners in their dissents in 2020 pharmaceutical mergers, including

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Bristol-Myers Squibb/Celgene and *AbbVie/Allergan*, signalled increased interest and concerns about pharmaceutical mergers inhibiting research and development. While innovation competition has long been a key part of antitrust review, and the 2010 Horizontal Merger Guidelines include a section on innovation, the working group may decide to explore new theories that are bespoke to the pharmaceutical industry. Similarly, and as foreshadowed by Commissioners Slaughter and Chopra's joint dissent in *Pfizer/Mylan*, the working group may consider how to reflect the merging parties' pre-merger conduct, such as reverse payment settlements or alleged price fixing, in merger review.

Bank mergers

On 1 September 2020, the DOJ announced that it was seeking public comments as to whether the DOJ should revise the 1995 Bank Merger Competitive Review Guidelines to reflect trends in the banking and financial services sector and modernise its approach.[32] Public comments were due by 15 October 2020. Among the recommendations submitted were: (1) increasing the concentration screening thresholds to reflect non-bank competition and deposit data issues; (2) incorporating and clarifying informal analyses adopted since 1995 affecting retail and small-business banking markets; (3) clarifying the DOJ's analysis of middle-market banking; (4) reducing uncertainty in local geographic market definition; (5) offering more guidance to address recurring issues related to centrally booked deposits; and (6) expanding and clarifying the weakened competitor defence applicable to financially impaired banks.

Proposed HSR Rules changes

On 21 September 2020, the FTC proposed significant amendments to the HSR rules that would aggregate and capture more information about holdings of investment funds, while at the same time exempt from the filing requirements certain minority acquisitions that "almost never present competition concerns".[33] Under the existing rules, investment funds and master limited partnerships managed by the same general partner or managing entity are generally treated as separate "persons" for HSR purposes. As a result, acquisitions made by different funds under common management are typically not aggregated, and are treated as separate transactions that may or may not individually trigger a filing requirement. The FTC's proposed amendment would close this "loophole" by requiring acquirers to aggregate the value of shares across all commonly managed funds. The proposed change would also require HSR filings to include detailed information for all commonly managed funds and their portfolio holdings.

Even if this first rule change is adopted, however, many activist investors would be able to accumulate equity positions of up to 10% in public companies without filing with antitrust agencies, as the second proposed rule change would introduce a sweeping new HSR exemption (Rule 802.15) for persons acquiring up to 10% of an issuer's voting securities. Unlike the existing passive investor exemption that applies narrowly to acquisitions made "solely for the purpose of investment", Rule 802.15 would exempt *all* acquisitions up to 10%, so long as the buyer (1) is not a competitor of the issuer, (2) does not hold 1% or more of the equity of any competitor of the issuer, (3) does not have a representative serving as an officer or director of the issuer or any of its competitors, and (4) has no vendor-vendee relationship with the issuer. The Commission's two Democratic Commissioners dissented from the decision to propose this new rule. When proposing these changes, the Commission understood that the new Rule 802.15 would significantly reduce the HSR Act's utility as a stock accumulation warning system; in fact, FTC Commissioner Noah Phillips stated that the HSR Act is "not supposed to be an early-warning system for tender offers and corporate takeovers".[34]

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In addition to the proposed rule changes, the FTC also has issued an advance notice of proposed rulemaking ("ANPR") to gather information on seven topics to "determine the path for future amendments to the premerger notification rules" and interpretations of those rules.[35] The notice covers important aspects of HSR reportability, including, among others, existing exemptions for transactions involving real estate investment trusts, convertible securities, and acquisitions made "solely for the purpose of investment", as well as the potential application of the HSR reporting obligations to certain events that do not involve stock purchases, such as the right to appoint board observers. The public comment period for both the proposed rule changes and the ANPR ends on 1 February 2021.

There will also be new leadership at both agencies. As mentioned, the FTC has split on policy and merger decisions – particularly in the pharmaceutical industry – in a number of transactions along partisan grounds. Both Democratic Commissioners Rebecca Slaughter and Rohit Chopra, who in the Spring of 2020 called for a COVID-19 moratorium on most mergers, have suggested that the agency should fundamentally change its approach to evaluating pharma mergers, vetting and approving divestiture buyers, and assessing the impact of vertical mergers and other transactions involving complementary products. Commissioner Slaughter advocates for the FTC to take steps to ensure greater equity to address racism in its enforcement decisions, and Commissioner Chopra supports holding unfair methods of competition and data security rule-making proceedings. Although Commissioner Chopra is expected to depart the FTC for another Biden Administration post, Acting Chairwoman Slaughter and FTC Commission nominee Laila Kahn are likely to be progressive in their agenda, and the ultimate shift of the composition of the Commission could have significant enforcement implications.

Transacting parties should be cognisant of the heightened antitrust scrutiny and changes as a result of the 2020 election when planning for the review of their transactions. Parties should identify not only current overlapping operations that may raise issues under traditional horizontal merger theories, but also other possible areas of inquiry, including vertical issues and the elimination of potential or nascent competition as a result of the transaction. In negotiating the scope of commitments and timing in their transaction documents, merger parties should also have a clear understanding of what remedies they will be prepared to offer if, at the end of the investigation, the reviewing agency remains concerned about the competitive impact of the transaction, and whether they are prepared to litigate if these concerns cannot be resolved. In an evolving and uncertain regulatory environment, against a backdrop of political change and a continuing pandemic, all indications are that transactions will continue at their recent blistering pace. Those parties that prepare intensively for the regulatory process, with the benefit of experienced advisors, will continue to be in a position to best navigate these complicated waters.

Reform proposals

Over the past few years, the political arena and the federal enforcement agencies have couched antitrust enforcement policy within broader industrial and societal policies. Some key members of the Democratic congressional leadership also advocated major changes to antitrust procedures and standards, under the rubric of a "Better Deal". In addition, congressional committees held hearings on a wide range of topics, including enhanced enforcement for transactions involving companies in the high-tech and data sectors. Regardless of whether new legislation passes, antitrust enforcement is likely to be as vigorous, if not more so, going forward.

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Digital Edition Chapters

Israel

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Overview of merger control activity during the last 12 months

Similarly to other countries, the year 2020 was not a typical year in terms of merger activity in Israel. The COVID-19 pandemic struck Israel in full swing and the market was subject to three lockdowns. During the first half of 2021, as the distribution of vaccines has progressed, Israel has been gradually recovering from the crisis and merger activity is already at pre-pandemic levels.

In March 2020, the Israel Competition Authority ("ICA") published several clarifications regarding the application of the Economic Competition Law, 1988 (the "Competition Law", or the "Law"), in light of the COVID-19 pandemic and the unprecedented business-related challenges it posed. Among others, the ICA acknowledges the need to apply a more flexible approach with respect to "gun-jumping" rules and clarified that if the waiting period during this crisis was likely to cause irreversible harm to merging entities, they may reach out to the ICA to find solutions for difficulties that might arise owing to the exceptional state of the economy. This lenient approach was applied to several contemplated mergers.

In October 2020, the ICA published interesting figures regarding merger control activity in Israel during 2020, which shed some light on the way the COVID-19 pandemic has impacted M&A activity in the country. According to the ICA's press release, in April 2020 (during which Israel was under the first COVID-19 lockdown), only six mergers were filed to the ICA – a 57% decrease in comparison to the previous month and more than a 75% decrease in comparison to April 2019. This decrease was expected, as both the global and Israeli markets were subject to a complete shutdown, and many transactions were halted abruptly. The decline continued, albeit to a lesser extent, over the summer, when Israel emerged from the first lockdown. By contrast, in September 2020 (during which Israel was under a second lockdown), 15 mergers were filed to the ICA. This is a slight increase in comparison to September 2019 (13). The figures clearly show the massive shock dealt to economic activity during the first lockdown, with a gradual return to normal levels over the final months of 2020. More importantly, the increase in filings during the second lockdown suggests that Israeli businesses became more adept at working from home and were able to hold course even under complete lockdown.

There seems to have been no real adverse impact of the lockdown on deal making, at least on transactions that were already under negotiation. This may indicate that while COVID-19 indeed posed a significant challenge, following the shock of the first lockdown, business reverted to long-term planning and investing. It is true that during the second lockdown in Israel, global markets stayed open (unlike the first lockdown, which converged with the lockdowns in Europe and the US). However, given the relatively small share of foreign filings made in Israel, the impact of this factor was relatively small. The year-over-year decline of approximately 20% during the first 10 months of 2020 (compared to the

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corresponding period in 2019) is significant, but even this drop is not necessarily entirely connected to COVID-19, as part of the difference may be explained by changes to merger control thresholds that took place gradually from the beginning of 2019 (further elaboration below). Indeed, the figures for the first two months of 2020 (i.e. before the pandemic) show a similar decline of 20%.

It will be interesting to see the data for 2021, during which Israel has been gradually returning to normal with the success of vaccinations and with M&A activity on the rise.

According to the Competition Law, the General Director of the ICA (the "General Director") has the power to either approve, block (if there is a reasonable likelihood that the merger will significantly harm competition in a relevant market), or approve the transaction subject to certain conditions (if said conditions can eliminate harm to competition). According to the ICA's merger registry, no mergers filed in 2019 were blocked by the General Director, and of the mergers relating to which the ICA issued a decision in 2019, only three were approved subject to remedies, and one was withdrawn following concerns raised by the ICA.

An analysis of the ICA's track record during the last decade shows that the share of mergers blocked is rather stable, ranging between 0–2% at most, with an additional 1–3% of notifications withdrawn.

Over the years, there has been an evident decrease in the use of remedies by the ICA. While in the years 2000–2005, approximately 18% of merger decisions included remedies, the number decreased to only 6–8% in recent years, with 0.5% in 2018 (a record low for conditional clearance decisions) and approximately 1.5% in 2019. The decline in use of remedies is in line with the ICA's new guidance on remedies – see "Key policy developments" below. However, we can see a small increase in the use of remedies since 2019, and it will be interesting to see whether this will evolve to be a trend. This potential trend, together with the ICA's gradual inclination to adopt more stringent structural remedies, may effectively derail more transactions than before.

In June 2021, the General Director announced that she will step down from office in August later this year, after five-and-a-half years in office. Several significant changes in competition law took place during her tenure (which will be described below). This is approximately six months before her formal term and may have a significant effect on the completion of reforms that have not yet been finalised. The identity of the new General Director is yet to be known and, as always, a new appointment will likely bring new policies as well as different focus points.

New developments in jurisdictional assessment and procedure

The main policy document regarding merger procedure remains the "General Director's Pre-merger Filing Guidelines" published in 2008 ("the Pre-merger Guidelines"). In addition, several years ago, the ICA published a detailed Q&A document relating to technical merger control procedure issues. In 2014, the ICA published an additional Q&A document, containing examples taken from pre-rulings filed to the ICA regarding merger control procedure. These guidelines elaborate and add important aspects that are not evident from a simple reading of the merger control provisions of the Competition Law.

One such example is the ICA's interpretive policy to classify a "merger" as a certain type of transaction that provides one entity with long-term control of essential assets of another company. Accordingly, the ICA has classified the long-term lease of critical assets or rights as a merger of companies (among others, relating to long-term lease of a hotel and of gas stations).

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The Competition Law defines a "merger of companies" as the acquisition of the principal assets of the target or more than 25% of either the outstanding shares, voting rights, rights to appoint directors or dividend rights of the target company. However, it remains unclear whether acquisitions of less than 25% of these rights may also be regarded as a merger of companies. The Pre-merger Guidelines offer limited certainty, suggesting that under specific circumstances, acquisitions of less than 25% of such rights, together with other holdings in a company, may be regarded as a merger of companies. The Pre-merger Guidelines also suggest that acquisitions of less than 25% of such rights may also be regarded as a restrictive arrangement.

On January 1st, 2019, the Israeli Parliament (the "Knesset") passed a major reform to the Competition Law, formerly known as the Restrictive Trade Practices Law.

This reform, which was advocated by the ICA, introduced extensive and significant changes to the three main chapters of the Competition Law: restrictive arrangements; monopoly; and merger control. The amendment also further increased the ICA's enforcement powers and the scope of criminal and administrative sanctions for violations of the Competition Law.

The main amendments of the **merger control** chapter included:

- A revision to the turnover threshold; the turnover threshold has been increased, such that the joint sales turnover of the merging parties that triggers a merger notification obligation has been increased from NIS 150m (approximately USD 46.2m) to NIS 360m (approximately USD 111m). The reform also implemented an update mechanism at the start of each year and in 2021, the turnover threshold stands at NIS 359.300m (approximately USD 110m). The requirement that the turnover of at least two of the merging parties be at least NIS 10m (approximately USD 3.1m) remains unchanged. However, the ICA stated it plans to implement an increase of this threshold to roughly NIS 20m (approximately USD 6.2m) and, in the meantime, is willing to grant waivers based on the elevated threshold (see below regarding reform in the Antitrust Regulations). The remaining two filing thresholds, which are based on market share tests, have not changed, although the reform did broaden the definition of "monopoly" for other purposes. Thus, mergers falling below the new turnover threshold would still be reportable if the combined market share of the parties exceeds 50% or if one of the parties has a market share exceeding 50% in any relevant market.
- Granting power to the General Director to extend the merger review period from 30 days to 150 days, by a reasoned administrative decision. Prior to the reform, the General Director was obligated to render a decision within 30 days, which could only be extended by a judicial decree or the consent of the parties. Practically, the ICA still prefers to ask for the parties' consent to an extension, rather than extending the review process unilaterally, in order to avoid issuing a reasoned decision. Such consent is usually granted and in practice, it seems that the ICA often does utilise its authority to practically extend the review period of the relevant transaction.
- Applying merger control to non-profit associations by expanding the definition of "company" in the Law to include an "association" as defined in the Associations Law 5740–1980.

It should also be noted that in the framework of the reform, the maximum monetary sanction imposed by the ICA has been increased to NIS 100m (approximately USD 30.8m). Prior to the reform, the ICA had the power to impose a monetary sanction on corporations for violations of the Law amounting to a maximum of 8% of the violator's sales turnover, provided the monetary penalty does not exceed NIS 24,490,070 (approximately USD 7.5m).

Another major reform is in progress, which is expected to dramatically change the merger control regime in Israel. On July 28th, 2019, the ICA published a draft amendment to the

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Antitrust Regulations (Registry, Publication and Reporting of Transactions), 5764–2004 (the "Antitrust Regulations") for public comment. The draft includes significant and far-reaching changes, both with respect to the scope of the transactions that will require merger approval by the General Director, as well as to the extent of disclosure required when filing merger notifications. The proposed amendment was subject to a public hearing that was concluded long since and, while the ICA stated that the amendment will take force subject to certain modifications, the ICA has yet to introduce the final version of the amendment.

If the reform is adopted as currently still proposed, it is expected to adversely affect foreign entities in terms of the scope of merger control scrutiny, the level of legal certainty, and the overall burden of filing mergers in Israel.

The proposed amendment includes:

- **An increase of the individual turnover threshold** – after the reform, the Competition Law and a consequent update to the threshold, a merger is currently notifiable under the turnover threshold if the combined turnover of the parties is at least NIS 359.3m and at least two parties have a minimum individual turnover exceeding NIS 10m. In the framework of the amendment to the Antitrust Regulations, the individual turnover will be increased to NIS 20m. In practice, the ICA has already partially implemented this change and grants waivers based on specific applications in the event the relevant turnover falls between the current and the proposed threshold.
- **Change in the rules concerning the calculation of turnover** – the definition of "control" for the purposes of defining an economic group (which should be taken into account when calculating turnover) will be amended to a broader, more elastic definition, such that control may be established even if the shareholding level in question is less than 50%.
- The abbreviated notification form will be abolished, and all mergers will require the submission of a new unified notification form.
- The new notification form will require extensive information, both quantitatively and qualitatively, across the full range of activities of the parties to the merger. Furthermore, regardless of its competitive complexity, the following information will be required for all mergers:
  - details of the stakeholders in each of the reporting parties;
  - a detailed mapping of their holdings and of potential overlaps between the controlling parties and other significant shareholders;
  - details of the activities of both parties to the merger;
  - details relating to the customers and suppliers of the parties;
  - details relating to the competitive context of the merger; and
  - details of financial information regarding sales turnover and quantitative sales volume.

International mergers that must be reported to the ICA under the proposed new merger control regime will additionally require the provision of details relating to filings made in other jurisdictions. Foreign entities may also be required to provide information regarding their agents, distributors or other representatives in Israel. According to the proposed amendment, the overall burden on foreign entities is expected to significantly increase. The ICA clarified that while there is indeed a significant increase in the scope of information that will be provided upon submission, this will in turn reduce the need for requests for further information and will allow for a shorter review period. However, insofar as the draft regulations are approved in their present form, it may be assumed that such regulations will require parties to a merger to invest significant resources in order to meet the new reporting requirements in a manner which, at times, would be unjustified and potentially impractical.

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In 2012, the ICA published the "Guidelines Regarding the Use of Enforcement Procedures of Financial Sanctions", which stated that the illegal execution of non-horizontal mergers would normally result in a financial sanction (an administrative tool) rather than criminal penalties, which could also be applied under the law. Illegal horizontal mergers are still subject to criminal enforcement.

In November 2019, the ICA published an amendment to Public Statement 1/16: Considerations of the General Director in determining a monetary sanction. In the framework of this amendment, it was determined that the base sum for technical "gun-jumping" violations would normally be set at 5% (with a maximum amount of 8%) of the violator's relevant sales turnover and not more than NIS 3m (approximately USD 920,000). In June 2019, the ICA imposed sanctions on two local pharma companies (Novolog and Informed) for failing to report a merger transaction between them. The sanction against Novolog was set at NIS 404,000 (approximately USD 124,000), and the sanction against Informed was set at NIS 72,000 (approximately USD 22,000).

In 2016, the ICA introduced a fast-track procedure for mergers that clearly do not harm competition (dubbed the "Ultra-Green Merger Procedure"). If a transaction clearly does not present a threat to competition and a certain degree of information on the transaction and its parties has been provided, it will be internally classified as an "Ultra-Green Merger" by the ICA, and the 30-day investigation period will be shortened to several days. The decision to classify a transaction as an Ultra-Green Merger is based mainly on the information provided by the merging parties. A regular merger notification form (rather than an abbreviated form) will be required for a transaction to benefit from this fast-track procedure. Merging parties that wish to qualify for the Ultra-Green Merger Procedure must provide the ICA with holding charts that fully detail direct holders of interest of each party and the controlling parties of each direct holder of interest. Moreover, the notification forms must be signed by the CEO and chief legal officer of each party (rather than any authorised signatory in the regular track). The Ultra-Green Merger Procedure has been successfully employed for several years and the ICA expeditiously clears mergers that qualify for the fast track, in some cases even clearing merger transactions within a day of submission.

In specific cases wherein a transaction that formally warrants filing is caught by the Israeli merger control regime, yet clearly has no effect on competition in Israel, the ICA is sometimes willing to grant a waiver from filing. This may be the case when the filing requirement is triggered by the specific characteristic of a seller that completely severs its ties with the acquired business; or, for instance, when the transaction clearly has no relation to Israel, although the parties' groups have a presence in Israel through affiliated companies which are active in unrelated activities.

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

In September 2018, the ICA published a public consultation on competition in the internet/digital economy. According to the publication, the ICA sought input from the public, including start-up companies and leading and established companies in the hi-tech sector, regarding current issues in competition as they relate to the online world. One of the questions on merger control aspects in the hi-tech sector asked for comment as to: whether scrutiny should be increased on mergers involving large tech firms; on the effects of such increased scrutiny on competition; and on the incentives to invest in the technology sector. The ICA addressed several challenges that exist in the digital economy, such as the difficulties to implement

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"traditional" tests when it comes to market definition or market power tests in the digital economy. On December 2020, the ICA published a report on: "Acquisitions of Israeli Start-ups: Ex-post Examination". This report was a follow-up to the ICA's contribution paper to the roundtable on "Start-ups, Killer Acquisitions and Merger Control" held before the competition committee of the Organisation for Economic Co-operation and Development ("OECD") in June 2020. The ICA issued a request for information to five tech giants: Google; Amazon; Facebook; Apple; and Microsoft, which acquired 21 Israeli start-ups over the years 2014–2019. The ICA did not find direct evidence of killer acquisition in Israel. Having said that, the ICA's probe has found that Facebook failed to report two acquisitions of Israeli companies (RedKix and Service Friend) and, subject to a hearing, the ICA is considering imposing a NIS 6m (approximately USD 1.85m) sanction on Facebook.

In several industries that are often characterised by global geographic markets, such as digital and online advertising, pharma, technology, mobility, and telecommunications sectors, the ICA has increased its degree of cooperation with foreign competition authorities, mainly the authorities in the EU and US. The ICA's clear policy is to engage with the relevant foreign authorities (and, in some cases, wait for their decisions) before announcing its decision (see further elaboration below).

In recent years, the ICA published several key decisions in numerous sectors. While each of these decisions was based on different concerns, the decisions demonstrate the ICA's tendency to block transactions even if the incremental market share increase is rather limited.

Financial sector

In May 2021, the ICA approved a merger between two leading Israeli investment houses, Altshuler Shaham Investments House Ltd. ("Altshuler") and Psagot Investment House Ltd. ("Psagot"). These two investment houses are active in the management of pension funds and other investment funds; Altshuler is a clear leader in several segments, and Psagot formerly led this segment. The ICA cleared Altshuler's acquisition of Psagot unconditionally, stating that the pension funds market in Israel is highly competitive, as indicated by the steady decline in management fees for consumers over the last years.

In May 2020, the ICA approved, subject to conditions, an acquisition made by Max It Finance Ltd. – an Israeli credit card services company – of an Israeli payment gateway provider (Credit Guard), formerly controlled by a Canadian company (Nuvei). The merger was cleared, subject to conditions aimed at maintaining full discretion for customers when choosing a payment gateway services provider.

In June 2018, the ICA blocked the proposed merger between two Israeli banks, Mizrahi Tefahot Bank Ltd. ("Mizrahi") and Union Bank of Israel Ltd. ("Union"), according to which Mizrahi would purchase Union's entire share capital. The ICA determined that the banking field in Israel is highly concentrated and is characterised by a limited number of competitors and significant barriers to entry and exit. The ICA was concerned that the acquisition of Union, which is a small bank, by a bigger bank may cause significant harm to competition, and that there is a reasonable concern that the acquisition could harm competition in banking services to the diamonds industry.

Both Mizrahi and Union appealed the decision to the Competition Tribunal. In November 2019, the Tribunal accepted the appeals and overturned the decision to block the merger. The Tribunal decided that the market definition set in the decision to block the merger raises significant difficulties, as the ICA relied upon subjective information it collected and disregarded ongoing changes in the banking industry. The Tribunal criticised such reliance on subjective evidence and stated that concerns of harm to competition raised by the ICA

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were purely theoretical. The Tribunal did, however, acknowledge the ICA's concerns relating to the diamond industry and ordered the case to be returned to the ICA to consider a remedy package to alleviate such concerns. Following the Tribunal's decision, in January 2020, the ICA approved the merger under several conditions, including a divestiture of Union's banking activity with the diamond industry.

In May 2019, the ICA approved a merger between one Israel's leading banks, Israel Discount Bank Ltd., and a smaller bank, Municipal Bank Ltd. (known as Dexia Bank), under conditions including divestiture of the acquired bank's credit business to a third party. A competing bank, Bank of Jerusalem, filed an appeal to the Competition Tribunal against the approval of the merger, mainly alleging that the approval of the merger thwarted the bank's ability to enter the market, which is characterised by high entry barriers. Bank of Jerusalem argued that practically, the approval of the transaction prevents its ability to acquire Dexia Bank by itself, and that such acquisition would have been better for competition in Israel. The appeal was dismissed by the Competition Tribunal in February 2020, finding that Bank of Jerusalem did not provide the required legal grounds for the appeal as it did not suffer an antitrust injury.

Food sector

In June 2021, the ICA raised concerns regarding a proposed merger between two Israeli food suppliers, concentrating on the waffle segment. The ICA was concerned that the parties, who were regarded as low-cost suppliers in the waffle segment, would be able to raise prices post-merger and would not be constrained by more expensive "premium Waffle suppliers". In light of the ICA's concerns, the parties withdrew the merger notifications. The ICA's position was criticised in the Israeli media for being fixated on a negligible niche, while at the same time clearing much more important and no less complicated mergers.

Failing firm doctrine applied

In August 2018, the ICA approved a merger between two Israeli television broadcasting and production companies which were running their own separate commercial television channels, Reshet Media Ltd. ("Reshet") and the new Channel 10 Ltd. ("Channel 10"). The approval of the merger was conditional on the prior sale of Reshet's holdings in Israeli News Company Ltd. (which was jointly held by Reshet and a third competitor, Keshet Broadcasting Ltd.). The ICA's approval of the merger was based on the "failing firm" doctrine, which was last applied almost 15 years ago. The ICA decided that in the present case, the three conditions of the doctrine are fulfilled: (1) Channel 10 was unable to sustain its activities without the merger and was likely to exit the market; (2) there was no alternative purchaser which was better for competition; and (3) the merger alternative was better for competition than the cessation of Channel 10's activities altogether.

In June 2019, the ICA once again referred to the failing firm doctrine and approved a merger between Cellcom Israel Ltd., a leading Israeli telecommunications company, and IBC, a company active in the provision of optical fiber communications infrastructure services for wholesale customers, and which is jointly held by the Israel Electric Corporation Ltd. and other corporations. The ICA implemented the failing firm doctrine and decided to clear the merger, even though it raised several competitive concerns, since IBC was facing insolvency issues.

Key economic appraisal techniques applied

The substantive test under Section 21(a) of the Competition Law is "reasonable likelihood that, as a result of the proposed merger, competition in the relevant market may be significantly harmed or that the public would be injured".

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In 2011, the ICA published the "Guidelines for Competitive Analysis of Horizontal Mergers", which describe the theoretical economic and legal foundations upon which the ICA's merger review is based.

According to these guidelines, the core purpose of merger review is to prevent the creation or enhancement of market power. The guidelines further explain that such market power can be exercised either unilaterally ("merger to monopoly") or collectively. Moreover, the guidelines explain that, in order to assess the competitive effects of a contemplated merger, the following steps will be carried out.

Firstly, the ICA will identify the relevant product and geographical markets in which the merging companies operate. The definition of the relevant market is based on the hypothetical monopolist test, which is implemented using practical indices such as differences in the functional use of the products, price differences, price correlation, the perspectives of market participants, differences in quality and so forth.

Secondly, the ICA will identify the players in the market, their market shares, and the level of concentration before and after the merger.

The guidelines stress that the merger investigation does not rest solely on static analysis. Therefore, when the initial assessment yields that the merger raises significant concerns, the ICA will enter a more detailed analysis of the "dynamic aspects", i.e. the possibility that the new entry or expansion of existing players in the market will mitigate the immediate and potentially harmful effects of the merger.

The analysis of entry and expansion will focus on a variety of entry and switching barriers, including regulatory barriers, scale economics, network effects, strategic behaviour by incumbent firms, branding, and access to essential inputs, among others.

In assessing the possible competitive outcome of a merger per the substantive test mentioned above, the ICA usually applies the same methodology as the relevant US and European Commission ("EC") authorities. The ICA would normally define the relevant market and then, if necessary, assess the relevant market shares of the parties, the existence of barriers to entry and expansion in the market, as well as other economic factors which may indicate how likely it is that the merger would result in either unilateral or coordinated effects.

The definition of the relevant market is mostly based on qualitative evidence, usually obtained by discussions with the merging parties and other market participants, internal documents, surveys, public records, information from other governmental agencies, and so forth. In cases where the qualitative analysis is not sufficiently informative, the ICA may seek to strengthen it with a quantitative analysis (critical loss analysis, price correlations, and so forth).

The ICA has increased the use of econometric analysis in recent years, but the analysis is still fundamentally qualitative. In January 2017, the ICA published a study on the methodology for defining markets utilising econometric models of demand. The study demonstrates the use of an econometric model for the evaluation of demand elasticity on the basis of consumer behaviour in order to define markets. The ICA notes, however, that the form of analysis demonstrated in the study is remarkable in its complexity and breadth and falls outside the scope of the ICA's resources in its day-to-day operations.

The ICA attributes special importance in merger investigations to direct evidence, such as natural experiments, internal documents, and market surveys. In recent years, many of the more complex cases filed with the ICA required an assessment of potential competition concerns. In this regard, the ICA is increasingly basing its analysis on the internal documentation it collects from the parties and on subjective assessments. Examples of this

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appraisal technique can be found in the *El Al/Israir* merger described above, in which the ICA decided to block the merger on the assumption that El Al intended to enter the route to Eilat were it not for the merger (to date, hypothetical) and the *Mizrachi/Union* merger, in which the Competition Tribunal criticised the ICA's decision to block the transaction, stating that it gave too much weight to subjective data, which was inconclusive.

The ICA will adjust its analysis to the case at hand and may adopt different market definitions within the same industry. For instance, in the food retail industry, the ICA's common approach has been to define broad demand areas when determining the relevant geographical market. However, in June 2019, subject to conditions, the ICA approved a merger between two food retail chains active in ultra-orthodox cities, Nativ Hahesed and Bar-Kol. Based on the unique consumer habits of this demographic, the ICA defined an ultra-narrow geographic market (short walking distance around each store) and accordingly required that in four areas, the parties would divest one of their stores. In many areas, the ICA refused to view large discount retailers positioned in close geographic proximity and beyond walking distance to competitors.

Approach to remedies

If the analysis results in a conclusion that the merger is anticompetitive, the ICA will examine whether there are available remedies that can eliminate the potential harm to competition.

If such remedies are unavailable, the ICA will block the merger, subject to the rare situations whereby an efficiency defence or the failing firm doctrine may be applied as mentioned above.

In 2011, the ICA published the "Guidelines on Remedies for Mergers that Raise a Reasonable Concern for Significant Harm to Competition" (the "Remedies Guidelines").

The Remedies Guidelines outline the governing legal principles of merger remedies, two of which stand out: (a) the ICA is authorised to request remedies only if the merger, as it was originally proposed, presents a concrete danger that competition will be significantly harmed – in other words, the ICA may impose conditions only for mergers that it would otherwise block; and (b) remedies are preferable to outright objection to the merger whenever they are capable of mitigating harm to competition.

The Remedies Guidelines explain that the ICA will generally prefer structural remedies over behavioural remedies. The ICA alleges that structural remedies are generally more effective as they deal with the proverbial disease rather than the symptoms. Moreover, they do not require complex and constant monitoring, demand fewer public resources, and are executed within a defined and often brief time period. However, the ICA acknowledged that in certain instances behavioural remedies, or a mix of behavioural and structural remedies, would be more appropriate.

However, over the years the ICA's willingness to accept behavioural undertakings has been significantly reduced. Since the implementation of structural remedies has also faced difficulties, including a failed attempt at divesting several supermarket stores in a major food retail case, the ICA shifted to an *a priori* sale of assets ("fix-it-first") remedy as the "new standard". This was the case in the decision to approve the merger between Shufersal Inc., (retail chain) and New-Pharm Drugstores Ltd. (drugstore chain), the merger between Reshet and Channel 10 and the aforementioned Nativ Hahesed merger with Bar-Kol.

In the *Shufersal/New-Pharm* case, the ICA even took the fix-it-first policy a step further and not only required the divestiture of assets to a third party before finalising the merger,

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but also the sale of 10 stores as a bulk to the same third party. The ICA concluded that there are two main chains active in the relevant segment and thus conditioned the approval of the merger between Shufersal and New-Pharm on the sale of 10 stores to create a third competitor and increase competition. While it would have been sufficient to require the sale of assets to any third party in order to alleviate concerns from harm to competition on the specific divested locations, the ICA attempted to restructure the market in a more competitive way. In retrospect, the ICA's attempt failed and the third party that acquired the divested stores entered financial difficulties, forcing the sale of some of the stores. In the Nativ Hahesed merger, the ICA also required the third-party acquirer to compensate the ICA in the event of the failure to operate the divested stores for a period of 18 months.

In the *Cimsa/Cemento* case, a merger between two foreign cement suppliers, Cimsa acquired two production plants from Cemento in Spain and in the US. Upon review of the merger, the ICA, in deviation from its declared policy of recent years, adopted a non-structural remedy. The ICA identified a concern for potential harm to competition in the provision of white cement in Israel and therefore imposed a remedy. Likely due to the fact that the merger was foreign-to-foreign, the ICA showed leniency and imposed a non-structural remedy, according to which the local subsidiary that distributes Cemex's products in Israel will contract with a third-party supplier of white cement for the acquisition of white cement to be distributed in Israel. The purpose of such remedy was to maintain competition in the market for the provision of white cement in Israel.

As mentioned above, the merger control procedure in Israel does not have a formal classification method. Regardless, it is not uncommon for parties seeking swift approval for complicated mergers to offer upfront remedies, attempting to expedite the review process. However, it is more common that remedies are discussed only if the ICA reaches a tentative conclusion that the proposed merger may significantly lessen competition in the market. In such cases, the parties may propose remedies that eliminate the harm to competition or, alternatively, the ICA may stipulate conditions in order to secure merger approval, which may then be discussed with the parties.

Key policy developments

As can be seen above, recent regulatory changes are expected to affect the merger control regime in Israel. On the one hand, the turnover filing threshold has been elevated significantly in order to filter less substantial transactions; on the other hand, the contemplated changes in the manner in which the turnover will be calculated may create regulatory uncertainty and have the opposite effect. Most of the planned reforms were put on hold during the COVID-19 crisis and now that business is gradually returning to normal, it may be expected that such reforms will soon be re-introduced. Having said that, the recent announcement of the General Director to step down from office may have an effect on the adoption of such contemplated changes.

The new merger notification form contemplated in the framework of the proposed amendment to the Antitrust Regulations is also expected to increase regulatory uncertainty. The scope of information which filing parties will be expected to collect before submission would be significantly broader. It remains to be seen whether the ICA's declarations that this reform would expedite the review period will come to fruition, or that in fact, the preparation period may increase, resulting in an overall increase in the process from preparation to clearance.

In the field of remedies, the ICA's tendency to demand stringent remedies is expected to continue. As described above, the ICA prefers to implement structural remedies and, with

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respect to divestitures, implements a fix-it-first policy. Structural remedies, the fix-it-first policy and other requirements intended to ensure adherence to remedies are gradually becoming the default position of the ICA when remedies are implemented. Obligations and commitments of third parties that acquire carved-out assets are becoming more prevalent as well.

With respect to international mergers, especially those involving industries with which the ICA is less familiar or when the "remote" access of the ICA to the foreign entities makes it difficult for the ICA to gather extensive information needed to analyse the merger, the ICA's policy is to defer its approval pending the decision of other antitrust authorities (namely the EU and US authorities). This practice has become increasingly common in past years in foreign-to-foreign transactions and may have a significant influence on the review schedule of certain merger transactions. The ICA will usually want to consider remedies offered to the foreign authority and possible Israeli-specific aspects, and will take a few business days after the relevant foreign authorities' decision to finalise the decision locally.

Reform proposals

As mentioned above, the ICA is currently working on a proposed amendment to the Antitrust Regulations which entails a complete reform to the merger control regime in Israel and an increase to the turnover threshold. For further information, please see the section above regarding new developments in jurisdictional assessment and procedure.

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Prior to joining the firm, Shai practised law in the legal department of the ICA (2002–2007), where he was in charge, among others, of the food sector, retailing, and intellectual property. He was later appointed as the head of the ICA's mergers team, where he participated in the International Competition Network's subgroup for merger investigative techniques.

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