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Market Intelligence

MERGER CONTROL 2023

Global interview panel led by Bradley Justus, Lisl Dunlop and James Hunsberger of Axinn Veltrop & Harkrider LLP.

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About the editors

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Bradley Justus focuses his practice on antitrust law, including mergers, litigation, government investigations and counselling. Bradley has represented clients in several of the most high-profile and complex deal reviews and antitrust litigations in recent memory.

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Contents

Introduction 1
Australia 4
China 13
Egypt 24
Germany 34
Greece 43
Italy 50
Japan 58
Malta 66
Mexico 74
Switzerland 84
Türkiye 90
United Kingdom 103
United States 113
Vietnam 123

About Market Intelligence 131

While reading, click this icon to return to the Contents at any time

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Introduction

Bradley Justus at Axinn, Veltrop & Harkrider focuses his practice on antitrust law, including mergers, litigation, government investigations and counselling. Bradley has represented clients in several of the most high-profile and complex deal reviews and antitrust litigations in recent memory. In addition to appearing in courts throughout the country, before the Department of Justice and before the Federal Trade Commission, Bradley has represented major clients facing merger reviews by the European, Brazilian, Chinese, Korean, Canadian, Mexican and Japanese competition regulators.

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Winning global approval of a merger has never been more challenging. Competition agencies across the globe are conducting independent and increasingly in-depth merger reviews. Merging parties need to have a comprehensive strategy from the outset that coordinates varying jurisdiction timelines, addresses global and local issues, prioritises jurisdictions where issues are most likely, plans for workable remedies where they are likely to be necessary, and even anticipates litigation in some jurisdictions.

This publication provides practitioners and businesses information they need to navigate this complex web of international regimes and includes contributions from competition counsel in Australia, China, Egypt, Germany, Greece, Italy, Japan, Malta, Mexico, Switzerland, the United Kingdom, the United States and Vietnam.

Jurisdictions that once may have been satisfied to rely on review by one of the few large competition authorities now increasingly undertake their own in-depth reviews and sometimes require their own local remedy. In addition to longer overall timelines for complex global deals, the procedure and timeline in each jurisdiction can vary widely. In some cases, jurisdictions may decide to delay their own local process or request extensions from the parties until major jurisdictions issue their decisions – potentially resulting in late-stage hold-up of the entire merger by a single jurisdiction. It is critical for merging parties to develop a strategy that coordinates timelines across jurisdictions and allows for global clearance before the 'outside date' in the merger agreement.

While each jurisdiction raises its own specific issues, some key global trends also emerge. Though agencies around the world have closely investigated mergers in a wide range of industries, a few industries in particular remain top priorities globally. In addition to years of intense scrutiny from agencies in the United States and Europe, agencies in several other jurisdictions, such as Australia (ACCC), Japan (JFTC) and Mexico (COFECE), have announced that mergers in high-tech and

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"Jurisdictions now increasingly undertake their own in-depth reviews."

digital industries are policy priorities and that they are committed to scrutinising these deals for potential harm to local economies. The recent in-depth multi-jurisdictional reviews of transactions such as *Microsoft/Activision* and *Broadcom/VMware* illustrate that these industries are a policy priority across the globe.

Because of their potential impact on consumers' day-to-day lives, healthcare and pharmaceutical mergers also continue to be a top priority, as reflected in global policy initiatives and enforcement actions. To give just a few examples, recently the FTC and EC have sought to unwind Illumina's US$7.1 billion acquisition of Grail, the FTC sought to block Amgen's US$27.8 billion acquisition of Horizon, and the State Administration for Market Regulation imposed a divestiture and other remedies on Simcere Pharma's acquisition of Beijing Tobishi Pharmaceutical.

Competition agencies have also continued to expand enforcement beyond traditional theories of harm. In particular, agencies have become aggressive investigating and challenging deals based on theories involving vertical or 'conglomerate' links between the merging parties, as demonstrated by the FTC and EC challenges to *Illumina/Grail*, the FTC, EC and CMA enforcement actions against *Microsoft/Activision*, in-depth reviews of *Broadcom/VMware* in multiple jurisdictions and the FTC's challenge of *Amgen/Horizon*. Agencies are also asserting expansive theories based on 'nascent' or 'potential' competition concerns. Companies considering mergers need to do more than confirm the lack of direct competition between the merging parties to accurately project the likelihood of regulatory scrutiny.

Complicating the picture, major competition agencies have diverged somewhat on the question of remedies. For example, the leadership of the United States antitrust agencies have announced a strong preference for litigating to block deals over accepting what they deem risky remedies. And while both agencies have suffered setbacks in court, they appear to be committed to continuing to pursue court challenges. In post-Brexit Europe, the EC and CMA appear to have diverged on the suitability of behavioural remedies, as showcased most prominently in *Microsoft/Activision* where the EC accepted a behavioural remedy but the CMA insisted on (what it considered to be) a more robust remedy to clear the now-closed deal. In the rest of the world, agencies are increasingly taking a hands-on approach to merger reviews, and often imposing their own remedies with strong local enforcement mechanisms even where transactions raise global issues and the parties have agreed to remedies in the United States, Europe or elsewhere.

This publication provides country-specific overviews that analyse these and other trends to help parties craft effective strategies for obtaining global merger approvals. While the challenges in this regulatory environment are real, major global deals remain achievable with a proactive strategy that develops compelling advocacy themes, anticipates potential roadblocks and formulates creative solutions.

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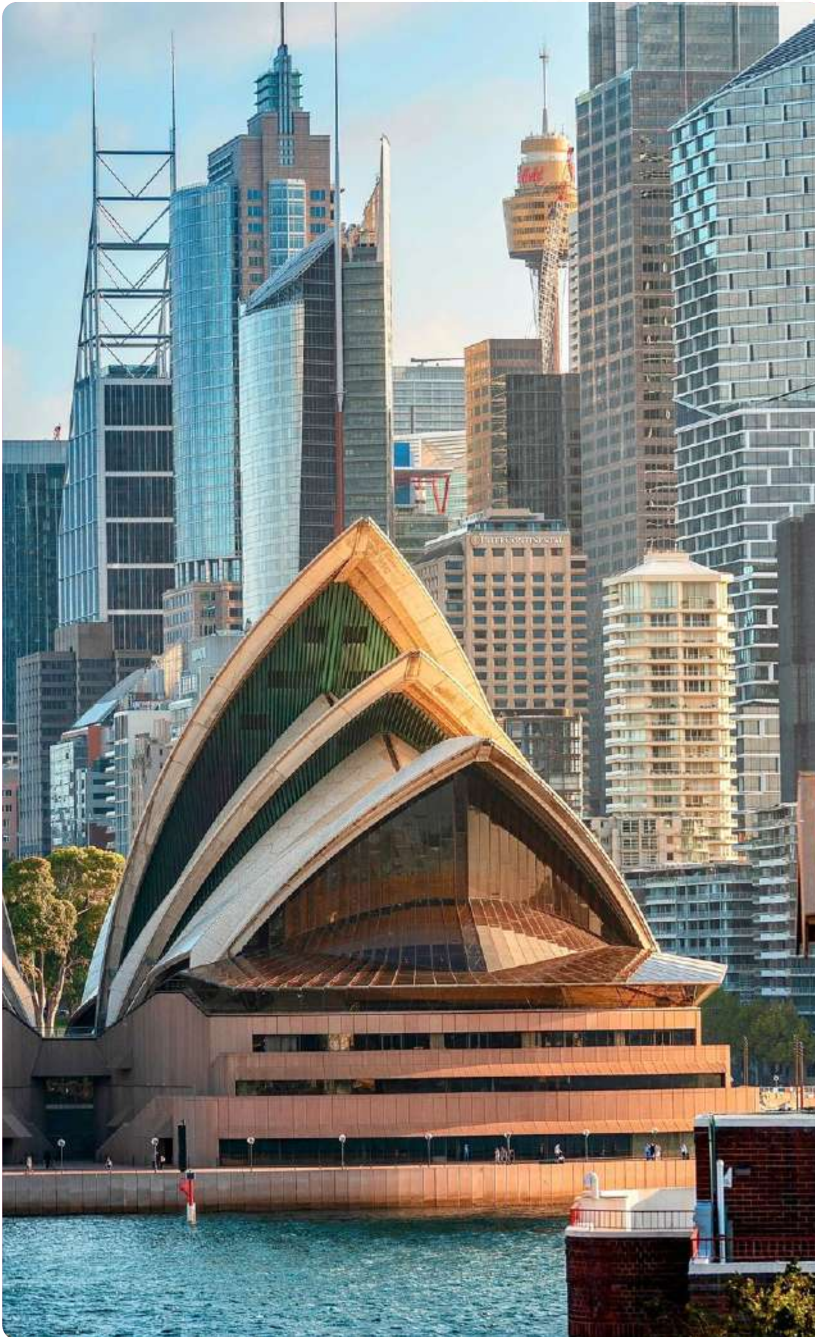

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Australia

Elizabeth Avery is the head of and senior partner in Gilbert + Tobin's competition, consumer and market regulation group. She advises on a broad range of cutting-edge competition law issues, including mergers, enforcement litigation and investigations, and ongoing strategic/operational advisory work. Her expertise spans across a broad range of industries, including financial services, the digital economy, health and life sciences and infrastructure. She has a particular focus on multi-jurisdictional matters, advising a range of participants on transactions, investigations and strategic initiatives.

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1 What are the key developments in the past year in merger control in your jurisdiction?

Merger parties have two Australian Competition and Consumer Commission (ACCC) review options: merger authorisation or informal clearance. Under the merger authorisation process, the ACCC may grant authorisation where the acquisition will not be likely to substantially lessen competition (a competition test) or will be likely to result in public benefits that outweigh any detriments (a net public benefit test). Public benefits may include economic and environmental efficiencies and a range of social benefits.

Over the past 12 months, ACCC merger authorisation has matured as an option for merger parties who may need to rely on public benefits. The ACCC reached a decision on three merger authorisation applications in FY2022–23 (*Linfox Armaguard/Prosegur, Telstra Corporation/TPG Telecom* and *ANZ/Suncorp Bank*) and reached a decision on a further application in October 2023 (*Brookfield/Origin Energy*).

The ACCC has also authorised its first mergers on the basis of net public benefits after reaching a view that the merger would result in a substantial lessening of competition (*Linfox Armaguard/Prosegur* and now *Brookfield/Origin Energy*, which was notably decided on environmental benefits). Prior to this, the ACCC had only granted authorisation where it had found that the proposed merger would not substantially lessen competition (subject to undertakings in the case of *AP Eagers/Automotive Holdings* and *BPAY/eftpos/NPP* amalgamation). However, the ACCC also refused to accept public benefits arguments in two of the applications (*Telstra Corporation/TPG Telecom* and *ANZ/Suncorp Bank*).

The past 12 months also saw the first appeal of a merger authorisation decision to the Australian Competition Tribunal (the

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“The majority of mergers in Australia (around 93 per cent) continue to be assessed via the ACCC's pre-assessment process.”

Tribunal) under the new framework (*Applications by Telstra Corporation Limited and TPG Telecom Limited (No. 2)* [2023] ACompT 2). The decision offers a first insight into the operation of the limited merits review process. Additional information is provided in response to question 2.

The ACCC completed 21 public informal merger reviews in FY2022–23 (down from 26 reviews in FY2021–22), with 10 reviews still under consideration. Of the 21 completed merger reviews:

- two were opposed by the ACCC (*Woolworths Group Limited/SUPA IGA Karabar* and *Qantas Airways Ltd/Alliance Aviation Services Ltd*). This is an increase from FY2021–22 where one merger was opposed under the public review process (albeit this was because the parties proceeded to close the transaction prior to the ACCC completing its review – *Virtus Health/Healius*), reflecting the ACCC's focus on increases in concentration in already concentrated industries – in these reviews airlines and supermarkets;
- two were withdrawn after the ACCC released a statement of issues containing its preliminary assessment of the issues, in which it identified either 'issues of concern' or 'issues that may raise concern' (*Forestry Corporation of NSW/Hume Forests Ltd* and *Spirit Super and Palisade Investment Partners Consortium/Port of Geelong*). The ACCC increased the number of statements of issues released in FY2022–23 (releasing nine for mergers completed in FY2022–23 (up from four in FY2021–22), with a further four released on mergers that are still being considered before the ACCC), despite the number of public merger reviews decreasing. The increased use of statement of issues is seeing merger parties walk away from mergers;
- one was withdrawn following market feedback and before the ACCC reached a decision on whether to issue a statement of issues (*Qube Ports Pty Ltd/Newcastle Stevedores Pty Ltd*); and
- the ACCC reached a decision in the remaining cases and did not oppose any of those applications outright, but required undertakings in five instances (*Sika AG/MBCC Group*, *THL Group/Apollo Tourism*, *Zoetis Australia Research and Manufacturing/Betrola Investments*, *Dye & Durham Corporation/Link Administration Holding* and *Aurizon Holdings Ltd/One Rail Australia Holdings LP*). Despite the ACCC's focus on big tech and concentrated industries, it granted unconditional approval in *Google LLC/Mandiant Inc* and *Korean Air Lines Co Ltd/Asiana Airlines, Inc*.

The majority of mergers in Australia (around 93 per cent) continue to be assessed via the ACCC's pre-assessment process. This provides for relatively expeditious review of non-contentious mergers.

2 Have there been any developments that impact how you advise clients about merger clearance?

In line with previous years (and notwithstanding an increase in the number of transactions opposed by the ACCC), for the vast majority of merger transactions without significant complexity, the ACCC's informal (and voluntary) merger clearance regime remains a flexible, convenient and relatively effective process for obtaining merger approval.

However, a key development in FY2022–23 was the Tribunal's first decision in the limited merits review process under the current merger authorisation framework (*Applications by Telstra Corporation Limited and TPG Telecom Limited (No. 2)* [2023] ACompT 2), which provided clarity on the operation of that process. In particular, the Tribunal's decision appears to:

- confirm that the limited merits review process performed by the Tribunal is a review 'on the papers'. The practical outcome of this is that there is very limited (if any) scope for merger parties to seek to file additional material or examine witnesses to test or clarify evidence before the Tribunal, including where this is intended to respond to material that was before the ACCC, but which was not disclosed to the merger parties during the authorisation process;
- conclude that the legal standard for satisfaction of section 90(7) of the Competition and Consumer Act 2010 provides both the ACCC and Tribunal with greater discretion to oppose mergers. The negative framing of the competition test in section 90(7) means that parties must convince the ACCC or Tribunal to an administrative law standard of 'affirmative belief' (as opposed to demonstrating that no substantial lessening of competition is likely 'on the balance of probabilities'); and

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- reframe the 'with and without' test applicable to causation, applying a 'normative competition causation' test. This test distinguishes commercial outcomes caused by a merger (which can be taken into account) from outcomes that are coincident with, but not caused by, the conduct for which authorisation is sought (which are not to be taken into account).

The practical implication of the decision is that merger parties may view the merger authorisation process as less attractive, which could result in an increased use of the informal merger review process, or encouragement for clients to look to the Federal Court of Australia to obtain legal immunity for complex deals opposed by the ACCC (subject to the Federal Court having jurisdiction, see the response to question 6). However, the ACCC's decision to oppose the authorisation application in *ANZ/Suncorp Bank* is currently being appealed to the Tribunal, which will provide additional clarity on the application of the limited merits review process under the current merger authorisation framework.

"The ACCC's focus also remains on competition issues in global and domestic supply chains."

3 Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

In a speech to the National Press Club in April 2023, ACCC Chair Gina Cass-Gottlieb expressed a focus for the ACCC on mergers in already concentrated industries, stating: 'some markets are particularly vulnerable to being adversely affected by further consolidation' and 'the problem of concentration is a growing one in Australia'. The ACCC's focus has been seen in recent decisions, including:

- *Qantas/Alliance Airlines* was opposed by the ACCC in April 2023. In its statement of issues, the ACCC raised concerns that the merger would 'lead to significant concentration and the removal of Alliance as a strong competitive constraint on Qantas in an already concentrated industry';
- *Woolworths/SUPA IGA Karabar* was opposed by the ACCC in May 2023. The ACCC also raised concerns relating to increased concentration in its statement of issues, stating 'the [retail grocery] market is already highly concentrated (irrespective of the precise geographic radius applied), and the [merger] would lead to a substantial increase in market concentration';
- *Telstra Corporation/TPG Telecom*'s application for merger authorisation was rejected by the ACCC in December 2022. In its decision, the ACCC reached a view that the merger would 'entrench Telstra's position as the largest supplier of mobile services in Australia' and that any benefits for regional Australia arising from the merger would be 'unlikely to endure' and, in any event, would not outweigh the likely public detriments, principally through loss of competition; and
- the ACCC has also issued statements of issues in four reviews currently under consideration, citing similar concerns regarding increases in concentration in already concentrated markets in two of those mergers (*Australian Clinical Labs/Healius* and *Cochlear Limited/Oticon Medical*).

The ACCC has also recently shown a focus on the 'coordinated effects' theory of harm. A key part of its decision to oppose the authorisation application in *ANZ/Suncorp Bank* was based on a theory of coordinated effects in home loan competition. That is, the ACCC considered that the merger would create market conditions conducive to an increased risk of tacit collusion between the 'big four' banks in Australia. The ACCC has also raised preliminary concerns relating to coordinated effects in a statement of issues in *Australian Clinical Labs/Healius*, which is a merger currently under consideration by the ACCC.

The ACCC's focus also remains on competition issues in global and domestic supply chains, particularly where they are disrupted by the covid-19 pandemic (as evidenced by *Qube/Newcastle Stevedores*, *Spirt Super and Palisade Investment Partners Consortium/Port of Geelong* and *Aurizon Holdings/OneRail*), on big tech and industries where mergers may cause direct consumer harm, including aviation, energy and telecommunications.

4 Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? Any notable deals that have been blocked or cleared subject to conditions?

Two recent merger decisions have demonstrated that it may be more realistic for merger parties to substantiate failing firm arguments in the current economic environment, especially in industries undergoing substantial change. For example:

- *Linfox Armaguard/Prosegur*, where the ACCC recognised that the cash-in-transit industry is in structural decline due to the decreasing use of cash as a payment method, and formed a view that it is highly probable that one of the merger parties would cease to supply cash-in-transit services in Australia, within the short term, absent the merger. In reaching its view, the ACCC conducted its own independent analysis of the financial state of each business, including the use of a third-party adviser; and
- *IVE Group/Ovato Limited*, where the ACCC did not oppose the merger in circumstances where Ovato had entered voluntary administration in July 2022.

The ACCC has also increased the instances of conditional clearances (from two in FY2021–22 to five in FY2022–23). In these clearances, we have observed a continued preference by the ACCC for structural remedies, with all five conditional clearances requiring a divestment of part of the business as part of the undertaking. However, contrary to its usual practice, in the *Linfox Armagaurd/Prosegur* authorisation decision, the ACCC accepted an undertaking that included behavioural elements. In addition to requiring certain divestments (surplus cash centre sites, personnel and equipment), the remedy included commitments on price, service levels and geographic coverage of services, which would be monitored by an independent auditor. The undertaking also included a dispute resolution mechanism for price and non-price disputes, which could ultimately be determined by an independent expert.

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5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

The ACCC's Chair, Gina Cass-Gottlieb, has given a number of speeches that indicate changes to the ACCC's approach to assessing mergers:

- in a speech to the Law Council in September 2023, Ms Cass Gottlieb emphasised that 'the current informal regime … favours a default position for clearance of mergers' advocating that the right approach to assessing mergers is by application of the 'precautionary principle', which is applied in other legal frameworks and is triggered by the threat or serious or irreversible competitive harm. Ms Cass-Gottlieb stated that

"In April 2023, the ACCC announced its proposal for reforms to merger review processes in Australia."

'competitiveness of Australian markets is best preserved by moving to a clearance regime where merger parties must make the case that clearance should be granted'. She noted that the ACCC considers that the risk of blocking an efficiency-enhancing merger 'is the lesser of two evils' when weighed against the risk of not blocking an anticompetitive merger, and that this risk should sit with the merger parties and not the public. Reflecting this, in April 2023, the ACCC announced its proposal for reforms to merger review processes in Australia, stating its preference for a mandatory notification regime to be introduced in Australia and proposing a reversal of the onus of proof requiring merging parties to demonstrate, on the balance of probabilities, that a merger is unlikely to result in a substantial lessening of competition. This is discussed in detail in response to question 6; and

- in a speech to the National Press Club in April 2023, Ms Cass-Gottlieb stated that, when assessing mergers, the ACCC will need to consider new theories of harm associated with the transition to a low-carbon economy. For example, Ms Cass-Gottlieb stated that consolidation within emerging green industries may lead to pro-competitive efficiencies and economies of scale that make nascent industries viable. On the other hand, environmental credentials and sustainable innovation may become increasingly important drivers of competition, and we may see risks to competition arising from mergers between key 'green competitors' or 'killer acquisitions' of nascent firms that remove the potential for increased competition.

6 Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

In a speech to the National Press Club on 12 April 2023, ACCC Chair, Gina Cass-Gottlieb, affirmed her support for significant reforms to Australia's current merger control regime. Ms Cass-Gottlieb put forward a proposal for reform containing the following elements:

- the introduction of a mandatory and suspensory ACCC notification requirement for transactions above certain thresholds. The ACCC's proposal to the Australian Government Treasury includes two potential metrics for determining whether a merger meets the threshold for review, being a turnover threshold of A$400 million and a global transaction value threshold of A$35 million;
- a 'call-in' power for review of certain mergers that do not meet the threshold, but might otherwise raise competition concerns;
- streamlined 'notification waiver' process for transactions that do not meet the thresholds and otherwise don't raise competition concerns;
- upfront information requirements for formal notification (such as estimates of market shares);

- a reverse onus of proof requiring merging parties to demonstrate, on the balance of probabilities, that a merger is unlikely to result in a substantial lessening of competition; and
- an appeal right to the Australian Competition Tribunal. Recently disclosed ACCC comments suggest this would be a limited merits review, with a narrower appeal right to the Full Federal Court on judicial review grounds only. Alternatively, parties will continue to be able to apply to the Federal Court for a declaration that the proposed transaction is not unlawful (subject to the constitutional requirement that there be a 'matter', ie, a sufficiently concrete, justiciable controversy rather than a hypothetical question).

The ACCC has also proposed that the current 'substantial lessening of competition' test include 'entrenching, materially increasing or materially extending a position of substantial market power'. The ACCC states this inclusion would be framed similarly to the EU test that prohibits concentrations that would significantly impede effective competition 'in particular as a result of the creation or strengthening of a dominant position'. The ACCC has said it would assist in 'addressing concerns about creeping acquisitions', where firms gain market power through a small series of acquisitions that do not amount to a substantial lessening of competition on their own. The ACCC noted creeping acquisitions were particularly an issue in digital platform markets.

The ACCC is also proposing to expand the merger factors to which the decision maker must have regard also include:

- the loss of actual or potential competitive rivalry;
- increased access to, or control of data, technology or other significant assets;
- whether the acquisition is part of a series of relevant acquisitions; and
- whether the acquisition entrenches or extends a position of substantial market power.

Any changes to Australia's merger control laws must be implemented through legislative change. In August 2023, Treasury announced a review of competition policy, which would consider, among other things, the proposal put forward by the Australian Competition and Consumer Commission around merger reform. The review will run for the next two years and, rather than issue a single report, the Treasury will publicly consult and release issue papers on specific reform topics. The competition policy review team will include former ACCC Chair Rod Sims (who is a strong proponent of the merger reforms).

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QUESTIONS

QUESTIONS

The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

The ACCC has expressed frustration that the absence of a mandatory notification in Australia may mean that it is often approached comparatively late, so that it is often faced with either the potential for completion prior to the conclusion of its assessment or holding up a global transaction. While the current framework for voluntary notification remains in place, merger parties should consider early engagement with the ACCC to avoid this situation.

The ACCC has maintained significant coordination with foreign regulators on multi-jurisdictional transactions, including asking parties for their submissions to other regulators and in some cases adopting theories of harm based on overseas analysis. For example, the ACCC considered the merger between *Microsoft/Activision Blizzard* from June 2022 to October 2023, after suspending the timeline pending the outcome of overseas regulatory reviews.

In your experience, what makes a difference in obtaining clearance quickly?

Providing detailed information upfront (especially market share estimates) and proactively engaging with the ACCC about any issues that are likely to be raised in the course of market inquiries by market participants, foreign regulators or in the media can help prevent lengthy inquiries aimed at answering questions that are ultimately irrelevant. It is also helpful to offer to provide the ACCC with 'teach-ins' to assist in understanding the merger parties and the industry, particularly if the industry is new or unfamiliar to the ACCC.

Providing timely response to the ACCC's request for information and documents also prevents delay and it is important for clients to be prepared for such requests.

If a deal demonstrates significant complexity from the outset, either providing an upfront remedy or opting for merger authorisation may provide better prospects of controlling the review timeline (given the statutory time frames).

What merger control issues did you observe in the past year that surprised you?

The difficulties posed by the merger authorisation process (as shown by the outcomes of the *Telstra/TPG Telecom* and *ANZ/Suncorp Bank* decisions) and the limits on Tribunal review of a merger authorisation decision.

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China

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Song Ying is a partner focusing on antitrust. She graduated from the University of Bonn in Germany with a master's degree in competition law. Ms Song has represented numerous multinational companies and has filed notifications for clients in the *MediaTek/Mstar*, *ChemChina/Sygenta* deal and *GlobalWafers/Siltronic deal*. She serves as an academic fellow at the Competition Policy Center of Wuhan University and an academic adviser to LLM candidates at North China University of Technology. She writes and speaks extensively on merger review and other antitrust issues.

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1 **What are the key developments in the past year in merger control in your jurisdiction?**

The key developments in the past year in merger control regime of China can be roughly divided into two parts: legislation development and enforcement development.

In relation to legislative development, on 24 June 2022, the National People's Congress of China released an amendment to the Anti-Monopoly Law (the New AML), which took effect on 1 August 2022. Following the New AML, the State Administration for Market Regulation (SAMR) issued the Provisions on the Review of Concentration of Undertakings to support the implementation of merger control rules in the New AML.

Provisions on the Review of Concentration of Undertakings

The Provisions on the Review of Concentration of Undertakings (the Provisions) comprise 78 articles, which took effect on 15 April 2023. Compared to the previous interim rules, 39 articles have been revised, 14 new articles have been added in, and one article has been deleted. According to SAMR's explanatory note, the changes include the following.

Clarifying application rules of relevant mechanisms

- Adding in provisions related to the 'stop-the-clock' mechanism (articles 23–26). The Provisions have refined the rules on the conditions for triggering the suspension and resumption of the calculation of the review time period, the start and end timings, as well as the form of decision.
- Improving the rules for handling concentration cases that do not meet the notification thresholds (articles 8, 43 and 56). Article 8 outlines notification procedures for concentration cases that do not meet the notification standards but are proved to have or

Zhan Hao

Song Ying

Wang Zhining

"The Provisions on the Review of Concentration of Undertakings comprise 78 articles."

QUESTIONS

> “From the end of 2022 to 18 September 2023, SAMR conditionally approved three transactions and lifted the restrictive conditions for one case.”

likely to have the effect of eliminating or restricting competition. It stipulates that SAMR may require the relevant parties to notify the regulator in writing.

Improving classified and graded review system

- Strengthening guidance for and the supervision of provincial market regulators delegated to carry out merger reviews (article 2).
- Enhancing fair and impartial as well as scientific oversight (articles 3, 6 and 7). Regulators may formulate specific measures for the review of concentration cases in key fields, such as those concerning the national economy and people's livelihood, evaluate the effects of implementation and improve related work.
- Improving the procedural regulations relating to simplified reviews (article 21).

Clarifying key concepts

- Further clarifying the factors to be considered in determining a company's control over other companies (article 5). The article has revised 'shareholders' general meeting' to 'general meeting of shareholders' and entities with authority in the company' and 'board of directors or board of supervisors' to 'board of directors and other decision-making or management entities'. Merger review officials must take into account the attendance and voting history of these entities. It also clarifies the meaning of joint control.
- Specifying the factors to be considered in determining the 'implementation of concentration' (article 8). The Provisions have clarified that these factors include, but are not limited to, whether the registration of market entities or the registration of rights modification has been completed, the appointment of senior managers, the participation in business decision-making and

management, the exchange of sensitive information with other operators, and substantial business integration.

- Optimising the calculation of turnover (articles 9 and 10). The Provisions have clarified that 'previous fiscal year' refers to the fiscal year preceding the date of signing the concentration agreement. They have optimised the calculation methods related to the turnover of a jointly controlled entity arising from its business with third parties.
- Standardising the terms relating to review procedures (articles 17, 18 and 22).

Clarifying responsibilities and obligations

- Regulating the behaviour of the notifying parties or their agents (articles 13, 14 and 70).
- Improving the rules for selecting and appointing monitoring trustees. The Provisions have clarified the responsibilities of obligors in the selection and appointment process and specified the requirements for monitoring trustees (article 45).
- Strengthening the protection of personal privacy and personal information (articles 15, 74 and 75).

Improving legal liabilities and deterrence

- Improving the regulations on fines in accordance with the New AML (articles 66, 67 and 73).
- Clarifying the factors to be considered in the investigation and handling of any illicit implementation of concentration (article 68).
- Enhancing the legal liabilities on trustees and buyers in divestitures for failure to fulfil their obligations (articles 71 and 72).
- Adding in an article stipulating that when an AML enforcement agency finds evidence of suspected violation by public officials, it should refer it to the discipline inspection and supervision agency (article 74).

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In terms of development of significant cases, from the end of 2022 to 18 September 2023, SAMR conditionally approved three transactions and lifted the restrictive conditions for one case. We summarise the four cases below. For more details, please refer to question 4.

Wanhua Chemical/Yantai Juli case

On 7 April 2023, SAMR conditionally cleared the acquisition of a stake in and exclusive control over Yantai Juli Fine Chemical (Yantai Juli) by Wanhua Chemical Group (Wanhua Chemical) after a 241-day review. SAMR regarded that the transaction is likely to eliminate or restrict competition in the Chinese market for toluene diisocyanate (TDI). Therefore, the authority granted an approval subject to restrictive conditions, requiring both parties and the combined entity to perform the following obligations for five years.

MaxLinear/Silicon Motion case

On 26 July 2023, SAMR conditionally cleared the acquisition of all issued and outstanding shares of semiconductor manufacturer Silicon

> "SAMR continues to attach importance to the sectors closely related to people's livelihood, such as chemicals and pharmaceuticals."

Motion Technology Corp (Silicon Motion) by US-based MaxLinear after a 314-day review. SAMR considered the deal would or would be likely to eliminate or restrict competition in the Chinese market for third-party NAND flash memory master control chips. Therefore, SAMR granted approval subject to restrictive conditions, requiring both parties to comply with – including but not limited to — the following conditions for five years.

Simcere Pharma/Tobishi case

On 22 September 2023, SAMR conditionally cleared the proposed acquisition of batroxobin injection manufacturer Beijing Tobishi Pharmaceutical (Tobishi) by Nanjing-based drug company Simcere Pharmaceutical (Simcere Pharma). Simcere Pharma sells batroxobin API, which is used to manufacture the batroxobin injection, primarily to treat sudden hearing loss. It has a vertical relationship with Tobishi, the only producer of batroxobin injection in China with a 100 per cent share in the relevant market. The two sides also have a horizontal overlap as Simcere Pharma is engaged in the research and development of batroxobin injection.

After review, SAMR granted approval subject to restrictive conditions.

Marubeni/Gavilon case (waive of conditions)

On 25 June 2023, SAMR waived the conditions imposed on the acquisition of a 100 per cent stake in Gavilon by Marubeni. The restrictive conditions on *Marubeni/Gavilon* were originally imposed by China's Ministry of Commerce (MOFCOM) on 22 April 2013.

To sum up, we think the implementation of the Provisions was the key development in 2023 under the Chinese merger control regime, which clarifies the implementation of the New AML and increases legal certainty. In terms of enforcement, it seems SAMR continues to attach importance to the sectors closely related to people's livelihood, such as chemicals and pharmaceuticals. In addition, the semiconductor industry continues to receive attention from SAMR.

2 Have there been any developments that impact how you advise clients about merger clearance?

In 2023 so far, SAMR has conditionally approved three transactions, namely, *Wanhua Chemical/Yantai Juli* case, *MaxLinear/Silicon Motion* case and *Simcere Pharmaceutical/Tobishi* case. Among the three cases, one case involves chemical industry, one involves the semiconductor industry, and another relates to the pharmaceutical industry. Regarding the review period, SAMR took around 241 days to review the parties' submission of the notification materials until the completion for the *Wanhua Chemical/Yantai Juli* case, took 314 days for *MaxLinear/Silicon Motion* case, and a lengthy 450 days for *Simcere Pharmaceutical/Tobishi* case. Out of the three cases, Wanhua *Chemical/Yantai Juli* case went through a pull and refile procedure, but

the other two have been applied the stop-the-clock mechanism based on the newly amended Anti-Monopoly Law.

When dealing with remedy cases, where necessary to communicate with the antitrust authority of other jurisdictions, SAMR would usually request the notifying parties to submit a waiver application. In some complex cases, SAMR may engage economists to provide assessment reports as SAMR deems necessary. For all the three cases conditionally approved by SAMR in 2023 so far, SAMR has engaged independent third-party consulting firms to conduct an economic analysis of the competition concerns in cases, and to verify the authenticity, completeness and accuracy of the documents and materials submitted by the notifying parties. In particular, when SAMR shares competition concerns with the notifying parties, it usually does not share the details of the economic report.

Apart from remedy cases, SAMR has kept rather busy by the rising number of simplified and normal cases. For the first half of 2023, the total number of transactions being unconditionally cleared by SAMR was 364. In the same period for 2022, the number was 357. To better prepare for the forthcoming notification filing boom, SAMR has launched the programme to delegate its power to conduct merger reviews under simplified procedures to five of its provincial counterparts in Beijing, Shanghai, Guangdong, Chongqing and Shaanxi. After one year of delegation, the five provincial regulators mandated to review merger control filings accounted for 45 per cent of all simplified cases. It took an average of 19.1 days and a median of 16 days for these deals to get the go-ahead.

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3 Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

SAMR's frequent enforcement activities against failure to notify concentration of undertaking especially since 2021 seems to have subsided gradually in 2023. From the end of 2022 to 27 September 2023, SAMR did not publish any cases of fines for failure to notify or gun-jumping. However, this apparent reduction in publication of enforcement activity should not necessarily be construed as a relaxation of SAMR's stringent antitrust scrutiny standards pertaining to merger control. Instead, it may be indicative of a significant improvement in the awareness of businesses to comply with the merger filing requirements mandated by the New AML. This heightened awareness is particularly significant because the New AML has substantially increased the potential fines for failure to notify, raising the maximum penalty from 500,000 yuan to 5 million yuan.

> "SAMR has made significant advancements in effectively employing various remedies to address competition issues."

A general trend still suggests that China's antitrust enforcement agencies will, under the newly introduced categorised and graded review system in the New AML, devote further efforts and administrative resources to exercising a more refined review of merger control in strategic industries. Pursuant to the New AML, the Threshold Rules and the Provisions, concentration of undertakings in the fields of finance, media, science and technology, people's livelihood and industries involving start-ups, new business models and labour-intensive industries are likely to fall under the scope of merger review.

In preparing a merger filing in China, companies in these industries need to prepare carefully and exercise caution. However, due to the law enforcement agency's increasing attention to antitrust, companies in other industries also need to keep an eye on merger review rules to mitigate antitrust risks. It is suggested that antitrust lawyers be involved in the early stages of the transaction to obtain favourable terms by taking a comprehensive view of the related antitrust risks.

4 Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? Any notable deals that have been blocked or cleared subject to conditions?

From the end of 2022 to 27 September 2023, there were three concentrations of undertakings cleared conditionally by SAMR, namely *Wanhua Chemical/Yantai Juli*, *Silicon Motion/MaxLinear*, *Simcere Pharma/Tobishi*, and no transactions blocked in this year. On 25 June 2023, SAMR announced it was waiving the conditions imposed on *Gavilon/Marubeni*.

In the past year, as a general trend, behavioural remedies are still popular. In particular, 'maintaining the supply' appears in all three cases, reflecting the importance of the downstream and supply chain. It is also notable that in *Simcere Pharma/Tobishi*, after the transaction SAMR asked the entity to divest Simcere Pharma's batroxobin injection business, which is still under research, underlining the importance of the innovative market of the pharmaceutical industry. Also in this case, SAMR for the first time used an 'alternative remedy' in case certain remedies could not be fulfilled, which is known as 'the rules of crown jewels' under EU competition law. This new policy instrument demonstrates that SAMR has made significant advancements in effectively employing various remedies to address competition issues. See the details below. In *Wanhua Chemical/Yantai Juli*, SAMR considered that the proposed deal is likely to eliminate or restrict competition in the Chinese market for toluene diisocyanate (TDI). To address relevant concerns, SAMR imposed the conditions: (1) under comparable trading conditions, the annual average price of TDI supplied to customers in the Chinese market following the deal completion shall not be higher than the average price for 24 months prior to the commitment date; (2) unless there are justifiable reasons, following the deal completion, the TDI production volume in China should be maintained or expanded, and efforts in research

and development and innovation should be made continuously; (3) the supplication of TDI to customers in the Chinese market should be based on the principles of fairness, reasonableness and non-discrimination; and (4) unless there are justifiable reasons, both parties should not coerce customers in the Chinese market to exclusively purchase TDI products from them or conduct tie-in sales.

In *MaxLinear/Silicon Motion*, SAMR considered that the proposed deal is likely to eliminate or restrict competition in the Chinese market for third-party NAND flash memory master control chips. To address relevant concerns, SAMR imposed the conditions: (1) the parties shall continue to supply NAND flash memory master control chip products in China on a FRAND basis; fulfil Silicon Motion's existing customer contracts and maintain Silicon Motion's existing business relationships; (2) the parties shall not substantially change the existing business model and operations of Silicon Motion; (3) the parties shall retain Silicon Motion's research and development (R&D) business relating to NAND flash memory master control chips in Taiwan; (4) the parties shall retain Silicon Motion's field application engineers in China as part of the R&D resources to provide support to its customers of NAND flash memory master control chips; and (5) for NAND flash memory master control chips sold in China, no malicious code shall be added to the design.

In *Simcere Pharma/Tobishi*, based on the decision made by SAMR, the proposed deal was voluntarily filed by Tobishi and Simcere Pharma even though it did not meet the mandatory filing threshold. After preliminarily assessing documents of the proposed deal voluntarily filed by the parties, SAMR considered that there was necessity to conduct further assessment on this concentration. Based on the decision made by SAMR, the proposed deal is likely to eliminate or restrict competition in the Chinese market for the batroxobin injection. To address relevant concerns, SAMR imposed the conditions: (1) the parties should terminate the agreement between Simcere Pharma

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and DSM over the exclusive supply of batroxobin API in China; (2) the parties should divest Simcere Pharma's batroxobin injection business under research; (3) the parties should lower the end user price of batroxobin injections, commonly used in clinical practice, by no less than 20 per cent of the current online procurement price; (4) the parties should meet the demand for batroxobin injections, commonly used in clinical practice; and (5) if the first or second conditions fail, the end user price for batroxobin injections should be cut by no less than 50 per cent of the current online procurement price.

Notably, this is the first time that SAMR has adopted an 'alternative remedy' for fear that condition (1) or (2) cannot be satisfied, 'the rules of crown jewels' under EU competition law.

"The Provisions provide factors to define whether a concentration of undertakings has been implemented."

5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

The official version of Provisions was released on 10 March 2023 and took effecs on 15 April 2023, which provides detailed review guidance to the new mechanisms established by the New AML.

In addition to make the corresponding changes to the New AML, below are the main contents in the Provisions:

- The detailed procedure of 'stop-the-clock' mechanism is set in the Provisions. The Provisions specify the triggering conditions, the point to end stop-the-clock and start the period for review and the forms of decision to be made.
- The Provisions further detail the procedure of investigation of killer acquisitions and states that if there is evidence that a transaction may exclude or restrict market competition, despite the mandatory turnover threshold not being met, SAMR has the right to notify by written notice the undertaking and require the undertaking involved to submit a notification within 180 days of the notification date.
- The provision regarding the publicity of summary merger review cases has been newly added to the Provisions. The Provisions stipulate that after accepting a summary case, the SAMR shall make public the basic information on the case for a period of 10 days. Any summary case that does not meet the criteria on summary cases shall be returned by the SAMR and required to be declared again by the declarant as a normal case.
- Some important terms have been clarified by the Provisions. For example, the Provisions provide criteria to define whether a concentration of undertakings has been implemented, including whether the administrative registration or changes in rights has been completed, the appointment of senior executives, the actual participation in business decision-making and management, the exchange of sensitive information with another undertaking, and the substantial integration of businesses and so on.
- The Provisions also emphasise that the agents of notifying parties also bear the obligations to assist the declarant in examining the authenticity, accuracy and completeness of the declaration documents and materials.

This year, SAMR is also focusing on promoting ex ante compliance work and has published Antitrust Compliance Guidelines on Concentrations of Undertakings (Compliance Guidelines) on 11 September 2023, which shows that SAMR is putting more efforts into normalised supervision. The Compliance Guidelines focus on the typical risks that should be paid attention to in each step of concentrations of undertakings, and how to formulate a targeted compliance management system to avoid such risks in enterprises' merger and acquisitions activities. It also introduces the management

measures on how to promote effective implementation of merger control compliance mechanisms.

6 Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

For the rest of 2023 and in the coming year, we believe that SAMR will continue to push forward to the official release of the Threshold Rules to serve as the supporting documents of the New AML. Meanwhile, SAMR may implement a tiered classification system for merger filing. For certain simple cases without any competition concerns, such as those involving pure overseas matters that have no impact on domestic market, it is expected that data requirements will be reduced, thus alleviating the burden of material submissions and expediting the review process. In addition, SAMR has published Compliance Guidelines, which shows that SAMR is paying more attention to ex ante compliance to relieve the burden on AMRs of ex post supervision. For instance, Beijing AMR enhances its services by implementing ex ante risk alert notifications on the 'e-Window Connect' enterprise service platform in Beijing. This feature primarily focuses on alerting undertakings during the registration of new joint ventures or changes in equity ownership. When engaging in such transactions, a pop-up notification reminds businesses of their legal obligation to make merger filing as stipulated by the law, along with the potential legal liabilities that may arise from failure to comply. Regarding the Threshold Rules, we remind enterprises to apply the new filing thresholds after they are finally determined and become effective and pay attention to the rules on the transition period when making the filing assessment. In particular, the newly introduced filing threshold in the Threshold Rules imposes on large companies with a Chinese turnover of more than 100 billion yuan an additional obligation; thus, enterprises of this scale should pay close attention to their transactions with innovative targets that have the required revenue and market value (market valuation), as the transactions in this kind could be largely notifiable before SAMR.

Regarding the Compliance Guidelines, we recommend that enterprises take advantage of the Compliance Guidelines to establish or improve the internal compliance mechanisms. As for the key compliance risks mentioned in the Compliance Guidelines, enterprises are asked to integrate the internal merger control review of these key risks to the internal decision-making procedure of merger and acquisition activities and set up management mechanisms to ensure the appropriate operation of internal compliance mechanisms such as compliance commitments, compliance training, compliance sanctions and motivations, etc.

Moreover, SAMR intends to issue horizontal concentration guidelines, vertical concentration guidelines and other related documents in the future. This initiative aims to provide businesses with greater legal certainty and transparency.

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The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

It is suggested that the client conduct a comprehensive assessment at an early stage as to which jurisdictions the client is under an obligation to notify. Moreover, if the required antitrust approval is one of the crucial factors of closing conditions in a special purchase agreement, the client should carefully assess the timeline for each jurisdiction to make a plan for filing for all jurisdictions to avoid any uncertainty of transaction's termination. In some high-profile and complex cases, communication between merger review authorities is possible. Thus, coordination between filings in all the required jurisdictions is necessary to ensure consistency on key substantive matters and to avoid unnecessary delay.

In your experience, what makes a difference in obtaining clearance quickly?

For normal procedure cases, most of the cases will seek opinions from the relevant authority departments or industry associations or top customers to determine whether the concentration will have an adverse impact on competition. Therefore, if they can feed back positive opinions in time, the review process would be accelerated effectively. For simplified procedure cases, correctly defining the relevant market and providing information completely in the initial filing makes a difference in obtaining clearance quickly. Also, if the notifying parties can maintain good communication with the case handler, it is possible to identify the case handler's concerns in good time, respond to certain questions orally and push the case on key nodes, which may accelerate the review process.

What merger control issues did you observe in the past year that surprised you?

In our view, SAMR is taking efforts to facilitate notifying parties to submit the notification materials to SAMR and simplify the procedure of notifications. The Provisions add a new provision to emphasise the development of an information system for the review of concentrations of undertakings to improve review efficiency. Correspondingly, a new uniform online system for notification and supervision of restrictive conditions cases has been introduced by SAMR so that notifying parties and their agents can submit materials and receive notices from the reviewing authorities in one go. SAMR is also considering simplifying documents requirements for summary cases of concentration of undertakings.

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Egypt

Amir Ibrahim was the previous Chairman of the Egyptian Competition Authority. He is currently a partner for trade and competition at Ibrachy & Dermarkar law firm in Cairo. He holds an international experience in competition and commercial legal matters. He is among the few Egyptian experts in the area of competition and economic regulation handling complex merger and acquisition cases as well as related economic matters. He has solid experience in advising businesses in the pharmaceutical, digital and tech industries. During his tenure as Chairman of the Competition Authority, he led the first merger investigations in 2018 onwards and other major investigations in the digital economy and other industries.

He has successfully litigated on behalf of the government of Egypt landmark antitrust cases in the area of sport broadcast rights and restrictive licensing practices. He has also successfully litigated several arbitration disputes related to other broadcasting rights.

He was appointed by presidential decree as board member to the Supreme Council of Media. During his public tenures, he contributed to the draft of competition law, including the new merger chapter and public procurement law. He is a former board member of the Gas Regulatory Authority, the Ministerial Committee for the Protection of Intellectual Property Rights, and the Anti-Dumping and Trade Remedies Board.

Amir holds a PhD degree in competition law from Queen Mary University of London, and an LLM in international and European business law from Paris 1 Pantheon-Sorbonne. He was named among the 10 most influential economic figures in Egypt for 2018.

QUESTIONS

1 What are the key developments in the past year in merger control in your jurisdiction?

After almost 17 years of enacting the Egyptian Competition Law (ECL), pre-merger control was finally introduced by Law No. 175/2022. In the past few years, the Egyptian Competition Authority (ECA) expressed concerns about the anticompetitive impact of some transactions. However, it was not until 2018 that ECA decided to revive an old but effective EU law doctrine, the Continental Can Doctrine. According to this doctrine, merger and acquisition can be assessed under the substantive provisions of Competition Law. Arguably, a merger or an acquisition is an agreement that falls perfectly under the different substantive provisions of the ECL. What was missing was not the substantive grounds to assess these types of transactions but a procedural framework regulating the matter more effectively.

To fill in this gap, the ECA used to intervene under article 6 of the ECL (prohibition of anticompetitive horizontal agreements), read in conjunction with article 20 of the Law (the ECA's powers to impose interim measures and remedies on the breaching undertakings) to assess the anticompetitive effect of some transactions. This approach was adopted in relation to an acquisition between the two most significant competitors in the healthcare sector, which was eventually prohibited by the ECA, marking the first blocked transaction under the substantive provisions and was also used in relation to the multi-jurisdictional *Uber/Careem* acquisition in the ride sharing sector.

The significance of the latter case cannot be overstated for several reasons. First, it was the first case in which the ECA adopted the Continental Can doctrine. Second, it was the first recorded case in which the ECA took the plunge into the rapidly evolving digital economy. Third, it was the first case in which the ECA explored its sphere of influence with other competition authorities concerned in

Amir Nabil

order to mark the first multi-jurisdictional cooperation in the area of merger control by the authority. Finally, in the absence of substantive guidelines under the different provisions of the law, the publication of the full report of the *Uber/Careem* acquisition offered the first insight into ECA procedural and substantive methodology in the assessment of anticompetitive behaviour as well as the role of economic analysis in such assessment.

Within this history, in December 2022, Law No. 175 of 2022 was adopted, it concerns the amendments of the ECL provisions, introducing the new economic concentration ex ante control regime for the first time in Egypt. The amendments provide a strict standstill obligation on the parties to the transaction if their transaction falls under the legal definition of economic concentration. The said definition covers the acquisition of 'decisive influence' (the concept of control) and the acquisition of material influence (ie, the ability to

"The amendments explicitly provide that the ECA reserves the right to review any economic concentration falling below the above-mentioned thresholds (non-notifiable concentrations)."

influence another person or entity's strategic and commercial policies and goals directly or indirectly, particularly the likelihood that such influence may lead to or facilitate a collusive outcome).

The amendments provide that, for an economic concentration to be notifiable under the new ex-ante control regime, it shall meet a certain financial threshold. Accordingly, a transaction should be notifiable if the combined aggregate local turnover of the parties (including related parties) exceeds EGP900 million. And the turnover of at least two of the parties concerned in Egypt exceeds EGP200 million for each separately. Or if the combined aggregate worldwide turnover of the parties (including related parties) exceeds EGP7.05 billion and the turnover realised in Egypt of at least one of the parties concerned exceeds EGP200 million.

However, and for the purpose of allowing the ECA wider scope for intervention that is not conditioned by any financial thresholds, the amendments explicitly provide that the ECA reserves the right to review any economic concentration falling below the above-mentioned thresholds (non-notifiable concentrations). The ECA could do so even if the transaction is consummated within a one-year deadline for intervention from the consummation date. In this context and unlike notifiable concentrations, the ECA can only impose behavioural remedies without blocking the transaction. Therefore, even if the transaction does not meet the above-mentioned financial thresholds, it may be subject to the ECA's scrutiny by virtue of article 19-bis paragraph (2) of the ECL. This was a deliberate attempt from the ECA to intervene in some mergers that could escape the financial threshold, yet they may have some anticompetitive effects. The ECA was concerned with the so-called pattern of killer acquisitions and acquisition with narrow geographic scope that could lead to the creation of monopolies at local level. This move came after some policy papers and interventions in which the ECA expressed concerns regarding those types of acquisitions.

The amendments also introduced the concept of remedies consisting of behavioural and structural remedies that the ECA may impose on parties to a certain transaction to eliminate harmful effects on competition resulting from the concentration instead of totally blocking it. The concept of remedies had always existed before the enactment of these amendments; however, an official definition of the nature of such remedies and the procedures related to them now clarifies things.

As to the substantive assessment conducted by the ECA for the notifiable economic concentration, the new article 19-bis (b) of the ECL states that economic concentration should be declared incompatible if it restricts, prevents or harms the freedom of competition. The article explicitly refers to the executive regulation to determine the factors to be considered in assessing whether the economic concentration restricts, prevents or harms the freedom of competition. Additionality, and in a controversial way, the second paragraph of the same article states that the ECA may approve a transaction after the approval of the council of ministers in two cases: first, if without the consummation of the transaction parties would exit the market (failing firm defence) or if the concentration yields economic efficiencies that outweigh the harm of competition or it achieves national security objectives. In a very atypical way, the exemption of an economic concentration on the basis of economic efficiency has to be made by the council of ministers instead of the ECA. This contradicts well-established international practice according to which the assessment of economic efficiencies should not be based on political whim but rather on genuine technical considerations.

Another controversial aspect of the amendments is creating a separate merger control regime for transactions in sectors under the supervision of the Financial Regulatory Authority (FRA) (ie, non-banking financial activities). The amendments explicitly excluded

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the activities under the FRA's supervision from the ECA's jurisdiction. In this regard, the new article 19(e) provides that entities exercising an activity under the supervision of the FRA must notify the FRA of the economic concentration. Here, ECA powers in relation to the concentration are only limited to issuing a non-binding opinion to the FRA. This provision creates a proliferated competition regime and is greatly expected to create uncertainty and confusion and possible contradictions between the FRA's and the ECA's decisions regarding a given transaction as, after all, the ECA's opinion or recommendations will not be binding for the FRA.

Upon the publication of the new law in the Official Gazette, the ECA published a press release stating that the new law would not be implemented until the adoption of executive regulation. To date, the executive regulation has not been issued, and therefore the ex ante control regime of economic concentration is not yet effective. This does not mean that ex ante control of economic concentrations will be totally suspended until the issuance of the executive regulation, as the ECA can still intervene under articles 6 and 20 of the ECL to assess

> "Economic evidence and its assessment will depend on the theory of economic harm that the authority is pursuing."

transactions that may produce anticompetitive effects, as it did in the past. Whether it will do so in the presence of a merger control law remains uncertain. Therefore, we usually advise and help our clients in assessing the legality of their mergers under the test set forth under article 6, which is, incidently, very different from the test set forth in the new merger law.

2 Have there been any developments that impact how you advise clients about merger clearance?

As previously clarified and although the new amendments introducing the ex-ante control regime for economic concentration were suspended till the issuance of the executive regulation, it is always advisable that firms procure the ECA's approval on the transaction (especially horizontal transaction, ie, between competing persons) before its implementation. At this stage (ie, prior to the implementation), the ECA should not block the transaction by any means; it may impose remedies (structural or behaviour measures) or provide its unconditional approval of the transaction. In any case, if the transaction triggers a notification under the Common Market for Eastern and Southern Africa (COMESA) competition rules, it is the ECA that investigates the matter in cooperation with the COMESA Competition Commission (CCC).

Here it is also important to note that clients need to seek local competition expertise with experience in ECA's methods for collecting economic evidence. On many occasions, data requests from the side of the authority are vague or wide in scope than necessary. The Request for Information (RFI) issued by the authority needs to be carefully reviewed and possibly negotiated with the authority. The ECA usually does not disclose the theory of harm it is after or even the scope of its investigation. I usually help my clients in preparing the answers to the RFI but also to guide them on the possible theory of harm that the authority is after as they may be revealed from the nature of the information requested in the RFI in question. Here, being an ex-case handler and decision maker is an added value. That is why, when navigating the Egyptian merger regime, clients need the assistance of local experts with economic experience and, in particular, experience with ECA economic analysis and data gathering in merger cases.

Economic evidence and its assessment will depend on the theory of economic harm that the authority is pursuing. The early merger cases that started in the years 2018 onwards, the test may seem very technically similar to the EU's Significant Impediment of Effective Competition (SIEC) test, which is not true. The test under article 6 is more similar to the test under the EU horizontal cooperation guidelines. While both may lead to the same results, the structure of economic analysis may differ. Now the new test set forth in the law is an entirely new substantive test, the freedom of competition test. According to this test, transactions that may prevent, restrict, or

harm the freedom of competition should be declared incompatible with the law. The latter test may also seem flexible enough to capture horizontal, unilateral, vertical and conglomerate effects. It may do so in a particular way, though that also places emphasis on the concept of freedom of competition. The law gave the ECA the freedom to interpret this test in the executive regulation of the law, which is still pending. However, regardless of what may be included in the executive regulation, such regulation cannot entirely reject the interpretation given by Egyptian courts to the concept of freedom of competition under the current article 1 of the law, which may give rise to new line of cases in which the principal focus is the likelihood of the merger in question restricting the freedom of competition of other undertakings as such.

The assessment of economic efficiencies is another controversial aspect of the law. In the European Union, the SIEC allows the European Commission to take economic efficiencies into consideration when assessing whether the transaction in question may significantly impede effective competition. A freedom of competition-based test may not allow this to a similar extent. The law does allow the exemption of the transaction on the basis of economic efficiency, yet the assessment of such efficiencies comes at a later stage after the competitive assessment. So, if a transaction is to be saved on grounds of efficiencies, this can only happen after the ECA declares the transaction restricting the freedom of competition. The body that can later save the transaction on economic efficiency grounds is not the ECA but rather the cabinet of ministers, meaning that clearance can be delayed even further beyond the statutory deadlines.

The particularities of the substantive test may add another hurdle for the international cooperation of the ECA in the area of merger control. As argued above, the ECA showed signs of effective cooperation with regional and national competition authorities during the assessment

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of the *Uber/Careem* acquisition. Recently, COMESA competition authorities joined by other competition authorities in the African continent issued a mutual statement setting out a framework for mutual cooperation in the area of digital markets. The events leading to such cooperation were unfolded at the time of the *Uber/Careem* acquisition when the ECA took the leading role in trying to ensure a consistent outcome of the assessment by different authorities concerned by the transaction and to streamline the commitments that may be imposed by different authorities. It also marked the first north African-wide intervention in the digital market. Now the particularity of the substantive test makes the Egyptian framework greatly different from that of the COMESA's, which may limit the effectiveness of such cooperation unless more harmonisation efforts are made. Also, the pending executive regulation means that Egypt will be the only member state of the African digital competition alliance that lacks an effective merger law.

"It is generally expected that the ECA will be more lenient towards the acquisition of material influence."

3 Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

The healthcare and pharmaceutical sectors were always and continue to be an enforcement priority. Despite that enforcement of the merger law is still suspended as a result of the absence of the executive regulation, the said sectors are an exception. As per Minister of Health Decree No. 497/2014, any transaction relating to the transfer – by any legal means – of hospitals and pharmaceutical assets shall be referred to the competent unit within the ministry to obtain its prior approval before the consummation of the legal act in question. In this regard, the practice of the Ministry of Health is to refer the transaction concerned to the ECA for consultation, the ECA conducts a competition law-based assessment to ensure that the rights of the patients, workers and physicians, but more importantly the Universal Healthcare Insurance, are not affected by the transaction, and that the transaction will not negatively affect the availability of necessary medicines. In practice, approval granted to transactions in the healthcare or pharmaceutical sectors is conditional on the ECA's assessment of the transaction and its potential impact on the relevant market. By way of illustration, prior to the merger law, during the era of applying article 6 against harmful concentrations, the ECA blocked a merger between two of the biggest healthcare providers in the Governorate of Greater Cairo on the basis that its consummation could lead to the creation of a monopoly in the said geographic zone.

Also, in relation to the healthcare sector, it is worth noting that the ECA may consider the availability of less restrictive purchasers as part of its assessment, and here the ECA's recent approach is unconventional and not without its critics.

4 Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? Any notable deals that have been blocked or cleared subject to conditions?

It is generally expected that the ECA will be more lenient towards the acquisition of material influence. In 2019, in a landmark case, the ECA concluded that the possession of minority shareholding conferring material influence led to a collusive outcome on the Egyptian market. Here, some commentators wrongly thought that it is as if the ECA is rejecting the acquisition of minority shareholding. Nothing could be further from the truth. This case was a classic textbook example of cross-shareholding across competitors and interlocking directorates that resulted in a collusive outcome. The ECA closed the case by accepting commitments from both parties. The significance of this legal precedent for the future is that it sheds light on the fine line that may bring a case of material influence under merger law or under the law of article 6 against anticompetitive horizontal agreements.

The ECA's approach is, however, stricter in the healthcare and pharmaceutical industry. Having said that, it is also noticeable that some parties, especially local players not familiar with competition law, often fail to defend a proper market delineation and market power that could have drastically changed the outcome of the assessment.

5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

To date, the only comprehensive guidance on ECA analysis in merger control is the published decision of the *Uber/Careem* acquisition. There have been some published policy papers issued by the authority that highlight the general economic benefits sought from the merger control law. The ECA has recently established a merger unit to develop the guidelines whether the substantive or the procedural guidelines. It is expected this unit will also establish those guidelines on the aspects of coordination of the ECA with other sector regulator especially the FRA to remove the overlap created by the law and the clear discrimination between entities subject to the ECA's jurisdiction and those subjected to the FRA.

On the international front, a joint statement of the CCC, ECA and other African competition authorities was issued to declare a framework of informal cooperation in investigation and exchange of expertise in enforcing competition rules in the digital economy. The statement cannot amount to a formal coordination framework and merely creates a forum for the exchange of expertise and capacity building. There are lots of legal and technical hurdles for effective international cooperation in law enforcement between the ECA and other competition authorities, the CCC included. That is why it is important for companies to consider this aspect and previous cooperation

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attempts performed by the ECA in multi-jurisdictional transactions to anticipate the outcome but also factor in the limitations.

6 Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

Of course, the most anticipated change is the pending executive regulation of the new merger law and the accompanying guidelines that shall finally bring the law into effect.

The absence of these pieces of legislation creates a highly uncertain and may create an uneven playing filed for different industries. At the least, it may create a race of mergers to monopoly since lots of industries would be aware that once the regulation is issued not all their transactions can escape the law. The very recent acquisitions in the tobacco industry are one piece of evidence that merger law may

"A few years ago, the ECA intervened against similar kinds of transactions that risked creating monopolies in different industries."

not be applied consistently whether on the substantive or procedural aspects. The transactions in this sector raise questions on the neutrality of the merger regime and whether it could ensure a fair and non-discriminatory treatment of different businesses. Yet it is the delay in issuing the above legislation that might be the reason for complaint. Many observers have also been justly expecting a kind of intervention by the ECA. Indeed, a few years ago, the ECA intervened against similar kinds of transactions that risked creating monopolies in different industries.

The issue here also raises the question of parties' rights during the investigation process, mainly their due process rights and access to case files. Nothing in the new merger law imposes any obligation on the ECA with regard to transparency and accountability. The law is completely silent on these matters, which seriously risks turning the merger regime into a closed process that is difficult to predict. The ECA has shown signs in the past towards recognising those rights and their importance for the technical efficiency of the merger investigation but also the integrity and credibility of the process. For instance, in the *Uber/Careem* decision, the ECA dedicated for the first time in its history a whole section that elaborates on the rights afforded to the parties during the assessment of a transaction. Similar stances were also observed under other areas of competition enforcement where for the first time the ECA shared what is akin to a fully detailed statement of objection and allowed the parties concerned to share their defences prior to issuing final decisions. Recent ECA practice shows, however, a drawing back from this track.

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QUESTIONS

The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

The new merger law allows for pre-merger discussions with the ECA and this should count as a positive point to help the parties in the design of their transactions. What might be challenging is arguing economic efficiencies, which is – as argued – something outside the scope of the ECA and is now left to the discretion of political bodies. Yet, it is safe to expect that if the authority is convinced of such efficiencies that should speed up the process of subsequent approvals.

Moreover, the law is not very clear on the circumstances in which a transaction can be impacted by a 'stop-the-clock' situation. In phase one, the law states clearly that the clock will start to count once the case file is 'complete'. Arguably, it is down to the ECA's discretion to decide whether the case file is complete. While this may provide the ECA with the flexibility it needs to conduct its assessment, it may also be burdensome for the parties, prolonging the the assessment period.

In your experience, what makes a difference in obtaining clearance quickly?

It is always having complete case file with the right amount of information especially in relation to market definition and market structure. Knowing the ECA's decisional practice in market definition in different markets but also the challenges associated with this exercise for the authority is key. There are several legal and technical challenges in gathering the relevant market information for such exercise that led the authority in recent cases to reach a wrong market definition. One cannot exclusively blame the ECA for this, as recent cases suggest that the parties involved may have not sufficiently challenge the authority's conclusion in relation to market definition and market power. The ECA usually bank on this. This has been noticed recently, for instance, in relation to some multisided markets. In all cases, parties should not expect that the authority will rubber-stamp their submissions. Thus recourse to local expertise at early stages of planning of a transaction is crucial to help with these aspects especially with the highly technical aspects of market definition and theories of harm that the authority may embark to follow. Further, the ECA usually interviews key stakeholders in the merging parties on some technical issues, which also requires significant experience of ECA tactics.

What merger control issues did you observe in the past year that surprised you?

Some cases have shown an unconventional approach towards conglomerate effects and the less restrictive purchaser test. Generally speaking, the role of economics has been marginal-ised in recent decisions when compared to previous decisions. But there is always a room for improvement through advocacy. That is why the parties and their counsel need to advocate these concepts to the authority within or before the assessment phase, particularly because the methodology of application of different economic tests varies from one market to another.

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Germany

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1 What are the key developments in the past year in merger control in your jurisdiction?

The merger volume continues to be in decline with the effect that the Federal Cartel Office (FCO) has more capacity to review those concentrations that meet the thresholds. As in the previous year, the number of transactions filed with the FCO decreased by 20 per cent. In 2022, the FCO examined around 800 mergers, only five of these in Phase II. One merger (in the surface water drainage sector) was prohibited while two, the takeover of OMV petrol stations by EG Group (Esso) and the combination of Rheinenergie and Westenergie (E.ON), were cleared subject to conditions. In two other cases, the parties involved have abandoned the project. In 2023, until the end of October, three mergers were cleared in Phase II. The deals *Funke/ BCN* as well as *Fluidera/Meranus* were cleared unconditionally, while the combination of *Theo Müller/Royal Friesland Campina* was cleared subject to conditions. In two cases, the parties involved have abandoned the transaction (Scrap and Metal Trading/ProMetall; EQT/ va-Q-tec). The review of two transactions in Phase II is still pending (*Veolia/Hofmann Group; 3G Capital Limited/erfal*).

The FCO suggests the pandemic or the Ukraine war as reasons for the decline. Probably the most significant reason, however, continues to be the increase of the lower local merger control threshold from €5 to €17.5 million introduced in 2021.

Germany's merger control sees no particular concentration on an industry sector as the FCO picks up cases as they come. Any sector focus in merger control would rather come in the form of a legal change or policy change, by using instruments that are available *ex officio*. One such *ex officio* example is the initiation of a sector inquiry in the waste management sector in January 2022. The sector inquiry followed the abandonment of a contemplated joint venture

Jonas Brueckner   Gerrit Rixen

by Rethmann Group and Rhein Main Group, two recycling operators. The sector inquiry's purpose is to examine whether or not the market mechanisms in this sector are functioning properly. In the case of a negative outcome, undertakings active on the relevant markets might under certain circumstances be obligated to submit acquisitions of small companies (below the minimum turnover threshold) to the authority for review in the future. As is common in almost all merger control regimes globally, merger control only comes into play when the companies involved achieve certain minimum turnovers, indicating a certain level of economic significance. However, a new provision introduced in 2021 (section 39a GWB) allows the FCO to require companies to notify acquisitions of smaller companies below the standard turnover thresholds. One of the prerequisites for such a requirement is a preceding special sector inquiry, which was now

"The market for automated driving assistance systems is a dynamically growing sector with a global volume of around €30 billion."

initiated with a focus on the waste management sector and the specific market position of the undertaking concerned.

Apart from this specific activity some of the most notable merger control cases were the following.

In March 2022, the FCO cleared in Phase I the takeover of the software division of the Swedish automotive supplier Veoneer by the US chip manufacturer Qualcomm. This acquisition is the result of a partnership already agreed between Qualcomm and Veoneer in early 2021 to develop an integrated driving assistance system, 'Arriver'. Arriver is composed of Qualcomm's Snapdragon Ride chip system and Veoneer's software. During its market investigation, the FCO held talks with many car manufacturers and producers of chips and software for driving assistance systems worldwide. Particular attention was paid to the question of whether Qualcomm's acquisition of Arriver could affect competition in this area, especially for companies that rely on the purchase of microchips or software. However, the results of this assessment did not reveal any competition concerns. This is partly due to the fact that, in addition to the leading supplier Mobileye, a subsidiary of Intel, another competitor will also bring integrated solutions to the market. The market for automated driving assistance systems is a dynamically growing sector with a global volume of around €30 billion. Apart from these considerations on the substance, the concentration between Qualcomm and Veoneer represents one of the few cases that was subjected to merger control because of the purchase price. Since 2017, mergers are subject to merger control in Germany if the target company has significant domestic operations and the value of the consideration, usually the purchase price of the acquired company, exceeds €400 million. This provision is aimed at examining mergers in which large, established companies want to strengthen their market position by acquiring nascent, potentially very innovative companies with high economic value. Without this provision, the acquisition of Veoneer's software

division by Qualcomm would not have been notifiable to any antitrust authority in Europe, even though the transaction is arguably of considerable interest due to its great economic importance.

In June 2022, the FCO received approval for the takeover of three eye and laser centres in Leipzig by the eye clinic chain 'SmileEyes'. The SmileEyes group already operates eye clinics in Munich, Trier, Luxembourg and Berlin. It also licenses the Smile Eyes brand to other practices, including the Leipzig-based Ophthalmology Group, which operates eye and laser centres in eastern Germany, as well as various eye care practices in Leipzig and the surrounding area. As these companies operate in different regions and the choice for patients remains unchanged, there were no antitrust concerns about this acquisition. However, in another concentration in the ophthalmology sector, the FCO came to a different assessment. In March, Sanoptis notified the FCO of its intention to acquire all shares in Augenklinik Rendsburg and the majority of shares in Augenklinik Rendsburg MVZ GmbH. At that time, the Sanoptis group of companies operated a total of three eye clinics in Germany and Switzerland, around 60 eye surgery centres as well as about 140 conservative ophthalmic practices in the form of so-called MVZs (medical services centres), including many in Schleswig-Holstein. The target of the takeover was an eye clinic in Rendsburg, Schleswig-Holstein, together with an MVZ, which also had 18 practice locations in Schleswig-Holstein. The FCO's initial market investigation indicated high combined market shares of the parties in outpatient ophthalmological care in the Kiel region, which necessitated an in-depth investigation. The companies involved eventually withdrew their merger control notification. What is important to note – apart from the local concentration – is that the purchase of large MVZ chains can be subject to antitrust scrutiny, whereas the purchase of individual practices or smaller chains does not normally meet the threshold for merger control.

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In March 2023, the FCO approved the planned participation of Funke Mediengruppe (Funke) in the marketing company BCN Brand Community Network (BCN). This marketing company is a subsidiary of the Burda Verlag (Burda). BCN has so far mainly marketed the advertising inventory (ie, all advertising space) of Burda and of another media company, Medienholding Klambt (Klambt). After the merger, the joint venture BCN will also market Funke's advertising inventory. Burda and Funke will jointly control BCN in the future, while Klambt will only retain a minority stake in BCN. As a result of the merger, the FCO found that Burda and Funke achieve a combined market share of up to almost 40 per cent in the advertising markets examined, depending on the individual publishing titles. Despite this strong market position, the transaction did not meet the requirements for prohibition proceedings under the merger control provisions. An important reason for this assessment is the willingness of the customers concerned to react to any price increase attempts by the companies involved by partially shifting their advertising budgets to competitors. Price increases would therefore ultimately be uneconomic for the publishers. In addition to the merger control, a

"Beyond merger control, the establishment (or modification) of a joint venture, as in the present case, requires an examination of the underlying agreements and contracts of the participating companies, which must be in line with the principles of the general prohibition of cartels."

review of the underlying agreements and contracts of the companies involved was also carried out in accordance with the principles of the general prohibition of cartels. Beyond merger control, the establishment (or modification) of a joint venture, as in the present case, requires an examination of the underlying agreements and contracts of the participating companies, which must be in line with the principles of the general prohibition of cartels. Interestingly, the FCO found that the antitrust exemption requirements, including efficiency gain, indispensability, appropriate consumer involvement, and the prevention of the ability to eliminate competition, were not fully met. This was, among other reasons, due to the excessive information exchange obligation in the contract drafts and the lack of consumer participation in the cooperation's profits. Nevertheless, the FCO has decided, at its discretion, not to prohibit the transaction. However, the authority is not prevented from revisiting the marketing cooperation in the future in the event of substantial complaints, potential expansions or further competition-relevant collaborations by the parties.

There has also been a notable appeal case.

The Higher Regional Court in Düsseldorf ruled on a series of very interesting questions in the aftermath of the *Facebook/Kustomer* merger. Initially, this merger was subject only to Austrian merger control due to Kustomer's low revenues. However, Austria requested a referral to the Commission under Article 22 of the EC Meger Control Regulation, and the Commission cleared the merger on 27 January 2022. The FCO initiated a procedure for determining merger control under Germany's merger control regulation and established the notification requirement on 9 December 2021. Facebook filed a complaint against this decision but pre-emptively notified the merger. The FCO cleared the merger on 11 February 2022, and imposed a fee of €25,000 for the process (as a filing fee). Facebook lodged a complaint against this decision.

The complaint against the decision establishing the notification requirement was dismissed by the Higher Regional Court as inadmissible due to being resolved by the clearance. The alternative continuing declaration of interest complaint was also rejected due to the lack of an interest in its determination, as there was little concern about the continuing effect of the declaration on future mergers. However, the complaint against the cost decision was successful because the disputed fee would never have arisen with the proper handling of the matter by the FCO. The Higher Regional Court confirmed the absence of a notification requirement under both section 35 paragraph 1 GWB and section 35 paragraph Ia GWB. For section 35 Ia GWB, it was dependent on Kustomer's activities in Germany. In this regard, the Court considered Kustomer's customers in Germany. The Court found Kustomer's activities in Germany not to be sufficiently substantial.

2 Have there been any developments that impact how you advise clients about merger clearance?

The overall advise to clients in relation to merger control in Germany has remained unchanged. The covid-19 pandemic, for example, has not had a significant impact on the operations of the FCO in the context of merger control. The FCO continues to adhere to its standard procedures. In simple cases, there is no anticipation of a pre-filing discussions, which is standard practice only for more complex cases. Regarding the timing of FCO proceedings in Phase I, a lesser number of notified cases suggests that the parties may be confronted with questions even in simple cases. As a consequence, it is now more likely that the FCO will exhaust the review period of one month in comparison to the time before 2021, although it still frequently clears simple transactions ahead of time. The FCO often does so even without prior communication with the FCO, whose case

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handler and head of unit remain available throughout the process. It should be noted though that a Phase I review by the FCO is, overall, very predictable in simple cases. Recent practice has indicated a tendency to extend Phase II proceedings, sometimes even more than once. This has resulted in a notably longer overall review period than the four to five months prescribed by German law.

3 Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

The FCO's recent case law does not suggest significant changes in its merger control enforcement priorities. It is obvious that merger clearances are more difficult to obtain in some industry sectors with a high a degree of (local) concentration. The industry sectors that have been subjected to a sector inquiry, such as cement and ready-mix concrete, charging infrastructure, food retailing or waste

“The FCO had expressed concerns particularly in the area of e-charging columns and heating electricity.”

management may be met with particular scrutiny and expertise by the FCO.

In addition to this, it should be assumed that any acquisition by Google, Meta, Amazon and other leading digital giants will be met with concerns from the outset. On the other hand, transactions that challenge these giants will be welcomed, an example of which is the merger of the services Paydirekt, Giropay and Kwitt in order to represent increased competition for Paypal.

4 Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? Any notable deals that have been blocked or cleared subject to conditions?

There are two notable deals that were cleared subject to conditions:

The first is the concentration between the E.ON subsidiary Westenergie and Rheinenergie. The FCO had expressed concerns particularly in the area of e-charging columns and heating electricity, which led to a sell-off of significant parts of the heating power business. While the divestment of the heating electricity business did not address all problematic markets, it was found that the creation of a new, strong competitive force significantly outweighed the loss of Westenergie's (E.ON) competitive position in the region. The approval is notable because the FCO has made use of the otherwise rarely used balancing clause, according to which a merger is not to be prohibited to the extent that it results in improvements in competitive conditions that outweigh the impairments of competition. It remains to be seen whether the FCO will introduce such opportunity considerations more frequently into its decisions.

The other is Müller Group's acquisition of dairy brands and production facilities, including 'Landliebe' and 'Tuffi', from Royal Friesland Campina after addressing competition concerns. The market investigation identified separate markets for rice pudding, fresh milk-based beverages and basic milk-based beverages, confined within domestic boundaries with minimal imports. According to the FCO, Müller Group held over 60 per cent market share in these areas, clearly surpassing the 40 per cent market dominance threshold. To resolve the concerns regarding the market dominance, commitments were made, including selling the Tuffi business and granting exclusive Landliebe licences for certain products. The FCO determined these undertakings sufficient to address competition issues, allowing the acquisition to proceed without conditions, with the usual possibility of revocation if commitments are not fulfilled.

5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

There have been several legal changes in the past year. At the European level, the European Commission has published new horizontal block exemption regulations for research and development (R&D) and specialisation agreements as well as revised horizontal guidelines that will apply from 1 September 2023. These new regulations and guidelines will be consulted by practitioners and the FCO alike and may thus impact the FCO's decisional practice with respect to non-full-functional joint ventures that are, contrary to the European Union, notifiable in Germany, if the thresholds are met.

At the national level, the 11th GWB Amendment passed the second chamber (Bundesrat) in September and will soon enter into force. The amendments concerning merger control, again, create more opportunities for the FCO to intervene: The right to obligate companies to report mergers below the notification thresholds for a period of three years after completing a sector inquiry is extended as it will now be coupled with even lower thresholds. In the future, a reporting obligation may be introduced for acquirers with domestic revenues exceeding €50 million and the acquired company exceeding only €1 million, down from €2 million in the current provision in section 39a of the GWB.

6 Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

The latest changes to Germany's merger control rules are still relatively fresh: That is the introduction of higher threshold meant to free up capacity within the FCO to allow it to focus on more problematic cases as well as the transaction value threshold, requiring an acquisition with a consideration of more than €400 million to be filed, irrespective of the target's turnover, with a view to address 'killer acquisitions' and, lastly, the extension of the possibilities of intervention in connection with sector inquiries. Thus, further changes should only be expected if these latest changes prove to be flawed in practice, which appears unlikely at this stage.

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QUESTIONS

The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

Complex, multi-jurisidictional transactional transactions must be planned early in advance. A feasibility assessment on the basis of clear and realistic expectations and discussions with the client and comprehensive information is key in order to be able to anticipate all potential concerns a regulator may have and navigate the deal through these. It is also important to anticipate early if a transaction may be subject to remedies and how these remedies may be structured and executed should the authorities require commitments from the parties to clear the transaction. Lastly, the human factor, a dedicated team of in-house lawyers, specialists at the client and advisers must be prepared to work diligently and seamlessly over the course of months.

In your experience, what makes a difference in obtaining clearance quickly?

The clarity of a notification that anticipates questions and concerns that the authority, competitors, customers and suppliers may have, is one of the key contributing factors. It requires in-depth knowledge of the parties involved and the market they operate in. As with more complex transactions, full and comprehensive information from the client and realistic assessments are similarly important, as they will allow the advisor to fully anticipate and address eventual concerns. Lastly, close contacts and a good, trusted relationship with the regulators always helps when it comes to sorting out concerns or, plainly, to speed up the process.

What merger control issues did you observe in the past year that surprised you?

The merger control issue of the past year that surprised the most is the *ex-post* review of concentration between undertakings that are not notifiable under either European or national merger control law in light of abuse of dominance rules (article 102 TFEU). Until the recent judgment in *Illumina/Grail* (C-625/22 P) and Towercast (C-449/21) by the General Court and the Court of Justice of the European Union (CJEU), the *ex-post* review of deals has not been present in practice since the introduction of the European Merger Control Regulation in 1990. And it now appears that the FCO is actively screening the market for transactions below the thresholds with potential implications from an abuse of dominance perspective.

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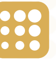

Greece

Efthymios Bourtzalas at MSB Associates specialises in competition and EU law, with a particular focus on merger control, state aid, restrictive trading arrangements, abuse of dominance and public procurement. He has extensive experience in representing clients before the European Commission, the EU Courts in Luxembourg (having acted in more than 30 cases) as well as national regulators and courts. As a Greek-qualified lawyer and member of the Athens Bar, Efthymios also has extensive expertise in Greek law and has dealt with several competition cases examined by the Greek competition authorities and courts.

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- Associate with Ashurst LLP (1995–2006);
- European Commission, DG for Competition (1993–1995);
- University of Southampton, LLM (1993); and
- National and Kapodistrian University of Athens, Law School.

1 What are the key developments in the past year in merger control in your jurisdiction?

The Hellenic Competition Commission (HCC) has had a busy year in the field of merger control.

During the period October 2022–October 2023, the HCC: (1) approved 19 transactions through a Phase I investigation, which included the clearance of one transaction with remedies (*ANEDIK KRITIKOS/Synergazomenoi Pantopoles*); (2) granted an exemption from the suspension obligation (*PYRSOS/Prometheus Gas*); (3) approved one transaction unconditionally following a Phase II investigation (*Attica Group/ANEK*); (4) launched a Phase II investigation (*Intrakat/Aktor*); and (5) re-assessed commitments undertaken in two previous merger cases (*ATTICA/Hellenic Seaways* and *Mytilineos/EPALME*).

During the above period, there were three firsts for the HCC's practice.

First, the HCC approved a transaction with remedies in Phase I investigation (*ANEDIK KRITIKOS/Synergazomenoi Pantopoles*), for the first time since the introduction in January 2022 of the relevant provision in Law 3959/2011 on the protection of free competition (the Competition Act).

Second, the HCC accepted for the first time the failing firm defence in *Attica Group/ANEK*, which concerned the absorption of ANEK by Attica Group, both of which are active in the market for passenger/freight ro-ro ferry services.

Third, the HCC approved through a Phase I investigation the creation of a joint venture for the production and supply of green hydrogen (*PPC/Motor Oil/Hellenic Hydrogen*), which is the second such transaction approved by a national competition authority in the

Efthymios Bourtzalas

European Union (after the first such transaction was approved by the French competition authority) concerning green hydrogen.

The energy sector led the race for clearance of transactions through a Phase I investigation. In particular, out of 19 Phase I decisions, seven decisions (ie, about 37 per cent) cleared transactions concerning markets in the energy sector (electricity and gas). Moreover, three Phase I decisions (ie, about 17 per cent of all Phase I cases) concerned transactions in the supermarket sector, which demonstrates the trend of consolidation observed over the past few years in that sector.

"Over the past few years, the HCC has actively enforced the standstill obligation and has imposed fines for violation of this obligation, where necessary."

2 Have there been any developments that impact how you advise clients about merger clearance?

First, the amendment to the Competition Act by Law 4886/2022 in January 2022, which expressly provided for the submission of remedies during the Phase I investigation, should be considered as a major procedural development, which might help accelerate the clearance time in cases, where the HCC might raise competition concerns.

The HCC approved for the first time a transaction in Phase I subject to remedies, in *ANEDIK KRITIKOS/Synergazomenoi Pantopoles*, which concerned the acquisition by Kritikos of sole control over Synergazomenoi Pantopoles, both active in the supermarket sector. In order to address its competition concerns in the geographic market of each of two stores associated with Synergazomenoi Pantopoles, the HCC required that the merged entity should not use any common trademarks or to engage in any new partnership or promotional activity with regard to these two stores, except for the wholesale supply of supermarket products.

Second, in *PPC/Motor Oil/Hellenic Hydrogen*, the HCC assessed the market for generation and wholesale supply of electricity from renewable energy sources, in contrast with its practice hitherto of defining the market regardless of the type of energy source. This raises the prospect that, going forward, the HCC might opt for a narrower definition of the market for the production and wholesale supply of electricity.

Third, over the past few years, the HCC has actively enforced the standstill obligation and has imposed fines for violation of this obligation, where necessary. In this respect, the HCC has initiated an investigation in respect of the late notification of the *ANEDIK KRITIKOS/Synergazomenoi Pantopoles* transaction and, according to

the HCC's press release dated 30 June 2023, the HCC Rapporteur has proposed imposing a fine on ANEDIK Kritikos for late notification.

3 Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

Under the Competition Act, the HCC should merely address the competition concerns arising from a notified transaction and non-competition issues are not taken into account.

However, its practice over the past few years suggests that the HCC might also take into account non-competition considerations, with a view to addressing other public policy concerns, such as sustainability or privacy concerns.

In this respect, in July 2020, the HCC published a Staff Discussion Paper on sustainability and competition law and issued a joint technical study with Authority for Consumers and Markets of the Netherlands on the same topic in February 2021. In the same vein, in June 2022 the HCC presented its 'sandbox' for sustainability and competition in the Greek market (that is, 'a supervised environment where undertakings can undertake initiatives that contribute significantly to the goals of sustainable development while not significantly impeding competition').

In *PPC/Motor Oil/Hellenic Hydrogen*, the HCC found that the creation of the joint venture would, inter alia, contribute towards the fulfilment of sustainability targets, by introducing an additional green energy source, which would in turn result in the improvement of health and generally the quality of life. However, it is not clear whether the above findings mark any shift in the HCC's approach to date in respect of sustainability arguments, especially given that the HCC accepted the above sustainability arguments in the context of the assessment of the

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horizontal effects of the transaction on the market for the production and supply of hydrogen in Greece, which is currently in its infancy and would not otherwise raise any competition issue, and did not take into account such arguments in other recent cases (for example, *Mitilineos/EPALME*, even though such considerations had been put forward by the parties, and *PPC Renewables/Volterra*).

Further, the HCC has taken into account privacy considerations in *Delivery Hero/Alfa Dianomes*. In that case, the HCC approved through a Phase II investigation subject to remedies the acquisition by Delivery Hero SE of sole control over certain companies of Mouchalis Group. The HCC found that the combination of the parties' activity on the market for the provision of online intermediation services relating to restaurant reservations with their activity on the market for the provision of online intermediation services relating to prepared meal delivery would be likely to give rise to non-coordinated effects. In this respect, the HCC requested that Delivery Hero refrain from, inter alia, using the data of the final users of its 'e-food' platform (ie, the platform relating to orders of prepared meal delivery), with a view to

"During the period October 2022–October 2023, the HCC actively pursued the evaluation of commitments that it had previously accepted by undertakings in order to approve concentrations."

promoting its 'e-table' platform (ie, the platform relating to restaurant bookings), unless authorised by the final user.

4 Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? Any notable deals that have been blocked or cleared subject to conditions?

The HCC shows a particular interest in markets showing high levels of concentration and the existence of cross-shareholdings.

The HCC seems to have taken such considerations into account in the *INTRAKAT/Aktor* transaction, which is currently subject to a Phase II investigation. According to its press release dated 1 September 2023, the HCC raised concerns that the transaction might result in a higher concentration in the construction sector and the merged entity would enjoy significant power in the relevant markets.

The decision of the HCC to initiate a Phase II investigation could be read in conjunction with its *ex officio* inquiry in the construction sector, which it launched in 2022. That inquiry was justified on the ground of the high level of concentration in the construction sector and the fact that certain investment funds held minority shareholdings in several competing construction companies in Greece.

Further, during the period October 2022–October 2023, the HCC actively pursued the evaluation of commitments that it had previously accepted by undertakings in order to approve concentrations.

In this respect, the HCC decided to lift the majority of the remedies undertaken by Mitilineos in a previous approved transaction, which concerned the acquisition by Mitilineos of 97 per cent of the shares in EPALME. Further, the HCC evaluated the effectiveness of the remedies imposed on Attica SA in 2018 in the context of the *Attica/Hellenic Seaways* transaction. These remedies had been accepted

by the HCC in connection with ferry routes between Piraeus and the Greek islands of Chios and Mytilini respectively, pursuant to which Attica undertook to maintain a stable number of routes and frequencies. According to the HCC's press release, Attica should be subject to these remedies for an additional period of three years (ie, up until 2026).

5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

As stated above, the Competition Act was amended in January 2022 and now expressly provides that the parties to a transaction may submit remedies during the Phase I investigation. Further, following an amendment to the standard notification forms in 2022, notifying parties have now been given the opportunity to engage in pre-notification contacts with the HCC.

6 Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

The reduction of the time that on average the HCC takes to approve a transaction under the merger control rules and to publish its clearance decision on the Government Gazette would be a great improvement in Greece's merger control regime.

The HCC's decisional practice suggests that the average clearance time has been reduced over the past couple of years. While in 2021 the HCC adopted its Phase I decisions within an average of 66 days (upon the basis of 14 decisions published on its website), the average time for the adoption of a Phase I decision during the period October 2022–October 2023 was reduced to 52 days, upon the basis of 19 decisions adopted over that period.

However, there have been cases where the clearance period seemed to be overly long. By way of example, during the period October 2022–October 2023, the HCC approved three transactions, which did not involve any horizontal or vertical overlaps. Despite the absence of such overlaps, the HCC required on average 52 days to issue its clearance (67, 53 and 34 days respectively), which represents a material extension of the statutory 30-day period, within which the HCC is required to adopt a Phase I decision following a complete notification.

The adaptation of the HCC's procedural rules to the recent changes to the European Commission's simplified procedure for the notification of mergers could help the HCC significantly reduce the clearance time for such transactions.

Second, there is scope for improvement as regards the delay in the publication of the HCC's decisions following their adoption. Recent data suggests that it takes more than five months on average for a clearance decision to be published in the Government Gazette, a delay that might have adverse effects upon the interests of a party(ies) wishing to challenge such a decision.

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The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

It is essential to consider carefully the turnover thresholds and the geographical allocation of the parties' turnover. The Competition Act is applicable to foreign-to-foreign transactions, provided that the undertakings concerned meet the statutory worldwide and national turnover thresholds.

In your experience, what makes a difference in obtaining clearance quickly?

Engaging with the HCC about issues that are likely to be raised in the course of its investigation through pre-notification contacts could help prevent lengthy proceedings.

Such pre-notification contacts might prove beneficial in particular as regards transactions in markets, where the HCC has no previous or extensive experience. In such cases, the submission of any relevant material (eg, studies, reports, etc) would also help the HCC determine the scope if its investigation.

Moreover, the submission of remedies up front, in case affected markets have already been identified prior to the notification, would be likely to accelerate the proceedings.

What merger control issues did you observe in the past year that surprised you?

In *ANEK/Attica*, which concerned the market for passenger/freight ro-ro ferry services, the HCC accepted for the first time the failing firm defence and cleared the absorption of ANEK by Attica following a Phase II investigation. The HCC concluded that (1) ANEK was a failing firm and would thus exit the market in the absence of the merger; (2) there were no other acquisition options available that would have less detrimental effects on competition; and (3) there was no credible interest from any party in acquiring ANEK's assets.

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Italy

Elisa Teti is partner at Rucellai & Raffaelli with more than 20 years' experience in competition law. Her work encompasses merger control proceedings before the Italian Antitrust Authority and the EC, cartel investigations, and proceedings for abuse of dominance, abuse of economic dependence and other restrictive practices. She also represents clients in follow-on and stand-alone actions for compensation for antitrust damages and has extensive experience in antitrust compliance programmes. In addition, she has significant knowledge of unfair commercial practices, consumer protection law and advertising law. She is member of the board committee of the Italian Antitrust Association.

Alessandro Raffaelli is a partner at the firm, whose main areas of practice are competition law, both Italian and European. He has significant experience in cartel investigations and proceedings for abuse of dominance and other restrictive practice. He acts in litigation, advising and representing major companies at both a national (proceedings before the Italian Antitrust Authority and administrative and civil courts) and EU level in relation to the areas of his expertise. Alessandro is a frequent lecturer in professional training courses at client companies and trade associations regarding competition themes, and a participant in the preparation and implementation of compliance programmes for clients regarding antitrust matters.

1 What are the key developments in the past year in merger control in your jurisdiction?

Elisa Teti
Alessandro Raffaelli

The year 2022 was a particularly important year for the Italian merger control discipline since the Italian legislator has updated the Italian antitrust discipline, and in particular the merger control rules, also with the purpose to align them to the European one.

The starting point for any consideration remains Law No 287/90 (Law or Italian Antitrust Law', which regulates antitrust matters in Italy and disciplines the powers and functioning of the Italian Antitrust Authority (IAA or Authority). The recent amendments to the Italian Antitrust Law that have been introduced are two different pieces of legislation: (1) Legislative Decree No 185/2021, implementing Directive (EU) 2019/1 (the ECN+ Directive), which came into force on 14 December 2021; (2) Law No 118/2022, the Italian Annual Market and Competition Law 2021, which came into force on 27 August 2022. In general, both pieces of legislation have widened the IAA's powers, especially by granting it greater investigative competence (see also the next paragraph).

As a general overview into the IAA's merger control activity, in 2022, the Authority examined 98 merger cases. In five cases, relating to different economic sectors, the Authority opened an investigation pursuant to article 16 Law No 287/90. Specifically, in one case it prohibited the notified concentration operation, while in three it authorised the transaction subject to the adoption of certain corrective measures. In a further case, the Authority revoked the corrective measures as a result of a previous proceeding against the same party. Two investigations were opened for the failure to comply with the obligation of preventive notification pursuant to article 19(2) Law No 287/90, which led to imposed sanctions for a total amount of €291,460.

Amongst the different economic sectors addressed by the Authority during 2022, particularly covered was the publishing sectors. In this regard, in case C12422B – *Mondadori Media-Artoni Group-SRH/Press Di Distribuzione Stampa e multimedia*, the Authority has conditionally authorised a concentration concerning the markets for the national and local distribution of daily and periodical newspapers. As a result of the operation there would have been a change in the structure of control of Press Di, which, previously controlled by Mondadori, would have seen the entry of Artoni and SRH, both operating in the local distribution of daily newspapers and magazines. The Authority found that the merger would have immediately led to the strengthening of the dominant positions held by the Artoni Group and SRH in the local distribution markets for daily newspapers and periodicals and reduced the potential competition exercised by competing local distributors, effectively making Press-Di's local distribution mandates

"In 2022, different legislative reforms updated the Italian antitrust merger control system."

incontestable for the latter compared to Artoni and SRH. The transaction would also have resulted in the creation of a new entity with the ability and incentives to implement strategies to foreclose or hinder both market outlets and supplies, with possible distortive effects on competition in the national and local distribution markets. In light of this, the Authority authorised the transaction subject to the compliance with certain conditions aimed at safeguarding relations with national and local distributors.

2 Have there been any developments that impact how you advise clients about merger clearance?

As anticipated, in 2022, different legislative reforms updated the Italian antitrust merger control system. Among these, particularly relevant is Law No. 118/2022, which has effectively made the major amendments to the merger discipline in Italy. In the relation with the clients, the update on these amendments is now absolutely necessary, so that they are aware of the latest merger control developments and can prepare accordingly.

Starting from the first relevant amendment, it is just the case to remind that, the Italian Antitrust Law, as well as European Law (Regulation No. 139/2004, Merger Regulation), provides for an obligation for undertakings to notify the Italian Antitrust Authority of any prospective merger before they are implemented, but only in the case that the company preparing the operation and the target company exceed specific and predetermined thresholds. More precisely, article 16 of the Law prescribes that pre-notification must be provided for merger operations if the combined aggregate national turnover of all the undertakings concerned exceeds €532 million; and if the aggregate domestic turnover of each of at least two of the undertakings concerned exceeds €32 million. Since 2012, the thresholds, which are subject to an annual review by the IAA, need to be met cumulatively in order for the notify obligation to apply.

However, the cumulative thresholds system resulted in the inability of the Authority to assess certain transactions that later showed a significant competitive impact in specific markets, despite not formally exceeding the thresholds. In this regard, Law No. 118/2022 has finally introduced into the Italian antitrust regime the obligation to notify below-thresholds transactions when they meet certain criteria, and in particular, under three cumulative conditions: (1) no more than six months have passed since the completion of the transaction; (2) one of the two turnover thresholds provided for in article 16 of the Law is exceeded, or the total worldwide turnover generated by all the undertakings concerned exceeds €5 billion; and (3) the Authority finds, on the basis of the available evidence, that there are serious competition risks in the national market, considering also the detrimental effects on the development of small innovative undertakings. Hence, the 'basic' rule provided by article 16 of the Law

must now be combined with the new regulation concerning below-threshold operations.

The second relevant amendment brought by Law No. 118/2022 regards the evaluation of the competitive harm deriving from a merger operation and consists in the update of the substantive test to be applied by the Italian Antitrust Authority. Until recently, the IAA assessment was only based on the so called 'dominance test', according to which a merger shall be prohibited if it creates or strengthens the dominant position of an undertaking on a specific market, with the effect of eliminating or appreciably restricting competition on a lasting basis. The amendment provided by Law No. 118/2022 has now modified article 6(1) of the Law by introducing the 'Substantial Impediment of Effective Competition' test (SIEC), which follows the dominance test. Indeed, it is important to underline that the dominance test continues to be the first indicator of when a certain transaction may affect competition in a given market.

The SIEC test, which is regularly applied at European level by the Commission, has as its underlying principle the provides that the mere existence of a dominant position cannot be necessary to prohibit a merger. Differently, it is needed to provide for an assessment that entails a broader evaluation of the effects deriving from the transaction on the interested market. The SIEC test, in other words, recalls for a more effects-based approach when assessing concentrations.

As can be seen, the application of the SIEC test, and thus of an additional test to that of dominance alone, proves to be a particularly effective system for detecting the so-called killer acquisitions, which rarely lead to the creation or strengthening of a dominant position – despite having effectively detrimental effects on innovative markets.

As part of the reform of the merger control system, the Italian legislator also shared what the Authority suggested regarding

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the need to adapt the calculation of the relevant turnover for the purpose of the obligation to notify transactions of banking and financial institutions. The amendment ensures that turnover is thus effectively measured on the basis of the size of the business by the entity (ie, on the sum of the items of operating income management, rather than on its size assets), as provided by article 16 of the Italian Antitrust Law.

Similarly, the control regime of the joint ventures has been adapted to the principles that emerged in European context. Indeed, the recent reform has expanded the category of notifiable joint ventures by including cooperative joint ventures, thus overcoming the distinction between concentrative and cooperative joint ventures, by substantially applying the cartel discipline for the analysis of cooperative effects, but always in the context of the merger control (article 5(3) of the Law).

As a final analysis, it is not yet possible to assess the impact of these reforms on the Authority's functioning. Certainly, the reforms require

QUESTIONS

"It is also possible to expect the Authority to increasingly focus its efforts on cases relating to the digital sector."

a greater and more thorough attention from the lawyers for the merger transactions they bring before the Italian Authority. In any case, also as a result of the continuous contacts, both formal and informal, that can be carried out at each stage of the transactions, the cooperation between the parties never ceases. Ultimately, we can consider the Italian authority more than ready to implement such changes.

3 Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

It is possible to foresee that the Authority will strive to implement the legislative changes described in answer 2, which will presumably lead to an increased activity of the Authority. This is also in view of the fact that the same legislative reforms have also provided for 'procedural' changes. Indeed, to assist the Authority in exercising its powers, the legislator recognised the need to extend its investigative powers, by providing for the possibility of sending companies binding requests for information – and therefore assisted by specific sanctions – already during the pre-investigation stage or outside formally initiated proceedings (articles 12(2-bis), 12(2-ter) and 16(bis) of Law No. 287/90).

Furthermore, as already highlighted by the Authority in its 2022 Annual Report, attention must be paid to the increased relevance of the diversion ratio analysis as an element in the assessment of the anticompetitiveness of transactions. In this regard, the Authority rightly considers that this assessment will now be even more central, in view of the revised transaction assessment test under article 6 of the Law (which now provides for a combination of the Dominance and the SIEC tests): indeed, the analysis of possible incentives to increase prices deriving from a merger becomes particularly important, even in markets where the operation does not determine the creation or strengthening of a position of dominance. During 2022, diversion ratio analyses was applied in the investigation of two mergers in the retail distribution sector (specifically, C12410B – *Cinven Capital Management-Fressnapf Beteiligungs/Agrifarma – Maxi Zoo Italia*; C12488 – *Bubbles Bidco/Quattro)*. The two investigations conducted are illustrative of the different techniques that can be used by the Authority to quantify diversion ratios through the use of consumer sample surveys.

Finally, considering the trend of the past few years, it is also possible to expect the Authority to increasingly focus its efforts on cases relating to the digital sector, which are among those most affected by the killer acquisitions that have been the subject of the recent reforms.

4 Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? Any notable deals that have been blocked or cleared subject to conditions?

With reference to the energy sector, it is worth mentioning a notable case decided by the IAA in 2022. In case C12461 – *Enel Produzione/Erg Power*, the Authority prohibited a concentration that would have led to the creation of a dominant position in the production and wholesale supply of electricity and the strengthening of a dominant position in the market for dispatching services in Sicily, such as to eliminate or reduce competition in a substantial and permanent manner. It is important to note that the detrimental effect for competition was appreciated not only in terms of market shares held by the parties involved in the transaction, but also by analysing the estimated growth of the 'pivotality' of Enel Produzione. In addition, the fact that the information available indicated how Erg Power's plant played, due to its technological conformation, a particularly competitive role in the Sicilian market, was also relevant to the prohibition decision. Therefore, the acquisition of the plant by the Enel group would have entailed the elimination of one of the group's most effective competitors. This last decision affects a sector that is clearly strategic in the current context and highlights the need to stimulate investments for the development of the sector – which is also the subject of transmission network infrastructures. Indeed, congestions in transmission nodes can give lead to situations of market power and at the same time hinder the development of renewable energies and active demand-side management, which can contribute to making the national electricity system more independent from foreign natural gas.

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5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

A procedural Communication has been adapted by the Authority on 2 January 2023 regarding the application of the above-mentioned article 16(1-bis) of Law No 287/90, entered into force in 2022, which has introduced the obligation to notify certain below-thresholds transactions. To mitigate the legal uncertainty for the parties of a concentration, and due to the fact that the Authority has a deadline of six months from the date of closing to request the notification of a below-threshold transaction, the possibility for parties to make a voluntary pre-notification has been introduced. In such a case, the voluntary notification to the Authority takes place before the closing of the transaction, but as a precondition the parties must have reached an agreement on the essential points of the operation. The pre-notification must allow IAA a complete assessment and, to this end, it must contain: (1) an indication of the operators involved and

their position on the market; (2) a brief description of the transaction and the markets concerned; (3) an indication of whether either one of the thresholds of article 16(1) of the Law or the €5 billion threshold in terms of worldwide turnover is exceeded; (4) the potential risks for competition in the national market; (5) any indication that the transaction has been or is to be notified in other countries. In cases of voluntary notification, the IAA, on the basis of the information received, will inform the undertakings concerned whether it intends to request a formal notification within 60 days of receipt of the voluntary notification, otherwise the merger will not raise anti-competitive doubts to the Authority.

The Communication also clarifies the temporal scope of the new provision. Indeed, the text of article 16(1-bis) of the Law clarifies that the disposition does not apply to transactions perfected before the date of entry into force of the provision (ie, 27 August 2022). At the same time, the Authority's power to require the notification of certain mergers is limited to transactions that have been perfected within the past six months. According to a general principle established by the Authority in its Communication of 14 November 2012, an operation is deemed perfected when the effect of the acquisition of control is produced. In light of this general criterion, where a merger is implemented through a complex negotiation sequence, the maximum time limit within which it would be possible for the Antitrust Authority to request the notification of a concentration is six months from the date of conclusion of the closing, that is, from the date on which the merger takes place.

6 Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

The legislative changes mentioned in the previous answers have made substantial amendments to the merger control regulation in Italy. The activity of the Authority will therefore have to evolve accordingly, and one could say it is desirable the adoption, where needed, of Communications or procedures aimed at better defining the sphere of action of the Authority in light of the new dispositions. For all these reasons, we usually advise our clients to submit to us as soon as possible all the issues related to a prospective merger, so as to eliminate all possible risks and to allow for an extremely comprehensive and detailed assessment of the operation.

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The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

A prospective client dealing with a complex and multi-jurisdictional operation should request the implementation of an extensive cross-evaluation of the different applicable regulations, in order to prepare a complete notification. In this respect, the most restrictive of the applicable regulations should then be taken as a reference, to avoid at the root any risk that the transaction will not be granted clearance in one or more of the jurisdictions involved.

In your experience, what makes a difference in obtaining clearance quickly?

The IAA is generally precise in complying with legal deadlines when assessing merger operations. Nevertheless, a prompt and accurate notification, an extensively prepared schedule as well as a constant cooperation with the Authority's officials, are certainly necessary elements to obtain clearance in a quick and smooth way without any harmful delay.

What merger control issues did you observe in the past year that surprised you?

Despite the important amendments to the Italian antitrust law, there were no particular surprises regarding merger control, while it is appreciated that the recent national reforms are in line with what has already been envisaged for some time at European level.

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Japan

Yusuke Nakano is a partner at Anderson Mōri & Tomotsune with broad experience in all aspects of antitrust and competition regulation. He has extensive knowledge and experience in merger control. He has also assisted Japanese companies and individuals involved in antitrust cases in foreign jurisdictions. As a result, he has substantial experience in enforcement of competition law by foreign authorities, such as the US Department of Justice and the European Commission. Yusuke is recognised as a leading individual for antitrust and competition law in Japan by *Chambers, The Legal 500: Asia Pacific* and Who's Who Legal: *Japan*.

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1 What are the key developments in the past year in merger control in your jurisdiction?

During financial year 2022 (FY2022: 1 April 2022 to 31 March 2023), the Japan Fair Trade Commission (JFTC) provided further valuable insights into its key considerations when reviewing potential transactions in Japan. In particular, it has applied the 2019 amendments to the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (Merger Guidelines) and clarified some of the important factors to be considered when coming to a decision. For example, it has revealed its interest in any transaction that might have an effect on the Japanese market, regardless of whether it meets the reportable thresholds. From the key cases of FY2022, it is apparent that the JFTC will consider a broader range of potential threats to competition, will continue to have an acute interest in emerging digital markets and will eagerly review any transaction, including non-reportable transactions, that might have an effect on competition in Japan.

Another key point is the JFTC's continuous emphasis on economic analysis in the context of merger review. In early 2022, an office was set up specifically for economic analysis purposes in the JFTC's general secretariat in order to strengthen the regulator's capability of handling digital markets matters, economic analysis and analytics of information relevant to investigations. The office is frequently conducting economic analysis in merger cases.

Yusuke Nakano

Vassili Moussis

Kiyoko Yagami

"The JFTC will consider a broader range of potential threats to competition."

> "Our main advice to clients after last year's developments would be to engage in open and transparent communications with the JFTC at the early stages of a proposed transaction, even if such transaction falls under the scope of a non-reportable transaction based on the mandatory thresholds."

2 Have there been any developments that impact how you advise clients about merger clearance?

As outlined above, the JFTC's published decisions of FY2022 have continued to indicate an appetite for early intervention, increasing interest in digital markets and an eagerness to review non-reportable transactions that may impact on competition in Japan. Therefore, our main advice to clients after last year's developments would be to engage in open and transparent communications with the JFTC at the early stages of a proposed transaction, even if such transaction falls under the scope of a non-reportable transaction based on the mandatory thresholds. As we previously reported, the JFTC amended the Policies Concerning Procedures of Review of Business Combination (the Policies for Merger Review) in December 2019, whereby it clearly indicates its willingness to review M&A transactions that will likely affect Japanese consumers but that do not meet the reporting threshold based on the domestic turnover of the target. The amendment encourages voluntary filing for non-reportable transactions with an acquisition value exceeding ¥40 billion, which would otherwise be reportable in cases where the domestic turnover of the target exceeds the relevant numerical thresholds, especially if one or more of the following factors is met:

- the business base or research and development base of the acquired company is located in Japan;
- the acquired company conducts sales activities targeting Japanese consumers, such as providing a website or a pamphlet in Japanese; or
- the aggregate domestic turnover of the acquired company and its subsidiaries exceeds ¥100 million.

Given that the JFTC opened a review of Google's acquisition of Fitbit in 2021, even though the notification thresholds were not met in that

case, we advise that clients engaging in non-reportable transactions that meet the criteria identified in the Policies for Merger Review should pay close attention to the potential need to make a voluntary filing with the JFTC.

We also note that there is more frequent use of economic analysis in the context of merger review. In the review of Microsoft's acquisition of Activision Blizzard in FY2022, the JFTC conducted a vertical analysis to evaluate the level of incentives of the parties for input foreclosure, and concluded that the acquisition would unlikely result in the input foreclosure of the downstream market. In contrast, in the review of the integration of Kobelco Engineered Construction Materials and Nippon Steel Metal Products in FY2021, the JFTC applied various models of economic analyses (including the Cournot model and the Bertrand model, etc) and partly relied on the results of such analyses to conclude that there would be a substantial restraint of competition. Since an economic analysis could be a key to a complex merger case, we advise clients that, where an economic analysis will be relevant, it is necessary to explore the possible approaches by involving an economist at an early stage.

The last point is that the JFTC continues to work actively with other major competition authorities on merger cases, including through the exchange of information with its foreign counterparts, and is entitled to share with foreign competition authorities information that is deemed helpful and necessary for their mandate. It is reported that in respect of large-scale multi-jurisdictional transactions, the JFTC does participate in significant exchanges of information with other competition authorities; for example, the JFTC communicated with the competition authorities of Australia, the United Kingdom, European Union, the United States and South Korea in the review of Microsoft's acquisition of Activision Blizzard in FY2022, and with authorities of Singapore and the United States in the review of Global Wafers GmbH's share acquisition of Siltronic in FY2021. We therefore remind clients of the importance of ensuring that all the

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QUESTIONS

information provided and the submissions that are made to the JFTC are consistent and up to date with those that are made to other competition authorities.

3 Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

FY2022 saw a continued focus on competition issues relating to digital markets. As this area continues to develop and expand, it is now clear that transactions in the digital space are at the forefront of the JFTC's enforcement priorities.

With the increased influence of digital platform operators in our ever-expanding digital world, the JFTC amended the Merger Guidelines in December 2019, where it provided important viewpoints on the definition of two-sided markets for digital platform operators and on the theory of harm in vertical and conglomerate business combinations. In addition, in June 2022, the JFTC released its

“According to the JFTC, the total number of merger notifications filed in FY2022 was 306, no case of which was brought into a Phase II review.”

policy on 'Active Promotion of Competition Policy in response to Socioeconomic Changes caused by Digitalization', where it announced that it would promote prompt and appropriate enforcement in merger cases involving digital markets by seeking comments from third parties, reviewing internal documents of the parties, and conducting economic analysis, where applicable. In the review of Microsoft's acquisition of Activision Blizzard in FY2022, the JFTC in fact reviewed the internal documents submitted by the parties, including the minutes of the board meetings, to assess the intention of the parties.

The JFTC also highlighted its increased interest in digital markets with its analysis of the business integration of Salesforce and Slack in FY2021. The JFTC characterised the transaction as a conglomerate business combination and demonstrated its proactive approach when assessing two-sided markets for digital platform operators and when setting out its concerns as to potential foreclosure and exclusion effects.

4 Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? Any notable deals that have been blocked or cleared subject to conditions?

According to the JFTC, the total number of merger notifications filed in FY2022 was 306, no case of which was brought into a Phase II review. Among those cases reviewed in FY2022, one case was cleared based on the remedies proposed by the parties and, notably, 15 cases were non-reportable transactions that were voluntarily submitted by the parties or investigated by the JFTC *ex officio*. Among the cases closed in FY2022, the most notable was Microsoft's acquisition of Activision Blizzard.

Microsoft's acquisition of Activision Blizzard

Microsoft is active in the manufacture and sale of OS software for PCs (Windows) and game consoles (Xbox), and also in game development and publishing services, and distribution of game software on its

QUESTIONS

online stores (Microsoft Store and Xbox Store). Activision is also active in the game development and publishing services for PCs and game consoles such as Xbox, Sony Interactive Entertainment's PlayStation and Nintendo's Switch, as well as distribution of game software on its online store (Battle.net). Although there are various markets in which Microsoft and Activision are both active, as the parties' combined market share in the game development and publishing services in Japan is less than 5 per cent, the JFTC concluded that no competition concern would arise in the context of horizontal integration. On the other hand, the JFTC identified, among others, the following foreclosure and exclusion concerns as potential theories of harm:

1. the parties might refuse to provide their game software to competing game service providers, or refuse to offer competitors' game software on their game platforms, thereby causing market foreclosure or exclusion in the downstream and/or upstream market; and
2. the parties might share confidential information on a competitor within the group and use it to their own benefit, whereby such a competitor might suffer a competitive disadvantage.

With regard to point 1 above, given the fact that there are many other game software titles that are more popular than Activision's *Call of Duty* and that there is no restriction on supply of game software, the JFTC found that the parties did not have the ability to cause market foreclosure or exclusion by engaging in foreclosure. Furthermore, the JFTC found that the parties would not have any incentive to cause market foreclosure or exclusion because it is essential for game service providers to offer many game software titles to consumers, and that if the parties engaged in foreclosure, the parties would lose customers to competitors.

With regard to point (2) above, the JFTC found that because the parties do not usually obtain confidential information on competitors' products or services or marketing plans when providing competitors' game

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software or using competitors' game providing services, it is unlikely that confidential information on the competitors would be shared within the parties. The JFTC also considered that even if the parties receive competitors' confidential information, it would not give the parties a competitive advantage in comparison with their competitors.

Based on the above analysis, the JFTC concluded that the notified transaction would not substantially restrain competition in any of the relevant markets.

5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

Although the JFTC has not released any new guidelines in FY2022, we have been able to see the practical implications of the FY2019 amendments to the Merger Guidelines and the Policies for Merger Review. The amended Merger Guidelines in 2019 made it apparent

that the JFTC had broadened the scope of factors that it would consider in coming to a decision on a proposed transaction. In addition and as mentioned above, in June 2022, the JFTC released its policy on 'Active Promotion of Competition Policy in response to Socioeconomic Changes caused by Digitalization', where it announced that it would promote prompt and appropriate enforcement in merger cases involving digital markets.

In the past couple of years, the JFTC took a proactive approach in the high-profile *Microsoft/Activision* case when assessing two-sided markets for platform operators, as well as when setting out the theory of harm in vertical and conglomerate business combinations. Similarly, when assessing Google's acquisition of Fitbit in FY2021, the JFTC confirmed that, as articulated in the Policies for Merger Review, it would review any transaction that was likely to affect Japanese consumers, regardless of whether such transaction meets the reportable thresholds.

6 Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

From the recent developments, we can see the importance of voluntary filing and early communication with the JFTC at the beginning of any proposed transaction affecting the market in Japan. The JFTC's publication of the *Google/Fitbit* case in FY2021 and the fact that the JFTC reviewed 15 non-reportable mergers in FY2022 is a clear warning shot that it continues to review cases of interest, even if they are non-reportable transactions, and does not hesitate to request remedies if deemed necessary.

The publication of the high-profile case *Microsoft/Activision* has given practitioners further insight into the process of the JFTC when reviewing transactions. In the *Microsoft/Activision* case, the JFTC demonstrated its proactive and detailed approach when assessing two-sided markets for digital platform operators and when setting out its foreclosure and exclusion concerns in vertical and conglomerate business combinations. In the *Kobelco Engineered Construction Materials/Nippon Steel Metal Products* case in FY2021, the JFTC disclosed specific details of the economic analysis it conducted, thereby giving greater transparency to its review. However, there is still a relative lack of available information regarding the JFTC's decisional practice, and there are some areas where further clarification is necessary. We hope that the JFTC will provide further guidance through the publication of more decisions in the near future.

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QUESTIONS

The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

All prospective clients should be aware of the JFTC's heightened interest in any transaction that might have an effect on Japanese consumers, regardless of the deal value or whether it meets the reportable thresholds. As noted above, given that the JFTC continues to work actively with other major competition authorities on multi-jurisdictional transactions, it is also important to ensure that the provided information and the submissions that are made to the JFTC are consistent and up to date with those made to other competition authorities.

In your experience, what makes a difference in obtaining clearance quickly?

It is important to engage in open and transparent communications with the JFTC at the early stages of a proposed transaction, even if such a transaction falls under the scope of a non-reportable transaction based on the mandatory thresholds. In any case, when communicating with the JFTC, the parties should be mindful to effectively address the points that the JFTC is likely to be interested in, particularly in cases of vertical and conglomerate business combinations, on which the JFTC provided important viewpoints in the FY2019 amendments of the Merger Guidelines.

What merger control issues did you observe in the past year that surprised you?

The publication of high-profile cases such as the *Microsoft/Activision* case has given practitioners further insight into the process of the JFTC when reviewing transactions. In this case, the JFTC took a proactive and detailed approach when assessing two-sided markets for digital platform operators and when setting out its concerns as to potential foreclosure and exclusion concerns in vertical and conglomerate business combinations.

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Malta

Ian Gauci is the managing partner at GTG Advocates, specialising in fintech, technology, media and telecommunications, financial services, data protection, e-commerce, competition, intellectual property, and mergers and acquisitions. He is a prominent figure in corporate and commercial IT and fintech matters. He played a pivotal role in the drafting of Malta's blockchain and virtual currency laws, serving as legal expert on Malta's National Blockchain Taskforce. Dr Gauci lectured on technology law, communications law and the master's in blockchain at the University of Malta. He has authored numerous publications on technology law, particularly on virtual currencies and blockchain, and is renowned as a global speaker in these areas.

Cherise Abela Grech, a partner at GTG Advocates, specialises in fintech, corporate law, financial services and competition law matters. She has assisted a vast range of corporate clients throughout the lifetime of their company, starting with incorporation or redomiciliation and providing ongoing support including in share transfer and shareholders' agreements. She has advised on multiple notable corporate transactions and matters, including advising on competition and foreign direct investment matters, such as by representing clients in antitrust clearances, guiding large-scale firms undergo a merger or acquisition process, or the acquisition/disposal of critical infrastructure.

1 What are the key developments in the past year in merger control in your jurisdiction?

Bearing in mind Malta's size, there were no key developments in this particular sector in the past year.

The national competition authority, the Malta Competition and Consumer Affairs Authority (the Authority), has a good track record in merger reviews. The number of transactions notified annually remains relatively consistent. According to the merger registry of the Authority, 15 concentrations were assessed and granted clearance during the past year. The notifications concerned different markets, including aviation, healthcare, gaming, furniture, shipping, plant and pet supplies and contract development and manufacturing organisation services.

2 Have there been any developments that impact how you advise clients about merger clearance?

The Authority has always encouraged notifying parties to hold pre-notification meetings with it. Although this has never been mandatory, it serves to discuss issues such as the information required for the notification and identification of key issues, as well as possible competition concerns. Pre-notification meetings are considered useful because they facilitate open discussion of both jurisdictional and substantive issues.

This level of communication with the Authority helps ensure that the clearance process is a smoother one overall. Indeed, the notification form itself notes that pre-notification meetings are extremely valuable to both the notifying parties and the director general in determining the precise amount of information required in a notification and, in

Cherise Abela Grech Ian Gauci

the large majority of cases, will result in a significant reduction of the information required. Notifying parties are thus encouraged to consult the director general of the Authority regarding the possibility of dispensing with the obligation to provide certain information. This is also particularly important bearing in mind that most requests for clearance are particularly time-sensitive.

Furthermore, following the coming into force of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the European Union, we also provide assistance to clients whose merger triggers the notification requirements under this new screening process. Under this cooperation mechanism, EU member states are required to carefully examine transactions by foreign (non-EU) companies that target the EU's strategic interests.

> "To date, there have been no foreign-to-foreign merger cases that have been objected to in Malta ... On the other hand, the Authority may look at more local concentrations with a higher level of scrutiny."

Foreign direct investment that originates from third countries (ie, involving investors who are non-EU nationals) may require prior approval from the national foreign direct investment screening office, depending on the relevant sector of the particular concentration. These include entities relating to the provision of critical infrastructure, critical technologies and dual use items; the supply of critical inputs; those with access to sensitive information, including personal data, or the ability to control such information; and the freedom and pluralism of the media. The screening office must also be notified in the case of companies that own intellectual property such as patents and any other incorporeal rights resulting from such activities.

3 Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

To date, there have been no foreign-to-foreign merger cases that have been objected to in Malta. Generally, where the Maltese authorities may have had cause to object to any such merger, this would also have been stopped or objected to by authorities elsewhere, foremost among which is the European Commission.

On the other hand, the Authority may look at more local concentrations with a higher level of scrutiny, most particularly because concentrations, particularly of certain large (by Maltese standards) entities in Malta, could more easily have an impact on competition law, given the size of the Maltese market.

On 5 September 2022, the Authority concluded an extensive Phase II Investigation into a joint venture between two companies offering passenger fast-ferry services between Malta's two main islands. The decision of the Authority was to declare the concentration lawful, on the condition that all the comments set out by the Authority are

complied with. The Authority's concerns were alleviated through steps taken by the parties themselves, being two major commitments relating to the operation of the concentration and the appointment of a monitoring trustee that will ensure compliance with these final commitments. The Authority, after reviewing these proposed commitments, came to the decision that proper steps were taken to eliminate unfair competition. Some of these commitments included ensuring public transport services are established and the provision of commercial access to the 'Tallinja' Card (public transport card). This approval is subject to a six-year monitoring period allowing the Authority to ensure the effective implementation of the commitments.

On 29 December 2022, the Authority also concluded a Phase I investigation into the acquisition of a shipping agency company within the Harbour Towage, Container liner shipping and oceanic cruise services sector. Justifying the additional competitive assessment, the Authority stated that 'Harbour towage service is an integral part of the Maltese port infrastructure as it is vital in ensuring the overall safety of big ships when entering, manoeuvring, mooring and unmooring a port.' This is also particularly relevant given that Malta has the largest ship register in the European Union and the seventh-largest register in the world. The decision was that with no serious doubts on its lawfulness present, the concentration was declared lawful.

4 Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? Any notable deals that have been blocked or cleared subject to conditions?

Although there have not been any new trends that have emerged, over the past year, the Authority was approached from a variety of sectors – the only repeating sector being that of shipping. This year, no concentrations were notified regarding the retail and grocery market sectors, breaking a past trend of notified concentrations.

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For the first time, a fast ferry passenger service notification was submitted, with Phase II investigations being initiated to ensure compliance with competition laws due to the increasing companies offering ferry services in Malta. The Authority expressed concerns that 'the undertakings forming part of this concentration may have the ability and incentive to engage in an input foreclosure strategy', effectively suffocating competition due to competitors being forced to raise prices. Therefore, the director felt that an in-depth investigation was warranted to decide on the lawfulness of the concentration. The Phase II investigation concluded that the concentration is legal and does not negatively affect the competition market due to two commitments undertaken by the entities, which removed the Authority's main concerns.

> "The submission made by the European Justice Forum ... suggested that further safeguards for third-party litigation funding ought to be considered."

5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

A consultation was published on 11 November 2022 (ending 25 November 2022) covering the bill entitled 'An Act to provide for representative actions for the protection of the collective interests of consumers, and to carry out other consequential amendments'. This was transposed into Maltese law this year. The consultation related to the national implementation of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020. This Directive aims to ensure that, both at EU and national levels, at least one effective and efficient mechanism for representative actions for injunctive measures be made available for consumers in all EU member states. Apart from that, the Directive is intended to enable 'qualified entities that represent the collective interests of consumers to bring representative actions for both injunctive measures against traders that infringe provision of Union law'. The primary aim of the consultation was to seek views relative to the transposition and implementation of the Directive, as well as those relative to the amendments vis-à-vis the necessary and consequential amendments of a number of other laws.

This consultation was subsequently followed by the issuing of the final report, which also took cognisance of feedback received from respondents. In total, there were eight submissions. Based on the first submission, made by the Malta Communications Authority, it was concluded that articles (8)(1)(a) and 9(7) of the proposed Bill were to be updated in such a manner as to clarify the following:

- the procedure to be adopted for representative actions for redress and injunctive measures;
- the provisions where national administrative authorities are empowered by regulations under the Act or by, or under, any other law regulating the procedure concerning such requests to have injunctive measures brought before them instead of before the Civil Court; and
- that manifestly unfounded applications before the Malta Communications Authority are to be dismissed.

With regard to the second submission, made by the US Chamber of Commerce – Institute of Legal Reform, a report was presented by said institute covering various matters, ranging from the proposal that 'domestic' qualified entities should be subject to the same criteria as 'cross-border' qualified entities, to the proposal that alternative dispute resolution mechanisms ought to be at the heart of any domestic regime in order to provide redress to consumers. These sets of recommendations put forth by the two authorities were noted and the Authority commented that a number of them were already included in current legislation or the draft Bill. The proposed Bill, in particular, applied the same criteria to domestic and cross-border qualified entities and also adopted an opt-in mechanism. With regard to the submission made by the Consumers Association as an overview

of the advantages and disadvantages of the opt-in and opt-out procedures and which also suggested that these procedures ought to be catered for in the proposed Bill, the Authority reiterated that the opt-in mechanism is already adopted in the Collective Proceedings Act; it stated that national legal tradition does not cater for an opt-out mechanism and that an opt-in mechanism as listed in the draft Bill provides different stages when affected consumers may join a representative action. Moreover, it did not exclude that, in future, the opt-out mechanism may be considered.

Other submissions, all made by telecommunication service providers, made reference to amendments such as the inclusion of manifestly unfounded cases in article 8(6) on 'Admissibility' by the Civil Court; the prohibition of double compensation, which, as the Authority remarked, is already addressed in sub-article 8(13) of the proposed Bill; the interruption of prescription introduced in the Consumer Affairs Act as a reflection of a well-established principle of the Maltese legal system; and, with regard to Part VII and VIII of the Bill, the Malta Communications Authority observed that the submission of one telecommunications service provider that the provision referring to the faculty of the competent courts/authorities to dismiss 'manifestly unfounded cases' appears to be valid and a new sub-article (7) to article 31A (reflected in clause 50 of the proposed Bill) would be accordingly added to address this requirement, while making other observations with regard to matters such as the deletion of the reference to 'qualified entities'.

The submission made by the Office of the Director of Environmental Health, concerned the role of the Consumer Affairs Council as competent authority and how the Council may designate a qualified entity for representative action in the food sector. Here, it was clarified that qualified entities, for the purposes of bringing representative actions, are to comply with criteria established by the Directive as adopted in the draft Bill, mainly concerning the structure, activities,

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independence and transparency of the entity. It was also specified that the proposed Bill aims to enable qualified entities that represent the collective interests of consumers to bring representative actions for both injunctive and redress measures against traders which contravene the provisions of Union law. On the other hand, the submission made by the European Justice Forum, while welcoming the provisions in article 8(6), suggested that further safeguards for third-party litigation funding ought to be considered, in particular with regard to publicly organised special funds for this purpose.

6 Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

Based on the previously mentioned consultation, the government provided a response in December 2022 establishing its decision over

the above-mentioned bill. The report provides amendments to the proposed bill based on the feedback received by the Authority. One of these amendments seeks to clarify that manifestly unfounded applications before the Authority are to be dismissed and the prohibition of double compensation.

This bill was transposed into Maltese law on 5 June 2023 through Act No. XVII of 2023, the name of which is shortened to the Representative Actions Act. The main features of this new Act are the following:

- Opt-in mechanism for representative actions, requiring registration of claim with a qualified entity.
- Representative actions brought forward through a sworn application to the Civil Court (Commercial Section).
- Qualified entities can only represent consumers and cannot appear on behalf of legal persons. They must act in the best interest of the consumer, providing updated information and progress of the proceedings.
- Certification of class action done at initial stages by court decree.
- Qualified entities acting as plaintiff are exempt from court registry fees, with third-party litigation funding limitedly permitted.
- The Malta Competition and Consumer Affairs Authority is to set up a national electronic database for filing representative actions.
- The Act also provides information on the effects of final decision, prescription, disclosure of evidence, punishment, appeals and the power to make regulations.

With regard to consequential amendments, the Collective Proceedings Act (Chapter 520 of the Laws of Malta) is renamed to 'Collective Proceedings (Competition) Act'. Through these amendments, collective proceedings may be instituted to seek the cessation of an infringement, the rectification or the consequences of an infringement, and or compensation for harm in cases when: (1) infringements of the Competition Act and/or articles 101 and/or 102 of the Treaty on the Functioning of the European Union (TFEU) are alleged to have occurred; (2) an investigation initiated by the Director General in accordance with the Competition Act and/or articles 101 and, or 102 of the TFEU, or proceedings before a tribunal or a similar body or the Court including any other court of civil jurisdiction, in relation to infringements of the Competition Act and, or articles 101 and/or 102 is or are still not resolved; and (3) a decision or judgement establishing a breach of the Competition Act and, or articles 101 and/or 102 of the TFEU relative to the same facts becomes res judicata.

A newly formulated article further states that 'When the class representative files a claim for damages arising from an infringement of the Competition Act and, or articles 101 or 102 of the TFEU, the provisions of article 27A of the Competition Act shall apply mutatis mutandis.' article 27A refers to actions for damages in respect of infringements of competition law.

Through these amendments, collective proceedings are to be instituted through a sworn application in the court, regardless of the amount of the claim.

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The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

In complex, multi-jurisdictional transactions, aside from concentration clearance, which might be required from multiple competition authorities across the relevant jurisdictions, a prospective client should also consider national direct investment screening requirements in the target jurisdictions. If a transaction falls within a specified list of factors or activities in terms of Regulation 2019/452, then notification to the national direct investment screening offices might also be required, together with possible prior approval.

Further, among other things, a prospective client should also consider that certain sector-specific regulation, such as in the gaming and the financial services industries, might also impose that the respective authority approves the transaction prior to its closure.

In your experience, what makes a difference in obtaining clearance quickly?

Particularly when dealing with a time-sensitive request for clearance, early communication with Maltese legal counsel (as much as possible) is vital. This will help in establishing an early channel of communication with the Malta Competition and Consumer Affairs Authority, and pre-notification meetings can be held, initially on a no names basis, to ensure that only the essential information and documentation need to be collected and submitted to the Authority. These meetings are also important to discuss and clarify any potentially complicated issues that could otherwise delay clearance.

What merger control issues did you observe in the past year that surprised you?

There were no particular issues that particularly stood out from our years of advising and assisting clients in this sector.

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Mexico

Ismael Henestrosa Pérez is a partner at Aziz & Kaye Business Law with extensive experience in competition and antitrust, data privacy and administrative law. His practice focuses mainly on competition law, working with domestic and international clients. He advises clients before the Mexican competition authorities in relation to the filing of global and domestic mergers, in the indictment and defence of companies under investigation for alleged anticompetitive practices, in investigations into barriers to competition and essential facilities, and in consultations relating to the implementation of the Federal Economic Competition Act. Ismael has worked as an independent consultant and occupied various positions in public bodies and private practice. He is a member of the Mexican Bar Association and has been professor of the economic competition module in the master's degree in business law at the Autonomous University of Ciudad Juarez.

Karime Novia is an associate at Aziz & Kaye Business Law. She works as a legal adviser to several companies in the filing of global and domestic mergers, as well as in the prosecution or defence of companies under investigations initiated by alleged anticompetitive practices in several economic sectors before the Federal Economic Competition Commission (COFECE). Karime also focuses on the defence of several companies against COFECE's resolutions before the Mexican specialised courts. Karime has developed compliance programmes to prevent violations of the Federal Economic Competition Act.

QUESTIONS

1 What are the key developments in the past year in merger control in your jurisdiction?

One significant trend in merger control over recent years has been the increasing focus on digital markets, particularly in the context of platforms and big data. As the digital economy continues to expand, both competitions authorities in Mexico, the Federal Economic Competition Commission (COFECE or Commission) and the Federal Telecommunications Institute (IFT or Institute) have been closely scrutinising mergers and acquisitions in this sector. This heightened scrutiny is driven by concerns related to market dominance and competition in the digital space. Authorities are increasingly evaluating the potential impact of these transactions on competition and consumer choice, making it essential for companies involved in digital industries to navigate merger control regulations effectively.

We would like to highlight that COFECE has established in its Strategic Plan for the 2022–2025 period a prioritisation of sectors on which it will focus its efforts. Among these priority sectors are digital markets. This decision is based on a series of relevant considerations and trends that have emerged in the context of the Mexican and global economy.

One of the main reasons supporting this prioritisation is the significant increase in the use of online shopping applications in Mexico. This increase occurred because of mobility restrictions imposed by the covid-19 pandemic. Specifically, there was a 90 per cent increase in the use of these applications during the first quarter of 2020 compared to the 25 per cent growth worldwide. Furthermore, it was highlighted by COFECE that two out of every 10 companies with online sales channels experienced growth rates exceeding 300 per cent. COFECE, as agencies in other countries, recognised that the digitisation of the economy poses new challenges that must

Ismael Heftestrosa Pérez

Karime Novia

be addressed from the perspective of competition and the efficient functioning of markets. The digital economy has transformed the dynamics of competition and has created situations that require specific and strategic attention from competition authorities.

Furthermore, COFECE's commitment to emphasising the importance of digital markets on its agenda and adopting a proactive approach to address the challenges that these markets pose in terms of economic competition and efficient functioning can be also observed since it has been actively conducting investigations related to platforms and data.

Regarding important decisions issued by the Commission, in the context of merger control within the Commission's jurisdiction over the past year, a noteworthy case has been the merger between PMHC II, Inc (PMHC II) and Ferro, resulting in Ferro becoming a fully owned subsidiary of PMHC II.

> “This year, there was significant activity on the part of the IFT as it asserted its competition to conduct a comprehensive analysis of the effects and, if necessary, approve the merger related to the market of designing, manufacturing and marketing of end-user devices.”

COFECE identified that this merger had horizontal effects in the markets for porcelain enamel coatings and glass coatings. Furthermore, competition authorities in the European Union and the United States also identified similar risks in these markets.

In response to these concerns, PMHC II and Ferro proposed remedies that consisted of divesting production plants in the United States and Europe. These remedies aimed to eliminate overlaps in the markets for porcelain enamel coatings and glass coatings in Mexico.

COFECE maintained close cooperation with foreign competition authorities such as the European Commission and the Federal Trade Commission throughout the process. This international cooperation and the submission of appropriate remedies allowed for the complete elimination of the risks identified by COFECE in this merger.

On the other hand, in 2022 the IFT did not issue resolutions regarding mergers; however, its efforts were focused on monitoring the compliance with conditions imposed on the merger between AT&T and Time Warner. Likewise, the Institute declared the closing of the acquisition of Fox Sports' business in Mexico by Grupo Lauman as the condition imposed for the merger notified by the Walt Disney Company and 21st Century Fox in March 2019, in order to correct the risks in the relevant market for the provision and licensing of audiovisual content of restricted television and audio service providers in the sports category.

Finally, this year, there was significant activity on the part of the IFT as it asserted its intention to conduct a comprehensive analysis of the effects and, if necessary, approve mergers related to the market of designing, manufacturing and marketing of end-user devices, such as desktop or conference phones; headsets; conference solutions and peripherals, and video conferencing systems, of the technology companies HP and Plantronics in Mexico. In this regard, it is likely that in the coming years, given the increasing efforts to prioritise

digital markets, we will continue to witness competition conflicts between the COFECE and the IFT, since the underlying reason for these conflicts lies in the growing convergence between the telecommunications and technology sectors, especially concerning communication services and digital content.

COFECE has been raising fines for those notifiable mergers and acquisitions where the parties involved had avoided getting prior authorisation. That is a strong message for economic agents and specialised lawyers. In the past, COFECE used to impose the minimum fine (around US$20,000), but in January 2023, it imposed fines of US$31 million approximately on HP and Plantronics.

2 Have there been any developments that impact how you advise clients about merger clearance?

Given the powers of enforcement of the Mexican antitrust authorities and based on our recent experience in different sectors, the culture of competition in Mexico is continuously increasing. We advise our clients to check every merger with a magnifying glass, because the antitrust authorities are increasing the number and amount of fines in the absence of notification of a merger. Antitrust authorities are increasingly imposing fines on firms for not having completed all the steps of a merger notification procedure, that is, for closing transactions before the issuance of the resolution by the Commission. Upon the completion of this procedure, the board of COFECE determined that the mergers did not pose any risks to competition, and therefore, the mergers were authorised. However, not completing the process before COFECE prior to the mergers closing has been deemed high severity as it lessens the exercise of COFECE's powers, leading to the imposition of corresponding sanctions.

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However, contemporary trends teach us that competition authorities in Mexico are increasingly focusing on markets that play a truly important role in the Mexican economy and digital markets. Through its Strategic Plan 2022–2025, COFECE has announced that a comprehensive monitoring of markets will take place to detect unlawful mergers mainly in the food and drink, transport and logistics, finance, real estate, construction, digital and public procurement markets. The foregoing reinforces the need to advise our clients in regard to COFECE's stricter policies and enforcement of merger regulations, especially in these markets. In that sense, we always seek to have an early understanding of the authorities' approach and of any potential concerns regarding the operation, as well as to gather and analyse all the information required by law before submitting the corresponding notification to the authorities.

It has also come to our attention that COFECE has adopted a stringent criterion in regard to the definition of the closing of operations, especially when this could consist of multiple acts to carry out the mergers. This means that COFECE will conduct an in-depth analysis

> “Gathering detailed and comprehensive information is crucial for regulatory authorities such as COFECE and IFT to properly assess the effects of mergers in the markets.”

to determine whether the notifying parties carried out transactions of assets such as real estate or the appointment of people in strategic positions on the target's board before the merger was notified.

In that regard, we advise our clients that the diligent way to carry out a merger and avoid delays in the transaction due to COFECE's current stringent policy on succession of acts or closing of operations should be to notify the authority before any type of act that can be interpreted as a transaction that grants control of any types of assets that are object of the transaction before the filing.

On the other hand, it is key that our clients know that the authorities will be more rigorous with the information they require from the notifying parties to have a better understanding of the relevant market. While we acknowledge that extensive information requirements can, in some cases, delay the resolution process, we believe that when these requirements are made to gain a deep understanding of the market in which mergers are taking place, it can be beneficial for the notifying parties. Gathering detailed and comprehensive information is crucial for regulatory authorities such as COFECE and IFT to properly assess the effects of mergers in the markets; this rigorous approach to obtaining accurate information can provide greater clarity and precision in evaluating mergers. This, in turn, can benefit the parties involved by ensuring that the final decision is based on a solid and objective analysis of available data.

In that sense, we predict that a clearer regulation and a more consistent merger analysis will come in the near future, as both COFECE and the IFT start to adopt measures to better understand the composition of a market by properly studying it. Likewise, having a clearer regulation will translate into a more concise and faster merger notification process for mergers that do not require specifically complex analysis.

Regarding cooperation with authorities from other jurisdictions, COFECE recently announced an initiative in which the antitrust division of the Department of Justice in the United States and the Competition Bureau in Canada would jointly collaborate to identify possible risks to the process of competition in the markets related to the 2026 FIFA Men's World Cup hosted by Mexico, United States and Canada. This could mean that in the near future the three competition authorities could be working together regularly in analysing the definition of relevant markets in the region needed for a merger.

Regarding jurisdictional conflict between the two Mexican competition authorities, it is important to mention the recent Supreme Court decision that split jurisdiction between the two Mexican competition authorities, COFECE and the IFT. The Supreme Court stated that COFECE may conduct antitrust investigations and merger control analysis in the online search services, social networks and cloud computing services markets, and IFT may do so only in the mobile operating systems market.

Since then, it has become clear that both COFECE and the IFT are dealing with jurisdiction settlements because traditional markets are migrating towards digital services, which require the internet as a critical input to connect suppliers, intermediaries and customers. Last year, a specialist court in economic competition resolved a jurisdictional conflict presented by the IFT regarding a merger concerning the market for designing, manufacturing and marketing of end-user devices, such as desktop or conference phones; headsets; conference solutions and peripherals, and video conferencing systems. The Court unanimously ruled that COFECE is legally competent to process and resolve this concentration, considering that it does not fall under the sectors of broadcasting and telecommunications. It emphasised that the fact that the products need to be homologated by the IFT to use the radio spectrum is not a sufficient factor for attributing jurisdiction to the Institute since the

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services and products under analysis do not focus on the functionality of end-user devices but on the creation process, which falls outside the broadcasting and telecommunications sector, and therefore, outside IFT's jurisdiction.

That leads us to anticipate a clearer regulation for this topic in the near future to allocate jurisdiction between the two authorities in that regard, and to introduce a new perspective for the analysis of such matters.

Regarding cooperation with authorities from other jurisdictions, COFECE recently announced an initiative in which the antitrust division of the Department of Justice in the United States and the Competition Bureau in Canada would jointly collaborate to identify possible risks to the process of competition in the markets related to the 2026 FIFA Men's World Cup hosted by Mexico, the United States and Canada. This could mean that in the near future the three competition authorities could be regularly working together in the

> "We have also noticed a trend in economic agents being economically sanctioned for not properly notifying mergers."

analysis for the definition of relevant markets in the region needed for a merger.

3 Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

Last year, COFECE's focus drifted from being mainly centred on the supply chains that were affected by the covid-19 pandemic, to a broader analysis of how those supply chains are gradually integrated into the digital market economy. COFECE's new approach will be to further study the main elements that integrate digital markets and how traditional supply chain elements, such as the distribution, transportation, packaging, among others, are integrated into the digital economy. As mentioned, COFECE announced that a comprehensive monitoring of markets will be made to detect unlawful mergers mainly in the food and drink, transport and logistics, finance, real estate, construction, digital and public procurement markets.

In that sense, it is possible to note that COFECE tends to be stricter when analysing notified concentrations that are closely related to the aforementioned markets. However, in general, we consider that, usually, the outcome is very predictable. If there are several overlaps, it is likely that COFECE will impose remedies.

This has led us to conclude that when notifying a concentration relating to the aforementioned markets, the procedure should be carried out with special diligence to ensure that it is aligned with the criteria and approach stated by COFECE, since, in such cases, COFECE tends to carry out its merger control analysis increasingly on the basis of economic evidence. It requires the largest possible quantities of economic information through several requests for information.

We have also noticed a trend in economic agents being economically sanctioned for not properly notifying mergers. Last year, COFECE sanctioned and fined various economic agents involved in four different transactions that were not properly notified or notified at all. This only shows that properly advising clients is key to get a quick approval with a low probability of COFECE imposing sanctions. In this sense, COFECE could deem that agents were not diligently carrying out the necessary procedures to successfully notify a merger and allow COFECE to properly analyse the impact the merger could have in the market. This shows that the authorities will become stricter when analysing the terms of the filing in comparison to the terms of the closing documents as well as previous acts relating to economic agents filing mergers.

4 Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? Any notable deals that have been blocked or cleared subject to conditions?

Following last year's trend, and from our experience, COFECE is still requiring a sometimes overwhelmingly high amount of information to economic agents that notify a merger. This can result in a delay in the resolution of files considering the increase in the number of operations that have been notified recently. However, even though this can overwhelm COFECE staff, in our experience, COFECE has been extremely efficient and cooperative, and deadlines are always met. Interestingly, there was not a single merger in 2022 that COFECE did not authorise. The cases in which a merger did not take place or had to be notified again occurred because the parties did not properly notify the merger or failed to present the information required by the authority.

In regard to the IFT, we continue to observe that, since the sectors in which it is competent to act are limited to telecommunications and broadcasting, it reviews very few operations per year, therefore the Institute does not suffer from the saturation that COFECE may sometimes have.

5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

Last year, the IFT modified the guide for the merger control for the telecommunications and broadcasting sectors, as well as the technical criteria for the calculation and application of a quantitative index (to determine the degree of concentration) and the guidelines for electronic procedures before the Economic Competition Unit.

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Furthermore, the IFT carried out a study focusing on user data privacy regarding the usage of digital platforms such as remote work tools, dating apps and mobile video games. The study mainly focused on data transfers made from one digital platform to another and which type of information is being obtained by these platforms.

In that sense, we infer that in the near future, Mexican antitrust authorities will have a greater focus on user data obtained by digital platforms as an essential input. This could in turn allow both COFECE and IFT to analyse user data as an essential asset that is being acquired through a merger.

Understanding user data as an essential input would permit COFECE and IFT to expand their analysis of relevant markets in which economic agents participate but could also mean that vertical mergers might not receive approval since the economic agents might have a meaningful amount of user data that could be absorbed by a single entity.

Studies like these suggest that both regulators could be jointly working to further increase their understanding of all of the aspects that make up digital markets, not limiting their analysis to supply chains or logistic processes that take place in those markets.

On the other hand, COFECE has incentivised the use of electronic files rather than a traditional filing. This is relevant since some mergers require the notifying parties to provide immense amounts of documents and information. Carrying out the entirety of the procedure on COFECE's digital platform means that it can be more efficient for all parties involved. In 2022, COFECE did not issue modifications; nevertheless, it is important to mention that this year COFECE published guidelines for the use of electronic media during the investigation, subsequent procedure, verification and incidents processed before the Commission. Specifically, regarding merger control, COFECE submitted its draft proposal for public consultation, which amends the electronic notification guidelines for mergers to facilitate and enhance the transparency of each stage of the electronic notification process for mergers. That is why we believe that COFECE's trend towards a fully digital file is not far from being implemented.

6 Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

We consider that there could be minor changes to the rules in merger control as COFECE's board has now been completed. The three missing commissioners needed to complete the board were appointed and ratified between late December 2022 and early 2023 (including a new Chair Commissioner), which means that regulation for market definition and issuance of resolutions can now be legally issued.

The issuance of new rules, such as relevant market definition regulation, could mean that mergers that take place between economic agents that participate in constantly evolving complex markets such as digital markets, would be more precisely analysed by Mexican competition authorities. Therefore, the new rules could lead to a much more transparent procedure, which could in turn assure the notifying parties that COFECE is being diligent in their analysis of the relevant market rather than defining the market according to their understanding of it mainly through public sources of information or by further requiring competitors for additional information to that already provided by the notifying parties.

In that regard, in accordance with what both Mexican competition authorities have expressed regarding the priority that will be given to digital markets, we could expect an increase in the notice of mergers that require a highly technical analysis to define the relevant market.

Finally, it is worth mentioning that four out of the seven COFECE board commissioners are economists. We consider that it is important to highlight the board's composition because this could have an impact on the resolutions COFECE adopts.

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The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

A complex and multi-jurisdictional transaction requires strong coordination between all parties involved. This includes the legal firms that represent the notifying parties, particularly to avoid delays to the closing date established by the parties.

There also needs to be special attention from the parties when carrying out any transaction that could be identified by authorities as a failure to notify a merger. Coordination is crucial to identify the different thresholds applicable to every jurisdiction involved, as well as the authorities' response times. Likewise, it is necessary to be aware of the applicable rules and precedents in each jurisdiction to anticipate whether a remedy could be imposed.

In your experience, what makes a difference in obtaining clearance quickly?

It is crucial that the authority initiates the procedure and analysis as soon as possible. For this, the filing must be submitted even with drafts of the main documents (agreement).

It is also a great help to have an early understanding of the authority's approach and any potential concerns regarding the transaction; therefore, it is essential to establish early contact with the officials who will oversee the merger procedure, to identify potential concerns arising from the transaction in the early stages of the filing.

What merger control issues did you observe in the past year that surprised you?

In some of the latest procedures filed before COFECE, we have observed greater delays in the issuance of the resolution. Mainly because of extensive information requests, the authority might often focus on details outside the scope of the relevant market and might not issue a resolution until it obtains all the minor details of its requirements.

We have also observed that there has been a greater delay in the issuance of resolutions, since there have been some discrepancies in the way in which the relevant market is defined by COFECE, and the definition given by the notifying parties.

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Switzerland

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1 What are the key developments in the past year in merger control in your jurisdiction?

On 24 May 2023, the Federal Council adopted its dispatch on the partial revision of the Federal Act on Cartels and other Restraints of Competition (Cartel Act). A core element of the partial revision is the introduction of the Significant Impediment to Effective Competition Test (SIEC test) in merger control. The SIEC test – which is already applied in the European Union – will replace the currently applied Qualified Market Dominance test.

The main difference between the Qualified Market Dominance test and the SIEC test is the threshold of intervention. Currently, the thresholds of intervention are very high. When applying the Qualified Market Dominance test, a concentration of undertakings must result in a 'qualified' market dominance for it to be prohibited. In other words, unless a concentration creates or strengthens a dominant position liable to eliminate effective competition and at the same time does not improve the conditions of competition in another market such that the harmful effects of the dominant position can be outweighed, the concentration must be approved. Under the SIEC test, the thresholds of intervention are much lower. Under this test, concentrations may already be prohibited or their approval subject to conditions if the concentration leads to a significant restriction of competition that may not be justified on grounds of economic efficiency. Thus, the effects on competition below the market dominance threshold also become relevant. The introduction of the SIEC test will assumably lead to more interventions in merger control. The authorities are likely to prohibit more concentrations or attach conditions to approvals for the same reason. It must be considered, however, that according to the Federal Council's dispatch, the notification requirements – in particular, the high thresholds – will remain unchanged. The introduction of the SIEC test will therefore not lead to an increase in notifications, but

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"The introduction of the SIEC test will assumably lead to more interventions in merger control."

“Due to the current high threshold of intervention, in-depth investigations are rare in Switzerland. In 2022, 49 mergers were notified pursuant to article 9 Cartel Act.”

only set the bar lower for an intervention once a concentration has been notified.

Since the Competition Commission (COMCO) must examine a concentration whenever a corresponding notification has been made pursuant to article 9 Cartel Act, there are no specific sectors on which it focuses more than others.

Furthermore, due to the current high threshold of intervention, in-depth investigations are rare in Switzerland. In 2022, 49 mergers were notified pursuant to article 9 Cartel Act. In all 49 cases, COMCO cleared the concentrations after a preliminary assessment since the concentration neither created nor strengthened a dominant position within the meaning of article 10 paragraph 1 Cartel Act. Hence, in 2022 COMCO did not carry out any in-depth investigations.

2 Have there been any developments that impact how you advise clients about merger clearance?

As mentioned above, the partial revision of the Cartel Act intends to introduce the SIEC test. With this test, the threshold of intervention for merger control will be set lower than with the previously applied Qualified Market Dominance test. This development directly impacts legal advice. When applying the Qualified Market Dominance test, legal advice must focus on minimising the risk of eliminating effective competition in the case of a concentration. Currently, therefore, legal advice focuses on the questions of market definition and market share additions. The introduction of the SIEC test creates new challenges. Although market share additions are still important here, we will have to make increased efforts to demonstrate the efficiency gains that result from a concentration.

3 Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

Owing to the takeover of Credit Suisse by UBS, the question arises as to what extent COMCO may want to investigate concentrations in the banking sector more closely. There are narrow limits to such a strategy for the following reasons.

If a concentration of banks within the meaning of the Banking Act is deemed necessary by the Swiss Financial Market Supervisory Authority (FINMA) for reasons related to creditor protection, the interests of creditors may be given priority. In these cases, FINMA replaces COMCO according to article 10 paragraph 3 Cartel Act, which it shall invite to submit a non-binding opinion. In the case of the *Credit Suisse/UBS* concentration, this provision was actually applied. The COMCO is currently preparing a statement on FINMA's questions.

As mentioned, the thresholds of intervention in merger control are very high and in-depth investigations are rare. As a consequence, only three concentrations have been completely prohibited in the past. Under the given circumstances, it is difficult for the authorities to actively target specific sectors with a merger control policy.

However, there is currently a discussion – especially in the political arena – about whether a stricter approach should be taken to concentrations involving undertakings that are partly state-owned. Undertakings that are partly state-owned are usually in a very strong position due to past monopolies or current partial monopolies. They can finance themselves easily, enjoy high credit ratings and can cross-subsidise the undertakings they buy. This enables the purchased undertakings to enter the market with very aggressive offers and thereby possibly distort competition. Examples of state-owned players are Swisscom (telecommunications and IT company), which is 51 per

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cent owned by the Swiss state, and the Swiss Post, of which the state is the sole owner with 100 per cent.

4 Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? Any notable deals that have been blocked or cleared subject to conditions?

In the past year, no concentration was blocked or cleared subject to conditions. In general, it can be said that in Switzerland only very few concentrations were prohibited or approved with conditions and/or obligations in the past. In total (as at 2022), only 12 concentrations were approved subject to conditions and/or obligations and only three were prohibited altogether. Due to the introduction of the SIEC test it is likely that prohibitions or approvals combined with conditions and/or obligations will increase in the future.

"There is currently a discussion – especially in the political arena – about whether a stricter approach should be taken to concentrations involving undertakings that are partly state-owned."

5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

The most important change, as mentioned above, is the intended introduction of the SIEC test as part of the partial revision of the Cartel Act. The SIEC test has already been described in more detail in the previous questions. As a result of those changes, efficiency gains will play a more important role in the assessment of concentrations.

6 Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

As mentioned, the Federal Council adopted the dispatch on the partial revision of the Cartel Act on 24 May 2023. The introduction of the SIEC test will result in an adjustment of the threshold of intervention. The thresholds for an obligation to notify a concentration, however, remain unchanged.

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QUESTIONS

The Inside Track

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Appropriate legal advice in the relevant countries is a must. The undertaking should take into account the different time periods in which the proposed concentration is assessed. If a company notifies a concentration to the European Union (EU) and a non-EU country at the same time, it should take into account the differing assessment deadlines of the authorities. The EU assessment must be available before the national authorities of non-EU countries take a decision. The national authorities will often reassure themselves that they are not making an assessment that differs from the EU assessment without good reason. It is also essential to put together a clean team consisting of employees from your own undertaking and the target undertaking. Undertakings should address all financial and legal considerations as well as potential risks and liabilities that may arise in the relevant jurisdictions. A timeline should be developed as there could be potential delays in the various jurisdictions. A risk mitigation strategy should also be developed. In addition, resources and budgets must be carefully defined for complex transactions.

In your experience, what makes a difference in obtaining clearance quickly?

There are different ways to get an approval faster. Basically, the speed of the approval process depends on the complexity of the case and the workload of the authority. By contacting the relevant competition authority at an early stage, an approval can be obtained sooner. It is sometimes advisable to send a draft of the notification to the authorities in advance before submitting the final formal notification. This allows for a better understanding of expectations and requirements and serves to identify potential problems and concerns at an early stage. All required documents and information should be submitted completely and correctly. This can prevent possible delays. There should be close cooperation with the relevant competition authority. Open and transparent communication can speed up the approval process.

What merger control issues did you observe in the past year that surprised you?

The takeover of Credit Suisse by UBS was very unusual. The concentration agreement could only be reached due to the circumstances following an intervention by the Federal Department of Finance, the Swiss National Bank and the FINMA. UBS will be the continuing entity and Credit Suisse shareholders receive one share of UBS for 22.48 shares of Credit Suisse. Based on the Emergency Ordinance issued by the Federal Council, the concentration can be implemented without shareholder approval.

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Türkiye

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1 What are the key developments in the past year in merger control in your jurisdiction?

On 4 March 2022, the Turkish Competition Authority published Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Board (the Amendment Communiqué). The Amendment Communiqué introduces certain new regulations concerning the Turkish merger control regime, which will fundamentally affect the notifiability analysis of whether a transaction requires mandatory notification in Türkiye and the content of the merger control notifications submitted to the Authority.

Two of the most significant developments that the Amendment Communiqué entails, inter alia, are the introduction of threshold exemption for undertakings active in certain markets and sectors and the increase of the applicable turnover thresholds for the concentrations that require mandatory merger control filing before the Authority.

The Amendment Communiqué does not seek a Turkish nexus for the threshold exemption. In other words, it is sufficient for the target company to be active in the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies anywhere in the world for the threshold exemption to be applicable, provided that the target company: (1) generates revenue from customers located in Türkiye; (2) conducts R&D activities in Türkiye; or (3) provides services to Turkish users in any field other than the above-mentioned ones. Accordingly, the Amendment Communiqué does not require: (1) revenue to be generated from customers located in Türkiye; (2) R&D activities conducted in Türkiye; or (3) services to

Gönenç Gürkaynak

Öznur İnanılır

be provided to Turkish users concerning the fields listed above for the exemption on the local turnover thresholds to become applicable.

The increased turnover thresholds and the exemption on the local turnover thresholds mechanism introduced by the Amendment Communiqué seems to alter the scope of the transactions that are notifiable to the Authority. On that note, concentrations related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies are expected to be more closely scrutinised more closely by the Authority.

Moreover, pursuant to the Decision Statistics of the Authority for 2022, the Board reviewed a total of 245 transactions in 2022 including 209 mergers and acquisitions that were approved unconditionally and two decisions that were approved conditionally. Thirty-four were out of

"The Decision Statistics for 2022 show that the transactions in the chemical and mining sector took the lead with 36 notifications, followed by the information technology and platform services sector with 30 notifications."

the scope of merger control (ie, they either did not meet the turnover thresholds or fell outside the scope of article 7 of Law No. 4054 on the Protection of Competition). The Decision Statistics for 2022 show that the transactions in the chemical and mining sector took the lead with 36 notifications, followed by the information technology and platform services sector with 30 notifications.

Some of the Board's most important recent merger control decisions are as follows.

One notable transaction concluded in 2022 was the *Ferro/Prince* Phase II review decision (Decision 22-10/144-59 of 24 February 2022). The transaction concerned the acquisition of sole control over Ferro by American Securities. Following the preliminary examination, the Board to initiate a Phase II review in accordance with the first paragraph of article 10 of Law 4054 based on concerns that the transaction could result in the significant impediment of effective competition in the market for glass coatings for white goods in Türkiye.

The Board defined the following product markets, in which competitive concerns were concentrated, and also defined as the affected markets:

- the porcelain enamel coatings market; and
- the glass coatings for white goods market.

The Board noted that the transaction would not cause competitive concerns in terms of coordination-inducing effects, considering that:

- the shares to be acquired by the merged entity as a result of the transaction in the porcelain enamel coatings market remained below the threshold set out in the Horizontal Guidelines;
- the increase in market share of the undertaking subject to the transaction would be limited in terms of volume and value;
- strong competition existed in the relevant markets;

QUESTIONS

- there were no significant barriers to entry to the market;
- there were no significant barriers to switching suppliers; and
- producers had sufficient capacity to meet the demand for porcelain enamel coatings.

The Board also analysed the market shares in the market for glass coatings for white goods for 2020 and noted that the merging undertakings were among the five largest undertakings in the market. Therefore, the Board noted that the possibility for undertakings to exert competitive pressure would be reduced following the merger between two of the five largest players in the market. The Board observed that:

- the market in question had a concentrated structure even before the transaction;
- although there were also small suppliers in the market in addition to the five largest players, the parties to the transaction owned a large portion of the market; and
- after the notified transaction, the market share of an important rival undertaking would be eliminated and a market structure with four players and greater concentration would emerge.

Hence, the Board concluded that this could lead to a significant restriction of competition in the market.

The merging parties had submitted commitments to the European Commission and the Board concluded in summary that Prince would be divesting its porcelain enamel coating activities and the entire glass coatings business in Europe. Accordingly, the Board ultimately conditionally approved the transaction subject to the implementation of these commitments, since they also removed the horizontal overlaps between the parties in the horizontally affected markets in Türkiye.

In *Vinmar/Arısan* (Decision 22-10/155 of 24 February 2022), the Board issued another eye-catching Phase II decision relating to

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non-compete and non-solicit clause assessments. The transaction concerned the acquisition of Arısan and Transol Arısan by Vinmar Group through Veser Kimya, which would have sole control over the target group. The board analysed the parties' fields of activity and concluded that the following activities of Vinmar Group conducted in Türkiye through its subsidiaries could overlap with the activities of the target group:

- cosmetic chemicals (including chemicals for personal care products);
- household chemicals (including detergents and cleaning chemicals);
- food chemicals;
- pharmaceutical chemicals (including veterinary chemicals and active ingredients); and
- the sale of lubricant chemicals.

However, the Board found that the market shares of the parties in the markets with horizontal overlap were low.

"The Board has geared up for a merger control regime focusing much more on deterrents."

Moreover, the agreement included four-year non-compete and non-solicit obligations, which the parties stated reflected their mutual agreement. The parties further stated that these aimed to ensure a smooth transition to the new company structure after the transaction, and that the economic benefits expected from the transaction could not be fully realised if the non-compete and non-solicit obligations had a shorter duration. The parties also stated that a high level of know-how would be transferred, and that the aim was to establish long-term commercial relationships with buyers in the specialty chemicals market.

All in all, the Board approved the transaction on the condition that the duration of non-compete and non-solicit obligations was reduced to three years, taking into account the market structure, customer loyalty and know-how.

Lastly, in *Alleghany/Berkshire Hathaway* (Decision 22-42/625-261 of 15 September 2022), the Board clarified that undertakings with turnover generated abroad in exempt sectors will be considered to fall within the scope of the exception in terms of the merger control thresholds if they have any activities in Türkiye. To that end, the Board concluded that Alleghany Corporation operated in the field of 'financial technologies' pursuant to Communiqué 2010/4, as it develops software to manage the systems of reinsurance companies and sells these products to third parties. Accordingly, the turnover threshold requirement of 250 million Turkish lira set out in Communiqué 2010/4 did not apply to Alleghany Corporation.

In addition, the Board noted that whether Alleghany Corporation operated in Türkiye in the field of 'financial technologies' had no effect on the assessment of the non-application of the turnover threshold requirement of 250 million lira set forth in Communiqué 2010/4; any activity of Alleghany Corporation in Türkiye would suffice for the non-application of the relevant requirement.

In this context, the Board concluded that the turnover threshold requirement of 250 million lira set forth in Communiqué 2010/4 will not be considered while determining whether a merger or acquisition is subject to the authorisation of the Board if the target entity operates in 'digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies' in any geographical market in the world and conducts any activity in Türkiye.

2 Have there been any developments that impact how you advise clients about merger clearance?

As mentioned in the above question, the Amendment Communiqué raised the notification thresholds. Article 7 of Communiqué No 2010/4 amended by Communiqué No. 2022/2 provides that a transaction will be required to be notified in Türkiye if one of the following increased turnover thresholds is met:

- the aggregate Turkish turnover of the transaction parties exceeding 750 million lira and the Turkish turnover of at least two of the transaction parties each exceeding 250 million lira; or
- the Turkish turnover of the transferred assets or businesses in acquisitions exceeding 250 million lira and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion lira; or
- the Turkish turnover of any of the parties in mergers exceeding 250 million lira and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion lira.

The Amendment Communiqué also introduced a threshold exemption for undertakings active in certain markets or sectors. Pursuant to Communiqué No 2022/2, 'the 250 million lira turnover thresholds' mentioned above will not be sought for the acquired undertakings active in or assets related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies, if they: (1) operate in the Turkish geographical market; (2) conduct research and development activities in the Turkish geographical market; or (3) provide services to Turkish users.

The regulation does not seek the existence of an 'affected market' in assessing whether a transaction triggers a notification requirement, and if a concentration exceeds one of the alternative jurisdictional thresholds, the concentration will automatically be subject to the approval of the Board.

Additionally, with the recent changes in Law No. 4054, the Board has geared up for a merger control regime focusing much more on deterrents. Accordingly, it is now even more advisable for the transaction parties to keep an eye on the notification and suspension requirements and avoid potential violations on that front. This is particularly important when transaction parties intend to put in place carve-out or hold-separate measures to override the operation of

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the notification and suspension requirements in foreign-to-foreign mergers. The Board is currently rather dismissive of carve-out and hold-separate arrangements, even though the wording of the new regulation allows some room to speculate that carve-out or hold-separate arrangements are now allowed. Because the position the Authority will take in interpreting this provision is not yet clear, such arrangements cannot be considered as safe early closing mechanisms recognised by the Board.

Many cross-border transactions meeting the jurisdictional thresholds of Communiqué No. 2010/4 will also require merger control approval in a number of other jurisdictions. Current indications in practice suggest that the Board is willing to cooperate more with other jurisdictions in reviewing cross-border transactions. Article 43 of Decision No. 1/95 of the EC–Türkiye Association Council authorises the Authority to notify and request the European Commission (the Competition Directorate-General) to apply relevant measures.

"Based on the new substantive test, mergers and acquisitions that do not significantly impede effective competition in a relevant product market within the whole or part of Türkiye would be cleared by the Board."

The Turkish merger control regime currently utilises a SIEC test in the evaluation of concentrations. In line with EU law, Law No. 7246 Amending Law No. 4054 on the Protection of Competition (the Amendment Law), entered into force on June 2020, and has replaced the dominance test with the SIEC test. Based on the new substantive test, mergers and acquisitions that do not significantly impede effective competition in a relevant product market within the whole or part of Türkiye would be cleared by the Board. This amendment aims to allow a more reliable assessment of the unilateral and cooperation effects that might arise as a result of mergers or acquisitions. The Board will be able to prohibit not only transactions that may result in the creation of a dominant position or strengthen an existing dominant position, but also those that can significantly impede effective competition.

On the other hand, the SIEC test may also reduce over-enforcement as it focuses more on whether and how much competition is impeded as a result of a transaction. Thus, pro-competitive mergers and acquisitions may benefit from the test even though a transaction leads to significant market power based on, for instance, major efficiencies.

Furthermore, economic analysis and econometric modelling are seen more in Board's decisions. For example, in *AFM/Mars Cinema* (17.11.2011; 11-57/1473-539), the Board employed the ordinary, least-squared and the two-staged, least-squared estimation models to determine price increases that would be expected as a result of the transaction. The Board also used the Breusch–Pagan, Breusch–Pagan/Godfrey/Cook–Weisberg and White/Koenker NR2 tests and the Arellano–Bond test on the simulation model. Such economic analyses are rare, but increasing in practice. Economic analyses that are used more often are the HHI and concentration ratio indices to analyse concentration levels. In 2019, the Board also published the *Handbook on Economic Analyses Used in Board Decisions*, which outlines the most prominent methods utilised by the Authority (eg, correlation analysis,

the small but significant and non-transitory increase in price test and the Elzinga–Hogarty test).

3 Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

Generally, the Authority pays special attention to those transactions in sectors where infringements of competition are frequently observed and the concentration level is high. Concentrations that concern strategic sectors such as automotive, construction, telecommunications, energy, etc, are on the front. As stated above, the consolidated statistics regarding merger cases in 2022 show that the transactions in the chemical and mining sector took the lead with 36 notifications, followed by the information technologies and platform services sector with 30 notifications. The sector reports published annually by the Authority also indicate trends. The last three sector reports concerned e-marketplaces, fresh vegetables and fruit and financial technology in payment services.

Further, as noted above, the Amendment Communiqué introduced a threshold exemption for the undertakings active in or assets related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies. To that end, it would be prudent to anticipate that the Authority will scrutinise notifications of transactions in any one of the sectors noted above.

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4 Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? Any notable deals that have been blocked or cleared subject to conditions?

As per the amendments introduced to Law No. 4054 via the Amendment Law, the Board is explicitly granted with the power to impose behavioural and/or structural remedies in case of a competition law infringement. This also applies to the infringement of article 7 of Law No. 4054, which prohibits concentrations, which would result in a significant lessening of effective competition within a market for goods or services, particularly in the form of creating or strengthening a dominant position. Article 9 of Law No. 4054 aims to grant the Board the power to order structural remedies for anticompetitive conduct infringing articles 4, 6 and 7 of Law No. 4054, provided that behavioural remedies are first applied and failed. Further, if the Board determines with a final decision that behavioural remedies have failed, undertakings or association of undertakings will be granted at least six months to comply with structural remedies.

> "The number of cases in which the Board decided on divestment or licensing commitments ... has increased dramatically over recent years."

Both behavioural and structural remedies should be proportionate to and necessary to end the infringement effectively.

Recent indications in practice show that remedies and conditional clearances are becoming increasingly important in Turkish merger control enforcement. The number of cases in which the Board decided on divestment or licensing commitments or other structural or behavioural remedies has increased dramatically over recent years. Examples include some of the most important decisions in the history of Turkish merger control enforcement such as *Lokman/Adatıp*, 24 March 2022, 22-14/233-101; *AON/Willis* 14 July 2021, 21-35/503-246; *Danfoss and Eaton*, 4 May 2021, 21-25/313-144; *Aon/WTW*, 14 July 2021, 21-35/503-246; *EssilorLuxottica/Hal*, 10 June 2021, 21-30/395-199; *PSA/FCA*, 17 July 2020; 20-34/441-M; *Bekaert/Pirelli*, 22 January 2015, 15-04/52-25, *Migros/Anadolu*, 9 July 2015, 29/420-117; *Luxottica/Essilor*, 1 October 2018, 18-36/585-286; *AFM/Mars*, 17 November 2011, 11-57/1473-539; *Vatan/Doğan*, 10 March 2008, 08-23/237-75; *ÇimSA/Bilecik*, 2 June 2008, 08-36/481-169; *OYAK/Lafarge*, 18 November 2009, 09-56/1338-341; *THY/HAVAS*, 27 August 2009, 09-40/986-248; and *Burgaz/Mey Ickı*, 8 July 2010, 10-49/900-314.

In line with this trend, the Authority issued the Guidelines on Remedies. The Guidelines on Remedies aim to provide guidance on remedies that can be offered to dismiss competition law concerns regarding a particular concentration that may otherwise be deemed as problematic under the SIEC test. The Guidelines on Remedies set out the general principles applicable to the remedies acceptable to the Board, the main types of commitments that may be accepted by the Board, the specific requirements that commitment proposals need to fulfil and the main mechanisms for the implementation of such commitments.

Separately, in *TIL/Marport*, the Board refused to grant approval to the transaction, concerning Terminal Investment Limited Sàrl's (TIL) acquisition of sole control over Marport Liman İşletmeleri Sanayi ve Ticaret Anonim Şirketi (Marport', which was under the joint control of TIL before the transaction, on the grounds that the notified transaction was likely to cause significant impediment of effective competition pursuant to article 7 of Law No. 4054. The Board found, among other things, that:

- the relevant transaction would lead to a horizontal overlap in the relevant product market for 'port management for container handling services' and a vertical overlap in the relevant product market for 'container line transportation';
- TIL has significant market power in 'port management for container handling services' and its sub-segments;
- the parent of TIL (Mediterranean Shipping Company (MSC)) (ie, holding joint control over TIL) is the biggest customer of TIL, and another JV of MSC (Asyaport Liman AŞ (Asyaport)) also almost entirely serves the MSC regarding transit and local loads, and, in terms of local loads, MSC is the major customer of Marport;

- in the port management for container handling services market for local loads in the North-west Marmara Region, Marport is the biggest player and Asyaport is in third place, hence the market share of TIL's parent group would significantly increase post-transaction;
- the HHI level in the relevant product market was already high and would increase to 4573 by a rise of 1187; and
- because MSC is one of the biggest line operators on a global scale, when evaluated together with its significant presence in the area of line transportation, the fact that MSC would operate a significant part of the container handling capacity of the North-west Marmara region is likely to build a disadvantage for other line operators that use the ports in the northern Marmara region.

5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

On 30 March 2023, the Authority published its final report on the review regarding fast-moving consumer goods sector and on 14 April 2022, it also published its final report on the review regarding the e-marketplace platforms sector. On 11 March 2022, the Authority published its final report on the review regarding the fresh vegetable and fruit sector. Also, the review report on financial technology in payment services was published on 9 December 2021.

In addition, the Authority updated the Horizontal Guidelines on 4 April 2022 by including explanations on, inter alia, (1) the theory of harm regarding digital markets and markets that are dependent on innovation and potential competition and (2) general principles applicable to the transactions whereby newly established or developing enterprises are acquired. Moreover, the Authority updated the Non-Horizontal Guidelines by providing, inter alia,

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further explanations regarding the unilateral effects and coordinated effects that may arise from the transactions with vertical overlaps or concerning multi-markets.

6 Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

The president of the Authority announced on 8 April 2021 that the Authority had initiated the Digital Markets Legislation Study to quickly identify the competition problems stemming from the digital transformation and to take the necessary steps to resolve these problems in a timely manner. The Authority started working on its sector inquiries that focus on online marketplaces in June 2020 and that focus on online advertising in March 2021. Therewith, the Authority aimed to determine behavioural and structural issues

> "The Authority clarified the relevant competitive concerns in relation to e-marketplace platforms."

surrounding these sectors and to offer solutions accordingly. Each of these sector inquiries served as preparatory components facilitating the Authority's legislative actions. Within the scope of the legislation preparations, the Authority sent information requests to undertakings active in the digital markets. As stated by the chair of the Authority, Birol Küle, the Authority is currently working on digital market regulations. Therefore, industry research conducted by foreign competition authorities as well as the Authority, and the experience and know-how gained from investigations concerning digital markets are likely to form the basis of digital market regulations in Türkiye. On 7 May 2021, the Competition Authority published its preliminary report on the e-marketplace sector inquiry and published its Final Report on the Sector Inquiry Regarding E-marketplace Platforms on 14 April 2022. In the Final Report, the Authority clarified the relevant competitive concerns in relation to e-marketplace platforms and proposed relevant policy recommendations. Moreover, on 7 April 2023, the Authority published its Preliminary Report on Online Advertising Sector Inquiry which was initiated in January 2021. Also, on 18 April 2023, the Authority published the Study on the Reflections of Digital Transformation on Competition Law, which provides an overview of the competition law framework for digital markets and highlights the challenges posed by data practices, algorithmic collusion, interoperability and platform neutrality.

In light of the above, given the focus on digital markets, several other steps may be taken in terms of the merger control enforcement related to the transactions conducted in these markets.

Further, in a recent development, the Amendment Communiqué was published in the Official Gazette on 4 March 2022, and entered into force on 4 May 2022. As explained above, the Amendment Communiqué raised the jurisdictional turnover thresholds under article 7 of Communiqué No 2010/4.

In this respect, two of the most significant developments that the Amendment Communiqué entails, inter alia, are the introduction of threshold exemption for undertakings active in certain markets/sectors and the increase of the applicable turnover thresholds for the concentrations that require mandatory merger control filing before the Authority. Additionally, the proposal for an amendment to Law No. 4054 has been approved by the Turkish parliament, namely the Grand National Assembly of Türkiye, on 17 June 2020. The Amendment Law that has been published in the Official Gazette and entered into force on 24 June 2020 essentially: clarifies certain mechanisms in Law No. 4054 that might have led to legal uncertainty in practice to a certain extent, and introduces new mechanisms as to the selection of cases for the Authority to focus on, such as: de minimis principle for agreements; concerted practices or decisions of association of undertakings (except hardcore violations); SIEC test for merger and acquisitions; behavioural and structural remedies for anticompetitive conduct; commitments and settlement mechanisms; clarification on the powers of the Authority in on-site inspections; and clarification on the self-assessment procedure in individual exemption mechanism.

The amendments that directly relate to merger control are the SIEC test and Board's power to apply behavioural and structural remedies for anticompetitive conduct.

The Board also enacted secondary legislation through the Communiqué on the Commitments to be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition and Abuse of Dominant Position published on 16 March 2021 alongside the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position that was published on 15 July 2021. The Authority published its Guidelines on Examination of Digital Data during On-site Inspections on 8 October 2020, which set forth the general principles with respect to the examination, processing and storage of data and documents held in electronic media and information systems, during on-site inspections. Lastly, as per Communiqué No. 2021/3 on Agreements, Concerted Practices and Decisions and Practice of Associations of Undertakings That Do Not Significantly Restrict Competition, promulgated in the Official Gazette on 16 March 2021, the de minimis principle would apply to following agreements that are deemed not to restrict competition in the market significantly: (1) those signed between competing undertakings, if the total market share of the parties to the agreement does not exceed 10 per cent in any of the relevant markets affected by the agreement; and (2) those signed between non-competing undertakings, if the market share of each of the parties does not exceed 15 per cent in any of the relevant markets affected by the agreement. Moreover, the de minimis principle is not applicable to 'naked and hardcore violations', which are: (1) price-fixing between competitors, allocation of customers, suppliers, regions or trade channels, restriction of supply amounts or imposing quotas, collusive bidding in tenders and sharing competitively sensitive information including future prices, output or sales amounts; and (2) resale price maintenance between vertically related undertakings (ie, setting fixed or minimum resale price levels for purchasers).

In terms of the significant changes to the merger control rules, with the SIEC test introduced via the Amendment Law the Board will be able to prohibit not only transactions that may create a dominant position or strengthen an existing dominant position but also those that could significantly impede competition.

QUESTIONS

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The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

In a multi-jurisdictional transaction, a prospective client may need to consider that the Turkish Competition Authority may be inclined to cooperate and get in contact with authorities from other jurisdictions in case the contemplated transaction may raise competition-related issues.

In any case, it should be noted that the Competition Authority is familiar with contacts with other competition authorities and indeed there have been cases where they have fielded such requests and/or they requested to contact other competition authorities. However, the Board will conduct its own analyses and assessments and thus, any concerns raised in another jurisdiction will not, by itself, effect the assessment of the transaction. We have seen a number of cases where the Authority cleared a transaction in Türkiye while other authorities went into Phase II, or vice versa, by taking into account the Türkiye-specific aspects of the transaction.

In your experience, what makes a difference in obtaining clearance quickly?

All the necessary information in the notification form must be provided to minimise the risk of receiving additional questions. The review process must be followed closely; merger control cases require the skill to closely follow up the process and build close contacts with the case handlers to ensure a smooth review process. Other significant factors are anticipating potential competition law concerns that the case handlers could raise beforehand, taking the necessary measures to avoid such concerns and also filing the notification form at least 60 calendar days before closing.

What merger control issues did you observe in the past year that surprised you?

As noted above, according to the Amendment Communiqué, the transaction would be notifiable if the target entity operates in 'digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies', even if the target's Turkish turnover does not exceed 250 million lira. In the past year, the Board clarified the application of this exception. Accordingly, in *Alleghany/Berkshire Hathaway* (Decision 22-42/625-261 of 15 September 2022), the Board decided that undertakings with turnover generated abroad in exempted sectors will be considered to fall within the scope of the exception in terms of the merger control thresholds if they have any activities in Türkiye. Therefore, the exception would apply if the target entity operates in 'digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies' in any geographical market in the world and conducts any activity (regardless of whether it is in the exempted sectors) in Türkiye.

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1 What are the key developments in the past year in merger control in your jurisdiction?

Although merger filings are voluntary, the UK merger control regime is at times viewed as onerous given the Competition and Markets Authority (CMA) exercises a broad – arguably overly broad – jurisdictional reach (being backed by its vigilant Mergers Intelligence Committee (MIC) and considerable merger fees). Key developments this year include: (1) a concerning increase in divergence with the European Commission (EC) (alongside an apparent (laudable) desire to further align with US antitrust authorities); (2) an (unprecedented) re-opening of an already prohibited transaction (*Microsoft/Activision*) and subsequent clearance; and (3) a notable drop in Phase II investigations, coupled with a rise in undertakings-in-lieu (UILs) accepted in Phase I (for the CMA's financial year to date (April–Sept) (FY23 YTD)). Separately, (4) the government published its first Annual Report under the National Security and Investment Act 2021 (NSIA), which offers insights into cases reviewed by the Investment Screening Unit (ISU) in a still nascent area of law.

Regrettably, divergence with the EC surfaced in a number of cases this year. Of the four parallel in-depth cases reviewed by the EC and the CMA, three resulted in diverging outcomes: (1) *Booking/eTraveli*: blocked by the EC this year having been cleared by the CMA; (2) *Microsoft/Activision*: initially blocked by the CMA (but subsequently cleared after the transaction was restructured and refiled) but cleared with remedies by the EC, and (3) *Broadcom/VMware*: cleared by the CMA, whereas the EC imposed behavioural remedies. Overall, the CMA seemed the more interventionist regulator, effectively blocking three transactions (*Microsoft/Activision* and *Cérélia/Jus-Rol*; a third *ForFarmers/Bopartran* was abandoned), whereas the EC has blocked only *Booking/eTraveli*.

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"Divergence with the EC surfaced in a number of cases this year."

> "In its FY23 YTD, the CMA has referred just one case to a Phase II investigation (*Adobe/Figma*). This is a remarkable decrease compared with the 14 in-depth investigations opened in 2022."

Simultaneously, the UK enforcement policy seemingly converges more with the current enforcement policy of the US antitrust authorities. This is epitomised in *Microsoft/Activision*, where the CMA aligned itself with the Federal Trade Commission (FTC), which had sued (unsuccessfully) to block the US$69 billion transaction. The CMA also aligned with the FTC on *Broadcom/VMware*, both raising no objections. Such alignment does not, fortunately, always conflict with the EC on in-depth reviews, and earlier this year the CMA, the FTC and EC all unconditionally cleared *Viasat/Inmarsat*.

Microsoft/Activision is also unusual from a procedural standpoint: the CMA reinvestigated a prohibited transaction. The CMA had blocked the transaction after finding the offered behavioural remedies insufficient. However, once it became clear that the FTC had failed to block the transaction in court, the CMA announced it would consider a new proposal if re-approached. Repackaged with the structural divestment of Activision's cloud-gaming service outside the EEA, *Microsoft/Activision* returned to a Phase I review in September 2023 and was cleared shortly thereafter. This remarkable U-turn shows a welcome acknowledgement of the difficulties caused to parties by divergence, and seems a positive development in that the CMA corrected itself even ahead of the Competition Appeal Tribunal (CAT) outcome.

The CMA's recent enforcement record is also promising. In its FY23 YTD, the CMA has referred just one case to a Phase II investigation (*Adobe/Figma*). This is a remarkable decrease compared with the 14 in-depth investigations opened in 2022, despite there being a similar number of Phase I investigations (43 in 2022) and 40 so far in FY23 year to date (with six months to go). Meanwhile, the number of UILs accepted almost doubled, with 24 accepted in six months compared with 13 in the previous year. This suggests an increased willingness of the CMA to accept remedies early on rather than launch a lengthy in-depth investigation.

Finally, the government has released insights into the type of cases and profile of investors reviewed under the NSIA this year. Unsurprisingly, investors from China constitute a considerable proportion (42 per cent) of cases referred to in-depth review (and 80 per cent of all prohibitions), but investors from allied nations are not immune – UK and US investors made up 52 per cent of in-depth reviews. In fact, the ISU is proving itself a strict regulator – having ordered five prohibitions and 10 remedies in its first full year.

2 Have there been any developments that impact how you advise clients about merger clearance?

Developments impacting counsel advice include: (1) for cross-border deals, the need for a specific UK-focused competition risk assessment (as opposed to a reliance on a global assessment); (2) to address an uncertain jurisdictional scope, a heightened need to approach the CMA upfront (eg, through briefing papers); and (3) to address less predictable outcomes in terms of substance and remedies, the heightened need towards notifications of anticipated mergers, and, where necessary, escalating UK clearance to a closing condition. Finally, (4) the upcoming the Digital Markets, Competition and Consumers Bill (DMCC), will, if enacted in current form, create further considerable challenges and additional filing burdens for investors.

First, cross-border deals require greater upfront assessment of likely CMA outcomes, particularly in light of increasing divergence with the EC and a CMA scepticism of behavioural remedies. Second, and relatedly, there has been an increase in briefing papers, which while not providing full legal certainty, provide comfort without necessitating a full investigation.

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Third, and in parallel, the numbers to date suggest an increase in anticipated transactions relative to completed transactions, which is reflected in a decrease in initial enforcement orders (IEOs) imposed compared with previous years: just three in FY23 YTD, against 36 in FY 2022. This may reflect growing recognition of the vigilant role of MIC and the onerous nature of IEOs, leading to a preference to notify transactions upfront and include CMA clearance as a closing condition.

Another anticipated development is the upcoming DMCC, and its impact on jurisdictional thresholds. Concerningly, the DMCC creates a new 'acquirer focused' threshold giving the CMA jurisdiction where: at least one party (in practice often the acquirer) has (1) a share of supply of 33 per cent in at least a substantial part of the United Kingdom; and (2) UK turnover exceeding £350 million, and the other party (in practice, then, often the target) has a UK nexus (ie, is formed in, or has at least part of its activities in, or supplies goods or services in, the United Kingdom). The new threshold therefore replaces the

"By basing jurisdiction almost entirely on the size of the acquirer, any transaction in any field involving a large investor could fall within the CMA's remit for review."

need to show an increment in share of supply (a concept already applied elastically), with a mere requirement of target UK nexus.

The purported purpose of the test is to catch transactions in emerging/dynamic markets, and the CMA estimates it will review two to five more cases per year under this threshold. Whether the CMA requires this expansive new threshold is questionable (let alone for other markets not covered by such rationale) given it already reviews a number of transactions in nascent markets under its broad interpretation of the share of supply test. Indeed, the CMA was one of the few jurisdictions in Europe able to review both *Facebook/WhatsApp* (2014) and *Facebook/Instagram* (2012), the latter based on an increment in the share of supply despite the target's free offering of services. More recently in *Roche/Spark* (2019), the CMA claimed jurisdiction on the basis of the number of employees working across Haemophilia A treatments.

The draft DMCC, if adopted, would result in an unprecedented jurisdictional reach. By basing jurisdiction almost entirely on the size of the acquirer, any transaction in any field involving a large investor could fall within the CMA's remit for review: first, because the 33 per cent is defined by the elastic concept of 'share of supply' rather a more specific 'market share', and second because the target UK nexus has no de minimis. The fact the DMCC proposes no baseline for domestic effects is both concerning and likely contrary to OECD Recommendations (2005) and ICN Recommended Practices (2018), which assert that the jurisdictional tests must be (1) clear and objective and (2) by reference to transactions with an appropriate nexus to that country (eg, by reference to target assets, sales or revenues (see ICN Recommended Practices)).

3 Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

Recent enforcement priorities include a consequent enforcement of IEO breaches and failures to provide documents requested by the CMA, and a reinforced preference for structural remedies (see question 4).

In August, the CMA fined Copart (£25,000) for failing to produce responsive documents requested under the CMA's formal powers in relation to the *Copart/Hill* review. This was the first penalty for failure to provide documents in three years (the last being *Amazon/Deliveroo* (2020)). Copart's non-compliance was discovered when the CMA issued compulsory information notices to third parties for internal documents relating to Copart, which revealed correspondence had been withheld.

The case comes on the back of record fines. Last year, JD Sports and Footasylum were fined £4.3 million and £380,000 respectively for breaching IEOs (in relation to the *JD Sports/Footasylum* review). The CMA found that the parties had held covert meetings, deleted phone records and withheld documentation, all in a deliberate breach of the IEOs imposed. The case is notable in that a fine was also imposed on the target (Footasylum).

In 2021, Facebook received a record £50.5 million fine for breaching IEOs in the context of the *Facebook/Giphy* blocked transaction. The CMA found that Facebook had deliberately limited the scope of its compliance reports, withholding information about activities during the IEO period. In 2022, Facebook received a further fine of £1.5 million for failing to alert the CMA to key staff leaving.

The CMA's focus on fines comes ahead of an expected expansion of its fining powers under the draft DMCC, increasing penalties for

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businesses to up to 1 per cent of worldwide annual turnover and 5 per cent of daily worldwide turnover (up from £30,000 fixed and/or £15,000 per day), and for IEOs to up to 5 per cent of worldwide turnover, and 5 per cent of daily worldwide turnover too.

The combination of the punitive enforcement of IEOs and a preference for structural remedies has arguably contributed this year to a heightened proportion of transactions being notified pre-closing (see question 1).

4 Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? any notable deals that have been blocked or cleared subject to conditions?

The spotlight case this year is *Microsoft/Activision*. Notably, it was blocked at Phase II while cleared by the EC; it was subsequently cleared upon re-notification at Phase I while an appeal was stayed before the CAT). The trends shown include: (1) a reinforced preference

"Of Phase II final decisions in 2023, the only remedies imposed were structural."

for structural remedies, as emphasised by the newly appointed CMA CEO and (2) a (welcome) acknowledgement of the difficulties caused to parties by diverging case outcomes.

The CMA, FTC and EC considered that *Microsoft/Activision* could, among other things, harm competition in the supply of cloud gaming services. Although cloud gaming services accounted for just 1 per cent of the worldwide games' distribution market, all three regulators considered that acquiring Activision's gaming portfolio would give Microsoft an unassailable advantage. In response, Microsoft offered remedies including a free 10-year licence to rival cloud gaming services to stream Activision products. The EC accepted this remedy, noting it would take time for cloud game streaming to 'unleash its potential'. The CMA and the FTC however, rejected it as insufficient. The CMA noted the remedy may become irrelevant, and was difficult to monitor and enforce.

This year, the CMA reinforced its scepticism of behavioural remedies in statements by the newly appointed CEO, Sarah Cardell. In July, she noted the CMA sees behavioural remedies as (1) unlikely to address the underlying competition concerns, (2) setting artificial arrangements between parties, and (3) imposing inherently practical challenges compared to structural remedies. The CMA's scepticism contrasts with the EC accepted behavioural remedies in three cases this year (*Broadcom/VMware*, *Microsoft/Activision*, *Orange/VOO/Brutélé*). Cardell's position entrenches a preference for structural remedies. This year, the CMA did accept a slot divestment UIL in *Korean Air Lines/ Asiana Airlines*, subject to ongoing oversight of a monitoring trustee. Aside from that investigation, the remaining seven UIL decisions in 2023 were clear divestment remedies. Of Phase II final decisions in 2023, the only remedies imposed were structural. In *Cérélia/Jus-Rol*, the CMA rejected the Phase II remedy proposed by Cérélia (an exclusive time-bound distribution agreement with a third party covering the concerning Jus-Rol products). The CMA viewed the remedy as insufficiently structural, and therefore insufficiently robust, at risk of circumvention and difficult to monitor.

Microsoft/Activision is further remarkable in that it was reopened after prohibition and during a CAT appeal – a procedural novelty but positive in that the CMA corrected itself ahead of the CAT and implicitly acknowledged the harm caused by divergence. For context, the CMA blocked the transaction in April 2023, when the FTC suit was in progress. In July, the FTC's suit was rejected, and the CMA became the only jurisdiction preventing closing. Shortly after, the CMA took the highly unusual step of offering to reconsider a repackaged proposal. Microsoft returned to the CMA in August with a revised transaction divesting Activision's ex-EEA cloud gaming business, which was cleared at Phase I review in September. While reactions have been mixed, there is an implicit shift by the CMA not to be perceived as 'closed for business' versus its counterparts. This is exemplified in further statements from Cardell, who has called for the progression of a formal cooperation agreement with the European Union.

5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

The CMA has released one new set of guidance as at October this year, the Mergers and Market Remedies – Guidance on reporting, investigation and enforcement of potential breaches (Guidance). The Guidance is not aimed at merger control itself, but explains the procedure for reporting breaches of final undertakings (not for IEOs). The CMA sets out the contact details and information required to report a breach. It then sets out the steps it will take to determine the severity of the breach and whether it is appropriate to take enforcement action. This aligns with the trend of robust enforcement of IEOs during the earlier investigation phases, but the new guidance is likely to apply more to markets remedies than mergers, given the overwhelming preference for structural merger remedies.

The government also published its first Annual Report (Report) on the functioning of the NSIA, the UK's mandatory merger control regime. Being a national security 'black box' for investors, the insights shared are welcomed. The Report shows: (1) more than 90 per cent of transactions are cleared within 30 days; (2) a preference for behavioural remedies; (3) heightened scrutiny of Chinese investors; and (4) a willingness to impose remedies on investors from the United Kingdom and 'allied' nations.

Between April 2022 and March 2023 (Reporting Period), 866 transactions were notified, well below the original estimate of 1,000–1,830 per year. The overwhelming majority of transactions (more than 90 per cent) were cleared at Phase I; and 65 transactions were 'called in' for in-depth review. While lower than the original estimate of 70–95, this is well above the number of Phase II investigations opened at the CMA (13 in FY2022) and investors will want to factor that into their timetables. Of those called in, 10 resulted in remedies and five in prohibitions.

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While the government's reasoning is deliberately vague, the following can be discerned.

First, there remains a clear preference for behavioural remedies, continuing the trend under the former public interest regime of the Enterprise Act 2002. This is in contrast to the competition regime, where divestments are favoured, meaning that a single catch-all remedy is unlikely to be available to transactions reviewed by both. Remedies have included: protecting UK-sensitive information, placement of government-appointed board observers, maintenance of certain defence programmes and capacity in the United Kingdom, due diligence checks on prospective customers, and information-sharing restrictions.

Second, scrutiny remains acute for Chinese investors. While Chinese investors accounted for only 4 per cent of accepted notifications in the Reporting Period, they accounted for 42 per cent of call-ins. The acquirer had China links in four of the five prohibitions, and the fifth prohibition concerned an acquirer with Russian links.

Investors from 'allied' countries and indeed domestic investors also face scrutiny. Of the 12 total remedy cases since the NSIA came into effect, one involved a French buyer, one Canadian, three American, one from the UAE, one German nationality individual and one UK PE fund. Indeed, UK investors accounted for approximately 32 per cent of call-ins and the United States accounted for approximately 20 per cent in FY2022. However, the Report highlights that investors often had a Chinese element.

6 Do you expect any significant changes to merger control rules? how could that change your client advocacy before the authorities? what changes would you like to see implemented in your jurisdiction?

The DMCC, if adopted as is, will introduce radical changes to the merger regime. Alongside the concerning revised jurisdictional thresholds (see question 2), these include (1) a mandatory reporting requirement for companies holding 'strategic market status' (SMS) and (2) a fast-track Phase II procedure, designed to allow investors to align timings in multi-jurisdictional transactions.

The DMCC proposes a new, mandatory regime for large companies deemed by the CMA to hold substantial and entrenched market power and a position of strategic significance in respect of a digital activity (ie, SMS). The mandatory regime is in marked contrast to the CMA's otherwise voluntary process, but shows parallels with the new EU Digital Markets Act, which also imposes a mandatory transaction reporting requirement on digital 'gatekeepers'. Under the new UK regime, firms with a global turnover greater than £25 billion or UK turnover of over £1 billion may be SMS designated.

Once SMS-designated, the firm will need to report acquisitions of 'qualifying status' to the CMA prior to closing. These will be acquisitions of 15 per cent or more in a UK target (also applicable to joint ventures), or more than 25 per cent or 50 per cent, provided the transaction value is at least £25 million. Although a report is not a formal notification process, the draft law requires that the CMA deem the report sufficient before the transaction can close. This is concerning, as it has potential for the CMA to expand the scope of reporting requirements needed to be deemed 'sufficient' into a de facto suspensory pre-notification process.

The DMCC will also include procedural reforms introducing a statutory procedure whereby parties can request fast-tracking their transaction to a Phase II investigation. Such an approach might be attractive in a complex multi-jurisdictional transaction, where the parties wish to align timetables, but it remains to be seen how a convergence of decisions will work in practice.

The DMCC is still in draft, and welcome revisions would be a roll back on the CMA's expansive jurisdictional reach. This could be done by defining the test by reference to market shares and adding a threshold to target activities in line with OECD and ICN recommendations. A mechanism to facilitate greater alignment on diverging outcomes would also be welcome.

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The Inside Track

1 What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

When engaging with regulators, being transparent about any prospective issues and being prepared to address hurdles head-on is key. Preparations should also consider that while regulators continue to cooperate, they are not obliged to harmonise on outcome, as shown by recent investigations.

FDI is important to consider too. Regimes vary considerably in their application and timeline, and more regimes are emerging. As with antitrust, authorities communicate (particularly within the European Union) and so clients must be prepared for outreaches.

In your experience, what makes a difference in obtaining clearance quickly?

In complex cases, a quick clearance is not always feasible, but steps can be taken to mitigate risks and anticipate obstacles. Clients should be prepared to do the majority of the preparation well in advance so that problems can be identified prior to regulators becoming involved. This may include reviewing internal documents so that parties are prepared for questions from regulators, and to the extent required remedies should be considered well in advance – both to ensure a smooth investigation process but also so that parties can assess upfront whether the transaction remains attractive with potential behavioural or divestiture obligations considered.

What merger control issues did you observe in the past year that surprised you?

Microsoft/Activision was remarkably reopened for investigation during a CAT appeal against its initial prohibition. This was a procedural novelty leading to suggestions of a quasi-Phase III review, but at the same time positive in that the CMA corrected itself ahead of the CAT and implicitly acknowledged the harm caused by divergence across regulators.

Microsoft/Activision also highlighted the trend of divergence between UK and EU investigations, both in process and outcome. Nevertheless, the endorsements by the CMA this year of progressing a formal UK–EU cooperation agreement, suggest the CMA is cognisant of the divergence and may take steps to address it.

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United States

Lisl Dunlop has over 30 years of experience guiding clients through antitrust reviews of their most significant transactions. A trusted adviser, she represents clients in antitrust agency investigations and complex antitrust litigation in a broad range of industries. Her clients include leading industrial, technology and healthcare companies.

Bradley Justus focuses his practice on antitrust law, including mergers, litigation, government investigations and counselling. Bradley has represented clients in several of the most high-profile and complex deal reviews and antitrust litigations in recent memory. In addition to appearing in courts throughout the country, before the Department of Justice and before the Federal Trade Commission, Bradley has represented major clients facing merger reviews by the European, Brazilian, Chinese, Korean, Canadian, Mexican and Japanese competition regulators.

James Hunsberger's practice focuses on the full range of antitrust matters, including mergers, litigation, government investigations and antitrust counselling. He has represented clients in a broad range of industries, including telecommunications, chemicals, software, semiconductors, consumer goods, building solutions and international shipping. In addition to his significant experience before US courts and agencies, James also has helped clients achieve merger clearances for complex global deals in several other major jurisdictions.

Aigerim Saudabayeva is an associate in the antitrust group in Axinn's Washington, DC office. Her practice focuses on merger clearance and litigation.

1 What are the key developments in the past year in merger control in your jurisdiction?

We are in a period of seismic change in US antitrust enforcement. Representing a sharp break from former Republican and Democrat administrations, the Biden administration is pushing an aggressive antitrust agenda that is hostile to deal making. The changes are reflected in enforcement actions being brought in the courts, new guidance on how the enforcement agencies will approach merger review, and significant proposed changes to the premerger notification regime.

The Federal Trade Commission (FTC) and the Department of Justice's Antitrust Division (DOJ) (the FTC and DOJ, collectively, the Agencies) have continued to choose high-profile cases to demonstrate their aggressive approach to merger enforcement, mounting often unsuccessful court challenges based on an expansive application of vertical theories of harm (eg, *Microsoft/Activision*), 'portfolio theory' (eg, *Amgen/Horizon*) and the doctrine of 'potential competition' (eg, *Meta/Within*). The FTC also overturned an adverse decision of its own Administrative Law Judge (ALJ) in *Illumina/GRAIL*.

On 19 July 2023, the Agencies released the 2023 Draft Merger Guidelines (DMGs). The DMGs signal an aggressive enforcement agenda, underpinned by a policy preference for organic growth over acquisitions. The DMGs represent a break from the bipartisan, economics-driven consensus of the past several decades, and are designed to give the Agencies more ways to challenge transactions through lower threshold presumptions and expansive theories for finding mergers unlawful.

The Agencies also have proposed massive changes to the premerger notification filing process under the Hart-Scott-Rodino (HSR) Act. If implemented, these changes would slow the review process and

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> "Clients need to be prepared to implement remedies proactively without Agency approval and 'litigate the fix' in court if necessary."

substantially increase the burden on merging parties. The changes signal a fundamental shift in the US review regime and could chill merger activity.

2 Have there been any developments that impact how you advise clients about merger clearance?

Each change impacts the way clients approach significant transactions. First, US merger reviews are becoming longer, covering a broader range of concerns. This has consequences for the time a pending deal needs to stay open before closing and the cost of obtaining clearance. While parties in the largest transactions will continue to make these investments, these factors may discourage smaller deals.

Given the Agencies' hostility to deals and their lack of success in court, clients need to consider the potential need to litigate to gain clearance. Again, this has implications for deal timing: failing to allot enough time may mean that the Agencies can effectively stop the merger without risking an adverse litigation outcome by simply 'running out the clock' in the investigation phase until the deal agreement expires. Without a credible threat of litigation, the Agencies may feel less constrained by the prospect of judicial review and have little incentive to engage in remedy discussions.

Additionally, given the Agencies' increased reluctance to accept remedies, clients need to be prepared to implement remedies proactively without Agency approval and 'litigate the fix' in court if necessary. In those rare cases where the Agencies will negotiate, clients need to be prepared for possibly onerous 'prior approval' provisions that may hamper future deal making.

3 Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

Recent cases showcase a more aggressive attitude toward enforcement. Key priorities are vertical deals, acquisitions involving private equity firms, deals in the high-tech and healthcare industries, and transactions affecting labour markets.

Vertical Mergers

Despite losing a vertical deal challenge last year – *UnitedHealth/Change Healthcare* – the Agencies have continued to bring enforcement actions against vertical mergers. The FTC challenged Microsoft's US$69 billion acquisition of Activision Blizzard, alleging that the deal would enable Microsoft to exclude its competitors by making Activision's content, particularly the *Call of Duty* video game franchise, exclusive to Microsoft's Xbox gaming console, and subscription and cloud gaming offerings. The FTC first initiated proceedings in its in-house administrative court. But after the

European Commission cleared the deal subject to behavioural remedies and the parties appealed the initial prohibition order from the UK Competition and Markets Authority (CMA), the FTC expressed concern that the parties may imminently close the deal despite the CMA's order and sought an injunction in federal district court (the FTC itself has no power to enjoin transactions on a preliminary basis, so FTC challenges typically follow this dual-track process). On 10 July 2023, the district court denied the FTC's request for a preliminary injunction, and that decision is now on appeal in the Ninth Circuit. The FTC's internal proceedings are suspended until the appeals court rules.

While past administrations viewed vertical mergers as generally procompetitive, the Agencies' current approach is highly skeptical of claimed efficiencies. In addition to the DOJ's challenge to *UnitedHealth/Change* in 2022 and the FTC's challenges to *Microsoft/Activision* and *Illumina/GRAIL*, the current administration's stricter approach toward vertical deals is also reflected in the FTC's withdrawal of the 2020 *Vertical Merger Guidelines* and the DMGs.

Private equity

Private equity acquisitions are a renewed enforcement priority. In particular, the Agencies are focused on stemming so-called private equity 'roll up' strategies, where the Agencies claim that private equity firms attain a dominant share in a particular industry by engaging in a series of small, often non-HSR-reportable transactions in a once-fragmented market. Last year, the FTC investigated two acquisitions by private equity firm JAB Consumer Partners, accusing it of using a 'roll-up' strategy to consolidate local markets for veterinary clinics. In addition to requiring clinic divestitures, the FTC's settlements with JAB imposed extensive notification and approval obligations for similar future transactions.

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In September 2023, the FTC filed a complaint against private equity firm Welsh Carson Anderson & Stowe and its subsidiary US Anesthesia Partners (USAP), alleging that Welsh Carson spearheaded a 'roll-up' strategy to consolidate hospital anaesthesia services, making USAP the 'dominant' provider in several major cities in Texas. The FTC alleges that the 'roll-up' strategy, combined with other agreements between USAP and other anaesthesia practices, enabled USAP to increase its negotiating leverage against insurers and impose higher prices on hospitals. The case is currently in its initial stages.

Big tech

The Agencies are still pursuing their quest against 'Big Tech,' with investigations and court actions underway against Meta, Google, Amazon and others. The FTC sued to enjoin Meta from acquiring virtual reality app developer Within alleging that the transaction was anticompetitive because it eliminated potential competition from Meta in the 'virtual reality dedicated fitness app market,' where Within competed with its app, *Supernatural*. The FTC argued that, with its

> "Another key trend is the Agencies' increased emphasis on a merger's potential effects on labour markets."

'virtual reality empire', Meta was an 'actual potential competitor' with the required resources and motivation to build competing apps, and its independent entry would spur innovation and competition. The FTC also claimed the mere threat of Meta's entry acted as a competitive constraint on market participants who 'perceived' Meta as a potential entrant. The district court rejected the FTC's challenge on the facts. However, the DMGs include the potential competition theories utilised in *Meta/Within*, and we expect the Agencies to increasingly push these theories, particularly against acquisitions of smaller competitors in nascent technology markets.

Healthcare

The FTC has continued its intense scrutiny of mergers involving healthcare, including its ongoing litigation against Illumina's acquisition of GRAIL. In September 2022, the Chief ALJ for the FTC sided with Illumina, finding the FTC failed to demonstrate that innovation in the market for multi-cancer early detection tests would be substantially lessened. On 3 April 2023, the full Commission reversed the decision, finding that Illumina's proposed remedies were inadequate to outweigh the acquisition's competitive harms. The case is currently on appeal in the Fifth Circuit Court of Appeals.

The FTC also challenged drug company Amgen's US$27.8 billion acquisition of Horizon alleging that Amgen could leverage the combined drug portfolio to disadvantage competitors, even though the companies' products had no significant horizontal overlap or non-horizontal links. The FTC sued the parties in district court to enjoin the transaction, but settled the case with a rare behavioral remedy, prohibiting Amgen from bundling Amgen and Horizon products, or from using contract terms to exclude competitor products.

Labour markets

Another key trend is the Agencies' increased emphasis on a merger's potential effects on labour markets, especially when the merged entity might be a large employer. The Agencies' proposed HSR amendments announced on 27 June 2023 would require merging companies to disclose detailed information regarding employees, including a five-year history of citations from the Occupational Safety and Health Administration, the National Labor Relations Board and the Department of Labor's Wage and Hour Division, and to report overlapping employee geographies.

The FTC's current investigation of Kroger's US$24.6 billion acquisition of Albertsons reportedly focuses on how the merged entity's size may allow it to exert downward pressure on store workers' wages and farmers' crop prices. To address these concerns, the parties announced a plan on 8 September 2023 to divest 413 stores and five brand labels to C&S Wholesale Grocers. It is unclear whether the Agencies will accept the parties' proposed remedies.

4 Are there any trends in merger challenges, settlements, or remedies that have emerged from the past year? Any notable deals that have been blocked or cleared subject to conditions?

Merger settlements remain limited and available only in rare situations. DOJ Assistant Attorney General (AAG) Jonathan Kanter has historically been skeptical of merger settlements, saying in a January 2022 speech that 'merger remedies short of blocking a transaction often miss the mark.' FTC Chair Lina Khan has similarly remarked that the FTC was going to focus resources on 'litigating, rather than settling'. Nonetheless, the Agencies have negotiated multiple remedies mid-litigation after bringing enforcement actions where they seemed to face the risk of a loss in court. The Agencies have settled three litigated cases under these circumstances so far in 2023: *Amgen/Horizon*, *Intercontinental Exchange/Black Knight* and *Spectrum/Assa Abloy*.

Where the Agencies have been unwilling to entertain remedies during the investigation phase, sometimes parties have acted independently to remedy their deals without agency sign-off and then 'litigated the fix' in the subsequent enforcement action. In *Microsoft/Activision*, for example, Microsoft entered into a series of agreements – including with Nintendo and rival cloud-based provider Ubisoft – to address potential foreclosure concerns. Despite the FTC's rejection of such a behavioral remedy in the investigation phase, the district court found the agreements relevant to its analysis of the merger's competitive effects, and Microsoft prevailed (the case is currently on appeal).

In September 2023, Principal Deputy AAG Doha Mekki refuted criticism that the DOJ is 'excessively obstructionist or uncompromising' in its approach to merger remedies, stating that 'consent decrees and fixes are still on the table'. But given AAG Kanter's recent comment that the strict 'remedies policy is working', merging parties should anticipate that settlement discussions will happen later in the review process, and possibly after the Agencies bring enforcement actions.

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5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

In July 2023, the Agencies released their draft guidelines for assessing the competitive effects of mergers. The DMGs adopt an approach that is generally skeptical – even hostile – to mergers, expressly stating a preference for internal growth over acquisition. The DMGs adopt 13 high-level principles, citing the text of the antitrust laws and largely pre-1970s Supreme Court cases, while relying more on structural presumptions rather than the modern effects-based economics of earlier merger guidelines. Among the changes, the DMGs lower the threshold presumption of illegality for horizontal

> "The FTC has continued its intense scrutiny of mergers involving healthcare, including its ongoing litigation against Illumina's acquisition of GRAIL."

mergers; introduce a structural presumption against vertical mergers where a party holds 50 per cent or more of a vertically related market; prohibit transactions that entrench or extend a dominant position; and continue their close scrutiny of potential effects on labour market competition.

The DMGs lower the thresholds for a horizontal merger to be presumed anticompetitive: mergers that increase concentration, as measured by the Herfindahl-Hirschman Index (HHI), by 100 points or more and result in a 'highly concentrated' market with an HHI of 1,800 or more are presumed unlawful. These thresholds are significantly lower than those in the 2010 Horizontal Merger Guidelines (requiring an increase by 200 or more resulting in a market HHI of 2,500 or more). The DMGs also include another strict structural presumption of illegality for a transaction that results in a combined market share over 30 per cent when the increase in HHI is 100 or more. This means, for example, that a firm with a share as low as 28 per cent could not acquire a firm with a share of only 2.1 per cent or more without triggering a presumption of illegality.

Additionally, the DMGs introduce a structural presumption against vertical mergers where the 'foreclosure share' in the vertically related market is above 50 per cent. The Agencies also include 'plus factors' they may use to find a merger unlawful, including a trend toward 'further vertical integration', the merger's nature and purpose, and possible increases in barriers to entry.

The DMGs also include concerns about transactions that are not horizontal or vertical, but that somehow entrench or extend a 'dominant position', which can be established with a share of as low as 30 per cent. The Agencies' aim with such enforcement is to 'preserve the possibility of eventual deconcentration' of markets. Similar concerns appear in a guideline prohibiting mergers that 'further a trend towards concentration'.

The DMGs do not carry the force of law and these significant changes – which depart from modern case law, economics and long-standing bipartisan consensus – create risk for the Agencies as to whether the courts will adopt them as the correct framework. The Agencies are now considering changes to the final version after receiving over 3,000 public comments.

Another major development is the proposed sweeping redesign of the premerger notification process. On 27 June 2023, the Agencies issued proposed amendments to the HSR rules. These amendments would require filing parties to provide significantly more information than is currently required, including supplying all draft versions of responsive documents related to the competitive effects of a transaction ('Item 4' documents), submitting narrative responses about the transaction's strategic rationales, providing detailed employee information and detailing the corporate governance structure. Notably, parties would also be required to identify and provide a narrative description for horizontal overlaps or vertical links between the parties' products and services, regardless of market share, revenue or competitive significance. The FTC estimates that the average time needed to

prepare a filing would increase almost fourfold from 37 hours to 144 hours, although practitioners estimate that considerably more time would be required. The extra costs associated with preparing an HSR filing will act as a burdensome tax on, and potentially disincentivise, small mergers even if they raise no competitive issues.

Finally, the proposed changes to the HSR review process create uncertainty that will impact the coordination of review processes for global deals. Outside the United States, several jurisdictions – notably the EC, United Kingdom and China – already have extended timelines for their own in-depth review. Under the regime in place since the 1970s, the HSR process has largely placed control of timing in the parties' hands. The initial HSR filing currently seeks objective, readily assembled information for the parties to 'start the clock' on the merger review. In complex deals garnering a 'Second Request' for additional information, the suspensory HSR waiting period expires 30 days after the parties certify that they have substantially complied with the Second Request. The proposed changes would inject a degree of subjectivity into the initial HSR filing that could give the Agencies unilateral discretion to 'bounce' filings they deem inadequate and may require an open-ended pre-notification process similar to regimes in Europe and Asia, extending the merger review process.

The comment period on the proposed HSR rules concluded on 27 September 2023, and the FTC will now review the submitted comments to consider whether to make revisions. Depending on the content of the final rules, parties and industry groups may challenge the changes in federal court by arguing that the FTC exceeded its rulemaking authority under the HSR Act.

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6 Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

Overall, US merger review has become more burdensome and more unpredictable for merging parties as a result of the Agencies' significant proposed changes to the HSR process and merger guidelines, enforcement priorities, and commitment to litigating more cases. First, the proposed HSR changes would burden transactions, requiring significantly more time and cost, with a possible effect of chilling merger activity. Second, transactions may face a broader and more stringent set of standards by which the Agencies will assess the legality of transactions, likely resulting in longer investigations and more cases being brought in court. Finally, Agency rhetoric has been hostile to remedies during the investigation stage, so that parties need to be prepared to litigate

> “[T]he proposed HSR changes would burden transactions, requiring significantly more time and cost with a possible effect of chilling merger activity.”

to either put pressure on the Agencies to accept a settlement or ‘litigate the fix’.

Counsel will need to have a deep understanding of these new challenges and be ready to proactively meet them head-on. First, to handle the changes to the HSR filing process, counsel will have to get involved earlier in the process so that a filing will meet the new requirements. Second, under the new DMGs, counsel will need to be proactive in demonstrating that there are no competitive concerns. It will also be important to show that the merging parties are ready to litigate, if necessary, to preserve leverage in obtaining clearance or remedy negotiations.

Overall, a key virtue of the US merger review system is that it has been predictable in its application, and the burden of prolonged reviews has been focused on transactions raising significant concerns. The Agencies are currently considering comments on the DMGs and proposed HSR changes, so their final form may not represent as significant a change as anticipated. We hope that the Agencies will not push outcome-seeking guidelines that do not reflect the sound economic analysis that has underpinned merger review and jurisprudence until now, or change the HSR process to slow down and burden a large volume of transactions that do not raise competitive concerns.

Thanks to Axinn law clerks Maryanne Magnier and Chandler Gordon for their contributions to this article.

QUESTIONS

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The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

Key considerations for our clients are timing and remedies. Companies considering complex deals that will be reviewed in multiple jurisdictions may be surprised by the duration and intensity of the review across the globe, as well as how long it can take to negotiate remedies. We have seen a trend in global deals for other jurisdictions, particularly in APAC, to open in-depth reviews and seek their own remedies rather than relying on decisions from other regulators. These developments mean that clients must give early consideration to the strategy for managing different jurisdictions and prepare early for possible remedies.

In your experience, what makes a difference in obtaining clearance quickly?

A key to obtaining clearance quickly is having a clear, strong procompetitive rationale from the beginning. Preferably, this rationale will be documented by management from the outset. The first impression the parties make with Agency staff is crucial in establishing trust. If there is a potential area of concern, it is best to be transparent instead of trying to bury it and risk losing credibility. Additionally, counsel must have an extensive understanding of the market and competitive dynamics to address concerns that an in-depth investigation is required for Agencies to figure out what is going on within an industry.

What merger control issue did you observe in the past year that surprised you?

It has been surprising that antitrust enforcers have brought cases in court but in some cases have been unwilling to fully litigate them or appeal adverse decisions. The FTC attempted to stop Meta's acquisition of Within, but did not appeal. Similarly, the Agencies initiated litigation in *Amgen/Horizon, Intercontinental Exchange/Black Knight* and *Spectrum/Assa* Abloy before withdrawing and engaging in settlement negotiations. While it is surprising that appeals and injunctions are not being more forcefully sought given the Agencies' preference against remedies, this may reflect Agency recognition that the judiciary operates as an independent check on their authority.

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Vietnam

Nguyen Anh Tuan is a partner in charge of LNT & Partners' corporate practice group and leads a team specialising in competition law. A co-founder of the Vietnam Competition Network, Tuan has been recognised as one of the few experts in Vietnam with an in-depth understanding of international practices and local insights in this area. He has advised leading multinational corporations in the food and beverage, pharmaceutical, automotive and consumer electronics sectors on the full suite of competition law matters, from merger filings, cartels, competition law litigation, to internal competition compliance audit and training. Tuan and his team have secured unconditional Vietnam clearance for a number of high-profile transactions, such as AMD's US$50 billion acquisition of Xilinx, Siemens Healthineers' US$16.4 billion acquisition of Varian, EQT AB's €6.8 billion acquisition of Baring Private Equity Asia, PETRONAS Chemical Group's US$2.4 billion acquisition of Perstorp or Archroma's acquisition of the Textile Effects business of Huntsman.

Tran Hai Thinh is an associate in LNT's competition practice. Thinh has extensive experience assisting clients in securing Vietnam clearance for complex cross-border transactions under strict timeline, as well as advising on other competition law issues, such as cartels, competition compliance audit and training.

Tran Hoang My is an associate in LNT's competition and compliance practice. She has accumulated considerable experience partaking in multi-jurisdictional filing exercises and advising leading MNCs on the full suite of competition law matters. She has also been involved in advising clients on internal compliance investigations and competition training programmes.

1 What are the key developments in the past year in merger control in your jurisdiction?

The most notable development in the past year in Vietnam is the establishment of the Vietnam Competition Commission (VCC), the official competition regulator under the current Competition Law. The VCC was formally established on 1 April 2023 and assumes the functions of overseeing the merger control regime and imposing penalties formerly discharged by the Vietnam Competition and Consumer Authority (VCCA) and the Vietnam Competition Council, respectively. The VCC's current Chairperson is Mr Le Trieu Dzung and the Vice Chair in charge of merger control is Ms Nguyen Thi Quynh Nga. Both have experience holding positions related to international trade and commerce, with the former previously working in trade remedies while the latter in multilateral trade policies prior to joining the VCC's leadership. At the working level, the case team in charge of merger review remains largely unchanged. To date, the authority is focusing its resources on capacity building initiatives while taking over the case review functions previously discharged by the VCCA.

Prior to the VCC's establishment, the VCCA remained very active with respect to merger review activities. According to its annual reports, the VCCA received a total of 154 notifications in 2022, which is an 18.5 per cent increase compared to 2021 and 146 per cent increase compared to 2020. Among the 154 notifications received in 2022, 38 (approximately 30 per cent) concerned foreign-to-foreign transactions. Notified mergers concern various industries including real estate (most popular); services; manufacturing and trading in motor vehicles and spare parts; construction materials; food and beverage; and energy. The authority completed review of 133 filings in 2022, 131 of which received unconditional clearance in Phase I. There were only two notifications subject to a Phase II review in 2022, which are Maersk's acquisitions of freight forwarder Senator

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"The authority completed review of 133 filings in 2022."

QUESTIONS

"We anticipate the VCC will adopt its predecessor's established interpretation of the law, such as the view that control for Vietnamese merger filing purposes does not encompass negative control."

International and logistics company LF Logistics. The transactions trigger Phase II review because Maersk's market share on a number of sea container shipping routes were reportedly above the 20 per cent safe harbour. The authority did not publish the decisions in full so their analysis and the conditions imposed are not clear. However, from the authority's merger control reports, the VCCA viewed the transactions as efforts of Maersk to complete its supply chain.

We expect that the VCC will be equally, if not more, busy than the VCCA, at least on the merger control front. On the one hand, we anticipate the VCC will adopt its predecessor's established interpretation of the law, such as the view that control for Vietnamese merger filing purposes does not encompass negative control, or that the 20 per cent combined market share jurisdictional threshold only applies to horizontal mergers where the parties have a substantive overlap on the Vietnamese market. On the other hand, we also understand that the establishment of the VCC will pave the way for reforming initiatives, such as the release of an official merger review guideline, the launch of an online submission portal, or perhaps even an expedited review process for no-issue filings such as intra-group restructuring or transactions where the target company is not active on the Vietnamese market. There have also talks that the VCC will take a more proactive approach towards enforcement, including investigating failure to file and gun-jumping violations.

2 Have there been any developments that impact how you advise clients about merger clearance?

Our recent filing experience shows that the VCC is constantly evolving its review practice, which makes it important to stay up to date with the authority to ensure that the merger review process goes as smoothly as possible.

In terms of the scope of review, the regulator is generally more interested in the filing parties' operations in Vietnam than their overseas business activities. To facilitate the review process, parties should focus on information that demonstrates the extent (or lack) of nexus to the Vietnamese market. The filing should provide a clear picture of the parties' respective product portfolios in Vietnam, a description of the characteristics and intended use of the products, the parties' respective local business models and commercial presence. If the filing parties are members of corporate groups, it is also advisable to provide an overview of the respective group's activities in Vietnam for the authority's assessment. We have seen a tendency to require a greater level of details on the product portfolio for purposes of identifying potential horizontal overlaps, vertical and conglomerate relationships.

As for no-nexus filings where, for example, the target company does not generate any revenues on the Vietnamese market, it seems to us that the authority still accepts the view that the transaction does not give rise to any relevant market in Vietnam. However, to assist the review, the parties should still discuss the activities outside of Vietnam of the target company and offer a hypothetical relevant market analysis on the assumption that the target might be considered an active player on the Vietnamese market. As for the market share report, in no-nexus filings the authority accepts submission of the parties' market share estimates with respect to their respective primary business activities in Vietnam.

Insofar as the review timeline is concerned, the regulator does generally keep to the statutory deadlines and issue clearance within 30 days of receiving a full and valid filing dossier if the filing is subject to a Phase I review. This is a very positive track record considering that the merger control division is balancing its limited resources between case review and other internal priorities. There are only a few rare instances where clearance is not issued within this statutory

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timeframe due to administrative delays (such as where the signatory is on a business trip), although in these cases concentration parties are safe to understand that their transaction has been automatically cleared on the expiry of the 30-day clock.

With respect to Phase II cases, the parties should expect a longer review timeline considering that statutorily the authority has 90 calendar days (for typical mergers) or 150 calendar days (for complex cases) from the date of commencing Phase II review. In addition, the authority has the power to stop the clock by issuing up to two Requests for Information (RFI) during Phase II review. In our experience, the VCC's Phase II RFIs are significantly more extensive than Phase I RFIs and designed to equip the case team with an in-depth understanding of not only the industry in question but also the parties' business model, supply chain, and clientele in Vietnam. The VCC may also specifically request the parties to submit templates of commercial contracts with key customers to review the commercial terms such as selling price and quantity, as well as to scan for restrictions as well as exclusivity obligations. If the target company

> "There are a number of measures we often advise our client to consider if they are under a tight timeline. Among those, it is most important to tailor the filing to address the regulator's substantive as well as formalities requirements."

has manufacturing sites in Vietnam, the VCC may also hold a site visit as part of their Phase II review.

In light of the VCC's review practice, there are a number of measures we often advise our client to consider if they are under a tight timeline. Among those, it is most important to tailor the filing to address the regulator's substantive as well as formalities requirements. For example, on the formalities side, it is best to start the legalisation process and translation of formalities documents as soon as possible to save time. Engaging an experienced local counsel with an established working relationship with the regulator would also help the parties navigate this constantly evolving merger control regime and ensure the global transaction timetable.

3 Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

The authority has not explicitly expressed concerns about the status quo of any industries, although its activities in the past years suggest a level of interest in certain sectors, such as logistics, e-commerce or the relatively concentrated ride-hailing app market. For instance, the VCCA said in its merger control report that given the importance of logistics services to the country's economy, the authority will closely monitor activities in the logistics industry to ensure a healthy competitive environment and protect the interests of local export companies and consumers. The authority should also have a relatively comprehensive understanding of and insight into the logistics industry considering their experience in reviewing two Phase II cases in this sector in 2022.

In addition, the authority has produced a research paper on factors relevant to the assessment of dominance in the e-commerce space. The authority also released a documentary on the Vietnam online

ride-hailing market, focusing on aspects such as the importance of users' data, market entry and expansion barriers and proposals to enhance competition in this market.

In addition, as part of their routine monitoring exercise, the authority has also issued post-clearance follow-up requests for information in a number of transactions where the post-merger undertaking is deemed to have a dominant position on the market.

4 Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? Any notable deals that have been blocked or cleared subject to conditions?

There are still no public records of any transaction blocked under the Competition Law 2018. According to the VCCA's latest tally on reported transactions in 2022, the majority (approximately 98 per cent) of notified transactions are unconditionally cleared in Phase I and only two transactions in the logistics industry were subject to a conditional clearance. There is no further publicly available information on these transactions, the conditions imposed or the authority's reasonings.

The competition regulator may also consult relevant stakeholders during the review process if they deem necessary. Although the authority conducts their merger review independently, such that negative third-party feedback does not automatically mean the transaction will be blocked or cleared subject to conditions, third-party consultation may delay the review process as not every stakeholder is responsive to the VCC's consultation request.

Similarly, there are no public records of any sanction imposed on parties for failure to file, gun-jumping or for conducting a prohibited concentration. Moving forward, however, it is expected that the regulator will ramp up their enforcement efforts with respect to both merger review and investigation of alleged violations such as failure

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to file or gun-jumping. According to its 2022 annual report, one of the VCCA's focuses is to collect information on concentrations which meet the notification thresholds but are not notified to the authority, as well as monitoring M&A activities on the market. Following its establishment, the VCC is reportedly working on a merger control guideline that would also assist with the enforcement efforts.

5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

As mentioned above, the VCC is reportedly working on a comprehensive merger review guideline, which is expected to facilitate filing preparation and increase legal certainty during the review process. However, the guideline has not been published for public comments nor there is any official release date. In the meantime, parties are advised to refer to the published materials,

including the official notification form, a checklist of required documents, an overview of the review process and expected timeline, and a set of practice notes on issues such as relevant market definition, impact assessment and request for confidential treatment. This is a much welcomed first step from the competition regulator.

In addition, the VCCA has also finished various industry reports, covering from the booming e-commerce market to the real estate and automobile sectors. Together with the sector-specific database the VCCA has been developing, these reports should pave the way for the VCC to develop a more simplified review process for key industries in the future.

6 Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

We currently do not expect any substantive changes to merger control rules considering that the current regime has only been in place since July 2019. However, we do anticipate that the VCC will soon release a comprehensive merger control guideline. Based on informal discussion with the regulator, we understand that the guidelines would be modelled based on the guidelines of the European Commission and the Competition and Consumer Commission of Singapore, although it is unclear which matters the guideline will address as the VCC has not released any draft for public comment. We hope that the document will at least address issues such as the inclusion of seller as a filing party and the treatment of no-nexus transactions such as intra-group restructuring and concentrations where the target company does not generate any revenues on the Vietnamese market. In any event, a full guideline is a welcomed development as it would be tremendously helpful to filing parties as well as practitioners.

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The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

A multi-jurisdictional screening should be conducted as soon as possible to identify jurisdictions where the transaction might trigger a filing. It is also useful to obtain an anticipated timeline and a checklist for each 'triggered' jurisdiction to facilitate cross-border coordination. Furthermore, having a master briefing note applicable to all jurisdictions would also help ensure consistency and save time.

If FDI filings are also required, it is critical to develop a matrix featuring the timelines of all relevant processes (such as M&A approval, merger clearance and title transfer) to ensure the transaction is completed within the expected timetable.

In your experience, what makes a difference in obtaining clearance quickly?

Maintaining an active communication channel with the regulator has proved instrumental in expediting the review process as it helps the parties promptly address any concern the regulator may have in relation to the transaction. To this end, it would help to engage experienced local counsel with an established working relationship with the authority.

In many cases, compliance with formalities requirements is also a roadblock for obtaining clearance quickly. The parties are advised to start preparation of the formalities (eg, legalisation of incorporation certificates, translation of financial statements and transactional document) as soon as possible to minimise delay.

What merger control issues did you observe in the past year that surprised you?

The authority's current approach to identifying filing parties is relatively unusual. For instance, sellers – including individual sellers – continue to be treated as filing parties. On the acquirer's side, there is inconsistency as some case handlers accept that only majority acquirers should be deemed filing parties, whereas some would require inclusion of the minority non-controlling acquirers because they are a party to the transactional document. The inclusion of sellers and minority acquirers creates onerous formalities requirements and may also lead to an anomalous situation where these entities could be held liable for failure to file or gun-jumping.

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