Merger Control Worldwide

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Second Supplement to the
First Edition

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Merger Control Worldwide

Merger Control Worldwide is a comprehensive, multi-contributor collection which sets out the details of every jurisdiction where a mechanism for merger control is in place. A concise, practical account is given of the relevant law in each jurisdiction, presented with the aid of flowcharts and diagrams. *Merger Control Worldwide* aims to provide the legal community, in particular law firms and policy-makers, with a clear point of reference that will prove invaluable when making decisions and delivering sound and accurate advice in merger cases. This, the second supplement to *Merger Control Worldwide*, provides an update on developments that have occurred recently in the field. It includes a comprehensive appraisal of a new jurisdiction, Singapore.

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Merger Control Worldwide

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Introduction to the Second Supplement

Maher Dabbah and Paul Lasok QC

It gives us particular pleasure to provide the truly global and distinguished audience of *Merger Control Worldwide* with this second (cumulative) supplement. We are extremely delighted to be able to keep all our readers up to date with the various developments which have occurred in the field of merger control globally since the publication of the first supplement. In particular, we are delighted to be able to extend the jurisdictional coverage of the work further and to include on this occasion a new chapter on the Singapore merger control regime.

As ever, we are fortunate to have such a wonderful team of contributors, to whom we are greatly indebted for showing such enthusiasm and commitment to *Merger Control Worldwide*. Without them, this new supplement would have never seen the light of day. We would like to express our deepest gratitude to them.

We hope that our readers will find the coverage of the supplement useful as they embark on their highly important advisory and research work and we look forward to sending them further updates in the future.

Introduction to the First Supplement

Maher Dabbah and Paul Lasok QC

We are delighted to place this first supplement before the readers of *Merger Control Worldwide*. Early in 2004 and well in advance of the day on which we began turning into reality our idea of preparing an 'Encyclopedia' covering merger control regimes around the world, we had planned supplements to bridge the time gap between the first and second editions of the work. At the relevant time, we left it open whether such supplements would be annual or biennial. Indeed, we contemplated opting for the former only if *Merger Control Worldwide* received a sufficiently warm welcome and provided that recent developments in different regimes would merit it. We are pleased that that has turned out to be the case and that we are able to produce this first annual supplement. More importantly, however, we are pleased to be able to include two new chapters covering South Korea and Mexico – jurisdictions that we had intended to include in the first edition but unfortunately were unable to do so at the time.

This supplement does not cover all the jurisdictions included in the first edition. In the case of most jurisdictions, no important developments have occurred over the past year. It is envisaged that jurisdictions that have not been included in this supplement will be included in the second supplement next year, should they witness any interesting and important developments.

At an international level, the International Competition Network (ICN) continues to engage in highly interesting merger control initiatives with some impressive results. The 5th Annual Conference of the ICN was held in South Africa in May 2006. Merger control was not, however, the sole topic of discussion at that event. Reflecting the expansion in the scope of the ICN's work, the Conference included a discussion of non-merger control issues, most notably cartels and other important topics such as competition policy implementation and the provision of technical assistance. The ICN's merger control subgroups have been particularly active over the past year in producing highly interesting guidelines and recommendations. Those include a *Set of Recommended Practices for Merger Notification and Review Procedures*, developed by The Merger Notification and Review Procedure Sub-group (April 2004), and the *ICN Merger Guidelines Workbook* prepared by the Investigation and Analysis Subgroup (April 2004).[1]

Producing supplements of multi-contributory works is never easy. The completion of the task of producing this first annual supplement was made possible only through the great cooperation of our excellent team of contributors, who were able to give contributing to *Merger Control Worldwide* a high ranking in their busy and demanding agendas. Very warm thanks go to all of them. It is an honour for us to work with them all. We look forward to continuing to do so and hopefully also to welcoming to our team of contributors new names in the years to come.

1 Both available at www.internationalcompetitionnetwork.org.

Argentina

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See Merger Control Worldwide Vol. 1, Chapter 2, pp. 43–58

1. Legislative development

1.1. 29 March 2007 Bill

On 29 March 2007 Senator Jorge Milton Capitanich submitted to Congress a bill with proposed amendments to the Competition Act 25,156 (“the Act”). The Bill has been subject to criticism, for the following reasons:

(1) The Bill provides that economic concentrations affecting the “national interest” in the utilities, defence, energy or mining sectors, or those sectors having “a substantially high impact on employment or investment in accordance with standards set forth by the enforcement authority, with respect to the level of impact in each sector”, may be subject to a second review, not by the competition authorities but by the Ministry of Economy. This new review is to be based on purely political grounds.

(2) While on the one hand the Bill provides for the completion of the steps required for the formation of the new competition agency, the TNDC, created by the Act, on the other it appoints the members of the existing agency, the CNDC, as members of the TNDC for the first tenure, while at the same time providing that the two new members who must be appointed to complete the seven-member TNDC will be appointed by the President of Argentina within 30 days from the passing of the law. This procedure would change the rules for the formation of the TNDC as originally provided for in the Act (election through an independent jury in a competitive process).

The text of the Bill almost completely reproduces the text of the bill that a former Minister of Economy of Argentina had introduced on 17 August 2005 (see below). Compared with the latter bill, the text of the Bill only adds the word “substantially” when referring to the required impact on employment or investment of the concentration, thus somewhat raising the standard for political intervention.

The proposed amendment contained in the Bill is at odds with the idea of an independent competition agency, as was originally intended by the Act. Given that the Act provided that the TNDC would be the only agency with powers over competition issues (today the CNDC issues non-binding reports to the Secretariat, which decides on the matter), the Bill seems to try to maintain the status quo by giving the Government broad discretion to overrule a decision of the TNDC on merger control matters when “national interest” issues so require.

This bill has still not been approved by any of the Houses of Congress.

1.2. 19 July 2006 Bill

This bill proposes to appoint the Consumer Protection Undersecretariat ("the Agency") to a prosecutorial role in all kinds of competition proceedings. The Agency would be granted the power to file complaints and have an active role in all filings submitted before the CNDC, including economic concentrations. Such role includes the capacity not only to submit opinions, documents and information, but most importantly to appeal final administrative decisions, a right which in the context of mergers the courts have so far restricted as applied to consumers, and under the Bill the Agency would be able to exercise its role more easily with the interest of the consumers in mind.

1.3. 5 July 2006 Bill

This bill proposes a potentially significant amendment to the substantive test contained in the Act as applied to anti-competitive practices (Section 1). Presently a conduct is in violation of the Act if it not only restricts competition but also harms "the general economic interest", this term being interpreted by the CNDC in a similar way to the concept of economic efficiency (total surplus). Section 7 of the Act – comprising the substantive test for merger appraisal – uses the same language, but in this case the CNDC has assimilated the term to the concept of consumer surplus.

The Bill penalises acts that restrict competition while harming " . . . *the economic interest of consumers or the general economic interest*".

Given that the interpretation of the term *general economic interest* offered by the CNDC and the courts includes the concept of "consumer surplus" (either directly or as part of total surplus), the introduction of a specific provision preventing harm to the *economic interest of consumers* might cause some confusion in terminology. During at least the last nine years, Section 1 of the Act has been basically taken to read simply that any act restricting competition (as modern economic theory defines it, that is, affecting consumer or total welfare) violates the Act. The new wording might lead the CNDC or the courts to conclude that a practice that appears on its face to be anti-competitive might infringe the Act if it causes some harm to consumers apart from the one competition rules are intended to sanction or, alternatively or concurrently, that the meaning given to the term *general economic interest* must be changed, to include interests other than total or consumer surplus.

Although the Bill does not seek to amend Section 7 of the Act, it seems inevitable that any inconsistency arising from it will spill over to merger review.

1.4. 17 August 2005 Bill

On 17 August 2005 the Government of Argentina submitted to Congress a bill with proposed amendments to the Competition Act 25,156 ("the Act"). The Bill was subject to criticism similar to that directed at the 29 March 2007 bill discussed above.

The proposed amendment contained in the Bill was considered to demonstrate the Government's opposition to the idea of an independent competition agency, as was intended by the Act. Given that the Act provided that the TNDC would be the only agency with powers over competition issues (today the CNDC issues a non-binding report to the Secretariat, which decides on the matter), the Bill seemed to maintain the status quo by giving the Government broad discretion to overrule a decision of the TNDC on merger control matters when "national interest" issues so required.

In the end however, the Bill was not enacted into law and, since the statutory terms lapsed, it in fact lost its parliamentary status.

1.5. Advisory Opinions

Advisory Opinions are rendered through a procedure created in order to enable firms to seek advice from the competition authorities as to whether the notification of a given economic concentration is required under the Act or not. This procedure has been implemented since the enactment of the Act, when the CNDC started to render Advisory Opinions *de facto*. The Regulation later provided that the filing of a request for an Advisory Opinion suspended the terms for the notification, but these opinions were not binding on the parties. In July 2006 the former Technical Coordination Secretariat (the then adjudicatory authority) issued Resolution 26/2006, whereby control over this procedure was granted to the adjudicatory authority (currently, the Secretariat of Internal Trade). Resolution 26/2006 provides that the CNDC will issue non-binding opinions in connection with requests for confirmation as to the "reportability" of concentrations, and then the Secretariat will decide on the matter through a binding resolution which can be appealed by the parties (first before the Secretariat and second – if the decision is not reverted – before a Court of Appeals).

2. Case law development

2.1. Pernod Ricard/Allied Domecq

On 14 October 2005 the CNDC recommended the approval of the acquisition of Allied Domecq Plc ("AD") by Pernod Ricard SA ("PR") (through its subsidiary Goals Acquisitions Limited) subject to several disinvestment undertakings.

The relevant market was defined as that for wines, on the one hand, and that for each of the drinks regarding which the parties' activities overlapped (whisky, gin, ginever, vodka, tequila, rum, cognac, brandy/neo-brandy, and liquors), on the other. While in connection with the market segment for wines the CNDC concluded that the transaction would not result in the parties' having a prominent market share, regarding the markets for whisky, gin, vodka and liquors, the CNDC held that the transaction raised competition concerns. Accordingly, the CNDC suggested that the Secretariat impose the following undertakings:

– PR would transfer to a third party the whisky businesses carried out under the "Teachers" and "Old Smuggler" brands.
– The ginever business carried out under the "Bols" brand would be transferred to a company independent and different from AD and PR.
– The parties would refrain from launching new brands in the Argentine gin, vodka and liquor markets, and discontinue certain brands in the same.
– PriceWaterhouseCoopers was appointed as oversight agent.

After PR gradually complied with all undertakings imposed, on 7 August 2007, the CNDC and Secretariat granted final approval of the transaction.

2.2. Pampa Holding

In the Pampa Holding (transfer of the shares of an energy company) case, the members of the CNDC other than its President issued a partially dissenting opinion regarding the powers of the CNDC to require certain information. Although they agreed with the President that the transactions under examination should be approved, they were of the opinion that information requests in areas such as tax, exchange control and environment, which the notifying parties had been required to address at the request of the President of the CNDC, fell outside the scope of a merger control investigation. In this case, the Secretariat approved the concentrations and specifically addressed the matter confirming the aforementioned position.

2.3. Suez SA/Gaz de France SA

This case also showed a diverging opinion between the President of the CNDC and its remaining three members. Differences were more serious than those seen in the Pampa Holding case, given that in this case the President recommended the suspension of the merger review process until Suez, one of the notifying parties, desisted from a claim it had brought against the Argentine Republic before the World Bank's International Centre for Settlement of Investment Disputes. Notwithstanding the foregoing, the transaction was approved without undertakings by the Secretariat.

2.4. Kimberly-Clark/Klabin

In November 2000, in the Kimberly Clark Argentina/Klabin case, the CNDC held that it was appropriate to limit the term of a non-compete clause in a share transfer acquisition not involving the transfer of know-how to two years. On 28 May 2007 the National Appeal Court on Economic Crimes, in a divided opinion, confirmed the CNDC's view in spite of the fact that neither the CNDC nor the Secretariat explained why such restriction over seller had an appreciable impact on competition, as should have been the case under the Act.

2.5. Multicanal SA y otros c/Conadeco

While Section 35 of the Act empowers the TNDC to issue cease-and-desist orders, subsection (m) of Section 24 of the Act states that the TNDC must resort to courts for the issuance of "precautionary measures". In practice, the CNDC (which has been appointed by the Act to apply the Act until the formation of the TNDC) has relied on Section 35 of the Act and not resorted to courts where a cease-and-desist order was requested in procedures concerning prohibited acts. However, given that Section 35 is included in the Chapter of the Act that pertains to anticompetitive practices and not concentrations, the CNDC has so far not issued such cease-and-desist orders in the context of merger control proceedings. Just in case, in re *Multicanal SA y otros c/Conadeco* (a decision issued in the context of the high-profile merger between the two leading cable companies in Argentina), an Appellate Court confirmed a decision by a lower court whereby a precautionary measure was granted, ordering the CNDC to refrain from issuing cease-and-desist orders. The Appellate Court stated that, although Section 35 has repeatedly been relied on by the CNDC, such provision actually refers to the TNDC and such power might not be temporarily awarded to the CNDC. According to this decision, the issuance of a cease-and-desist order may only be done under the terms of Section 24 of the Act, i.e., provided that a court has previously authorised such measure.

2.6. Repsol Yacimientos Petrolíferos Fiscales GLP Envasado en la Ciudad de San Nicolás/Luncheon Tickets s/Apelación Resolución Comisión Nacional de Defensa de la Competencia

Several court decisions have recently dealt with the issue of which is the competent court to hear an appeal filed against a decision by the CNDC or the Secretariat. In March 2006, in re *Repsol Yacimientos Petrolíferos Fiscales GLP Envasado en la Ciudad de San Nicolás*, the Argentina Supreme Court held that the National Appeal Court on Economic Crimes had jurisdiction over the case (a presumed cartel), indirectly declaring the unconstitutionality of the provision of the Regulation that, as regards the city of Buenos Aires, grants jurisdiction to the Federal Civil and Commercial Court. Based on such precedent, one of the three Chambers of the Federal Civil and Commercial Court of the city of Buenos Aires, in re *Luncheon Tickets s/Apelación Resolución Comisión Nacional de Defensa de la Competencia* (an abuse of dominance case), held that the Regulation was unconstitutional, and consequently declared its own lack of jurisdiction, in favour of the National Appeal Court on Economic Crimes. More recently the Supreme Court held in re *Multicanal SA y otros/denuncia infracción a la ley 22.262* that, at least in cases where the effects of the anticompetitive conduct are produced in jurisdictions other than the city of Buenos Aires (one of the provinces), the corresponding Federal provincial court has jurisdiction.

2.7. Repsol YPF

In November 2006 the CNDC issued its opinion as regarded a transaction whereby DAPSA sold oil and gas company YPF a going concern consisting of a single Compressed Natural Gas ("CNG") filling station located in downtown Buenos Aires.

Surprisingly, the CNDC concluded that the transaction infringed Section 7 of the Act and therefore recommended that the Secretariat deny approval, to which the Secretariat agreed through Resolution No. 04/07 dated 22 January 2007.

Key to the decision was a particularly narrow definition of the relevant geographic market and the present high barriers to entry.

As regards the former, although there were involved products other than CNG (e.g. fuel and gasoil), only the market for CNG raised concerns regarding the degree of concentration after the transaction. Consequently, the latter was the market thoroughly scrutinised by the CNDC and its decision was based upon such analysis.

On barriers to entry to the relevant market, the CNDC considered that there was not enough CNG to meet demand, that there was a high degree of uncertainty regarding operation in the natural gas and CNG market, and that barriers to entry were high. Accordingly, the agency concluded that it was unlikely that prospective competitors would achieve a substantial share of the relevant market in the short term.

2.8. Brahma/Quilmes

In 2003 the CNDC approved the economic concentration Brahma/Quilmes with undertakings. Despite non-fulfilment of the same, the concentration was implemented and started to render effects. Consequently, Cervecería Argentina Isenbeck SA, the competitor of the parties to the transaction, filed a claim with the CNDC in order to request a precautionary order instructing the parties to suspend the implementation of the merger. The claim was rejected by the agency and Isenbeck appealed.

On 24 August 2006 a National Court of Appeals granted the order requested by Isenbeck, reversing the resolution issued by the Secretariat of Technical Coordination. In accordance with Section 13 of the Act, the Appeals Court held that the effects of the transaction had to be suspended until the requisite conditions were met. Interestingly, the Court also held that the transaction may partially render effects, but only to the extent necessary for the companies to comply with the applicable conditions, and if so justified by the Competition authorities.

2.9. Arcor/La Campagnola

In August 2006 the CNDC examined the acquisition of Benvenuto SACI ("Benvenuto") by Arcor SAIC ("Arcor"). The CNDC concluded that the transaction violated Section 7 of the Act because it might restrict or distort competition. Accordingly, it recommended that the Secretariat approve it subject to a number of conditions.

The transaction involved horizontal relationships in a number of food markets (namely olive oil, tomato products, marmalades and jellies, vegetable, fish and canned fruits), as well as vertical relations in other markets. Regarding the marmalades and jellies markets, the CNDC found that the transaction would substantially increase the degree of concentration and that, even when entrance was likely in the short term, any such competitors would not dispute the merging parties' market power. In spite of the findings described above, the CNDC finally accepted relatively mild undertakings. Arcor offered to refrain from creating new marmalade or jelly brands for a term of three years and making investments in television advertising for a term of two years. In addition, Arcor offered to submit a quarterly report on the average price per kilo of marmalades and jellies manufactured by Arcor and Benvenuto, for a term of two years. Finally, the CNDC required that the five-year non-compete term included in the purchase agreement be reduced to two years, given that, in the agency's view, the agreement did not include the transfer of know-how.

2.10. Oxígeno Líquido

In the *Medical Oxygen* cartel case, decided on 15 July 2005, the CNDC examined – for the first time so specifically – the effects on competition of an acquisition that did *not* require mandatory notification. The CNDC concluded that Air Liquide's acquisition of competitor Messer, even when part of a foreign-to-foreign transaction, violated the Act, given that Messer, although a small company, was a strong competitor in a market that, in the CNDC's opinion, was cartelised. Consequently, it imposed on Air Liquide a separate fine of Pesos AR $1,185,938 (approximately US $409,000).

2.11. Grupo Clarín SA/Cablevisión SA

On 21 March 2006 the CNDC issued a long-awaited advisory opinion, declaring that the purchase by Grupo Clarín SA of a 20% share in Cablevisión SA was not subject to notification.

Cablevisión is the largest cable-TV company in Argentina, with over 1.2 million subscribers. Grupo Clarín is the largest local media group, with interests in, among other things, the newspaper, radio, internet, open and cable-TV and sports programming businesses. Most notably, it controls Multicanal, the second largest cable company and competitor of Cablevisión. Over the years both companies have been the target of a considerable number of competition law investigations.

Through a series of transactions, Clarín became the indirect owner of 20% in Cablevisión. It then submitted a request for an advisory opinion with the CNDC, in order for the latter to determine whether the transaction required prior clearance.

Clarín pointed to several provisions of the relevant shareholders agreement in support of its view that the transaction entailed no transfer of control, namely that:

– directors appointed by Clarín have to be independent
– Clarín cannot appoint or replace key employees in Cablevisión
– Cablevisión cannot provide sensitive information to a shareholder that is also its competitor
– no special voting majorities apply, with the exception of issues related to the "protection of the investment" of the minority shareholder, such as amendment of by-laws, merger, spin-off, financial indebtedness, etc.
– even when Clarín's vote is required to approve the budget if profits do not reach 28% of Cablevisión's EBITDA, in the last five years Cablevisión has exceeded that percentage.

Three of the five members of the CNDC, following certain past administrative precedents on the interpretation of the term "control" (which triggers the application of the Act's merger control provisions), concluded that no notification was required at that point. They did, however, warn Clarín that any additional change in the current control structure, or the disclosure of Cablevisión's confidential information to one of Clarín's directors, could render the advisory opinion inapplicable and/or trigger the opening of an investigation and the imposition of sanctions.

The remaining two members of the CNDC – in separate opinions – dissented, claiming not only that there were past advisory opinions where the existence of some of the items listed above in support of the exemption were considered as granting some sort of control, but also that an "economic reality" approach had to be taken, and consequently Clarín's position in Cablevisión should not be considered as that of a mere "passive investor".

Third parties have already commenced litigation in connection with the transaction described above. Considering that the Act provides that advisory opinions are not binding, in this case it is unlikely that the CNDC's advisory opinion will provide comfort to the acquirer, in particular given the stark difference of opinions within the CNDC.

2.12. Sanofi/Aventis

The Secretariat of Technical Coordination ("the SCT") recently decided to approve an economic concentration in which a change in control occurred in several local companies belonging to the multinational pharmaceutical company Aventis, as a consequence of the foreign-to-foreign acquisition of Aventis by Sanofi and the subsequent merger of both companies.

Notwithstanding this, the SCT imposed on the merged entity a penalty of AR $832,500 (approximately US $277,500) for late filing of the transaction under the Act. It is worth noting that Section 8 of the Act provides for the obligation to notify certain acquisitions of control of companies within a week of the conclusion of the relevant agreement. The transaction in the case at hand was carried out through a tender offer filed by Sanofi Synthelabo before the Paris, New York and Frankfurt Stock Exchanges. The offer expired on 20 August 2004. According to the administrative resolution, the transaction was notified in Argentina with a delay of 185 business days. The fine is the highest imposed to date for late filing, both in absolute figures and when considering the daily fine taken into account by the SCT for purposes of the total fine (AR $4,500 vs. AR $3,000 in the *Air Comet SA – SEPI de España* case, where the previously highest fine had been imposed).

When setting the level of the fine in the case, the CNDC – in its recommendation to the SCT – took into account several mitigating and aggravating factors. Mitigating factors included the following circumstances: (i) that the tender offer was a hostile one, thus making access to information about the target company by the acquirer difficult; (ii) that the transaction had to be notified in more than 18 jurisdictions worldwide; and (iii) the difficulty experienced by Sanofi to determine precisely the turnover of the relevant companies within its group. Aggravating factors on the other hand included the following ones: (i) more than eight months had elapsed between closing and notification; (ii) had the transaction been timely notified, the CNDC would have noticed in advance potential anti-competitive effects in the heparin market (a concern which however was addressed as a consequence of the undertakings imposed by foreign competition authorities); and (iii) the turnover of the companies in Argentina was significant, with over AR $270 million in the relevant year.

2.13. Disco/Jumbo

In a recent judicial ruling in the *Disco/Jumbo* case (acquisition of a nationwide supermarket chain by a competitor) the Federal Court of Appeals of Mendoza expressly acknowledged that the CNDC has jurisdiction to carry out the merger control analysis prescribed by the Act, until the TNDC is finally constituted.[1]

Although several courts have already recognised the CNDC's power in this regard, they have generally also acknowledged that its role is an advisory one – as it was under former Competition Act 22,262 – namely a role complemented by a final decision by the Internal Trade Secretariat (the former SCT). This dual role – existent under the former Competition Act 22,262 and expressly continued by the regulation of the Act and the CNDC's and SCT's practice – has been somewhat challenged by this ruling, which contrary to prior decisions of the same court held that the CNDC had the same powers reserved to the to-be-created TNDC, and consequently the power is adjudicatory rather than simply one for carrying out advisory tasks.

However, the Federal Court also interpreted that due to the fact that the Act provides that the TNDC would have seven members and the CNDC has only five, CNDC decisions require unanimity in order to assimilate the CNDC operation as much as possible to that of the TNDC.

Given the recent resignation of one of the voting members of the CNDC and the non-appointment of his replacement as of the present date, it appears that the long-awaited *Disco* merger decision will be delayed even longer. Due to several judicial challenges, the administrative review of this case has become one of the longest ever, stretching over 28 months.

Furthermore, if the criterion of the Federal Court is adopted by other tribunals – something that is doubtful but that remains to be seen – a unanimous CNDC quorum would be required for all decisions based on the Act (not only merger control ones), thus effectively halting the adoption of decisions in this field.

1 The creation of the TNDC was provided for by Section 17 of the Act.

Armenia (Republic of Armenia)

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See Merger Control Worldwide Vol. 1, Chapter 3, pp. 59–75

1. Economic growth

In relation to the economic growth in Armenia, GDP growth rate has been at double-digit levels since 2002; real GDP growth for 2002 was 13.2%, for 2003 14%, for 2004 10.1%, for 2005 13.9%, and for 2006 13.3%.

2. Relevant legislation and statutory standards

The Constitution of the Republic of Armenia was amended in 2005. Article 8(2) of the new version of the Constitution stipulates that the "Republic of Armenia guarantees freedom of economic activity and free economic competition".

The Law of the Republic of Armenia on Protection of Economic Competition (the "Law") provides a first fundamental regulatory framework for competition assessment of economic entities in commodity markets. It prohibits concerted practices and abuse of a dominant position, regulates mergers, and deals with unfair competition and consumer protection issues, as well as state aid. It is largely aligned with the rules of the European Community (EC), in particular with those of the EC Treaty.

3. Decision-making bodies and enforcement authority(ies)

One of the important amendments to the Law, introduced as recently as 22 February 2007, is the granting of the right of inspection to the Commission, which will essentially enhance the powers of the Commission in terms of supervising the competitive environment. This right of inspection is expected to cause new problems for the Commission however. The Commission is not institutionally well developed and problems in relation to the internal distribution of powers of inspection within the Commission and human resources are likely to arise. In general, the establishment and development of the inspection mechanism is a long-term process and requires significant financial resources. Thus, currently the Commission's powers of inspection will be limited only to examining and verifying the basis of documents provided by economic entities as part of their merger notifications.

4. Tasks and functions of the Commission

One of the tasks assigned to the Commission is the provision of an appropriate environment for fair and free competition.

5. Notification requirements and procedures

5.1. Notification thresholds

According to recent amendments to the Law, the criteria for notification have been changed and currently the value of assets serves as a basis for notification of concentrations. The Law states that:

2. Concentration of economic entities, before its practising or participation therein, shall be subject to declaration if:

a) The joint value of assets of the participants was at least 3 billion AMD in the financial year preceding its establishment;
b) Participants operate on the same product market, and the joint value of their assets was at least 1 billion AMD in the financial year preceding its establishment;
c) The value of assets of one of the participants was at least 3 billion AMD in the financial year preceding its establishment;
d) Participants operate on the same product market, and the value of assets of one of them was at least 1 billion AMD in the financial year preceding its establishment.

5.1.1. Asset value

Changing the notification criteria from gross income to asset value is largely explained by the peculiarities of an economy in transition when most undertakings do not fully utilise their capacities and when a concentration between undertakings may significantly enhance their opportunities to increase their share in the market and their influence on the competitive process. Moreover, since consolidation of assets underlies concentration, it was considered expedient in the current stage to regulate concentrations in terms of abuses of dominant position. However, in the authors' view, concentrations should be subject to declaration, taking as a basis for notification the volume of turnover, since this expresses the real potential of the participants in a given commodity market. Indeed, considering the logic behind the amendment made to the notification thresholds in the Law, it should be noted that the change introduced is not without drawbacks. First and foremost, a question arises why the production capacities may not be fully utilised. If the reason is physical and moral depreciation, then the justification for the amendment made to the Law loses its logic. Secondly, when reference is made to assets it may be understood that this concerns only tangible assets; in fact, if this is so, this means that intangible assets will be excluded. On the other hand, if intangible assets are to be included, certain difficulties may arise in the assessment of those assets: among other things, the real value of intangible assets is not presented in the "balance" submitted by the merging parties and it is not necessarily possible to calculate and quantify it. In this respect, it is also necessary to be aware of one hypothetical situation: since tangible assets are presented in the balance by their historic value and since in the current stage of economic development tangible assets of various undertakings are almost physically depreciated, it is possible that the sum of assets of the parties to the concentration does not exceed the established threshold but nonetheless those undertakings have a significant share in the market and, thus, may essentially hinder free competition in the future.

5.1.2. On the given commodity market

Following the recent amendments to the Law, vertical and conglomerate mergers are within the scope of the Commission's review of merger operations.

5.2. Concentration

Article 8 of the Law deems the following to be a concentration in a commodity market:

a) Amalgamation or merger of economic entities;
b) Acquisition of assets or shares of one economic entity by another if the acquisition per se or together with the assets or share already possessed by the acquirer constitutes 20% of assets or shares of such economic entity;
c) Any amalgamation of economic entities by which one economic entity may, directly or indirectly, influence the decision making or competitiveness of another economic entity.

Natural persons have been included in the notion of "Economic entity", which can be considered to be an important amendment to the Law. However their participation in a concentration is not clearly formulated, particularly in cases when the natural person who already exercises control over an economic entity is granted a right to fully or partially control another economic entity or entities (or part of them).

5.2.1. Decision by the Commission

The Law as amended no longer contains a provision related to the timing of the notification procedure.[1] Instead 90 days are determined to be the maximum timeframe within which the Commission may conduct an administrative proceeding.

5.2.2. Information to be submitted

The Law provides the following in relation to information to be submitted as part of the notification of concentrations:

1. The declaration of concentration shall specify the type of concentration and the following information referring to each participant:

a) Name, residency (location) address and business address;
b) Financial statements of annual activity as of the end of the year preceding the declaration and auditing conclusion concerning them. If one of the concentration participants started its activity in that year, the financial statements and auditing conclusion concerning them shall be presented as of the end of the month preceding the declaration;
c) Volumes of products sold during the preceding year according to their assortment, as well as the description of production capacities;
d) Other information referring to the product market and activities of the market participants, if the declarer so wishes.

2. The procedure for declaration of concentration and the form of declaration shall be defined by the Commission.

5.2.3. Confidentiality

The Commission must protect commercial, banking and official secrets of economic entities and confidential information in accordance with the Law.

1 It is likely that this will be defined more precisely in secondary legislation to be adopted.

5.2.4. Due process

All general issues regarding the right of economic entities to participate in hearings of cases (by state institutions) related to them are dealt with by the Law on Administrative Proceedings. The right of merging parties to participate in the Commission's hearings will be regulated in detail by the special secondary legislation on Merger Notification which at the time of writing was in the process of being prepared.

6. Substantive assessment

The Law as amended states that any concentration leading to a dominant position shall be prohibited, except for cases when it promotes the interests of consumers and (or) development of a competitive environment in the product market. The merger control regime in Armenia generally does not employ a "public interest" test or welfare-based examination when reviewing merger operations.

6.1. Dominant position

The recent amendments to the Law have introduced new approaches regarding establishing the existence of a dominant position. According to Article 6 of the Law:

1. Within the meaning of this Law, an economic entity shall be deemed as having a monopolistic position on a product market if it has no competitor as a seller (acquirer).
2. An economic entity shall be deemed as having a dominant position on a product market if as a seller (acquirer) it captures at least one third of the given market in terms of sale volumes.
3. Each of two economic entities having the largest sale (purchase) volumes on a product market shall be deemed as having a dominant position on the given product market if as seller (acquirer) they capture at least half of the given market in terms of sale volumes.
4. Each of three economic entities having the largest sale (purchase) volumes on a product market shall be deemed as having a dominant position on the given product market if as seller (acquirer) they jointly capture at least two thirds of the given market in terms of sale volumes.
5. The Commission shall define the monopolistic or dominant position of economic entities, as well as the procedure on maintaining the Centralised Log (Register) of Economic Entities having Dominant Position.

An economic entity shall be recorded in the Centralised Log (Register) of Economic Entities having Dominant Position on the product market, and it shall be removed from the Log if it loses that position.

There is some uncertainty regarding the issue of collective dominance however (particularly in relation to the proportion of each economic entity in establishing the existence of a collective dominant position). In the authors' view, this issue needs to be clarified.

7. Final orders and sanction by the authorities

It should be mentioned that recent amendments to the Law continue the tendency (started in May 2005) to strengthen the authority of the Commission and increase the responsibility of economic entities for violations of the provisions of the Law. According to Article 36 of the Law:

1. Economic entities, the state administration and local government bodies and their officials shall incur liability for the violation of this Law according to the procedure defined by this Law and the legislation.
2. Entering into (establishing, participating in) anticompetitive agreement shall lead to imposition of a fine upon the economic entity–anticompetitive agreement participant at the rate of 2% of proceeds of the year preceding the entry into (establishment, participation in) the agreement, but not exceeding three hundred million AMD. In case the conducted activity lasted less than 12 months during the previous year, the infringements stipulated in this part shall lead to imposition of a fine at the rate of 2% of proceeds (however not exceeding three hundred million AMD) from the activity conducted prior to the entry into (establishment, participation in) that agreement but not exceeding 12 months' period.
3. Abuse of dominant position shall lead to imposition of a fine upon economic entity at the rate of 1% of proceeds of the previous year, but not exceeding three hundred million AMD. In case the conducted activity lasted less than 12 months during the previous year, the infringements stipulated in this part shall lead to imposition of a fine at the rate of 1% of proceeds (however not exceeding three hundred million AMD) from activity conducted in the period preceding the infringement but not exceeding 12 months' period.
4. Failure to declare the concentration as stipulated by this Law, or enactment of (participation in) prohibited concentration, shall lead to imposition of a fine upon the economic entity–concentration participant at the rate of 4% of proceeds of the year preceding the participation in the concentration, but not exceeding five hundred million AMD. In case the activity conducted in the previous year lasted less than 12 months, the infringement stipulated in this part shall lead to imposition of a fine upon the economic entity–concentration participant at the rate of 4% of proceeds (however not exceeding five hundred million AMD) of the year preceding the concentration but not exceeding 12 months' period.
5. Action of unfair competition shall lead to imposition of a fine at the size of five hundred thousand AMD. Repetition of an infringement stipulated in this part during one year shall lead to imposition of a fine at the size of one million AMD.
6. Receipt of prohibited state aid shall lead to imposition of a fine upon economic entity at the rate of 2% of proceeds of the year preceding the infringement, but not exceeding three hundred million AMD. In case the activity conducted in the previous year lasted less than 12 months, the infringement stipulated in this part shall lead to imposition of a fine at the rate of 2% of proceeds (however not exceeding three hundred million AMD) from activity conducted in the period preceding the infringement but not exceeding 12 months' period.
7. Failure to submit documents or other information as defined by the Commission decision, or submission of unreliable or false data, shall lead to imposition of a fine at the size of five hundred thousand AMD. Repetition of the violation stipulated in this Part during one year shall lead to imposition of a fine at the size of two million AMD.
8. Preventing the Commissioners or Commission staff from performing the rights or duties reserved to them by this Law, the Statute or other legal acts shall lead to imposition of a fine at the size of five hundred thousand AMD.

8. Appeal/judicial review

Following the adoption of an administrative act, a copy thereof shall be delivered to the addressee within 5 days. The administrative act adopted by the Commission shall take effect on the day following the date of its delivery to the addressee, unless a later date is specified in the act. In case the administrative act has more than one addressee, the relevant part of the administrative act shall become effective on the day following the date of delivering its copy to the respective addressee, unless a later date is specified in the act.

Other individual legal acts adopted by the Commission shall take effect from the moment of their adoption, unless a later date is specified therein. The Commission decision may be appealed in an administrative order within 10 days following its effective date. The Commission decision may be appealed in the court: in case of disagreement with the results of discussion of an administrative appeal, within one month from the time of adoption of a decision on appeal; and in case of not filing an administrative appeal, within one month following the effective date of the Commission decision.

9. Mergers in specific sectors

Currently the Commission is in the process of negotiating with the Central Bank of Armenia to sign a Memorandum of Understanding on cooperation aimed at unifying efforts in effective protection of competition in the banking sector.

10. Cooperation with other competition authorities

With regard to the Commission's cooperation with international organisations (other than its involvement within the ICN and its cooperation with the OECD, UNCTAD, the World Bank and the WTO), the Commission cooperates with EU-funded projects and with the Organization for Security and Cooperation in Europe (OSCE) as well.

Australia

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1. Notification requirements and procedures

This Supplement identifies proposed amendments to the existing "informal clearance" procedure used by the Australian Competition and Consumer Commission for merger review in Australia. This Supplement adopts the defined terms used in the original *Australia* chapter of *Merger Control Worldwide* and is intended to *replace* section 3.1.3 and Figure 1 of the original *Australia* chapter.

Relevantly, the *Trade Practices Legislation Amendment Bill (No. 1) 2005* (the "Dawson Bill") referred to in section 1.1 of the original chapter was defeated in the Australian Senate in October 2005 and so has not been enacted into law. The Dawson Bill was intended to introduce a new formal merger clearance procedure that would operate in parallel with the existing informal clearance procedure in Australia. A political impasse is delaying the reintroduction of the merger reform provisions of the Dawson Bill into the Australian Parliament although it is likely to be reintroduced during 2006 or 2007.

2. Informal clearance

The third option is to seek informal clearance from the Commission for the merger on a confidential or non-confidential basis. If the Commission grants informal clearance to a merger, the parties to the merger obtain a "comfort letter", which usually states that the Commission will not oppose the merger but reserves the right to do so should new information come to light. While a comfort letter is not binding on the Commission, it is rare for the Commission to grant informal clearance and subsequently oppose the merger.[1]

The term "informal" is used in Australia because the informal clearance procedure has no statutory basis. In July 2006, the Commission published new *Merger Review Process Guidelines* (the "2006 Guidelines") to increase the transparency of the informal clearance procedure. The 2006 Guidelines are not binding on the Commission but should be followed by the Commission in most instances. As of August 2006, the Commission is also reviewing its *Merger Guidelines* (referred to in Section 4.1 of the original chapter).

The informal clearance procedure is usually initiated by providing a detailed written submission to the Commission which describes such matters as the businesses of the acquirer and vendor, the nature of the proposed acquisition, the rationale for the proposed acquisition, the proposed timetable for the acquisition, an analysis of the reasons why the proposed merger

1 See, for example, *Trade Practices Commission v. Santos* (1992) 38 FCR 382 where the Commission alleged that further information had come to light which indicated that the merger could result in a contravention of Section 50.

would not be likely to lessen competition substantially in any market in Australia (including estimates of market shares), and nominating persons for the Commission to contact should it require further information.[2] In some cases, the written submission will also set out contact details for the significant customers and suppliers of the acquirer and vendor. The acquirer usually takes the lead in the preparation of the submission (since the acquirer has the primary liability under Section 50 of the Trade Practices Act) but the submission is typically submitted jointly by the acquirer and vendor. The written submission is typically provided at a meeting with representatives of the Commission attended by senior executives of the acquirer and vendor and their legal representatives.

Less commonly, the Commission may initiate its own merger review in the absence of an application for informal clearance. This could occur as a result of a courtesy briefing where the Commission considers competition issues do arise. This could also occur as a result of information received by the Commission from other sources, including Australian and foreign regulators, media reports and third party complainants.

Following the promulgation of its 2006 Guidelines, the Commission has defined three separate procedures that it may apply to informal clearance applications, namely Confidential Review, Basic Review, and Comprehensive Review.

Confidential Review: Approximately half of all mergers reviewed by the Commission are confidential mergers. The Commission is willing to provide an interim confidential view on a confidential merger within 3 to 4 weeks of receiving a full submission from the parties, although information requests may extend this time frame. The Commission will typically give one of three responses. First, the Commission could indicate on a qualified and interim basis that the Commission does not propose to oppose the merger based on information received, but reserves the right to conduct market inquiries once the matter becomes public. The Commission would subsequently undertake a Basic Review or Comprehensive Review once the merger became public. Secondly, the Commission could identify that it has competition concerns with the merger and is unable to form a view without undertaking market inquiries once the merger becomes public. Thirdly, the Commission may indicate that it has formed a preliminary view that the merger would breach Section 50 of the Trade Practices Act.

Basic Review: If the merger is not confidential and the Commission decides that no or limited public consultation ("market inquiries") is required the merger will be subject to a Basic Review. Approximately half of non-confidential mergers considered by the Commission are subject to a Basic Review. The Commission will usually complete a Basic Review within 2 to 3 weeks, although information requests may extend this time frame. At the completion of a Basic Review, the Commission's decision and summary analysis is posted on the Commission's website.

Comprehensive Review: All other non-confidential mergers are subject to a Comprehensive Review which involves two distinct review phases. Phase I usually lasts 6 to 8 weeks from the date submissions are received, including a 2 to 3 week market inquiry process. If no substantial competition concerns are identified, the Commission will grant informal clearance at the end of Phase I. However, if substantial competition concerns are identified, the Commission will publish a Statement of Issues on its website and the comprehensive review will proceed to Phase II. Around 2.5% of mergers reviewed by the Commission proceed to Phase II. During Phase II, the Commission and the parties will discuss the issues raised in the Statement of Issues and any scope for remedial action. While the parties may not provide editorial comment on the Statement of

2 A detailed guide to the information requirements for informal merger assessments is set out in the Appendix to the *Merger Review Process Guidelines*.

Issues before it is published, they do have the ability to publish a reply on the Commission's website. The length and scope of Phase II depends on the nature and scope of the issues identified, but is typically completed within 6 weeks. At the completion of Phase II, the Commission will publish a Public Competition Assessment on its website containing its final decision and analysis.

A flow chart identifying the informal clearance procedure in the 2006 Guidelines is set out in Figure 1 below.[3]

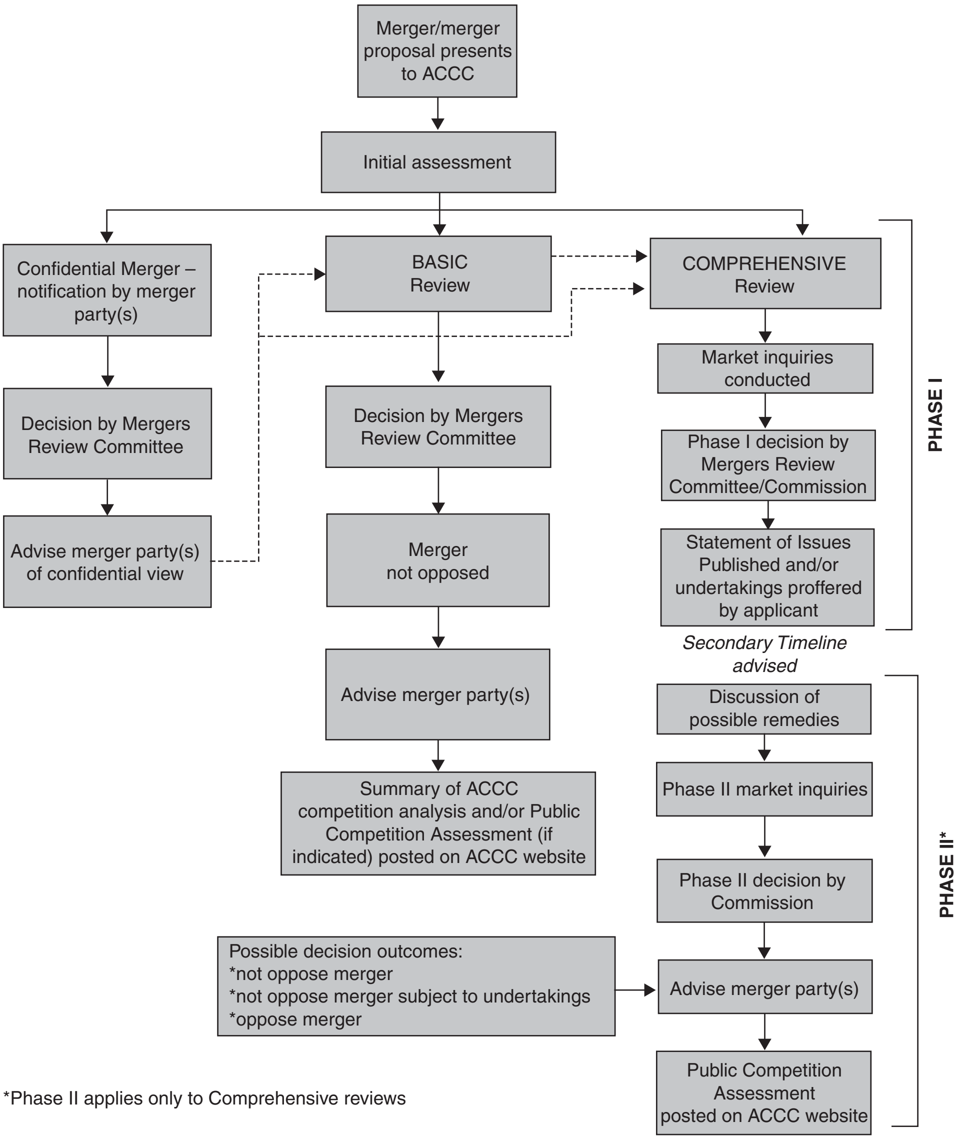

Figure 1 Assessment process for informal clearance applications

3 Source: ACCC *Merger Review Process Guidelines*, Australian Competition & Consumer Commission, July 2006, page 8.

Austria

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See Merger Control Worldwide Vol. 1, Chapter 5, pp. 112–142

1. Introduction

The Austrian Cartel Act 1988 (Kartellgesetz, KartG) and the Austrian Competition Act (Wettbewerbsgesetz, WettbG) were amended in June 2005. The new Cartel Act 2005 and the amended Competition Act entered into force on 1 January 2006. With respect to the Austrian merger regime governed by the Cartel Act and the Competition Act, the amendments brought about only minor modifications. Changes include higher turnover thresholds, the exclusivity of turnover-based fines, a leniency programme and the competency of the Federal Competition Authority (the "FCA") for filing notifications. These changes are flagged and discussed in the text that follows.

2. Notification requirements

In the new Cartel Act 2005, concentrations are defined in Section 7.

3. The concept of concentration

According to Section 7(2) of the new Cartel Act 2005, cooperative full-function joint ventures are regarded as concentrations within the meaning of the Austrian merger regime while Section 7(4) provides that intra-group mergers are exempt from merger control.

The Cartel Act 2005 abolished the distinction between concentrative and cooperative full-function joint ventures insofar as both forms of joint ventures will qualify as concentration within the meaning of the Austrian merger regime.

4. Notification thresholds

In the new Cartel Act 2005, the thresholds are set out in Section 9(1). The new Cartel Act 2005 brought about the following changes:

- The turnover thresholds must not simply be met, but exceeded.
- The second turnover threshold (combined turnover in Austria) has been increased to €30 million.
- The third turnover threshold (of each undertaking concerned worldwide) has been increased to €5 million.
- According to Section 9(2), concentrations exceeding the turnover thresholds set out in Section 9(1) are exempt by law from the notification obligation, as long as (i) only

one undertaking concerned achieved a turnover of more than €5 million in Austria; and (ii) the combined worldwide turnover of the other undertaking(s) concerned does not exceed €30 million. This provision is intended to cover, in particular, mergers which do not have any material effect on the Austrian market (e.g. one large Austrian undertaking acquires one or more small foreign entities).

5. Public announcement

Since 1 January 2006, the FCA has been publishing merger notifications on its website (www.bwb.gv.at).

6. Notification procedure (Phase 1)

Section 10 of the new Cartel Act 2005 provides that notifications have to be filed with the FCA instead of the Cartel Court. The FCA immediately forwards a copy of the notification to the Federal Cartel Prosecutor (the "FCP").

If the official parties do not file an application for an in-depth examination of a concentration within the four-week period, or such request is withdrawn during the four-week period, the FCA (instead of the Cartel Court) will issue a respective confirmation after expiry of the four-week period.

7. Notification procedure (Phase 2)

The five-month time limit for a decision of the Cartel Court starts to run at the time the FCA or the FCP files a request for an in-depth examination with the Cartel Court. Thus, the examination period of Phase 2 is extended.

8. Filing fees

According to Section 10a of the Competition Act, a flat-rate court fee of €1,500 shall be charged by the FCA. The four-week time limit for the official parties to apply for an in-depth examination of the concentration starts to run only after the filing fees have been settled.

In Phase 2 cases, where an in-depth examination has been conducted, a variable court fee of up to €30,000 is charged.

9. Timescale for clearance

The five-month time limit for a decision of the Cartel Court starts to run at the time the FCA or the FCP files a request for an in-depth examination with the Cartel Court. Thus, the examination period of Phase 2 is extended.

10. Fines

According to Section 29 of the new Cartel Act 2005, the prohibited implementation of a concentration or failure to implement a concentration in accordance with restrictions or conditions imposed by the Cartel Court or commitments entered into vis-à-vis the official parties can lead to a fine of up to 10% of the worldwide turnover of the undertaking(s) concerned. The submission of misleading or incorrect information in the notification may lead to a fine of up to 1% of the worldwide turnover. These fines are imposed by the Cartel Court.

The Competition Act 2005 provides for a leniency programme in Section 11(3). The FCA is authorised not to apply for the imposition of a fine against an undertaking or an association of undertakings which:

– ceased their involvement in a violation of Section 1 of the new Cartel Act 2005,
– informed the FCA about this violation, before the FCA became aware of the circumstances of the case,
– cooperated fully with the FCA to clarify these circumstances, and
– did not coerce other undertakings to participate in the violation of the Cartel Act.

Should the circumstances of the case become known to the FCA, but all other requirements are met, the FCA may apply for an alleviated fine.

11. Appeal

Under the new Cartel Act 2005, the Supreme Cartel Court must make a decision within two months of the case reaching it.

Belgium

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1. New merger thresholds

On 19 July 2005, new merger notification thresholds entered into force by the adoption of a Royal Decree of 3 July 2005 amending the current Competition Act.

The system of mandatory pre-merger notification is maintained, but the notification thresholds have been increased significantly. Mergers, acquisitions, takeovers and joint ventures are subject to control in Belgium only if (a) the combined Belgian turnover of all the companies concerned (including their affiliates) exceeds EUR 100 million and (b) each of at least 2 of the companies concerned, including their affiliates, has a Belgian turnover exceeding EUR 40 million. Under the old rules on notification, these thresholds were EUR 40 million and EUR 15 million respectively. The merger thresholds may be increased by Royal Decree and they will be subject to an evaluation by the Competition Council every three years.

2. A new competition law

Furthermore, on 29 June 2006, the new legislation replacing the existing Competition Act was published in the Belgian Official Journal.

This “New Law” represents the second of a “2-stage” reform of Belgian competition law which started with the Royal Decree of 25 April 2004, bringing the provisions of the Competition Law into line with the provisions of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Rather than amending the current regulatory framework, the legislator has opted for a complete overhaul resulting in a new law which contains a range of novel provisions.

Concerning the control of concentrations, the proposal provides that merging parties will be barred from implementing their concentration until the Competition Council has approved it. Under the present Competition Act, the parties have only had to refrain from taking any action that could impede the reversibility of the transaction and affect the market in a sustained manner pending the Competition Council’s review of the transaction.

With regard to the criteria for approval of concentrations, the New Law embraces the “significant impediment to effective competition” test introduced at the EU level by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

The New Law also contains an explicit confirmation that the Competition Council has the power to accept and formalise commitments offered by the parties for the purposes of merger clearance. It is worth noting however, that under the existing regime the Competition Council considers itself competent to accept such commitments, though it is fair to say that the absence of an explicit provision has caused some degree of controversy.

As regards appeals against decisions of the Competition Council, the New Law confers on the Brussels Court of Appeal full jurisdiction to re-examine cases on their merits. In so doing, the Brussels Court of Appeal may rely on the services of the Auditorate. The New Law therefore fills a gap in the rules of the present regime which are unclear as to the extent of the jurisdiction of the Brussels Court of Appeal when asked to rule on an appeal against a decision of the Competition Council. The Brussels Court of Appeal may also impose fines and penalty payments.

Concerning the relationship with specific sector regulators (e.g. electricity, telecommunications), the New Law provides for an appellate procedure before the Competition Council against the decisions of these regulators.

The New Law will enter into force on 1 October 2006.

Brazil

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1. Effects in Brazil

On 18 October 2005 the CADE issued a precedent (CADE's Precedent No. 1) "formalising" its understanding that the turnover criterion dealt with in the Competition Act should apply to the turnover achieved by any of the parties to the merger transaction in Brazil (and not worldwide, as previously stated by CADE). This precedent affords merging parties the necessary legal certainty when evaluating whether they must notify their operation in Brazil.

On 27 August 2007 CADE issued another precedent, CADE's Precedent No. 2, consolidating its understanding that notification of transactions involving simple corporate reorganisation is not mandatory. According to this precedent, acquisition of a minority ownership interest in the voting capital, by a partner that already holds a majority ownership interest, does not constitute a transaction that requires notification to the Brazilian competition authorities, provided that:

(i) the seller does not hold powers arising from laws, by-laws or agreements to appoint senior managers, determine the company's business policy or veto any corporate matters; and
(ii) the transaction does not include non-compete clauses for a period exceeding 5 years and/or a territorial scope broader than that in which the company actually operates; or clauses that entail any type of control between the parties.

Thus, the purpose of CADE's Precedent No. 2 is to settle any problems related to the notification of merger operations, as it seeks to "filter" such operations, distinguishing between events that involve mere corporate restructuring with no effects on the market (where there is no change in decision-making structure and notification is not mandatory) and transactions which must be notified in which: (i) a partner holding decision-making powers "leaves" the company; or (ii) a new partner, belonging to another economic group, which may add its strategic position in the market to the management of the company in question, joins the company.

In the event of corporate restructuring, it is important nonetheless to examine whether the non-compete clause stipulated in the agreement does not concern a period exceeding 5 years or whether its territorial scope is limited to the market in which the parties operate, since such clause may be a factor that determines whether or not the transaction must be notified.

2. Timing for the notification

On 14 February 2007 CADE issued a new resolution containing the methodology for calculation of fines for untimely notification of merger operations, as provided for in Article 54, paragraph 5 of Law 8884/94 (the "Law"). This Resolution 44/2007 repealed the erstwhile Resolution 36/2004 dealing with this matter.

The exact moment to start the 15 business days' countdown for notification of concentration acts (mergers, acquisitions, joint ventures and other corporate acts that are subject to CADE review and approval) is still a bone of contention, but the recently enacted Resolution clarifies some key points in relation to the calculation of fines for untimely notifications, also streamlining the existing calculation system and offering criteria that are clearer and easier to use.

With this Resolution, CADE clearly intends to encourage the voluntary notification of concentration acts, even belatedly. CADE also seeks to lay down more objective criteria for aggravation or mitigation of the ultimate fine to be imposed, as will be seen below.

Resolution 44/2007 sets a threshold fine (known as "base fine") at 60,000 Reference Tax Units – UFIR (approximately R$60,000). An additional sum of 600 UFIR (approximately R$600) is charged for each day of delay. Under the defunct Resolution, such addition was charged at a progressive rate per number of days in delay, apparently based on random standards.

In case of recidivism (that is, when the same company fails to observe the notification period more than once), the base fine is doubled.

The ultimate penalty may be aggravated or mitigated (vis-à-vis the base fine) depending on some factors already prescribed in the Law, namely: severity of the offence; the advantage obtained or intended by the offender; (non) consummation of the offence; the risk of injury to free competition, the national economy, consumers or third parties; anticompetitive effects on the market; and the offender's economic condition. Within this context:

- If the arithmetic average of the gross turnover of the groups which the Brazilian parties involved in the concentration act belong to, in the preceding fiscal year, exceeds four hundred million reais (R$400,000,000), the base fine will escalate at 0.005% of the average turnover of the participants' groups, capped at seven hundred thousand (700,000) UFIR or approx. R$700,000 (the offender's economic condition).
- If the concentration act is approved subject to conditions, the fine value may be increased by up to 50% (severity of the offence, actual consummation of the offence, anticompetitive effects on the market).
- If the concentration act is not approved, the fine value may be increased by from 50% up to 100% (idem).

If notification is made (however untimely) on the petitioner's own initiative, the fine imposed by CADE will be reduced by 30% (on the basis of the offender's "good faith"). This is an assured mitigation of penalty: according to Resolution 44/2007, such reduction is not conditional on CADE's discretionary decisions in this regard.

Although still open to subjective interpretation, it is undeniable that Resolution 44/2007 offers a degree of legal certainty that is far greater than that available under the aegis of Resolution 36/2004. This is a positive step forward, the more so because it deals with a matter that is extremely relevant when determining the contingencies expected from deals that are subject to CADE's preventive control and scrutiny.

As for the timing for the notification, CADE has also issued on 21 September 2007 a new precedent (CADE's Precedent No. 3, 2007) establishing that transactions with the specific purpose of participation in a public bid must be notified to the competition authorities, when required by law, within 15 business days from the moment the concession agreement is signed.

3. Preventive measure

On 28 March 2007 CADE issued a new resolution, Resolution No. 45/07 ("CADE Resolution 45/07"), which provides for revised Internal Rules for CADE. In essence, this Resolution consolidates certain provisions which were contained in several Resolutions, providing transparency and simplification to the Brazilian competition law regime in general. It also includes provisions on Preventive Measures and Reversibility Agreements ("APROs"). These provisions are essentially the same as those set forth in CADE Resolution 28/02, which has been revoked by this new resolution.

4. Confidentiality

Ordinance 849/00 has been revoked by Ordinance 4, issued by the SDE on 4 January 2006 and which came into effect on 6 March 2006 ("Ordinance 4/06" or "Joint Ordinance"). Among other things, Ordinance 4/06 contains provisions on confidentiality and secrecy of documents and information.

Article 23 of Ordinance 4/06 sets forth three types of treatment for case dockets, information, effects and documents:

(i) Public, when unrestricted access to said items is allowed to anyone;
(ii) Confidential, when access is restricted to the disclosing party, to persons expressly authorised by the SDE, and to governmental authorities in charge of reviewing the case; and
(iii) Secret, when access is restricted to government authorities in charge of reviewing the case.

According to Ordinance 4/06, the SDE may accord confidential treatment to the case dockets, documents, objects and information, at its own discretion, should they be related to:

(i) Bookkeeping;
(ii) Economic and financial status of the companies;
(iii) Bank or tax secrecy;
(iv) Corporate secrets;
(v) Industrial secrets, particularly industrial processes and formulas related to product manufacturing;
(vi) Turnover of the applicant or of the group to which it belongs;
(vii) Date, value of the transaction and payment mechanisms;
(viii) Documents that substantiate the notified transaction;
(ix) Latest annual report, except when it has a public nature;
(x) Value and quantity of sales, and financial reports;
(xi) Customers and suppliers;
(xii) Installed capacity, meaning the total capacity of production of a certain industry or enterprise;
(xiii) Production costs and expenses of research and development of new products; and
(xiv) Other factors at the SDE's discretion.

Article 28 of the Ordinance maintains the provisions regarding rejection of a confidentiality request when the information and documents which are the subject matter of the request have a public nature by virtue of law, including in other jurisdictions, or when these are in the public domain, whether in Brazil or abroad. The same list of events for rejection is maintained in Ordinance 4/06, except for the "estimated share in a relevant market of products or services" which has been deleted. An additional item has been included however, namely equity, financial or corporate information related to publicly held companies, including foreign companies.

CADE Resolution 45/07, recently issued by CADE, which provides for revised Internal Rules for CADE, also includes some provisions on the confidentiality and secrecy of documents and information. These provisions are essentially in line with the ones set forth in Ordinance 4/06 of the Ministry of Justice.

5. Initial review and assessment

Based on the general principles of the Law, on 4 January 2006 the SEAE and the SDE issued a new Joint Ordinance (SEAE/SDE Joint Ordinance 4/06), establishing cooperation mechanisms between the two bodies.

The main objective sought by the SEAE and the SDE is to provide greater legal certainty to private parties, more efficiency and effectiveness to the competition agencies, as well as greater transparency and expeditiousness to the authorities' respective administrative proceedings.

With regard to control of concentration acts, the Joint Ordinance establishes that the SEAE and the SDE are to act together simultaneously in the review of highly complex transactions or transactions entailing a high degree of concentration in the relevant market(s). Under the Joint Ordinance, once the discovery phase has been completed the SEAE will send its opinion to the SDE, which, if in agreement with its content, will promptly issue a "simplified" opinion ratifying the SEAE's opinion, and refer the case to the CADE.

In addition to this initiative, and aiming to avoid the overlapping of activities developed by CADE's Attorney-General's Office and SDE, on 20 August 2007 the two entities came into a 24-month-term agreement establishing cooperation mechanisms between them. In brief, the agreement establishes that CADE's Attorney-General's Office will pronounce in relation to the formalities of simple transactions, an activity formerly undertaken by SDE, allowing SDE to focus on the review of highly complex transactions or transactions entailing a high degree of concentration in the relevant markets involved, thus providing a better analysis.

In accordance with the agreement, in the case of a simple transaction, SDE, when the merger case follows the summary proceeding for review (known as fast-track procedure) and when its opinion is in line with SEAE's opinion, will merely issue a simplified opinion ratifying it, and then forward the case to CADE's Attorney-General's Office, which will only verify if all the formalities are met (such as the payment of the filing fee or if the public notice was correctly published) and then issue a standard opinion.

The above-mentioned procedures have already expedited the review of cases, shortening the time for review and forwarding of cases to CADE for a final decision.

6. Financial sector

As to the conflict of authority between CADE and BACEN regarding the analysis of merger cases in the Brazilian financial system, it is worth mentioning a recent judicial decision,[1]

1 Writ of mandamus, case No. 2002.34.00.033475-0, Petitioners: Banco do BCN SA and Banco Bradesco SA, Defendant: CADE, Date of judgment: 29 August 2007, Regional Federal Court.

issued by the Regional Federal Court on 29 August 2007, declaring that it is mandatory that any concentration acts involving financial sectors be sent to CADE. The full content of the decision is not in the public domain yet, but in essence it declares that BACEN will have authority to examine mergers in the banking sector only when such transactions entail systemic risks. All the transactions involving financial institutions operating in Brazil that do not entail systemic risks will, in turn, fall within CADE's jurisdiction.

This judicial decision is not final and is subject to appeal, but it should certainly be analysed and considered by companies when structuring transactions in the financial sector.

7. Bill of Law 5877/2005

On 1 September 2005 the President of the Republic sent Congress the proposed draft bill intended to restructure the Brazilian competition law regime, in particular by changing important aspects of the Competition Act. The draft bill takes into consideration several of the recommendations made by the Organization for Economic Co-operation and Development (OECD) in a comprehensive report on the Brazilian competition law regime, released on 6 October 2005 (Peer Review Report), after a seven-month peer review proceeding requested by the Brazilian Government (see below).

As stated in the document released by the Brazilian competition authorities explaining the draft bill, the idea is to tackle the main problems of the current regime, such as:

(a) The existence of two bodies (the SDE and the SEAE) conducting investigations, while final decisions are taken by a third entity, the administrative tribunal (the CADE);
(b) The extremely broad market share notification threshold for merger and acquisition filings, which results in a huge number of filings of transactions that do not really affect competition in Brazil, thus hindering the competition authorities' ability to focus on complex cases and on the investigation of serious anti-competitive practices, such as cartels;
(c) Post-merger closing notification;
(d) Understaffing problems at the authorities;
(e) Certain statutory provisions that interfere with efficient and effective law enforcement; and
(f) Lack of familiarity with competition law on the part of the judiciary.

The changes proposed by the draft bill include: (i) the creation of a pre-merger notification system with thresholds designed to identify transactions that actually represent competition concerns for Brazilian authorities or markets; (ii) the elimination of the mandatory analysis of cases by three different agencies (the SEAE, the SDE and the CADE); (iii) the transformation of the SDE into a division of the CADE (the General Authority), which will also be composed of an Administrative Tribunal, the Economic Studies Department and the Attorney-General's Office; (iv) changing the Commissioners' term of office, which will be increased from two to four years without reappointment for the subsequent period, and (v) the federalisation of crimes of an economic nature which would facilitate the negotiation of leniency agreements.

During 2007 some amendments have been made to the original Bill of Law 5877/2005, proposed by the President of the Republic on 1 September 2005, and as a consequence alternative bills to the Bill of Law 5877/2005 have been sent to the Brazilian Congress. These alternative bills have essentially the same purpose and content as the Bill of Law 5877/2005.

It is worth mentioning that the restructuring of the Brazilian competition law system by this proposed bill is one of the top priorities in the Brazilian Government's Growth Acceleration Program ("PAC"). It is expected that such a bill will be approved by the Brazilian Congress by 2008.

The table below provides a summary of how the draft bill proposes to change various aspects of the current regime:

	Current situation	**Changes proposed by the draft bill**
Structure	Three bodies are involved in the current regime: the SEAE, the SDE and the CADE. The duties of the SDE and SEAE overlap, particularly in the review of concentration acts, since both bodies carry out the same evidentiary work and each body is required to issue an opinion in every case.	The CADE will handle all the investigations, reviews and decisions in competition cases. The SDE will cease to exist. The SEAE will continue to exist, but will focus primarily on competition advocacy.
Mergers and acquisitions	Transactions are approved after the deal is completed.	Pre-merger review.
Criteria for notification of concentrations	All transactions where one of the companies concerned has a turnover in excess of R$400 million or which result in a market concentration of 20% must be notified.	The notification criteria will be more selective and objective. The interpretation of the "submission filter" is changed so as to take into account only the turnover achieved in Brazil by the companies concerned: all transactions where one group of the companies concerned has a turnover in excess of R $400 million and the other group has a turnover in excess of R$30 million. Therefore, the criteria will no longer be based on market share. Figures may be changed to conform to the economic dynamics of the country.
Simplified review	For all cases, even the simplest ones, the SDE and the SEAE are required to issue opinions on the transaction in question and refer such transaction to the CADE for a final decision.	Cases that do not involve competition risks may be approved by the mere determination of a supervisory board member. More complex cases will continue to be decided by the CADE.

8. The OECD Report

On 6 October 2005, the Organization for Economic Co-operation and Development (OECD) released its comprehensive report on the Brazilian competition law regime.

The OECD made several suggestions for improvement in the regime, such as: (a) consolidating the investigative, prosecutorial and adjudicative functions of the regime into one autonomous agency; (b) modifying the merger notification rules and review process by adopting an explicit standard for reviewing the competition impact of merger transactions and establishing a prior analysis of mergers; (c) modifying the leniency programme; (d) a consideration whether to designate specialised judges and appellate panels to decide competition cases; (e) limiting the Economic Crimes Law to cartel violations; (f) a consideration whether to limit civil suits for competition law damages to parties and conduct that have been subject to a specific finding of illegality by the CADE; and (g) extending the terms of the CADE commissioners to at least four years (preferably five).

In addition to these suggestions, the OECD report details the strengths and weaknesses in the activities of the agencies during the relevant period. The Report concludes that notwithstanding serious deficiencies, the Brazilian competition law regime had made substantial progress during the last five years, including implementing a solid competition policy in Brazil, increased efficacy in the review of concentrations and allocation of funds to fight cartels.

9. Changes in the criteria for monetary adjustment of fines imposed on companies

In a recent decision issued by the CADE in the judgment of the administrative proceeding filed against newspaper companies Sindicato das Empresas Proprietárias de Jornais e Revistas do Município do RJ and others,[2] the Board determined a change in the criteria for monetary adjustment of fines imposed on companies, reducing amounts of fine by 50%. The CADE had been applying the Selic rate, but in this case it resolved to adhere to the Special Extended Consumer Price Index (IPCA-E).

With this new monetary adjustment system, companies that had been unable to pay the fines will now be entitled to a considerable reduction in the amounts imposed. For example, fines of R$100,000 in 1999, adjusted by the Selic rate, would come to R$200,000 today. By applying the IPCA-E, the amount will drop to R$150,000. The reduction is 25% for a party fined in 1999.

2 Administrative proceeding No. 08012.002097/99–81.

Canada

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See Merger Control Worldwide Vol. 1, Chapter 9, pp. 203–239

There have been two developments of particular note in Canadian merger jurisprudence and practice. The first relates to the Competition Tribunal's understanding of the Commissioner's statutory burden when seeking an interim injunction to prevent a proposed transaction from being consummated to afford the Commissioner more time to complete her review. The second concerns the Commissioner's recently issued position on proposed remedies for problematic mergers.

1. Scope of interim injunctions to prevent consummation of proposed transactions

If the Commissioner has not brought an application for a Section 92[1] order seeking to enjoin the consummation of a proposed transaction but is concerned that the parties may, after the expiry of the applicable waiting period, take steps to consummate their transaction, Section 100 allows the Commissioner to apply for an interim order. If granted, the Tribunal can issue an order "forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of a proposed merger" for up to 10 days on an *ex parte* basis or up to 30 days on notice to the parties (extendable for up to 60 days on subsequent application),[2] provided the following are satisfied:

- the Commissioner certifies that a Section 10(1)(b) inquiry into the proposed transaction is being carried out under the Act and that, in the Commissioner's opinion, more time is required to complete the inquiry; and
- the Tribunal finds that, in the absence of the interim order, its ability to remedy any anti-competitive harm caused by the merger would be substantially impaired.[3]

Since the amendment of Section 100 to adopt its current language in 1999,[4] conventional wisdom has held that the Commissioner's burden of demonstrating "substantial impairment" in the absence of the interim order would be a straightforward matter for the Commissioner to satisfy. One recent case has, however, upset this conventional wisdom: *The Commissioner of Competition* v. *Labatt Brewing Co. Ltd et al*.[5] In this case, the Commissioner argued that more time was needed for the completion of the review of the transaction and that in the absence of the order the Tribunal's ability to remedy the effect of the proposed merger on competition

1 R S C., 1985, c. C.34 (hereinafter the "Act"). The Act can be viewed at http://laws.justice.gc.ca/en/C-34/. See Section 7.2.
2 *Ibid*., s. 100(5)(6).
3 *Ibid*., s. 100(1)(a).
4 S C 1999, c. 2 (Bill C-20), S C 1999, c. 2, s. 24.
5 *The Commissioner of Competition* v. *Labatt Brewing Co. Ltd et al*., 2007 Comp. Trib. 9 File No. CT-2007-003.

would be substantially impaired. In the case, the parties had offered the Commissioner a "hold-separate" arrangement by which the parties would have held their businesses separate until the conclusion of the merger review process, but the Commissioner rejected this offer. Instead, the Commissioner sought a Section 100 interim injunction to prevent the parties from consummating their transaction until she could complete her review.

On application, the Tribunal held that the Commissioner had had more than 40 days to review the transaction by the time of the Section 100 application and that the Bureau had significant experience in reviewing brewing industry mergers (both historically and more recently). More importantly, the Tribunal drew an important distinction in this respect between the Tribunal's ability to remedy the effect of a merger on competition and – as the Commissioner had argued should be the correct interpretation of Section 100's "substantially impaired" requirement – the Tribunal's ability to restore the market to the conditions that prevailed before consummation of the transaction. The Tribunal held that mergers are not always prohibitively difficult to unwind, noting that "a merger can be broken up, competition can be restored, though it may be difficult to do and inconvenient". The Tribunal ultimately found that the Commissioner failed to satisfy the "substantially impaired" requirement of the Act and therefore the Tribunal refused the Commissioner's Section 100 application and did not require a hold-separate agreement from the parties, thus allowing them to close their transaction immediately.

While the Commissioner subsequently appealed the Tribunal's decision and, as of this writing, the matter is not yet resolved, the outcome of this case will be significant in at least two key respects. First, it is likely to affect the Commissioner's willingness to accept hold-separate offers from merger parties. Second, it is also likely to have a salutary effect on the diligence with which the Commissioner will need to conduct future merger reviews. The outcome of this matter will be of great interest to all competition practitioners in Canada as it has the potential to affect the dynamic that had prevailed until now between the Commissioner and merger parties.

2. Commissioner sets out public position on merger remedies

The release in 2006 of the Bureau's "Information Bulletin on Merger Remedies" provided competition practitioners with a useful clarification of the Commissioner's position on a number of issues in merger remedies. In particular, the Bulletin confirmed the Commissioner's preference for structural (as opposed to behavioural) remedies and, in particular, for "fix-it-first" divestitures. Such a remedial approach requires that the merger parties identify and get approval from the Commissioner of a buyer or buyers for the businesses that are to be divested from one or both of the merger parties to address the Commissioner's competition concerns. Importantly, the approach requires that the divestiture to such approved "up front" buyers occurs prior to or simultaneously with consummation by the merger parties of their own transaction.

As this is an ideal remedial process, the Bulletin implicitly recognises that such an ideal may, in practice, be difficult or impossible to achieve routinely. Consequently, the Bulletin also makes clear that the Commissioner will expect that, if such a fix-it-first remedy cannot be brought about, a remedial divestiture must be made within three to six months of the consummation of the merger parties' transaction. If they fail to effect such a divestiture in the required time, the Bulletin states that the agreed-upon process will then see a trustee appointed to complete the sale of the businesses to be divested. Significantly, a sale in these circumstances, the Bulletin emphasises, will be made by the trustee without any guaranteed minimum price to the seller.

Chile

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See Merger Control Worldwide Vol. 1, Chapter 10, pp. 240–264

1. Introduction

Since the publication of the Main Work, the major event in the Chilean merger control scene has been the publication by the *Fiscalía Nacional Económica* (FNE, the governmental entity in charge of investigating competition law violations) of its non-binding guidance (the “Guidelines”) in October 2006 on different aspects of merger review, including the criteria that the FNE shall use when analysing horizontal integration cases (but excluding vertical integrations).

The FNE has incorporated in the Guidelines some principles or criteria that were already applied by the Chilean Antitrust Court. The Guidelines include an important clarification: they fix the threshold of degree of concentration that the FNE will use based on the Herfindahl–Hirschman Index.

2. Degree of concentration

After determining the companies participating in a relevant market (including those based outside Chile, when applicable), the FNE will establish market shares mainly by considering the sales of each participant in monetary terms; however, the FNE may use other considerations to complement or replace sales (e.g. sales in units, production and installed capacity, inventory and reserves of natural resources).

The FNE will use the Herfindahl–Hirschmann Index (HHI)[1] to measure the levels of concentration of a particular market before and after a merger or acquisition. The FNE will deem that an operation does *not* have anticompetitive effects, if:

- the post-merger HHI is less than 1,000;
- the post-merger HHI is between 1,000 and 1,800 (this value indicates a moderately concentrated market) and the variation of the HHI resulting from the merger is below 100; or
- the post-merger HHI is greater than 1,800 (this value indicates a highly concentrated market) and the variation of the HHI resulting from the merger is below 50.

1 As is widely known, the HHI of a market is calculated by adding the squares of the percentage market shares held by the respective firms.

3. Barriers to entry

The existence or absence of barriers to entry into a market is a weighty factor when attempting to determine the consequences of horizontal combinations from a competition law perspective. The FNE will in particular analyse:

Legal barriers: any obstacle to entry into a market due to a law blocking the access of new competitors or generating a cost advantage to the firms already in such market *vis-à-vis* the newcomers (e.g. highly regulated sectors, patents, licences or consents for the exercise of a specific activity). In the case of international trade, tariff or non-tariff restrictions (prior authorisation) to import a product or the existence of market shares for a product or a substitute will be considered as a legal barrier.

Sunk cost: The FNE will look especially at the following sunk costs: (a) cost of implementation of an activity (e.g. gathering of market information, cost of testing products, installation of equipment, etc.); (b) investment in specific assets; (c) investment in advertising, marketing, trademark development, post-sale services; (d) R&D, innovation and technology; (e) essential infrastructure owned by some of the firms in the market.

Time to become a real competitor: The FNE will also take into consideration the time necessary for a participant to become a real competitor and the probabilities of success.

Strategic behaviour: The strategic behaviour of the firms in the relevant market may thwart or make more costly the entry of new competitors. Therefore, the FNE will analyse the different strategic variables used or that have been used in the industry that could prevent the entry of new competitors (e.g. investment of installed capacity, investment in advertising, prices (cap prices and constant price campaign), proliferation of trademarks and products to control and possibly seal off the market).

4. Risks for competition

The FNE will take special care to identify risks to competition related to unilateral abuses of market power and risk of coordination among the incumbents if the number of competitors decreases.

However, the FNE explicitly states in the Guidelines that it will consider the following factors, as evidenced by the information, documentation and studies furnished by interested parties, which may offset or mitigate the risk imposed by concentration:

Efficiencies: The FNE will consider the efficiencies generated by the concentration of the relevant market, provided the probability and magnitude of achieving such efficiencies could be verified and other means to accomplish such efficiencies are non-existent. Hence, efficiencies as a result of the increase of marker power, decrease of the quantity or quality of the products, access to larger discounts or rebates from suppliers or the chances to reduce the salary of the workforce, would be disregarded by the FNE as efficiencies. On the other hand, the FNE would take into account the cost savings due to economies of scale, economies of scope and economies of density.

Firms in dire straits and concentration abroad: The FNE acknowledges in the Guidelines that the probable effects of a concentration may be innocuous when the acquired company is doomed to disappear, for example due to insolvency or incapacity to generate revenues. Also, the FNE may deem innocuous the effects of a concentration in Chile that are a result of a concentration taking place abroad. However, in both cases, some “safety” measures to protect competition in Chile may be appropriate due to the magnitude of the foreseeable effects in the country.

China

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See Merger Control Worldwide Vol. 1, Chapter 11, pp. 265–275

As is widely known, China was engaged in the process of adopting a new competition law, the Anti-monopoly Law (the "AML") for over ten years. Several drafts came to be produced in the process. On 7 June 2006 however, the Central Government of China (known as the State Council) held a discussion on the then latest draft of the AML and a decision was made to approve in principle that draft. On 30 August 2007 a draft dated 24 August 2007 was enacted into law and on that basis the AML was finally adopted.

Considerable importance is being attached in many quarters in China to the AML as a vital tool for the purpose of protecting the process of competition in the country. The general consensus over the desirability of a proper competition law that has been gaining strong grounds over the last few years has revealed considerable doubts over the effectiveness of the various laws and regulations which have been in use (see the Main Chapter). The firm belief held in many quarters is that the AML, when it comes into force, will prove to be particularly effective in building a strong market economy through the eradication of anti-competitive behaviour and abusive conduct as well as through scrutinising what has become a fast-developing process of acquisitions of domestic firms by multinational enterprises which many in China have come to view as a serious development likely to give those multinationals the ability to develop a monopoly position in various domestic sectors.

The AML consists of 8 chapters and 57 Articles. The tables below are provided for the benefit of the reader.

Table 1 Scheme of AML

Chapter of AML	Title of Chapter	Articles in Chapter
Chapter 1	General Provisions	Articles 1-12
Chapter 2	Monopoly Agreements	Articles 13-16
Chapter 3	Abuse of Dominant Market Position	Articles 17-19
Chapter 4	Concentrations of Undertakings	Articles 20-31
Chapter 5	Abuse of Administrative Power	Articles 32-37
Chapter 6	Investigation of Suspected Monopolies	Articles 38-45
Chapter 7	Legal Liability	Articles 46-54
Chapter 8	Supplementary Provisions	Articles 55-57

Table 2 Chapter 4 of AML		
Article	**Subject-matter of Article**	**Comment**
Article 20	Situations of Concentrations of Undertakings	The AML uses the concept of "concentration" as opposed to that of "merger" or "combination" as is common in most jurisdictions. Article 20 defines the concept as follows: a merger of undertakings; acquisition by an undertaking of voting shares or assets in one or more other undertakings to an adequate extent; acquisition of control of other undertakings by contract, technology or other means, or the capability of imposing material effects on competition (interestingly the reference in old drafts of the AML such as that of April 2005 to direct or indirect control has been removed. Also, it would be interesting to see how the new concept of "capability of imposing material effects on competition" will be clarified whether during the legislative process or through its application in practice).
Article 21	Standard for Notification and Calculation of Turnover	The AML provides for mandatory notification of concentrations in China where certain thresholds are exceeded.
Article 22	Exemption from Notification	The Article provides that no notification needs to be made where: 1. one of the undertakings concerned owns more than half of the voting shares or the assets of each and every other undertaking concerned; 2. more than half of the entire voting shares or the assets of every undertaking concerned is owned by an undertaking which is not an undertaking concerned.
Article 23	Documents Needed for Notification	The Article specifies the documents and information to be submitted as part of the notification of concentrations. These include: a completed notification form; an evaluation report concerning the likely influence on competition in the relevant market; a summary of the operation; financial accounting reports of the undertakings concerned audited by a certified public accountant; and other documents required by the Anti-monopoly Law Enforcement Authority (presumably these would include sales reports, information about production, costs, sale prices and output of the relevant products, the rationale for the concentration, the expected date of implementation, and general information about the undertakings concerned).
Article 24	Supplementation of Documents	The Article gives the Anti-monopoly Law Enforcement Authority the power to request further information to supplement that submitted by the parties where the latter is incomplete.

(*Continued*)

Table 2 (*Continued*)

Article	Subject-matter of Article	Comment
Article 25	Preliminary Review	The Article provides for a waiting period of 30 days of preliminary review by the Anti-monopoly Law Enforcement Authority within which the concentration must be suspended. The parties may go ahead and effect their concentration however where the Anti-monopoly Law Enforcement Authority fails to reach a decision within this period to conduct further review or where it decides not to initiate further review.
Article 26	Further Review	Should the Anti-monopoly Law Enforcement Authority decide within the 30 days (see Article 25) to conduct further review of the concentration, the waiting period will be extended by up to 90 days. A further extension of a maximum of 60 days of the waiting period is possible however in circumstances described in the Article itself, namely where the parties agree to the extension; the documents submitted to the Anti-monopoly Law Enforcement Authority are inaccurate and require verification; or the relevant circumstances have significantly changed after notification. The Article does not explain what amounts to a significant change of circumstances. Presumably this is meant to cater for situations in which the parties submit post-notification commitments or decide to change the structure of the concentration or the terms of their agreement in a material way.
Article 27	Factors taken into Consideration	The Article lists factors which may be taken into consideration as part of the substantive appraisal of concentrations. These include market shares, level of concentration, barriers to entry, possible impact on consumers and competitors, and national economic development and social public interest. This list of factors is not exhaustive. Indeed, the Article itself contains a catch-all provision as it provides for the Anti-monopoly Law Enforcement Authority to take other factors into account at its own discretion.
Article 28	Decision Making	The Article contains the substantive test to be used in determining whether to block a concentration. The Article provides that a concentration shall be blocked where it "may eliminate or restrict competition". It is worth noting that this test is different from the one featuring in old drafts of the AML. The April 2005 draft of the AML, for example, contained the test of "creation or strengthening of dominant market positions as well as the elimination or restriction of market competition".

(*Continued*)

Table 2 (*Continued*)		
Article	**Subject-matter of Article**	**Comment**
		A dominant market position is taken to refer to a controlling market position held by one undertaking or several undertakings as a whole which is capable of controlling the price or quantity of products or other trading conditions in the relevant market or restricting or affecting other undertakings entering the market. Dominance will be presumed where: an undertaking has a market share of more than 50%; two undertakings have a combined market share of more than two thirds; three undertakings have a combined market share of more than three quarters. It is also worth noting that the November 2005 draft of the AML contained the test of "substantial elimination or restriction of competition". Thus, the word substantial has been removed from the final draft of the AML.
Article 30	Publication of Decisions	The Article provides for the publication of decisions blocking or clearing concentrations. It is important to note that clearance of a concentration can be made conditional.

Table 3 Miscellaneous	
Article	**Title**
Article 9	Composition and functions of the Anti-monopoly Committee
Article 10	Functions of the Anti-monopoly Law Enforcement Authority
Article 38	Complaints Against Monopolistic Conduct
Article 39	Investigatory Functions and Powers
Article 40	Requirement for Enforcement of the Law
Article 41	Confidentiality
Article 42	Duty to Cooperate
Article 43	Statements and Defences
Article 44	Relationship Between the Anti-monopoly Authority and Relevant Authorities
Article 45	Commitments and Undertakings
Article 48	Penalty Against Implementation of Concentration in Contravention of this Law
Article 49	Factors to be Considered for Fines
Article 50	Obligation to Compensate for Injury
Article 52	Penalty Against Refusal or Hindrance of Investigation
Article 53	Administrative Reconsideration and Administrative Litigation
Article 54	The Responsibilities of the Enforcer (i.e. Anti-monopoly Law Enforcement Authority)

Denmark

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See Merger Control Worldwide Vol. 1, Chapter 16, pp. 338–358

1. Relevant legislation and statutory standards

It should be pointed out that note 1 in the Denmark chapter in the Main Work now should read as follows: Consolidated Competition Act No. 785 of 8 August 2005 as amended by Act No. 572 of 6 June 2007 – Act to Amend the Competition Act, the Administration of Justice Act, the Act on Tender Procedures for Public Work Contracts and the Act on the Complaints Board for Public Procurement; an English version can be found at www.ks.dk/english/competition/legislation/.

2. Decision-making bodies and enforcement authority(ies)

2.1. The Competition Authority

The Danish Competition Authority comprises eight competition units and three units dealing specifically with the energy sector. In addition, the Danish Competition Authority now also has a unit for special assignments as well as an administration secretariat and a management secretariat.

2.2. The Competition Council

The Council consists of a Chairman appointed by the King of Denmark (the government) and 17 members appointed by the Minister for Economic and Business Affairs. Nine of the members are appointed after recommendations by trade organisations, consumer organisations and municipal organisations.

3. Notification requirements and procedures

3.1. Notification requirements and proceedings

3.1.1. Notification formalities

It should be pointed out that note 32 of the Denmark chapter in the Main Work now should read as follows: Executive Order on the Notification of Mergers No. 480 dated 15 June 2005. An English translation can be found at www.ks.dk/english/competition/legislation/.

3.1.2. Decision

The Council can, under section 12(c)(6), allow parties to (partially) implement the notified merger. As an example, the Council has, in the past, allowed the parties to a merger to enter into distribution agreements while the Council reviewed the merger notification.[1] In that instance, the Council found that an exemption would not raise any concerns in regard to third parties or to the level of competition in the relevant markets. The Council did, however, make the exemption subject to remedies and stressed that the "pre-implementation" of the merger was at the parties' own risk.

3.2. The competition authorities' investigation of mergers

Note 41 in the Main Work now should read as follows: Executive Order on the Notification of Mergers No. 480 dated 15 June 2005. An English translation can be found at www.ks.dk/english/competition/legislation/.

4. Final orders and sanctions by authority(ies)

4.1. Conditional clearance

During 2006 and 2007 the Competition Council has dealt with a number of interesting merger cases in terms of commitments.

On 30 August 2006 the Competition Council approved the establishment of a joint venture for the distribution of free morning newspapers between the partially state-owned Post Danmark A/S and 365 Media Scandinavia A/S, which was owned by an Icelandic media group. The purpose of the joint venture was to distribute unaddressed postal items. The Competition Council found that the merger would be pro-competitive in several markets, and would provide benefits such as postal distribution in the morning before 7 a.m. However, the Competition Council also found that the merger could strengthen Post Danmark's dominant position in the market for the distribution of unaddressed items, which would have a significant anti-competitive impact. The Council was particularly concerned that Post Danmark might engage in anti-competitive conduct to the detriment of its competitors. To meet the concerns of anti-competitive conduct, Media Scandinavia and Post Danmark proposed a set of commitments regarding something as unusual as price control, as well as other behavioural remedies. Thus, the clearance was subject to the condition that the joint venture should establish minimum prices, as approved by the Danish Competition Authority, and also be limited in its entry into client contracts, allowing only short-term agreements. The joint venture was to be kept isolated from Post Danmark's other business so that it could not benefit from Post Danmark, or exchange services on terms that would decrease competition in the market. In practice, this was achieved by Post Danmark making certain resources unavailable to the joint venture, such as building access and customer databases. Further, Post Danmark was not allowed to use the joint venture as a sub-supplier. However, from an efficiency point of view this meant that most synergies in the establishment of the joint venture were lost.

In another merger case, capital fund CVC notified its acquisition of the Danish retail chain Matas. The Competition Council found that the transformation of Matas from a voluntary chain

1 See decision of 28 February 2007 – TV2 Sport (implementation of joint venture) and decision of 30 August 2006 – Post Danmark A/S (see further below).

(where individual shops set their own prices) to a centralised and partly franchised chain (where the prices could be centrally determined) would impede competition significantly in the market for high-end cosmetics. The Competition Council's concerns were related to two issues: the Matas chain's ability to influence market prices; and the chain's ability to reinforce barriers to entry in the market for high-end cosmetics. Again, the parties proposed a set of commitments designed to open up access to the market and ensure a level playing field. The commitments limit the Matas chain's abilities to acquire competitors, and Matas' competitors were also ensured better access to supplies, staff and facilities. The commitments are time-limited.

Finally, the Competition Council approved by decision of 11 April 2007 the establishment of the joint venture "TV2 Sport" between Modern Times Group MTG A/S and TV2/Danmark A/S. The Council found that the joint venture could impede effective competition and the parties proposed seventeen commitments. The commitments included total separation of TV2 Sport's board and management from the parent companies so that the board and management would comprise persons with no relation or interest in the parent companies. Overall the commitments prevented the parties from exchanging sensitive competitive information through the joint venture. At the same time it ensured that the joint venture would be a full-functioning entity with autonomous behaviour. The competition was promoted as long as the joint venture was an independent player in the market which competed with MGT and TV2 on viewers and advertisements.

European Union

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See Merger Control Worldwide Vol. 1, Chapter 19, pp. 379–422

1. Relevant legislation and statutory standards

Regulation No. 139/2004 (the "Merger Regulation") remains the core piece of legislation governing the European Union (EU) system of merger control.[1] However, the Commission has embarked on a review of various elements of the "merger control package".[2] The current state of the review is as follows.

1.1. New Jurisdictional Notice

In July 2007, the Commission adopted a new Notice on jurisdictional issues (the "New Jurisdictional Notice").[3] It replaces the previous four (old) notices dealing with jurisdictional issues,[4] namely:

i. the Notice on the concept of concentration;
ii. the Notice on the concept of full-function joint ventures;
iii. the Notice on the concept of undertakings concerned; and
iv. the Notice on calculation of turnover.

The New Jurisdictional Notice consolidates, simplifies and updates the guidance contained in the four notices to reflect recent developments in the case-law. It is divided into four parts. Part A provides a brief introduction. Part B discusses the concept of "concentration", including the notions of "sole control", "negative control", "joint control" and changes in the "quality of control". Part C considers the meaning of "Community dimension" and includes practical guidance on how to calculate turnover for the purposes of the Merger Regulation. Part D identifies and deals with different categories of concentration, addressing "joint control", changes of controlling shareholders in an existing joint venture undertaking, dissolution of a joint venture, and asset swaps.

1.2. Guidelines on Non-Horizontal Mergers

In February 2007, the Commission put out to consultation a set of draft Guidelines for companies in a vertical or conglomerate relationship. The consultation closed in May 2007. The non-horizontal Merger Guidelines were finalised in November 2007 and complement the

1 Cited in n. 7 of the main work.
2 See section 1.3 of the main work.
3 Available at http://ec.europa.eu/comm/competition/mergers/legislation/draft_jn.html.
4 Cited in nn. 36–39 of the EU chapter in the main work.

Guidelines on horizontal mergers.[5] The core of the Guidelines is to be found in parts IV and V, which set out the Commission's framework of analysis in the context of vertical mergers and conglomerate mergers respectively. In each case, the Commission identifies the range of possible anti-competitive effects arising from vertical mergers (foreclosure, coordinated effects) that the Commission will consider in assessing a merger, alongside any pro-competitive effects stemming from efficiencies identified and substantiated by the parties.

1.3. Draft Revised Guidelines on Remedies

In April 2007, the Commission published draft revised guidelines on remedies. The consultation ran until June 2007. When finalised the guidelines will replace the 2001 Remedies Notice.[6] The proposed draft reflects the conclusions from the Commission's "Merger Remedies Study", published in October 2005. In this study, the Commission undertook a comprehensive review of past merger cases where remedies were accepted and analysed the implementation and effectiveness of these remedies. The draft revised Notice also incorporates recent jurisprudence from the Community Courts which gave useful guidance on the legal framework for accepting or rejecting remedies as well as on more specific issues concerning their design. The experience gained in the Commission's practice in recent years in the implementation of remedies is also reflected. Finally, the draft revised Notice takes into account changes concerning remedies introduced in the Merger Regulation in 2004 (i.e. after the previous Notice was published). Some of the proposed amendments, such as a new information form to be submitted by the parties to describe their remedies proposals, will also require an amendment of Commission Regulation 802/2004 on implementing the Merger Regulation (the "Implementing Regulation").[7] The Commission published a draft Regulation amending Regulation 802/2004 at the same time that it published the draft remedies guidelines themselves.

2. Notification requirements and procedures

2.1. Merger notification rules

In October 2006, the Commission published a Communication pursuant to Article 3(2) of the Implementing Regulation.[8] This specifies a new format in which merger notifications and reasoned submissions should be delivered.[9] In summary, Form CO notifications must consist of one signed original on paper, five paper copies of the entire Form CO and annexes, and thirty copies of the notification in CD- or DVD-ROM format, comprising files in PDF format preferably not in excess of 5MB each, with each file named, listed, numbered and named by reference to the proceeding for which the notification is submitted. Reasoned submissions (within the meaning of Article 4(4) and 4(5) of the Merger Regulation)[10] must consist of one signed original on paper, five complete paper copies and one CD- or DVD-ROM containing files adhering to the same specifications as in the case of Form CO notifications.

5 Cited in n. 41 of the main work.
6 Cited in n. 44 of the main work.
7 Cited in n. 35 of the main work.
8 OJ [2006] C 251, p. 2.
9 As to the contents of notifications, see section 3.8 of the main work.
10 As to which see section 3.4.3 of the main work.

2.2. Case Referral Guidelines

Since the main work was published, the Case Referral Guidelines have been published,[11] providing guidance on the operation of the case referral system in Articles 4(4) and (5), 9 and 22 of the Merger Regulation.[12]

3. Appeal and judicial review

3.1. Expedited procedure

In October 2005,[13] the European Court of First Instance (CFI) adopted various changes to its Rules of Procedure. One important modification related to Article 76a of the Rules, which concerns "expedited procedures".[14] The first recital in the preamble of the decision amending the Rules of Procedure explains that the amendments were considered necessary "in the light of experience ... in order to clarify their scope or to adapt them to the needs of the efficient organisation of the conduct of proceedings".

First, the applicant has the option of enclosing an abbreviated version of the application and a shortened list of the annexes which can then be used in the event that the case is allocated for decision in accordance with the expedited procedure.[15] Second, when it decides to adjudicate a case under the expedited procedure, the CFI may set conditions as to the length of pleadings, the subsequent conduct of the proceedings and the pleas in law and arguments to be decided by the CFI. Non-compliance with such conditions may result in the withdrawal of the decision to proceed under the expedited procedure.[16] Third, the period granted to the Commission to lodge the defence to an application for judicial review in which expedition is requested is reduced to one month from the normal period of two months. If the CFI subsequently decides not to allow expedition, the Commission is then granted a further month in which to lodge or supplement the defence.[17]

3.2. Award of compensation for losses resulting from an illegal prohibition decision

On 11 July 2007,[18] the CFI ruled that the European Community (EC) must compensate Schneider Electric SA ("Schneider") for losses suffered as a result of the European Commission's illegal prohibition of its proposed merger with Legrand SA ("Legrand"). This is the first occasion on which the Commission has been ordered to pay damages following an incorrect merger decision.

11 OJ [2005] C 56, p. 2.

12 Discussed in section 3.4 of the main work.

13 OJ [2005] L 298, p. 1.

14 Discussed in section 6.5 of the main work.

15 See Rule 76(a), paragraph 1, second sub-paragraph: "[The] application may state that certain pleas in law or arguments or certain passages of the application initiating the proceedings or the defence are raised only in the event that the case is not decided under an expedited procedure, in particular by enclosing with the application an abbreviated version of the application initiating the proceedings and a list of the annexes which are to be taken into consideration only if the case is decided under an expedited procedure."

16 See Rule 76(a), paragraph 4: "The decision of the Court of First Instance to adjudicate under an expedited procedure may prescribe conditions as to the volume and presentation of the pleadings of the partiesâ* the subsequent conduct of the proceedings or as to the pleas in law and arguments on which the Court of First Instance will be called upon to decide. If one of the parties does not comply with any one of those conditions, the decision to adjudicate under an expedited procedure may be revoked. The proceedings shall then continue in accordance with the ordinary procedure."

17 See Rule 76(a), paragraph 2: "By way of derogation from Article 46(1), where the applicant has requested, in accordance with paragraph 1 of this Article, that the case should be decided under an expedited procedure, the period prescribed for the lodging of the defence shall be one month. If the Court of First Instance decides not to allow the request, the defendant shall be granted an additional period of one month in order to lodge or, as the case may be, supplement the defence. The time limits laid down in this subparagraph may be extended pursuant to Article 46(3)."

18 Case T-351/03, not yet reported.

The case arose out of the CFI's earlier judgment annulling the Commission's decision of 2000 to prohibit the merger of Schneider and Legrand.[19] Following the judgment, and a subsequent unsuccessful attempt to complete the merger, which met with further resistance from the Commission, Schneider launched proceedings for non-contractual damages against the Commission before the CFI, claiming compensation for losses allegedly resulting from the annulled decision.

The CFI held that where the Commission makes errors that are manifestly incorrect, which cause damage to third parties, and which cannot be "justified or explained" by what the CFI terms "the objective constraints of the merger-control procedure", compensation should be available. Only certain of the heads of damage claimed by Schneider were allowed by the CFI, the others lacking the necessary causal connection with the Commission's sufficiently serious breach.

Another compensation claim, by MyTravel in respect of the Commission's decision to prohibit its merger with AirTours, which was similarly annulled by the CFI,[20] is pending at the time of writing.

3.3. Standard of evidence required of the Commission in conglomerate effects

In *Tetra Laval*, the European Court of Justice (ECJ) dismissed the Commission's appeal from the annulment by the CFI of the prohibition decision in *Tetra Laval/Sidel*.[21] The ECJ stressed that the evidence required to find that a merger is anti-competitive by reason of conglomerate effects must be of a particularly high quality:

> The analysis of a "conglomerate-type" concentration is a prospective analysis in which, first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to give rise to a significant impediment to effective competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important, since that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible.[22]

The difficulty for the Commission in sustaining a finding of conglomerate effects has since been underlined by the CFI's judgment in *GE/Honeywell*.[23] The Commission had found that competitive harm would result from the merger by reason of the vertical relationship between GE's engine-manufacturing business and Honeywell's production of starters for the engines. Specifically, the Commission had found that the merger would strengthen GE's dominant position in the downstream market for large commercial aircraft jet engines; and that the merged group would have the incentive to delay or disrupt supplies of engine starters to GE's competitors in order to foreclose. The CFI accepted that such conduct would be in the merged group's commercial interests but held that the Commission had failed to take sufficient account of the deterrent effect of Article 82 EC, and that this amounted to a manifest error of assessment. The Commission's prohibition decision was however upheld on the basis of the Commission's analysis of horizontal overlaps.

19 The CFI's judgment is cited at n. 23 of the main work.
20 Cited in n. 23 of the main work.
21 Cited in the main work at n. 23.
22 Case C-12/03 P [2005] ECR I-987, paragraph 44 of the judgment.
23 Case T-210/01 [2005] ECR II-5575.

Germany (Federal Republic of Germany)

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1. Relevant legislation and statutory standards

Merger control was introduced in Germany in 1973. The relevant statutory rules are to be found in chapter 7 of the Act Against Restraints of Competition (the "ARC") (Sections 35 to 43), a statute dating from 1958, as substantially amended in 2005 by the 7th amendment of the ARC, which entered into force on 1 July 2005.[1] The ARC as a whole deals with all kinds of breaches of competition law. The chapter on merger control contains special rules on the relevant thresholds, the definition and the substantive appraisal of concentrations, and notification and reporting obligations, procedures, etc. Otherwise (e.g. as regards the definition of market dominance or participation in procedures) the general provisions of the ARC apply.

With the 7th amendment the ARC has aligned German competition law with the new EC Merger Regulation, Regulation 139/2004. In merger control the 7th amendment brought changes for the temporary relief (see Section 6.4 below) and civil proceedings (see Section 7.2 below). The suggested changes in the media sector[2] have not been implemented in the end (see Section 8.3 below).

2. Decision-making bodies and enforcement authority(ies)

An updated organisational chart of the FCO is provided in **Annex I**.

3. Notification requirements and procedure

Threshold exceptions

Even where parties to a concentration reach the notification thresholds, they are not subject to merger control if the target is an independent undertaking that had less than €10 million turnover in the last business year (so-called "*de minimis* clause").[3] This rule is intended to make it easier for small undertakings to give up their independence and affiliate with a larger

1 *Siebtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen* v. 7.7.2005, BGBl. I v. 12.7.2005, S. 1954; available at www.bmwi.de. The current version of the ARC, as well as recent amendments, are available at the website of the German Federal Cartel Office (*Bundeskartellamt*, "FCO") in German, English and French (www.bundeskartellamt.de). The last amendment of the ARC was the *Gesetz zur Beschleunigung der Umsetzung von Öffentlich Privaten Partnerschaften und zur Verbesserung der Rahmenbedingungen für Öffentlich Private Partnerschaften*, BGBl. I v. 7.9.2005, S. 2676; available at www.bundesgesetzblatt.de.

2 See *Entwurf Siebtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen* (legislative draft); available at www.bmwi.de.

3 Section 35(2), No. 1ARC.

undertaking. Merger control does not apply, either, if the market affected is a so-called *de minimis* market (so-called "minor market clause").[4] This is the case if the market concerned is one in which goods or commercial services have been offered for at least five years and which had a sales volume of less than €15 million in the last calendar year. The rationale behind this provision is that those markets which are not relevant in relation to the economy as a whole are excluded from merger control. By demanding that the market has to have been existent for at least five years, mergers on newly developed and still expanding markets are caught by the provisions on merger control. It is important to note that the FCO – contrary to its previous practice where the geographical scope of markets was strictly confined to Germany (see below Section 4) – calculates the €15 million turnover threshold with reference to the entire geographical market, i.e. it takes into account the EU-wide turnover generated on this market if the market is determined to be EU-wide in geographical scope.[5] It is obvious that this interpretation of the minor market clause significantly reduces its area of application.

The market definition (both in terms of relevant product and relevant geographic market) follows the general rules. Products are generally considered to belong to the same market if they are substitutable on the demand side (in case of offer markets) or on the offer side (in case of demand markets).[6] Since the markets thus defined are often quite small and would therefore qualify for exemption, the FCO has adopted a "bundling policy" to assess groups of minor markets together. The German Federal Court of Justice, being the highest court dealing with competition law, has accepted this doubtful policy for numerous minor, juxtaposed markets.[7]

Conduct of the investigation

First, the FCO will look at whether the information available is sufficient in order to appraise the concentration. If not, it will obtain additional information from the undertakings involved or from third parties if necessary. For this purpose Section 57(1) of the ARC stipulates the right of the FCO to conduct necessary investigations and provides the respective powers for the FCO.[8] The FCO can require a person to answer questions,[9] provide information or produce documents including general market surveys which serve the purpose of evaluating or analysing the conditions of competition or market situation.[10] Moreover, the FCO has the power to enter premises under a warrant[11] and to seize documents or other objects which may be of importance as evidence in the investigation.[12] Non-compliance or resistance may attract a fine of up to €100,000.[13]

If, on the other hand, the FCO has concerns that the concentration could create or strengthen a dominant position, or if material information is still missing, it will send the parties the "1-month" letter advising them that it has commenced its examination of the concentration (main examination procedure, *Hauptprüfverfahren*). On expiry of a period of 4 months from receipt of the notification the FCO will either prohibit or clear the concentration (possibly subject to conditions and obligations). Both prohibitions and clearances following the main examination procedure are formal administrative acts (*Verwaltungsakte*), for which grounds must be presented and which are subject to judicial review. The FCO may only prohibit a concentration or clear it subject to conditions and obligations if it has examined the concentration in the main

4 Section 35(2), No. 2 ARC.
5 See e.g. decision of the FCO of 13th March 2006, case B4 – 29530 – FA – 240/05, paragraph 14 – H. Meyn.
6 See Section 4.1.
7 Decision of Federal Court of Justice of 19 December 1995, WuW/E BGH pp. 3037, 3042 et seq. – *Raiffeisen*.
8 See Sections 57 to 59 ARC.
9 Section 57(2) ARC.
10 Section 59(1) ARC.
11 Section 59(4) ARC.
12 Section 58 ARC.
13 See Section 5.5 below.

examination procedure. It cannot do this in the first phase of the proceedings, but (as described in Section 3.9 of the Main Chapter on Germany) it may institute the second phase of the proceedings immediately without having to wait one month.

Number of mergers

On average the FCO deals with about 1500 cases of notified concentrations per year.[14] The large majority of these notified concentrations are eventually cleared, though many subject to conditions and obligations. Only 163 concentrations have been prohibited from the implementation of merger control in 1973 until March 2006. This might be due to the fact that the legal situation for concentrations is quite clear, so that concentrations which have no reasonable chance of being cleared are not notified in the first place or are withdrawn after discussions with the FCO.

4. Substantive assessment and test

Geographical market

The definition of the geographical market is also based on the concept of demand substitutability. It is constituted by the area in which the parties to the merger compete with one another, in which the competitive conditions are homogeneous and which differ considerably from other areas.[15] In many cases the whole area of the Federal Republic of Germany will constitute the relevant market. A smaller area can be relevant if competition beyond this area is prevented or considerably diminished due to objective reasons. For example the market for radio advertising only covers the broadcasting area for which the broadcasting station has a licence.[16] Another example is local transport systems, which are not interchangeable with transport systems in other areas and therefore constitute a market of their own.[17] The market for newspapers is defined by their area of circulation.[18]

The 7th amendment of the ARC, which entered into force on 1 July 2005 did away with the limitation established by the Federal Court of Justice (*Bundesgerichtshof*) according to which the geographical market in German merger control could not extend beyond the borders of Germany[19]. Section 19(2) sentence 3 of the ARC explicitly allows the geographical market to extend beyond the geographical borders of Germany.

5. Final orders and sanctions by authority(ies)

Infringement of duties under the ARC

The FCO can impose fines of up to €100,000 for the provision of false information, incorrect or incomplete details in the notification, delayed filing or failure to file a notification, and for failure to report consummation, or incorrect information in the report of consummation.[20]

14 Lower House of German Parliament, Printing (*Drucksache*) 15/1226, p. 12.
15 Decision of the FCO of 7 November 2003, B 4-132/03 – *Zimmer/Fleissner*.
16 Decision of the FCO of 23 April 2004, B 6-56/03 – *Radio Ton Regional/Lokal Radio Services*.
17 Decision of the FCO of 2 December 2003, B 9-91/03 – *DB Regio/Ülstra Intalliance AG*.
18 Decision of the FCO of 2 February 2004, B 6-120/03, WuW DE-V p. 871 – *Tagesspiegel/Berliner Zeitung*.
19 Decision of Federal Court of Justice of 24 October 1995, WuW/E BGH p. 3026 at p. 3029 *Backofen*, with further references; the Federal Court of Justice (*Bundesgerichtshof*) had retracted from this position in a later judgement: decision of Federal Court of Justice of 5 October 2004, KVR 14/03, WuW DE/R 1355, *Staubsaugerbeutel*.
20 Section 81(2) Nos. 3, 4, 6 in conjunction with (4) of the ARC.

According to Section 41(1) of the ARC, undertakings may not consummate a concentration or participate in the consummation thereof until clearance has been given. This non-consummation rule covers all legal acts intended to bring about the consummation of the concentration under civil law as well as all acts which anticipate the economic effects of the concentration. Violation of this rule is an administrative offence which could subject the parties concerned to a fine of up to 10% of their aggregate world-wide turnover.[21] The legal transaction that was performed in violation of the non-consummation rule becomes temporarily null and void (*schwebende Unwirksamkeit*). The validity of the transaction will subsequently be reinstated, with retroactive effect, if the merger control procedure takes place and the FCO clears the concentration. As described in greater detail above[22] the FCO may grant an exemption from the non-consummation rule. Such an exemption can be granted at any time, even before notification, and conditions and requirements may be imposed in connection with it.[23]

6. Appeal and judicial review

Temporary relief

Appeals against clearances do not have a suspensive effect.[24] Upon application, however, the appellate court may order a suspensive effect in full or in part if there are serious doubts as to the legality of the appealed decision or the enforcement would result in undue hardship for the party concerned which is not necessitated by prevailing public interests.[25] The Higher Regional Court of Düsseldorf has granted temporary relief to third parties by suspending consummation of the ministerial authorisation in the E.ON Ruhrgas concentration.[26] According to this case law, the third party applicants did not have to demonstrate either urgency or that their own rights have been infringed by the respective decision of the FCO.

In particular, the fact that the infringement of rights need not be demonstrated was severely criticised and triggered a reform of Section 65(3) of the ARC which entered into force on 1 July 2005. According to Section 65(3) sentence 4 of the ARC third party applications for the suspensive effect of appeals against second phase decisions of the FCO are subject to the prerequisite that the respective decision has infringed the applicant's own rights. The legal standing for filing appeals remains unaltered, and the divergence between the two tests has been accepted by the legislature in order to prevent concentrations from being unnecessarily delayed by third parties.[27]

7. Enforcement by private parties

Participation of third parties in the proceedings

If third parties wish to prevent concentrations from being realised or to have an influence on how they are cleared, they may participate in the proceedings instituted by the

21 Section 81(2) No. 1 in conjunction with (4) of the ARC.
22 See Section 3.
23 Section 41(2) of the ARC.
24 Section 64(1) of the ARC.
25 Section 65(3) sentence 3 of the ARC in conjunction with Section 65 (3) sentence 1 Nos. 2 or 3 ARC.
26 Section 65(3) sentence 3 in conjunction with Sections 65 (3) sentence 1 No. 2, 64 (3) and 60 No. 3 of the ARC. See, for example, decision of 11 July 2002, WuW/E DE-R, p. 885 at p. 886.
27 See *Begründung zum Siebten Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen* (legislative intent), p. 36; available at www.bmwi.de.

FCO. However, third parties do not have the right to request that the FCO commences proceedings in the first place.

If they wish to take part in the proceedings they have to be a party to the procedure. According to Section 54(2) No. 4 ARC the vendor is automatically a party to the proceedings in the case of asset and share sales constituting a concentration.[28] All other third parties must apply for admission to the procedure by the FCO. According to Section 54(2) No. 3 ARC, their interests have to be substantially affected by the decision. The Higher Regional Court of Düsseldorf has specified the pre-requisites for such an interest as follows: the interests must be connected with the freedom of competition or the structure of the market, and the third party must be at least indirectly affected by the FCO's decision. This does not necessarily require a legal interest; an economic interest can suffice.[29] There is some dispute as to the extent to which interests of consumers or employees are sufficient.[30] However, consumer associations are deemed to be substantially affected if the decision in question has an impact on a multitude of consumers and thus substantially affects the interests of consumers altogether in their totality.[31]

If third parties are admitted as interveners, they will have the opportunity to comment on the concentration and can force the cartel authority to call a hearing,[32] in which they may participate. It is very important in this respect that third parties can only appeal decisions by the cartel authority if they have been officially admitted to the proceedings.[33]

Civil proceedings of third parties against the concentration

Under the ARC, as amended, any infringement of competition law can now give rise to private cease and desist as well as damage claims irrespective of whether the relevant provision expressly protects the claimant.

Third parties may institute civil proceedings against a concentration with the aim of injunctive relief against the concentration according to Section 33(1) of the ARC[34] or obtaining damages according to Section 33(3) of the ARC[35] if they are "affected" by the infringement in question. According to Section 33(1) of the ARC affected persons are "competitors or other market participants impaired by the infringement". Possible infringements of merger control law, however, constitute rather procedural failures of the merging parties than infringements of material competition law, which may lead to disadvantages of consumers or competitors. Moreover, in Germany the merger control regime exists mainly in the public interest of

28 Section 37(1) Nos. 1 and 3 ARC.

29 Decision of Düsseldorf Higher Regional Court of 5 July 2000, WuW/E DE-R, p. 523 – *SPNV*.

30 Karsten Schmidt in Immenga/Mestmäcker, *GWB*, *Kommentar zum Kartellgesetz* (Commentary on the Law against Restraints of Competition), 3rd edition 2001, Section 54 No. 38.

31 Section 54(2) No. 3 of the ARC.

32 Section 56(1) of the ARC.

33 Sections 63(2) and 76(1) of the ARC. As explained above in Section 6.2 the Higher Regional Court of Berlin (*Kammergericht*) has acknowledged a right of appeal also for those third parties whose rights have been infringed by the decision of the FCO; it may remain open whether this would require admission to the procedure *ex post*.

34 Section 33(1) of the ARC reads: "Whoever violates a provision of this Act, Articles 81 or 82 of the EC Treaty or a decision taken by the cartel authority shall be obliged to the person affected to remediate and, in case of danger of recurrence, to refrain from his conduct. A claim for injunction already exists if an infringement is foreseeable. Affected persons are competitors or other market participants impaired by the infringement."

35 Section 33(3) of the ARC reads: "Whoever intentionally or negligently commits an infringement pursuant to paragraph 1 shall be liable for the damages arising therefrom. If a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service. The assessment of the size of the damage pursuant to §287 of the Code of Civil Procedure (*Zivilprozessordnung*) may take into account, in particular, the proportion of the profit which the undertaking has derived from the infringement. From the occurrence of the damage, the undertaking shall pay interest on its obligations to pay money pursuant to sentence 1. §§288 and 289 sentence 1 of the Civil Code shall apply *mutatis mutandis*."

maintaining competition as such and is not intended to protect other undertakings.[36] Thus an infringement pursuant to Section 41(1) (i.e. closing before clearance) or Section 39 (i.e. failure to notify a merger/closing) cannot be regarded as impairing competitors or other market participants within the meaning of Section 33 of the ARC.

For similar reasons, a claim for damages cannot be based on Section 823(2) of the German Civil Code (*BGB*), which requires the violation of a protective law (*Schutzgesetz*). Such a law has the purpose – at least partly – of protecting the individual claimant, as opposed to laws intended to protect the general public alone or the objects of legal protection to which the general public is entitled, without referring to the individual.

36 Emmerich in Immenga/Mestmäcker, *GWB*, *Kommentar zum Kartellgesetz* (Commentary on the Law against Restraints of Competition), 3rd edition 2002, section 33 no. 31.

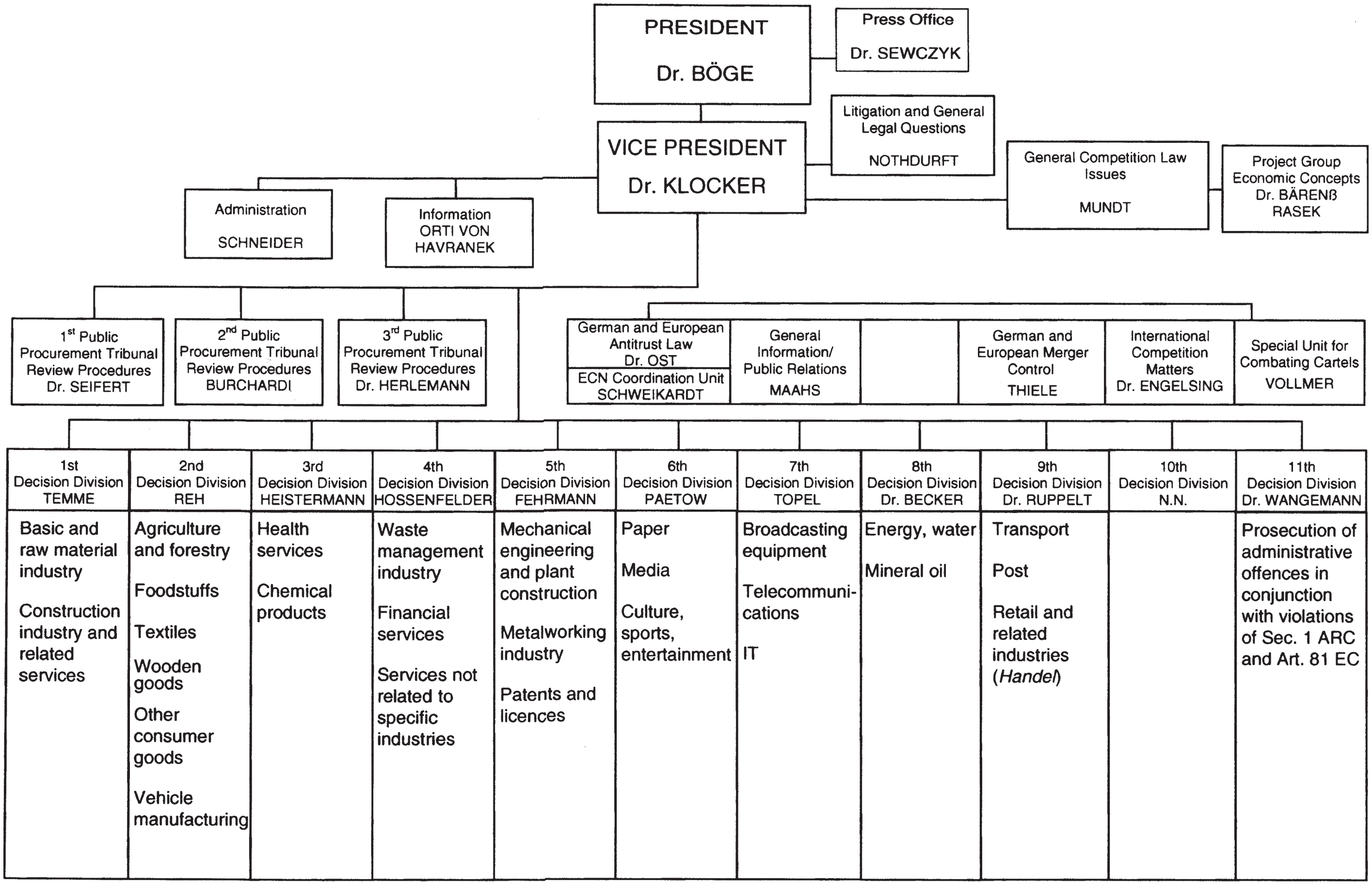

Figure 2 Organisational Chart German Federal Cartel Office (*Bundeskartellamt*)

Greece

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See Merger Control Worldwide Vol. 1, Chapter 23, pp. 525–549

In August 2005 the provisions of Law 703/1977 "*on the control of monopolies and oligopolies and the protection of free competition*" ("Law 703/77"), including the merger control rules, were amended by Law 3373/2005.[1] Under Law 703/77 as recently revised (the "revised law"), post-merger notification, which had previously been abolished by way of Law 2837/2000, has been reintroduced with Article 4a. Moreover, the structure of the Greek Competition Commission (the "GCC") has been modified while the merger notification requirements and procedures, as described in our Chapter (the "Main Chapter"), have been amended primarily by abolishing the market share criterion for a pre-merger notification under Article 4b and introducing a two-step procedure for the examination of these transactions. The main amendments to the merger control rules, including, also, the readjustments to the fines and penalties that may be imposed by the GCC for any infringements of Law 703/77 as well as the significant additions to the revised law, particularly concerning sectoral investigations, will be examined in this supplement.

1. Structure of the GCC

Under the revised law, the composition of the GCC has been increased from nine to eleven members. In particular, rather than appointing only one member from a Greek university specialising in financial matters and economic policy, the Minister appoints two, while, in relation to those members who are appointed to the GCC because of their prestige and experience in public and community economic law as well as competition policy matters, three members are appointed instead of two. Moreover, pursuant to the revised law, although the Minister of Development retains responsibility for appointing the GCC's members (and their substitutes) for a 3-year term subject to a once only renewal, it is the Ministerial Council, acting on the Minister's recommendation, and not the Minister of Development himself, that selects the Chairman of the GCC.

It should be noted that, in accordance with the Parliamentary Report on the basis of which the proposed amendments to Law 703/77 were introduced to the Greek Parliament for discussion, the membership of the GCC has been increased in order to allow for its more flexible, speedy and effective operation in two 5-member Sections, with the intervention of the Plenary Session being always crucial in matters of great interest and importance. The reason for this amendment, in combination with a number of other provisions adopted, including the appointment of the Chairman by the Ministerial Council as described above, is to further ensure

1 Official Gazette A' 188/02.08.2005.

the GCC's "*operational independence, its regulatory powers and prescriptive intervention in order that it may effectively fulfil its central institutional role within the framework of a market economy and the sensitive mechanisms of the National Economy*".[2]

2. Notification requirements and procedures

As mentioned above, following the amendment of Law 703/77 in August 2005 (by virtue of Law 3373/2005), post-merger notification, which had previously been abolished by Law 2837/2000, was reintroduced under Article 4a. In consequence, under the current Greek merger control regime, parties to a concentration meeting certain threshold requirements under Article 4b of the revised law are obliged to obtain advance clearance for a proposed transaction while, also, parties to a concentration who meet inferior threshold levels are required to notify a transaction following its realisation pursuant to Article 4a (Annex 1). An overview of the specific requirements for notification is provided below.

In this regard, it should be noted that the notions of concentration and control, as defined in section 3.1. of the Main Chapter, remain unaltered under the revised law, while the provisions relating to the person(s) who are responsible for notification and the calculation of turnover (save as regards the calculation of turnover of financial institutions which follows the principles set out in the new EU Merger Regulation No. 139/2004) as well as market share also remain unchanged (section 3.3. of the Main Chapter). However, in relation to the types of transactions that constitute concentrations, in accordance with the revised law, Article 4 paragraph 5 was rephrased in order to follow the wording of paragraphs 4 and 5 of Article 2 of the new EU Merger Regulation No. 139/2004. Accordingly, the distinction in the law between cooperative and concentrative joint ventures has been abolished and all full-function joint ventures, i.e. those that perform on a lasting basis all the functions of an autonomous economic entity, are considered to be concentrations subject to the merger control rules. To the extent that the creation of the joint venture constituting a concentration has as its object or effect the coordination of the competitive behaviour of companies that remain independent, such coordination will be appraised pursuant to the criteria of Article 1 of Law 703/77 on restrictive trade practices. In making this appraisal, the GCC will take into account in particular:

- whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in an upstream or downstream market from that of the joint venture or in a neighbouring market closely related to this market; and
- whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services concerned.

2.1. Pre-merger notification

In accordance with the revised law, the market share criterion for pre-merger notification, which had proven very difficult and often problematic to apply in practice, was abolished and such notification is dependent on turnover only. According to the Parliamentary Report, the market share criterion was abolished because a pre-merger notification requires "*clarity and swiftness*" for the issuance of a timely decision.[3]

2 Section A, point 3(a), Parliamentary Report dated 15 April 2005.
3 Section B, Article 4, Parliamentary Report dated 15 April 2005.

In particular, a merger is notifiable where the participating undertakings satisfy the following cumulative conditions:

- They have an aggregate world-wide turnover of at least EUR 150 million; and
- At least two of the participating undertakings realise, separately, an aggregate national turnover of over EUR 15 million.

A concentration that meets the turnover threshold set by the law should be notified to the Directorate-General for Competition[4] of the GCC within 10 working days from the conclusion of the agreement or the announcement of the public bid to buy or exchange or the acquisition of a controlling interest, whichever occurs first.

The hearing procedure, as set out in sections 3.4., 3.5. and 3.6. of the Main Chapter, has not been altered by the revised law. However, the time limits established for the assessment of a pre-merger notification have been amended significantly and a new two-step procedure has been introduced. Specifically, under Article 4d, after the GCC examines a notification which has been submitted for advance clearance, the following decisions may be issued:

- As described in section 3.7. of the Main Chapter, in the event that the concentration notified does not meet the thresholds for prior notification and is, therefore, not subject to compulsory notification, the Chairman of the GCC may issue a decision, within one month from notification, declaring the provisions of Law 703/77 inapplicable and this decision is served on the interested parties.
- If it is found that a concentration notified, although falling within the ambit of Article 4b, does not raise serious doubts as to the possibility of significantly restricting competition within the relevant markets affected by it, the GCC will decide not to oppose the transaction within one month from notification.
- If, however, the GCC finds that the concentration notified does raise serious doubts as to its compatibility with competition conditions, the Chairman of the GCC will decide within one month from notification to initiate proceedings for the examination of the transaction by the GCC and will inform the undertakings concerned accordingly. In this event, the case will be introduced before the GCC 45 days from notification, which (deadline) may be extended by another 14 days, while a decision prohibiting a concentration from taking effect will be issued within an exclusive deadline of 90 days from notification, otherwise the concentration will be deemed to have been approved.

2.2. Post-merger notification

As stated in the Parliamentary Report, the purpose of a post-merger notification is to provide the GCC with sufficient information on the conditions existing in the market.[5] A merger qualifies for post-merger notification if either of the following alternative conditions is met:

- The market share of the participating undertakings represents, in the relevant national market or a substantial part of it, at least 10%; or
- The aggregate national turnover of the participating undertakings amounts to at least EUR 15,000,000.

4 It should be noted that, pursuant to Article 33 paragraph 7 of Law 3373/2005, the Secretariat is referred to as the Directorate-General for Competition under the revised law.

5 Section B, Article 3, Parliamentary Report dated 15 April 2005.

A concentration which satisfies the relevant threshold requirements should be notified to the Directorate-General for Competition of the GCC within one month from its realisation.

2.3. Other amendments

The following provisions have been renumbered under the revised law:

- The power of the GCC to revoke its decisions and the relevant conditions that need to be satisfied are contained in Article 4d paragraph 12 of the revised law (see sections 2.2.1. and 7. of the Main Chapter).[6]
- A decision approving a concentration, following its prohibition by the GCC, may be issued by the Ministers of Finance and Economy and of Development under Article 4d paragraph 9 (see sections 4.3. and 5.2. of the Main Chapter).[7]
- Ancillary restrictions contained in a merger agreement are also covered by the GCC decision approving a concentration pursuant to Article 4d paragraph 7 (see section 4.4. of the Main Chapter).[8]

3. Fines and penalties

The fines imposed by the GCC for breaches of Law 703/77, as set out in the Main Chapter and, particularly, in section 5., have been readjusted or increased under the revised law. Specifically, the level of fines that the GCC may impose has been amended in relation to the following infringements:

3.1. Late notification

In the event of a deliberate failure to notify a concentration that fulfils the requirements for a pre-merger notification within the statutory deadline of 10 working days, the GCC imposes on those liable for notification a fine between EUR 15,000 and up to 7% of the aggregate national turnover of the undertakings concerned. In the case of culpable violation of the duty to notify a concentration that satisfies the post-merger thresholds within one month from its realisation, the GCC imposes a fine on those responsible for notification ranging from EUR 3,000 and up to 5% of the aggregate national turnover of the participating undertakings.

3.2. Early implementation

In accordance with the revised law, where there is a deliberate failure to suspend the implementation of a concentration that is subject to pre-merger notification pending the issuance of a decision by the GCC and provided that the GCC has not granted a derogation in this regard, the GCC imposes on those responsible for notification a fine starting from EUR 30,000 and up to 15% of the aggregate national turnover of the participating undertakings.

6 Before the recent amendment of Law 703/77, the relevant provision was numbered, in error, as Article 4d paragraph 10 while, in the Main Chapter, it is referred to as being Article 4d paragraph 11.
7 Previously, Article 4d paragraph 7.
8 Originally numbered as Article 4d paragraph 5.

3.3. Divestiture

In the event of non-compliance with a decision of the GCC under which measures are required to be adopted in order to remove the restrictive effects of the merger on competition, including the separation of participating undertakings, the GCC may impose a fine of up to 15% on the aggregate national turnover of the undertakings concerned as well as a daily penalty not exceeding EUR 10,000 for any delay in compliance.

3.4. Failure or delay in furnishing information and obstruction of investigations

Under the revised law, where undertakings or associations of undertakings, their directors and employees or individuals and private legal entities fail to supply or cause delay in providing the GCC with any information requested in writing or, if the information furnished is incomplete or inaccurate, the GCC is entitled to impose, on each of them and in respect of every violation, a fine of EUR 15,000 up to a maximum of 1% of turnover,[9] while it may impose a fine ranging from EUR 15,000 to EUR 100,000[10] on anyone who obstructs its investigation.

3.5. Criminal sanctions

A financial penalty ranging from EUR 3,000 to 30,000[11] is imposed on those acting either as individuals or in their capacity as representatives of a legal entity who contravene the merger control rules. Moreover, anyone who impedes the GCC's investigations and fails to provide any information requested or misrepresents the truth may, in addition to being imprisoned for at least 3 months, be charged with the payment of a penalty amounting to between EUR 5,000 and 15,000.[12] The relevant financial penalties may be doubled in the case of a repeated offence.

4. Appeal/judicial review

In relation to the appeal process before the Athens Administrative Court of Appeal, as described in section 6.1. of the Main Chapter, the only change instituted by the revised law is that, in order for the appeal to be heard, a filing fee equal to 20% of the fine imposed on the parties is payable. The filing fee cannot exceed EUR 100,000 (Article 14 paragraph 5). According to the Parliamentary Report, the main reason for the introduction of this provision is "*to prevent the abuse of the judicial process and to secure the effectiveness of the rules contained in the legislation for competition and the deterrent effect of administrative sanctions*".[13]

5. Mergers in specific sectors

5.1. Sectoral investigations

A new Article 5 has been included in the revised law which provides that the GCC, either by its own decision or following the request of the Minister of Development, may

9 Previously, the maximum fine was EUR 8,804.

10 Previously, the maximum fine was EUR 8,804.

11 Previously, the financial penalty ranged from EUR 2,934 to 14,673.

12 Readjusted from EUR 2,934 to 8,804.

13 Section A, point 3(f), Parliamentary Report dated 15 April 2005.

examine a specific sector of the national economy in order to determine whether or not the conditions for effective competition are present in that sector. The GCC may issue a reasoned opinion adopting all the necessary structural or behavioural measures that are required for establishing effective competition in the sector under examination if it considers that these conditions do not exist in the sector and, also, if it is satisfied that the application of the merger control rules will not result in the necessary conditions being established.

The GCC is required to notify the relevant sector of its views within 60 days from the date of commencement of the above procedure, defining the relevant markets that compose the sector under consideration. Furthermore, the GCC is required to publicise its views sufficiently and to initiate a period of public consultation lasting 30 days, following which, and provided that its views remain unchanged as regards the non-existence of effective competition in the relevant sector under examination, the GCC announces the specific structural or behavioural measures that it considers to be absolutely necessary, in accordance with the principle of proportionality, for the creation of effective competition. The measures that may be imposed by the GCC include ensuring the compliance with the principles of transparency and non-discrimination, the separation of accounts and the obligation to set prices by taking into account the relevant costs (Article 5 paragraph 3). The measures proposed by the GCC are published and form the subject of a further 30-day period of public consultation. Following this period and after taking into account the results of the public consultation, the GCC may impose, by way of decision, the specific structural or behavioural measures that it considers to be absolutely necessary for creating the conditions for effective competition. The GCC's decision is transmitted to the Minister of Development who, within an exclusive period of 30 days, may decide that the measures proposed should not be implemented or, alternatively, he may consider that they should be amended, for public interest reasons.

Assuming that the GCC's decision is not overturned by the Minister of Development, the GCC is required, one year after the decision's publication or, in any event, following the request of the Minister of Development, to re-examine the specific sector and to determine if the conditions for effective competition have been established or whether the measures proposed should be amended, in which case the procedure outlined above should be followed for the issuance of a new decision.

A fine of between EUR 15,000 and up to 15% of the aggregate national turnover may be imposed on each undertaking that fails to comply with these decisions.

5.2. Cooperation with sector-related regulatory authorities

As noted in section 8 of the Main Chapter, the GCC is encouraged to collaborate with other independent authorities that regulate and monitor the functioning of specific sectors of the Greek economy, such as the National Telecommunications and Postal Committee (NTPC) and the Regulatory Authority for Energy (RAE). Under the revised law, these authorities are not specifically listed in Article 8f, as was previously the case. Under Article 8f, the GCC continues to be empowered to render opinions, following a request from the relevant regulatory or other authorities, as regards competition law matters pertaining to these sectors. The specific reference to the GCC's ability to rule on cases referred to it by these regulatory authorities has been deleted from this provision, as currently in force. Consequently, the revised law does not appear to resolve the issue of parallel competence which is discussed in the Main Chapter.

6. Cooperation with other competition authorities

A reference has been inserted in the revised law, under Article 8b paragraph 2(19), according to which the GCC is authorised to cooperate closely with the European Commission and the competition authorities of the other Member States of the European Union ("EU") in order to ensure the application of the EU competition law, in accordance with Law 703/77. The Parliamentary Report states that the aim is to create a framework within which the cooperation between the GCC and the European Commission as well as the competition authorities of the other Member States will be stable and effective.[14]

14 Section A, point 3(e), Parliamentary Report dated 15 April 2005.

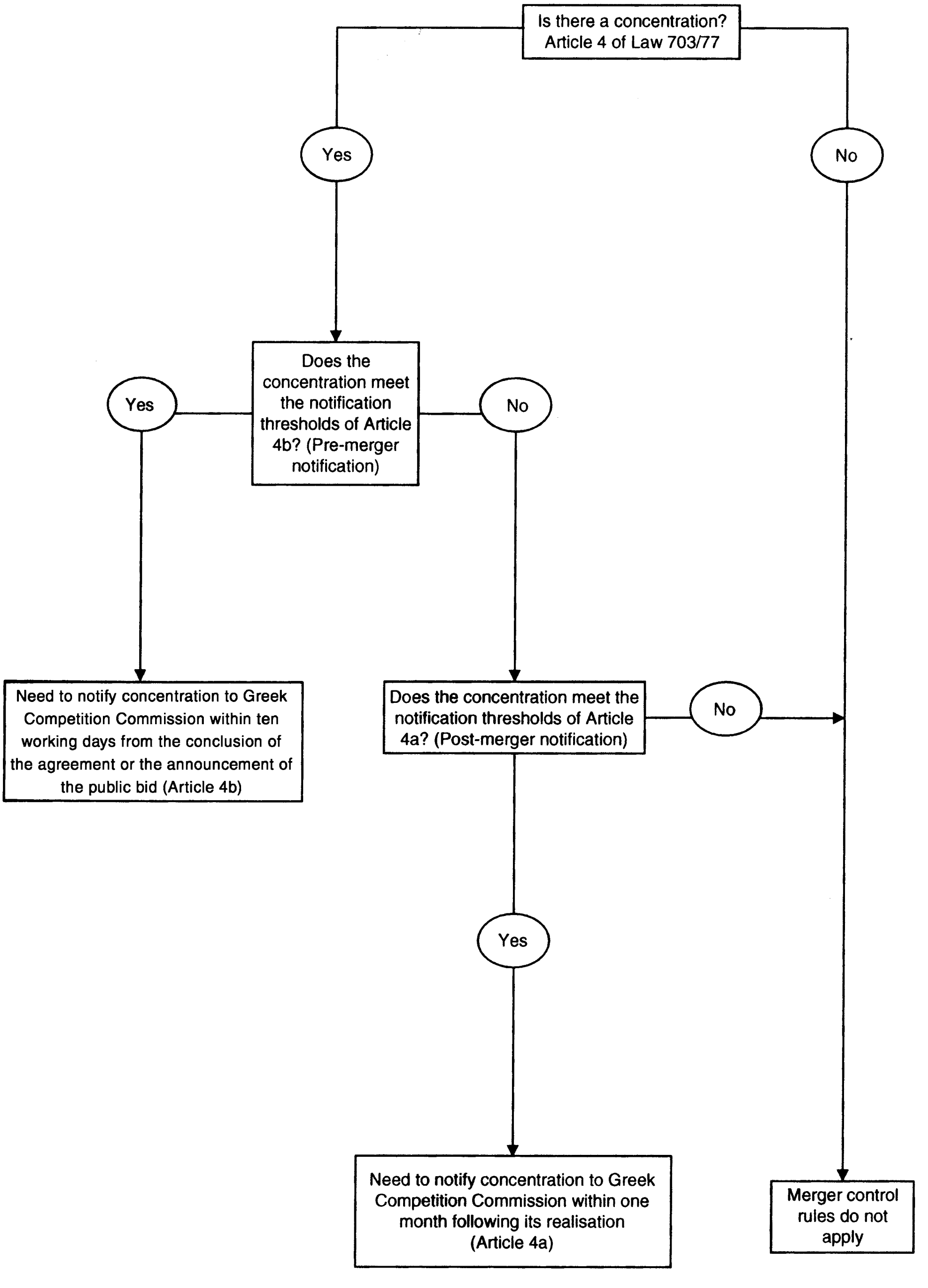

Figure 3 Annex 1

Iceland

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See Merger Control Worldwide Vol. 1, Chapter 25, pp. 575–592

A new competition law was enacted on 1 July 2005, the Competition Act No. 44/2005 (hereinafter referred to as the "Competition Act 2005"), which replaces the current competition law from 1993. The main changes are of an administrative nature, with the merging of the Competition Authority and the Competition Council into a new entity called the Competition Authority. In addition the enforcement of rules on unfair trade practices has been divested to a new institution, the Consumer Agency. The merger control provision was not amended but is now numbered 17 instead of 18. An English version of the Competition Act 2005 is available on the Competition Authority's website, www.samkeppni.is.

The Competition Act 2005 was amended in April 2007. The amendments include adding a new provision concerning structural remedies and clear authority to impose fines when mergers are not notified correctly within the time limits. The English translation of the Competition Act 2005 available on the Competition Authority's website has not been updated to reflect these changes. It will eventually be updated, though at the time of writing a precise date for this was not known.

Icelandic merger rules are based on European Community ("EC") merger rules. The Competition Authority's standard work method is therefore to seek guidance from EC and European practice when resolving specific issues and to follow a similar line unless some Icelandic rule or a specific local situation leads to a different conclusion. As in the Main Chapter, the coverage in this supplement is intended to give clear and concise guidance on relevant Icelandic practice and rules. However, as much of the Icelandic rules and practice follows the principles applied in the European Union and European Economic Area, this coverage is limited as much as possible to avoid repetition of the discussion in the relevant chapters, namely the EC and EEA chapters of Merger Control Worldwide. In addition it should be noted that when specific issues are not discussed in the Main Chapter or below it can be assumed that they are not directly detailed in Icelandic merger rules and/or have not been addressed in practice. In such instances it is most likely that guidance can be sought from EC merger rules and practice, with local (Icelandic) circumstances in mind.

1. Relevant legislation and statutory standards

The Competition Act's 2005 merger provisions are unchanged in substance. The only change is that the merger provision itself now appears as Section 17, instead of Section 18. The principal legislation dealing with mergers in Iceland is therefore now contained within Sections 4 and 17 of the Competition Act 2005.

The Competition Authority has issued new rules of procedure (hereinafter referred to as the “Procedural Rules”),[1] as well as new merger notification rules (hereinafter referred to as the “Merger Rules”).[2] The new Merger Rules are also almost identical to their predecessor in substance.[3]

2. Decision-making bodies and enforcement authorities

The Minister of Commerce is in charge of the implementation of the Competition Act 2005. However, day-to-day administration of matters within the sphere of the Act is performed on behalf of the Minister by the independent administrative authority: the Competition Authority (hereinafter referred to as the “Authority”).[4]

2.1. Competition Authority

The Competition Authority both investigates and decides cases. Its operations are managed by a three-person board of directors, appointed by the Minister of Commerce for a 4-year term. The board is not involved in day-to-day investigation or decision making but material decisions are subject to its approval. It has issued rules of procedure that define what constitutes a material decision.[5] This includes all decisions to intervene in merger cases. A decision to approve mergers where companies operate on the same market and have a combined market share of 50% or more is also considered a material decision.

The board appoints a General Director for the Competition Authority who handles its day-to-day administration.

3. Notification requirements and procedures

3.1. Definitions: “merger” and “control”

In several decisions rendered since 2005 the Competition Authority has considered as mergers transactions that only involve the purchase of assets. For example, in decision No. 7/2007 the authority found that the purchase of all equipment used to operate two radio channels along with the broadcast and trademark rights etc. was a merger.[6] In decision No. 3/2007 the purchase of a bank outlet with the takeover of all loans, savings accounts, warranties etc. concerning the outlet was considered a merger.[7] In decision No. 17/2006 purchase of pharmaceutical stock and goodwill associated with a retail outlet of pharmaceuticals was considered a merger.[8] The decisions regrettably contain no specific arguments or a discussion of possible conditions concerning when assets constitute an undertaking.

The issue of joint control has come up on a number of occasions after 2005 as it did before that year. Most of these cases are based on the common commercial interest method and the Competition Authority seems to be more inclined to use this concept than its European counterparts. It can be expected that this trend will continue.

1 Law Gazette no. 880/2005.
2 Law Gazette no. 881/2005.
3 Law Gazette no. 930/2001.
4 As stipulated by Sections 5 to 8 of the Competition Act 2005.
5 Law Gazette no. 759/2005.
6 365 miðlar ehf. purchase of the radio stations Kiss FM and XFM from Íslenska útvarpsfélagið ehf.
7 Sparisjóður Keflavíkur purchase of Landsbanki Íslands hf. outlet in Sandgerði.
8 The merger of Lyf og heilsa hf. and Apótek Vestmannaeyja ehf.

In decision No. 46/2006 the Competition Authority found that the owners of Penninn hf., a bookstore chain, were linked, either through family relations, friendship or common commercial interests.[9] It considered that they had common commercial or financial interests regarding their holdings in Penninn beyond what was involved in being shareholders in the same company. This led to a finding of their joint control of Penninn.

In decision No. 38/2006 the Authority found that Exista hf., an investment firm, had control of Síminn hf., a telecommunication and media company, either on its own or jointly with Kaupthing bank hf.[10] Exista owned 43.6% of the share capital and Kaupthing bank 29.4%; Exista owned 21.1% of the share capital in Kaupthing bank. It was the biggest shareholder, with the next largest shareholder owning 10.8%. Kaupthing bank had owned 20.9% of the share capital in Exista. Its share had recently been reduced to 10.5% and it had been publicly stated that it would be insignificant by the end of the year. The Competition Authority concluded that the interests of Exista and shareholders in Kaupthing bank would coincide in the future, which could, among other things, affect the operations of Síminn. There had been a very close cooperation between the two undertakings for a considerable time that could be equated to them being linked. Even though Kaupthing bank would reduce its share in Exista, the Authority considered that they were linked undertakings that had common interests regarding their share in Síminn. Therefore Exista had control over Síminn, either alone or jointly with Kaupthing bank.

Similar arguments can be found in decision No. 22/2006.[11] That decision was, however, annulled by the Competition Appeals Committee (CAC) in ruling No. 5/2006 because of procedural defaults.

3.2. Thresholds for mandatory notification

The following rulings and decisions concerning turnover thresholds that warrant special coverage have been rendered since 2005. The thresholds themselves remain unchanged.

The Competition Appeals Committee (CAC) clarified which undertakings should be included in assessing whether turnover thresholds are met in ruling No. 22/2005.[12] It overturned the Competition Authority's decision to order FL Group hf. to notify its purchase of the Danish airline company Sterling Airlines A/S. The Authority maintained that the vendor, Fons eignarhaldsfélag hf., was a party to the merger and therefore its turnover should be taken into account when assessing whether the notification thresholds were met. The CAC stated that the competition authorities must have clear and decisive legal authority to require undertakings to notify mergers and Section 17 of the Competition Act 2005 did not directly deal with the legal position of an undertaking that sells an undertaking which is then merged with another undertaking. Therefore the turnover of Fons eignarhaldsfélag hf. should not be included when assessing the notification thresholds in Section 17(2).

In decision No. 8/2007 the Competition Authority considered that even though the turnover of one undertaking being acquired was below the relevant turnover thresholds, the merger nevertheless had to be notified as the combined turnover of the undertaking and another undertaking being acquired from the same vendors was above the thresholds.[13] This was not discussed further and the decision was not appealed.

9 DM ehf. purchase of Dreifingarmiðstöðin ehf.

10 The merger of Exista ehf. and VÍS eignarhaldsfélag hf.

11 The merger of Dagsbrún hf. and Sena ehf.

12 *FL Group hf. v. The Competition Authority.*

13 Bílanaust's hf. purchase of Bæjardekk ehf., Dekk.is ehf. and Hjólbarðaverkstæðið Dekkið ehf.

In decision No. 23/2007 the parties argued that because the transaction was not a merger under company law only their turnover in the relevant market should be included in the assessment of the notification duty.[14] The Competition Authority completely rejected these arguments, stating that Section 17(2) clearly referred to the total turnover of the relevant undertakings.

Decision No. 26/2007 concerned a merger between two savings banks. The Competition Authority stated that the turnover concept was not defined in "commentary on the law". Guidance to its interpretation could, however, be sought from EC merger rules, as they were the model on which Section 17 turnover thresholds were based and it was customary to look to EC law when interpreting Icelandic competition law. It then referred to Article 5(3) of EC Merger Regulation No. 139/2004, regarding the turnover of financial undertakings, and the European Commission's guidance on *calculation of turnover*, regarding what annual accounts should be used and from what time. The Competition Authority then went on to calculate turnover in 2005 according to the financial undertakings method and found that it was above the thresholds. In addition the results for the first half of 2006 indicated that the finding would be the same for that year.

3.3. Notification deadline and procedure

As stated before, the Competition Act 2005 was amended by Act No. 52/2007 enacted on 3 April 2007 (hereinafter referred to as the "Amendment Act"). Section 37(g) of the Competition Act 2005 now provides the Competition Authority with clear permission to fine undertakings for not notifying mergers correctly within the time limits prescribed in Section 17(3). The Authority has already used this power in decision No. 31/2007 where it imposed a fine of ISK 250,000;[15] also in decision No. 9/2007 periodic penalty fines of ISK 250,000 a day were imposed to force the parties to notify a merger correctly to the Competition Authority.[16] This decision was, however, based on Section 38 which includes the power to impose such fines in case of non-compliance with decisions. In this case the Competition Authority had taken a specific decision forcing the parties to notify the merger; according to the decision, the authority repeatedly asked the undertakings to notify the operation correctly.

The procedure for notification is unchanged. It is, however, worth mentioning that in decision No. 44/2007 the Competition Authority, under Section 7 of the Merger Rules, agreed to exempt the parties from the obligation to submit certain information requested in the Annex to the rules.[17] The undertakings' operations overlapped only in a very limited manner as they mostly operated in different geographical markets.

3.4. Investigation of mergers

3.4.1. Information gathering

Sections 39 and 40, regarding investigations, are now numbered Sections 19 and 20.

The Amendment Act introduced a new provision concerning the penalisation of individuals for destroying, forging, removing or in another way making unusable any evidence that has relevance for the investigation of the Competition Authority under Sections 19 or 20. This

14 The merger of Aðalskoðun hf. and Frumherji hf.
15 Insufficient provision of information regarding the merger of VBS and FSP.
16 Decision to impose periodic penalty fines because of the negligence of Mest ehf. to notify a merger.
17 The purchase of Kaupthing bank hf. by NIBC Holding NV.

infringement is subject to fines or imprisonment for up to three years according to Section 41(b)(1). In addition, anyone who provides the Competition Authority with wrong, misleading or incomplete information shall be fined or imprisoned for up to two years according to Section 41(b)(2). It has yet to be seen how these provisions will be applied. According to Section 42 of the Competition Act 2005, it is the police who investigate these infringements, but only following a complaint from the Competition Authority. The Competition Authority decides whether to send a case to the police and it is not possible to appeal such a decision to the CAC: see Section 42(4). However, it is the police or public prosecutor who decide whether to prosecute.

Finally, we should note that the Competition Authority has, at least on one occasion, seized documents from independent lawyers in dawn raids on the premises of undertakings under investigation. It considers that this falls within its investigative powers. This practice has not been tested before the CAC or the courts.

3.4.2. Rights of third parties

The Competition Act 2005 did not introduce provisions for the rights of interested third parties to be heard. However, previously the Competition Authority did not issue non-opposition decisions, but it has changed this practice and now issues formal published decisions in all merger cases. This at least provides third parties with information about mergers. The Competition Authority had also started publishing on its website a list of notified mergers but regrettably this has not been consistent enough to guarantee its completeness. These two factors must, although imperfect, be considered to be an improvement in the standing and position of third parties and the transparency of the Competition Authority's practice in merger cases.

It is also worth mentioning that in decision No. 22/2006 the Competition Authority annulled a merger between a media company and an entertainment company.[18] This decision was overturned by the CAC in ruling No. 5/2006 because the vendor's right to be heard was not sufficiently respected. The vendor is therefore considered to be a party to a merger case with the legal rights that entails.

4. Substantive assessment and test

The substantive assessment in the merger review process remains unchanged. The Competition Authority can annul or condition a merger if it deems that it obstructs effective competition by giving one or more undertakings a dominant position or where such a position is strengthened. It is worth iterating that the substantive test prescribed in the Competition Act 2005 was not aligned with the new test prescribed in the EC Merger Regulation No. 139/2004. It has yet to be seen whether it will nevertheless have an impact on merger decisions not involving a clear and direct effect on the market position of merging parties. As described in the Iceland chapter of the Main Work, the Icelandic competition authorities have intervened in such mergers on the basis of a possible obstruction to effective competition, sometimes without a direct reference to the creation or strengthening of a dominant position as a result of the merger. This practice has not been tested before the CAC or the courts. From decisions rendered from 2005 it could be inferred that the Competition Authority places more emphasis on directly referring to a possible effect on the undertakings' dominant position in accordance with the wording of Section 17(1).

18 The merger of Dagsbrún hf. and Sena ehf.

As stated in the Main Chapter, the competition authorities have never, in formal publicly available decisions, allowed a merger creating or strengthening a dominant position on the basis of the failing firm defence. However, we should note that in a recent decision, No. 14/2005,[19] concerning a merger between two insurance companies, the Competition Council allowed a merger that it considered would reduce competition in an already oligopolistic market, subject to conditions. In the Council's decision a reference is made to the difficult business, as evidenced by documents, of the undertaking taken over. Subsequent to negotiations the merger was subjected to conditions aimed at ensuring the independent operations of the merging insurance companies. The Competition Authority also referred to the poor business conditions of acquired undertakings in decisions No. 46/2006, No. 18/2007 and No. 46/2007.[20]

5. Final orders and sanctions by authorities

The Competition Authority can either decide to not intervene in a merger, annul it or approve it subject to conditions. The Authority's practice to date clearly indicates that the preferred order, where competition concerns arise, is to approve a merger subject to conditions rather than prohibit it outright. However, various developments occurring since 2005 seem to have made the Authority become more assertive. In 2005 alone there were three formal Council decisions annulling a merger clearance; a remarkable number given that the Council has had this power for the past 12 years. Since 2005 the Competition Authority has prohibited three mergers. In decision No. 23/2007 the Authority blocked a merger that led to a 100% market share in the car inspection and testing market.[21] In decision No. 28/2006 the Authority blocked a merger between two undertakings involved in the packaging, automatic dose dispensing and retail sale of pharmaceuticals.[22] The Authority considered that the merger would lead to their dominant position in dose dispensing for public undertakings and strengthen the already joint dominant position that Lyf og Heilsa, a sister company of one of the merging undertakings, had along with its main rival Lyfja. This finding was confirmed by the CAC in ruling No. 6/2006. In decision No. 22/2006 the Authority blocked a merger between a media company and an entertainment company.[23] This decision was, however, overturned by the CAC in ruling No. 5/2006 on procedural grounds.

Following the enactment of the Amendment Act, Section 37(f) of the Competition Act 2005 now provides the Competition Authority with specific power to fine undertakings for infringing interventions, orders or conditions enforced under Section 17(1), (5) and (6). Section 37(a) provides for a limitation period however, and states that fines cannot be imposed seven years after the end of an infringement. This moratorium is stopped from the time the Competition Authority notifies a party about the start of an investigation of an alleged infringement or when it conducts inspections on the premises of an undertaking.

The Amendment Act also contained a specific provision, Section 17(a) of the Competition Act 2005, giving the Competition Authority permission to base its decisions, including merger decisions, on negotiated solutions. This is in line with previous practice but is now clearly

19 Vátryggingafélag Íslands hf. purchase of Íslandstrygging hf. and the merger of Íslandstrygging hf. and Vörður vátryggingafélag hf.

20 The merger of Birtingur útgáfufélag ehf. and Útgáfufélagið Fögrudyr ehf., DM ehf. purchase of Dreifingarmiðstöðin ehf. and Sparisjóðs Mýrarsýslu purchase of Sparisjóður Ólafsfjarðar.

21 The merger of Aðalskoðun hf. and Frumherji hf.

22 The merger of DAC ehf. and Lyfjaver ehf.

23 The merger of Dagsbrún hf. and Sena ehf.

provided for by law. Section 37(h) further provides the Authority with the power to fine undertakings for infringing such decisions.

Sections 1(2d) and 18 of the Procedural Rules are now numbered as Sections 2(d) and 22.

Finally, it is necessary to mention that with the Amendment Act a specific structural remedies provision was added to the Competition Act 2005, namely Section 16(2). The application of the section is, however, subject to it being necessary to stop an infringement which it is not possible to stop by other means and only in so far as the action taken is proportionate bearing in mind the infringement itself.

Italy

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1. Decision-making bodies and enforcement authority(ies)

Law No. 262 of 28 December 2005 abrogated Article 20(2), (3) and (6) of Law No. 287/1990 which attributed the power to enforce Italian competition law in cases affecting core banking activities to the Bank of Italy. As a result, the Antitrust Authority ("the Authority") is now the exclusive enforcement body as far as all competition matters are concerned.

For lack of jurisdiction, the Bank of Italy has closed all its pending investigations and has dismantled its specialized Antitrust Unit.

2. Notification requirements and procedures

2.1. Mandatory or voluntary notification

2.1.1. Definition of "concentration" under Law No. 287/90

Acquisition of sole control. Under particular circumstances, sole control may be ascertained even in the absence of a formal participation in the capital of the controlled undertaking. This is shown by an interesting decision[2] in which the Authority assessed that Tetra Pak International SA ("Tetra Pak") had exercised *de facto* control over Italpack Srl ("Italpack") for almost ten years, thus infringing a 1993 decision by which the Authority prohibited Tetra Pak's proposed acquisition of Italpack.[3] The decision is noteworthy since the Authority reached such conclusion notwithstanding the fact that Eaglepack Italia, a third independent company, formally acquired Italpack in 1995.

In the Authority's view, a number of elements demonstrated the existence of a *de facto* control by way of decisive influence over the Italpack's management: (1) the substantially exclusive, stable and integrated commercial relationships between the companies that had intensified during the years, leading to Italpack acting almost exclusively (*i.e.*, approximately 90% dedicated) to satisfy orders from Tetra Pak; (2) Italpack's use of machinery leased free of charge by Tetra Pak; (3) Tetra Pak's influence over the appointment of some members of Italpack's senior management (a number of whom either originated from Tetra Pak or were

1 *The authors would like to thank their colleagues Saverio Valentino, Pietro Merlino and Alessandro Pellegrini for their contribution towards drafting the present supplement. The usual disclaimers apply to the end result.*
2 Case C812B – *Emilcarta/Agrifood Machinery*, 29 July 2004, Bulletin n. 31/2004.
3 According to the Authority, such acquisition was likely to strengthen Tetra Pak's dominant position on the aseptic and non-aseptic packaging markets for liquids and semi-liquids for human consumption, so as to restrict competition appreciably and on a lasting basis.

trained by Tetra Pak); and (4) the joint management of supplies, as well as the sharing an IT system, which ensured that Tetra Pak could access important commercial information regarding Italpack's activities. Such a *de facto* control over Italpack led to the same anti-competitive effects that the Authority intended to prevent by its 1993 decision and therefore was in violation of Article 19(1) of Law No. 287/90 that bans the implementation of a concentration which has been prohibited (see below, par. 5.2.1, for the sanction levied to Tetra Pak pursuant to this provision).[4]

Creation of a concentrative joint venture. The acquisition by API – Anonima Petroli Italiana SpA ("API") of a 90% stake in its direct competitor IP SpA ("IP") provides a clear illustration of the differences between the Italian and EC rules dealing with joint ventures. In fact, as Law No. 287/1990 was not amended to reflect changes introduced in 1997 in the old EC Merger Regulation (*i.e*., Regulation 4064/89), the original distinction between "concentrative" and "cooperative" joint ventures remains applicable to Italian merger control rules.[5]

In the case in question, the Authority held that the 10% stake in IP kept by the seller, the Italian oil and gas company ENI SpA ("ENI"), was sufficient to confer it joint control over IP, because (i) it was accompanied by a number of veto powers on significant decisions and (ii) pursuant to three five-year supply agreements entered into simultaneously with the acquisition by API, IP committed to source the vast majority of its oil requirements from ENI. Moreover, IP qualified as a full function joint venture since it was an existing company with significant resources. However, its creation resulted in a risk of coordination between the two parent companies, both active in the oil distribution market. Accordingly, the Authority found that the notified transaction did not amount to a "concentration" within the meaning of Article 5 of Law No. 287/1990.[6]

2.1.2. Turnover thresholds

On 14 June 2006, the Authority updated the turnover thresholds provided for in Article 16(1) of Law No. 287/90, that trigger the obligation to notify concentrations.[7] Transactions are now reportable to the Authority if:

- the combined aggregate Italian turnover of all undertakings concerned exceeds €432 million in the preceding fiscal year, *or*
- the aggregate Italian turnover of the target undertaking exceeds €43 million in the preceding fiscal year.

Two decisions shed light on the criteria for attribution of turnover in the case of joint ventures between an "undertaking concerned" and third parties. In particular, consistent with the Commission's practice, the Authority allocates the turnover shared equally by all the

4 Ruling on Tetra Pak's appeal of the decision, the TAR Lazio substantially confirmed the correctness of the Authority's assessment. See *Tetra Pak International SA v. Autorità Garante della Concorrenza e del Mercato*, 10 May 2005, n. 3572.

5 Case C7018 – *API-Anonima Petroli Italiana/IP*, 30 June 2005, Bulletin n. 25/2005.

6 The Authority simultaneously initiated an in-depth investigation of the agreement between API and ENI for the formation of a cooperative joint venture (Case I653 – *API-Anonima Petroli Italiana-ENI*, 30 June 2005, Bulletin n. 25/2005). As a result, API and ENI modified their initial agreement by transforming the transaction into API's acquisition of 100% shares of IP. In addition, the parties reduced the scope of the supply agreements between ENI and IP by allowing the latter to source at least 20% of its requirements from companies other than ENI. In light of the amendments, the Authority unconditionally cleared the transaction qualifying it as a concentration (Case C7200 – *API-Anonima Petroli Italiana/ENI*, 25 August 2005, Bulletin n. 32-33-34/2005).

7 Bulletin n. 22/2005.

controlling companies in the joint venture to the undertaking concerned. Accordingly, if, for example, the joint venture is controlled by one undertaking concerned and two independent companies, one third of joint venture turnover will be allocated to the undertaking concerned.[8]

2.2. Procedural steps and notification formalities

In 2005, two important procedural developments occurred, namely: (i) the formal provision of the so-called pre-notification contacts and (ii) the introduction of a filing fee.

(i) On 15 June 2005, the Authority published a notice introducing a new rule concerning the notification procedure, which currently applies only to concentrations where both turnover thresholds set forth in Article 16(1) of Law No. 287/90 are *cumulatively* met.[9] Following the well-established practice of the European Commission, notifying parties are now formally advised to conduct confidential pre-notification discussions with the Authority regarding the concentration as well as any concerns about its possible anti-competitive effects. In the Authority's view, pre-notification contacts serve the purpose of ensuring that notification forms are complete from the outset. In particular, the notifying parties may file a preliminary memorandum with the Authority 15 days prior to the expected date of the formal filing. This memorandum should provide: (a) a brief description of the parties and the transaction, (b) the identification of the markets affected by the transaction, specifying the position held by the merging parties, and (c) an indication of whether the concentration is subject to merger control filing obligations in other countries.

(ii) On 22 December 2005, the Italian Parliament adopted the 2006 budget law (Law No. 266/2005) which introduced an obligation to pay a filing fee for every concentration notified to the Authority. Law No. 266/2005 required the Authority to establish the criteria to calculate the sum of the filing fee with the only limit that such filing fee should not exceed 1.2% of the total value of the notified transaction. A few days later, the Authority issued a decision setting the filing fee at 1% of the transaction value and fixing a €50,000 cap and a €3,000 floor.[10] Evidence of payment of the filing fee must be attached to the notification. On 1 February 2006, the Authority clarified that the value of the transaction, taken into account for the calculation of the filing fee, corresponds to the total purchase price agreed by the parties for the totality of the activities that are the object of the transaction, including those generating turnover outside the Italian territory.[11] On the basis of the criteria introduced by the Authority, the filing fee will almost invariably be equal to €50,000, since a lower filing fee will only be due under the rare circumstances that the purchase price is less than €5 million.

8 In *I.Net/Siosistem*, the acquiring party was controlled by British Telecom ("BT") that, in conjunction with the target company, had a turnover below the thresholds set forth by Article 16(1) of Law No. 287/90. By contrast, taking into account the entire Italian turnover of Albacom, a company jointly controlled by BT and two other independent shareholders, BT would have crossed the statutory threshold. The Authority stated that only one third of Albacom's turnover needed to be considered for purposes of turnover calculation (Case C6228, *I.Net/Siosistem*, 22 December 2003, Bulletin n. 52/2003). The same approach was followed in *FC Internazionale Milano/Spezia Calcio 1906*. The Authority concluded that Internazionale failed to notify a concentration because it considered that its turnover should include the entire turnover of all companies solely controlled by its controlling shareholder (Mr Moratti) and 50% of the turnover of the companies jointly controlled by Mr Moratti together with a third party (Case C6878 – *FC Internazionale Milano/Spezia Calcio 1906*, 27 April 2005, Bulletin n. 17/2005).

9 The notice is published in Bulletin n. 22/2005.

10 Decision of the Authority dated 28 December 2005, published in Bulletin n. 50/2005.

11 Decision published in Bulletin n. 3/2006.

3. Rights of defence: the rights of third parties

Following the practice in force at the EU level, the Authority adopted a notice on 15 June, 2005 which introduced the possibility for third parties to intervene in Phase I investigation, when the notified concentration meets both alternative turnover thresholds that trigger a duty to notify pursuant to Article 16(1) of Law No. 287/90.[12] After receiving a notification, the Authority will publish a brief notice on its official website providing the essential information on the notified transaction and inviting interested third parties to submit their observations to the Authority within five days after the notice has been published. To this end, the Authority added a new section to the notification form requesting the notifying parties' consent to the publication of the notice.

4. Final orders and sanctions by authority(ies)

On 29 July 2004, the Authority imposed a fine on Tetra Pak for failure to comply with its decision of 6 August 1993, by which the Authority prohibited Tetra Pak's proposed acquisition of Italpack (see above par. 2.1.1.).[13] Although Italpack was formally acquired by a third independent company, Eaglepack Italia in 1995, the Authority concluded that Tetra Pak exercised *de facto* control over Italpack for almost ten years, by way of decisive influence over Italpack's management. As the breach of the prohibition of the acquisition by exercising *de facto* control over Italpack led to the same anticompetitive effects the Authority intended to prevent by its 1993 decision, and considering the particularly long period of time in which the breach had been consummated, the Authority imposed a fine of over €95 million on Tetra Pak. This fine was by far the highest ever imposed by the Authority on a company for failure to comply with a decision prohibiting a merger.[14]

5. Appeal and judicial review

On 21 March 2005, the Supreme Administrative Court issued a judgment affirming that its recent judgment overruling the case law of the Italian administrative courts, according to which only addressees of the Authority's decisions have standing to appeal them, applied not only to decisions exempting restrictive agreements under Article 4 of Law No. 287/90, but also to decisions clearing a proposed concentration.[15]

Following the previous case law, the TAR Lazio declared inadmissible Fondiaria Industriale Romagnola's ("SFIR") appeal against an Authority decision clearing (subject to certain conditions) the acquisition of Eridania, the largest sugar producer in Italy, by Seci-Sadam, Co. prob and Finbieticola. The Supreme Administrative Court reversed this judgment, holding that third parties (such as competitors or consumer associations) have standing to appeal if they can demonstrate that their interests can be directly and immediately harmed by the Authority's

12 See Authority's "*Communication concerning some procedural aspects of mergers, according to Law 287, 10 October 1990 – B. Information to the market concerning the merger operation formally filed*" published in Bulletin n. 22/2005.

13 Case C812B – *Emilcarta/Agrifood Machinery*, 29 July 2004, Bulletin n. 31/2004.

14 Ruling on Tetra Pak's appeal, the TAR Lazio ascertained that Tetra Pak's control over Italpack lasted for a period shorter than that established by the Authority (until 1999 instead of 2001) and, accordingly, referred the case back to the Authority for a new determination of the amount of the fine. See *Tetra Pak International SA* v. *Autorità Garante della Concorrenza e del Mercato*, 10 May 2005, n. 3572.

15 Supreme Administrative Court, *Fondiaria Industriale Romagnola SpA* v. *Autorità Garante della Concorrenza e del Mercato*, 21 March 2005, No. 1113.

decision (or its omission to adopt a decision). This may also be the case for decisions clearing, conditionally or unconditionally, a proposed concentration; indeed, such decisions are capable of affecting third party interests insofar as the proposed concentration would result in non-competitive market structures. The Court noted that its ruling was in line with the EC courts' case law on Article 230 EC and consistent with the rationale behind the Supreme Court's recent judgment on consumer standing to claim damages from undertakings that have breached Italian antitrust rules (see below par. 7.1).

As it was clear that the appellant was the main competitor of the companies involved in the transaction, the Supreme Administrative Court found that SFIR had a direct interest in the proceedings and, thus, its appeal was considered admissible. As the Court agreed with the appellant's arguments that the conditions to which clearance had been subjected did not effectively remedy the competition concerns raised by the vertical integration resulting from the acquisition (Finbieticola was active in the upstream market of sugar beet supply, representing sugar beet producer associations), it partially annulled the clearance decision and referred the case back to the Authority for a fresh assessment of the necessary remedies.

This judgment eliminates any doubt as to the possibility for the Authority to re-assess the impact of a concentration following a judgment annulling a previous decision clearing the same. Law No. 287/1990 establishes mandatory time limits for the review of a proposed concentration and, absent a provision similar to Article 10(5) of the EC Merger Regulation,[16] one could have argued that the Authority's power with respect to the particular case would have already expired by the time such a judgment is rendered.

6. Enforcement by private parties

In *Unipol* v. *Ricciarelli*, the Supreme Court (sitting in *en banc*, in light of the importance of the case) stated the consumers have standing to seek an award for damages as a result of anticompetitive practices infringing Article 2 of Law No. 287/1990 on the ground that such a law protects the interests of all market players.[17] This judgment reverses the Supreme Court's previous case law which narrowly interpreted Article 33(2) of Law No. 287/1990, holding that Italian antitrust rules are intended to protect only undertakings, not consumers who in turn may sue antitrust infringers for damages merely on the basis of ordinary civil liability rules and procedures.[18]

In particular, in *Unipol* v. *Ricciarelli*, an insurance policyholder claimed the refund of a portion of an insurance premium, arguing that the insurance company raised the premium as a result of a restrictive agreement among insurance companies that had been adjudicated upon by the Authorities. The policyholder successfully sued his insurance company before a lower court under the ordinary civil procedural rules. The insurance company appealed the decision directly before the Supreme Court, arguing that the lower courts lacked jurisdiction. The Supreme Court held that the objective of Italian antitrust rules is that of ensuring, in common and public interest, that competition in the national market is not restricted. Anyone, including consumers, alleging prejudice resulting from reduced competition should thus be entitled to claim damages from undertakings that have breached Law No. 287/1990. That being said, the Supreme Court clarified that, pursuant to Article 33(2) of Law No. 287/1990, courts of appeals have exclusive

16 Pursuant to which "*where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision which is subject to a time limit* [. . .], *the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to art. 6(1)*".

17 *Unipol* v. *Ricciarelli*, 4 February 2005, No 2207.

18 *Axa Assicurazioni* v. *ISVAP*, 9 December 2002, n. 17475.

jurisdiction with reference to damage lawsuits brought under Italian antitrust rules. Therefore, it concluded that the policyholder had wrongly sued his insurance company before a lower court, as only the competent court of appeals had jurisdiction on the case.

7. Mergers in specific sectors

7.1. Banking

As explained under paragraph 1. above, the Bank of Italy is no longer entrusted with the application of antitrust rules with respect to banks and other financial institutions. Therefore, all merger cases concerning banks fall now within the exclusive and general jurisdiction of the Authority.

As the Bank of Italy retains jurisdiction over the assessment whether mergers in the banking sector comply with national prudential rules, the newly-adopted Article 20(13) provides that the Authority and the Bank of Italy must include their respective assessment and resolutions (*i.e.*, on competition law for the Authority and prudential rules for the Bank of Italy) in a single decision. This joint decision must be issued within 60 days of notification.

7.2. General economic interest services and legal monopolies

On 20 September 2005, the TAR Lazio ruled on the new provisions set forth in Article 8 of Law No. 287/1990, as amended by Article 11 of Law No. 57/2001, aimed at preventing the unlawful exploitation of the advantages enjoyed by companies in regulated markets that seek to strengthen their position in neighboring markets.[19] The TAR Lazio annulled the Authority's decision of 12 February, 2004,[20] which imposed a €25,000 fine on Italgas, the sole provider of natural gas distribution services in several local central Italian markets. In particular, the Authority found that Italgas infringed Article 8(2)-*bis* by *directly* operating in the (non-reserved) market for the evaluation of the combustion efficiency of heating appliances in two Italian provinces. In the Authority's view, infringement of Article 8.2-*bis* automatically resulted in the infringement of Article 8(2)-*ter*.[21] The TAR Lazio annulled the Authority's decision on procedural grounds. In particular, the TAR Lazio held that the Authority was wrong in basing its investigation on the procedural framework established by Law No. 689/1981, concerning administrative sanctions for decriminalised conduct, rather than the general procedural rules for the application of Law No. 287/1990, which are more protective of defence rights (in particular, under Law No. 689/1981, the Authority is not required to issue a statement of objections nor are parties entitled to a final hearing). The TAR Lazio's conclusion was substantially based on the following grounds: (a) Article 8(2)-*quinquies* explicitly refers to the Authority's general investigative powers as well as to the procedural framework for their exercise set forth in Law No. 287/1990; (b) the Authority's finding that Italgas infringed the reporting obligation was the result of a complex assessment concerning the distinction between its reserved and non-reserved activities. As the nature of such assessment was analogous to those the Authority makes when applying Articles 2 and 3 of Law No. 287/1990, the same procedural safeguards should have been guaranteed.

19 *Italgas* v. *Autorità Garante della Concorrenza e del Mercato*, 20 September 2005, n. 7325.

20 Case SP1 – *Italgas*, 12 February 2004, Bulletin n. 7/2004.

21 Pursuant to this provision, the formation of a separate entity as well as the acquisition of control of an entity active in a different market must be communicated in advance to the Authority.

Japan

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See Merger Control Worldwide Vol. 1, Chapter 31, pp. 712–733

The amendment to the Antimonopoly Law of Japan, which has a material impact on enforcement practices under the Antimonopoly Law by the sole competition enforcement agency, the Fair Trade Commission of Japan (the "JFTC"), has become effective as of 4 January 2006 (the "2006 Amendment"). However, that Amendment has not introduced a legislative change in relation to merger controls. Rather, the changes concerning merger control were made through an amendment to the former merger guidelines published by the JFTC and the prior consultation system in which companies involved in a concentration may obtain a clearance by the JFTC in advance.[1]

While the JFTCs is considering amending the Antimonopoly Law with regard to the filing requirements for the specific concentrations in the near future, no detailed information on such thinking is available to date; nor has the JFTC taken any concrete steps in this regard.

This supplement aims to provide *Merger Control Worldwide* readers with an overview of the merger guidelines and the prior consultation system as recently amended by the JFTC.

1. Regulation under the Antimonopoly Law and prior consultation

Concentrations which may substantially restrain competition in a particular field of trade (i.e., the relevant market) or which involve unfair trade practice will be prohibited under the Antimonopoly Law. Companies, whether domestic or foreign,[2] involved in such concentrations are subject to the merger regulation mechanism of the Antimonopoly Law.

Where a concentration violates the substantive merger control rules, the JFTC is authorised to issue a cease and desist order to take certain measures necessary for eliminating any actual or possible adverse effect, including issuing, for example, a divestiture order, an order to split a company into two or more entities or to transfer shares in the acquired company. There are no recent cases, however, in which sanctions were actually imposed. The normal practice that many companies have come to follow is to conduct prior consultation with the JFTC in order to seek clearance where competition concerns – under the Antimonopoly Law – are thought to be present.

1 Note that no amendment has been made with regard to the filing requirements under the Antimonopoly Law.
2 In the case of foreign companies, this would be the case provided that the merger occurring outside Japan would produce anticompetitive effects in Japan.

2. Merger Guidelines

2.1. Major guidelines published by the JFTC with regard to the concentration

The major JFTC guidelines for the specific concentration of economic power, such as mergers and acquisitions of businesses, as opposed to the regulations on the general concentration such as those under Articles 9 (prohibition of incorporation of a company which may cause excessive concentration of economic power) and 11 (restriction on the stockholding by a bank or insurance company), are the *Guidelines concerning Review of Business Combination* (the "Merger Guidelines") issued on 31 May 2004.[3] The JFTC assesses the concentration under the Merger Guidelines as part of its merger review process.

The Merger Guidelines were amended most recently on 28 March 2007. This particular amendment reflects recent developments in the field and has introduced a more detailed approach than that existing prior to the amendment.[4]

2.2. Overview of the amended Merger Guidelines

The Merger Guidelines primarily cover: (a) the scope of mergers subject to the review of the JFTC and those not subject to the review of the JFTC; (b) the approach to the definition of the relevant market; (c) the assessment of the impact on the competition in the relevant market; and (d) remedies.

2.3. Scope of the concentration to be reviewed under the Antimonopoly Law and the Merger Guidelines

The Merger Guidelines provide for more detailed thresholds for each type of concentration (i.e., an acquisition of voting rights, a merger, an acquisition of the entire/an important portion of business, an acquisition of fixed assets for business, a company-split involving an integration of business, and an interlocking directorate) as provided under the Antimonopoly Law, and which require an assessment under the Antimonopoly Law.

Although the Antimonopoly Law prohibits an acquisition of an important portion or fixed assets of a business which may substantially restrain competition in a particular field of trade (i.e., the relevant market), no definition of "an important portion" of a business is provided under the Antimonopoly Law. The Merger Guidelines provide – concerning the question of what is deemed "important" – that instances where the annual turnover of the acquired or transferred portion is 5% or less of the total turnover of the transferor and the amount thereof is 100 million yen or less, such acquired portion is not, in principle, considered to be an important portion. Further, the Merger Guidelines provide that a merger between a parent company and a subsidiary or between the affiliates which are controlled by a common parent is exempted from review by the JFTC.

3 The JFTC also published the *Guidelines for Merger Investigation concerning Cases on Corporate and Industrial Revitalisation* on 9 April 2003 (the "Special M&A Guidelines"), which were also amended on 28 March 2007. The Special M&A Guidelines provide guidance under the Antimonopoly Law for cases to which the Corporate and Industrial Revitalisation Special Measures Act (*Sangyo katsuryoku saisei tokubetsu sochi-ho*) applies.

4 See www.jftc.go.jp/e-page/pressreleases/2007/March/RevisedMergerGuidelines.pdf.

2.4. Definition of the relevant market

The amended Merger Guidelines follow an approach for the definition and analysis of the relevant market (both relevant product market and geographic market) similar (but not identical) to that seen in the published guidance and practice of other jurisdictions. This can be seen for example in relation to the SNIPP Test. The amended Merger Guidelines provide that the relevant market is defined basically in terms of the "substitutability" and whether substitutability – in the product or geographic location sense – will occur if a "small but significant and non-transitory" increase in price is introduced by a "monopolist" for the purpose of maximizing the latter's profit. Such increase in price is generally in the region of 5%–10% provided that it lasts for about a year, according to the Merger Guidelines.

2.5. Approach for the assessment

2.5.1. Horizontal mergers

(1) The amended Merger Guidelines provide the following safe harbour with regard to the assessment of the impact on competition in the relevant market resulting or expected from horizontal concentrations:
   (i) post-merger situation, the Herfindahl–Hirschmann Index ("HHI") is 1,500 or less; or
   (ii) post-merger situation, the HHI is between 1,500 and 2,500, and the increase in the rate of concentration following the merger is 250 or less; or
   (iii) post-merger situation, the HHI is more than 2,500, and the increase in the rate of concentration following the merger is 150 or less.

   Moreover, the Merger Guidelines provide that the JFTC would view the concentration to be unlikely to restrict the competition in the relevant market if in the post-merger situation the HHI is 2,500 or less and the combined market share of the merged entity is 35% or less based on the precedents reviewed by the JFTC.

(2) The JFTC will review a concentration which does not fall under the safe harbour set out above from the perspective of "possible unilateral activities", taking account of factors such as the status of the companies involved and competitors (i.e., market shares, ranking, and the differences in the market shares between the merging parties and their competitors before and after the merger), the existing competition between the parties, competitive pressures from competitors, any excess in capacity for supply and substitutability, and the degree of product differentiation.

   Other factors such as pressure from imports, possible entry into the market, competitive pressures from closely related markets (such as competitive products and a nearby geographic market), the total capability of business (such as market power in the procurement of materials, financial status and advertisement), and financial difficulties (such as a failing company) are also taken into account.

(3) The Merger Guidelines provide that the JFTC will also examine the proposed concentration in terms of coordinated effects having regard to various factors, namely the number of market participants, existing competition between the party companies, any excess in supply capacity, the terms and conditions of the transactions and/or business practice in the market, competitive pressures from imports, potential entrants and (vertically) related markets.

2.5.2. Vertical and conglomerate mergers

The Merger Guidelines set out a safe harbour for both vertical and conglomerate concentration as follows:

(i) where the combined market share of the parties in any of the relevant markets is 10% or less; or
(ii) where the combined market share of the parties in any of the relevant markets is 25% or less and the HHI is 2,500 or less.

Moreover, the Merger Guidelines provide that the JFTC would view a concentration as not likely to restrict competition in the relevant market if post merger the HHI is 2,500 or less and the combined market share is 35% or less based on the precedents reviewed by the JFTC.

3. Prior consultation system

3.1. Overview

Merging companies may conduct a prior consultation with the JFTC as to whether the proposed concentration would raise any competition concerns and therefore would be prohibited under the Antimonopoly Law. The JFTC published its policy regarding the prior consultation system for specific concentrations on 11 December 2002; it amended this on 28 March 2007.[5]

It must be noted that although the concentration can be consummated if a party files the merger notification and the waiting period expires without further investigation being initiated by the JFTC, the filing with regard to stock acquisition (i.e., acquisition of voting rights) is subject to a post-facto report rather than prior filing. Therefore, a merging party which foresees any competition concerns with regard to a stock acquisition would be required, as a matter of practice, to consider whether it should conduct the prior consultation.

3.2. Initial review – Review through written documents filed by the merging parties

The JFTC informs merging parties that have requested a prior consultation, in writing, within 30 days in principle, after all of the necessary materials including additional information and materials submitted in response to the JFTC's request are provided to the JFTC by the parties, that: (a) their transaction is not "problematic" under the Antimonopoly Law or (b) a second review (a further detailed review) by the JFTC is required.

3.3. Second review – Detailed review through the investigation by the JFTC

If the JFTC decides that a more detailed review is necessary, the proposed transaction must, in principle, be made public. If the merging parties are not in favour of, and would object to, the public announcement for the second review, the concentration in question may not be subject to the prior consultation by the JFTC.

Any person may submit their opinion to the JFTC in respect of any specific concentration that requires detailed review by the JFTC.

5 See www.jftc.go.jp/e-page/pressreleases/2007/March/MApriorconsultation.pdf.

The JFTC will inform the merging parties of the results of the second review within 90 days, in principle, and also make a public announcement of the same.

4. Amendment to the filing requirement for stock acquisitions

A bill of amendment to the Antimonopoly Law is currently under review by the JFTC in accordance with the decision by the National Diet made at the time of the 2006 Amendment.

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1. Relevant legislation and statutory standards

The primary competition legislation in Korea is the Monopoly Regulation and Fair Trade Law ("FTL"), which was enacted in April 1980. The FTL contains various sections which regulate particular aspects of competitive behavior of companies. As major examples, the FTL regulates and covers, among others, the following areas of activity:

(i) Monopolies, monopolisation and abuse of monopolistic power in general;
(ii) Unfair collaborative activity;
(iii) Business combination, including mergers and acquisitions; and
(iv) Unfair trade practices.

2. Decision-making bodies and enforcement authority(ies)

The main competition authority in Korea is the Korea Fair Trade Commission ("KFTC"), which is authorised under the FTL to oversee the enforcement of that legislation. Among other things, the KFTC is involved in formulating and administering competition policy in Korea. It also deliberates, decides and handles competition cases through its decision-making process.[1]

The KFTC consists of a committee (the "Committee"), which is a decision-making body, and a secretariat (the "Secretariat"), which is an administering body. There are currently nine commissioners in the Committee, five of whom are government officials (including the Chairman, the Vice-Chairman of the KFTC and three standing commissioners) and four of whom are non-standing. The Secretariat performs activities such as investigating competition issues and enforcing decisions made by the Committee.

When a competition issue potentially violating the FTL is brought to the KFTC's attention either by complaints filed by a competitor, customer, consumers or any other person, or at its own initiative, officials of the KFTC, who are mainly responsible for fact-finding, perform their investigation and submit a report of their findings to the Committee. The General Council's Office of the KFTC also presents its independent assessment of the case in question to the Committee.

After reviewing the investigation report submitted and the assessment of the General Council's Office, deliberating relevant issues and, if it is deemed necessary, holding hearings where the entity subject to the investigation can present its case, the commissioners make a final decision by majority votes.

1 See further below.

3. Notification requirements and procedures

3.1. Types of business combination subject to filing

Filing of a business combination report to the KFTC under the FTL is required when a company or its Specially Related Person[2] engages in the following business combinations:

(1) Acquisition of business or assets: (i) either acquisition or lease of all or an important portion of the business of another company, or (ii) acquisition of all or important portion of fixed assets for the business;
(2) Acquisition of shares: (i) purchase of 20% (15% if a listed company) or more of the voting shares of an existing company (either existing shares or newly issued shares), (ii) acquisition of 20% or more of the shares in a newly incorporated company, except for the incorporation of a wholly owned subsidiary, or (iii) additional acquisition of such number of shares that results in the acquirer becoming the largest shareholder of another company (except for cases where the acquirer is already the largest shareholder at the time of the additional acquisition);
(3) Merger with another company; and
(4) Interlocking directorate of a large-scale corporation.[3]

Each of the above business combinations is discussed below.

3.1.1. Acquisition of business or assets

According to the Mergers & Acquisition Notification Guidelines published by the KFTC (the "Notification Guidelines"), the term "business" in this context means combined property rights of the company formed as an organic entity for the purpose of engaging in business activities. It also includes intangible property rights, such as sales rights, patent rights, trademarks and rights associated with licences and authorisations with property value.

In addition, a "major portion of the business" is deemed to be acquired if the purchase price is 10% or more of the transferor company's total assets as stated in the financial statement of the most recent fiscal year, or 5 billion Korean Won or more.

3.1.2. Acquisition of shares

The concept of "acquisition" in this context means the change of its shareholding from less than 20% (15% in the case of a listed company) to 20% or more. In other words, the filing obligation is triggered at the point where the shareholding reaches 20% (or 15% in the case of a listed company). According to the Notification Guidelines, the "acquisition" for this purpose also includes an increase in the shareholding ratio due to forfeited shares generated by paid-in capital increase, due to a donation of shares without compensation or for any other reasons.[4]

In addition, when calculating the shareholding ratio, the shares that may be held or acquired by a Specially Related Person is required to be included.

2 See 3.2 below.
3 The large-scale corporation for the purpose of the FTL means a company whose revenue or assets (including those of its affiliates) exceed 2 trillion Korean Won.
4 Notification Guidelines, III.1.B.

3.1.3. Merger

The Notification Guidelines requires that in the case of a merger, the companies concerned jointly submit a notification form.

3.1.4. Interlocking directorate

The filing obligation under this category is triggered when an “officer” or “employee” of a company concurrently holds the position of “officer” of another company. The term “officer” for this purpose means a person who is in charge of overall operation of the head office or a branch, such as directors, representative director, executive officers with unlimited liability, auditors or any person in an equivalent position.[5] The term “employee” for this purpose means a person other than an officer who continuously engages in the company’s business.[6]

It is worth noting that since the recent amendment of the FTL in April 2005, an interlocking directorate between affiliated companies has been exempted from the business combination report-filing obligation.

3.2. “**Specially Related Person**”

For the purpose of determining the applicability of the filing requirement, the term “Specially Related Person” is defined as follows:

3.2.1. Determination of “Specially Related Person”

Under the Enforcement Decree of the FTL (the “Decree”), a “Specially Related Person” means a person other than a corporation who:

(1) in fact controls the company concerned;
(2) is a *Related Person*;[7] and
(3) engages in the business combination with the joint purpose of controlling management.

3.2.2. Determination of “Related Person”

The Decree defines “Related Persons” as:

(1) A spouse, a blood relative within at least eight degrees of kinship, a relative by marriage who is at least a cousin in relationship (hereinafter referred to as “Relatives”);
(2) A non-profit juridical person or an organisation (which means unincorporated association or foundation; hereinafter the same) in which the person, by himself or with any Related Person, becomes the largest shareholder of a company of which either the person or the Related Person is the founder;
(3) A non-profit juridical person or an organization in which the person, directly or through the Related Person, exercises market-dominating influence on the composition of officers or the operation of business, etc;
(4) A corporation whose operation is in control of the person *per se* (when applying the concept of “control” in 3.2.3. below); or

5 Article 2, Item 5 of the FTL.
6 Article 7, Paragraph 1, Item 2 of the FTL.
7 Out of “Related Persons”, any person who has been disaffiliated from a business group pursuant to another section of the FTL is excluded.

(5) The officers of the "controlling" (as further discussed in 3.2.3 below) persons (in case the controlling person is a juridical person) and the employees of the controlling person (in case the controlling person is an individual), as well as the officers or the employees, as the case may be, of a Related Person as defined in Item (2) through Item (4).

3.2.3. Determination of "control"

Under the FTL and the Decree, there are two possible ways to determine "control": (i) an equity ratio test or (ii) a management control test.

First, under the equity ratio test, "control" is when an entity (i) owns at least a thirty percent interest and (ii) is the largest shareholder of another company.

Secondly, under the management control test, a company is found to be under the control of another, if the latter exercises considerable influence over the management of such company. Such influence can be indicated by the following:

(1) The shareholder, by agreement with the other major shareholders, has the power to appoint and remove the representative director, or has appointed or has the power to appoint at least 50% of the directors or officers.
(2) The shareholder, directly or indirectly, exercises controlling influence over major decisions of the company including but not limited to organisational restructuring and initiation of a new business.
(3) The company has "exchange of personnel" between itself and its affiliate controlled by the shareholder as follows:
    (i) The company and the affiliate have interlocking directors and officers.
    (ii) Officers or employees of the affiliate are dispatched to the company and are later reinstated after a period to the affiliate.
    (iii) Officers or employees of the company are dispatched to the affiliate and are later reinstated after a period to the company.
(4) The company undertakes transactions of funds, assets, goods, or services, etc., or takes or provides debt guarantees with the shareholder or affiliates of the shareholder, exceeding the normal scope of such transactions; or the company may be deemed to be considered economically to be the same entity as the shareholder by virtue of general common knowledge or by indicative activities by the company.

3.3. Simplified notification

When a transaction falls into one of the categories requiring filing of a business combination report, if it further satisfies the following conditions, filing a simplified form of business combination report is allowed:[8]

(1) When the two companies involved in a business combination are Specially Related Persons of each other (excluding the parties to the business combination who participate with the common goal of gaining managerial control);
(2) When a company that is not a large-scale company engages in a business combination with another company whose total amount of assets and sales are 10 billion Korean Won or less (excluding participation in the establishment of a new enterprise); or

8 Notification Guidelines, II.1.

(3) When a company engages in interlocking directorate with less than 1/3 of the total number of officers in the other party of the business combination (excluding interlocking directorate of the representative director).

It should be noted that the Notification Guidelines allows the online filing of a simplified form of business combination report.

3.4. Companies subject to filing requirements

Only those companies whose total assets or total sales of not less than 100 billion Korean Won on a global basis are subject to such filing requirement.[9] If the filing obligation is triggered, the acquirer is responsible for filing a business combination report to the KFTC.

3.5. Timing of filing

The filing of a business combination report shall be made, in principle, within 30 days after the closing of the transactions, i.e., the acquisition of shares, assets or a business or the incorporation of a new company, as the case may be. However, in scenarios described in 3.1(1), (2)(i) (only when it is a large-scaled corporation's acquisition of existing shares in private transactions), (2)(ii) and (3) above, if the total consolidated assets or total annual consolidated sales of the business group to which either the transferor or the transferee belongs to are 2 trillion Korean Won or more, the business combination report will need to be filed within 30 days of execution of the underlying contracts and KFTC clearance obtained prior to the closing of the acquisition or the establishment, as the case may be. Even in the case of a post-closing filing obligation, making a voluntary filing for pre-clearance is allowed.

In the case of a pre-closing obligation, closing of the business combination, which can be acquisition of shares, registration of a merger, performance of a business or asset transfer agreement, may not occur until the KFTC approves the transaction. For this purpose, according to the Notification Guidelines, the "acquisition of shares" refers to the payment of the price of the shares and the "performance of a business or asset transfer agreement" refers to (i) delivery or distribution in the case of movable assets, (ii) registration in the public registry in the case of real property and (iii) registration in the case of properties like trademarks. In addition, if there is any major change to the filing in the case of a pre-closing filing, even if the KFTC's clearance has been issued, the filer has the obligation to report such changes to the KFTC.[10]

3.6. Review by the KFTC

The KFTC will review the cases as filed and may issue an order to enjoin the transaction or an order to divest if it finds that the business combination has an effect of substantially restraining competition in a specific field. For this purpose, the KFTC will first define the relevant markets, namely the relevant product and geographic market, and then review, among others, the market shares of the parties and other competitors, the historical trend of the market shares, the possibility of new market entry including foreign importations,

9 For this purpose, total aggregate amount of assets or sales of all the companies belonging to a group will be counted. Thus, even if a company which is engaged in a business combination has smaller assets or sales than 100 million Korean Won, if the total assets or sales of the parents, subsidiaries and affiliates (as defined in the FTL) are not less than the said amount, the business combination will need to be filed.

10 Article 18, Paragraph 6 of the Decree.

the possibility of collusion among the remaining competitors after the combination. The KFTC also reviews whether the business combination can be justified by "efficiency" or the "failing company doctrine." The substantive standards of the KFTC's review are discussed in more detail in section 4 below.

The statutory review period of the business combination report is 30 days from the filing, but the KFTC at its own discretion, may extend the period for additional 90 days, thus making the total possible review period up to 120 days.

3.7. Extraterritorial application of filing requirements

Since 1 July 2003, the KFTC has exercised its extraterritorial jurisdiction and required a business combination filing for mergers and acquisitions taking place outside Korea if certain conditions are met. In more detail, the acquisition of an offshore company by another offshore company will be subject to the business combination filing requirement, if the acquisition satisfies the following conditions:

(1) One party's total assets or sales are 100 billion Korean Won or more (on a worldwide basis); and
(2) The sales of the acquirer and the acquired in Korea, respectively,[11] are in each case 3 billion Korean Won or more.

According to the Notification Guidelines, in determining the Korean sales for the purpose of (2) above, such sales of the companies remaining as affiliates before and after the completion of the business combination should be included in principle. For this purpose, in the case of acquisition of business or assets, the KFTC regards that the affiliate relationship between the target entity (i.e., the entity transferring such business or assets) and its affiliates no longer exist with respect to the transferred business or assets. Accordingly, in the case of acquisition of business or assets, the Korean sales of affiliates should not be included in calculating the Korean sales of the target entity.

In addition, the Notification Guidelines further provide that in the case of a business combination report filed in connection with an overseas M&A, the concept "affiliate" means, in the case there is no other document, any company required to draw consolidated financial statements.

For the purpose of converting figures in other currencies into Korean Won, when calculating total assets, the Notification Guidelines require the exchange rate as of the closing date of the immediately preceding business year to be used. For the purpose of determining the amount of sales, however, the applicable exchange rate is the average exchange rate of the immediately preceding business year.

3.8. Penalties for failure to file

Failure to comply with the filing obligation is subject to an administrative fine up to 100 million Korean Won.

Details of the penalties as set forth in the Notification Guidelines are as follows:

In case of violation of post-closing filing obligation, if the delay is less than 15 days, the amount of fine for a one-time violation is 1 million Korean Won, two-times, 20 million Korean

11 As determined by total affiliated companies' sales in Korea, not necessarily limited to the company at issue; the same rule applies to the sales revenue requirement.

Won, and three-times, 50 million Korean Won. If the delay is longer than 15 days, the above amounts increase to 3 million Korean Won, 25 million Korea Won and 55 million Korean Won, respectively. In addition, if the violation is directly detected by the KFTC, the fine amount may be increased by 50%.

In case of violation of pre-closing filing obligation, if the report is filed after the due date (30 days after agreement) but before closing, the amount of fine for one-time violation is 7.5 million Korean Won, two-times, 30 million Korean Won, and three-times, 60 million Korean Won. If the report is filed after closing or the reporting company proceeds to closing without getting approval for the reported combination, the amount of fine for one-time violation is 15 million Korean Won, two-times, 40 million Korean Won, and three-times, 70 million Korean Won.

4. Substantive assessment and test

Article 7 of the FTL prohibits any person from engaging in a business combination that "substantially restrains competition" in a "given area of trade". Accordingly, when the KFTC reviews a particular transaction, these are the two major issues that it will look into.

4.1. "**Substantial restraint on competition**"

According to the M&A Review Guidelines (the "Review Guidelines"), a guidance published by the KFTC, "substantially restrains competition" means reducing competition in a given area of trade so that a certain company or a certain business group freely influences or is expected to freely influence major terms of trade in the market, such as the price, output and quality of a product.[12]

4.2. "**Given area of trade**"

The term "given area of trade" is interpreted under the Review Guidelines as the area where a competing relationship may be created.[13] Factors that are considered for the purpose of defining a "given area of trade" include the object of transaction, transaction territory, stage of transaction and party to transaction, which are discussed further below:

4.2.1. Object of transaction

From a product market perspective, a "given area of trade" refers to the aggregate of products to which major buyers of a specific product can switch, in response to a significant and non-transitory increase in the price of such product in transaction.[14]

Further, in determining whether specific products belong to the same area of trade, the following factors will be considered: (i) similarities in the function and the usage of products, (ii) similarities in the price of products, (iii) buyer's perception of products' substitutability and their related purchase pattern, (iv) sellers' perception of products' substitutability and their related pattern of business decision-making, and (v) Korea Standard Industry Classification notified by the National Statistical Office.[15]

12 Review Guidelines, II.6.
13 Review Guidelines, VI.1.A.
14 Review Guidelines, VI.1.A.
15 Review Guidelines, VI.1.B.

4.2.2. Transaction territory

From a geographic market perspective, a "given area of trade" refers to the entire geographic area to which major consumers in a certain area can practically switch for alternative sources or a specific product when there is a significant and non-transitory increase in the price of the product in the specific area.[16]

The following factors will be considered when determining whether a given geographic area falls under the same area of trade: (i) characteristics of the product (the product is perishable, breakable, etc.), (ii) buyers' perception of the possibility to shift to other geographic areas for sources of the product and pattern of their related behavior in shifting purchasing areas, (iii) sellers' perception of the possibility of their buyers' shifting to other geographic areas for sources of the product and their related managerial decision-making patterns, and (iv) difficulty of shifting purchase areas from the time, economic and legal perspectives.[17]

4.2.3. Stages of transaction

A "given area of trade" may be defined depending on whether the transaction involves manufacturing, wholesale or resale.[18]

4.2.4. Parties to transaction

If a particular buyer group exists according to products, geographic areas or stages of transaction, due to the characteristics of product buyers or the uniqueness of the product, a "given area of trade" may be defined according to the buyer groups.[19]

4.3. Statutory presumption of anti-competitiveness

4.3.1. Creation of presumption

One of the most significant elements of the criteria considered by the KFTC in its review of anti-competitiveness is the market share element. In this regard, Article 7(4) of the FTL provides that where all of the following conditions are met, a legal presumption of anti-competitiveness is created:

(1) The combined market share of the acquirer and the target company falls under the presumption of a "market dominant company", which is satisfied where a company holds 50% or more of market share or the top three (3) companies hold 75% or more of market share;
(2) The combined market share is the largest in the market; and
(3) The difference between the combined market share of the parties and the market share of the second largest market shareholder is 25% or more of the combined market shares of the parties.

In addition, the legal presumption of anti-competitiveness is triggered when a large-scale company engages in a business combination under the following circumstances arise:

(1) The business combination takes place in the market in which small to medium businesses have 2/3 or more market share; and

16 Review Guidelines, VI.2.
17 A. Review Guidelines, VI.2.B.
18 Review Guidelines, VI.3.
19 Review Guidelines, VI.4.

(2) The large-scale company has 5/100 or more market share in the market as a result of the business combination.

Once a presumption of anti-competitiveness is created, the burden will be on the parties to the transaction to prove that the particular acquisition will not, in fact, have anti-competitive effects on the relevant market.

4.3.2. Exceptions to presumption

The statutory presumption of anti-competitiveness does not apply where (i) the KFTC deems that the increase in efficiency that is expected to be realised through the business combination is greater than the damages that the anti-competitiveness may cause and (ii) the company involved in the business combination is likely to close its business without the business combination, which we further discuss below.

(1) Effect of enhancing efficiency For the purpose of the first exception to the statutory presumption of anti-competitiveness, the "effect of enhancing efficiency" refers to the enhanced efficiency in the areas of production, sales and R&D or on the national economy as a whole, which is clearly expected to take place in the near future.

Factors considered in assessing the effect of enhancing efficiency in the areas of production, sales and R&D are whether, as a result of the combination:[20]

(i) the production cost can be cut through the economies of scale, integration of production facilities, rationalisation of production process;
(ii) the sales cost can be reduced or sales or exports can be increased by integration or sharing sales network;
(iii) sales or exports can be increased by sharing market information;
(iv) logistics cost can be saved by sharing transportation and storage facilities;
(v) production-related technology and research abilities can be improved by complementing each other's technology, or sharing or effectively utilising a skilled workforce, organisation and capital; and
(vi) other expenses can be significantly reduced.

In addition, factors relevant to the assessment of the effect of enhancing efficiency on the national economy as a whole are whether the combination makes a significant contribution to the following areas: (i) job creation; (ii) development of regional economies; (iii) development of related markets; (iv) stabilisation of the national economy by means of a stable supply of energy, etc.; or (v) improvement of environmental pollution.[21]

(2) Criteria for determining non-viable company In order to rely on the second exception to the statutory presumption, the company involved in the business combination first should be deemed "non-viable". For this purpose, the KFTC would consider the following factors:[22]

(i) Whether the company's total shareholder's equity in its balance sheet is less than the paid-in capital for a considerable period of time;

20 Review Guidelines, VIII.1.A (1).
21 Review Guidelines, VIII.1.A (2).
22 Review Guidelines, VIII.2.A.

(ii) Whether the company's operating income is less than interest expense for a considerable time and the company is recording ordinary loss during that period of time;
(iii) Whether the company filed for bankruptcy or the commencement of composition prescribed under the applicable laws;
(iv) Whether the company filed for commencement of liquidation procedure under the applicable law; and
(v) Whether the company is under the management of its creditor financial institution.

When a company is deemed non-viable, the KFTC would apply this exception to the presumption if: (i) it is difficult to use the company's production facilities, etc. on a continuous basis in the market concerned by no other means than the proposed business combination; and (ii) it is difficult to come by a business combination that is less likely to restrain competition than the proposed business combination.[23]

4.4. Review under the KFTC Guidelines

The Review Guidelines further sets forth detailed criteria for the KFTC's review of anti-competitiveness in various types of business combinations.

4.4.1. Horizontal combinations

A horizontal combination for the KFTC's review purpose refers to a business combination between companies competing in the same market. When the KFTC makes an assessment whether a particular horizontal combination substantially restrains competition, it will comprehensively consider a number of factors such as market concentration (before and after the combination), the degree of foreign competition introduced and international competition situation, possibility of entry, possibility of collusion between competing businesses and existence of similar goods and adjacent markets.

Each of these factors is discussed below.

(1) Market Concentration: Presumption under the Review Guidelines Under the Review Guidelines, even if the business combination does not meet the foregoing conditions to the creation of a presumption of anti-competitiveness, the KFTC will examine the transaction on a product-by-product basis for each relevant market. Among other factors, the KFTC will examine whether (i) the relevant market is already highly concentrated, and (ii) the acquisition will further concentrate the relevant market. In this regard, some of the factors considered by the KFTC include:

(i) Whether the combined market share after consummation of the acquisition is 50% or more; and
(ii) Whether the combined market share makes the parties one of the top three players in the relevant market, where such top three players also have a combined market share of 70% or more.

23 Review Guidelines, VIII.2.B.

Please note that in applying this standard, the Review Guidelines provide that the following cases will not be considered substantially restricting competition in the market:

(i) The combined market share of the acquirer and others and the target ranks second with less than 30% and there is a significant gap with the first;
(ii) The combined market share of the acquirer and others and the target ranks third and there is a significant gap between the first and the second or the second and the third; or
(iii) There is a fourth company in the market and there is no significant gap between the market shares of the first and the second, the second and the third, and the third and the fourth.[24]

For this purpose, a "significant gap" means that the combined market share of the acquirer and others and the target is less than 75% of the market shares of the immediately preceding market player.[25]

In addition, even though anti-competitiveness is presumed under the Review Guidelines, where the increase in market share is minimal, which is currently defined as less than 5%, the KFTC will not consider such transaction as substantially restraining competition. Also, if a bulk purchaser exists in the given area of trade, the KFTC may find a transaction not substantially restraining competition despite the presumption under the Review Guidelines.[26]

(2) Level of foreign competition in the market If a business combination occurs in a market where import is relatively easy or imported products take up an increasingly greater percentage, the KFTC would consider that the possibility of substantially restraining competition is less likely in such a market. For this purpose, the KFTC considers the following factors: (i) international price and the status of supply and demand of the product; (ii) the extent of domestic market opening and the current status of foreign investment; (iii) the existence of formidable international competitors; (iv) customs tariffs and plans to lower customs tariffs; and (v) other non-tariff barriers.[27]

(3) Likelihood of new entries Under this test, the basic premise is that if new entry to the relevant market is relatively easy, the number of competitors reduced by the business combination in question would increase in a relatively short time, therefore making the combination less likely to substantially restrain competition. The following factors will be further considered by the KFTC in this regard: (i) presence/absence of legal or institutional barriers to entry; (ii) the size of minimum required capital; (iii) production technology requirements including patents and other intellectual property rights; (iv) conditions of location; (v) conditions of purchase of raw material; (vi) the distribution network of competitors and the cost of establishing a sales network; and (vii) the level of product differentiation.[28]

Further, the KFTC will consider new entries to any given market easy if there is a company which falls under one of the following categories:

(i) A company which has publicly announced its intent, plans to invest and participate in the market; or

24 Review Guidelines, VII.1.A (1)(a).
25 Review Guidelines, VII.1.A.(1)(b).
26 Review Guidelines, VII.1.A.(1)(c).
27 Review Guidelines, VII.1.B(1).
28 Review Guidelines, VII.1.C(1).

(ii) A company which is deemed likely to participate in the market in the near future without a significant burden of cost of entry or exit in response to a meaningful and non-transitory increase in price in the market.[29]

(4) Possibility of collusion by competitors The basic assumption under this test is that a business combination is likely to substantially restrain competition if the combination increases the chance of collusion by the market players by reducing the number of competitors. In order to assess whether collusion by competitors becomes easier, the following factors will be considered: (i) whether the price of the relevant products has been markedly higher than the average market price of similar products not included in the relevant market; (ii) whether the competitors have maintained a stable market share for the past several years where the demand for the products in the relevant market is inelastic; (iii) whether there is high homogeneity among competing products and whether the terms of production and sale are similar among competitors; (iv) whether the information on the business activities of competitors is easily accessible; and (v) whether there have been cases of undue concerted acts in the past.[30]

(5) Existence of similar goods and adjacent markets Under this test, if similar goods and adjacent markets are available, it will be deemed that the business combination concerned is less likely to substantially restrain competition in the market. Factors to consider for this purpose include: (i) when a product is deemed similar to the product concerned in terms of function and use, but belongs to a different product market due to difference in price or other factors, the similar product's effect on the market and the similarity of sales channels will be considered; and (ii) when markets are separated according to their geographic locations, the effects of surrounding geographic markets, such as the size of participants in the markets, the geographical proximity among the markets and means of transportation and the possibility of development of transportation technology, will be considered.[31]

4.4.2. Vertical combinations

A "vertical combination" refers to a business combination between interrelated corporate entities in the process of production and distribution from the production of raw materials to the production and sales of goods. In order to determine whether a particular vertical combination substantially restrains competition, the following factors will be considered:

(1) Market blocking effect Under this test, the KFTC will deem that a company could substantially restrain competition by foreclosing the purchase or sales channels of its competitors, if (i) the company as a raw material supplier, its market share satisfies the market share thresholds used for determining the market concentration in horizontal combinations, which were discussed in section 4.4.1(1) above; and (ii) the company as a buyer of raw materials, its ratio of the total amount of purchase to the total domestic supply amount satisfies the market share thresholds discussed in section 4.4.1(1) above.[32]

In addition, the following factors will also be considered: (i) the purpose of the business combination; (ii) the possibility of securing substitute channels for supply and sales; (iii) the extent of vertical integration of competitors; (iv) the growth prospect of the relevant market and the plans for expansion of the company concerned, etc.; (v) likelihood of collusion to eliminate

29 Review Guidelines, VII.1.C(2).
30 Review Guidelines, VII.1.D.
31 Review Guidelines, VII.1.E.
32 Review Guidelines, VII.2.A (1).

competitors; and (vi) situation of and effect on the raw material market and the end product market.[33]

(2) Other considerations In reviewing vertical combinations for its anti-competitiveness, the KFTC would find a particular vertical combination likely to substantially restrain competition if the combination takes place between large-scaled corporations or takes place widely through continuous stages, thus raising the entry barrier to the point of making it hard for competitors to enter the market.[34] One example would be a situation where the size of minimum capital required for market entry is substantially increased due to the combination.

4.4.3. Conglomerate combinations

A "conglomerate combination" refers to business combinations other than horizontal or vertical combinations. In reviewing this type of combination, the main focus of the KFTC is whether the combination undermines potential competition.

(1) Hindrance of potential competition A conglomerate combination will be deemed to substantially restrain competition in a given area of trade by hindering potential competition if it meets all of the following conditions:

- (i) The acquirer is a large-scale corporation;
- (ii) The acquirer is a potential entrant to the market and meets one of the following criteria:
  - (a) the acquirer would have entered the given area of trade using other means with less competition-restrictive effects even without the combination concerned; or
  - (b) the existence of the acquirer and others, which have the possibility to enter the given area of trade, is deterring the companies in the given area of trade from exercising market dominance.
- (iii) The market share of the target meets the thresholds set forth in section 4.4.1(1) above; and
- (iv) There are significant gaps between the acquirer and most of the competitors of the target in terms of size and capital, etc.[35]

(2) Other considerations In addition, the KFTC would consider a given combination anti-competitive if (i) the combination results in a significant enhancement of the overall business capabilities of the companies involved in the combination to the point of eliminating competitors based on factors other than price and quality, or (ii) the combination increases the barriers.[36]

5. Final orders and sanctions by authority(ies)

5.1. KFTC's orders and sanctions

If the commissioners of the KFTC find a company in violation of the FTL, they may impose the following sanctions on the company and/or on those individuals who actually conducted the acts in violation of the law.

33 Review Guidelines, VII.2.A(2).
34 Review Guidelines, VII.2.B.
35 Review Guidelines, VII.3.A.
36 Review Guidelines, VII.3.B.

5.1.1. Cease and desist order

The KFTC usually issues a corrective order wherein the offending party or parties are ordered not to do the prohibited activity.

5.1.2. Public announcement of the violation

The KFTC may also order the offending party or parties to publish a public announcement concerning the violation of the FTL (as a public apology). The KFTC will designate the number of daily newspapers in which the announcement must be carried, the size of the announcement and will usually dictate its contents as well.

5.1.3. Surcharge

The violating party or parties may be subject to up to 10% surcharge on the gross sales derived from the business activities conducted in violation of the FTL.[37]

5.1.4. Complaint for criminal sanctions

Criminal sanctions are the most severe penalties available under the FTL. In the case of criminal sanction, the KFTC will file a complaint with the prosecutor's office for indictment under the FTL. Criminal proceeding can be commenced only if the KFTC files the complaint. In the case of conviction, the offending party or parties may be subject to up to a 150 million Korean Won fine or up to two years' imprisonment, although we note that imprisonment is reserved for only the most exceptional cases.

6. Appeal and judicial review

6.1. Application for reconsideration

Once the KFTC issues its orders or sanctions, the company subject to such orders and sanctions may appeal to the KFTC for reconsideration of its ruling within 30 days from the receipt of such ruling. The reconsideration hearing(s) before the Committee is procedurally identical to the original hearing, except that new evidence and arguments may be raised. The KFTC must issue a decision on application for reconsideration within 60 days of the date of application, which period may be extended by the KFTC by an additional 30 days.

6.2. Judicial review

6.2.1. Review by appellate court

In addition to or in parallel with the application for reconsideration, the company may appeal to a High Court. In cases where the application for reconsideration is filed with the KFTC, the company will be given until 30 days after the KFTC's decision on the reconsideration to file an appeal before the court.

The appellate review will be carried out by a panel of three judges (constituting one presiding judge and two assisting judges) of the High Court. The judges of the High Court are appointed

37 The ceiling for surcharge was recently increased to 10% in the case of a cartel.

by the Chief Justice of the Supreme Court, and the appellate courts as a judicial body are completely independent of the administrative bodies of the government like the KFTC. The standard of review on appeal is *de novo* review and new evidence may be submitted and additional factual assertions may be made.

6.2.2. Stay order

For any corrective order issued by the KFTC, a stay order may be granted by the court until its decision on the merits of the appeal is rendered, if such corrective order is deemed to result in irreparable harm to the respondent. In addition, the appealing party must also demonstrate that there is a possibility of prevailing on the merits of the case.

In theory, the corrective order of the KFTC should be complied with immediately upon issuance. However, if a stay order is sought from the court, the KFTC generally does not take any action until the court rules on the petition for a stay order. If the company does not petition for a stay order or the court rejects the petition, and the company continues to fail to comply with the KFTC's corrective order, then the KFTC may file a criminal complaint with respect to such non-compliance.

If the KFTC's order includes a surcharge, such surcharge must generally be paid according to the terms of the order even if the case has been appealed to the High Court. If the surcharge is initially paid by the company and the KFTC's order is overruled on appeal, the company will be reimbursed for the amount of the surcharge plus interest.

7. Enforcement by private parties

Although both public and private remedies are available under the FTL depending on the type of violation, private remedies are rather limited. In other words, only compensatory damages covering actual damages caused by violation of the act is recoverable.[38] Therefore, injured parties tend to prefer filing complaints with the KFTC to initiating their private lawsuits to enforce their right.

8. Mergers in specific sectors

In addition to the review by the KFTC of anti-competitiveness in the affected market, a business combination involving certain sectors is further subject to approval by other competent authorities in Korea.

For example, a business combination involving banks, insurance companies and other financial institutions under certain circumstances requires approval by the Financial Supervisory Service of Korea. In addition, under the Telecommunications Business Law, a company in which foreigners hold in aggregate more than 49% of the shares is not eligible to obtain a network telecommunication business licence. Certain broadcasting companies are subject to similar or stricter restrictions under the Broadcasting Law. The other industries for which it would be necessary to seek the competent authorities' approval or review include defence and pharmaceuticals.

38 The Korean courts do not recognize the concept of punitive damages in respect of the FTL or in any other context.

9. Co-operation with other competition authorities

There is no provision in the FTL or any guidance published by the KFTC addressing this issue. However, the KFTC sometimes informally contacts competition authorities of other jurisdictions for information-gathering purposes, either for matters it is currently investigating or for general matters.

In this connection, the Organization for Economic Co-operation and Development (OECD), of which Korea is a member, adopted in 1995 the Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade (the "Recommendation").

In the Recommendation, the OECD Council, "recognizing the need for Member countries to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of co-operation on the field of anticompetitive practices",[39] encourages its member countries to notify, exchange information with and co-ordinate actions with the other member countries whose interests may be affected by one member country's enforcement of its antitrust laws on an anticompetitive practice in international trade.[40] In addition, a member country that considers that an investigation or proceedings conducted by another member country may affect its important interests is allowed to transmit its views on the matter to or request consultation with the other member country.[41]

As there has been no case in which the KFTC conducted its investigation jointly with competition authorities of other jurisdictions, it is not clear how much the Recommendation would be respected by the KFTC. It is worth noting in this regard that the Recommendation, as it is not a treaty or a convention which has a legal binding effect, is merely a non-binding recommendation published by an international organisation.

39 Recitals in the Recommendation.
40 I.A (Notification, Exchange of Information and Co-ordination of Action) of the Recommendation.
41 I.B (Consultation and Conciliation) of the Recommendation.

Malta

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See Merger Control Worldwide Vol. 2, Chapter 36, pp. 776–786

1. Relevant legislation and statutory standards

The Control of Concentrations Regulations[1] (the "Regulations") were amended on 13 March 2007 by the Control of Concentrations (Amendment) Regulations 2007 (the "Amending Regulations").[2] The latter regulations modified the notification threshold and the time-limit for notification of merger operations, introduced a notification fee and formalised the procedure for third-party objections and deleted the guidelines attached to the Regulations in the Schedule, as will be described below.

2. Notification requirements and procedures

The notification threshold in the Regulations had often been criticised as casting the net too wide, thereby catching even concentrations with no effect or with an insignificant effect on the Maltese market. Caught by the notification requirement were all concentrations, including those concluded and implemented outside Malta, where at least one of the undertakings concerned had an aggregate turnover in Malta of Lm750,000 (equivalent to €1,747,035) in the preceding financial year. With a view to restricting the scope of the notification requirement, the Amending Regulations raised the turnover threshold to Lm1,000,000 (equivalent to €2,329,380). Moreover, for a concentration to be notifiable it is no longer sufficient for just one of the parties to the transaction to have a turnover in Malta but it is now necessary that *all* the undertakings concerned *each* have a presence in Malta through a sales turnover equivalent to 10% of the combined turnover of all the undertakings concerned. Thus, the Regulations[3] now provide that a concentration is notifiable only *if in the preceding financial year the aggregate turnover in Malta of the undertakings concerned exceeded Lm1,000,000 (equivalent to €2,329,380) and* ***each*** *of the undertakings concerned had a turnover in Malta equivalent to at least 10% of the combined aggregate turnover of the undertakings concerned*.

Another amendment is related to the time-limit for notifying a concentration to the Director of the Office for Fair Competition following the conclusion of the agreement, announcement of the public bid or the acquisition of a controlling interest. The time-limit was raised from one week to fifteen working days because undertakings had regularly complained that the period for

1 LN 294 of 2002 as amended by LN 299 of 2002.
2 LN 49 of 2007.
3 Regulation 2(d).

notification was rather too short, considering the detailed information required in the notification form.[4] Moreover, the number of copies of the Form CN that must be filed has been reduced from five to two.[5]

A new provision was added to formalise a practice that was already in place informally, namely that, following the publication in the press by the Office for Fair Competition of a notice stating that a notification of a concentration had been received, any third party objecting to the concentration would have the right to submit its objections in writing within seven days of the publication.

Finally, a notification fee of Lm70 (equivalent to €163.06) was introduced in order to cover the administrative expenses incurred in the processing of merger notifications. Regulation 5(3) now provides that, if this notification fee is not paid on notification, the notification will be declared incomplete and invalid by the Director of the Office for Fair Competition and the concentration will not be deemed to have been notified.

3. Substantive assessment and test

The amending regulations also repealed the Guidelines on Efficiencies and the Guidelines on Assessment of Failing Firms and Exiting Assets contained in the Schedule to the Regulations and instead inserted a new provision that states that in the interpretation of Regulation 4(4) and Regulation 4(2)(b), which specifically refer to the consideration of claims based on efficiencies or failing firm/division situations in the assessment of the concentration, the Office for Fair Competition is required to take into account not only its own previous decisions and those of the Commission for Fair Trading but also the case law of the European Community Courts, the decisional practice of the European Commission and other pertinent foreign jurisprudence as well as the interpretative European Commission notices and guidelines on the relevant EC Treaty provisions and secondary legislation related to competition. The latter would presumably include the European Commission Guidelines on the Assessment of Horizontal Mergers,[6] which contain guidance on the consideration of efficiencies and failing firm claims.

Thus, the amendments give more leeway to the Office for Fair Competition to be influenced by and to follow the latest developments in foreign doctrine in the application of these defences, without being tied to guidelines set in the law. On the other hand, however, this might prejudice legal certainty for undertakings; though even the guidelines had stated that they were intended merely for general guidance purposes and did not give rise to any legal rights or obligations so that even then the Office for Fair Competition was not precluded from taking a different approach in any particular case from that prescribed in the guidelines.

4. Final orders and sanctions by authority(ies)

In January 2007 the first and so far the only concentration that was conditionally approved following the submission of commitments by the parties arose. All other notified concentrations since the entry into force of the Control of Concentrations Regulations in 2003 were approved unconditionally, most of them having no effect on markets in Malta. The case in question, *Maltacom plc/Multiplus Limited*,[7] concerned the acquisition of control by Maltacom plc (Maltacom) of Multiplus Limited (Multiplus) through a share purchase agreement.

4 Regulation 5.
5 Part E of the Schedule.
6 [2004] OJ C31/5.
7 Decision CCD/368/06 of 26 January 2007.

Maltacom is a telecommunications and ancillary service provider and in addition to fixed line and mobile voice telephony and data services it is authorised to provide television and radio distribution services and, to this effect, holds one of the two licences for the use of radio frequencies for the purpose of providing a Digital Terrestrial Television (DTTV) service. Multiplus was a private limited liability company whose principal activity was the operation of a licence to transmit digital TV channels. Specifically, it was authorised to operate a public electronic communications network and to provide television and radio distribution services. To this effect, Multiplus held one of the two licences (the other held by Maltacom) for the use of radio frequencies for the purpose of providing a DTTV service.

Considering the relevant market as the market for digital terrestrial television transmission services in Malta, the Office for Fair Competition held that although Maltacom and Multiplus were engaged in business activities in the same geographic market, they did not have any overlapping business activities; that is, none of the parties to the concentration were actively engaged in business activities in the same product market or were actively engaged in business activities in a product market which was upstream or downstream of a product market in which any other party to the concentration was engaged.

However, although strictly speaking there were no "affected markets" in terms of the Control of Concentrations Regulations, the Office for Fair Competition considered Maltacom as a potential competitor of Multiplus since it held a licence to operate a DTTV network though it did not operate one. The Malta Communications Authority had awarded Maltacom a licence to use eight radio frequencies in order to operate a DTTV network and so together with Multiplus they were the only operators licensed to provide DTTV services in Malta. Furthermore, the licences awarded to them included a deadline to roll out their services by 2007. As a result, although Maltacom had not in fact built a DTTV network and had never operated in this market, it could potentially do so.

In addition, both Maltacom's licence and Multiplus's licence for the use of DTTV frequencies prohibited the transfer of the frequencies granted to each undertaking. This was done in order to foster competition in view of the fact that radio spectrum is a scarce resource and needs to be utilised in the most efficient manner. As a consequence, the Office for Fair Competition feared that if, upon the acquisition, Maltacom were to be allowed to retain the frequencies assigned to Multiplus, it would effectively acquire a monopoly on DTTV services since it would be in possession of all the frequencies allocated for the provision of DTTV services, thus nullifying any possibility of new entrants entering the market. The Office for Fair Competition concluded that, therefore, the transaction would potentially result in a substantial lessening of competition, especially in view of the fact that there is a lack of demand and supply side substitutability between the different transmission platforms.

The Office for Fair Competition consequently approved the concentration subject to the condition that upon the acquisition of Multiplus, Maltacom would surrender to the Malta Communications Authority one of the licences and the corresponding block of eight frequencies held by it or by Multiplus.

Mexico

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The Mexican Constitution has prohibited monopoly since its ratification in 1917. Historically, however, Mexican competition policy initiatives and practices began during the mid-1980s to procure the ending of central government control and protection of the national economy in an effort to develop, instead, a market-based economy. Among the initial activities conducted by the Mexican government was the adherence to the General Agreement on Tariffs and Trade (GATT), and as a result most compulsory import licences which existed until then were eliminated and official import prices were abolished. In addition, in 1994, Mexico entered into the North American Free Trade Agreement (NAFTA), the signing of which was followed by Mexico entering into free trade agreements with the European Union and other Latin American countries.

During the early 1990s the government also undertook important initiatives aiming at the privatisation of state-owned corporations; the largest of these being the sale of Telefonos de México, the telephone monopoly, which was followed by the privatisation of commercial banks, tv-broadcasting, satellites, airport and seaport facilities, as well as railway companies.

Given that some of the privatised sectors had natural monopoly characteristics, regulatory regimes were instituted to deal with defects in market operation. However, in some of the privatised industries regulatory schemes were either not sufficiently well conceived or not implemented in the end. In addition to this, it is worth noting that in non-public sectors, private companies often organised themselves into chambers, which more often than not ended up being utilised to fix prices (interestingly doing so with the consent of the government). Not surprisingly, these chambers continued to be so utilised even after the government's participation and approval effectively came to an end.

A key element in the government's economic reform was the adoption of a general competition law. As a party to NAFTA, Mexico was committed to the adoption of measures proscribing anticompetitive business conduct. In 1993, Mexico therefore adopted the Federal Law of Economic Competition ("LFCE") and created the Federal Competition Commission ("CFC") to enforce it.

The drafters of the LFCE undertook to integrate the best ideas and practices of competition law and policy available around the world at the relevant time. Thus, the LFCE treats harshly the most harmful competitive constraints (such as cartels), and applies an economically sensitive analysis to the more ambiguous forms of conduct by using a market power screening and permitting an efficiency defence.

The competition policy objectives set out explicitly in the LFCE are those seeking "to protect the competitive process and free market access by preventing monopolies, monopolistic practices, and other restraints on the efficient functioning of markets for goods and services".

On 27 July 2005 a proposal to amend several provisions of the LFCE was submitted for discussion to the lower chamber of the Congress. After nearly a year of negotiations between the Congress and industry, on 29 June 2006 the proposal was published and enacted. Apart from the fact that the initial rationale of this proposal was to correct deficiencies in the LFCE following 10 years of experience with this piece of legislation, by means of, among other things, providing the CFC with greater autonomy to enforce the LFCE and to procure a clearer and more efficient competition policy, the Congress, taking advantage of the presidential pre-election political environment, dragged out negotiations without taking into account the actual need to improve competition policy that could result in updating and modernizing the competition rules of Mexico further.

The amendments contain several provisions, which in summary include the following provisions with respect to merger control:

- an increase in the pre-merger notification thresholds;
- providing that a concentration may only be closed upon receipt of a favourable outcome by the CFC;
- clarifying the situations in which pre-merger notification is not required with respect to corporate reorganisations conducted by foreign entities having Mexican subsidiaries;
- an increase in the powers of the CFC to carry out investigations, such as the possibility to carry out verification visits to the business premises of the notifying parties; and
- an increase in the amount of the fines that may be imposed by the CFC with respect to, among other things, prohibited concentrations.

1. Relevant legislation and statutory standards

As the introduction above makes clear, the legal principles for competition law and policy in Mexico are deeply rooted in the Mexican Constitution of 1917.[1] Nonetheless, it was not until the enactment in the LFCE and the creation of the CFC in 1993 – both developments being part of Mexico's overall economic reform agenda – that Mexico in practice came to develop a modern, working competition law and policy. Subsequent sector-specific regulatory laws as well as a series of regulations of the LFCE (the "Regulations") and internal regulations of the CFC have further reinforced the procedures for the implementation of Mexico's competition policy. The Supreme Court has – through dealing with a number of actions brought before it – reaffirmed the "constitutionality" of the LFCE and that all economic entities are subject to the law and the procedures of the CFC.

The LFCE is laid out in seven chapters that start by revealing its aims and function, namely prohibiting monopolies and monopolistic practices among all economic entities, public and private, with the specific exceptions of those "strategic sectors" designated by the Constitution.

Chapter 2 of the LFCE classifies monopolistic practices as either "absolute" or "relative". The former, which are horizontal in nature (i.e. agreements between competing firms), are prohibited *per se* by the law and include harmful practices (common in Mexico's not so distant past) such as price fixing, output restriction, market sharing and vertical practices (agreements between firms operating at different levels of the market) such as those aimed at market division, resale price maintenance, exclusive dealing, concentrations and restrictions on the effective functioning of the markets. Relative monopolistic practices, on the other hand, are

1 See Article 28 in particular.

dealt with on a case-by-case basis and involve rather sophisticated economic analysis to determine their legality. Specifically, the practices will only be deemed illegal if they are proved to be harmful to competition (i.e. those raising barriers to entry) and if the perpetrator of the practice has substantial market power in the relevant market. The LFCE, thus, deals with market dominance by firms only in terms of harmful practices, and does not deal with a dominant firm's potentially abusive power in and of itself.

More relevant to the purposes of this publication however, Chapter 3 of the LFCE deals with mergers and acquisitions which are otherwise referred to as concentrations. The CFC is responsible for clearing concentrations taking place in Mexico, and those that are deemed to be harmful to competition are either cleared subject to conditions or simply blocked. The LFCE specifies the relevant thresholds that determine whether a concentration must be notified to the CFC and outlines the relevant time frame.

2. Decision-making bodies and enforcement authority(ies)

As was noted above, the body responsible for the regulation of concentrations in Mexico is the CFC. Chapter 4 of the LFCE outlines the duties of the CFC in enforcing the former's provisions, as well as the CFC's organisational and institutional structure. The first part of the Chapter foresees the CFC's participation in other aspects of government policy-making and economic regulation, which for many industries has been further formalised in subsequent sector-specific regulatory laws. In terms of structure, the CFC is headed by a *pleno* of five commissioners, one of whom is the CFC's president, who on an annual basis shall issue a status report to the Congress and the Mexican President in connection with the activities performed by the CFC during the preceding year. The *pleno* has the final say on all decisions reached by the CFC through majority vote, while the president has particular duties for competition advocacy. The CFC is formally housed within the Ministry of Economy but is operationally autonomous. Its members are appointed by the President of Mexico for 10-year terms, a provision designated to strengthen the CFC's institutional autonomy.

The procedural norms of the CFC are outlined in Chapter 5 of the LFCE, while Chapter 6 deals with sanctions that may be applied for violations of the LFCE (see further below). Aside from suspension of concentrations, the CFC may order the divestiture of assets acquired through illegal concentration and/or fines for monopolistic practices.

The CFC enjoys powers that can be broken down into three basic branches: advocacy, preventive and punitive.[2] The role of advocacy is manifested in the Commission's participation in economic policy-making through its presence on inter-ministerial committees, though its participation is often as an observer offering (usually non-binding) opinions in an attempt to convey the point of view of competition. Advocacy also implies an effort to educate the business community, the political circles and the public at large about the benefits of competition for economic welfare. The CFC carries out its advocacy work through organising conferences, seminars, weekly on-line publications, consultations, and the publication of annual reports and periodic research notes.

The CFC's preventive powers lie in its ability to authorise, condition or challenge concentrations; issue resolutions regarding a firm's substantial power in the relevant market; and influence a firm's participation in government concessions and privatisation programmes. Finally, the CFC's punitive power, as outlined in the LFCE, takes the form of fines and corrective measures issued to combat absolute and relative monopolistic practices.

2 The First Decade of the Federal Competition Comisión, Comisión Federal de Competencia Economica 2003, p. 56.

3. Notification requirements and procedures

Article 20 of the LFCE provides for prior mandatory notification to the CFC where a concentration meets any of the following thresholds which are indexed to the general minimum daily wage in Mexico, the Federal District[3] (which is updated on an annual basis):

- if the value of the transaction or a series of transactions in question is equal to or higher than the equivalent of 18 million times the general minimum wage in the Federal District;
- where as a result of the concentration there could be an accumulation of 35 per cent of the assets of an entity worth more than the equivalent of 18 million times the general minimum wage in the Federal District;
- if the value of the underlying transaction or series of transactions is equal to 8.4 million times the general minimum wage in the Federal District, and in such concentration participate two or more economic agents whose assets or annual sales volume, jointly or separately, exceed the equivalent of more than 48 million times the general minimum wage in the Federal District.

Within the following 10 days from filing the merger notice, the CFC may order the economic agents not to enter into the underlying concentration until a favourable resolution by the CFC is obtained. In that regard, it is worth pointing out that no filings with respect to the underlying transactions shall be made at the Public Registry of Commerce until a favourable resolution of the CFC, either expressed or implied (factious affirmation), is obtained.

It is also worth pointing out that all mergers affecting assets or operations or economic entities doing business in Mexico, subject to the relevant thresholds, are within the scope of the pre-merger notification requirement. However, Regulations 21 Fr I and II of the LFCE allow for exemptions to the general mandatory requirement rule. First, foreign-to-foreign transactions are not subject to pre-merger notification when the additional assets to be acquired are located outside Mexico. The second exception concerns cases of corporate reorganisations and applies in situations where the parent company has owned, directly or indirectly, at least 98 per cent of the assets, shares or equity interests of the party or parties involved in the transaction, for a term of at least three years.

Notwithstanding what Regulation 21 Fr II of the LFCE establishes, a simplified notification must be made to the CFC within 5 days of the completion of the reorganisation, specifying the name of the entities involved in the reorganisation, a corporate structure description of each of such entities before and after the reorganisation and a summary of the reorganisation.

With respect to the deadlines for notification and the sanctions which may be imposed for failure to notify a concentration meeting the above thresholds, the LFCE establishes only that notification must be made prior to the implementation of the concentration. Although the notification can be made at any time prior to the signing of the agreement, it is advisable for the parties to notify as soon as the terms and conditions of the underlying transaction have been agreed upon. Closing before clearance is given by the CFC can attract serious consequences. In addition to a possible fine of up to approximately US $4,000,000 which may be imposed on the parties, the CFC can request modification of the structure or the agreed terms of what the parties at that time would have considered a closed transaction, or even order total or partial divestiture of assets.

3 As of 30 March 2006, the minimum daily wage in Mexico, Federal District is $46.80 pesos, equivalent approximately to US $4.30.

Finally, the following parties are responsible for notification of the concentration to the CFC: (i) the surviving company in a merger, (ii) the party that accumulates or intends to accumulate shares, equity interest or control over trusts or assets in a particular transaction; (iii) the party that by any other means acquires control over another company or partnership. Notwithstanding the foregoing, any entity involved in a transaction that qualifies as a notifiable concentration is entitled to notify the relevant concentration.

4. Substantive assessment and test

Article 16 of the LFCE provides on a broad basis that a concentration shall be interpreted as any merger or acquisition of control or any other similar act or series of acts that imply the concentration or combination of corporations, associations, shares of stock, partnership interests, trusts or assets between competitors, suppliers, clients or any other economic entities. The breadth of the foregoing definition incidentally encompasses transactions that result in the accumulation, combination or integration of any kind of assets.

By virtue of Article 16 the CFC is empowered to contest concentrations that could result in damaging, diminishing or threatening the process of competition, regardless of whether such concentration is subject to the rule on mandatory notification as explained above.

When deciding whether to challenge or sanction a concentration, the CFC shall take into consideration the following factors:

- the relevant market, in accordance with Article 12[4] of the LFCE;
- identifying the economic entities that supply customers in the relevant market, the analysis of the power these have in the relevant market pursuant to Article 13[5] of the LFCE, and the degree of concentration in that market;
- the effects of the concentration in the relevant market with respect to competitors and consumers of the goods and services, as well as in other markets and related economic agents;
- the participation of the responsible parties to the concentration in other economic agents and vice versa, always assuming that such economic agents have a direct or indirect participation in the relevant market or in related markets (when it is not possible to identify such participation, such circumstance shall be duly justified);

4 Article 12 provides: "The following criteria must be evaluated in order to determine which are the relevant markets:
I. The possibility to substitute the goods or services in question by other national or domestic goods or services, taking into consideration the technological potential, to what extent consumers have substitutes and the time required for that substitution;
II. The distribution cost of the goods; their relevant inputs; their supplements and substitutes from other regions and from abroad, taking into account freight, insurance, customs duties and non customs restrictions, the restrictions imposed by economic agents or their associations and the time required to supply those regions from the market;
III. The costs and potential access to other markets of users or consumers; and
IV. The federal, local or international standard restrictions that limit the access of users or consumers to alternative supply sources, or the access of the suppliers to alternative customers."

5 Article 13 provides: "The following should be evaluated in order to determine if an economic agent has substantial power in the relevant market:
I. Its market share and whether it can unilaterally set prices or restrict supply in the relevant market without competitive agents being able to act or potentially to counteract that power;
II. Entry barriers and the elements that may alter those barriers and also other competitors' offers;
III. The existence and power of competitors;
IV. The possibility that the economic agent and its competitors have to access sources of inputs;
V. Its recent performance; and
VI. All other criteria established in the regulations of this Law."

- the elements given by the economic agents to evidence that the underlying concentration would result in an improvement of the market that would favour the competitive process;
- all other analytical criteria and instruments prescribed by the Regulations.

The CFC's analytical approach when assessing a given concentration considers all of the following: (i) whether the merging parties would be able to fix prices unilaterally, substantially restrict access by competitors to the market, or engage in anti-competitive acts in violation of the LFCE; (ii) the definition of the relevant market(s) and the determination of substantial power in such relevant market(s) pursuant to the criteria set forth by the LFCE and the Regulations; (iii) the likely effects that the concentration will have in the relevant market(s), with respect to both competitors and consumers, as well as the cumulative effects on other markets and economic entities; and (iv) the equity interest or shareholding that the merging parties have in other economic entities that participate either directly or indirectly in the same relevant market(s) or related markets.

The Regulations allow for efficiency defences to be invoked by the merging parties, but the burden of proof that economic phenomena such as economies of scale or scope or other dynamic efficiency gains will increase economic welfare, and are thus efficient, lies squarely on the shoulders of the merging parties.

As far as the time framework within which the CFC is intended to operate is concerned, it is important to note that the CFC may request additional information from the parties within 15 calendar days of a complete notification. The notifying party(ies) have up to 15 calendar days from that time to produce this additional information. Following the receipt of all information requested, the CFC has 35 calendar days within which it must reach its decision. Failure to do so will be considered to amount to a clearance of the concentration. Having said that, it is worth pointing out that before the expiry of the 35 days, the Chairman of the CFC may extend such term by up to an additional 40 calendar days.

5. Final orders and sanctions by authority(ies)

If, following the investigation and analysis carried out, the CFC concludes that the concentration constitutes an act foreseen in Chapter 3 of the LFCE, the CFC may, in addition to imposing a penalty, decide to:

- make the clearance of the concentration subject to compliance with such conditions as it sees fit;
- order partial or total divestiture in cases where the parties proceeded with the implementation of their concentration in contravention of the provisions of the LFCE and the Regulations.

These orders and penalties are notwithstanding the power of the CFC to block a concentration outright.[6]

6. Appeal and judicial review

A non-favourable decision by the CFC in the case of a concentration can be challenged by the notifying party(ies) by filing a reconsideration action or appeal within 30 business days

6 See the discussion under section 2 above in relation to the CFC's preventive and corrective powers.

following the date of notification of the decision. The CFC must resolve and notify the result of the reconsideration action within 60 calendar days following the filing date. Failure by the CFC to issue its decision within this term will be deemed to amount to a confirmation of the original non-favourable concentration resolution. Such a result, in addition to situations where the CFC fails to follow the proper reconsideration procedure, may trigger an appeal to a federal judge or the Administrative Justice Tribunal.

The LFCE's final chapter – Chapter 7 – outlines the right to and the procedures for an appeal request (*recurso de reconsideración*) before the CFC for those economic entities affected by a CFC decision. In summary, the action should be addressed by the appellant in writing to the Chairman of the CFC, and should include contentions and related supporting evidence.

7. Enforcement by private parties

Third parties whose interests may be adversely affected by a concentration (which has not been notified contrary to the provisions of the LFCE) or its implementation may report the party responsible for such concentration to the CFC. Such report shall include a description of the alleged concentration, as well as of the damage that has resulted, or may result, from it.

Unless such report complies with the provisions set forth in Chapter V of the Regulations, the CFC is entitled to dismiss such action. If the CFC does not dismiss the action, an official investigation will be implemented with respect to the alleged concentration.

8. Mergers in specific sectors

Mexico's competition law was further complemented by a number of regulatory reforms in various industrial sectors of the country adopted in the years following the adoption of the LFCE. The CFC's role in sector-specific regulation – most notably in the process of granting licences and permits – is explicitly outlined in regulatory laws concerning seaports, navigation, roads, bridges, railroads, aviation, natural gas, pension funds and, of course, telecommunications.[7]

Based on the recent telecom development in Mexico, the Federal Commission of Telecommunications (*Comisión Federal de Telecomunicaciones*) has been continuously participating with the CFC in the analysis and determinations made with respect to concentrations in the sector. During the 1990s the National Banking and Securities Commission also played an important role in the CFC's resolutions with respect to banking concentrations.

9. Co-operation with other competition authorities

Beyond its participation in NAFTA, Mexico is party to five important bilateral agreements and memoranda of understanding in the field of competition law. Four of these were entered into in 2000 (with Canada, the EU, Israel and the USA) and one was entered into in 2004 (with Chile).

Mexico has been an important participant in the International Competition Network (ICN).

7 M. Wise, "The Role of Competition Policy in Regulatory Reform", *Regulatory Reform in Mexico*, OECD 1999, p. 23.

The Netherlands

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See Merger Control Worldwide Vol. 2, Chapter 37, pp. 787–816.

1. Relevant legislation

On 1 October 2007, a revised Dutch Competition Act (the "revised Act") entered into force. The revised Act provides for the following changes with regard to merger control in the Netherlands:

- **Substantive test:** The "dominance" test for concentrations has been altered to follow the reworded "significant impediment of competition" assessment in European Community (EC) Regulation No. 139/2004. The Dutch Competition Authority, NMa, will focus on the economic reality of each case and efficiencies will be considered.
- **Joint ventures:** Under the revised Act all full-function joint ventures are dealt with under the merger control provisions. Before the entry into force of the revised Act, full-function "co-operative" joint ventures were not considered under merger control rules but rather under the cartel rules, a practice that was in line with the EC merger control rules as they applied until March 1998.
- **Remedies:** The revised Act provides the NMa with the power to grant conditional clearance (i.e. with remedies) in phase I decisions, in line with EC Regulation No. 139/2004. Prior to the revised Act, it was not possible for the NMa formally to impose conditions in relation to a phase I clearance decision. Merging parties in practice worked round this by restructuring their transaction following pre-notification discussions or during phase I.
- **Related transactions:** The revised Act expressly provides the NMa with the authority to assess legally or economically related transactions as part of the same concentration; this was already the case in practice. It is important to note, however, that the NMa does not specifically follow the EC rule of treating transactions between the same persons or undertakings within two years as one and the same merger and no specific time period has yet been set. The explanatory memorandum to the revised Act indicates in which circumstances transactions would be considered part of the same concentration.
- **Notification:** The revised Act clarifies that the notification procedure starts when all the information required for completion of the notification form has been received by the NMa. Furthermore, it contains an express provision that the "clock" will be stopped when the NMa makes a formal request for further information, until the information requested has been received. The revised Act also clarifies that information can be requested not just from the notifying parties but from all the undertakings concerned.
- **Time-out:** The revised Act allows the parties to formally request a one-off extension to the phase I period. This possibility has been included to give the parties more time to contemplate and propose possible remedies if so required.

- **Turnover:** The notification thresholds for credit and financial organisations have been aligned with the EC notification threshold rules, i.e., the current asset thresholds have been replaced by turnover calculation rules.
- **Sanctions:** The revised Act also increases the sanctions for breach of the merger control rules:
  - Fines for breach of the substantive merger control rules have been increased significantly, in line with EC Regulation No. 139/2004, to 10% of turnover or €450,000, whichever is higher. This covers the following situations: breach of the obligation to notify a merger operation to the NMa before completion; and breach of conditions attached to a phase I clearance decision (a new sanction) or to a phase II licence decision. The revised Act also expressly introduces (administrative) fines of a maximum €450,000 for individuals – directors and managers – who are *de facto* responsible for an infringement.
  - Fines for breach of the procedural merger control rules (for sending incomplete or incorrect information in relation to a phase I or phase II investigation, and not producing information requested by the NMa for a phase II investigation) have been increased to €450,000 or 1% of turnover, whichever is the greater, also in line with EC Regulation No. 139/2004.

The revised Act furthermore includes the possibility to change the turnover threshold rules by governmental decree to allow the NMa to apply (temporary) lower turnover thresholds to mergers in sectors in transition, and in particular in the healthcare sector. On this basis, the NMa can assess smaller concentrations between healthcare companies which would otherwise fall outside the merger control rules. A governmental decree specifying the lower thresholds for specific sectors is expected to be published in 2007. The draft governmental decree is currently pending for advice with the Council of State. In this context it should be noted that as of 1 October 2006, the Healthcare Market Organisation Act (Wet Marktordening Gezondheidszorg) entered into force. With the coming into force of this Act, the Office of Health Regulation (Nederlandse Zorgautoriteit, NZa) was established. One of the tasks of the NZa is to regulate the markets for healthcare provision, healthcare insurance and healthcare procurement. If one or several parties have appreciable market power, which may reduce the development of a market, the NZa may impose specific obligations on such parties. The NMa retains its exclusive power to assess mergers on the basis of the revised Act.

In June 2007, the Act on Temporary Media Concentrations entered into force, providing for a separate threshold in relation to mergers between newspapers. These are subject to a combined 35% market share ceiling on the Dutch newspaper market. A market share threshold of 90% has been introduced for media concentrations relating to a combination of the user markets for newspapers, television programmes and/or radio programmes. The market share test would be complementary to cross-ownership rules in the Media Act regulating media concentration.

2. Notification requirements and procedures

The notification requirements remain the same, i.e., a concentration will trigger the thresholds in the Netherlands when:

(1) the undertakings concerned have a combined worldwide turnover of more than €113.45 million; and

(2) the turnover of at least two of the undertakings concerned is at least €30 million in the Netherlands.

Special turnover calculation rules apply in the case of credit and/or financial institutions and insurance companies. The revised Act brings the turnover calculation for credit and financial organisations into line with EC Regulation No. 139/2004, that is, the sum of certain types of (banking) income. For insurance companies (within the meaning of the Insurance Industry Supervision Act 1993 – *Wet toezicht verzekeringsbedrijf 1993*), turnover is replaced by the value of the gross premiums written in the preceding financial year and of these at least €4.54 million must have been received from Dutch residents.

The revised Act clarifies that the notification procedure starts when all the information required for completion of the notification form has been received by the NMa. Furthermore, it contains an express provision that the clock will be stopped when the NMa makes a formal request for further information, until the information requested has been received. The revised Act also clarifies that information can be requested from not just the notifying parties but from all the undertakings concerned. Another amendment in the revised Act provides merging parties with the opportunity to formally request a one-off extension to the phase I period. This possibility has been introduced to give the parties more time to contemplate and propose possible remedies if so required.

As of late 2006, undertakings are required to pay a filing fee of €15,000 for a phase I decision and an additional €30,000 for a phase II decision by the NMa.

3. Substantive assessment and test

The revised Act aligns the Dutch merger control test with the EC's "significant impediment to competition" test, i.e., the NMa examines whether there is "... reason to assume that the concentration would significantly impede effective competition in the Dutch market or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position". The previous substantive test corresponded to the EC's former merger control "dominance" test (under the old EC Merger Regulation No. 4064/89), that is, whether a dominant position that significantly restricts actual or potential competition in the Dutch market or a part thereof could be created or strengthened as a result of the proposed concentration. The NMa generally follows the European Commission's policy in applying the substantive test, as contained in decisions of the Commission and in the Commission Notice on definition of the relevant market (1997).

The revised Act provides the NMa with the authority to grant conditional clearance attaching remedies to a phase I decision, in line with EC Regulation No. 139/2004. Previously it was not possible for the NMa to formally impose conditions in relation to a phase I clearance decision. Parties worked around this by restructuring the transaction following pre-notification discussions or during phase I. On the basis of the new 2007 Guidelines on remedies it is now possible to offer behavioural remedies during the phase I procedure (instead of structural remedies only). Contrary to the European Commission's Notice on Remedies (2001) and the NMa's current practice, however, the Guidelines do not permit the closing of the transaction prior to the transfer of the business to a suitable purchaser (in the case of structural remedies) or the effectuation of the behaviour (in the case of behavioural remedies). This "fix-it-first" requirement may prove to be a burdensome restriction of the current practice because parties who seek phase I remedies are usually time constrained.

4. Investigation and sanctions

The NMa's investigative powers in relation to merger control derive from the Competition Act and the General Administrative Law Act. Apart from the power to request information from the parties and third parties, NMa officials can also carry out inspections in relation to suspected merger control breaches. The revised Act allows the NMa to carry out inspections at private premises without permission.

A number of sanctions are available to the NMa concerning infringements of the merger control rules, in particular fines and periodic penalty payments. These sanctions are of an administrative nature. It should be noted that the revised Act limits the imposition of the fines by the NMa (mentioned in part 2 above) to five years from the date of the infringement of the merger control provisions (previously this was two years). The following sanctions have been amended by the revised Act.

4.1 Breach of the requirement to comply with a phase II request for information

Under the Competition Act, aside from the general duty to co-operate, there is a specific requirement on undertakings to comply with a request from the NMa to provide such explanations of the company's business information as can be deemed reasonably necessary for the assessment of an application for authorisation.

Under the revised Act, non-compliance with this requirement can be sanctioned with a maximum fine of €450,000 or 1% of an undertaking's turnover (previously the maximum amounted to a fine of €4,500).

4.2 Provision of incomplete or inaccurate information in phase I or phase II

The fines for providing inaccurate or incomplete information at the phase I notification or phase II authorisation application stage have been increased in the revised Act to a maximum of €450,000 or 1% of an undertaking's turnover (the previous maximum was €22,500).

4.3 Breach of the standstill obligation and related deadlines

Implementation of a concentration which meets the criteria set out in the Act before the NMa has granted clearance is an infringement of the Competition Act. The revised Act sets maximum fines of €450,000 or 10% of an undertaking's turnover for such breach. Furthermore, fines up to €450,000 can be imposed on directors and *de facto* managers.

4.4 Breach of authorisation conditions

If conditions have been attached to an authorisation, breach of these is liable to a fine of a maximum of €450,000 or 10% of turnover for breach of conditions. This can be imposed on a natural or legal person. Periodic penalty payments can also be imposed, together with or instead of a fine.

4.5 Breach of full standstill exemption conditions

In cases where an exemption from the standstill provision (in relation to a phase I notification or in relation to an application for authorisation) has been granted by the NMa, that is, allowing implementation of a concentration before clearance has been granted by the NMa, sanctions shall apply where conditions set out in such an exemption decision are breached. Under the revised Act, the maximum fine is €450,000 or 10% of turnover, and this can be imposed on a natural or legal person.

New Zealand

Justice Jill Mallon,[a] David Blacktop[b] and Martyn Taylor[c]
[a]*High Court, Wellington, New Zealand*
[b]*Bell Gully, Wellington, New Zealand*
[c]*Mallesons Stephen Jaques, Sydney, Australia*
See Merger Control Worldwide Vol. 2, Chapter 38, pp. 817–843

1. Undertakings

The Commerce Commission has outlined the factors it considers in assessing the extent to which the submitting undertaking would allay anticipated concerns resulting from a given merger operation.[1] The Commission examines three types of risks which could undermine the efficacy of an undertaking:

- **composition risks**: risks associated with the scope of the assets to be divested, which may not be sufficient to attract a buyer or may not allow a purchaser to operate effectively and viably in the market;
- **purchaser risks**: risks associated with the person purchasing the assets. The Commission will consider the incentives for an applicant to divest to a strategically weak purchaser;[2] and
- **asset risks**: risks associated with the loss of value or competitive capability of the assets during the divestment process.

2. Substantive assessment and test

The High Court's recent decision in *Commerce Commission v. New Zealand Bus* (2006) 3 NZCCLR 111 provided useful guidance on the "substantial lessening of competition" test in New Zealand. Prior to this decision, there was limited case law on the topic, with the High Court's decision in *Brambles New Zealand Ltd v. Commerce Commission*,[3] the only statement on this test.

Miller J's judgment confirmed the principles that had been applied in previous cases, and his decision provides a useful summary of the way to approach the question of whether a substantial lessening of competition as a result of a merger operation is likely in the New Zealand context:

The question whether a substantial lessening of competition is likely is determined by comparing the likely state of competition should the acquisition proceed (the factual) with the

1 Decision 545 (23 February 2005) *Gallagher Holdings Limited and Tru-Test Corporation*, paragraph 64.
2 In *Gallagher*, the applicant sought to satisfy the Commission that there was no purchaser risk by offering to accept the best price for the assets to be divested. However, the Commission stated that such an undertaking did not solve the Commission's concern that a weak purchaser might purchase the assets. The Commission also noted that such an undertaking might be behavioural, in which case it could not accept that undertaking. See also Decision 558 (15 September 2005) *Fletcher Concrete and Infrastructure Limited and W Stevenson and Sons Limited* in which the Commission accepted that there was no substantial purchaser risk. The Commission's conclusion was based largely on its factual examination of the potential purchasers, which the Commission described as sound companies with appropriate infrastructure and knowledge.
3 (2003) 10 TCLR 868 at 910.

likely state of competition if it does not (the counterfactual): *Tru Tone Ltd v Festival Records* [1988] 2 NZLR 352 (CA). "Competition" means workable or effective competition and a reference to the lessening of competition includes hindering or preventing it. The Act defines "substantial" to mean real or of substance, and a "likely" effect is one that involves a real and substantial risk that the stated consequence will happen: *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554, 562 (CA). Substantial lessening of competition is a relative rather than an absolute standard; it examines the state of competition with and without the transaction to determine whether, and to what extent, market power will move along the spectrum from perfect competition to monopoly: *Air New Zealand/Qantas v Commerce Commission (No 6)* (2004) 11 TCLR 347 at [42] (HC). It must be assessed in the particular circumstances of the case: *ANZCO Foods Waitara Ltd v AFFCO NZ Ltd* (2005) 11 TCLR 278 at [240] (CA).

3. Pecuniary penalties

Where an acquisition contravenes section 47 of the Commerce Act 1986, the Commission can apply to the Court for orders requiring the payment of pecuniary penalties. The High Court's decision in *Commerce Commission v. New Zealand Bus* is significant in two respects.

First, it marks the first occasion where the Court found the vendor liable for a breach of the Act. This finding was on the basis that the vendors were a party to that breach by aiding and abetting and being knowingly concerned with the contravention of the Act by New Zealand Bus.

Secondly, it is the first occasion when the Court has addressed the issue of pecuniary penalty in a merger context. The Court affirmed that the purpose of a pecuniary penalty is to deter a rational party from engaging in the conduct *ex ante*. That is, the commercial gain of the action should be cancelled out by the penalty. The Court was not satisfied that the vendors would receive any commercial gain from the sale over and above a commercial selling price. For that reason, it did not impose a pecuniary penalty on the vendors.

While the Court noted that the amount of any commercial gain provided an appropriate starting point, it identified a number of other factors relevant to the issue of penalty, including:

- New Zealand's voluntary merger clearance regime meant that an acquirer could not claim in mitigation that it proceeded with the merger believing reasonably but wrongly that the acquisition would not breach the Commerce Act (including receiving legal advice to that effect); and
- that a penalty should not be set so high as to deter an active business acquisition market.

The Court also confirmed that the issues of pecuniary penalty and court costs should be treated (and calculated) separately. It noted that a penalty represents the harm done to consumers and is designed to deter a contravention; while an award of costs is designed to compensate for the social costs of enforcing the Act.

Norway

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Merger Control Worldwide Vol. 2, Chapter 39, pp. 844–866

1. Relevant legislation and statutory standards

The Notification Regulation[1] was amended on 29 November 2006,[2] with effect from 1 January 2007. Revised versions of the Competition Authority's forms and guidelines for standardised and complete notifications were published on 2 January 2007. The most important amendments are dealt with in section 3.1 below.[3]

2. Decision-making bodies and enforcement authority(ies)

2.1. The Competition Authority

The relocation of the Competition Authority from Oslo to Bergen was completed in 2006.

2.2. The Ministry

As a result of reorganisations within the central administration, under the current government the Ministry of Modernisation (*Moderniseringsdepartementet*) has been replaced by the Ministry of Government Administration and Reform (*Fornyings- og Administrasjonsdepartementet*).[4]

3. Notification requirements and procedures

3.1. Thresholds

The amendments to the Notification Regulation have increased the turnover thresholds provided for under Section 2 of the Regulation. As of 1 January 2007 concentrations are exempted from the general obligation to notify in the following situations:

(a) if the combined annual turnover in Norway of the undertakings concerned is less than NOK 50 million (approximately €6.3 million); or

1 Regulation 28 April 2004 on the Notification of concentrations, etc.
2 Regulation 29 November 2006 no. 1354.
3 An English translation of the consolidated revised Notification Regulation and English language versions of the Authority's revised guidelines for standardised and complete notifications can be downloaded from the website of the Competition Authority, www.kt.no.
4 The Ministry maintains a web page concerning competition law policy at www.regjeringen.no/nb/dep/fad/Tema/konkurransepolitikk.html?i=1363.

(b) if only one of the undertakings concerned has an annual turnover in Norway of more than NOK 20 million (approximately €2.5 million).

While the Notification Regulation still uses the accounting and company law term "konsern" (i.e. corporate group) to define the group of companies that shall be included for the purpose of calculating turnover, the revised guidelines of the Competition Authority state that:

"Generally, turnover of all undertakings that are included in the new economic entity are taken into account when assessing whether the turnover threshold has been met. This applies to mergers, acquisitions and other means of acquiring control."[5]

3.2. Procedure

3.2.1. Time of notification

The mandatory notification system introduced by the Competition Act 2004 with effect from 1 May 2004 provides that the parties to the merger or the undertaking(s) acquiring control have an obligation to submit the notification "at the latest when a final agreement has been entered into or control acquired",[6] whichever occurs first. The Competition Authority's guidelines state that in cases where it is difficult to prepare the notification prior to conclusion of the final agreement the Authority will tolerate a delay of up to three days.

Violation of the obligation to notify concentrations within the deadline can be sanctioned by administrative fines, criminal fines and – in principle – up to 6 years' imprisonment.[7] In practice criminal fines and imprisonment are not likely in such cases and have never been imposed. The maximum administrative fine for such violations is 1 per cent of the turnover of the undertaking in question.[8]

After a "grace period" the Competition Authority in late 2005 started imposing administrative fines for violation of the obligation to notify, and it has since then issued a significant number of decisions imposing fines in such cases. The fines have ranged from NOK 10,000 (€1,250) to NOK 90,000 (€11,250) depending on the circumstances of the case. Fines have been imposed for delays of as little as 12 days.

4. Substantive assessment and test

4.1. The efficiency defence

When the Parliament adopted the Competition Act 2004 it added the following sentence to Section 1:

"When applying the Act, special consideration shall be given to the interests of the consumers."

Following adoption of the Act there was some uncertainty as to the implications of this sentence for the efficiency defence in merger cases. This was clarified in the Ministry's appeal

5 The Guidelines (English language version), section 4.3.
6 Section 18 first paragraph of the Competition Act (the author's translation). The term "final agreement" is discussed in the Main Work at page 848.
7 Sections 29(1)(a) and 30(1)(a) of the Competition Act.
8 Regulation 22 August 2005 no. 909 on the setting of fines and leniency, section 2. The Regulation (in Norwegian) can be downloaded from the Competition Authority's website, www.kt.no.

decision of 6 February 2006 in the *Prior Norge – Norgården* case.[9] In its decision the Ministry made it clear that the balancing of positive and negative socio-economic effects of a concentration is done in the same manner under the Competition Act 2004 as under the Competition Act 1993, i.e. socio-economic efficiency gains that do not benefit consumers may also be taken into account.

4.1.1. Efficiencies materialising outside vs. inside Norway

In its appeal decision of 5 October 2006 in the *Gilde Norsk Kjøtt – Prior Norge* merger[10] the Ministry confirmed that the ability of a Norwegian entity to obtain reduced purchasing prices from a foreign supplier as a result of the merger qualifies as an efficiency for the purpose of Norwegian merger control irrespective of whether the reduced prices are a result of genuine efficiencies or simply a transfer from the supplier to the Norwegian buyer as a result of the latter's increased buying power.

5. Appeal and judicial review

5.1. Cases involving public principles or interests of major significance

Section 21 of the Competition Act 2004 empowers the King (i.e. the Council of Ministers) to make decisions with regard to concentrations involving "public principles or interests of major significance". The current Government has demonstrated its willingness to rely on this provision to give the green light to concentrations which, although they produce anti-competitive effects, are believed to benefit other policy areas.

On 29 September 2005 the Competition Authority prohibited the proposed acquisition by Prior Norge BA (Prior) of its smaller competitor Norgården AS (Norgården).[11] The transaction would have increased Prior's market share from more than 60 per cent to around 80 per cent in several markets for eggs and egg products.

In its decision of 6 February 2006 the Ministry upheld, on the basis of a competition law analysis, the intervention decision of the Competition Authority.[12] However, following a recommendation from the same Ministry the acquisition was approved by the Council a few days later subject to the divestment of a subsidiary.[13] The reason for the approval was that, despite its negative effects on competition, the concentration was found to have positive effects for Norwegian agricultural policy.[14]

9 Ministry reference 200503763. The decision concerned an appeal against the Competition Authority's decision of 29 September 2005 in case V2005-12.

10 Ministry reference 200602223-88. The decision concerned an appeal against the Competition Authority's decision of January 2006 in case V2006-223.

11 Decision of the Competition Authority of 29 September 2005 in case V2005-12.

12 Ministry reference 200503763.

13 Royal decree 10 February 2006; Ministry reference 200600403.

14 A similar reversal had also taken place a few months earlier in a case in the energy sector. By Royal decree 23 November 2005 the King in Council annulled the Ministry's intervention decision of 7 February 2003 concerning Statkraft Holding's acquisition of Trondheim Energiverk. The Competition Authority and the Ministry had ordered Statkraft to divest either Trondheim Energiverk or other production capacity. Statkraft had not fully complied with the order and the Royal decree 23 November 2005 approved the acquisition on more lenient conditions. The reasons given for the reversal were that the transaction was considered beneficial from an industrial perspective and that Statkraft's obligation to remedy bottlenecks in the power grid would reduce the competition problems related to the acquisition. As this case had originally been decided under the former Competition Act 1993, the Government could not rely on Section 21 of the Competition Act 2004 to annul the original decision and instead used a provision in the general Administration Act as the legal basis for the reversal.

Singapore

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The Singapore Competition Act (Cap. 50B) (the "Act") was passed into law in October 2004. The Act has been brought into force in phases. In phase 1, the provisions establishing the Competition Commission of Singapore (the "CCS") and the Competition Appeal Board first came into force, respectively on 1 January 2005 and on 1 September 2005. In phase 2, the provisions relating to anti-competitive agreements (the section 34 prohibition) and abuse of dominance (the section 47 prohibition) came into force on 1 January 2006. The merger provisions, which are also regulated by the Act, were brought into force as part of phase 3 of the implementation of the Act.

The Merger control regime of Singapore applies only to mergers that have occurred after 1 July 2007, i.e. where control has not passed or was not acquired or transferred before 1 July 2007. However, it is important to note that where the documentation in relation to the merger has been executed before 1 July 2007 but control has not passed before 1 July 2007, the merger would still be reviewed under the regime.

Although the notification of a merger is not compulsory under the Act, the CCS encourages merger parties to notify their merger situation when an indicative threshold is met, as this will suggest that the merger is likely to result in a substantial lessening of competition (SLC).

This chapter provides an overview of the operation of the merger provisions in Singapore. It does not discuss the provisions of the Takeover Code, which typically applies to all mergers and acquisitions.

1. Relevant legislation and statutory standards

Merger control in Singapore is primarily governed by Division 4 – Part III of the Act. The CCS is the national competition regulator for Singapore. The CCS may review a merger either on the basis of an application for decision by a party to a merger or of its own initiative, where it decides to investigate a merger.

The provisions in relation to mergers came into force on 1 July 2007. The primary provision dealing with mergers, section 54 of the Act, prohibits "mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services". The Third Schedule to the Act makes it clear that sections 34 and 47 do not apply to agreements or conducts that result in a merger, i.e. where section 54 applies. Ancillary restrictions, i.e. restrictions that are directly related and necessary to the implementation of a merger, are also excluded from the ambit of the sections 34 and 47 prohibitions. However, post merger sections 34 and 47 prohibitions will apply to conducts or agreements entered into by the merged entity.

Supplementing the Act are various Guidelines issued by the CCS, among which two apply specifically to mergers:

(a) the CCS Guidelines on the Substantive Assessment of Mergers, and
(b) the CCS Guidelines on Merger Procedures.

In addition, other general Guidelines are also relevant to merger control assessment, such as:

(a) the CCS Guideline on Market Definition,
(b) the CCS Guideline on Enforcement, and
(c) the CCS Guideline on the Powers of Investigation.

There are a number of other Guidelines that have been issued by the CCS under the Act. Additionally, there are several regulations that have been issued pursuant to the Act. Not all these Guidelines and regulations are relevant to the merger provisions, and so have not been included for discussion in this chapter.

1.1. The term "merger"

A merger is defined broadly under the Act as the acquisition or establishment by one or more entities of direct or indirect control over the entire part of a business. The typical transactions that will see direct or indirect control being acquired include the common sale and purchase of shares, subscriptions, inclusions of call options, as well as perhaps the seemingly innocuous joint venture. What this means is that any firm that undertakes a transaction must review and be alert to the possibility of the merger provisions being relevant to and applicable in the case.

1.2. Occurrence of a merger

Under section 54(2) of the Act, a merger occurs if:

(a) two or more undertakings, previously independent of one another, merge;
(b) one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or
(c) the result of an acquisition by one undertaking (the first undertaking) of the assets (including goodwill), or a substantial part of the assets, of another undertaking (the second undertaking) is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate, the part concerned of the business in which that undertaking was engaged immediately before the acquisition.

1.3. Concept of control

Determining the existence of a merger centres around the concept of control. Under section 54(3), control is considered to exist where a decisive influence is capable of being exercised with regard to the activities of the undertaking, by reason of contracts, securities or any other means.

The CCS Guidelines on the Substantive Assessment of Mergers provide explanations and illustrations of situations that are intended to amount to a merger under the Competition Act, and set out that:

(a) control can be acquired solely or jointly; or
(b) control can be legal control or *de facto* control.

Sole control relates to the power of one shareholder to impose strategic decisions on the business policy of an undertaking, whilst joint control is evidenced by the ability of two or more shareholders of an undertaking to block strategic decisions (through veto rights for instance), regardless of the percentage of their voting rights.

In general, legal control, i.e. ownership of more than 50% of the voting rights, will likely indicate the existence or at least the possibility of a decisive influence. Ownership of between 30% and 50% of the voting rights would give rise to a presumption that a decisive influence exists. However, an ownership of more than 30% or even more than 50% of the voting rights may not necessarily be sufficient to gain control over an undertaking, and, therefore, amount to a merger. Hence, the specific facts of the case must be studied very carefully before a conclusive assessment on the existence of legal control could be made.

De facto control exists where an undertaking, though only owning minority voting rights in another undertaking, has additional rights that enable it to exercise decisive influence on the strategic decisions of this latter undertaking; e.g. where a shareholders' agreement gives the first undertaking the ability to control the decision-making function of the Board of the second undertaking.

However, there are four instances where the acquisition of control would not amount to a merger situation. These are set out under section 54(7), (8), (9) and (10):

(a) the person acquiring control is a receiver or liquidator acting as such or is an underwriter acting as such;
(b) all of the undertakings involved in the merger are, directly or indirectly, under the control of the same undertaking;
(c) control is acquired solely as a result of a testamentary disposition, intestacy or the right of survivorship under a joint tenancy; or
(d) control is acquired by an undertaking the normal activities of which include the carrying out of transactions and dealings in securities for its own account or for the account of others in the certain prescribed circumstances.

1.4. Joint ventures

Section 54(5) further specifies that the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity also constitutes a merger. In this respect, it is important to note that the creation of a joint venture in itself does not necessarily amount to a merger. Only the creation of a "full-function joint venture" falls under the ambit of the Singaporean merger control regime. A joint venture is considered full-function when "it performs on a lasting basis the function of an autonomous economic entity".

In practice, this means that the joint venture is set up to compete independently on a market, performing the functions normally carried out by undertakings operating on the same market. In that respect, it must have a management dedicated to its day-to-day operations, access to sufficient resources, which include finance, staff and assets (tangible and intangible), and should not rely only upon its parents for financial support. In addition, the joint venture must be created to operate on a lasting basis.

1.5. Types of mergers

There are three main types of mergers, namely horizontal mergers, vertical mergers and conglomerate mergers. A horizontal merger is one that occurs between entities that operate in the same market sphere or at the same value chain of the business circle. A vertical merger is one that occurs between two or more entities that operate at different levels of the supply chain. Finally, a conglomerate merger occurs where entities in different market spheres seek to merge.

The importance of characterising the different types of mergers is that it impacts directly on whether the merger provisions will apply or otherwise. Under the Singapore merger control regime, the likelihood of "substantial lessening of competition" for example applying is higher in the case of horizontal mergers.

1.6. Mergers falling outside the regime

The merger control rules of Singapore do not apply to certain specified mergers. Under section 33 of the Act, the provisions regulating anti-competitive agreements, abuses of dominance and mergers do not apply to activities carried on by, agreements entered into or conduct on the part of:

(a) the Government;
(b) any statutory body; or
(c) any person acting on behalf of the Government or that statutory body in relation to the activity, agreement or conduct.

The Fourth Schedule also makes it clear that a merger that leads to a substantial lessening of competition but brings economic efficiencies that outweigh such detriment is excluded from the prohibition. Such a merger would have to show verifiable evidence of the benefits that are likely to materialise within a reasonable period of time as a direct consequence of the merger, such as greater innovation or choice, higher quality or lower costs, before it can be approved by the CCS. The merging parties must also show the benefits of the merger for the Singapore market. This is discussed at greater length in part 4 below.

In addition, section 55 of the Act provides that the merger prohibition does not apply to mergers as specified in the Fourth Schedule to the Act, and which include mergers:

(a) approved by any Minister or regulatory authority (other than the CCS) pursuant to any requirement for such approval imposed by any written law;
(b) approved by the Monetary Authority of Singapore established under section 3 of the Monetary Authority of Singapore Act (Cap. 186) pursuant to any requirement for such approval imposed under any written law;
(c) under the jurisdiction of any regulatory authority (other than the Commission) under any written law relating to competition, or code of practice relating to competition issued under any written law; or
(d) involving any undertaking relating to any specified activity as defined in paragraph 6(2) of the Third Schedule to the Competition Act.

These situations are discussed further in part 8 below.

2. Decision-making bodies and enforcement authority(ies)

2.1. The Competition Commission of Singapore (CCS)

The CCS is a body corporate established under the Act on 1 January 2005 to administer and enforce the Act. It falls under the purview of the Ministry of Trade and Industry.

The CCS currently comprises the Chairman and six Commission Members, all of whom are appointed by the Minister for Trade and Industry for specified terms.

The role of the CCS is to maintain and enhance efficient market conduct and promote overall productivity, innovation and competition of markets in Singapore as well as to eliminate or control practices having an adverse effect on competition in Singapore. The CCS is also in charge of advising the Government or other public authorities on national needs and policies in respect of competition matters generally, and to act internationally as the national body representative of Singapore in respect of competition matters.

The CCS identifies the following as its functions and duties:

(a) to maintain and enhance efficient market conduct and promote overall productivity, innovation and competitiveness of markets in Singapore;
(b) to eliminate or control practices having adverse effect on competition in Singapore;
(c) to promote and sustain competition in markets in Singapore;
(d) to promote a strong competitive culture and environment throughout the economy in Singapore;
(e) to act internationally as the national body representative of Singapore in respect of competition matters; and
(f) to advise the Government or other public authority on national needs and policies in respect of competition matters generally.

The CCS has two functional groups beneath it, namely the Policy and Economic Analysis (PEA) Group and the Legal and Enforcement (LE) Group. The former establishes the policy framework and guidelines in implementing the Act; undertakes economic analysis and conducts market studies, and investigates and evaluates the economic merits of competition cases. The latter undertakes legal analyses, reviews and prepares all the legal documentation needed in the course of the CCS's work, and represents the CCS in appeal and legal cases.

Specifically in relation to mergers, the CCS may review a merger either on the basis of an application for decision by a party to a merger or on its own motion, where it decides to investigate a merger. This is further explained in part 3 below.

2.2. The Competition Appeal Board

Under section 72 of the Competition Act, the Competition Appeal Board, consisting of members appointed by the Minister for Trade and Industry, has exclusive jurisdiction to hear appeals against any appealable decision made by the CCS.

2.3. The Minister for Trade and Industry

The Minister for Trade and Industry, under whose Ministry the administration of the Act falls, has various powers under the Act. Specifically, in relation to mergers, the Minister has the exclusive power to exempt a merger from the section 54 prohibition on the ground of public interest considerations.

The Minister's power of exemption is usually triggered by an appeal from a decision of the CCS that section 54 of the Act has been infringed.

3. Notification requirements and procedures

3.1. Notifiable mergers

All amalgamations between companies that fall within the definition of mergers can be notified. Additionally, anticipated mergers can also be notified to the CCS by the parties thereto. An anticipated merger is defined as "an arrangement that is in progress or contemplation that, if carried into effect, will result in the occurrence of a merger". However, only anticipated mergers that are no longer confidential are eligible for notification to the CCS for a decision.

The CCS is also empowered to investigate mergers that have not been notified, where there are reasonable grounds to suspect that the merger is likely to lead to a substantial lessening of competition in a market in Singapore. In this regard, the CCS Guidelines on Merger Procedures provide that the CCS is unlikely to intervene in a merger situation which falls below the following thresholds:

(a) the merged entity will have a market share of 40%; or
(b) the merged entity will have a market share of between 20% and 40%, and the post-merger combined market share of the three largest firms ("CR3") is 70% or more.

3.2. Voluntary notification and self-assessment

The merger notification regime under the Act is voluntary. As such, there is no requirement for a party to notify a merger to the CCS under the Competition Act. As a consequence, it is up to the merging parties to assess their proposed merger transaction and to decide for themselves whether the merger is likely to lead to a substantial lessening of competition in one or more markets in Singapore; where this is likely to be the case, the parties must notify the CCS. If they take the view that it is not likely, however, no notification is necessary. In short, as there is no requirement to obtain clearance for mergers, merging parties do not need any approval by the CCS prior to implementing their merger operation and can, therefore, effect the merger at their earliest convenience.

Sections 56 to 58 of the Act provide for merging parties to consult with the CCS and file an application to obtain a decision by the CCS that their merger transaction in its current form does not, in fact, raise competition issues. This covers both anticipated mergers and completed mergers.

The procedure for applying to the CCS and the review process is detailed in the CCS Guidelines on Merger Procedures. The merger review process is discussed below in part 6.

3.3. Pre-notification discussion

Parties considering filing a merger notification for decision can engage the CCS in pre-notification discussions (PND) to help identify potential competition concerns and to identify information to be submitted as part of a formal notification. A PND will also enable the CCS to complete an assessment of the merger situation more expeditiously.

The PND process involves the submission of a written request by merging parties for PND, which, if acceded to by the CCS (where there are perceived competition concerns or issues requiring clarification), must be followed by submission of a draft application form (Form M1) to the CCS at least five (5) working days before the date fixed for the pre-notification discussions.

Any request for PND that is submitted must provide sufficient information to show the good faith of the parties that they do intend to proceed with the merger. This is borne out by the fact that the parties have submitted or are in the process of submitting within the stipulated deadline a Form M1.

Pre-notification discussions are confidential and the indications the CCS may give on the potential competition concerns arising from the merger are not legally binding on the CCS. Practically, the PND is intended to guide the parties and could aid in reducing the timeline for a final decision once the merger becomes public and a formal notification is made to the CCS. This is because the key issues pertaining to the merger would have been identified and steps taken to resolve them.

3.4. Formal notification: information required

Parties to a merger that choose to notify their merger and apply for a decision by the CCS must submit their notification using prescribed forms. An application for decision will be deemed to have been made only after the CCS has determined that the relevant Form is complete, accompanied by the relevant supporting documents and the appropriate fees.

There are two forms appended to the CCS Guidelines on Merger Procedures, Form M1 and Form M2. Form M1 requires general information on the parties, their representatives, the group to which they belong, the nature and a brief description of the merger as well as information on the reportable markets. Form M2 requires a full description of the reportable market(s), i.e. their size, breakdown of market shares held by competitors, structure of both supply and demand in the market, etc., and the other markets in which the notified merger may have a significant impact. Only Form M1 must be submitted at the commencement of the procedure.

Parties to a merger that choose to notify their operation to the CCS have an obligation to provide the CCS with accurate information. Any material change in relation to the information previously provided must be transmitted to the CCS at once. Under section 77 of the Act, any person who, knowingly or recklessly, provides false or misleading information to the CCS may be found guilty of an offence. Breaching this provision can lead to either a financial penalty or imprisonment.

3.5. Transparent procedures

The Procedure Guidelines seek to provide as much transparency as possible in relation to applications made to the CCS in relation to a merger.

In this regard, the CCS makes it clear that a public version (i.e., with confidential information highlighted by the parties carved out) of the application Forms M1 and M2 and any accompanying documents furnished by the Applicants to the CCS, as well as any correspondence sent to the CCS, may be published in the public register, on the CCS's website.

This desire for transparency also applies to third parties. Comments submitted to the CCS by interested third parties once the application is made public may also be published in the CCS public register.

The same degree of transparency applies to complaints in relation to merger notifications lodged with the CCS. The Procedure Guidelines provide that the public version of the complaint and any accompanying documents may be shared with the parties against whom the complaint is made or other third parties.

3.6. Confidentiality of information

As each and any document, including notification form(s), provided to the CCS may be made public, the CCS requires that the notifying parties, from the inception of the procedure, lodge both a confidential and a public version of the documents. Further, those notifying are requested to provide "a separate annex to the public version of each Form or document, identifying the confidential information and furnishing reasons as to why the information should be treated as confidential". This will require the relevant party(ies) to exercise careful scrutiny over their documents. Given the volume of documents that could be involved, notifying parties must ensure that they plan carefully ahead and set aside sufficient time.

To illustrate, Form M1 provides that supporting documents that have to be provided include "copies of all analyses, reports, studies, surveys, and any comparable documents prepared by or for any member(s) of the board of directors (or equivalent) or other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting, for the purpose of assessing or analysing the merger with respect to market shares, competitive conditions, competitors (actual and potential), the rationale of the merger, potential for sales growth or expansion into other product or geographic markets, and/or general market conditions".

Purging these documents of confidential information and, further, drafting a written submission explaining why such information should be treated as confidential is onerous and time-consuming. It is, however, a necessary exercise.[1]

If the CCS disagrees with the views of the relevant party(ies) that certain information shall be regarded as confidential, it will ask such party(ies) to re-submit a public version of the relevant Form or document including the relevant information, within a prescribed time-limit. If the party(ies) in question do not accede to the CCS's request, the CCS may deal with the notification by not giving a decision.

Even in the case where the CCS allows any information to be treated as confidential, the Procedure Guidelines provide that the CCS "may at any subsequent point in time require the Applicant to re-submit the public version of the relevant Form, document or correspondence with that information included", which means that the CCS has the ability to review its agreement to treat information as confidential.

There does not appear to be any appeal possible against the CCS's refusal to treat certain information as confidential.

4. Substantive assessment and test

4.1. Substantial lessening of competition (SLC)

4.1.1. Substantive assessment

Under section 54 of the Competition Act, only mergers that may, or do, result in a substantial lessening of competition (SLC) within any market in Singapore are prohibited.

1 For comparison purposes, such an exercise is also necessary when notifications under sections 34 and 47 are made. However, the time provided under those sections is not as pressing.

4.1.2. Application of the SLC test: identifying the proper counterfactual

In applying the SLC test, the CCS evaluates what would be the situation of competition in the defined market(s) in the future, with and without the merger. The situation of competition without the merger is termed the "counterfactual".

Whilst in most cases the counterfactual will be the prevailing conditions of competition, the CCS will also take into account foreseeable changes in the structure of competition, such as the imminent entry into, or exit from, the market of another competitor or changes in the regulatory structure of the market.

4.1.3. Indicative thresholds

The CCS Guidelines on Merger Procedures provide that the CCS is unlikely to intervene in and therefore object to a merger situation which falls below the following indicative thresholds where:

(a) the merged entity will have a market share of 40%; or
(b) the merged entity will have a market share of between 20% and 40%, and the post-merger combined market share of the three largest firms ("CR3") is 70% or more.

4.1.4. Test is really about market power

The CCS Guidelines on Substantive Assessment provide that in determining the position of an entity in the market, the CCS will look at the following key factors:

(a) the market power of the merged entity;
(b) the market share of the entity; and
(c) the degree and level of concentration in the market.

4.2. Market definition

A preliminary step to applying the SLC test is determining the relevant market. How the market is defined is a critical element in determining whether the merger will result in anti-competitiveness and so should be disallowed. Where the market is defined too narrowly, the likelihood of the entity having market power increases. With this, the potential for SLC also increases. However, if the market is defined widely, then there are likely to be more players and the market power of the entity is correspondingly reduced.

The definition of the market is set out in the CCS Guideline on Market Definition. For the purpose of defining both the product market and the geographic market, the CCS essentially uses the hypothetical monopolist test, or SSNIP test, i.e. whether a significant number of buyers will switch to other products (or area when defining the geographic market) if the price of the focal product is raised by 10% above the competitive price. The market is widened until the point is reached where most of the buyers will not switch to other products (or areas) in response to a small but significant increase in the price.

The markets that one has to look at on which the merger may have a significant impact are categorized by the CCS as being:

(a) the "reportable markets", i.e. "all relevant product and geographic markets as well as plausible alternative relevant product and geographic markets"; and
(b) the "other markets", being markets where:
    (i) one of the merging parties has a market share larger than 20% and another party is a potential competitor in that market;

(ii) one of the merging parties has a market share larger than 20% and another party holds important intellectual property rights concerning that market; or
(iii) one of the merging parties is present in a product market, which is a neighbouring market closely related to a product market in which another party is engaged, and the individual or combined market shares of the parties in any one of these markets is 20% or more.

4.3. Timeframe

The merger review is in two phases. For mergers that do not raise substantive competition issues, the CCS will issue a favourable decision at the end of Phase I. Conversely, mergers that appear to pose significant competition concerns will be transferred to a Phase II review.

The CCS will aim to complete the Phase I review within 30 working days, commencing from the date when the notification in the format of Form 1 is complete and the notification fee is paid to the CCS. The indicative timeframe for a Phase II review is 120 working days, commencing from the day the CCS receives a complete Form M2 and the relevant fee is paid to the CCS.

The timeframe mentioned in the previous paragraph is indicative only and the CCS has the power to "stop the clock" in cases where the parties to the merger are requested to provide additional information or where the parties offer commitments to the CCS in order to remedy the competition concerns that may arise from the merger. In this latter case, the timeframe for the merger review will be stopped for the period necessary for the parties and the CCS to negotiate the commitments, until the CCS accepts those commitments.

The review starts with the publication of a summary of the application on the CCS's public register and the invitation to interested third parties to submit comments within 10 working days from the publication.

4.4. Merger assessment

Once the reportable markets (and other markets as the case may be) are defined, the analysis starts with the consideration of both the market power of the parties to the merger and the concentration and structure of the market(s).

Indicative thresholds that would point to the likely occurrence of an SLC have been set out as follows:

(i) the merged entity will have a market share of 40% or more; or
(ii) the merged entity will have a market share of between 20% and 40%, and the post-merger combined market share of the three largest firms ("CR3") in the market is 70% or more.

4.5. Assessment of the immediate competitive effects of the merger

The merger assessment takes into account both the non-coordinated effects and the coordinated effects of the merger.

4.5.1. Non-coordinated effects of the merger

Non-coordinated effects may arise when the loss of competition between parties to a (horizontal) merger provides to the merged entity the ability to raise prices or reduce output or quality. This may occur in cases where there is a small number of players in the market, where the merging firms have substantial market shares, are close competitors, etc.

When assessing a vertical merger, regard will be had to the ability for the merged entity to foreclose access to competitors either in an upstream market for selling inputs or at a downstream level for distribution or marketing of the product. The CCS Guidelines stress that vertical mergers are unlikely to lead to an SLC unless one of the parties to the merger has market power or the merged entity gains market power as a result of the merger.

Finally, conglomerate mergers, i.e. mergers involving firms active in different markets which are not vertically related, may, in rare instances, lead to an SLC where one of the merger parties already has market power, and the merger results in market foreclosure by making anti-competitive conduct, such as tying/bundling, more likely.

4.5.2. Coordinated effects

In the case of a horizontal merger, coordinated effects relate to the post-merger increased ability of the remaining competitors in the market to coordinate their behaviour in the market, either expressly or even tacitly.

This assumes that the remaining firms are indeed able to align their conduct in the market, which will imply a limited number of market participants, transparency of the market, homogeneity of the product and that the remaining firms have an incentive to join the alignment, i.e. that deviation from agreed conduct amongst the competitors can be easily monitored and retaliated against and that the potential for new competitors to enter the market is low.

4.6. Examining other competitive constraints

Whilst a merger may lessen competition by resulting in non-coordinated and/or coordinated effects, existing competitive constraints may offset the competition issues identified.

In this regard, the CCS Guidelines on Substantive Assessment provide various examples of factors that could offset competition, including:

(a) the entry of new competitors or expansion by existing competitors;
(b) the constraint on the ability of an entity to raise its prices by the existence of the countervailing power of buyers;
(c) the creation of efficiencies resulting from the merger that could increase rivalry between the remaining firms in the market;
(d) the fact that one of the entities to the merger is genuinely failing and will exit the market but for the merger.

The CCS will also give regard to defences put forward by the parties, such as the occurrence of efficiencies that would outweigh the detrimental effects of the merger.

4.7. Reviewing economic efficiencies

The Act excludes mergers where the economic efficiencies arising from the merger outweigh the adverse effects arising as a consequence of a substantial lessening of competition. The CCS Guidelines on Substantive Assessment provide illustrations as guidance regarding when economic efficiencies may be established. These include:

(a) where the merger has scope for or clearly will result in large cost savings through a reduction in the costs of production;

(b) where the merger facilitates innovation through R&D that can only be achieved through a certain critical mass, especially where larger fixed and sunk costs are involved; and
(c) where the merger results in greater choice or higher quality.

5. Final orders and sanctions by authority(ies)

5.1. Conclusion of CCS review

At the end of the Phase I review, the CCS will either:

(a) make a favourable decision (with or without legally binding commitments by the merging parties); or
(b) make a decision to open a Phase II review. This decision will be notified to the merger parties stating the reasons why the CCS finds it necessary to proceed to Phase II. The merging parties will also be requested to provide the CCS with a complete Form M2.

At the end of the Phase II review, the CCS will either:

(a) make a favourable decision (with or without legally binding commitments by the merging parties), or
(b) make an unfavourable decision and issue all appropriate directions to remedy the competition concerns identified, including unwinding of the merger or imposing divestiture where necessary.

5.2. Favourable decisions

Once the CCS has made a favourable decision that the merger does not, or is not likely to, result in an SLC, and thus does not infringe the section 54 prohibition, it will normally not take further action with respect to the merger.

However, the CCS may take further action and even revoke its decision where:

(a) the information on which it based its decision was incomplete, false or misleading in a material particular; or
(b) a party to a commitment has failed to adhere to one or more of the terms of the commitment.

5.3. Unfavourable decisions

If the CCS concludes that a merger situation has resulted, or may be expected to result, in an SLC, the CCS may give such directions as it considers appropriate for the purpose of remedying, mitigating or preventing the substantial lessening of competition.

The CCS may make a direction under section 69(2) of the Act to require that the merger situation be not further proceeded with, or be dissolved or modified in such manner as the CCS may direct. This may include requiring any party involved in the merger to give commitments to do one of the following:

(a) enter into such legally enforceable agreements as may be specified by the CCS and designed to prevent or lessen the anti-competitive effects which have arisen;
(b) dispose of such operations, assets or shares of such undertaking in such manner as may be specified by the CCS;

(c) pay to the CCS such financial penalty as the CCS may determine; or
(d) provide a performance bond, guarantee or other form of security on such terms and conditions as the CCS may determine.

5.4. Powers of the CCS

5.4.1. Wide-ranging powers

Apart from its authority to make decisions on merger situations, the CCS has very wide-ranging powers at its disposal. These powers include the following:

(a) Request for additional information
The CCS has the right at any point in time to request additional information from the merging parties. In such a case, the "clock" will be stopped, i.e. the 30/120 days period, as the case may be, will be suspended until the parties submit the additional information requested. The CCS also has the power to request additional information or documents from third parties as it may deem fit.

More importantly, the CCS is empowered to require any person to produce documents or provide information to the CCS for the purpose of conducting market inquiries or applications for decision. Failure by a person to provide information or the deliberate destruction or falsification of a document requested by the CCS constitutes an offence, punishable with a fine up to S$10,000 and/or imprisonment for a term not exceeding 12 months.

(b) Imposition of interim measures
Merging parties can, at their own risk, proceed with an anticipated merger or further effect a merger while a notification or investigation is pending the CCS's decision. However, the Act empowers the CCS to make interim directions to prevent parties from taking actions that would prejudice the consideration of the merger or to impose directions or remedies to address the anti-competitive effect of the merger. This is on the basis that the CCS has reasonable grounds to suspect that a merger is anti-competitive. As a matter of urgency, the CCS can also take immediate action to prevent serious irreversible damage or protect the public interest.

(c) Acceptance of commitments
Sections 60A and 60B of the Competition Act empower the CCS to accept commitments by the merging parties that will remedy identified competition concerns, and these shall form part of the CCS's favourable decision. Commitments refer to proposals offered by the parties to the CCS to modify their operation, for example by divesting a business or assets. The CCS also has the powers to accept variations, substitution, release and enforcement of such commitments. However, any non-compliance with the commitments by the merger parties may lead the CCS to revoke its favourable decision.

5.4.2. Investigation of mergers by the CCS

Under section 62 of the Competition Act, the CCS is entitled to conduct an investigation if there are reasonable grounds for suspecting that the section 54 prohibition will be infringed by an anticipated merger or has been infringed by a completed merger.

A merger investigation can be initiated following a complaint by third parties or at the CCS's own initiative. A complaint form has been established by the CCS, which complainants are strongly advised to use.

The CCS has wide investigative powers. It is entitled to request any person to produce documents or provide information, to enter and search premises with a warrant or enter premises without a warrant.

6. Appeal and judicial review

Any decision made by the CCS in relation to a merger, including directions imposing interim measures, are appealable, and in general are dealt with under Part IV of the Competition Act.

The notice of appeal shall be lodged within two months of the date on which the appellant was notified of the contested decision.

7. Enforcement by private parties

Once the CCS has made an unfavourable decision, and in the event the decision is subject to an appeal, upon expiry of the appeal period or upon determination of the appeal, third parties that have suffered a loss or damage as a result of the merger can commence a civil action seeking relief against the undertakings that have violated the section 54 prohibition.

8. Mergers in specific sectors

The CCS does not have exclusive jurisdiction in relation to mergers occurring in every sector of the economy. Section 55 of the Act provides that the merger prohibition in section 54 does not apply to mergers specified in the Fourth Schedule to the Act, i.e. to any mergers:

(a) approved by any Minister or regulatory authority (other than the Commission) pursuant to any requirement for such approval imposed by any written law;
(b) approved by the Monetary Authority of Singapore established under section 3 of the Monetary Authority of Singapore Act (Cap. 186) pursuant to any requirement for such approval imposed under any written law; or
(c) under the jurisdiction of any regulatory authority (other than the Commission) under any written law relating to competition, or code of practice relating to competition issued under any written law.

Mergers involving any undertaking relating to any specified activity as defined in paragraph 6(2) of the Third Schedule are also excluded. Such activities include:

(a) the supply of ordinary letter and postcard services,
(b) the supply of piped potable water,
(c) the supply of wastewater management services,
(d) the supply of scheduled bus services and of rail services, and
(e) cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act (Cap. 170A).

Finally, the following activities involving change of control are also excluded from the CCS jurisdiction:

(f) merger between banks incorporated in Singapore, which are subject to the Minister for Finance's approval under the Banking Act;
(g) takeovers of insurers incorporated in Singapore, which are subject to the Monetary Authority of Singapore's approval under the Insurance Act;

(h) acquisition of substantial control of a casino operator, which is subject to the Minister for Home Affairs' approval under the Casino Control Act;
(i) mergers under the jurisdiction of sectoral regulators, such as the Infocomm Development Authority of Singapore, the Media Development Authority or the Maritime and Port Authority.

9. Cooperation with other competition authorities

Section 88 of the Act enables the CCS to enter into agreements with foreign competition bodies where each party to the arrangements may:

(a) furnish to the other party information in its possession if the information is required by that other party for the purpose of performance by it of any of its functions; and
(b) provide such other assistance to the other party as will facilitate the performance by that other party of any of its functions.

According to subsection 4 of section 88, a foreign competition body refers to "a person in whom there are vested functions under the law of another country or territory with respect to the enforcement or the administration of provisions of law of that country or territory concerning competition between undertakings (whether in a particular sector of the economy of that country or territory or throughout that economy generally)".

Spain

Cani Fernández and Andrew Ward

Cuatrecasas, Madrid and Brussels[1]

See Merger Control Worldwide Vol. 2, Chapter 51, pp. 1114–1156

1. Relevant legislation and statutory standards

On 5 July 2007 the Spanish parliament enacted a new Defence of Competition Act 2007 (the "Act") which entered into force on 1 September 2007.[2] The Act, which replaces the much-amended 1989 Act,[3] contains several potentially important reforms of the Spanish merger control rules, which are described below.[4]

The Act is to be implemented through a Royal Decree in the coming months, although at the time of writing the implementing legislation in force is still the legislation applicable under the previous legislation (specifically, Royal Decree 1443/2001).[5] As such, the account provided below should be verified against the actual provisions of the final implementing legislation.

1.1. Greater independence in decision-making

The Act makes fundamental changes to the decision-making bodies and enforcement authorities by combining previously separate authorities and minimising the role of the Government.

Under the 1989 Act, decision-making powers were shared between the Competition Service (the "Servicio de Defensa de Competencia" or "SDC"), the Minister of the Economy (the "Minister"), and the Government (the "Consejo de Ministros" or "Council of Ministers"), while investigative and enforcement functions were shared by the SDC and a Competition Tribunal (the "Tribunal de Defensa de Competencia" or "TDC"). Under the new Act, however, the Competition Service and the Competition Tribunal have been merged within a single, independent and autonomous National Competition Commission (the "Comisión Nacional de Competencia" or "CNC") that in turn incorporates an Investigation Directorate and a decision-making Council.

One result of this reform would be to make decision-making in the merger control process more independent of the Government. Specifically, the first-phase decision on merger notifications would no longer be the responsibility of the Minister of the Economy or the Competition Service, an administrative body within the Ministry for the Economy. Moreover,

1 The authors would also like to thank the other members of the Cuatrecasas competition team in Madrid who contributed to the present work. In particular, special thanks are due to Carmen Hernández Saseta, Alfonso Muñiz Vigil and Pablo Lavandeira Suárez.

2 *Ley 15/2007 de Defensa de la Competencia*, of 3 July (BOE, 4 July 2007). The text is provided on the web-page of the Comisión Nacional de Competencia.

3 *Ley 16/1989 de Defensa de la Competencia*, of 17 July (BOE, 18 July 1989).

4 The new Act's provisions are not numbered so as to coincide with those of the 1989 Act – and as such even where provisions are unchanged or very similar, caution should be exercised when relying on references in previously published works.

5 *Real Decreto 1443/2001*, of 21 December (BOE, 18 January 2002).

under the Act the CNC (and not the Government) will adopt the final decision on a notified transaction, applying competition-law criteria, subject only to a narrowly circumscribed power of veto.

1.2. Changes to decision-making bodies and enforcement authorities

Under the Act, decision-making powers are vested in the CNC, subject only to certain specific powers retained by the Government to veto decisions prohibiting and imposing conditions on transactions.

The CNC is an administrative body attached to the Ministry for the Economy but functionally independent of the Government. It is composed of a President, who manages and represents the CNC and presides over the Council, a Directorate of Investigation ("Dirección de Investigación", or "DoI") and the Council of the CNC (el "Consejo de la Comisión Nacional de Competencia" or the "Council").[6]

The Directorate of Investigation is staffed by civil servants specialising in competition law matters (many of them former members of the SDC and staff of the TDC) under a Director General who is appointed by the Government.[7] It is responsible, in general terms, for the investigation of all concentration cases. Specifically, it:

- monitors compliance with the notification requirements of the Act, investigating non-notified transactions and if necessary requiring the notification of transactions which satisfy the thresholds;[8]
- carries out the initial review of notified concentrations and prepares a report and proposed resolution for the Council on whether to waive the suspension obligation[9] and on whether to clear the transaction in the first phase;[10]
- carries out the in-depth investigation in the second phase, including the preparation of a published summary of the transaction, coordination with other affected government bodies, the preparation of any Statement of Objections, and the preparation of a proposed resolution in the second phase;[11] and monitors compliance with obligations imposed by the Act and implementing legislation, agreements and resolutions;[12] and
- makes proposals to the Council as to the imposition of fines for failure to comply with orders and resolutions, undertakings and conditions.[13]

All the important decisions under the Act, however, are taken by the Council. These decisions include whether to waive the suspension obligation;[14] whether a second phase should be initiated, conditions imposed or a reference made; whether to impose fines for failure to notify or to observe conditions and other obligations;[15] and, most importantly, whether a transaction should be prohibited or allowed on the basis of compromises or conditions. The Council is composed of the President of the CNC and six other members, each of whom must be a "jurist, economist or other professional of recognised prestige" appointed by the government for a period of six years.[16] Currently, the Council is made up of former members ("Vocales") of the TDC.

6 Article 20 of the Act.
7 Article 29.4 of the Act.
8 Articles 35.2 f) and 55.3 of the Act.
9 Article 9.6 of the Act.
10 Article 57.1 of the Act.
11 Article 58.4 of the Act.
12 Article 35.2 c) of the Act.
13 Article 41.2 of the Act.
14 Article 34.1 d) of the Act.
15 Article 34.1 b) of the Act.
16 Article 29 of the Act.

Finally, the role of the Minister and Council of Ministers is limited under the Act. In the case of a decision prohibiting a transaction or authorising a transaction on the basis of conditions, the Minister may decide to refer the decision to the Council of Ministers,[17] which may confirm the CNC decision but also has a limited power to authorise a prohibited transaction with or without conditions or to vary the conditions imposed.[18]

1.3. "Cooperative" full function joint ventures to be notified as concentrations under the merger control rules

Previously Spanish merger control maintained a distinction between "cooperative" and "concentrative" full function joint ventures of the kind that appeared in the original text of the old EC Merger Control Regulation, Regulation No. 4064/89, but which was subsequently abandoned following the adoption of amending Regulation No. 1310/97. Under the Spanish regime, concentrative full function joint ventures were notifiable under the merger control rules, while cooperative full function joint ventures had to be notified as an agreement between competitors.

In order to bring Spanish rules into line with those at the EC level, the Act abandons this distinction so that all full function joint ventures, including those giving rise to coordination between the parents of the joint venture, will amount to concentrations for the purposes of the merger control rules.

1.4. Modification of the thresholds for notification

Despite initial suggestions that the market share threshold set out in the current Article 14(1)(a) of the LDC would be removed, the concept is maintained in the Act, although the threshold itself is increased from 25% to 30%.

1.5. Changes to the duration of investigations

Although the time periods for investigations have nominally remained the same, changes contained in the Act (and other changes in the practice of the CNC) will result in investigations of longer and less certain duration, for a number of reasons:

First, and although there is currently no legal requirement to do so, the CNC has started recommending that merging parties engage in pre-notification contacts with it in order to ensure that the notification and accompanying documents prepared are complete – in particular in transactions which do not raise serious issues and for which it may be possible to dispense with certain of the requirements of the notification form.[19] Although there is no direct experience of this process yet, it is likely to extend the effective duration of proceedings by at least two weeks.

Secondly, the Act introduces the possibility of negotiated remedies in the first and second phases. Should the parties wish to adopt this possibility, the one-month period in the first phase is extended by ten days[20] and the two-month period in the second phase is extended by fifteen days.[21]

17 Article 58.6 of the Act.

18 Article 60.3 of the Act.

19 Although there is currently no legal requirement to engage in pre-notification requirements we cannot exclude that such a requirement might be introduced as part of the implementing legislation in the coming months.

20 Article 59.2 of the Act.

21 Article 59.2 of the Act.

Thirdly, in the case that the CNC's report is a prohibition or imposes conditions, the Minister and Government have periods of fifteen days[22] and one month,[23] respectively, in which to vary the decision (previously, the Government had a single period of one month).

Finally, and most importantly, the new Act substantially increases the circumstances in which the CNC may "stop the clock" and thus effectively extend the investigation. Specifically, it will now be possible to extend both the first and second phases; previously, it was only possible to extend the first phase. Furthermore, whereas previously it was only possible to extend the period if the parties failed to provide information or documents specified in the notification form, under the new Act the time periods will be automatically suspended if the CNC requests information from the parties in relation to the concentration or requests a report on the transaction from a sectoral regulator or regional authority and may also be suspended by reasoned decision:

- if it is necessary to request any interested party (including third parties and public bodies) to complete information or supply documents or evidence;
- if it is necessary to cooperate or coordinate with the European Commission or the authorities of other EC Member States; and
- if a decision of the DoI is appealed under Article 47 of the Act or by means of judicial review.[24]

1.6. Lifting of the suspension obligation at any time

Although it was always possible to apply for a lifting of the suspension obligation under the 1989 Act, this was previously only possible at the end of the first phase. Under Article 9(6) of the Act, however, the CNC may lift the suspension obligation at any stage of the procedure.

1.7. Special arrangements for takeover bids

Special arrangements will apply to takeover bids. First, parties will be required to notify public offers for shares that satisfy the notification thresholds to the CNC within 5 days of their application to the CNMV for authorisation of the prospectus.[25] Provided that is done, however, the parties will be allowed to proceed with the offer without prior authorisation or the lifting of the suspension, although they will not be able to exercise the voting rights until the transaction is cleared, except to maintain the full value of its investments on the basis of a derogation granted by the CNC.[26]

1.8. Short form notifications

The Act provides for notification on "short form", a mechanism similar to the EC's simplified procedure, for non-problematic transactions. In this regard, the details of the simplified procedure and the short form notification are not yet known and will be set out in the implementing legislation expected in the coming months.

However, according to the preliminary indications of the CNC, concentrations will likely be notifiable under the short form in the following situations:

- none of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (no horizontal overlap), or in a market which

22 Article 36.3 of the Act.
23 Article 38.4 of the Act.
24 Article 37.2 of the Act.
25 Article 9.3 a) of the Act.
26 Article 9.3 b) of the Act.

is upstream or downstream of a market in which another party to the concentration is engaged (no vertical relationship);
- the parties' participation in the markets is of minor importance such that it is not likely significantly to affect competition;[27]
- a party is to acquire sole control of an undertaking over which it already has joint control; or
- the transaction concerns a joint venture that is not active in Spain and which has no plans to establish a presence in Spain.[28]

Pending the introduction of the implementing legislation, parties are advised to consult with the CNC in order to agree dispensations from the notification form on an informal basis as part of pre-notification contacts.[29] It is worth noting here that the Act has introduced a reduced fee of €1,500 for the transactions notified under the short form.

1.9. Formal procedure for first phase and second phase commitments

Under the old Law, notified transactions were authorised on the basis of conditions only at the end of the second phase and only on the basis of conditions fixed by the Government without consultation with the parties.[30]

The new Act establishes that the parties may submit remedies in the form of compromises in the first or second phase. In this regard, the Act does not establish a time limit or formal requirements for the submission of remedies (although these may be introduced in the implementing legislation).

However, the Act does provide that any remedies proposed will have the effect of extending the time periods for the investigation (by ten days in the first phase and fifteen days in the second phase, respectively). Moreover, the Act establishes that proposed remedies may be the subject of market testing, which will presumably be accompanied by a decision further suspending the time periods for the investigation.[31]

As such, the duration of proceedings in cases where remedies are proposed is expected to be significantly longer than in other cases. More importantly, and although the introduction of negotiated remedies in the second phase is broadly welcome, doubts have been expressed as to whether first phase compromises are really necessary: it has been noted that relatively few cases have been referred for second phase investigation while a previous formal procedure for first phase compromises was never used.

1.10. Express recognition of efficiencies as a possible justification

The Act introduces slight adjustments to the substantive test used in merger assessment, and specifically so as to allow account to be taken of any efficiencies achieved as a

27 According to Point 4 of the Provisional Guidelines for the notification of concentrations according to the Act (*Indicaciones Provisionales para la tramitación de las notificaciones de operaciones de concentración económica de acuerdo con la Ley 15/2007, de 3 de Julio, de Defensa de la Competencia*, BOE, 4 July 2007), the concept of "participation of minor importance" applies when (i) the parties to the concentration do not hold a combined market share higher than 15% in any product market in Spain, or (ii) the parties to the concentration hold an individual or combined market share of less than 25% in a vertically related product market where at least one of the parties is active in any market in Spain.

28 Article 56.1 of the Act. Note that it refers to an open list of possible situations.

29 Point 4 of the Provisional Guidelines for the notification of concentrations according to the Act. See also above.

30 A procedure for clearance on the basis of compromises offered by the parties at the end of the first phase had never been used due to its complexity and the long delays implied by the procedure.

31 Article 59.2 of the Act.

result of the relevant concentration, provided that the envisaged efficiencies are quantifiable and benefit consumers through a price reduction or quality improvement.

1.11. Strengthened role for third parties

The Act proposes strengthening the role of third parties in the investigation, including allowing the national Competition Council to use European Commission-style market testing and information requests during the first phase. Importantly, such information requests may have the effect of suspending the time-period for the CNC's investigation.

2. Prohibitions recommended by the TDC

The TDC has recommended the prohibition of two recent transactions, taking the total of such decisions by the TDC to 11, in 100 second phase investigations (or 11%). In one of those cases, *Gas Natural/Endesa*, however, the Council of Ministers decided not to prohibit the transaction, which was instead authorised with extensive conditions: the sixth occasion this has happened.

Telefónica v. *Iberbanda*[32] involved the attempted acquisition of Iberbanda, a provider of global communication services including high speed internet access through LMDS technology, by Telefónica, the leading company in almost all the telecommunications markets in Spain. The TDC considered that the acquisition was going to reinforce Telefónica's position, particularly in the market of wholesale and retail internet access services, since Iberbanda was one of the three operators which had obtained an access licence in 2000 to develop the LMDS technology (Local Multipoint Distribution System or wireless technology) which was expected to have a significant potential impact in the immediate future of the internet services markets. Therefore, taking into account the barriers to entry in the internet services market (administrative licences) and the leading position of Telefónica, the TDC found that the transaction could hinder the maintenance of effective competition on the market and prohibited the transaction.

Gas Natural v. *Endesa*[33] involved the acquisition of the Spanish company Endesa, primarily active in the electricity sector, by Gas Natural, a leading Spanish gas company, by means of a public offer. In its substantive assessment, the TDC defined separate product markets for electricity and natural gas, including separate markets for the acquisition and importation, transport, distribution and supply of natural gas, and the generation, transport, distribution and commercialisation of electricity, respectively. On that basis, according to the TDC's calculations, the parties would have combined market shares of 68% in acquisition of natural gas, between 90 and 100% in distribution of natural gas, around 60% in natural gas supply to final customers, around 42% in the electricity generation (wholesale) market, around 99% of some electricity distribution markets and very high market shares in the rest of the relevant markets. The TDC also found that there was a high level of concentration in the affected markets, that barriers to entry in the affected markets were high and that effective competition was weak. Accordingly, and taking into account the (albeit limited) overlaps between the parties' operations in most of the markets affected, the TDC concluded (by a six:three majority vote) that the transaction should be prohibited.

32 C93/05, *Telefónica/Iberbanda*.
33 C94/05 *Gas Natural/Endesa*.

3. Assessment by the Council of Ministers: *Gas Natural/Endesa*

In a reasoned decision published on 4 February 2006 the Council of Ministers decided to authorise, subject to conditions, Gas Natural's proposed acquisition of Endesa.

The decision was one of the most high-profile cases of recent years: Gas Natural's takeover bid for Endesa had been the subject of intense political and public debate and had given rise to numerous disputes before Spanish and Community courts, regulators and authorities. Moreover, the TDC had, in a report made public prior to the Council of Ministers' decision, recommended the prohibition of the transaction.

Nevertheless, the Council of Ministers authorised the transaction on the basis of a series of conditions, including requirements that Gas Natural:

- auction natural gas to third parties on an annual basis,
- make available excess capacity in Liquefied Natural Gas ("LNG") installations for the importation of gas,
- divest its shareholdings in infrastructure businessses (*inter alia*, reducing its participation in the national network operator to 1%),
- divest electricity generation plants with a total power capacity of 4,300 MW and not acquire new plants for a two-year period,
- allow clients purchasing gas for combined cycle electricity generation to freely rescind their contracts,
- divest a business equivalent in scale to its or Endesa's existing electricity marketing businessss,
- divest any cross shareholdings in competing undertakings,
- facilitate competition by independent undertakings in areas where Gas Natural would distribute both natural gas and electricity following the transaction, and
- provide for a clear separation between its businesses related to regulated and non-regulated activities.

4. Appeal and judicial review: *Gas Natural/Endesa*

The *Gas Natural/Endesa* case also resulted in an appeal by Endesa to the Spanish Supreme Court against the conditional clearance decision made by the Council of Ministers. At the time of writing, the final result of the appeal is not known although, in any event, Gas Natural decided to withdraw its offer.

As part of its appeal, however, Endesa requested interim measures consisting of the suspension of the authorisation decision (and thus, the temporary suspension of the transaction) and, on 28 April 2006, a plenary sitting of the administrative division of the Supreme Court voted in favour of granting the interim measures, subject to the provision by Endesa of a guarantee of €1 billion (which was subsequently provided). In this regard, the Supreme Court based its decision on the potential "harm" to Endesa as a result of the clearance decision's "irreversible consequences" for the company, notwithstanding the fact that the European Court of First Instance had earlier rejected a similar challenge on precisely those grounds. The interim measures decision is itself subject to appeal (to the same Chamber of the Supreme Court) and a further decision is expected in the coming months.

5. Enforcement by private parties: *Gas Natural/Endesa*

Finally, and in addition to the appeal to the Supreme Court of the Council of Ministers' decision to clear the transaction on conditions, on 25 November 2005 Endesa launched an action against Gas Natural and Iberdrola in the Madrid Commercial Court, alleging the existence of a joint strategy between Iberdrola and Gas Natural to, *inter alia*, eliminate Endesa as a competitor by acquiring it and dividing its businesses between themselves. Endesa claimed the alleged joint strategy was a breach of Article 81(1) EC and requested the Court to declare it and "the instruments used to execute" it (i.e., the public takeover bid) void under Article 81(2) EC.

No decision has yet been taken in relation to the substance of Endesa's claim. In the same action, however, Endesa requested interim measures suspending the alleged joint strategy (and, as such, the transaction) pending a final decision. The Court made its order on the separate claim for interim measures on 21 March 2006.

In its decision, the Commercial Court found that the facts described by Endesa corresponded to reality and its legal arguments were, at first sight, correct, and that, absent the interim measures, it might be impossible to enforce a final judgment declaring the joint strategy to be void since the transaction might, by the time of that judgment, be irreversible. Accordingly, the Court ordered the interim suspension of the joint strategy and all related acts – and specifically, of the public takeover bid. Given the risk of harm to Gas Natural and Iberdrola's interests as a result of the interim measures, the Court conditioned their effectiveness on Endesa's providing a bank guarantee for €1 billion.

The case represents the first time that a private party has successfully applied to the courts for suspension of a merger transaction and highlights the increased confidence of the new specialist Commercial Courts in handling competition cases. The case also raises a number of interesting issues in relation to the possible residual application of Article 81 EC and its national law equivalent to cases of concentrations. However, the decision to grant those interim measures was later overturned on appeal: the Audiencia Nacional rejected the decision of the Commercial Court due to the absence of sufficient evidence of the existence of a cooperative agreement between Gas Natural and Iberdrola.

Switzerland

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See Merger Control Worldwide Vol. 2, Chapter 54, pp. 1181–1211

1. Dominant undertakings

According to Article 9(4) ACart, once the ComCo has established, in a binding and legally enforceable decision, that a specific undertaking holds a dominant position in a given market, every merger transaction involving that undertaking in the market in which it holds a dominant position or in a neighbouring market is subject to notification, irrespective of any thresholds.

In addition to the undertakings mentioned in the Switzerland chapter in the Main Work, the Swiss retail department store chain Migros has been held by the ComCo to be dominant within the meaning of Article 9(4) ACart.[1] Consequently, Migros will have to notify all future concentrations pursuant to Art. 9(4) ACart.

2. Procedure and substantive assessment

The so-called *Swissgrid* concentration clarified the scope of the right to be heard of the parties in merger situations and the substantive assessment test in Switzerland.

Swissgrid, a joint venture created by seven electricity companies, was first cleared with conditions by the ComCo.[2] The imposed conditions were notably the following: *Swissgrid* was ordered to grant third parties non-discriminatory access to its network, to refrain from trading in energy and from energy production and to maintain legal and factual independence from other Swiss electricity companies. The partnering undertakings challenged this decision in front of the Appeal Commission, which reversed the decision and cleared the concentration without any conditions.[3] First, the Appeal Commission stated that the companies partnering in *Swissgrid* were denied a constitutional right to be heard during Phase II, and that they were also denied a right to comment on the conditions imposed by the ComCo. Secondly, the Appeal Commission held that *Swissgrid* would have no negative impact upon the level of competition in its market because the market in question already lacked competition before the concentration: there is no competition in the market for power transmission in Switzerland

1 Decision of 3 September 2007 not yet published in RPW/DPC.
2 *Swissgrid AG*, RPW/DPC 2005/2, p. 347.
3 *Swissgrid AG*, RPW/DPC 2006/2, p. 310.

since electricity transmission constitutes a natural monopoly. Consequently, no competition could be eliminated through the concentration, since there was already none prior to the concentration. In addition, the Appeal Commission held that *Swissgrid* would improve Switzerland's position in the international energy markets. The ComCo unsuccessfully challenged this decision before the Swiss Supreme Court.[4] The latter, however, confirmed that the Swiss test pertaining to merger control is strict, in the sense that the concept of "creation or strengthening of a dominant position liable to eliminate effective competition" (Art. 10(2) lit.a ACart) is narrower than the threshold used in the *ex post* control of abuse of a dominant position.

Moreover, the Swiss Supreme Court confirmed the ComCo's position with respect to its power to unilaterally impose conditions, without having to show that their content is the result of any "negotiation process" or "consensus" between the undertakings and the ComCo.

3. Ancillary restraints

In two recent mergers, the ComCo clarified the rules applicable in Switzerland with respect to ancillary restraints.

In the ISS/Edelweiss[5] merger, the ComCo stated that non-compete clauses were ancillary to a merger if they were directly related and necessary to the implementation of the transaction. Pursuant to the ComCo, non-compete clauses are necessary for a concentration if their duration, subject matter and geographical field of application do not exceed what the implementation of the concentration reasonably required. In this case, the undertakings had agreed on two non-compete clauses. The first one, which was limited to Switzerland, was imposed on the seller for a duration of three years. The ComCo held that the transfer of know-how justified the duration and scope of the clause. The second one, worldwide in its scope, was imposed on the seller for five years. The ComCo stated that the duration of the non-compete clause could be justified by the specific circumstances of the case. Regarding the geographical scope, it held that it must be limited to Switzerland and the neighbouring regions abroad to constitute an ancillary restraint.

In the joint venture between Migros and AFH Angehrn concerning the Swiss retail market, the non-compete clause was concluded for a period of five years. The ComCo stated that such clause was ancillary to the merger, but left open the question whether the new practice of the EU (i.e. the validity of a non-compete clause for the duration of a joint venture) was going to be adopted in Switzerland. Therefore, it remains uncertain whether a non-compete clause for the duration of the joint venture constitutes an ancillary restraint under Swiss competition law.

4. Table of Phase II investigations

The following chart provides an update of the cases in which a Phase II investigation has been initiated and completed since June 2004:

4 *Swissgrid AG*, RPW/DPC 2007/2, p. 324.
5 *ISS / Edelweiss*, RPW/DPC 2006/4, p. 682.

Case name and reference	Cleared	Cleared with charges/conditions	Prohibited
Tamedia AG / Edipresse SA / Homegate AG RPW/DPC 2005/2, p. 312	X		
Swissgrid RPW/DPC 2005/2, p. 347		X[6]	
Zschokke Holding AG / Batigroup Holding AG RPW/DPC 2007/1, p. 101	X		
Migros / Denner AG Not yet published		X[7]	
Coop / Fust AG Decision has not yet been taken by the ComCo			

5. Appeal and judicial review

5.1. The Federal Administrative Court

With effect from 1 January 2007, the Appeal Commission for Competition Matters ("Appeal Commission") has been suppressed. As from this date, an appeal against decisions of the ComCo may be lodged before the Federal Administrative Court (Art. 33(f) of the Federal Act on the Federal Administrative Court). The appeal shall be filed within 30 days from notification (Art. 50(1) of the Federal Act on Administrative Procedure).

The grounds of appeal are the wrongful application of the law, the inexact or incomplete establishment of the facts and the inadvisability of the decision (Art. 49 of the Federal Act on Administrative Procedure). In the field of merger control, an appeal may in particular be lodged by the participating undertakings in order to challenge a decision of the ComCo prohibiting a concentration or authorising it subject to obligations and conditions. There is no possibility of appeal against the ComCo's decision to open an in-depth review of a concentration (Art. 32 ACart). Indeed, an appeal is, in principle, only possible against final decisions and not against incidental decisions, i.e. decisions rendered in relation to procedural issues in the course of the

6 The imposed conditions were notably the following: *Swissgrid* was ordered to grant third parties non-discriminatory access to its network, to refrain from trading and energy production and to maintain legal and factual independence from other Swiss electricity companies.

7 The imposed conditions were notably the following:

- Migros shall leave Denner independent in a legal, organisational and operational way.
- Migros shall not acquire another food department store in Switzerland.
- Migros shall notify all future acquisitions pursuant to Art. 9(4) of the ACart.
- Migros shall permanently waive exclusivity towards all of its product suppliers.
- Migros and Denner shall separately purchase goods which are intended for resale.
- Suppliers which on average have realised more than 30% of their turnover with Denner in 2004–2006 may continue supplying Denner to the same extent, provided the supplier delivers the products in the usual quality in the market and at a competitive price.
- Denner shall only be allowed to replace store brand suppliers by Migros industries if the latter deliver the product in similar quality at a better price. The resulting net cost reductions shall be passed on to consumers.
- In general, the charges shall be in force for seven years. Certain of these charges are not applicable to multinational companies and their subsidiaries, as well as to large Swiss companies.

procedure. An appeal is however possible against incidental decisions enumerated in Article 45 (2) of the Federal Act on Administrative Procedure, such as decisions concerning the competence of the ComCo, the refusal to give access to the file or an objection to the composition of the ComCo (should any member of the ComCo have a conflict of interest with an undertaking party to a concentration).

5.2. The Swiss Supreme Court

A decision of the Federal Administrative Court may be challenged by way of an appeal in public law matters before the Swiss Supreme Court (Arts. 82 and 86(1) of the Federal Act on the Federal Supreme Court). Such appeal may be filed within 30 days of notification of a decision of the Federal Administrative Court (Art. 100 of the Federal Act on the Federal Supreme Court).

The grounds of appeal are limited to the wrongful application of the law. The inexact or incomplete establishment of the facts may only be invoked if the facts were established in a manifestly wrongful way or in violation of the law.

6. Right of third parties to appeal against decisions of the ComCo

The Swiss Supreme Court rendered an important decision on 14 June 2005, with respect to the right of appeal of third parties.[8] According to Article 43(4) ACart, the status of party in the procedure of first instance is reserved to the undertakings taking part in the concentration and is denied to any third party. The Swiss Supreme Court decided that this provision shall be interpreted broadly, thus including the right to appeal. Consequently, the right to appeal shall also be reserved to the participating undertakings and shall be refused to any third party. Therefore, any appeal by a third party in a merger case is excluded. This decision was confirmed in a subsequent decision of 12 October 2006.[9]

The *Berner Zeitung* concentration was prohibited by the ComCo.[10] The latter held that this transaction would strengthen a dominant position liable to eliminate effective competition in the market for local newspapers in Berne.[11] This decision was then overruled by the Appeal Commission, which authorised the merger subject to commitments.[12] The Appeal Commission considered that the commitment submitted by the *Berner Zeitung* not to bid for the publication of the official gazette for the city of Berne constituted a sufficient remedy for the elimination of competition in the local market for written media. Therefore, it held that the refusal by the ComCo to take into account such commitment offered by *Berner Zeitung* infringed Article 10(2) ACart. Accordingly, it authorised the merger with the aforementioned obligation. The latter decision was recently confirmed by the Swiss Supreme Court.[13]

8 Decision of the Swiss Supreme Court of 14 June 2005 in the case *Etablissements Ed. Cherix et Filanosa SA v. Edipresse SA and Swiss Competition Commission and Appeal Commission for Competition Matters*, ATF 131 II 497.

9 Decision of the Swiss Supreme Court of 12 October 2006 in the case *Cablecom GmbH v. Swisscom Fixnet AG and CT Cinetrade AG*, 2A.161/2006, not published.

10 See the flowchart in part 4 of the Switzerland chapter in the Main Work.

11 *Berner Zeitung AG / 20 Minuten (Schweiz) AG*, RPW/DPC 2004/2, p. 529.

12 *Berner Zeitung AG, Tamedia AG / Wettbewerbskommission*, RPW/DPC 2006/2, p. 347.

13 *Wettbewerbskommission v. Berner Zeitung AG et al.*, Judgment of 22 February 2007, 2A.327/2006, RPW/DPC 2007/2, p. 331.

Taiwan

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See Merger Control Worldwide Vol. 2, Chapter 55, pp. 1212–1220

1. Relevant legislation and statutory standards

The Fair Trade Law of 1991 (FTL) and the Enforcement Rules to the FTL are the principal pieces of legislation concerning mergers and acquisitions, unfair competition and monopolies in Taiwan. The FTL and the Enforcement Rules were last amended in February 2002 and June 2002, respectively. The Guidelines for the Handling of Combination Filings were first promulgated in July 2006 (the "Guidelines"). Article 6 of the FTL places mergers and acquisitions in the broader category of "combinations of enterprises". The amendments to the FTL and its related Enforcement Rules have changed the filing process for combinations from an approval system to a notification system.

2. Decision-making bodies and enforcement authorities

At the national level, the Fair Trade Commission (FTC) is the government authority regulating mergers and other types of combinations under the FTL. The FTC is empowered to examine and investigate possible violations of the FTL and to take action against violators by imposing fines and other penalties. The FTC is also empowered to order the dissolution of any combinations that violate the provisions of the FTL. The FTC will investigate complaints against combinations that are effected without the consent of the FTC, but may also investigate matters on its own initiative.

3. Notification requirements and procedures

3.1. Combinations subject to notification in Taiwan

Transactions that fall under the broad category of "enterprise combinations" under Article 6 of the FTL and meet one of the jurisdictional thresholds set forth below must be notified to the FTC in advance. A combination under the FTL occurs when an enterprise:

- merges with another enterprise;
- holds or acquires more than one-third of the total voting shares or capital stock of another enterprise;
- accepts the transfer of or leases the whole or a substantial part of the business or properties of another enterprise;
- operates jointly with another enterprise on a regular basis or is entrusted by another enterprise with the operation of its business on its behalf; or

- directly or indirectly gains control over the business operations or the employment and dismissal of the personnel of another enterprise.

The term "enterprise" as used in the FTL means a company, sole proprietorship, partnership, trade association or any other organisation engaging in transactions through the provision of goods or services. The establishment of a joint venture company by two or more enterprises is considered to be an "enterprise combination" subject to the FTL. Hence, the jurisdictional thresholds discussed below would apply to these operations.

3.2. Jurisdictional thresholds

Article 11 of the FTL sets forth the following three jurisdictional thresholds, any one of which (subject to certain exceptions) triggers a requirement to notify the FTC before completion of a transaction:

- if, post-combination, the resulting enterprise will have a market share in Taiwan of at least one-third;
- if one of the parties to the combination has a market share in Taiwan of at least one-quarter; or
- if the volume of sales during the previous fiscal year of any enterprise that is a party to the combination exceeds a figure set by the FTC. The current sales threshold promulgated by the FTC is reached when one party to the combination has a sales volume in the immediately preceding fiscal year of at least NT$10 billion and another party to the combination has a sales volume for the same year of at least NT$1 billion; save that, if a financial institution (e.g. a bank, a securities company, an insurance company or a financial holding company) is a party to the combination, the threshold is at least NT$20 billion in sales volume in the immediately preceding fiscal year for such financial institution.

However, according to Article 11(1) of the FTL, a combination is exempt from the requirement to notify if: (i) one of the enterprises already holds fifty per cent (50%) or more of the voting shares or capital contribution of the enterprise with which it plans to combine; (ii) the enterprises are already subsidiaries of the same parent company; (iii) an enterprise plans to sell a distinct division to a newly established enterprise established solely by the former enterprise; or (iv) one of the enterprises plans to engage in a qualified stock redemption plan.

In many jurisdictions, such market share tests described above apply only to markets in which the parties to a transaction compete with each other or at least are present simultaneously. This, however, is not the case under the FTL. It is clearly the position of the FTC in its examination of notification filings that the market share thresholds do not apply only to markets in which the parties' businesses overlap.

Moreover, the FTC provides little guidance on market definition. The FTC has noted that the key factor to be considered when defining the relevant market is whether the products or services in one "market" may be substituted at roughly the same price for products or services in another "market". If such products or services are subject to a high degree of substitution, then the "markets" should be viewed as one market for the purposes of considering the notification thresholds under the FTL.

The FTC must be notified of a combination in which one of the parties has sales of at least NT$10 billion (approximately US$300 million) and another party has sales of at least NT$1 billion (approximately US$30 million). The FTC has ruled that, in respect of foreign-to-foreign combinations, this sales figure applies only to sales in Taiwan, which would include sales by Taiwan subsidiaries (including export sales from Taiwan) and export sales to Taiwan. It is significant to note that such a restriction would not apply to domestic combinations: in the case of such combinations, both domestic and export sales of domestic enterprises would be included in the calculation.

As noted above, there are three jurisdictional thresholds relating to market share and volume of sales for the previous fiscal year. Volume of sales generally refers to the total sales of an enterprise. Market share, on the other hand, is a more complicated matter. To calculate the market share of an enterprise, the FTC must first identify the "market". To do this, the FTC will consider the following factors:

- the product or service supplied by the enterprise as well as the availability of supply of that product or service and of substitutes for that product or service;
- the geographic location of the enterprise; and
- the long-term versus short-term goals of the enterprise.

After the market has been identified, the market share is calculated by a consideration of the production, sales, stock, and import and export turnover of the enterprise in relation to the total market.

3.3. The Guidelines for the handling of combination filings

The Guidelines further categorise combinations into three different types: including horizontal (where the combining enterprises engage in horizontal competition), vertical (where the combining enterprises have an upstream–downstream relationship) and conglomerate (where the combining enterprises do not engage in horizontal competition and do not have an upstream–downstream relationship).

According to the Guidelines, a general filing is required to be made to the FTC (under the foregoing thresholds) unless special thresholds are met, in which case, a simplified filing can be made. A simplified filing generally requires a shorter waiting period and the submission of less information in the notification, e.g. fewer major products, competitors and customers covered and fewer years of market and economic information covered. Articles 7 and 8 of the Guidelines provide special thresholds and exceptions relating to simplified filings. A simplified filing is permissible where (i) sales for the preceding fiscal year of the combining enterprises in the combination exceed the threshold amount (Article 11, subparagraph 3 of the FTL) and (a) the combined market share in any market in Taiwan of the enterprises participating in a horizontal combination is less than 15 per cent (provided that this excludes situations where the combined market share of the top two enterprises in a relevant market reaches two-thirds of the market, or where the combined market share of the top three enterprises in a relevant market reaches three-quarters of the market) or (b) the combined market share in individual markets of the enterprises participating in a vertical combination is less than 25 per cent; (ii) after taking into account major competition factors, the enterprises participating in a conglomerate combination are determined to be without the possibility of becoming major potential competitors; or (iii) the following controlling or affiliated enterprises change their structure (a) an enterprise participating in the combination directly holds not less than one-third, but not more than one-half of the total voting shares or total capital of, and subsequently combines with, the other enterprise, (b) an enterprise combines with a subsidiary of its subsidiary (where the enterprise directly holds not less than 50 per cent of the total voting shares or total capital of such subsidiaries) or (c) an enterprise combines with a subsidiary of another enterprise (where both enterprises are subsidiaries of the same parent enterprise and the parent enterprise holds not less than 50 per cent of the total voting shares or total capital of such subsidiaries). However, general filing may become applicable if the FTC determines that (i) the combination involves major public interest, (ii) one of the parties to the combination is a holding company as defined in either the Financial Holding Company Act or the Taiwan Stock Exchange Corporation Regulations for the Review of Stock Exchange Listing Applications by Investment Holding Companies, (iii) the scope of the relevant market or the market shares of the combining enterprises is difficult to determine, (iv) the relevant market of the combining enterprises may incur major disadvantages resulting from competition restraint, such as high barriers to entry and high market concentration.

3.4. Jurisdictional waiver

Once any of the jurisdictional thresholds set out above is met, notification of the combination (including foreign-to-foreign mergers) to the FTC is mandatory. However, in some cases notification can be avoided by making a formal request to the FTC that it decline to exercise jurisdiction pursuant to the Principles for Handling Applications of Extraterritorial Combinations (the "Principles"), the last amendment of which was promulgated on 4 February 2005. The Principles apply not only to combinations involving foreign enterprises with no presence in Taiwan, but also to combinations involving Taiwan enterprises and foreign enterprises, and Taiwan enterprises and Taiwan subsidiaries or branches of foreign enterprises.

The Principles define an "extraterritorial combination" as an Article 6 "enterprise combination" involving two or more foreign enterprises that occurs outside Taiwan where the result of the combination has "a direct, substantial, and reasonably foreseeable effect" on a Taiwan market. Notes to the Principles published by the FTC state that the "effect principle" was specifically modelled on corresponding US antitrust law. The Principles do not provide guidance on what constitutes "a direct, substantial, and reasonably foreseeable effect". An "extraterritorial combination" must be notified to the FTC in advance if one of the jurisdictional thresholds outlined in part 3.2 above is satisfied; there is a presumption that the combination will have a "direct, substantial, and reasonably foreseeable effect" in Taiwan if one of the three jurisdictional thresholds is satisfied.

The Principles also specify that the volume of sales is calculated based on the sales in Taiwan of the combining enterprises plus the volume of goods and services imported by Taiwan companies involved, directly or indirectly, in the combination.

Once an extraterritorial combination meets the jurisdictional thresholds, the Principles set forth factors based on international comity that the FTC must then weigh to determine whether to exercise jurisdiction. These factors include:

- the relative importance of the effects of the combination on Taiwan and foreign markets;
- the nationalities, locations and principal places of business of the combining enterprises;
- the explicitness and foreseeability of intent to affect competition in Taiwan;
- the degree of conflict with the law or policy of the country of the merging enterprises;
- the possibility of administrative sanctions or compulsory execution;
- the effect of compulsory execution on the foreign enterprise(s);

- international conventions and treaties, or provisions of international organisations; and
- other factors considered important by the FTC.

The jurisdictional waiver generally requires significantly less information than a full notification filing. There are no specific rules on filing deadlines for jurisdictional requests. However, a notification must be filed at least 30 days prior to consummation of the combination. If a filing party wishes to file a jurisdictional request, it is recommended to file the request early in order to leave sufficient time to file the full notification in the event that the FTC decides to exercise jurisdiction over the combination.

3.5. Notifying parties

The enterprises that are responsible for notifying a combination include the following:

- all enterprises participating in a combination where the combination consists of a merger, a transfer or lease of the operations or assets of another enterprise(s), regular joint operation of enterprises, or operation of another enterprise by agreement;
- the holding or acquiring enterprise, where it holds or acquires at least one-third of the shares or capital of another enterprise; and
- the controlling enterprise, where it directly or indirectly controls the operations or employment and dismissal of personnel of another enterprise.

The ultimate foreign parent companies of foreign enterprises involved in an extraterritorial combination are responsible for filing. There are currently no filing fees in Taiwan for combinations that must be notified to the FTC.

3.6. Waiting period

A combination cannot take effect until 30 days after the FTC receives the complete notification materials. Submitting incomplete or inaccurate notification materials to the FTC will not start the 30-day waiting period. The FTC may shorten or extend the 30-day waiting period by providing written notification to the notifying enterprise of such change. The maximum period of any extension is 30 days. Provided that there is no extension of the original 30-day period or that the FTC has not objected to the combination by the end of the original 30-day period, the enterprises may combine 30 days after the FTC receives the complete notification. The FTC may shorten the original 30-day period if it determines that it has no objection to the combination.

Where the FTC extends the deadline, the enterprises may combine at the end of this extended deadline, provided that the deadline is not further extended with the consent of the notifying parties. The parties may also combine before the deadline if the FTC issues a decision allowing them to do so. The parties may not merge if the FTC issues an objection to the combination, or if false or misleading statements are found in the the parties' notification.

3.7. Closing before clearance

A combination that is subject to FTL filing requirements may not legally be implemented if the FTC objects to the combination. If the combination is implemented despite FTC objections, the enterprises may be punished as described in section 5 below. If there is no FTC objection after the waiting period has ended, the combination may take place.

One outstanding issue is whether a combination is void *per se* until it is properly notified, or is to be deemed valid unless and until the FTC declares it to be illegal and thus void *ab initio*. A district court issued an opinion on this matter holding that a combination triggering the requirement to notify was void without approval by the FTC. It should, however, be noted that the opinion was issued by a district court, which is a lower court, and that this holding is without precedent. There continues to be a lack of consensus on this issue.

3.8. Filing information

The FTC requires the following information in a notification of an enterprise combination:

- a form describing the combination and the parties involved, the target closing date of the combination, contact information and domicile of the combining enterprises, and the name of the attorney representing the enterprises and power of attorney, if applicable;
- basic information about each enterprise involved, including incorporation documents, business items, employment statistics, turnover for the previous fiscal year, and total capital;
- the balance sheet and income statement of the preceding year for each enterprise involved;
- a report detailing each merging enterprise's production or operating costs and the value and sales of the major products it produces; this information must be provided for the period up to five years prior to the date of the notification filing;
- an explanation of the benefits of the combination to the overall economy of Taiwan, including information on the relevant markets of the participating enterprises in terms of market shares, major competitors, level of competitiveness in and difficulty of entry into the markets, as well as the impact of the combination on the relevant markets;
- a business plan for each merging enterprise;
- the status of the investment of each merging enterprise;
- the latest financial report or prospectus of the merging enterprises which are listed on the Taiwan Stock Exchange or Taiwan Over-the-Counter market;
- market structure information related to horizontal and vertical businesses in the markets of the merging enterprises for each of the preceding 5 fiscal years; this may also include information regarding competitors' market information (market share, etc.);
- any other documents that may be required by the FTC; and,
- in the case of establishment of a financial holding company by way of combination, contract documents.

3.9. Review process

Under the FTC's internal rules and procedures, notifications of combinations are first submitted for initial review to the sub-department of the FTC that deals with combinations. During the initial review, the sub-department will examine whether the combination falls within the jurisdiction thresholds and whether all required documents have been submitted. If a combination does not fall within the jurisdictional thresholds, the FTC will issue a letter to indicate this fact. If all the required documents have not been submitted, the FTC will issue a letter requesting supplementary information. As noted above, the failure to submit a complete notification to the FTC will delay the start of the 30-day waiting period. The sub-department will then submit the case to the Commissioners of the FTC after all required documents have been provided. The Commissioners will make the final decision on whether or not to reject the combination, or whether to extend or shorten the clearance period.

Pursuant to Article 27 of the FTL, the FTC may require the parties or related third parties to make statements, or require relevant organisations or individuals to submit records, documents and any other necessary materials. The FTC is also authorised to dispatch personnel to inspect the offices, places of business, or other locations of relevant organisations.

The Commissioners may also ask the participants to appear in person at hearings or interviews. The FTC is not legally required to solicit or accept the comments of customers or competitors of an enterprise that is filing a combination notification, nor is it required to hold public hearings as part of the review process. However, the FTC passed an internal rule in April 2002 to the effect that a summary of any combination notification filed with the FTC may be published on the FTC's website accompanied by a public request for opinions concerning the combination. The FTC will not make any answer or statement in response to such opinions. Thus, if customers or competitors are aware of a notification to the FTC, they may submit their views, but the FTC is under no statutory obligation to accept or take such views into account.

Only the FTC may review the opinions submitted by the public on the combination. Beyond this, the review of the notification of a combination is an internal process kept within the FTC, except that the notifying enterprise or a party registering a complaint against the combination may, as required for the advocacy or defence of its legal rights and interests, apply to read, transcribe, photocopy or photograph relevant materials or files. The right to do so is subject to the following excluded items provided for in the FTL:

- drafts of an administrative decision or any other working document related to a case;
- materials related to national defence, military affairs, diplomatic affairs and any other official secrets that are required to be kept confidential by laws or regulations;
- materials relating to personal privacy, professional secrets or business secrets that are required to be kept confidential by laws or regulations;
- where review of such materials is likely to infringe upon the rights and interests of a third party; and
- where review of such materials is likely to seriously obstruct the performance of official duties in maintaining social order, public security or any other public interests.

4. Substantive assessment

It is the FTC's task to weigh the advantages of a possible combination against any negative effects it might have on the economy. If a combination would result in more positive than negative effects on the economy, the FTC cannot object to the proposed combination. However, where the FTC needs to make a decision on a notified combination, it may attach conditions or remedies to ensure that the overall economic benefit of the combination will be greater than the negative effects on competition.

There are no regulations or published FTC decisions concerning the carving out of assets or business activities in Taiwan with respect to a proposed merger. Unofficially, the FTC has indicated a willingness to consider a "carve out" of Taiwan assets or business activities on a case-by-case basis and will look at the level of activity in Taiwan and the degree of impact the combination will have in Taiwan. Due to the lack of precedent in Taiwan on this issue, it is difficult to predict whether a "carve out" is possible.

When considering whether the benefits of the combination for the overall economy are likely to outweigh its negative effects, the FTC may take into account a number of issues, including: vertical foreclosure, portfolio effects, elimination of close substitutes, market structure, general industry policy, barriers to entry, legal restrictions on the industry, influence on technology and/or financing, number (and size) of competitors as well as the intensity of competition, benefit to consumers, and the international competitive situation, among others. The FTL does not limit the types of factors that the FTC may consider. The controlling principle is whether the overall economic benefit is greater than the disadvantages resulting from reduced competition.

The FTC will only take non-competition issues into account to the extent that they may have an impact on the overall economy. In one case, the FTC based its decision regarding a semiconductor combination in part on the desire to promote the development of the semiconductor industry as a strategic industry. In another case, the FTC approved a merger between cable television operators partly to ensure continued service for customers who had already paid subscription fees.

The FTC will examine economic efficiency issues more closely when there are strong disadvantages resulting from the proposed combination. Additionally, the FTC assigns less weight to efficiency benefits that accrue as an indirect result of a combination, or if the combination is not the only (or best) way to achieve the efficiency benefit. The FTC may consider the following factors in conducting its analysis: increased efficiency with regard to the utilisation of assets, lowered production and transportation costs, economies of scale and diversification of services, whether there is a practical and effective savings plan, whether the combination lowers the variable costs of doing business, and the general impact of the combination on prices and/or services to consumers. The FTC considers only those efficiency benefits that have been passed down to consumers in one form or another.

Numerous combinations approved by the FTC in recent years under the earlier version of the FTL involved combinations of enterprises whose business activities had little overlap. This type of transaction is likely to have little impact on the enterprises' relevant markets, and recent history indicates that the FTC will generally approve such combinations.

5. Final order and sanctions

5.1. Final orders

As indicated above, the FTC's review of a notified combination may result in a decision clearing the combination or a decision objecting to it. In the latter case, the implementation of the combination is unlawful. The February 2002 amendments to the FTL give the FTC the right to order additional conditions or remedies, when a combination is cleared, to ensure that the overall economic benefit of the combination will be greater than the disadvantages of restraining competition. For example, the FTC allowed one company to enter into a combination but forbade it from using its monopoly status to its advantage in the local market. While the FTC has the requisite power, it has yet to order a divesture undertaking.

5.2. Sanctions

Sanctions for not filing include fines ranging from NT$100,000 to NT$50 million for each violation of the FTL and orders to cease or unwind the combination. Sanctions have been applied in practice in several cases. In one particular case, several cable systems companies were each fined between NT$2 million and NT$4 million for failing to notify the FTC of their combination.

The FTC is authorised to order the dissolution of the enterprise or the suspension of its operations if that enterprise fails to comply with the FTC's orders. Divestments or other remedies are enforced when enterprises combine without undergoing the mandatory waiting period, combine despite prohibition by the FTC, or fail to abide by conditions set by the FTC.

The FTC will also consider the effect of foreign-to-foreign mergers on companies operating in Taiwan. For example, if a foreign company gains control of a Taiwanese company as a result of a foreign-to-foreign merger, the FTC may step in to order the creation of a "hold separate arrangement" to separate control of the two entities.

In practice, the parties to a merger may exchange information and conduct other communications related to the merger provided such actions do not rise to the level of "concerted action" as defined in the FTL. Article 7 of the FTL defines "concerted action" as the conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding, with any other competing enterprise, to jointly determine the price of goods or services, or to limit the terms of quantity, technology, products, facilities, trading counterparts or trading territory with respect to such goods and services, etc., and thereby to restrict each other's business activities. Article 14 of the FTL prohibits any form of concerted action unless: (i) it meets certain requirements under Article 14; (ii) it is beneficial to the economy as a whole and is in the public interest; and (iii) an application to engage in such concerted action has been made to, and approved by, the FTC.

If enterprises are found to have engaged in "concerted action", the FTC will impose a fine of between NT$50,000 and NT$25 million and order them to cease or rectify their conduct, or take necessary corrective action. Failure to abide by the terms of the FTC order may result in a criminal fine of not more than NT$100 million (approximately US$3 million), and may also subject the chairman or general manager of the offending enterprise to a prison term of not more than three years.

Since the addition of the 30-day waiting period requirement to the FTL in 2002, the FTC has imposed fines against companies engaging in "pre-merger" concerted action. In one case involving domestic enterprises, a local company notified the FTC of its intent to acquire all the shares of another Taiwan entity. Before the end of the 30-day waiting period, the acquiring company engaged in contract negotiations and customer service for the target company. The FTC deemed these acts to be a violation of the FTL and fined the acquiring company and target NT$1,500,000 (approximately US$45,000) and NT$100,000 (approximately US$3,000), respectively.

If a combination occurs without the requisite notification or is disallowed by the FTC, the FTC may, in addition to imposing fines ranging from NT$100,000 to NT$50 million for each violation of the FTL, issue orders prohibiting the combination, set a deadline within which the enterprises must separate, require the disposal of acquired shares, require that business activities be transferred, or require that certain company officers or employees resign from their positions. In addition, the FTC may order the dissolution of the enterprise or suspension of its operations if that enterprise fails to comply with the FTC's orders. The FTC may also pursue remedies beyond those enumerated above where warranted by the circumstances.

6. Appeal and judicial review

Under the Law of Administrative Appeal and the Law of Administrative Procedure, enterprises or persons of standing who wish to appeal FTC decisions must first appeal to the Appeals Committee of the Executive Yuan, then to the High Administrative Court, and finally to the Supreme Administrative Court. Any enterprise or person who can demonstrate that his legal rights may be infringed by an FTC decision may initiate an appeal action.

7. Enforcement by private parties

Under the FTL, if a party is harmed by the actions of an enterprise that is acting in violation of the FTL, such party may seek injunctive relief as well as damages. A court may award treble damages. However, a party's ability to recover damages for injuries resulting from merger and acquisition activities is largely theoretical.

8. Mergers in specific sectors

Taiwan does not have general sector-specific rules for the control of mergers but, although it has joined the WTO and generally moved towards the liberalisation of restrictions on foreign investment, it still prohibits or restricts foreign investment in a number of industries. Foreign investors should particularly be aware of investment caps or barriers to investment in sectors such as telecommunications, financial services, securities brokering, accounting services and insurance. Full details of prohibited or restricted areas are set out in the Negative List for Investment by Overseas Chinese and Foreign Nationals issued by the Industrial Development and Investment Centre of the Ministry of Economic Affairs.

According to the Enterprises Merger and Acquisition Law, foreign companies may merge with or assume all of the assets and liabilities of Taiwan companies subject to the Negative List for Investment by Overseas Chinese and Foreign Nationals.

According to the Financial Institution Merger Law, foreign financial institutions may merge with or assume all the assets and liabilities of Taiwan incorporated financial institutions. Under the Financial Holding Company Law, foreign financial holding companies may obtain controlling ownership interests (up to 100 per cent) in financial subsidiaries of financial holding companies.

Investment in Taiwan funded from Mainland Chinese sources is strictly prohibited. In addition, the Taiwan currency, the New Taiwan Dollar, is not freely convertible. If a combination were to involve the inward remittance of more than US$50 million or its equivalent by any company involved in the transaction, that company would be required to seek approval from Taiwan's Central Bank on this and any other currency-related issues.

9. Cooperation with authorities in other jurisdictions

The FTC is the government authority responsible for competition law matters. The FTL does not explicitly authorise cooperation with competition authorities in other jurisdictions. However, the FTC has communicated with foreign competition authorities while conducting investigations. Additionally, the FTC has entered into a cooperation agreement with the competition authorities of Australia, New Zealand and France.

FTC policy statements note that in recent years there has been a trend towards large combinations between multinational corporations, the parent companies of which are located in the advanced industrialised countries. It is noted that while such combinations may improve the competitiveness of the parties in their respective home countries, due to the market power of such companies in other countries, it is necessary that the competition authorities coordinate and scrutinise the competitive impact of such transactions. Accordingly, it is the policy of the FTC to interpret broadly its jurisdiction in offshore transactions which may have a competitive impact in Taiwan.

Ukraine

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See Merger Control Worldwide Vol. 2, Chapter 59, pp. 1239–1256

1. Definition of concentration

Under the Competition Act 2001, concentrations need the prior approval of the Antimonopoly Committee of Ukraine (AMC) if the stipulated thresholds are exceeded. A concentration is deemed to arise where:

(1) two or more previously independent undertakings merge, or
(2) one or more undertakings acquire direct or indirect control of the whole or parts of one or more other undertakings, namely by means of:
   (a) the direct or indirect (through other parties) purchase of assets in the form of integrated asset units or including asset purchases of undertakings in liquidation proceedings; the management, rental or leasing of, or a concession or other contract conferring rights to use, fixed assets in the form of integrated asset units or subdivisions including use of the assets of undertakings in liquidation proceedings;
   (b) the appointment or election to top executive positions, or as chairmen of boards, of persons already holding a similar position in other undertakings; the creation of situations where more than 50% of the members of the supervisory council, board or other supervisory or executive body of one or more companies are the same persons;
(3) the establishment of a business entity by two or more entities, provided that business entity would undertake business activities independently, where the establishment of that entity will not lead to co-ordination of competitive conduct among participating undertakings;
(4) one person or undertaking directly or indirectly purchases the shares conferring more than 25% and 50% of the votes within the higher decision-making bodies of another undertaking.

The Competition Act 2001 stipulates that the creation of a joint venture that will lead to the co-ordination of competitive conduct among parent companies or between the parent companies and the joint venture is not deemed to be a concentration. Such a joint venture is instead deemed to be a concerted practice that could require the prior approval of the AMC in some cases. In that event, the Regulation on Concerted Practices 2002,[1] which employs other procedures and requirements, would apply.

1 Regulation of the Antimonopoly Committee of Ukraine, "On the Procedure for Obtaining the Antimonopoly Committee's Approval for Concentration", No. 26-R of 12 February 2002.

2. Thresholds

Prior AMC approval of concentrations is mandatory in the case of concentrations as described above where the undertakings' worldwide total asset value or aggregated sales turnover for the last financial year exceeds €12 million, and at the same time:

- the worldwide total asset value or aggregated sales turnover of at least two participants in the concentration exceeded €1 million each;
- the total asset value or aggregated sales turnover in Ukraine of at least one participant in the concentration exceeded €1 million.

Even if thresholds are not triggered, approval for a concentration is also required if one or all of the participants in the concentration together with controlled entities have a market share which exceeds 35% in the relevant market or in an adjacent market.

By comparison with other countries, the Ukrainian thresholds are very low. According to officials of the AMC, the thresholds were fixed by reference to the size of the Ukrainian economy and correspond *pro rata* to the same figures for other countries and the European Union (EU).

3. The structure of the AMC

The AMC consists of a Chairman and 10 state commissioners, with two First Vice-Chairmen and three Vice-Chairmen appointed from among them. One of the state commissioners is at the same time the Head of the Kiev Regional Department. There are also 27 Regional Departments.

Regional Departments are responsible for enforcement of the antimonopoly legislation and for the protection of entrepreneurs' and consumers' interests within the region (e.g. the Kiev Regional Department regulates only competition issues within Kiev city), but in case the competition takes place in more than one region or foreign entities are involved, the case should be considered by the AMC itself.

The Chairman of the AMC is appointed and dismissed by the Parliament on the basis of a proposal made by the President. State commissioners are appointed and dismissed by the President of Ukraine on the basis of a proposal made by the Prime Minister of Ukraine. The term of service of the Chairman is 7 years; the same person can be appointed Chairman for a maximum of two consecutive terms.

The AMC consists of six research and investigation (R&I) departments, which have specialisation in the following areas:

(1) production and distribution of coal mining; gas, oil, energy, water manufacture and distribution;
(2) chemistry, metallurgy, construction, machinery construction, woodworking;
(3) light industry, food industry, agro-industrial complex, medicine, hunting, fishing;
(4) jewellery, insurance, financial services, legal services, accounting, real estate;
(5) publishing, advertising, employment services, tourism, education, culture, sport, entertainment;
(6) transport, telecommunications.

These six R&I departments examine cases and provide the AMC (its administrative board or state commissioners) with their conclusions. But these R&I departments do not have the right to approve concentrations.

The AMC celebrated its 10-year anniversary in 2004. The history of competition legislation, competition authorities and competition itself in Ukraine is therefore comparatively recent. In spite of this, competition law has developed more quickly than any other branch of the law in Ukraine; and Ukrainian and foreign experts agree that the competition legislation of Ukraine most closely corresponds to that of the EU.

More information about the activity of the AMC can be found at www.amc.gov.ua, but, at the time of writing, the site is only in Ukrainian.

4. Payments for obtaining AMC approval for a concentration

The Competition Act 2001 stipulates the following payments should be made by parties applying to the AMC:

- for obtaining approval of a concentration – 5,100 Ukrainian hrynvas (about €825);
- for obtaining a preliminary conclusion whether or not AMC approval is required for a concentration – 1,360 Ukrainian hrynvas (about €220).

5. Media

The main law which regulates television (TV) and radio broadcasting is the Act of Ukraine “On Television and Radio Broadcasting” of 21 December 1993. This Act contains special rules as to the establishment and operation of TV and radio broadcasting organisations.

In particular, a single TV or radio broadcasting company (including its subsidiaries) may not use more than one licence for broadcasting in one region or the whole territory of Ukraine. The legislation requires that at least 50% of programming on Ukrainian TV and radio has to be produced in Ukraine.

Only Ukrainian citizens, Ukrainian legal entities, the Parliament of Ukraine and the President of Ukraine have the right to establish TV and radio companies in Ukraine.

The legislation currently in force requires TV and radio broadcasters, as subjects of information activity as performed by the National Council on Television and Radio Broadcasting of Ukraine, to be registered in the State Register of TV and Radio Companies.

5.1. Relevant body

The relevant body is the National Council on Television and Radio Broadcasting of Ukraine.

5.2. Relevant legislation

The Act of Ukraine “On telecommunications” of 18 October 2003.

The Act of Ukraine “On Television and Radio Broadcasting” of 21 December 1993.

6. International co-operation through bilateral arrangements

The AMC has developed relations with the competition authorities of other countries through bilateral agreements.

The bilateral agreement on co-operation in the field of the development of competition made with the Russian Federation (2000) stipulates the following types of co-operation:

- communication of notification of concentrations;
- requests for information;
- consultations;
- exchange of information;
- exchange of experience;
- performance of joint research.

Ukraine has signed a bilateral agreement on competition co-operation with Bulgaria (1994) which stipulates the following types of co-operation:

- exchange of legislative acts, scientific–methodological and information materials;
- co-operation on the development of working methods, joint performance of expert analysis and consultations;
- staff training with the object of exchanging experience;
- organisation of conferences and seminars;
- staff education.

The bilateral agreement between the AMC and the Ministry of Economic Competition of the Czech Republic, signed in 1994, is similar in content.

Co-operation between the AMC and the Hungarian Competition Authority is performed on the basis of an Agreement on Co-operation (2006) by means of exchange of annual reports, scientific research on competition issues and the like, exchange of information regarding professional forums and participation in such forums.

The bilateral agreement on co-operation in the field of competition with Lithuania (1997) stipulates the following types of co-operation:

- exchange of legislative acts, scientific–methodological and information materials;
- staff education;
- organisation of conferences and seminars.

The parties have also agreed about co-operation in the field of the investigation of anticompetitive activities.

A similar bilateral agreement, except for co-operation in the field of the investigation of anti-competitive activities, was signed with Poland (1997). This agreement also provides for co-operation at regional level between regional departments of the competition authorities of both countries.

In 2002, a Memorandum on Cooperation with France was signed. It provides for the development of annual programmes in the following areas:

- the legal basis for the regulation of the relationship between the parties in the field of competition;
- competition and anti-competitive practices, including bilateral consultations, staff education, the participation of the French competition authority with the object of providing practical support during the investigation of particular cases;
- Informational co-operation.

Bilateral co-operation agreements have also been signed with other countries, including Georgia (2002) and Azerbaijan (2002). Those agreements contain procedures for specific co-operation between the competition enforcement authorities of the parties in relation to the prevention and elimination of infringements of the competition rules that spread beyond national markets.

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See Merger Control Worldwide Vol. 2, Chapter 60, pp. 1257–1290

1. Statutory guidance

The Competition Commission (the "CC") has issued *Water Merger References: Competition Guidelines* (CC9). These provide further detail as to the manner in which the CC will approach its functions in this specialist area.[1] The CC has also issued guidance on *Disclosure of information by the Competition Commission to other public authorities* (CC12)[2] and *Guidance on the use of interim measures pending final determination of merger references*.

2. Time limits and prior notice

In November 2005 the Office of Fair Trading (the "OFT") suspended the provision of confidential guidance and informal advice as described in the UK chapter in the Main Work in view of the changing nature of its role and resource constraints. The OFT has now announced that following a review it has reinstated the provision of informal advice.[3] Informal advice will only be provided where there is a "good faith intention to proceed", there is a genuine issue (merging parties will be expected to articulate the theory of harm which might make the case a genuine candidate for reference to the CC), and the OFT's advice would genuinely assist. Where OFT officials possess no particular insights that the parties and their advisers lack, the advice will be to this effect. Where an issue is complex and finely balanced, the OFT is likely to confine itself to advice on those terms, rather than necessarily giving a likely/unlikely to refer indication as was previously the case. The general approach will sometimes result in more modest or qualified – but ultimately more accurate – advice. Where a case is deemed suitable for advice, the OFT case team will endeavour to provide advice within 5–10 working days, although attempts will be made to accommodate parties where a view is needed more quickly. The informal advice procedure is considered unsuitable by the OFT for advising on the decisive legal question of whether the structure of a transaction, designed to fall outside the Water Act regime, is nonetheless caught by the relevant automatic reference provisions.[4]

3. Disclosure and confidentiality

Recently issued guidance covers how the CC intends to deal with requests from other public bodies such as the OFT for the disclosure of "specified information" received by the CC

1 See the UK chapter in the Main Work at section 8.3.
2 This is in addition to its existing guidance, *Disclosure of information in merger and market inquiries* (CC7) referred to in the UK chapter in the Main Work, at section 1.2 (statutory guidance) and section 5.3 (disclosure and confidentiality).
3 Interim arrangements for informal advice and pre-notification contacts (updated April 2006).
4 See section 8.3 (water and sewerage mergers) in the UK chapter in the Main Work.

during the course of a merger investigation and also when the CC will make disclosure of specified information of its own motion.[5]

4. Substantive assessment and test

4.1 The circumstances in which the OFT need not make a reference

The OFT has decided to revisit its guidance in relation to the so-called "markets of insufficient importance" exception to its duty to refer certain mergers under the Enterprise Act 2002 (the "EA 2002"). This guidance is currently contained in paragraphs 7.5 and 7.6 of the OFT *Mergers – Substantive assessment guidance* (OFT 516).[6]

4.2. The acceptance of undertakings

When deciding whether or not to accept undertakings in lieu of making a reference to the CC, section 73(3) of the EA 2002 requires the OFT to have regard, in particular, "to the need to achieve as comprehensive a solution as is reasonable and practicable to the [substantial lessening of competition (SLC)] and any adverse effects resulting from it". It should be noted that the role of the OFT is only to conduct a preliminary investigation of whether there is a potential SLC that requires further investigation by the CC. If, where it has identified a potential SLC, the OFT is to accept an undertaking in lieu of a reference, it will look for a remedy by way of an undertaking which addresses its concerns about the adverse effects of a merger without the need for further investigation. The remedy must therefore be clear-cut and capable of ready implementation.[7] Although not specifically mentioned in its Guidance, the same principles apply at the stage of implementing such an undertaking. Thus in one case the Competition Appeal Tribunal (the "CAT") held that it was not unreasonable for the OFT to refuse to approve the sale of a divestment package pursuant to an undertaking on the basis of its conclusion that the fact that the CEO of the proposed purchaser was also a director of the vendor would deliberately or inadvertently result in them being less effective competitors post divestment. A complex and detailed inquiry as to the degree of independence between vendor and purchaser was not required of the OFT in the light of its role. If the merging parties wished to engage in a more elaborate and complex remedy process, they could have refused to sign the undertakings in lieu and instead opted for a reference to the CC.[8]

4.3. Initial orders and undertakings

In *Stericycle* the CAT upheld the decision of the CC to impose a hold separate manager in relation to a completed merger in order to prevent pre-emptive action.[9] In that case certain steps had been taken to integrate the two businesses prior to the reference to the CC. The CC concluded that without a hold separate manager there would not be during the period of the inquiry a demonstrably independent CEO of the acquired business operating at arm's length of Stericycle. To impose such measures the CC need only have a "relatively low" expectation that

5 See above under "Statutory guidance".

6 Consultation on proposed revision to *Mergers – Substantive assessment guidance*, Exception to the duty to refer: markets of insufficient importance, June 2007. The consultation closed in August 2007. The OFT's response is awaited.

7 See *Mergers – Substantive assessment guidance* (OFT 516).

8 *Co-operative Group (CWS) Limited v. Office of Fair Trading* [2007] CAT 24, at para. 128.

9 *Stericycle LLC and others v. Competition Commission* [2006] CAT 21, under s. 81 of the 2002 Act.

due to the steps taken to integrate the businesses the outcome of the reference might be impeded.

5. Final orders and sanctions by authority(ies)

5.1. Effectiveness of remedies

In *Somerfield*, the CAT dismissed the first application for review of a decision by the CC to order divestment of a number of grocery stores in local markets in order to address its finding of SLC in those markets arising from the merger.[10] On procedural matters the CAT made clear that generally speaking the review will take place essentially on the basis of the record created before the CC. In relation to the CC's criteria for divestment remedies, the CC was content in relation to three local markets to leave it to Somerfield to decide which stores to divest. However, in four other local markets the CC concluded that the most effective remedy required Somerfield to divest itself of its acquired rather than existing store. Somerfield argued that as the owner it should be allowed to choose which store to sell and that the CC's starting point that it was the acquired stores that should be divested was wrong. In particular, according to Somerfield, the CC ignored that saleability was simply a function of price. In its judgment the CAT pointed out that the CC's powers are designed to enable it to remedy any SLC "as quickly and effectively as possible" and that in this regard the CC has "a clear margin of appreciation to decide what reasonable action was appropriate for remedying, mitigating or preventing the SLC created by Somerfield's acquisition of the disputed stores". The CC's starting point was not open to criticism as it was reasonable to assume that the quickest and most effective way of restoring the status quo ante was to divest the acquired store to a person able to act as a viable competitor to the existing store. This approach was reflected in the CC's merger reference guidelines (June 2003) and its divestiture guidelines (December 2004), which were not challenged by Somerfield.[11] If Somerfield had concerns about this approach it could have sought prior clearance from the OFT rather than complete the acquisition.

6. Appeal and judicial review

In *Unichem*, the CAT set aside the OFT's decision to clear a merger between the UK's third largest pharmaceutical wholesaler, Phoenix, and a smaller regional wholesaler.[12] Following the merger, the merged entity would have remained only the third largest wholesaler behind AAH and Unichem. The CAT set aside the OFT's decision on the basis that the OFT had failed to put back to Unichem for comment evidence which suggested that Unichem would act as a constraint on the merged entity in a particular local market. The CAT continues to apply rigorous standards of procedural fairness to merger control decisions. The OFT subsequently adopted a similar decision clearing Phoenix's acquisition, however.

In *Celesio*, the CAT dismissed a challenge by Celesio AG to the OFT's decision to clear the acquisition by Boots Group PLC of Alliance Unichem PLC subject to appropriate commitments under section 73 of the EA 2002.[13] The CAT rejected Celesio's challenge to the OFT's decision to clear the merger on the grounds that a reduction in the level of fascias in local retail

10 *Somerfield PLC v. Competition Commission* [2006] CAT 4.
11 For more detail on the relevant guidelines see section 5 in the UK chapter in the Main Work.
12 *Unichem Limited v. Office of Fair Trading* [2005] CAT 8.
13 On the acceptance of undertakings see section 4.1.4 in the Main Work at p. 1296.

pharmacy markets from 4 to 3 would not give rise to an SLC. In the circumstances of the case the OFT's decision was not unreasonable. The threat to mergers from unmeritorious challenges by interested third parties against clearance decisions is mitigated to some extent by the fact that to date the CAT has been able to determine applications expeditiously within approximately 4 months from the date on which the OFT's decision was taken. Nevertheless, a number of practitioners consider that the possibility of challenge before the CAT has increased somewhat the likelihood of a merger being referred to the CC.

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1. Notification requirements and procedures

1.1. General

The parties to a merger transaction must comply with the notification and waiting period provisions of the Clayton Act 1914 (the "Act") prior to the acquiring person's assuming beneficial ownership of the assets or voting securities from the acquired person. Failure to fully comply with the Act and its regulations may subject any person, or officer, director, or partner of such person, to civil penalties of up to US $11,000, adjusted by a cost-of-living increase every 4 years, for each day of violation. Since its enactment, civil penalties in excess of US $5,000,000 have been obtained from *individual* non-complying persons.

Criteria for pre-merger notification.

The three threshold criteria are the following:

1. The acquiring or acquired person must be "engaged in commerce or in any activity affecting commerce" in the USA.
2. As a result of the transaction, the acquiring person would hold in excess of US $59.8 million of assets or voting securities.
3. For transactions valued at less than US 239.2 million, at least one person meets the US $12 million "size-of-person" test, and one meets the US $119.6 million "size-of-person" test, meaning, one person must have at least US $12 million of total assets (if engaged in manufacturing, the test is met with US $12 million in total assets or annual net sales), and the other has US $119.6 million of total assets (or net sales, if engaged in manufacturing). If the transaction is valued in excess of US $239.2 million, this size-of-person test does not apply.[1]

The terms "acquiring person" and "acquired person" are defined terms and refer to the ultimate parent of the entity involved in the transaction. Likewise, it is important to note that the Hart–Scott–Rodino Antitrust Improvements Act 1976 (the "HSR Act") speaks in terms of "holding as a result of" so that prior acquisitions may need to be aggregated with the current transaction. If one held US $48 million worth of voting securities of Company X and agreed to purchase US $15 million more, an HSR filing might be required for a transaction that most

1 15 USC Section 18a(a). The second and third thresholds are adjusted each year starting from 2005 to reflect yearly changes in US Gross Domestic Product (GDP). Effective from 21 February 2007, the thresholds are now $59.8 million, $119.6 million, $597.9 million; 25% in excess of $1,196 million and 50%.

people would value at only US $15 million. Likewise, if one acquires assets from a person, the value of the assets may need to be aggregated with prior agreements to acquire assets or asset acquisitions from the same person (in the preceding 180 days) to determine if one has met the *applicable* size-of-transaction test.

1.2. Exemptions

The acquisition of assets located outside the USA is exempt from filing under the HSR Act if the assets did not generate sales in or into the USA in excess of US $59.8 million during the seller's most recent fiscal year.[2] If the US $59.8 million threshold is exceeded, the acquisition is nevertheless exempt if four tests are met:

1. Both acquiring and acquired persons are foreign.
2. Aggregate *sales* of both acquiring and acquired persons in or into the USA are less than US $131.5 million in their most recent fiscal years.
3. Aggregate total *assets* (other than investment assets) of both acquiring and acquired persons in the USA are less than US $131.5 million.
4. The transaction is valued at less than US $239.2 million.

If the assets are being acquired from a foreign state, foreign government, or agency thereof, and the assets are located within that foreign state, the acquisition is exempt regardless of the amount of sales in or into the USA.[3]

The acquisition of voting securities of a "foreign issuer" is always exempt if the acquiring person is foreign and does not get control of the foreign issuer, regardless of the size of the transaction. If the acquiring person is a US person[4] or if control of the foreign issuer passes to the foreign acquiring person, the transaction is still exempt if the issuer does not hold assets in the USA worth in excess of US $59.8 million in aggregate *and* did not have sales in or into the USA in excess of US $59.8 million in its most recent fiscal year.[5] In addition, if the US $59.8 million threshold is exceeded, the acquisition is nevertheless exempt if four tests are met:

1. Both acquiring and acquired persons are foreign.
2. Aggregate *sales* of both acquiring and acquired persons in or into the USA are less than US $131.9 million in their most recent fiscal years.
3. Aggregate total *assets* (other than investment assets) of both acquiring and acquired persons in the USA are less than US $131.9 million.
4. The transaction is valued at less than US $239.2 million.

If such voting securities are acquired from a foreign state, foreign government, or agency thereof, and the issuer is organised under the laws of that foreign state, the acquisition is exempt regardless of the amount of sales in or into the USA.[6]

If a transaction involves the acquisition of both foreign assets and voting securities of a foreign issuer from the same person, under recently amended HSR Rules effective 1 April 2005, a person acquiring assets and voting securities from different entities within the same person must aggregate the sales of each entity in or into the USA for purposes of the US $59.8 million tests discussed above.[7]

2 16 CFR Section 802.50.
3 16 CFR Section 802.52.
4 16 CFR Section 801.1(e).
5 16 CFR Section 802.51.
6 16 CFR Section 802.52.
7 69 Federal Regulation 18,686–18,721 (8 April 2004).

2. Substantive assessment and test

2.1. The Horizontal Merger Guidelines

In 1992, the Federal Trade Commission and Department of Justice (the "Agencies") jointly issued Horizontal Merger Guidelines (the "Merger Guidelines" or "Guidelines")[8] which describe the analytical framework used by the Agencies in determining the likely competitive effects of a transaction.[9] Because so few transactions are actually litigated, the Agencies' analysis of the competitive effects of a transaction is often the effective end of the merger enforcement process. In addition, while the Guidelines are not binding upon the courts,[10] they are relied on heavily by courts and largely reflect the current state of Section 7 case law. Therefore, the Guidelines will inform the parties regarding the substantive assessment of a transaction.

2.2. Market definition

Among the most important elements of the analysis of a merger transaction is the determination of appropriate product and geographic markets in which to analyse the competitive impact of a transaction. Finding relevant product and geographic markets is a " 'necessary predicate' to finding anticompetitive effects".[11]

2.3 Market concentration

The starting point for a competitive effects analysis in a relevant market is generally the market shares and market concentration of market participants. Demonstrating low market shares and market concentration is generally sufficient to demonstrate a transaction's absence of anticompetitive effect to the Agencies.[12] The Agencies utilise the Herfindahl–Hirschmann Index ("HHI") of market concentration. The HHI is calculated by summing the squares of the individual market shares of all the participants.[13]

The Agencies consider post-merger markets with HHI below 1,000 to be unconcentrated and such transactions will likely not face a challenge from regulators.[14] Post-merger markets with an HHI of 1,000–1,800 are considered moderately concentrated. Transactions in this range resulting in an HHI change of less than 100 will likely not face a challenge from regulators; but where the HHI change is greater than 100, the Agencies *may* need to conduct additional

8 The Guidelines, *available at* www.ftc.gov/bc/docs/horizmer.htm, followed the DOJ's and FTC's separate merger enforcement guidelines issued in 1982 and 1984. The 1992 Guidelines were revised in 1997 to add Section 4 addressing efficiencies.

9 See also, FTC DOJ, Commentary on the Horizontal Merger Guidelines, March 2006, available at www.usdoj.gov., Horizontal Merger Investigation Data Fiscal Years 1996–2003 (2 February 2004, revised 31 August 2004), available at www.ftc.gov.

10 See, for example, *Fruehauf Corp. v. FTC*, 603 F.2d 345, 353 (2d Cir. 1979) ("[J]ust as these guidelines do not preclude governmental challenge to a merger which does not fall within all the terms of the guidelines, so the guidelines do not establish the illegality of a merger which does fit the criteria used by the [Agencies] in deciding whether to challenge a merger.") (citation omitted); Herbert Hovenkamp, *Federal Antitrust Policy* (2nd edition 1999); *Olin Corp. v. FTC*, 986 F.2d 1295, 1300 (9th Cir. 1993).

11 *FTC v. Whole Foods Markets, Inc*. 2007-2 Trade Cas. (CCH) ¶ 75,831 (DDC 2007); *United States v. Oracle Corp*., No. C 04-0807, 2004 WL 2006847, at *11 (ND Cal. 9 September 2004) (citing *United States v. du Pont & Co*., 353 US 586, 593 (1957)); see also *United States v. Gen. Dynamics Corp*., 415 US 486, 510 (1974) ("[A] delineation of proper geographic and product markets is a necessary precondition to assessment of the probabilities of a substantial effect on competition within them.").

12 "Although large market shares and high concentration by themselves are an insufficient basis for challenging a merger, low market shares and concentration are a sufficient basis for not challenging a merger." US Department of Justice/Federal Trade Commission, Merger Challenges Data, Fiscal Years 1999–2003, at 1 (2003).

13 Merger Guidelines Section 1.5.

14 See *ibid*., Section 1.51(a).

analysis.[15] Post-merger markets with an HHI of greater than 1,800 are considered highly concentrated. Such markets will likely not face a challenge from regulators if the HHI increase is less than 50. Where HHI change is between 50 and 100, additional analysis is needed. If the HHI change is greater than 100, the Agencies will presume that the transaction will result in anticompetitive effects.[16] While courts analysing Section 7 cases often refer to and cite the Guidelines' HHI breakdowns with approval,[17] they are "by no means to be considered binding on the court".[18]

2.4 Likelihood of adverse effect on competition: co-ordinated effects

One potential anticompetitive outcome of a merger transaction discussed in the Guidelines is that, post-merger, market participants will be able more easily to engage in co-ordinated interaction with each other, and therefore depress competition. "Significant market concentration makes it 'easier for firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level'."[19] The danger of such co-ordination need not rise to the level of an independent violation of the law to provide sufficient grounds to challenge the transaction under Section 7.[20] In fact, because tacit co-ordination cannot be controlled by the antitrust laws, the Agencies are even more cautious to avoid oligopolistic market structures that are conducive to such tacit co-ordination.[21]

If it is believed that post-merger market conditions are or will be conducive to co-ordinated action, it is likely the transaction will be challenged.[22] The Guidelines set out specific market conditions that may be relevant to determining the likelihood of post-merger co-ordinated interaction: "the availability of key information concerning market conditions, transactions, and individual competitors; the extent of firm and product heterogeneity; pricing or marketing practices typically employed by firms in the market; the characteristics of buyers and sellers; and the characteristics of typical transactions".[23]

3. State enforcement: examples

State attorneys general have frequently partnered with the federal agencies in opposing proposed merger transactions. One of the first joint lawsuits took place in 1998, when the FTC and the State of Missouri obtained an injunction (ultimately removed by the Eighth Circuit) against the merger of two hospitals in southeast Missouri.[24] Subsequent state–federal joint

15 See *ibid*., Section 1.51(b).
16 *Ibid*., Section 1.51(c).
17 See, for example, *FTC v. HJ Heinz Co*., 246 F.3d 708, 715–717 (DC Cir. 2001); *FTC v. Univ. Health, Inc*., 938 F.2d 1206, 1211 No. 12 (11th Cir. 1991); *FTC v. Cardinal Health, Inc*., 12 F. Supp. 2d 34, 53 (DDC 1998).
18 *FTC v. PPG Indus., Inc*., 798 F.2d 1500, 1503 No. 4 (DC Cir. 1986) (citing an earlier version of the Guidelines); see also *United States v. Oracle Corp*., No. C 04-0807, 2004 WL 2006847, at *[ ] (ND Cal. 9 September 2004); *United States v. Baker Hughes, Inc*., 908 F.2d 981, 984 (DC Cir. 1990).
19 *FTC v. Arch Coal*, 2004-2 Trade Cas. (CCH) ¶ 74,531 (DDC 2004), *Univ. Health*, 938 F.2d at 1218 No. 24 (citation omitted).
20 See, for example, *Oracle*, 2004 WL 2006847, at *[14]; *PPG Indus*., 798 F.2d at 1503.
21 See *Heinz*, 246 F.3d at 725 (citing 4 Philip E. Areeda *et al*. Antitrust Law Section 9062, at 9 (revised edition 1998)).
22 To make this determination, the Agency looks at "the extent to which post-merger market conditions are conducive to reaching terms of co-ordination, detecting deviations from those terms, and punishing such deviations". Merger Guidelines Section 2.1; see also *FTC v. Elders Grain, Inc*., 868 F.2d 901, 905 (7th Cir. 1989); *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1386–1387 (7th Cir. 1986).
23 Guidelines Section 2.10; see also *FTC v. Whole Foods*, note 11 above; *Brooke Group Ltd v. Brown & Williamson Tobacco Corp*., 509 US 209, 238 (1993); *Elders Grain*, 868 F.2d at 905; *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 168 (DDC 2000).
24 *FTC v. Tenet Health Care Corp*., 186 F.3d 1045 (8th Cir. 1999). See also FTC, Missouri Obtain Court Order Blocking Missouri Hospitals Merger, 75 Antitrust and Trade Reg. Rep. (BNA) 149 (6 August 1998).

enforcement efforts have occurred in a wide variety of industries, including managed care services,[25] waste management,[26] petroleum,[27] motion picture theatres,[28] ready-mix concrete,[29] banking,[30] cable/satellite television,[31] and department stores.

4. Mergers in specific sectors: rail transportation

The Surface Transportation Board (the "STB") has exclusive jurisdiction over rail mergers.[32] Any rail carrier, corporation, or person that participates in a merger that is either approved or immunised by the STB "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction".[33]

The standard of review applied by the STB is whether the transaction is "consistent with public interest".[34] In rail merger proceedings not involving two large railroads, the STB must grant approval unless it determines that (1) "there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight service transportation", and (2) "the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs".[35]

25 See *United States v. Aetna, Inc*., 1999–2002 Trade Cas. (CCH) paragraph 72,730 (ND Tex. 1999) (challenge brought by DOJ and the State of Texas in connection with Aetna's proposed acquisition of Prudential's health care business). Fourteen other states, including California, New Jersey, Florida, and New York also investigated the merger. See States Review Aetna–Prudential Deal, Set Conditions on Top of DOJ Decree, 77 Antitrust and Trade Reg. Rep. (BNA) 68 (15 July 1999).

26 See *United States v. USA Waste Servs., Inc*., 1999–2002 Trade Cas. (CCH) paragraph 72,680 (ND Ohio 1999) (DOJ and 13 states opposing the merger of two of the nation's largest waste management companies).

27 See Shell, Texaco Resolve California Antitrust Claims with Settlement, 74 Antitrust and Trade Reg. Rep. (BNA) 13 (8 January 1998); *Exxon Corp*., FTC File No. 12 991-0077 (30 November 1999); *Chevron Corp. & Texaco Inc*., FTC File No. 011-0011 (7 September 2001); *Valero Energy Corp*., FTC File No. 12 011-0141 (18 December 2001); see also Valero Energy and Ultramar May Merge, Must Divest Refinery and Gasoline Stations, 81 Antitrust and Trade Reg. Rep. (BNA) 547 (21 December 2001).

28 *United States v. Sony Corp. of Am*., 2000–2001 Trade Cas. (CCH) paragraph 72,787 (SDNY 1998).

29 See Firms Must Restructure for DOJ Clearance for Acquisition in Ready-Mix Concrete Sector, 83 Antitrust and Trade Reg. Rep. (BNA) 239 (13 September 2002).

30 See Press Release, DOJ requires Wells Fargo and Company and First Security Corporation to Make Divestitures in Four States (14 September 2000), *available at* www.usdoj.gov/atr/public/press_releases/2000/6496.htm.

31 DOJ Seeks to Block Echostar's Bid for GM's Hughes Electronics Corp., 83 Antitrust and Trade Reg. Rep. (BNA) 425 (1 November 2002).

32 49 USC Section 11321(a).

33 *Ibid*. Currently, legislation is pending in the US Senate that would subject railroad mergers to antitrust review by the DOJ and FTC. See, Railroad Antitrust Enforcement Act of 2007.

34 *Ibid*., Section 11324(c).

35 *Ibid*., Section 11324(d); see *Illinois v. ICC*, 687 F.2d 1047 (7th Cir. 1982).

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