Global merger control: Navigating stormy seas

There have been a number of developments in merger control in 2020 and Q1 2021. Some are related to the repercussions of the COVID-19 pandemic, while others are borne out of the ambitions and changes sought by individual competition authorities or unexpected jurisprudence

By Axel Schulz and Rebecca Farrington

Early on in the Coronavirus crisis, the European Commission's Directorate-General for Competition (DG Comp) sent a daunting message to businesses across the world when it recommended that the parties delay their merger notifications where possible. DG Comp warned it would likely "face difficulties in collecting information from third parties, such as customers, competitors and suppliers" and may "face limitations in terms of access to information and databases" due to remote working measures.

However, it only took a short time for the directorate-general to adapt and it soon began encouraging companies to submit merger notifications through electronic platforms such as the Merger Registry or the eTrustEx platform, and things slowly got back to a new normal.

In a September 2020 speech entitled "The future of EU merger control", the European commissioner for competition, Margrethe Vestager, said that in light of the current economic context, and the need to "stay competitive in a fast-changing world", changes to merger notifications at the EU level ought to be looked at.

The commissioner suggested a broader application of the EU Merger Regulation's simplified procedure, which would feature reduced information requirements for the parties, and a speedier review process. In particular, Vestager said pre-notification discussions in cases that are "so straightforward that there's really nothing to discuss before the merger is filed" could be cut back.

On 26 March 2021, the European Commission launched an impact assessment on policy options for further targeting and simplification of merger procedures, inviting stakeholders to submit their views by 18 June 2021. This was accompanied by the publication on the same day of a Staff Working Paper (SWP). This Paper summarises the European Commission's findings of its evaluation (launched back in August 2016) of procedural and jurisdictional aspects of EU merger control. With respect to simplification, the paper notes the potential room for the additional expansion of the simplified procedure, and identifies scope for reductions in the information requirements for simplified procedure reviews.

Business and legal advisers would welcome the further simplification of merger procedures, as it is something that many have been advocating for a long time, and especially during the COVID-19 crisis.

Another pressing issue tackled by Vestager in her speech was the review of EU notification thresholds. This has been a hot topic in competition circles, as national competition authorities have begun advocating for and adopting value based thresholds in order to trigger notifications, to supplement turnover based thresholds.

The goal of these new mechanisms is mainly to enable authorities to catch so-called "killer acquisitions" — incumbent firms acquiring innovative targets to pre-empt future competition, before the targets are big enough to reach turnover based thresholds.

Vestager suggested that value based thresholds would not be among the future measures to be adopted in order

> **EU notification thresholds have been a hot topic in competition circles for some time now, as national competition authorities have begun advocating for value-based thresholds to trigger notifications**

to catch this type of deal, but did reveal the European Commission's intention to use Article 22 of the EU Merger Regulation to address this issue. The reasoning was confirmed by the SWP which concludes that more referrals under Article 22 of transactions that do not meet EU or Member State merger control thresholds might address the perceived enforcement gap.

The change in the EC's Article 22 referral policy became effective in March 2021 when the EC published its guidance on the application of the Article 22 referral mechanism (Article 22 Guidance). The European Commission now encourages national competition authorities to use the referral mechanism even where transactions do not meet the national merger control thresholds of the referring Member States.

The Guidance details the categories of transactions which may be suitable candidates for referral. The EC's focus is predominantly on transactions in the digital and pharmaceutical sectors, but also on other sectors, for example where innovation or access to competitively valuable assets is an issue.

The Article 22 Guidance states that the European Commission will generally not consider a referral appropriate if 6 months have passed since transaction closing, or where the transaction has been notified in one or several Member States that did not request a referral to the EC. However, the European Commission considers that in exceptional circumstances a later referral may be appropriate based on, for example, the magnitude of the potential competition concerns and of the potential detrimental effect on consumers.

The guidance implements a major policy change and has important consequences for dealmakers. Any transaction that could be assessed as threatening competition within the EU may now be reviewed by the EC – no matter how small the target, and even after the deal has closed. This impacts deal risk assessment, transaction timelines, and deal documentation for certain transactions.

In her September 2020 speech,the Commissioner also announced a review of the substantive assessment to see whether the Commission "is getting things right". However, Vestager also made it clear that no decision on

Article 22

of the EU Merger Regulation stipulates that national authorities can refer transactions to the EC in specific cases that raise potential competition concerns, even if national turnover thresholds are not met

substantive assessment would be taken until the European General Court had considered the Commission's appeal against its judgment in the landmark Hutchison mobile case, which dealt with the burden of proof that DG Comp must meet in its merger decisions.

In particular, the court clarified that "the mere effect of reducing competitive pressure on the remaining competitors is not, in principle, sufficient in itself to demonstrate a significant impact on effective competition". It also said the commission "is required to produce sufficient evidence to demonstrate with a strong probability the existence of significant impediments following the concentration".

While at first glance this case may seem to exclusively benefit companies undergoing a merger review process, it might turn out to be a double edged sword. Indeed, while a higher burden of proof makes it harder for the European Commission to demonstrate the competition concerns raised by a proposed merger to the requisite legal standard, this could ultimately result in companies and their outside counsel having increased document production requirements.

This risk was raised in a speech by DG Comp official Guillaume Loriot in September. Loriot told a competition webinar: "I actually fear that this judgment creates, even more, a spiral of having to motivate more and

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While a higher burden of proof makes it harder for the EC to demonstrate the competition concerns raised by a proposed merger, this could ultimately result in companies having increased document production requirements

therefore getting even more evidence to reach a decision, whether negative or positive. And that's not really in the interest of anyone."

The European Commission also appears to be increasingly stringent when it comes to the enforcement of procedural rules. Indeed, decisions such as Facebook/WhatsApp, Canon/Toshiba Medical Systems Corporation, GE/LM Wind and Altice/PT Portugal have been characterized by the imposition of hefty fines for procedural violations such as gun jumping or the provision of incorrect or misleading information.

National competition policy

At the national level, the activity of the French Competition Authority (FCA) and of the German Federal Cartel Office (FCO) provides a good example of the developments in competition policy and enforcement at the European national level.

The FCA has recently shifted the focus of its merger control activity toward digital issues, in particular to large digital platforms. One particularly innovative example is the novel approach of modernizing its market definitions to consider the development of online sales in the retail sector.

In a decision authorizing the merger between toy retailers Luderix and Jellej Jouets, the FCA determined that the relevant market included both in-store and online sales. Such a stance was further confirmed in its study on competition and e-commerce released in June 2020, in which the FCA highlighted the rapid growth of e-commerce during the COVID-19 pandemic. It said it had adapted its analytical framework by more frequently identifying relevant markets that cover both online and offline sales.

This trend has been unequivocally confirmed in the new FCA merger guidelines introduced in July 2020, which now contain a specific section dedicated to online sales, describing in detail the elements to consider when assessing the substitutability of in-store and online sales.

An evolution of particular interest when considering notifications to the German FCO concerns the timing of proceedings. Recent practice has shown a trend to extend Phase II proceedings (in some cases even more than once), leading to a significantly longer total review period than the four months German law currently stipulates.

However, planned amendments to applicable German laws aim to address these de facto prolonged review periods by extending the review deadlines. Current deadlines are automatically extended by one month in case the parties offer remedies, and the FCO can further extend them multiple times without any limitation, but only with the parties' consent. Contrary to an original proposal, there will be no limit to the sum of further extensions.

In the UK, the Competition and Markets Authority (CMA), has taken a rather interventionist approach to merger control. This seems evident from its approval of Roche's takeover of Spark, in which the CMA found that the share of supply test — one of the tests triggering notification — was met, despite the fact that Spark did not have any sales in the UK.

The CMA justified this by pointing to the existence of numerous UK-based employees, defined as "assets" by the decision. This aggressive stance was repeated in the Amazon/Deliveroo decision, in which, despite the fact that Amazon was only acquiring a minority 16 percent stake in Deliveroo, and had exited the restaurant delivery market, the CMA still asserted jurisdiction and performed an in-depth review of the transaction.

While both deals were ultimately found not to give rise to competition problems in the UK and were cleared, there are various cases from the past year in which the CMA's concerns resulted in a transaction being blocked.

In its decision over travel technology company Sabre's proposed acquisition of ticketing technology business Farelogix, for example, the CMA found that the share of supply test was satisfied on the basis of revenue in the supply of IT solutions to UK airlines, even though Farelogix had an indirect agreement with only one UK airline. The decision to block the deal came after the US District Court of Delaware had cleared it, ruling against the US Department of Justice (DOJ), which had challenged the merger.

The US focus

On the other side of the Atlantic, antitrust agencies have largely adapted to the challenges created by COVID-19.

"The development of merger control policy and rules worldwide shows that companies looking to take advantage of the disrupted economic environment need to make sure they are abreast of the changes to navigate their way through the uncertainty that lies ahead

The US Federal Trade Commission (FTC) and DOJ have continued to be active in merger investigations and successfully introduced a Hart-Scott-Rodino (HSR) Act e-filing system.

In the first quarter of 2021, coinciding with the inauguration of the Biden Administration, senators from both the Republican and Democratic Parties have each introduced legislation aimed at altering existing antitrust laws. While these proponents come from different ends of the political spectrum, the new bills share many similarities. Most notably, both bills create rebuttable presumptions of illegality or harm based solely on the size of the acquirer and increase the focus on enforcement of vertical mergers. While it remains to be seen whether these bills will become law, there has been increased debate on Capitol Hill about the possibility of significantly changing existing antitrust laws, exacerbated by the current discourse on under-enforcement in dynamic industries like big tech and pharma.

Nevertheless, both the FTC and the DOJ began 2021 with heightened merger enforcement activity. In January, Visa and Plaid abandoned their planned merger as a result of a DOJ lawsuit alleging Visa had nefarious incentives for the acquistion, mainly to preserve its monopoly in online debit services by eliminating a nascent competitor to Visa. The new administration's first vertical merger enforcement move occurred in February when the DOJ issued Second Requests to Slack and Salesforce. In March, the FTC announced it was forming a working group alongside the UK's Competition and Markets Authority, Canada's Competition Bureau, and the European Commission, to update the FTC's approach to analysing the effects of pharmaceutical mergers, and in particular, to broaden the approach in reviewing these mergers. Just two weeks later, the FTC challenged DNA sequencing provider Illumina's proposed acquisition of Grail, maker of early cancer detection liquid biopsy tests. Illumina provides an essential input for development and commercialization of Grail's tests, making this the agency's first vertical merger challenge in decades.

18 June 2021

Submission deadline for views on policy options for the simplification of EU merger control procedures

The US agencies have also demonstrated a continued focus on transactions involving nascent competitors, as evidenced by the FTC's challenges to Edgewell Personal Care's acquisition of razor manufacturer Harry's and the life sciences merger between Illumina and Pacific Biosciences, as well as the DOJ's challenge to Sabre/Farelogix.

These cases also reflect that the agencies are still focused on killer acquisition theories, with the DOJ alleging that Sabre's acquisition of Farelogix was an attempt to neutralize or eliminate an innovative competitor. Despite the pandemic, the US agencies also released new vertical merger guidelines, which reflect the agencies' approach to investigating the competitive impact of vertical mergers.

Although COVID-19 has been at the forefront of most people's minds, the development of merger control policy and rules worldwide shows that companies looking to take advantage of the disrupted economic environment need to make sure they are abreast of the changes to navigate their way through the uncertainty that still lies ahead.

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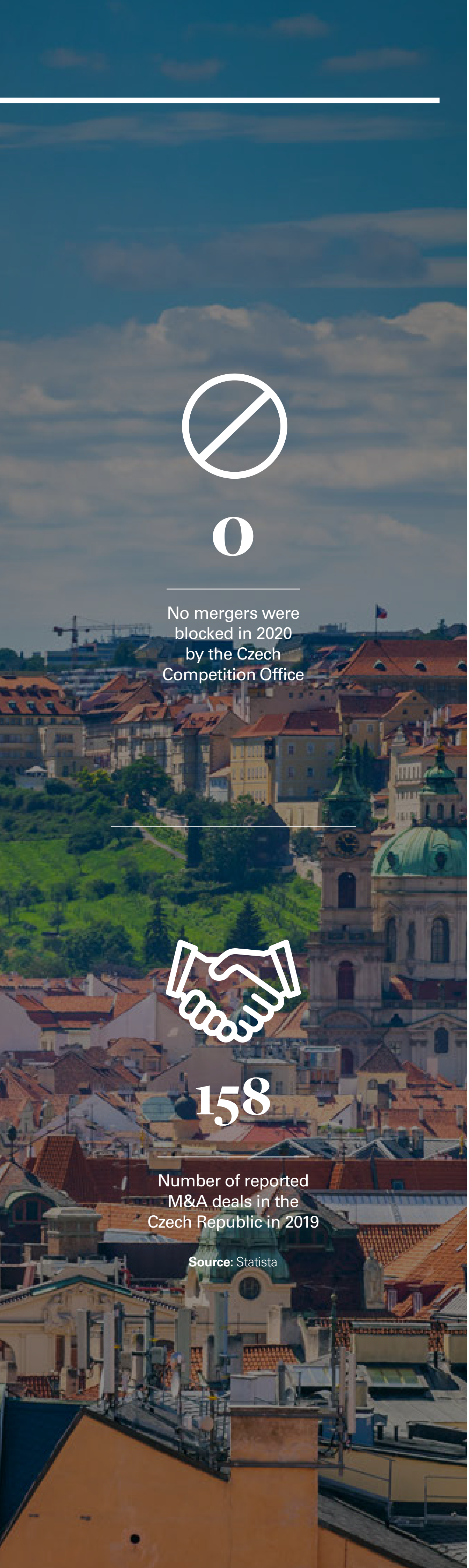
Global merger control: Czech Republic

The merger unit of the Czech Competition Office (CCO) ranks among the most stable teams at the CCO with accessible and responsive staff, so the more detailed the pre-notification, the faster and smoother the process following official notification will be



Czech Republic

By Ivo Janda, Magda Olyšarová

Key developments

Perhaps the most interesting development last year was the application of an upward referral by the Czech Competition Office (CCO) in one case.

This is rare, as the office does not have a history of interfering with merger cases falling within the jurisdiction of the EU. This particular case concerned the acquisition of a distributor for non-original spare parts for light vehicles, heptus 292, by LKQ German Holding. It was part of a broader transaction approved by the European Commission, and it resulted in approval by the CCO, subject to structural commitments.

The vast majority of merger cases were approved in Phase I without commitments. The most notable cases for the Czech market included the acquisition of sole control of Ondrasovka by Kofola, both producers and distributors of non-alcoholic drinks; and the acquisition of sole control of insurance company Wustenrot by Moneta Bank.

The latter was a significant transaction for the Czech insurance market, as Wustenrot is a well-established insurer that as a result gained a new, financially strong owner and potential for growth.

Impact on merging parties

There have been no developments in the merger clearance field recently. The merger unit ranks among the most stable teams at the CCO, and the same people have been working there for a number of years.

Staff are accessible and responsive, which makes life significantly easier, particularly during pre-notification—the one part of the process that is always a bit unpredictable in terms of timing and in terms of the depth to which issues will be scrutinized in each case. Clients can be confident that their pre-notification will be quickly addressed by case teams instead of waiting in a long queue.

The quality of review by the CCO is good and officials know and follow the most recent case law of the European Commission and EU courts. The flip side of this is that clients should not expect the office to be ready to take a revolutionary approach to merger law concepts, such as going beyond commission practice in its definition of the relevant markets. The CCO commonly takes a conservative attitude.

The CCO remained open for most of the spring of 2020 as the COVID-19 pandemic erupted, but future delays in the availability and responsiveness of officials cannot be ruled out.

That being said, the filing process should not be affected much thanks to the introduction of data boxes, which allow documents sent to public authorities to be filed remotely without physical copies. This system has been functioning for a number of years now and facilitates communication with the office and other courts and authorities, particularly in these exceptional circumstances.

Recent changes in priorities

There do not appear to be any changes in this regard. It is not clear whether the merger agenda is one where the office pushes prioritization, and it is equally not clear whether it should do so.

There are certainly some industries in which competition does not function perfectly, and in which a sector inquiry should perhaps be considered, but this is more a matter of cartel enforcement and prevention than a priority in merger cases.

Obviously, there are industries such as agriculture or wholesale bakeries where the CCO has dealt with a number of cases in the past few years and has perhaps more knowledge and expertise than in other industries, for which it will be expected to deal with a merger once in a decade. This may show in the depth of inquiry and market review by the office, but is not necessarily a change in priorities or heightened focus on any sector.

Key enforcement trends

No mergers were blocked in the past year, but there were some Phase II investigations that ultimately led to approved structural commitments. There was a case in the medical sector in which financial group PENTA was approved to take over local hospitals, subject to the commitment to divest pharmacies located within the premises of a hospital.

The competition office can be open-minded in relation to behavioral remedies. Like every other competition regulator, it considers them to be secondary and less preferable to structural remedies, but it is not a non-starter or uncharted territory for them, as is sometimes the case for other national competition authorities across the EU.

Overall, however, 2019/20 was not a notable year for the merger agenda that would highlight any new trends.

Recent studies and guidelines

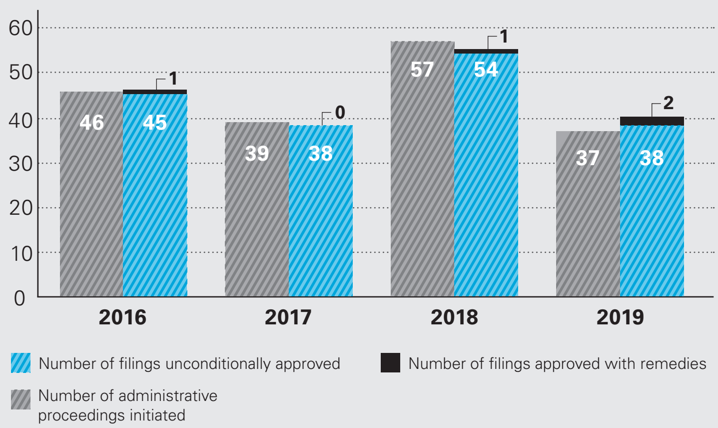
No major developments have taken place in this area over the past year. However, the CCO holds regular seminars and conferences every year, and it is always interesting to note what its representatives have to say on these occasions.

Looking ahead

There has been some recent media speculation that the Czech Competition Office chair, Petr Rafaj, may step down following negative publicity associated with certain high-profile public procurement cases in which the office was involved. Changes in administration would have an impact on various departments and units of the office.

Such a change would be surprising, although if new people were to join the CCO, this might alter its tone and style, and would therefore have an impact on how lawyers represent their merger cases there.

Merger filings in the Czech Republic



THE INSIDE TRACK

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

One of the key points is to seek good legal advice on regulatory and competition law requirements to which the transaction may be subject worldwide. Merger control duties may often be triggered in non-EU jurisdictions, even if the transaction does not have any immediate effect there. Approvals by other authorities may often be required in heavily regulated industries, such as energy or media.

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

A detailed pre-notification filing with a thorough analysis of every possible horizontal and vertical angle that may be taken up by third parties and competition authorities during market testing. The more detailed the pre-notification is, the faster and smoother the process following official notification will be.

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

On the local level, a lack of complicated mergers in concentrated markets that would tackle difficult legal and economic questions or any new ideas or trends in the office's jurisprudence.

We were also (pleasantly) surprised by the EU General Court's annulment of the European Commission's decision to block the Telefonica UK/Hutchison merger.

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Global merger control: European Union

The COVID-19 pandemic, and the ensuing lockdown measures—along with some landmark judgments—have led the European Commission's Directorate General for Competition to reflect on its approach to merger control notifications and reviews

European Union

By Axel Schulz, Mark Powell, Kasia Czaprazka, Strati Sakellariou-Witt, Jérémie Jourdan, Jan Jeram, Giuseppe Tantulli

Key developments

The COVID-19 pandemic and the ensuing lockdown measures, as well as some landmark judgments and the finalization of a nearly 5 year long evaluation of procedure/jurisdiction, have led the European Commission's Directorate General for Competition to reflect on its approach to merger control notifications and reviews, both from a practical and procedural as well as substantive viewpoint.

Early on in the crisis, because of the negative impact of COVID-19 on market tests and technical issues caused by remote working, the Directorate General for Competition recommended that companies delay their merger notifications where possible. Soon afterwards, the Commission began encouraging companies to submit their notifications electronically, either by e-mailing the Merger Registry or using the eTrustEx platform. The latest communication on this point insists that this measure is temporary, but we would not be surprised if it develops into a new best practice.

On September 11, 2020, in her speech on the future of EU merger control, European Commissioner for Competition Margrethe Vestager declared that in light of the current economic context and the necessity to "stay competitive in a fast-changing world", changes to merger notifications at the EU level ought to be envisaged. She foresaw that these changes could include a broader application of the simplified procedure, which would entail reduced information requirements for parties and a speedier review process. In particular, this could result in a reduction in pre-notification discussions in cases that are "so straightforward that there's really nothing to discuss before the merger is filed".

On March 26, 2021, the European Commission launched an impact assessment on policy options for further targeting and simplification of merger procedures, inviting stakeholders to submit their views by 18 June 2021. This was accompanied by the publication on the same day of a Staff Working Paper (SWP). This Paper summarises the European Commission's findings of its evaluation (launched back in August 2016) of procedural and jurisdictional aspects of EU merger control. With respect to simplification, the paper notes the potential room for the additional expansion of the simplified procedure, and identifies scope for reductions in the information requirements for simplified procedure reviews.

In her speech, Commissioner Vestager also declared that the EU Merger Regulation ("EUMR") could be applied to so-called "killer acquisitions", where incumbents aim to acquire innovative targets to preempt future competition, even if the target does not meet the turnover-based thresholds. While the Commissioner excluded the introduction of value-based thresholds to catch such deals, she underscored that Article 22 of the EUMR already enables national competition authorities to refer to the EU transactions that raise potential competition concerns, even if they do not meet the national turnover thresholds.

The change in the EC's Article 22 referral policy became effective in March 2021 when the EC published its guidance on the application of the Article 22 referral mechanism (Article 22 Guidance). The EC now encourages national competition authorities to use the referral mechanism even where transactions do not meet the national merger control thresholds of the referring Member States.

The Article 22 Guidance details the categories of transactions which may be suitable candidates for referral. The EC's focus is predominantly on transactions in the digital and pharmaceutical sectors, but also on other sectors, for example, where innovation or access to competitively valuable assets is an issue.

The Article 22 Guidance states that the European Commission will generally not consider a referral appropriate if 6 months have passed since transaction closing, or where the transaction has been notified in one or several Member States that did not request a referral to the EC. However, the European Commission considers that in exceptional circumstances a later referral may be appropriate based on, for example, the magnitude of the potential competition concerns and of the potential detrimental effect on consumers.

The guidance implements a major policy change and has important consequences for dealmakers. Any transaction that could be assessed as threatening competition within the EU may now be reviewed by the EC – no matter how small the target, and even after the deal has closed. This impacts deal risk assessment, transaction timelines, and deal documentation for certain transactions.

Beyond procedural changes, Commissioner Vestager has announced a review of the substantive assessment to see whether the Commission "is getting things right". However, this review has been postponed until the Court of Justice rules on the Commission's appeal against the General Court's May 2020 judgment in CK Telecoms UK Investments v. European Commission, which clarifies the burden of proof that the Commission must meet in its merger decisions (see below for details).

In this landmark judgment, which is possibly the most relevant substantive development in the field of merger control in 2020, the General Court held that the Commission must produce sufficient evidence to demonstrate with a strong probability the existence of significant impediments to effective competition due to a proposed transaction. The required standard of proof is stricter than a mere "balance of probabilities", but still less strict than "beyond all reasonable doubt".

Another interesting development has been the Commission's recent questioning whether it should take into consideration public interest in merger reviews. There seemed to have been little space for such considerations in the highly politicized decision to prohibit Siemens' acquisition of Alstom. However, the recent clearance of PKN Orlen's acquisition of Lotos, which created a Polish energy champion, signaled that there might be room for policy considerations in the Commission's decision-making. Similarly, in commenting on the clearance of Aurubis' acquisition of copper scrap refiner Metallo, Commissioner Vestager signaled a public policy consideration when explaining that copper was "an important input needed for electric mobility and digitization. A well-functioning circular economy in copper is important to ensure a sustainable usage of resources in the context of the European Green Deal".

We also saw a few interesting developments in the area of commitments. In Nidec/Embraco, the Commission requested as part of the remedy package that Nidec fund certain capital expenditure investments of a plant in Austria, which appears to have been largely driven by the Commission's desire to keep that plant afloat. Earlier in 2020, the Commission allowed Nidec to buy back this plant, after its purchaser under the remedy package had announced its closure.

Moreover, in the pharmaceutical sector transaction between Takeda and Shire, the Commission accepted Takeda's request to waive the entirety of the commitments imposed by the Commission's conditional clearance, in light of several significant and permanent developments affecting the competitive landscape. This was the first time that the Commission waived divestiture commitments in their entirety since the General Court's May 2018 annulment of the Commission's rejection of Lufthansa's request to waive its commitments on the basis that the Commission did not carry out a careful examination of Lufthansa's arguments that significant market changes justified a waiver.

Finally, the Commission continues to be stringent when it comes to the enforcement of procedural rules in relation to provision of information as part of merger reviews. This trend started in 2014 with the Commission imposing a €20 million fine on a salmon-farming company for closing on the acquisition of a 48.5% stake in a rival before notifying the transaction. This fine was confirmed by the Court of Justice in March 2020. The trend continued throughout 2019 with a number of global companies receiving hefty fines for gun jumping violations. A few appeals against these fines are currently pending before the General Court.

Impact on merging parties

As with any other sector in the world, a key development affecting merger control process in 2020 was COVID-19. At least partially due to the difficulties in obtaining information from the parties in a pandemic, the Commission suspended reviews in five Phase II cases in early 2020.

The Commission might have been initially slightly more reluctant to open Phase II investigations to ensure that its strained resources were efficiently allocated to transactions raising serious concerns. However, with remote working becoming the "new normal", this effect has diminished and we do not expect it to be a long-term trend. In fact, by the time COVID-19-related lockdowns were lifted across the EU in the summer of 2020, Vestager concluded that EU merger control review processes suffered very little disruption in relation to both simplified and more complex cases.

> "
> **EU merger control review processes suffered very little disruption due to Covid-19-related lockdowns in relation to both simplified and more complex cases**

266

merger filings received by the EC's Directorate General for Competition in 2020 were approved unconditionally

Contrary to what one might instinctively expect in a stressed economy, we have also not seen an increase in successful "failing firm" defenses, for which the burden of proof has remained notably high.

The Commission's change in its Article 22 referral policy, effective from March 2021, under which it now encourages national competition authorities to use the referral mechanism even where transactions do not meet the national merger control thresholds of the referring Member States is likely to impact dealmakers going forward. Even if the Commission reviews only a few transactions per year under the new policy, the Article 22 Guidance creates legal uncertainty for parties to transactions falling below the EU Merger Regulation's thresholds. Parties to a transaction must now incorporate a specific Article 22 referral risk assessment, and reflect any risk in the transaction documents and timetable. For certain transactions, the merging parties may also want to consider whether to proactively contact the Commission to gain an early indication that the transaction is not a candidate for a referral.

A development which has had astrong impact on our advice to clients was the General Court's May 2020 judgment in CK Hutchinson, highlighting the increased importance of economic evidence in merger control review and a more stringent standard of proof. The General Court held that the Commission must go beyond demonstrating a reduction in competitive pressure when objecting to a transaction and prove, with a "sufficiently high degree of probability" that increases in prices will follow. This standard of proof is stricter than a mere "balance of probabilities", but still less strict than "beyond all reasonable doubt". This ruling goes in the same direction as the Court of Justice in European Commission v. UPS, where the court had acknowledged the added value of transparent econometric models to competition cases. While the judgment could influence the Commission's enforcement approach, it is still unclear how the Commission will react (the Commission's appeal is pending). Raising the Commission's standard of proof appears beneficial for the merging parties, but it also increases the risk of the parties having to undertake a more burdensome notification process.

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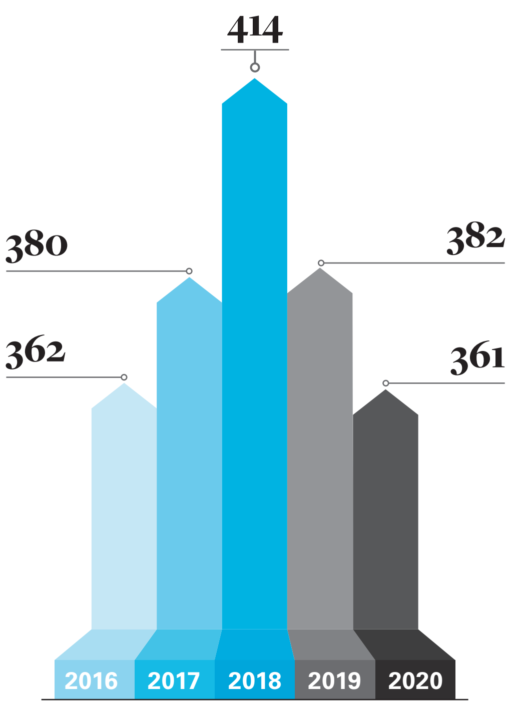
Only 12 merger filings approved by the EC's Directorate General for Competition in 2020 were approved with remedies

Another relevant development for our clients' preparation for a merger review process but also for their timing and cost expectations is the Commission's increased reliance on internal documents. In in-depth investigations, the Commission now typically requests a production of responsive documents from a broad selection of custodians. The scope of this exercise is starting to resemble the Hart-Scott-Rodino process in the US to which expansive documents productions have been reserved until recently. Lengthy pre-notification periods and hundreds of pages of standard merger notification forms also place a heavy burden on companies, in particular when compared to the US system, where initial notifications are quite thin.

If, as suggested by Commissioner Vestager, the Commission is planning to once again treat simple cases in a simple way, the burden on notifying parties will be reduced. However, we remain skeptical that this will happen.



Number of filings submitted to the EC's Directorate General for Competition

*as of 31 December 2020

Finally, while the Commission has long been cooperating with other global authorities, such cooperation is increasing and becoming closer. It is therefore crucial for parties to transactions that are notifiable in more than one jurisdiction to think carefully the choreography of the filings and ensure a consistent approach to substantive issues.

Recent changes in priorities

As an established authority, the Commission applies EU merger control rules consistently across industries. Generally, the Commission is more likely to express concerns in transactions taking place in consolidated industries. Over the past years, the most prominent examples of this were several four-to-three mergers in the telecoms industry, which have since 2012 all been reviewed in in-depth investigations. The Commission's approach has changed gradually over the years and it has generally applied a tougher stance by requesting structural remedies that would ensure the entry of a fourth telecoms player in the market.

However, in November 2018, following an in-depth review, the Commission unconditionally cleared the acquisition of Tele2 NL by T-Mobile NL, combining the third and fourth- largest mobile network operators in the Netherlands. The companies successfully demonstrated that the merger would generate efficiencies and benefit consumers, and also showed that the other two mobile operators in the Dutch market had different strategies and incentives based on multi-play offers that combined mobile and fixed services.

The Commission raised concerns about all other recent four-to-three mergers in the telecoms industry. To address these concerns, the buyers had to offer access to suitable network and divestment remedies, such as divestment of Spectrum together with network capacity. The T-Mobile NL/Tele 2 NL non-conditional clearance is therefore an exception, for now. However this success shows that, in the right circumstances and with well-prepared arguments, even four-to-three mergers in the telecoms industry can be approved unconditionally.

As has been demonstrated by the EC's change in Article 22 referral policy and by the results of its evaluation of procedure/jurisdiction (published in its Staff Working Document on 26 March 2021), the Commission also seems to believe that it should more consistently review "killer acquisitions" to protect nascent competition, affecting in particular the pharmaceutical and digital sectors.

Key enforcement trends

The Commission has not prohibited any transactions since 2019, when it issued three prohibition decisions in Wieland/Aurubis, Siemens/Alstom and Tata Steel/ThyssenKrupp. In these cases, the parties were leaders in their markets, and the Commission considered that the EEA was the relevant geographic market, despite the companies arguing that markets were global and competition from Chinese players fierce. These prohibitions demonstrate the Commission's reluctance to define global markets and, at least in those decisions, to acknowledge the impact of competition from, for example, Asian competitors.

While this was the highest number of prohibitions since 2001, it clearly did not point to a trend of more prohibitions. Having said this, antitrust concerns shared by the Commission during the review process led the parties reportedly to abandon three deals in 2020 and early 2021: in Johnson & Johnson/TachoSil and Fincantieri/Chantiers de l'Atlantique, the Commission preliminarily concluded that it was unlikely that a timely and credible entry from other players would offset the possible negative effects of the proposed transactions, which could significantly reduce competition and lead to higher prices, less choice and reduced incentives to innovate. Similarly, in Boeing/Embraer the Commission was also reluctant to acknowledge the impact of competition by international players from China, Japan and Russia and had raised possible concerns.

A number of cases have been cleared with remedies in recent times. In 2020, two out of the three

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Number of notified filings received by the EC in 2020

Phase II remedy cases (Google LLC/Fitbit Inc. and Fiat Chrysler/Peugeot) involved purely behavioral commitments. Nevertheless, structural remedies remain the norm, possibly covering all or a substantial part of the overlapping business. In BASF/Solvay's Polyamide Business, the Commission was worried there would be price increases in the markets for nylon compounds and nylon fibers because the transaction reduced the number of EEA suppliers. BASF divested several facilities and, to strengthen the divestiture buyer's position on the market, created a production joint venture between the merged entity and the divestiture buyer. It also entered into long-term supply agreements with the divestiture buyer to meet the divestment business' requirements and thus preserve the viability of the facilities.

A recent example of a mixed structural / behavioral remedy is PKN Orlen/Grupa Lotos, where PKN divested part of its stake in Lotos' refinery and several other facilities, as well as sold Lotos' 50% stake in the jet fuel-marketing joint venture the latter maintained with BP. The remedy package also included the commitment to make available up to 80,000 tonnes of jet fuel per year to competitors in via an annual open tender.

Recent studies and guidelines

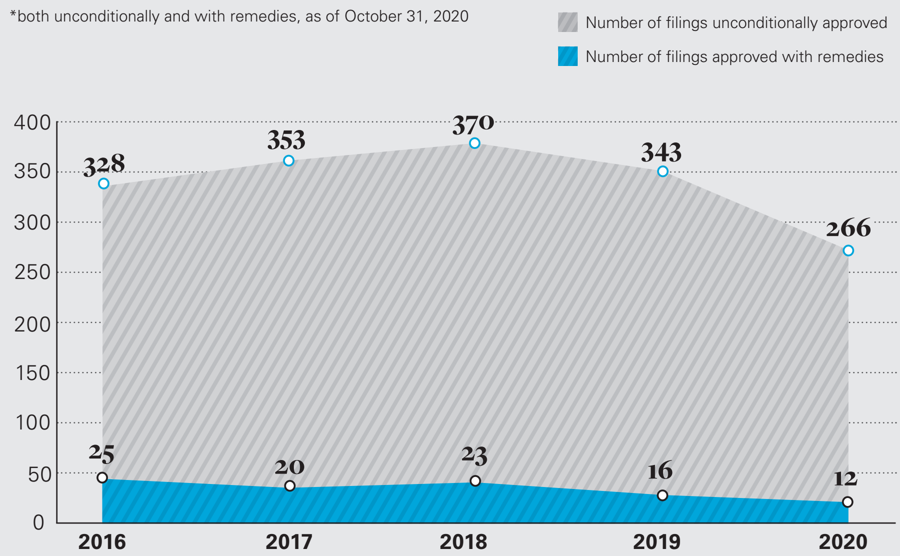
On December 9, 2019, Commissioner Vestager announced that the Commission would start a review of the two-decades-old Market Definition Notice to see whether it needs to be adjusted for a digitalized and globalized world. The adoption of a new notice is expected for 2022.

The review process is raising a number of interesting topics, including how to properly take into account that geographic markets are more and more global; the role of the small significant non-transitory increase in price (SSNIP) test in digital services, which are often available for free; the right approach to defining markets in data-intense industries, which often function as ecosystems; and the need to update the existing approach to internet sales.

In addition, the Commission's interest in common ownership—where investors hold minority stakes in multiple companies active in the same industry—has been recently revived.

Number of approved filings by the EC's Directorate General for Competition

*both unconditionally and with remedies, as of October 31, 2020



Source: The European Commission

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The EU believes that it should review ‘killer acquisitions’ more consistently in order to protect nascent competition, affecting in particular the pharmaceuticals and digital sectors

In its Dow/DuPont investigation, the Commission measured the level of common ownership in the industry based on (i) the number of shareholders that together held more than a certain percentage of the shares in each of the main industry players, (ii) the number of reported equity holders with shares in all competitors, and (iii) the level of equity collectively held in each competitor by these common reported shareholders.

In September 2020, the Commission published a 336-page Joint Research Centre report on common shareholding in Europe, which concluded that, while common ownership leads to greater market power, the phenomenon is very complex and it is difficult to conclude whether competition is harmed. We therefore expect that this question will continue to be assessed on a case-by-case basis.

Looking ahead

Overall, the most significant impact on merger control could be the more widespread use of Article 22 of the EUMR to capture transactions, such as “killer acquisitions”, that do not meet the threshold of the regulation nor of any of the 27 national merger control rules in the EU. This would create significant legal uncertainty as it would significantly increase regulatory risk for small transactions that do not meet the applicable thresholds.

Commissioner Vestager's promise of a broader application of the EUMR’s simplified procedure is certainly welcome, but, if it happens, will not take place until the first quarter of 2022. This could be further expanded by increasing the thresholds for affected markets to capture more cases that are unlikely to cause a significant impediment to effective competition.

THE INSIDE TRACK

What should a prospective client consider when contemplating a complex, multijurisdictional transaction?

Above all else, it is in the parties’ interest to plan ahead. The timing of filings should be planned backwards, starting from the expected closing or long-stop date. If an authority could potentially object to all or part of the transaction, it is paramount to identify all potential roadblocks and to set hard deadlines to ensure the success of the process. Detailed project management is therefore essential to successful merger notifications.

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

One item that recurrently affects the outcome of merger notifications is the support, or lack of support, of other market participants. When customers or companies involved at any level of the relevant supply chain provide strong opinions either in favor of or against a transaction, this will strongly affect the outcome of the review process. While DG Comp takes a dim view of perceived attempts to unduly influence the reactions of market participants, it is still important to explain the rationale of the transaction to its customers.

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

In its CK Hutchinson judgment, the General Court ruled that the Commission must go beyond demonstrating a reduction in competitive pressure when objecting to a transaction. Instead, the Commission has to prove, with a “sufficiently high degree of probability” that increases in prices will follow.

While the judgment could potentially influence the Commission’s enforcement approach, it is still unclear how the Commission will react. Raising the Commission’s standard of proof appears beneficial for merging parties; however, it also increases the risk of companies having to undertake a more burdensome notification process.

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Global merger control: Finland

The investigations by the Finnish Competition and Consumer Authority (FCCA) have become increasingly data-driven—in particular in cases with potential concerns—and economists have outnumbered lawyers in the FCCA's merger control unit.

Finland

By Marika Harjula, Martina Castren

Key developments & impact on merging parties

The merger control procedure before the Finnish Competition and Consumer authority (the FCCA) is increasingly built upon a sophisticated and meticulous economic analysis. Investigations have become highly data-driven—in particular in cases with potential concerns—and economists have outnumbered lawyers in the FCCA's merger control unit.

As economic analysis has taken a more essential role in the merger investigations, the duration of reviews has extended accordingly. While the statutory review period in Finland is 92 business days (23 days for Phase I and 69 days for Phase II), the investigations in recent complex matters have taken almost a year when taking into account the pre-notification discussions between the authority and the parties, extensions to the review period granted by the Market Court (up to 46 days) and other delays caused by e.g., an incomplete notification or the FCCA "stopping-the-clock" while waiting for input from the parties. Nevertheless, in simple transactions with no significant overlaps between the parties, relatively swift clearance can be expected.

The FCCA has adopted a strict policy with respect to incomplete notifications. Indeed, if essential information is not included in the notification, or information submitted during the process contradicts the notification, the authority does not hesitate to declare the notification incomplete and restart the review period—even during Phase II.

The authority has also become more active in requesting extensions to the statutory review period from the Market Court. The parties normally support such requests, but the FCCA has equally secured extensions despite the parties' objections. While the merging parties are often under time pressure to submit a merger notification, it is important to understand that rushing may backfire later on in the process, especially in potentially complex cases.

While pre-notification is voluntary in theory, parties are strongly encouraged to engage in pre-notification discussions with the authority. A potentially lengthy pre-notification phase is de facto mandatory in cases that are likely to raise competition concerns as well as in cases that may otherwise require extensive data collection by the parties and/or the FCCA. However, even in straightforward cases, it is often in the interests of the merging parties to enter into pre-notification discussions with the FCCA, given e.g., the above-mentioned risk of being declared incomplete. Generally, it is advisable for parties to have transparent and early communication with the FCCA in all cases, as case handlers are usually allocated on a first-come first-served basis, and the authority normally requires approximately five business days to review draft notifications in simple deals.

An aspect of the Finnish process that often surprises companies that are not familiar with it is the publicity of the process. While pre-notification discussions are conducted on a confidential basis, after the submission of the notification, the case file is open to third parties to the extent that there are no statutory grounds for keeping the information confidential. When dealing with the FCCA, the merging parties should therefore be prepared to provide non-confidential versions of their submissions in the course of the proceedings.

Despite the emphasis on publicity, Finnish legislation does not allow the authority to organize a data room for the parties' advisors to review third-party data used in the authority's assessment, a process in place in many other jurisdictions.

In principle, submissions to the FCCA should be made in Finnish, while the authority normally accepts

“While pre-notification discussions are conducted on a confidential basis, after the submission of the notification, the case file is open to third parties to the extent that there are no statutory grounds for keeping the information confidential

92

The statutory review period in Finland is 92 business days, but complex investigations take longer in practice

English-language economic analyses and other underlying documents. Finnish companies with Swedish as their official language can make submissions in Swedish.

As has been the case for some time, the FCCA routinely requests transaction-related documents as part of its review. However, contrary to the trend in the EU, where increasingly extensive requests for internal documents have become the norm in complex transactions, the FCCA in general does not require extensive production of internal documents. The FCCA considers internal documents as a reliable way of gauging the parties' intentions, but does not base its analysis on such evidence. Nevertheless, transaction-related materials remain potentially disclosable to the FCCA, so companies looking at potential transactions should take a prudent approach to document creation and management, both in terms of information memoranda and other market-facing materials, but also with respect to internal communications.

The FCCA has recently become more focused on avoiding failed remedies, and has encouraged parties to engage in timely and careful remedy design. The FCCA has clearly communicated its preference for structural remedies in cases with horizontal concerns, and has systematically rejected behavioral commitments in such cases. In principle, behavioral commitments may be accepted as the primary remedy only in vertical cases.

The authority has also started paying more attention to remedy purchasers. In April 2021, in the merger between Finnish alcoholic beverage company Altia Oyj and its Norwegian counterpart, Arcus ASA, the FCCA imposed an upfront buyer condition for the first time, making the closing of the transaction conditional on the approval of the remedy buyer. Only a few months later, the FCCA imposed an upfront buyer condition in another case (a transaction in the building automation sector between Assemblin AB and Fidelix Holding Oy in July 2021). The authority has publicly noted that finding buyers post-closing has turned out to be challenging in various previous cases and indicated that upfront buyer requirements could become standard practice, especially in concentrated markets. As such, parties should be prepared for upfront buyer conditions in remedy cases going forward, and should consider potential remedies and the viability of buyer candidates early on in the process, in order to ensure the effectiveness of their potential remedy proposals and therefore to avoid procedural delays.

The Altia/Arcus transaction, which was notified to competition authorities in Finland, Sweden and Norway, is also illustrative of continued close cooperation between the Nordic competition authorities in transactions affecting the Nordic region. The competition authorities of Denmark, Finland and Sweden cooperate through the European Competition Network (ECN); however, there is also a Nordic Agreement on Cooperation in Competition Cases between the authorities in Denmark, Finland, Iceland, Norway and Sweden that provides inter alia for more effective information sharing between the Nordic authorities in merger cases. In Altia/Arcus the authorities cooperated on the review rather openly, even referring to each other's reviews in their publications. However, close cooperation does not necessarily entail uniform results across the Nordic countries in a given case—in Altia/Arcus, for instance, an upfront buyer condition was imposed by the FCCA and the Norwegian Competition Authority, but the Swedish Competition Authority (which also cleared the transaction subject to commitments) did not require an upfront buyer.

Recent cases

In 2021, toward the end of Q3, the FCCA accepted 18 mergers unconditionally and three mergers conditionally (*Assemblin AB (Triton) / Fidelix Holding Oy, Valio Oy / Heinon Tukku Oy and Altia Oyj / Arcus ASA*). As discussed above, 2021 so far has seen the FCCA increase its focus on the effectiveness of remedies, in particular through the imposition of an upfront buyer condition in two out of the three conditional clearance decisions (the third one involved a behavioral commitment, so the upfront buyer issue was not relevant).

In 2020, the FCCA accepted 19 mergers unconditionally, two mergers conditionally (*Donges Teräs Oy / Ruukki Building Systems Oy and Automatia Pankkiautomaatit Oy / Loomis AB*) and proposed the prohibition of one transaction (*Mehiläinen Yhtiöt Oy / Pihlajalinna Oyj*). In addition, the Market Court prohibited one merger in accordance with the authority's proposal made in 2019 (*Kesko Oyj / Heinon Tukku Oy*). Year 2020 was historical in Finnish merger control, as the Market Court prohibited a merger for the first time when it ruled in February 2020—in line with the FCCA's proposal—that grocery wholesaler Kesko could

400

FCCA's prohoibition proposal in Mehilainen/ Pihlajalinna was over 400 pages long and accompanied by a 200-page annex on economic analysis

not acquire its rival, Heinon Tukku. The FCCA requested the Court to prohibit the acquisition, as it would have significantly impeded effective competition in the market for broadline distribution of groceries to Finnish food service customers, such as restaurants and hotels.

At the core of the dispute were the FCCA and the parties' different views on the definition of the relevant product market. According to the authority, broadline distributors, such as the parties, that offer a broad range of products to foodservice customers, do not compete in the same market as smaller specialist suppliers focusing on a limited number of product categories, or manufacturers of daily consumer goods supplying products directly to foodservice customers. The parties argued for a broader product market. The Court agreed with the authority's approach and found that the acquisition would have created a dominant position in the market for broadline wholesale distribution of groceries to foodservice customers. Heinon Tukku was later acquired by Valio, a manufacturer of dairy products. The FCCA approved the deal in July 2021, subject to conditions designed to ensure that Valio does not use sensitive competitor information gained in the wholesale business.

In September 2020, the FCCA issued a proposal to prohibit the merger between healthcare firms Mehiläinen and Pihlajalinna. After the oral hearing at the Market Court in November 2020, the parties' merger agreement lapsed and the acquirer's public purchase offer expired. Despite the objections of the merging parties, the Court refused to assess the substance of the 3-to-2 deal given that it was no longer going to take place.

The FCCA's prohibition proposal was preceded by a ten-month investigation, the largest in the authority's history. Consequently, the decision amounts to more than 400 pages and is accompanied by a 200-page annex on economic analysis. The broad overlapping portfolios of the parties and unique characteristics of national healthcare services triggered the need for an in-depth review of the deal. The FCCA's prohibition proposal was based e.g., on the following elements: (i) the Finnish healthcare market is dominated by three national players, the merging parties and Terveystalo; (ii) the market has concentrated rapidly and the top-three players have multiplied their combined market shares within a short period of time; (iii) the top-three players offer a similar range of services (occupational healthcare and medical and examination services in the private and the public sector); and (iv) the target (Pihlajalinna) has expanded its range of services in recent years, becoming a significant competitor for the two leading firms, Mehiläinen and Terveystalo.

The detailed investigation was based on extensive data available to and collected by the authority. During its review, the FCCA identified competition concerns in several healthcare segments, including inter alia private medical services in 16 local markets, occupational health services in 21 locations, private hospital services in four hospital districts, and services provided to insurance companies, as well as public sector outsourcing in various segments. The authority's conclusion of the merger's negative effects on competition were based on a wide range of empirical and qualitative assessments, including bidding analysis and various price analyses.

A pivotal question in the investigation was whether public and private healthcare services belong to the same relevant product market and to what extent the public sector should be taken into account in the assessment of competitive effects. The question was decisive, since the public healthcare sector in Finland is four times the size of the private sector. While the parties argued that all healthcare services are within the same market, customer surveys, other qualitative reviews and a critical loss analysis showed that private service providers form a distinct relevant market.

Given the authority's deepened understanding of the healthcare sector, a high level of scrutiny can be expected in future deals in the sector. The authority is also aiming to prevent further concentration of the healthcare sector occurring through deals that do not trigger the national thresholds, and to prevent such rapid concentration of other sectors, by advocating for updates to the national merger filing thresholds, as discussed below.

In 2020, the FCCA also conducted a rare in-depth review of a vertical merger. Vertical deals do not usually trigger the need for scrutiny by the authorities, but that was not the case in *Automatia/Loomis,* a deal between cash-handling company Loomis and bank machine operator Automatia, owned by three Nordic banks. Automatia operates automated teller machines and is responsible for supplying Finnish banks and ATMs with cash. The FCCA was concerned about the transaction's effects on the highly concentrated markets for cash in transit and cash-handling services, but ultimately cleared it in October 2020 subject to behavioral remedies. The merged entity agreed to grant rivals access to its cash points and other services for the period of five years and agreed to continue buying cash management and transportation services from Loomi's main competitor, Avarn. According to the FCCA, *Automatia/Loomis* was the most thorough investigation into a vertical deal and marked the first time it applied economic analysis to assess the exclusionary effects of a vertical acquisition.

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Parties should be prepared for upfront buyer conditions in remedy cases going forward, and should consider potential remedies and the viability of buyer candidates early on in the process

Recent changes in priorities

There have been no noticeable changes in merger enforcement priorities in the past year in Finland. The FCCA remains a robust enforcer toward any merger that could potentially lead to competition concerns either nationally or locally and across all industries, as evidenced by the variety of sectors subject to in-depth investigation in recent years.

Recent studies and guidelines

In June 2021, the FCCA proposed lowering the national filing thresholds and introducing the power to request notifications of potentially problematic transactions falling below the present filing thresholds. Under the current rules, an obligation to notify a merger to the Finnish authority is triggered when the combined global turnover of the parties exceeds €350 million, and the turnover of at least two of the parties resulting from Finland exceeds €20 million. The proposed new thresholds would lead to a mandatory filing when the parties' combined Finnish (not global) turnover exceeds €100 million. The individual turnover requirement would remain at €20 million. The proposed rules would align the Finnish framework with other Nordic merger control regimes.

The authority's initiative is supported by its study showing that certain mergers harmful to competition and even some Finnish industries may currently escape the authority's scrutiny. According to the FCCA, the proposed amendment would increase the number of mergers reviewed by the authority by approximately one-third.

The study was conducted at the request of the Ministry of Economic Affairs and Employment of Finland, which is responsible for the Finnish competition regulation. The Ministry is considering whether legislative actions are required based on the authority's findings.

1

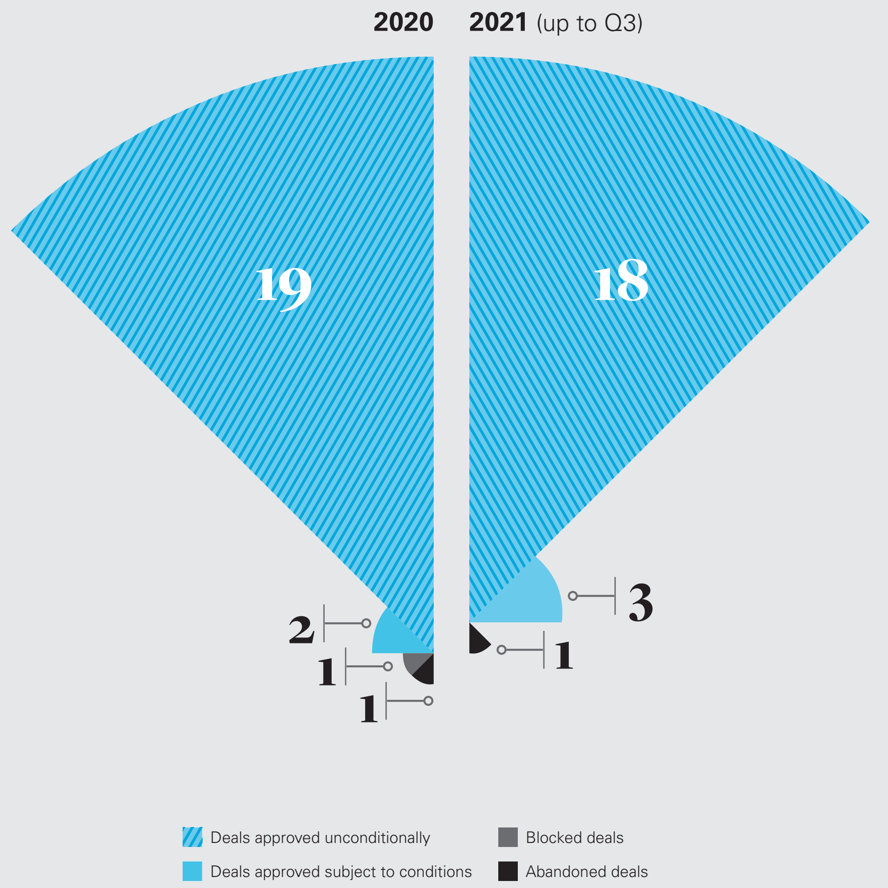
In 2020, the Market Court prohibited a merger for the first (and so far only) time

Looking ahead

Other than the possible developments described above, no significant changes to Finnish merger control rules are expected in the near future.

Number of cases reviewed by the FCCA

*Based on the date of the decision



> **The FCCA remains a robust enforcer toward any merger that could potentially lead to competition concerns either nationally or locally and across all industries**

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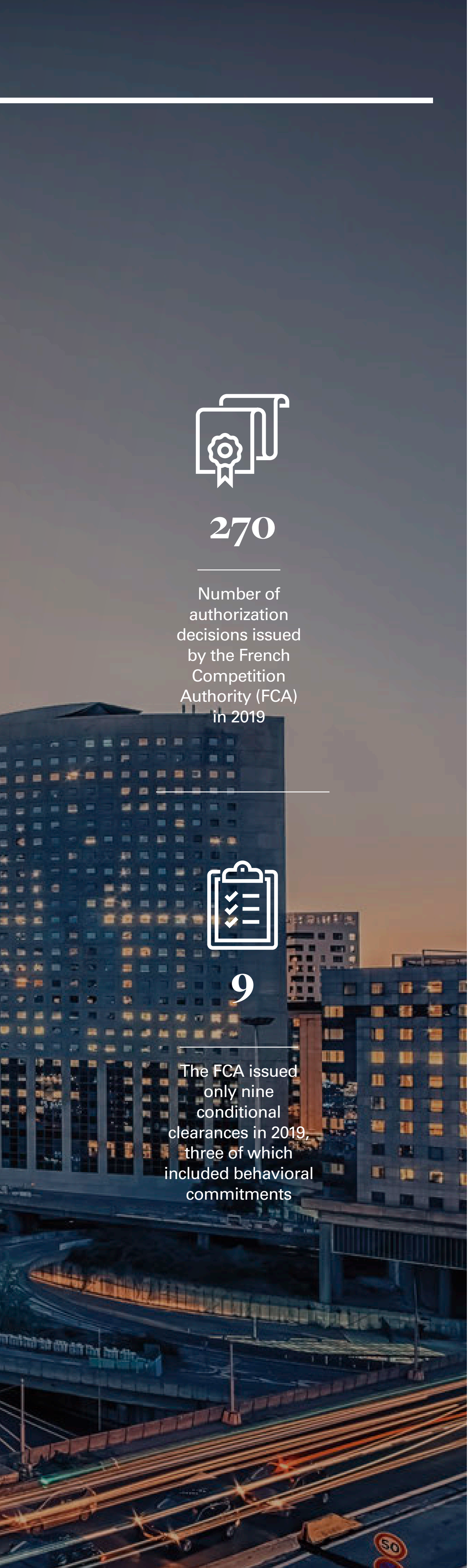
Global merger control: France

The most notable development for the French Competition Authority over the past 18 months has been its growing attention to the digitalization of merger control



France

By Yann Utzschneider, Jérémie Jourdan, Jean-Julien Lemonnier, Mickael Rivollier

Key developments

A quick look at the year 2019 shows that the French Competition Authority (FCA) was very active, with 285 authorization decisions, of which eleven were cleared with conditions. However, these activity levels reduced in 2020, probably due to the COVID-19 pandemic: the FCA only rendered 210 merger decisions based on publicly available information as of 1st February 2021.

The main developments in the past year include a focus on digital issues, particularly large digital platforms; an emphasis on behavioral commitments and their monitoring; and the modernization of the notification procedure.

From a substantive perspective, the most notable development has been the growing attention given by the FCA to digital issues relating to merger control.

First, the FCA updated its market definitions to take into account the growth of online sales in the retail sector. For instance, in its 2019 decision on Luderix's acquisition of Jellej Jouets, the FCA considered that the retail toy market included both in-store and online sales.

In a study on competition and e-commerce released in June 2020, the FCA said the rapid growth of e-commerce—accentuated by the COVID-19 pandemic—had led it to adapt its analytical framework by more frequently identifying relevant markets that cover both online and offline sales.

This trend follows the landmark 2016 Fnac/Darty decision, in which the FCA updated its product market definition on the retail market for electronic products by considering that in-store sales and online sales were part of the same market, and that online sales exerted significant competitive pressure at the retail level.

The merger guidelines introduced in July 2020 now contain a section dedicated to online sales, in which the FCA specified the elements that should be taken into consideration when assessing the substitutability of in-store and online sales.

The FCA made digital issues in competition law one of its main priorities in 2020, as illustrated by the creation of a specific service for the digital economy within the FCA organization. It has also voiced the need to adapt the legal framework in order to deal with competitive issues relating to large digital platforms. At the end of 2020, the FCA announced that digital issues would remain a top priority in 2021 and that its specific service for the digital economy would strengthen its expertise on platforms, algorithms and data sciences.

The FCA has been making consistent use of behavioral commitments and, in line with its practice in past years, has been closely monitoring compliance with the remedies made binding by its merger control decisions. Among the nine FCA-conditional clearances in 2019, three included behavioral commitments while in 2020, four out of ten conditional decisions contained behavioral remedies.

For instance, in August 2019, the FCA approved, subject to behavioral remedies only, the creation of TV platform Salto by TF1, France Télévisions and Métropole Télévision. Salto offers television services, including free-to-air television channels and related services, directly over the internet.

The FCA identified several competition concerns. The FCA considered that the parent companies were likely to use their strong market position for the acquisition of linear broadcasting rights in order to favor Salto's access to non-linear broadcasting content.

The authority also found that the parties would have the ability and incentive to eliminate competitors' access to their channels and related services. Finally, the FCA was concerned that the common platform would increase market transparency and facilitate coordination between the parent companies.

Despite these strong competition concerns, the FCA cleared the transaction subject to several behavioral commitments, including: limiting the amount of video-on-demand content that Salto can purchase from the parties, excluding any exclusive distribution agreements by Salto; offering on objective and non-discriminatory terms the distribution of the parties' free-to-air channels along with their associated services to any interested third-party distributor; and, lastly, establishing a set of guarantees to limit the exchange of information.

Similarly, in its RATP Développement/Keolis/CDG Express decision of April 2019, the FCA conditionally authorized the creation of a joint venture for the operation of the CDG Express transport between the center of Paris and Paris-Charles de Gaulle airport.

The FCA had identified the risk that the new entity could rely on its market position for the provision of public transport between Paris and Paris-Charles de Gaulle to sell, together with a ticket for CDG Express and on preferential terms, a check-in and baggage transport service. In order to maintain effective competition, the companies committed to entrusting the baggage service to an independent partner with autonomy in determining its commercial policy.

In September 2020, the FCA conditionally cleared the acquisition of the local finance company (SFIL) by the French deposit and consignment office, la Caisse des Dépôts et Consignations (CDC).

The FCA identified risks of harm to competition in the export credit sector concerning refinancing offers and confidentiality. The CDC committed not to favor its subsidiary, La Banque Postale, in the refinancing process and to maintain confidentiality provisions in the agreements entered into with commercial banks. For the application of the first commitment, ex-ante control by a representative is provided in situations of risk of foreclosure of LBP's competitors.

In December 2020, the FCA also authorized the Bouygues Telecom group to take exclusive control of Euro Information Telecom (EIT), subject to conditions. To address the risk of foreclosure on the wholesale supply market for virtual operators marketing their offers to businesses, Bouygues Telecom committed to maintain a wholesale offer equivalent to EIT's current offer at the end of the transaction.

> **“The merger control procedure before the FCA has been increasingly characterized by a search for greater precision in its analyses, with tailor-made solutions, including use of behavioral commitments**

Despite not imposing any sanctions for failure to comply with commitments in 2019, the FCA has continued to closely monitor compliance with remedies as well as their continued adequacy in light of changes in market conditions.

For example, in September 2019 or 2020, the FCA closed its ex officio proceedings reviewing Altice's compliance with its commitment to sell Completel's DSL network, obtained in 2014 when the authority cleared Altice's acquisition of SFR.

The FCA concluded that the delay in the delivery of the components of Completel's DSL network was due to the diligence of third-party operators and the performance of services over which Altice France had no control, and therefore did not constitute a breach of its commitments.

In October 2019, the FCA also decided not to renew the behavioral commitments made by Altice upon acquiring SFR in 2014—notably giving all telecom operators access to its cable network—in light of changes to market conditions.

As the five-year behavioral commitments were about to expire, the FCA considered that it was not necessary to extend the cable access commitment because other telecom operators, especially Orange, had significantly deployed their own fiber-optic networks since the merger. This non-renewal of Altice's commitments illustrates the careful monitoring by the FCA of the adequacy of behavioral commitments considering changes in market conditions.

Since 2017, the FCA has also committed to modernizing and simplifying its merger control procedures.

In line with this approach, a decree issued in April 2019 introduced several practical measures to reduce burdens on notifying parties. The decree removed the obligation to submit four hard copies of the notification files; one copy is now sufficient. The decree also reduced the amount of financial data required for the companies concerned from 93 statistical items previously down to just 12.

In addition, in October 2019, the FCA launched an online electronic notification system for certain mergers that fall under the simplified procedure. These include transactions in which the acquirer is not present in the same markets as those in which the target operates or in upstream, downstream or related markets; transactions relating to food distribution that do not lead to a change in the name of the retail stores concerned; and transactions relating to motor vehicle distribution. The FCA anticipates that approximately half of the notifications filed will be eligible for this online notification procedure.

New merger control guidelines, published by the FCA on 23 July 2020, constitute an additional step in the modernisation of merger control procedures. In the guidelines the FCA provided several indicative time frames to give greater visibility to notifying parties. It will now indicate within 10 working days of the notification whether or not the file is complete, and will also confirm within 10 working days if a transaction is eligible for the simplified procedure.

Impact on merging parties

The merger control procedure before the FCA has been increasingly characterized by a search for greater precision in its analyses, with tailor-made solutions. The greater use of behavioral commitments and the close monitoring of their adequacy in changing market conditions are clear examples of this.

Another illustration of this quest for tailor-made solutions is the extension of the pre-notification period in recent years, with numerous exchanges with the rapporteur, substantial requests for information and the increasing use of market tests. In fact, to keep to the notification period timeline, most of the investigation is now carried out during the pre-notification phase. In this regard, the FCA has aligned to a greater extent with the practice of the European Commission.

More generally, the FCA has no hesitation in launching particularly extensive consultations with important market participants during pre-notification and investigation procedures.

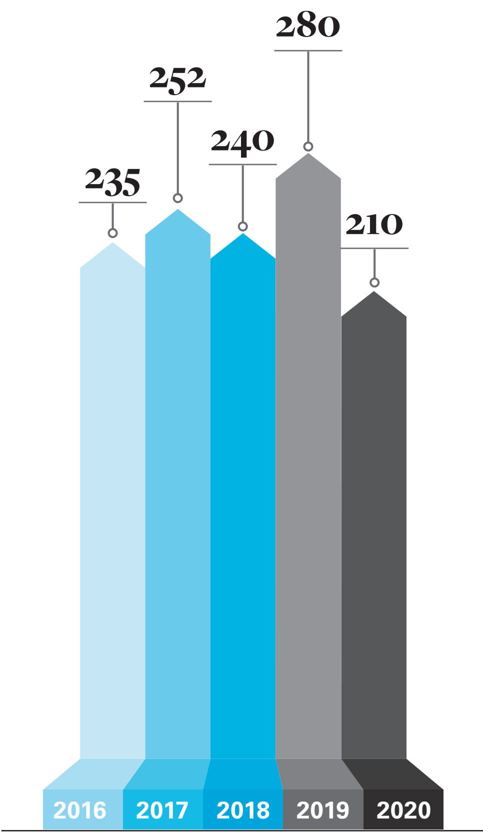
For instance, in the 2018 Concept Multimédia/Axel Springer deal, which consisted of the merger of the two main online property advertising platforms (Logic-Immo.com and SeLoger.com), the FCA conducted a broad consultation with all real estate professionals as well as an online questionnaire sent to more than 30,000 estate agencies to assess the capacity of current or potential competitors to stimulate competition.

Similarly, in the February 2020 clearance of Elsan's acquisition of Hexagone Santé Méditerranée, which concerned the acquisition of healthcare facilities, the FCA conducted a large consultation with market players and local private doctors through market tests, polls and interviews before conditionally clearing the transaction. It appears that the FCA is aiming for a higher level of granularity and depth in its data collection on relevant markets.

In 2019, the FCA also granted several derogations from the classical standstill obligation in light of exceptional circumstances, illustrating again its flexible approach. The FCA granted four derogations in mergers involving distressed targets: one in British Steel's acquisition of Ascoval in May 2019 where Ascoval was facing severe financial difficulties, and three derogations for the acquisition of AltéAd in December 2019 as part of an insolvency procedure.

More uniquely, the FCA also granted a derogation from the standstill obligation in the Ineos takeover of football club OGC Nice's decision in August 2019, its first sports-related merger control case. It was the first time the FCA has granted such a derogation on grounds not relating to the financial hardship of the target. Instead, the FCA considered that the derogation was necessary so as not to unduly limit the club's ability to recruit players and allow it to sufficiently prepare for the upcoming season.

This trend continued in 2020 where the FCA granted two derogations from standstill obligations for operations involving distressed targets, namely Buffalo Grill's acquisition of Courtepaille and in Financière Immobilière Bordelaise's acquisition of Camaïeu.



Number of filings submitted to the French Competition Authority

*based on available public information as of 1 February 2021.

Also, in the past year, the FCA has been increasingly using upfront buyer and fix-it-first purchaser clauses when structural remedies are entered into.

In September 2019, the authority agreed on its first-ever upfront buyer when it approved the sale of French Guianese supermarket company NDIS to SAFO, which was already operating a Carrefour supermarket in the country.

SAFO committed not to run the hypermarket acquired in the deal under a Carrefour brand and not to implement the transaction until prior approval by the FCA of the purchaser of its subsidiary, NG Kon Tia. While the European Commission routinely imposes upfront buyer clauses, it was the first time the FCA had accepted such a commitment.

In the sale of baking brand Alsa France to Dr. Oetker, the FCA cleared the acquisition subject to a fix-it commitment. Dr. Oetker committed to entering into a trademark licensing agreement for five years for the Ancel brand with the company Sainte Lucie, which the FCA approved before clearing the deal.

This trend is set to continue in 2020. The FCA has already made use of a fix-it-first commitment in the Vindemia/GBH decision of May 2020, where GBH committed to divesting seven stores to two purchasers, Make Distribution and the Tak group, which received prior approval from the FCA.

These specific types of commitments limit the risk that the parties will encounter particular difficulties—unknown to the FCA—in finding a suitable purchaser, which would make it difficult to execute the divestiture.

While this gives more certainty in the execution of the remedies, there are still potential drawbacks for parties, especially as an upfront buyer process inevitably delays the closing of the transaction. This also means that in complex transactions, parties need to carefully consider at an earlier stage the assets to be divested, and potential buyers.

During the COVID-19 pandemic, the FCA adapted its merger control procedures by inviting companies to postpone their planned mergers as well as suspending the applicable time limits in which the FCA has to render its decisions. However, this exceptional framework ended on June 24, 2020 and, since then, the FCA has returned to business as usual.

In the context of the economic crisis, the FCA also announced that it would carefully assess the transactions in 2021 to ensure that those transactions do not artificially escape control because of a low turnover achieved in 2020. In this regard, Isabelle de Silva, the head of the FCA, declared at a conference held in December 2020 that the FCA will consider whether revenues recorded by coronavirus-struck businesses in 2020 can be used for merger control thresholds or whether they do not reflect the target's true value.

In our view, this statement will need to be clarified in the light of the FCA's newly published merger guidelines. Indeed, the guidelines (§128) provide that the turnover figures must be valued at the date of the last closed financial year on the basis of the audited accounts and can only be corrected, if necessary, to take into account permanent changes in the economic reality of the company.

Nevertheless, there will remain the possibility for those transactions to be assessed under Article 22 of the EU merger regulation which—since the European Commission's recent change of approach—will allow national competition authorities to request that the European Commission examine merger transactions that do not have an EU dimension even when these mergers do not exceed the national notification thresholds.

Recent changes in priorities

Consistent with its practice in 2018, the FCA has been focusing heavily on online platforms, both in terms of anti-competitive practices and merger control. The assessment of digital tools and platforms in competition policy is one of the FCA's top priorities in 2020.

In the past year, the FCA has set out several proposals to adapt merger control to the new challenges posed by digital platforms. In particular, in its February 2020 contribution to the debate on competition policy and the challenges posed by the digital economy, the FCA observed that a number of transactions carried out by digital giants were not monitored by competition authorities because they concerned a developing innovative player, and notification thresholds were not crossed.

To address these challenges, the FCA has been advocating for a new tool that would enable the FCA to instruct companies to notify a transaction in cases where all the undertakings have a combined aggregate worldwide turnover above €150 million and the operation raises "substantial competition concerns" in the territory concerned. The FCA suggested that this intervention should only be open for a period of 12 months after the deal completes.

In addition, there is an ongoing debate before the French parliament on the creation of a list of systemic companies that would be obliged to inform the FCA of any planned mergers that are likely to affect the French market one month before these are carried out, even if the notification thresholds are not reached However, Cedric O, the French minister for the digital transition, declared that this new mechanism will not be introduced at the French level, but at the European Union level with the adoption of the Digital Market Act, which provides for such list of systemic companies.

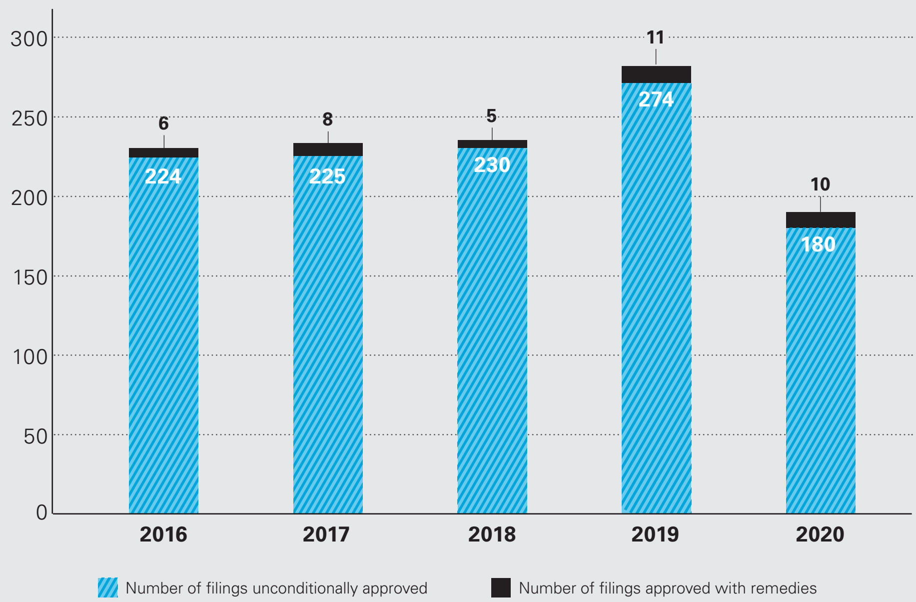
Key enforcement trends

On August 28, 2020, the FCA blocked a transaction for the first time. The FCA vetoed Leclerc's bid to buy a hypermarket operated by Géant Casino outside the French town of Troyes after the parties failed to submit sufficient remedies to counter the creation of a duopoly in the area with Carrefour.

Until this decision, there had been no prohibition by the FCA, although there had been several cases where parties withdrew their notification during a Phase II in-depth examination. An example would be the withdrawal of the acquisition of Trapil by Pisto in July 2020, where the FCA had identified a serious risk to competition

Number of filings approved by the French Competition Authority

*based on publicly available information as of 1 February 2021.



in the refined product pipeline transport and storage markets, and opened a Phase II procedure.

More generally, in 2019, a high number of transactions were abandoned by the parties before the FCA's final decision. Indeed, 31 planned transactions were withdrawn in 2019, whereas in 2018 only 13 transactions were withdrawn after their notification to the FCA. Based on the available information for 2020 on the FCA's website, four notifications were withdrawn in 2020.

In June 2020, the FCA conditionally cleared the Coopérative Dauphinoise/ Terre d'Alliances deal with an unprecedented behavioral commitment. In this deal, the two agricultural cooperatives notified the FCA of their planned merger, but the FCA was concerned that the tie-up would harm competition in the market for the sale of gardening products in the local areas where the companies' activities overlapped.

As a result, the companies committed to submit for the FCA's prior approval any strategic decision, such as a change of brand name for a store located in the catchment areas where their businesses overlap, since such a decision could influence the local competitive structure.

Such a commitment—which is unheard of in the FCA's decision-making—enables the authority to monitor any future strategic decisions that might affect the competitive structure in the catchment area of the store concerned.

Recent studies and guidelines

The FCA has made several key advances in merger control in the past year. It revamped its merger control guidelines in July 2020, completely reshaping the previous version issued in 2013 in order to incorporate recent FCA decision-making, simplify merger control procedures and make the guidelines more practical.

Among the significant changes, the guidelines added a new, optional stage prior to the pre-notification phase. In this stage, companies can request the appointment of a "rapporteur" in order to anticipate and speed up the information flow and notification process—similar to case allocation requests to the European Commission.

The FCA also said it would provide a response within ten working days on the completeness of the notification file and on whether the transaction is eligible for the simplified procedure. It seems that these indicative time frames depend on a very complete and detailed pre-notification phase during which the FCA obtains all the information requested.

The new guidelines include several appendices comprising templates regarding online notification, requests for information and structural commitments.

Meanwhile, eligibility criteria for the simplified procedure have been revised, increasing the number of transactions that may fall within its scope. For instance, all operations where the combined market share of the companies involved is under 25 per- cent in markets consistently defined by decision-making practice are now eligible for the simplified procedure.

In May 2020, the FCA published a study on competition and e-commerce that highlighted the impact of e-commerce on distribution models with the emergence of new types of players and new consumer behaviors toward digital tools for purchases, as well as the FCA's decision-making practice in the field of e-commerce.

The study said the growth of e-commerce had led the FCA to adapt its analytical framework to assess the various competitive constraints, in particular by identifying more and more frequently relevant markets that cover both online and offline sales.

Lastly, to promote the use of behavioral remedies in practice, the FCA released a lengthy study on behavioural commitments in January 2020. The study provides an analysis of its decision-making practice in regard to behavioral commitments, some discussion on its significant use of this tool compared to other competition authorities, and a comparison with structural remedies in terms of implementation and monitoring.

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> **The FCA has clearly expressed its wish to adapt merger control rules to the challenges of the digital economy and has been pushing for new tools in order to tackle more effectively the transactions entered into by digital platforms and tech giants**

Looking ahead

The FCA has clearly expressed its wish to adapt merger control rules to the challenges of the digital economy and has been pushing for new tools in order to tackle more effectively the transactions entered into by digital platforms and tech giants. It will be interesting to see if any changes to the merger control framework will be adopted in the next few years.

The importance of the pre-notification phase will continue to increase in the future, bringing French processes closer to the typical procedure before the European Commission. Indeed, the importance of the formal phase from notification to the FCA decision is diminishing in comparison to the pre-notification phase, and the FCA seems inclined to conduct an in-depth analysis from the start of the whole process.

Companies and advisers should therefore approach the informal phase more strategically by being more meticulous and transparent in their analysis of the proposed transaction.

Another current trend is the increased judicial review of merger control decisions, measured by the increasing number of challenges against FCA decisions before the French Supreme Court, the Conseil d'Etat.

Indeed, three FCA authorization decisions rendered in 2019 were subject to a challenge. Since the beginning of 2020, three additional FCA authorization decisions have already been challenged before the Conseil d'Etat, including one emergency procedure aimed at suspending the completion of a merger after FCA approval, which was rejected.

While it is not impossible to call into question the FCA's approval of the merger before the Conseil d'Etat, a third party should first attempt to influence the review process by proactively intervening during the FCA's examination of the potential deal.

THE INSIDE TRACK

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

Any client confronted with a complex multi-jurisdictional transaction should, firstly, not underestimate how strenuous the process will be for its organisation. The process is long, often frustrating and unpredictable, and always intense, especially in the phase where multiple authorities send rapid-fire requests for information with tied deadlines.

Merger control aspects, including potential remedies, must be prepared well in advance to be able to change course quickly if need be. A legal partner with a global reach, able to deal with the trans-national aspects of the transaction efficiently, is a must.

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

Obtaining clearance quickly requires anticipation. This means gathering relevant information such as economic data well ahead of signing if possible.

Data gathering and shaping often consumes a lot of time and has to be started as early as possible, otherwise it risks delaying pre-notification discussions. Remedies anticipation is also key: if the deal is likely to require remedies, they should be framed very early on, well ahead of the first contact with the authorities.

Finally, in a complex deal requiring many filings, the sequencing of such filings is key and should be planned early on.

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

The most surprising trend is the high number of transactions that have been abandoned. This is mainly due to the fact that parties now notify the planned deal earlier than in the past, before having carefully analysed all the competition issues, and that the pre-notification stage enables the parties to identify insurmountable competitive concerns before any formal decision is reached.

The past year was also marked by the increasing number of challenges against FCA decisions by interested parties, including through emergency suspensive procedures. Clients and their advisors thus need to prepare for another obstacle to the closing of the transaction, even after the FCA has given clearance.

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Global merger control: Germany

The COVID-19 pandemic has not had a significant impact on the work of the Federal Cartel Office (FCO). For 2021 and going forward, the 10th amendment of the ARC that just came into force will bring the most substantial overhaul of competition law in a long time.

Germany

By Dr. Justus Herrlinger, Dr. Tilman Kuhn, Cristina Caroppo

Key developments

The Federal Cartel Office (FCO) reviewed approximately 1,200 transactions in 2020 – slightly less than in 2019 (approximately 1,400 transactions) – and entered into in-depth or Phase II investigations in only 8 cases (14 in 2019).

The year saw less interventions than the previous year. In 2020, the FCO did not block any transaction. In two cases, the parties withdrew their filing in Phase II based on the FCO's objections and abandoned the transaction; four cases were cleared without remedies after a Phase II review.

In 2019, there were six withdrawals, and four transactions were blocked.

Prohibitions/Withdrawals

In 2019/2020, the FCO reviewed a number of "three-to-two" mergers, one of which was withdrawn in early 2020, and another prohibited in late 2019. In February 2020, the FCO raised objections to a deal based on a noteworthy distinction between branded and private label personal care goods. Edgewell Personal Care Company's planned acquisition of Harry's Inc. was abandoned after the FCO expressed concerns that the merger would impede competition on the national market for private-label wet-shaving razors.

The US Federal Trade Commission had also raised concerns about the merger of the two US-based companies. Edgewell sells its shaving products under the Wilkinson Sword brand and as private-label products to retailers, which resell them under their own brands. Harry's traditionally manufactured and sold wet-shaving private-label products, but recently established and expanded the sale of branded products.

While from a customer perspective, private-label and branded goods may well be interchangeable, the FCO's preliminary view was that there is a separate market for private-label products due to significant differences in the market characteristics, including distribution channels, availability, procurement factors and prices. The FCO found that the parties' combined market share for private-label wet-shaving products would have significantly exceeded 40 percent, exceeding the statutory dominance presumption threshold.

With only one other major competitor left, the FCO was concerned that this merger would have likely created both unilateral and coordinated effects. It also said that the statutory presumption for collective dominance was met, since the merging parties were close competitors, and the number of significant competitors left was limited.

In December 2019, the FCO reviewed—and ultimately prohibited—another three-to-two merger. The deal concerned the provision of cash for business and banks. Sweden's Loomis, a company providing cash-handling services in northern and western Germany, planned to acquire Ziemann Sicherheit Holding, the second-largest cash-handling services provider in Germany.

According to the FCO, Loomis's acquisition would have been part of a continuous consolidation process in the market. The FCO found that Prosegur was the only other relevant competitor active in many highly concentrated regional markets that the merger would have affected, and the merged company and Prosegur would have had a combined market share of between 60 percent and more than 85 percent in these regions.

The FCO was concerned that the transaction would have likely created unilateral effects. It said the company would have had strong incentives post-merger to increase prices or otherwise adversely change business terms, especially because there were considerable price increases even before the transaction.

In July 2019, the FCO blocked the proposed acquisition by Remondis, Germany's largest waste disposal company, of Duales System Holding (DSD), active in the collection and recycling of packing waste. According to the FCO, the vertical integration of the companies would have impeded DSD's competitors both downstream and upstream.

The merger would also have paved the way for competitor foreclosure

20%

The FCA aims to reduce the number of filings significantly through the increase in domestic turnover thresholds from €25 million to €50 million and €5 million to €17.5 million with the recently introduced 10th amendment of the ARC.

approx. 1,400/1,200

The Federal Cartel Office (FCO) reviewed approximately 1,400 transactions in 2019 and approximately 1,200 in 2020

€2 million+

Under the so-called "Remondis" clause, the FCO now has the right to oblige certain companies to notify upcoming mergers, if, *inter alia*, the target's turnover is above €2 million.

505

Notifications were filed with the FCO in H1 2020, a decline of more than 20% on the same period in 2019 towards competing waste disposal companies, resulting in additional price increases for DSD's competitors. The Düsseldorf Court of Appeal (DCA) rejected Remondis's appeal against the prohibition decision in April 2020.

In March 2019, the FCO continued a series of decisions concerning the petrol station segment. The FCO's objections induced Total Deutschland to abandon its proposed acquisition of 11 petrol stations in the Trier area. The FCO found that the deal would increase the likelihood of coordinated effects, since the joint dominant position of the leading petrol providers in the region would have been further strengthened.

The FCO works under the presumption that the "big five" mineral oil companies—BP, Jet, ExxonMobil, Total and Shell—form an oligopoly without active competition. Remarkably, according to its case summary, the FCO still considers Esso to be part of the oligopoly, despite the fact that Exxon sold the operation of its Esso gas stations in 2018.

For the affected Trier area, the three largest petrol station operators—BP, Shell and Total—would have jointly had a market share of more than 80 percent post-transaction. Additionally, the FCO also found that the petrol station operators set prices very uniformly, and gas prices in Trier were already way above average.

In 2020 and 2019, the FCO also reviewed an unusually large number of hospital mergers. Two notifications were withdrawn (Cellitinnen Nord/ Cellitinnen Süd and Ameos/Sana Kliniken) after the FCO voiced concerns in Phase II proceedings.

Ameos and Sana Kliniken's largest competitor, Schön Klinik, are portfolio companies of investment funds operated and controlled by The Carlyle Group. If the Ameos/Sana Kliniken merger had been implemented, the latter's controlling shareholder would have at least co-controlled all somatic hospitals in the Ostholstein region.

In both cases, the FCO found that the acquisitions would have created or strengthened a dominant position in very narrow regional markets.

In contrast, in August 2020 the FCO cleared the merger of two hospital operators in north Germany, Diakonissenanstalt and Malteser Norddeutschland. The two hospitals operated by the merging parties in Flensburg were to be replaced by a new building and the FCO found that the remaining hospitals in the region had sufficient capacity to maintain competition.

Between March and June 2020, the FCO also cleared the acquisition of the Malteser Hospital in Bonn by Helios Kliniken, the purchase of Rhön Klinikum by Asklepios Kliniken, and SRH Kliniken's purchase of Klinikum Burgenlandkreis. Another hospital merger in the Allgäu region was cleared in 2019.

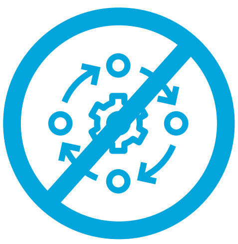
In early 2019, another peculiarity of the German merger control regime came into play again after the FCO had blocked a joint venture between Miba and Zollern in the sphere of engine and industrial bearings: the ministerial authorization.

Since the market was already highly concentrated, and the merging parties were the two major suppliers and very close competitors, the FCO found the deal would further reduce competition. However, the German Federal Minister of Economic Affairs overruled the FCO's prohibition by way of a ministerial authorization, despite the fact that the Monopolies Commission (an advisory body to the Federal Government) had issued a recommendation to reject the request.

The Minister found that public interests, such as safeguarding know-how and innovation, outweighed competitive concerns. The decision was unusual as ministerial authorizations typically focus more on public interests other than know-how or innovation, such as preserving jobs.

Surprisingly, Miba and Zollern still applied for an annulment of the FCO's prohibition decision before the DCA, despite their joint venture already having been implemented after the ministerial authorization. The companies claimed that a commitment to invest €50 million into research and development over the next eight years was an undue burden, especially during the pandemic, so they were looking for an unconditional clearance.

The move to challenge the FCO decision despite a ministerial authorization is uncommon, and the DCA dismissed the application in late August 2020. The DCA found that the appeal was inadmissible since the FCO's prohibition decision became groundless after the ministerial authorization, and so there was no "commendable interest" in reviewing it.



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The FCO blocked four transactions in 2019 ; no transaction blocked in 2020

Clearances

The FCO has also issued a number of noteworthy conditional clearance decisions. In late 2019, joint venture partners Telekom Deutschland and EWE committed to extensive remedies that could be perceived as market development or even market opening measures.

The two companies are major suppliers of gigabit-ready broadband access in north-west Germany, and the FCO expressed doubts about whether they were willing to make the necessary significant investments in building fiber-optic networks. The two companies committed to building at least 300,000 gigabit-ready broadband connections, which exceeds the number they originally planned to build and that would have been expected had they carried out the development independently.

In addition, Telekom and EWE will have to concentrate on rural areas to build new connections, and to refrain from strategic defense measures towards competitors in order to uphold competition for gigabit technology. The commitments were made not to address an SIEC, but to resolve concerns under Section 1 of the German Act Against Restraints of Competition (ARC), which the FCO carried out in parallel to the merger review.

Such a large package of commitments was crucial for the FCO, although the joint venture covers less than 10 percent of all

German households and businesses. The FCO said the clearance could be a potential model for network expansion in other parts of Germany.

Another conditional clearance decision related to the cinema sector. In March 2020, the FCO cleared the merger of two major cinema operators in Germany. The acquirer, Vue Nederland, operates cinemas under the CinemaxX brand, while the target companies operate cinemas under the Cinestar brand.

The FCO found that the merger would create a leading cinema operator in Germany in terms of turnover and number of cinemas. Similar to cases in the food retail sector, the FCO assessed narrow regional markets based on the cinemas' actual catchment areas and, in order to clear the merger, the parties committed to divest one cinema in each of the six regions that would otherwise be adversely affected.

Although the merger created a significant position in other regions as well, the FCO found that competition was still guaranteed through large rival cinema operators in those areas. The case is also remarkable due to its extensive review process, which lasted about one year, an extraordinarily long time period for the FCO.

The FCO has also made a number of unconditional clearances, for example in the online dating platform market. While the FCO has suggested that digital and platform cases will have a review and enforcement focus, and they certainly do in behavioral cases, the FCO's merger control enforcement in this area has been limited.

The ProSiebenSat.1 group with platforms Parship and ElitePartner took over control of the Meet Group, which operates several online dating platforms, and is active in the German market with its Lovoo app. Despite the platforms' relatively high market shares, the FCO did not expect any competitive harm, since users still have sufficient alternative dating platforms to choose from, are often using several different platforms at once, and there are only low barriers for market entries.

The FCO also cleared the merger between Papyrus Deutschland and Papier Union despite the high combined market shares in the market for printing paper (40 to 45 percent), which exceeded the statutory threshold for a rebuttable

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The review of a competitor cooperation can raise questions under the cartel prohibition clauses of the ARC: They cannot be reviewed as part of merger control proceedings, so it is common practice to review such questions in parallel but separate proceedings

single-dominance presumption. This was because their main competitor, Igepa Group, had an even higher market share.

Additionally, multi-sourcing practices, customers' ease of switching suppliers, and spare capacity among competitors led the FCO to find that the single dominance presumption was rebutted. According to the FCO, it could not be assumed with certainty that any unilateral and coordinated effects resulting from the merger would reach the threshold for a prohibition, in particular due to the market structure and the competitive landscape—including new competitive pressure arising from new distribution channels.

After having cleared mergers in the food wholesale sector, the FCO continued rigorous reviews in the food retail sector. In December 2020, the FCO conditionally cleared Kaufland's acquisition of up to 92 Real stores from SCP Retail, a Russian investment company, which had acquired all of the approximately 270 Real stores from Metro. Kaufland had originally notified the acquisition of up to 101 Real stores. At the same time, Globus can acquire up to 24 Real stores from SCP.

The European Commission had referred the case to the FCO. Kaufland is part of the Schwarz Group, which is the largest food retailer in Europe. In food retailer concentrations, the FCO traditionally focuses on buyer power. In particular, the FCO found that the transaction would have expanded the Schwarz Group's distribution network significantly and increased Kaufland's sales and procurement volume within

8

In 2020, the Federal Cartel Office (FCO) entered into in-depth or Phase II investigations in only 8 cases

a very short time, while the RTG procurement cooperation, of which Real was a significant member at the time, would have lost a large part of its procurement volume. RTG is a significant alternative for manufacturers on the procurement side: Thus SCP committed to sell Real stores with a purchase volume of € 200 million to medium-sized food retailers (including Globus). In the same vein, in March 2021, the FCO only partly cleared the acquisition of Real stores by Edeka. Edeka planned to acquire up to 72 real stores from SCP, but the FCO only cleared the acquisition of 45 stores; Edeka committed not to acquire 21 stores and for six other stores committed to carve out retail space to competitors or to close stores.

Similarly, the FCO conditionally cleared the acquisition of 50 percent of the shares and joint control of Roller and other companies of the Tessner Group by XXXLutz KG in November 2020. The clearance decision was subject to the commitment to sell 23 locations to third parties. Notably, due to the Parties revenues, the transaction was notifiable to the European Commission, but the Parties requested a referral to the FCO. However, as the procurement markets were likely wider than national, the European Commission's referral to the FCO was limited to the furniture retail markets. In late November 2020, the European Commission (unconditionally) cleared the transaction regarding the procurement side. For the retail side, the FCO assessed the transaction with regard to the overall market for the retail of basic furniture products and various sub-segments, such as stationary discount retailing and furniture stores. For the geographic market definition, the FCO relied on its standard practice of identifying "catchment areas" on the basis of post codes (i.e., post codes that relate to customers accounting for c. 90% of the sales) and areas within a radius of 30km around a store.

In December 2020, the FCO cleared Carglass GmbH's acquisition of A.T.U Auto-Teile Unger GmbH's glass business in Phase II. The transaction included a purchase agreement regarding ATU's "controlled business" (i.e, commercial customers with framework agreements and insurance holders with fixed workshop clauses) and a long-term cooperation agreement regarding the "uncontrolled business" (e.g., drive-in customers). Therefore, the FCO assessed the case under merger control law regarding the controlled business and under antitrust law regarding the uncontrolled business. For the controlled business, the parties' combined shares were below the statutory threshold for a rebuttable single-dominance presumption. Also, during the course of the proceeding and upon discussion with the FCO, the parties limited the scope of the cooperation agreement both in terms of content and duration.

In April 2020, the FCO cleared the purchase of Vossloh Locomotives GmbH ("Vossloh") by Chinese state-owned company CRRC Zhuzhou Locomotives Co., Ltd. ("CRRC"). After the German Ministry for Economic Affairs had already granted a certificate of non-objection under the German foreign direct investment rules, the FCO had to deal with two particularities: (i) the foreseeable change of the parties' market shares during the forecast period (which was extended to five to ten years rather than the traditional three to five years), and (ii) particularities associated with the acquisition by a Chinese state-owned company. The FCO found that the historical market share data could not provide a robust picture of the parties' actual market positions in the future. The FCO found, based on the development of Vossloh's market position in recent years that Vossloh's market position was expected to decrease, while CRRC was expected to increase its share. Further, the FCO faced the challenge to assess an acquisition by a Chinese state-owned company, which according to the FCO, is a subject of public debate. In particular, with a view to its pricing strategy, the FCO assessed CRRC's access to financial resources, such as subsidies, which according to the FCO can considerably distort competition. Ultimately, the Bundeskartellamt was not able to issue a robust forecast whether the merger will result in a dominant market position and cleared the deal, since it expected competitors to gain stronger positions despite the risk that CRRC will implement a low-price strategy. Notably, even though the European Commission's prohibition decision in the Siemens/Alstom case lead to strong voices claiming that Chinese state-owned enterprises should be treated as strongest future competitors due to their access to state funding and subsidies, such concerns were not strong enough for the FCO to block the deal.

> **The COVID-19 pandemic has not had a significant impact on the FCO's work: it kept on with business as usual, adopting a professional and accessible "no-frills" approach towards ongoing and new cases**

Also, in February 2021, the FCO cleared Taiwanese company GlobalWafers's acquisition of German competitor Siltronic unconditionally in Phase I. The Parties are active in the manufacture and supply of silicon wafers, which are an essential input product for the semiconductor industry. They mainly compete against large Japanese competitors ShinEtsu and SUMCO and Korean manufacturer SK Siltron. The FCO found that the parties' combined shares were below the thresholds for the presumption of single dominance (Section 18(4) GWB), but found that pre- and post-Transaction, the thresholds for collective dominance under Section 18(6) GWB were met. However, the FCO ruled out concerns related to unilateral and coordinated effects, *inter alia*, due to strong countervailing buyer power that the parties face from large semiconductor customers.

Another notable clearance decision in Phase I related to SAP's acquisition of Signavio in February 2021. SAP is a major supplier of enterprise application software (EAS) with a strong position in enterprise resource management software (ERP); Signavio provides B2B software solutions for process management. The parties' products do not overlap and the FCO could also rule out any vertical effects, as their products were mainly complementary. The FCO further assessed whether tying or bundling SAP's ERP with Signavio's process management software could impede effective competition. However, the FCO found that the parties' products were typically not requested as a bundle and Signavio's software did not meet all customer requirements, so it was unlikely for SAP to attempt bundling strategies by preventing customers from using other software.

Also in February 2021, the FCO cleared salesforce.com's acquisition of Slack Technologies Inc. in Phase I. Salesforce offers customer relationship management software, while Slack is active in enterprise collaboration software (such as group messages, document sharing, voice and video calls).

The FCO also cleared transactions that featured interesting procedural questions. In late 2019, the FCO faced a transaction that was only notifiable due to the new "consideration" threshold introduced in the previous ARC amendment. That states that, if the turnover thresholds are not met, a substantial purchase price may still trigger a filing requirement.

The target, Honey Science, mainly operates a browser add-on, which searches for and applies vouchers and rebate offers during online purchase check-outs. Although Honey had 17 million monthly active users, its turnover in Germany was below €5 million and it did not meet German filing thresholds.

Online payment services giant PayPal acquired Honey for approximately €3.6 billion, exceeding the new consideration threshold of €400 million. The FCO found that despite its low domestic turnover, Honey was able to generate a high number of users in Germany. Therefore, its activities were not just marginal (which could have been a factor to exclude a filing obligation under the new threshold). The merger was cleared unconditionally in Phase I.

The FCO also faced the question of whether a minority acquisition establishes a notifiable transaction under the merger control regime and, in particular, whether it confers a "competitively significant influence" over the target, which is a peculiarity of the German merger control regime.

As part of a complex asset and share swap, energy company RWE acquired a minority stake of 16.67 percent in rival E.ON. The merger notified to the FCO was part of a larger transaction, parts of which were assessed by the European Commission.

The FCO found that the minority stake, through which RWE became the largest single shareholder, together with the right to appoint a member of E.ON's supervisory board, led to corporate influence by RWE. This is also competitively significant, because the parties will continue to operate similar businesses, albeit with diverging industry focuses.

In May 2020, the FCO assessed – and did not have objections against – the B2B online platform for the distribution of petroleum products, which is currently in trial operation and operated by a joint venture between OnlineFuels Limited and Shell Deutschland Oil GmbH (the establishment of which was not subject to merger control). The platform shall be used for the short-term spot trade of petroleum products at the wholesale level. The FCO had to assess whether the increase in transparency could be detrimental to competition, but ultimately found that the JV had taken precautions to limit the risk, e.g., as suppliers and customers have to register and set up a user account and the data (prices, quantities, availability, etc.) are mostly displayed on an anonymous basis.

In November 2020, the FCO cleared the *Thalia/Osiander* merger. Thalia is German's largest stationary book retailer with more than 300 bookstores and an online shop. Osiander is mainly active in southern Germany and operates more than 70 bookstores. Notably, for the product market definition, the FCO did nt limit its assessment to the stationary stores, but also included the online and mail-order business when determining market volumes and shares. The FCO noted that links between online and stationary sales are increasing as, e.g., stationary shops offer click-and-collect services and overnight delivery, while online retailers such as Amazon try to get closer to stationary book experiences with services such as "book sneak peeks". Despite the parties' high combined shares on the retail side, the FCO found that market entry barriers were relatively low and due to the national statutory obligation to sell books at a fixed price, smaller retailer were protected from price competition. The FCO further assessed the purchase side and despite concerns from publishers and book wholesalers, did not find an impediment to effective competition, particularly due to the parties' low combined shares and alternative sales opportunities to other retailers and online shops.

Pending Phase II proceedings

The FCO continues its reviews in the waste disposal/recycling sector with currently two pending phase II proceedings related to scrap metal trade.

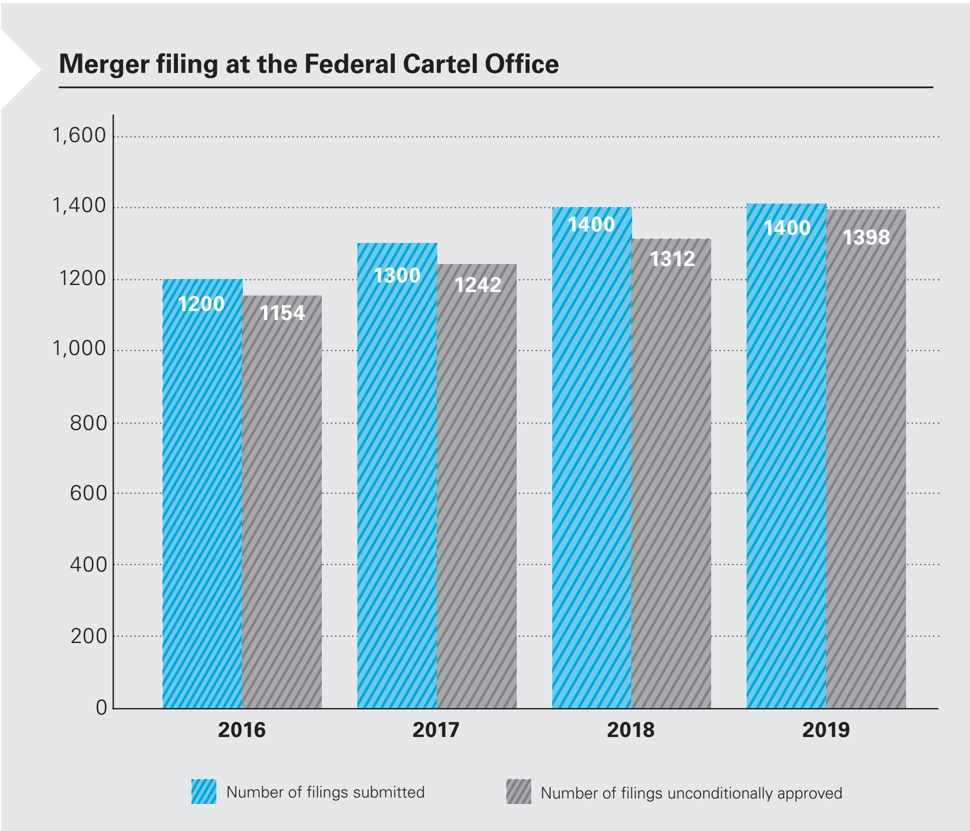
Appeals

In the market for concert and event tickets, the DCA took an important decision concerning markets involving multi-sided platforms, leading the way for Germany's new rules on the assessment of market power on multi-sided markets, which entered into force in mid-2017.

CTS Eventim's planned acquisition of Four Artists Booking Agentur GmbH (Four Artists) was squashed by the FCO in 2017, since it would have strengthened the already strong market position of CTS for ticketing services, given that CTS allegedly held a dominant position. Remarkably, the DCA confirmed the FCO decision and underlined that German merger control (still) deviates from EU merger control when it comes to the assessment of whether a transaction leads to a significant impediment of effective competition (SIEC), which is also the substantive test under the EU Merger Regulation: although Four Artists's market share amounted to only 1.5 per cent of all tickets sold in Germany, even such minimal increment of market share is sufficient to establish the strengthening of a dominant position. The DCA made clear that even under the SIEC test, German law does not require a 'significant' strengthening of a dominant position.

In March 2020, the Federal Court of Justice accepted to hear the case concerning the question of whether any de minimis increase of a dominant position fulfils the prohibition criterion of an SIEC under section 36, paragraph 1 of the ARC.

An unusual appeal against a clearance decision by the FCO was still pending at the time of writing, after the DCA upheld EnBW Energie



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It is crucial to have transparent and early communication with the case team about the timing, before formally notifying the merger; the parties can also accelerate the review process by providing extensive information upfront, rather than providing information bit by bit

Baden-Wurttemberg's acquisition of a minority shareholding of 6.28 percent in competitor MVV Energie, raising its total stake to 28.76 percent.

The acquisition triggered a notification under the ARC, as acquisitions that bring the buyer's aggregate stake to at least 25 percent are treated as a concentration under German merger control rules (even where the buyer does not obtain control).

MVV challenged the increase before the DCA, trying to get rid of EnBW's blocking minority gained by the transaction. The court, however, in line with previous case law, said MVV was unable to challenge the FCO's unconditional clearance of the deal, since only third parties can be adversely affected by a clearance decision.

According to the DCA, any adverse effects, to the detriment of the parties to the transaction, do not result from the clearance decision itself, but from the private law agreement underlying the transaction. MVV has appealed to the Federal Court of Justice.

Impact on merging parties

The COVID-19 pandemic has not had a significant impact on the FCO's work. Despite the short period when review periods were extended, the FCO kept on with business as usual, adopting a professional and accessible "no-frills" approach toward ongoing and new cases. In particular, the FCO continued to engage in informal pre-filing contacts and applied a flexible approach to help companies hold to their timetable, where possible.

The FCO's general practice is that it does not expect any pre-filing discussions in straightforward cases, while more complex cases can be presented on a draft basis in order to enable substantive discussions with the case team—without starting the clock.

When it comes to the timing of FCO proceedings, recent practice has shown a trend to extend Phase II proceedings, in some cases even more than once, leading to a significantly longer total review period than the four to five months German law stipulates.

For example, in the Loomis/Ziemann case, the parties agreed to at least four extensions, leading to a total review period of more than nine months from the notification date to the final decision. Taking into account that the 2020 decision in the CinemaxX/Cinestar case was based on an even longer review period of about one year, this trend is likely to continue in the future.

However, the recent amendments to the ARC aim at addressing these de facto prolonged review periods by extending the review deadlines.

Going forward, we believe the DCA's and the Federal Court of Justice's future decisions related to the question of whether any de minimis share increment can fulfill the significant impediment of effective competition (SIEC) test will have a significant impact on the FCO's decisions.

Also, it will be worth keeping an eye on how the European General Court's judgment on the European Commission's 2016 prohibition of the UK merger between Hutchison 3G and Telefonica UK will influence German merger control practice, especially regarding the analysis of the closeness of competition between the parties, whether at least one of them is an important competitive force, and regarding the treatment of efficiencies.

Recent changes in priorities

The FCO is taking cases as they come. It has not been faced with headline end-game mergers, but its decisional practice focuses on narrow and mature markets with high market shares, such as hospitals and retail, as well as platform markets.

Although the FCO said it planned to focus on the technology giants collectively known as GAFA (Google, Amazon, Facebook and Apple), and has issued antitrust decisions against some of them merger control practice in 2020 has not followed this path.

Additionally, although the "new" consideration/transaction value threshold has now been in place for more than three years and was designed to capture critical digital and pharmaceutical mergers that would otherwise fly under the radar, there has not been the expected wave of new cases, let alone interventions.

In particular, the FCO has not reviewed any cases raising substantive concerns that could be reviewed only under this new threshold. The deals captured by the threshold, such as the PayPal/Honey deal, have been cleared without remedies.

Key enforcement trends

A classical remedies case is the CinemaxX/Cinestar case mentioned earlier. By way of a package of regional divestitures, business overlaps have been completely neutralized in geographic markets with both high combined market shares and a significant increment.

The Telekom/EWE joint venture cleared by the FCO in late 2019 is an illustrative example of parallel Article 101, Section 1 ARC, and merger control proceedings. The extensive remedy package the companies committed to will likely affect the FCO's future policy in this sector.

Since the review of a competitor cooperation can also raise questions under the cartel prohibition clauses of the ARC, which cannot be reviewed as part of merger control proceedings, it is common practice to review such questions in parallel but separate proceedings. As the parties' commitments go even further than what they originally planned to do under their cooperation, this appears to be the FCO's way of shaping and opening the market.

The FCO's decision in the PayPal/Honey deal provides helpful clarification with regard to the relatively new consideration value threshold. In particular, the FCO sheds more light on the question of whether and when a target's activities in Germany are only "marginal", which can be a factor in excluding a filing obligation under this threshold.

Finally, the DCA's confirmation in the CTS Eventim/Four Artists deal that even minimal market share increments can be sufficient to strengthen a dominant position will affect the application of the SIEC test under German law, pending the Federal Court of Justice's decision and a possible referral to the European Court of Justice.

Recent studies and guidelines

Apart from the recent 10th amendments to the ARC, no significant changes to German merger control rules are currently expected.

Looking ahead

The FCO takes the view that it is reviewing too many unproblematic cases, but also still misses out on problematic cases below the current thresholds.

The 10th amendment of the ARC that just came into force, and which includes the most substantial overhaul of German competition law in a long time, is trying to square these two contradictory observations.

First, it has increased the domestic turnover thresholds from €25 million to €50 million and €5 million to €17.5 million with the aim of reducing the number of filings significantly. The exemption that transactions do not need to be filed if one of two parties involved has worldwide consolidated revenues of less than €10 million has been eliminated. The additional de minimis market exemption has been extended to markets with a total national sales volume of up to €20 million (whereas the cumulative requirement of relevant products being offered since at least 5 years has remained unchanged).

The FCO, however, has also obtained new powers to review transactions that it could not investigate previously with the so-called 'Remondis' clause. It allows the FCO to capture successive acquisitions of smaller companies. The FCO can order a company to notify all acquisitions in certain sectors (following a previous FCO sector inquiry), provided that the acquirer's worldwide revenues exceed €500 million and its domestic market share exceeds 15% and provided there are objective reasons to be concerned that the acquisition will significantly impede effective competition in Germany in the sector concerned. The duty to notify only applies to transactions where the target company's worldwide revenues exceed €2 million and if at least 66% of the target's worldwide revenues are realized in Germany. While this amendment is most likely based on German waste disposal company Remondis's acquisitions of small regional targets that did not trigger a filing obligation with the FCO, it can also apply to other sectors and enable the FCO to capture deals perceived as potential 'killer acquisitions'.

The review period has been extended. German law stipulates that Phase I lasts up to one month, and Phase II proceeding shall now be concluded within five months from the filing date. Thus, with the 10th amendment the Phase II review period has been increased by one month. This period is automatically extended by one month in case the parties offer remedies, and the FCO can further extend it multiple times (without any limitation, but only with the parties' consent). Contrary to an original proposal, there will be no limit to the sum of further extensions.

Finally, merger control related wrongdoings, in particular wrong or incomplete filings or non-compliance with FCO's requests for market data, revenues or other information can now be penalized with fines up to one per cent of the annual group turnover (from prior maximum €100,000).

THE INSIDE TRACK

What should a prospective client consider when contemplating a complex, multijurisdictional transaction?

In terms of timing, the basic rule is to do the German notification first, since the FCO generally acts as a "lighthouse" authority, whose decisions pave the way for other regulators. Austria's Federal Cartel Authority in particular agrees with the FCO in many cases.

As to the procedural side, the filing is typically not particularly burdensome. In expected Phase II cases, the procedure is far less tedious than a filing with the European Commission, with less focus on sophisticated economics and limited requests for internal documents. As a downside, pure behavioral remedies are not possible under the German merger regime.

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

It is crucial to have transparent and early communication with the case team about the timing, before formally notifying the merger. Also, the parties can accelerate the review process by providing extensive information upfront, rather than providing information bit by bit.

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

Despite public focus on platforms and digital mergers, and the introduction of the new consideration threshold, there was no intensification in these sectors.

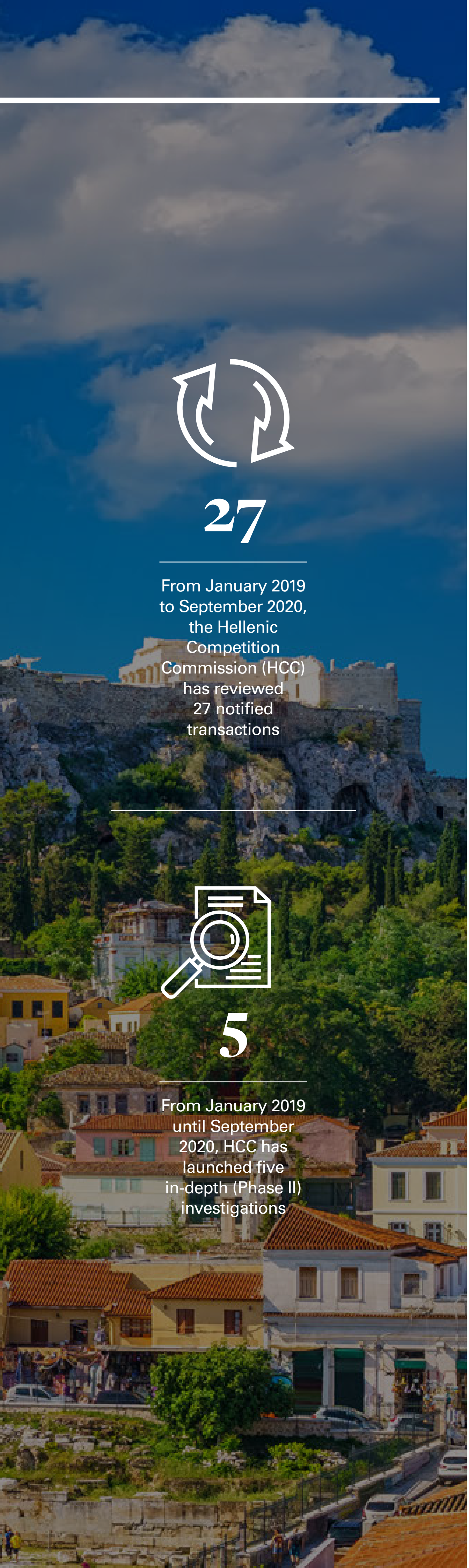
On substance, the DCA's decision in CTS Eventim/Four Artists will lead the way for Germany's rules on the assessment of market power on multi-sided markets and the application of the SIEC test.

Finally, on the remedies side, the extensive market opening and development remedies the parties to the Telekom/EWE joint venture committed to will likely affect future deals in this sector.

LON1020063_GE_10

Global merger control: Greece

The new president of the Hellenic Competition Commission (HCC), Ioannis Lianos, is a well-known academic particularly attuned to public interest issues. In 2020, Lianos led an HCC initiative to launch a dialogue around the potential integration of sustainability concerns in EU competition law, including merger control.



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From January 2019 to September 2020, the Hellenic Competition Commission (HCC) has reviewed 27 notified transactions

5

From January 2019 until September 2020, HCC has launched five in-depth (Phase II) investigations

Greece

By Dr Assimakis Komninos, Strati Sakellariou-Witt, Iakovos Sarmas

Key developments

From January 2019 until September 2020, the Hellenic Competition Commission (HCC) has reviewed 27 notified transactions, and launched five in-depth (Phase II) investigations.

Remedies were only accepted in the aluminium recycling market deal between Mytilineos and EPALME; they were behavioural and aimed to address vertical foreclosure concerns. All other transactions were cleared unconditionally.

The remaining Phase II investigations came in a variety of markets, including railway maintenance services, electronics retail, online gambling, and chemical products for crop protection.

Arguably, the most important merger decision of the HCC over the past year concerned the clearance of a privatisation in which the incumbent railway operator, TrainOSE, which is a subsidiary of Italian State Railways, sought to acquire sole control of the incumbent railway maintenance services provider, EESTY.

The transaction formed part of Greece's privatisation and, by extension, fiscal adjustment programme. As the HCC noted, the merger led to two monopolists being consolidated into one, vertically integrated.

The HCC examined whether the merged entity would have the incentives and ability to foreclose potential rivals, whether in the primary market of railway transport services, or the secondary market of maintenance services. To determine this, it asked for the opinion of market players and the Independent Railway Authority (RAS).

It was notable that RAS downplayed the risk of foreclosure of rival railway operators, relying on the applicable regulatory framework and the niche character of maintenance services.

When looking at the risk that other maintenance services providers could be excluded as a result of the deal, the HCC placed particular emphasis on the regulatory framework, which is enforced by RAS, and the risk of antitrust enforcement against potential foreclosure and discriminatory practices.

It noted that a potential entrant would not only have TrainOSE as a potential customer, but other railway cargo carriers. The HCC also hinted at potential efficiencies arising as a result of the deal, accepting that because of the merger, EESTY could expand its activities in other railway transport markets.

Because of these reasons as well as the fact that no other company had expressed an interest in acquiring EESTY, the HCC cleared the transaction unconditionally.

In its examination of Mytilineos' acquisition of EPALME, the HCC launched a Phase II investigation to assess whether the merged entity would be in a position to foreclose upstream rivals from the provision of recycling services, and downstream rivals from the supply of primary aluminium.

The HCC identified a number of issues in relation to the markets for primary and secondary aluminium and recycling services that could prevent effective competition. Notably, in light of EPALME's monopolistic position in the recycling market, the HCC said the likelihood of tying recycling services with the purchase of primary aluminium would increase as the result of the contemplated transaction.

However, the regulator cleared the transaction, subject to behavioural remedies. Mytilineos committed to maintaining EPALME's solvent customer base, refrain from tying the supply of primary aluminium with the aftermarkets related to recycling, and from engaging in exclusivity practices, for a period of three years.

Another Phase II investigation concerned the acquisition of sole control by Olympia Group, owner of PUBLIC retail stores, of the Media Markt retail stores. Both PUBLIC and Media Markt sell a wide range of technology equipment.

The HCC launched an investigation focusing on whether brick-and-mortar and online channels were easily interchangeable. It also looked at whether there would be potential non-coordinated effects of the transaction, arising from the similarity in the merging entities' portfolios.

Referring to European Commission and French precedents in cases where an online channel exerted sufficient competitive pressure on the brick-and-mortar channel to form a single relevant market, as well as market test feedback, the HCC concluded that the relevant product market included both channels in Greece. It left open the question of whether sales from foreign marketplaces, such as Amazon and eBay, should also be included.

It also delineated markets based on the type of devices sold, with an emphasis on 'black' and 'grey' goods like TVs, stereos, computers and smartphones where the merging companies had higher market shares.

According to the HCC's market share analysis, the merged entity's share would not exceed 20 per cent in either black or grey goods. It also showed that the change in market share would not exceed 200 points in either case.

Based on these findings, the high levels of competition due to the convergence of offline and online channels, and the recent expansion of several retail chains into black and grey goods, the HCC was convinced that the transaction would not raise competition concerns and cleared it unconditionally.

A final case worth examining involved Chinese state-owned chemical company ChemChina's plans to acquire, through its Dutch subsidiary, Adama, sole control over Alfa, its exclusive distributor in Greece. Adama already held a minority shareholding in Alfa.

The transaction had horizontal effects, since both companies overlapped in the wholesale supply of crop protection products. There were also vertical effects, given that Adama's group was mainly active in the upstream market of supply, whereas Alfa was active in the downstream market of distribution.

The HCC found that the merged entity's combined market share in the overall market of crop protection products would be 25-35 per cent, making it the leader in Greece.

"Unlike the current state of the law in the EU and in most EU member states, Greek competition law includes a mandatory 30-day filing deadline after the signing of the transaction

However, the market share analysis broken down by protected crop and enemy – such as insects – segments identified a number of markets whereby the combined strength of the entity would be even higher.

The HCC broke down the affected markets into three categories: markets where the merged company would hold a high share with an increment exceeding 5 per cent; markets where the entity would hold a high share, but with a low increment; and markets where the high share would not be attributed to the transaction, but to the ongoing distribution agreement between Adama and Alfa.

It focused more on the first group, but also downplayed the non-coordinated effects of the merger due to the presence of powerful competitors like BASF and Bayer, the transient nature of high market shares, the declining trend of the parties' shares, and the fact that the target already distributed Adama's products in the relevant market segment.

In assessing the coordinated effects of the deal, the HCC found that Alfa was dependent upon competing suppliers, and not vice-versa. It would not make business sense to retaliate against them, because they could easily substitute other distributors for Alfa, while Alfa needed them to have a presence in a number of segments.

The HCC also examined whether Alfa would have the power to become a one-stop-shop for end users, given its potential to distribute Adama fertilisers, and providing bundled rebates taking advantage of its wide portfolio. The HCC held that such bundles were unlikely to produce foreclosure effects, and, in any case, reserved its rights to pursue enforcement against abusive practices in the future, if need be.

As a result, the HCC cleared the transaction unconditionally, pursuant to an in-depth Phase II investigation. The HCC also validated two ancillary restraints, namely a non-compete clause and a transitional services and supply agreement between the seller and the acquirer.

Impact on merging parties

Unlike the current state of the law in the EU and in most EU member states, Greek competition law includes a mandatory 30-day filing deadline after the signing of the transaction. Given the deadline, actual pre-notification discussions with the HCC can be limited in time and depth.

However, the HCC's Directorate General (DG) encourages such discussions, given that they can prevent significant errors and omissions in the filings, expedite the actual launching of the investigation, and streamline clearance. That being said, Greece has no 'real' pre-notification stage in the sense of the EU system.

On that note, the HCC's recent merger control practice has confirmed that parties should anticipate that concentration investigations will not be launched immediately after the notification is filed, because the HCC will deem the notifications incomplete. Specifically, according to merger control decisions published in 2019 and the first half of 2020, in all but the Olympia/Media-Saturn case, the notification form was incomplete and the parties had to supply additional information. Delays in launching the investigation ranged from 20 to 85 days.

In most cases, the HCC merger investigation is straightforward and predictable. During the investigation, the HCC's DG frequently sends requests for information (RFIs) to the parties by e-mail, and carries out market tests. The case teams may also hold informal meetings with the companies involved, and organise interviews with third parties. The HCC's past activity demonstrates a track record of keeping to deadlines, once the notification is formally accepted and the investigation launched.

Moreover, there are signs that, even post-clearance, the HCC can continue to monitor the effects of a merger. In 2018, the HCC cleared the acquisition by passenger-shipping leader Attica Group of its main competitor, Hellenic Seaways, subject to strict behavioural remedies for three years, and monitoring of the remedies.

In December 2019, the HCC launched an investigation to assess Attica's compliance with the remedies. In August 2020, the HCC announced its decision to fine Attica Group €29,792 for breaching one of its commitments, and also ordered the extension of that commitment by an additional year.

In June 2020, the HCC decided to modify a previously accepted commitment from supermarket chain Massoutis to divest a store on Andros Island. Given the lack of interest for the store, and the "unfavourable economic situation affecting the country," the HCC agreed to allow Massoutis to sell a different store on the island.

In April 2020, the HCC published its final report on its inquiry into the Greek supermarket sector. The sector has undergone a long period of consolidation over the past decade, mainly through HCC clearance decisions. The HCC's report confirmed that, despite the numerous mergers, market concentration remained at healthy levels.

As of late August 2020, the HCC had not published any merger decisions covering the Covid-19 period.

Recent changes in priorities

The HCC's recent merger control activity has demonstrated an increased focus on the vertical effects of concentrations. In most cases where the HCC identified affected markets, its competition concerns were vertical.

In the TrainOSE/EESTY case, given the vertical relationship between railway transport services on the one hand, and maintenance services on the other hand, the HCC assessed whether the merged entity would have the incentive and ability to foreclose potential rivals from entering in those markets.

In Mytilineos/EPALME, the HCC examined whether the merged entity would be in a position to foreclose upstream rivals from the provision of recycling services, and downstream rivals from the supply of primary aluminium.

In Andromeda/Perseus, a merger between fish farms, there were vertically affected markets due to the target's shares in fish feed markets. However, those market shares were downplayed by the HCC as the target was previously jointly controlled by the acquirer, and the switch to sole control would not create competition risks.

Vertical considerations also came into play in the HCC's examination of logistics company COSCO's intention to acquire joint control over logistics and rail service provider Pearl. The HCC took the view that the dominant presence of the incumbent railway operator TrainOSE and other likely entries in the logistics market, coupled with the absence of any incentive from the second holder of joint control over Pearl, were unlikely to lead to the foreclosure of COSCO's rivals from the joint venture's services.

In Adama/Alfa, the HCC examined whether the merged entity would be able to combine Adama's wide agrochemical portfolio and Alfa's customer base in order to foreclose competitors by creating a one-stop shop distribution point for customers and offering bundle rebates. The HCC ultimately decided it was unlikely that competitors would be foreclosed as a result of such practices, but reserved its enforcement powers for the future.

In merger filings before the HCC, parties are therefore best advised to identify all potential vertical overlaps and carry out an assessment of the vertical effects of the merger.

The HCC has also demonstrated its capacity to cooperate with other independent Greek regulators when reviewing transactions. For example, in both the Alpha Media joint venture and Motor Oil/Alpha Media cases, the HCC got in touch with the National Council of Radio and Television, requesting information to gain technical insights and a more comprehensive view of the relevant markets.

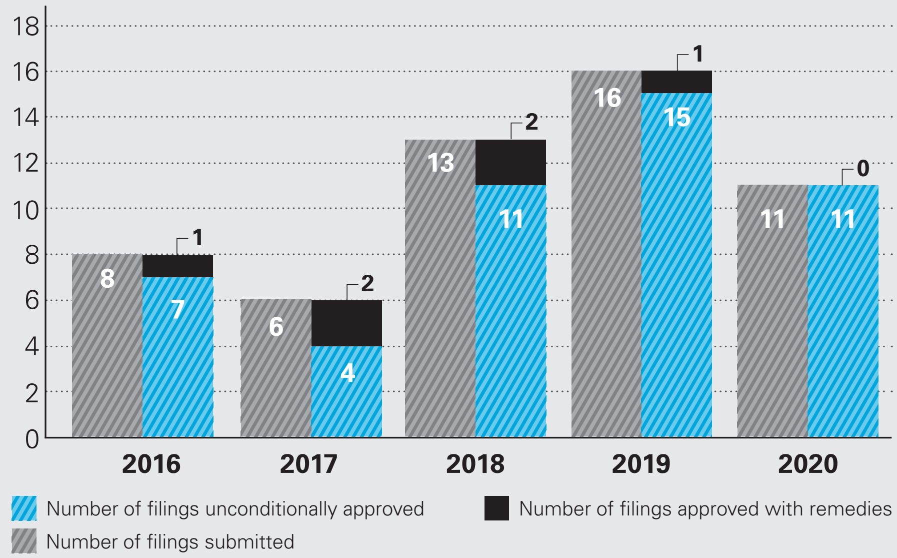
It also asked for the opinion of the railway authority RAS in the TrainOSE/EESTY case, to evaluate whether the merged entity would have the incentive and ability to foreclose potential rivals from entering the primary market or the relevant aftermarkets.

The HCC's merger control activity in 2020 has not exposed any particular industry as suffering from increased consolidation.

The technocratic nature of the HCC means that it does not take political considerations into account – but at

Merger filings at the Hellenic Competition Commission (HCC)

*as of 3 December 2020



the same time, 2019 was a turbulent year for the body. After a long and stable period of independence between 2009 and 2018, the previous government appointed as president and members of the HCC people who had previously held positions as advisers to members of the executive.

The opposition contested those appointments and, in the wake of winning the July 2019 election, it presented new legislation on rules on conflicts, which was adopted by parliament. The Competition Act was amended and the HCC president, vice-president, two commissioners and the director-general were ousted. New appointments came in in September 2019.

Merger enforcement has not been affected by this political turbulence, and it is hoped the new appointees will perform their duties in a manner befitting the HCC tradition of de-politicisation.

The new president of the HCC, Ioannis Lianos, a well-known academic, is particularly attuned to public interest issues and has written extensively in favour of integrating such issues into competition enforcement. It remains to be seen whether such issues will now acquire a specific role in merger enforcement.

Key enforcement trends

The HCC did not block any transactions in the past year. In a total of five cases reaching Phase II, the HCC required remedies only in one, and the remedies were behavioural. Indeed, the HCC has historically blocked only one transaction, in the very early days of Greek merger enforcement – although this case was subsequently cleared by the Minister of Development based on the then applicable system of ministerial authorisation, which has long been repealed.

Recent studies and guidelines

In September 2020, the HCC published a draft staff discussion paper on sustainability issues and competition law. The paper formed part of the HCC's initiative to launch a dialogue around the potential integration of sustainability concerns in EU competition policy and legal analysis.

In the field of merger control, the paper suggested that environmental and sustainability concerns could play a role in the definition of relevant markets, the assessment of efficiencies and the provision of remedies. Member states could also be allowed to deal with local sustainability issues by making use of article 21(4) EUMR, and through the review of mergers under national competition law.

Also in the field of advocacy, the HCC was, at the time of writing, carrying out three sector inquiries, in relation to e-commerce; basic consumer goods; and fintech. It is possible that the results of these inquiries will touch upon merger control.

Looking ahead

As of the time of writing, an expert committee is proposing to amend the Greek Competition Act. The committee is expected to propose no major changes in the merger rules, other than the possibility to accept commitments and clear transactions with remedies in Phase I. Such a possibility has not been available to the HCC and to notifying parties; remedies are only possible in Phase II proceedings.

No other amendment is foreseen.

THE INSIDE TRACK

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

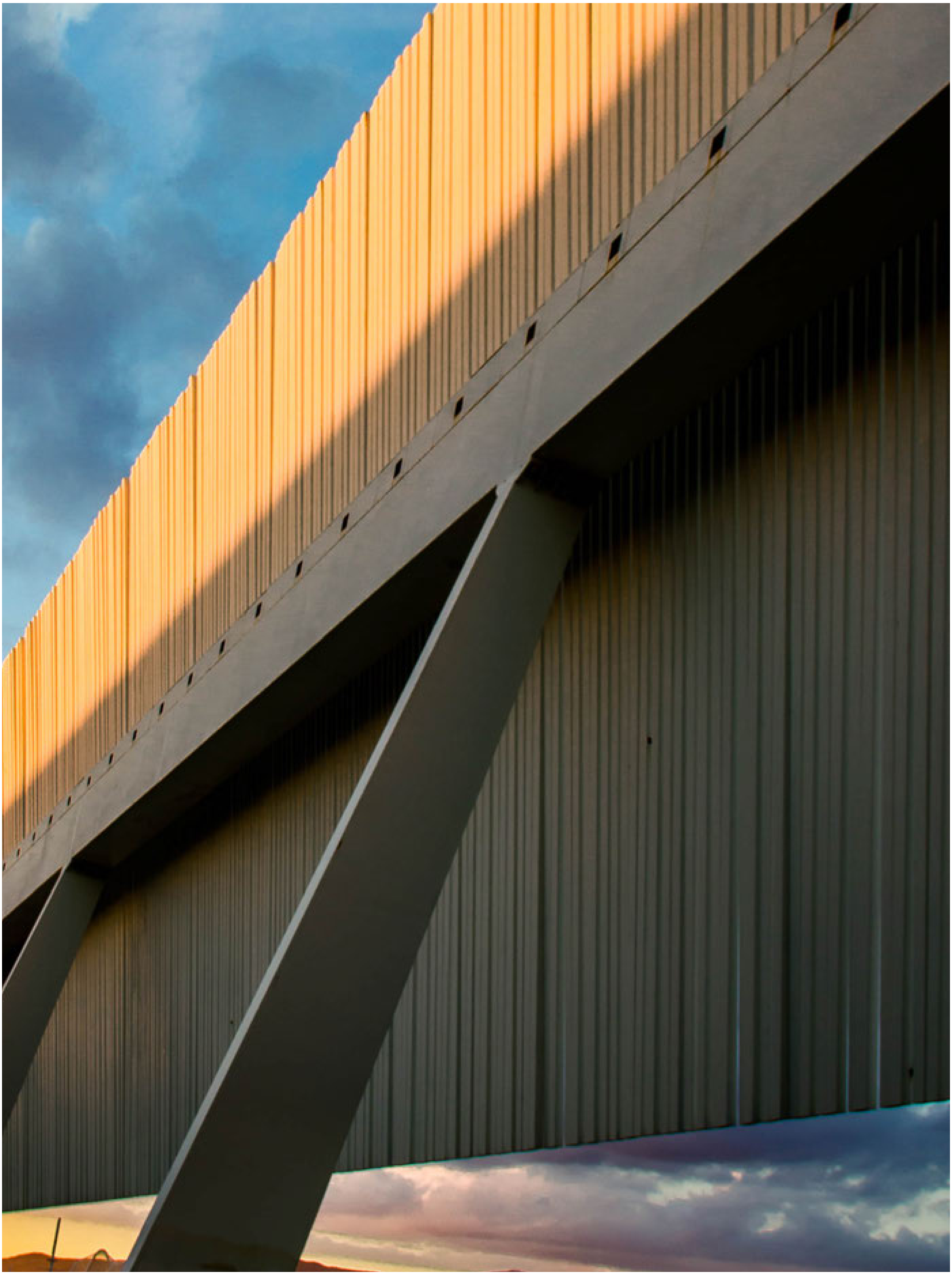
Market definition is critical to the outcome of a case before the HCC. However, the average number of merger cases handled by the HCC do not tend to exceed 10 or 15 per year. As a result, the HCC may often lack the necessary experience and data in relation to specific industries, which may in turn delay its market test and analysis. It is therefore important that notifying parties have readily available as much market data as possible to allow the HCC to expedite its knowledge gathering and education with respect to the relevant markets.

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

Early engagement with the HCC's DG and case handlers may lead to a short yet fruitful pre-notification period. After notifying, parties are encouraged to maintain open channels of communication with the DG and case handlers, in order to address any requests and concerns that might arise.

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

Market investigations in all merger cases handled by the HCC in 2019 and so far in 2020 were officially launched two weeks or more after the notification was filed. This is probably due to the mandatory notification deadline of 30 days post-signing, which causes parties to rush the HCC notification before it is deemed complete and satisfactory to case handlers.



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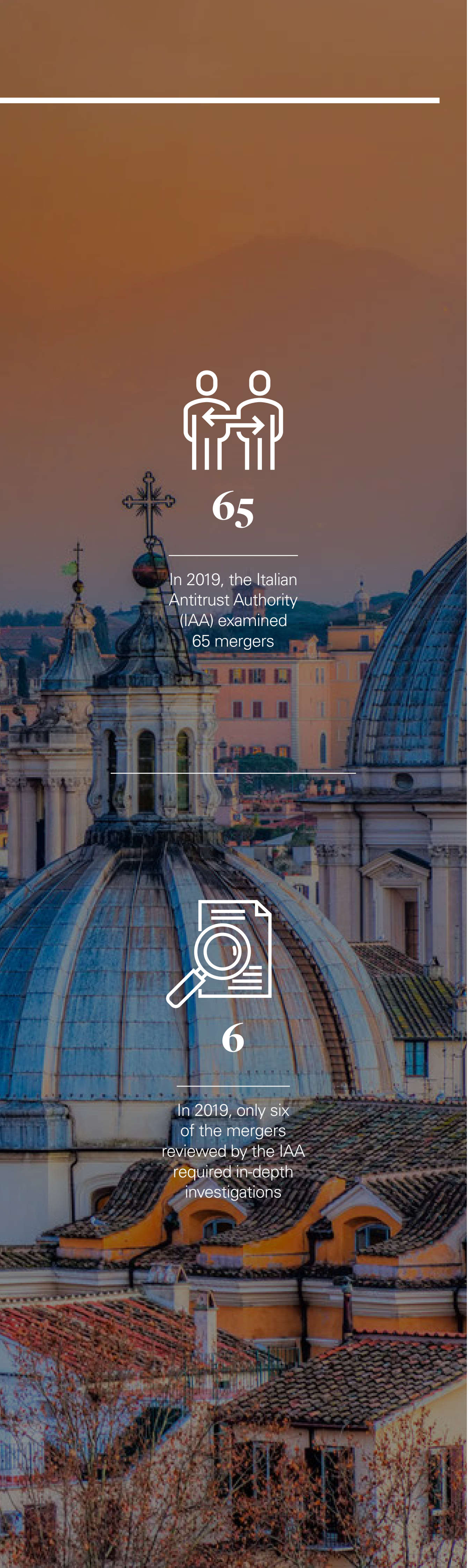
Global merger control: Italy

The Italian Antitrust Authority (IAA) has traditionally operated in line with the rules and guidelines stipulated by the European Commission, but IAA's increasing use of far-reaching behavioral remedies in merger cases is certainly a development to be monitored in the future



Italy

By Veronica Pinotti, Martino Sforza and Patrizia Pedretti

Key developments

In 2019, the Italian Antitrust Authority (IAA) examined 65 mergers, six of which required an in-depth investigation in the sectors of natural gas distribution, media, banking and retail grocery distribution.

The IAA cleared five of these transactions subject to the adoption of corrective measures, while in the remaining case the investigation was closed for procedural reasons. In general, the decisions issued by the IAA in the past year highlight a trend toward far-reaching and innovative remedies.

The IAA conducted an extensive market investigation into the proposed acquisition of control of some business units of natural gas distribution company AcegasApsAmga by Ascopiave. Following its investigation, the IAA imposed remedies aimed at avoiding the creation of a dominant position, which would have permanently reduced competition in the market in the event of a future tender of the concession to manage natural gas distribution service in the Padua area.

The remedies imposed were aimed at reducing information and financial barriers; there were also organizational measures concerning employment. These remedies sought to provide incentives for potential external participants in the future tender, as well as off-setting the advantages linked to the incumbency of the acquired company, which back then held the largest part of the concessions in the area concerned.

In the media sector, the IAA cleared the acquisition by Sky Italian Holding of assets of the digital terrestrial pay TV service owned by Mediaset Premium, also subject to remedies. Specifically, the IAA found that the transaction led to a strengthening of Sky Group's dominant position on the retail pay TV market.

After the IAA issued a statement of objections, Sky indicated it wished to return the R2 technological platform and other assets to Mediaset. However, in view of the fact that the return of R2 was only partial and some RS assets would remain Sky's property, and because the merger had already had an impact on the market, the IAA decided to complete its review of the deal.

The IAA determined that the transaction had generated specific anti-competitive effects, and had removed the existing and future competitive pressure that Mediaset had on Sky's pay TV offering. For this reason, it decided to impose, for a three-year period, measures to restore competition to the pay TV market.

Under these restrictions, Sky is prohibited from imposing exclusive rights for its audiovisual content and linear channels on internet platforms in Italy. The IAA authorized the merger subject to the full and effective implementation of the prescribed measures.

Despite Sky's successful appeal at a first instance administrative court, the Council of State annulled the judgment and restored the IAA's initial decision, banning Sky from acquiring exclusive broadcasting rights for audiovisual content and linear channels for internet platforms in Italy until 2022.

Also in the media sector, the IAA conditionally cleared the acquisition of sole control of digital terrestrial television network operator Persidera by F2i. The detailed investigation confirmed that the deal, due to F2i's control of TV and radio infrastructure company EI Towers, would have strengthened the dominant position of the new entity in the television broadcast infrastructure market to such an extent as to eliminate, or substantially and permanently reduce, competition in that market. The IAA said there would be a similar impact on downstream markets including digital broadcasting, free television, pay TV and TV advertising.

In line with the findings and while approving the transaction, the IAA requested remedies. These consisted of obligations to provide access and deliver hospitality services and maintenance on fair, reasonable, transparent and non-discriminatory terms and in any case no worse than those currently applied by EI Towers; and obligations to deliver full services on fair, reasonable and non-discriminatory terms on the basis of an unbundled approach, in which the network operator is free to define the extent of the services offered and the degree of its technological autonomy.

The deal will create two Persidera divisions known as MuxCo and NetCo. MuxCo will hold intangible assets allocated to F2i, such as the rights to certain frequencies, as well as some network assets, and will also manage business relations with television broadcasters. NetCo will handle terrestrial broadcasting infrastructure.

The remedies included measures relating to MuxCo's independence; measures to reduce the risk of information exchange between MuxCo, NetCo, EI Towers, F2i and Mediaset; measures changing the risk-sharing clauses between EI Towers, NetCo and MuxCo and to assure the transfer of part of the efficiencies generated on NetCo to MuxCo, for the benefit of the latter's customers.

In the banking sector, the IAA authorized, subject to conditions, BPER Banca's acquisition of Unipol Banca. Its investigation focused on the Sardinia region and covered local markets including private and commercial banking, as well as investment and asset management services to consumer households and small and medium-size enterprises. The investigation also covered the market for loans to public bodies and to medium-size and large businesses.

During the in-depth investigation, the IAA analyzed the post-merger increases in market share held on the various markets by BPER and Unipol, concluding that a joint share of at least 40 percent would cause significant obstacles to competition.

Based on its findings, the IAA said the merger was likely to result in the creation or strengthening of the dominant position of BPER in certain markets in Sardinia. Therefore, it decided to authorize the merger subject to measures aimed at eliminating the anti-competitive effects of the merger.

These included the sale of some Unipol branches to an independent company in geographical markets where the effects of the merger would affect competition. The independent company had to be capable of being an actual or potential competitor in the market and, eventually, the Unipol branches located in Sardinia were transferred to Banco di Sardegna.

There were also two cases concerning the retail grocery distribution sector. In the first of these, the IAA authorized subject to conditions the acquisition by Fratelli Arena of exclusive control over three groups of business branches: 33 supermarkets from the Simply network; eight supermarkets from Distribuzione Cambria; and 11 supermarkets from the Roberto Abate Group.

€29.1bn

Italian M&A deal value in Q1 – Q3 2020

Source: Mergermarket

The IAA commissioned a market investigation, conducted with a national representative sample, in order to better understand the habits of consumers and the dynamics of demand in the retail grocery sector.

Following a quantitative analysis of the companies' positions on the relevant markets and the competitive constraints exercised by the stores subject to purchase on those of the acquirer, and qualitative examination of the specific characteristics of each of the relevant markets, the IAA identified competition issues for eight local markets (two hypermarkets and five supermarket in Catania and one supermarket in Messina).

In order to prevent any reduction in competition, the IAA authorized the merger subject to behavioral and structural remedies including the sale of various stores and the signing of a lease agreement for a business branch.

Arena appealed the IAA's decision at a first instance administrative court. However, following Distibuzione Cambria's (the target) declaration of insolvency in August 2020, the court suspended its judgment in late November 2020. An application for interim measures lodged at a first instance administrative court on the same matter by target Distribuzione Cambria was dismissed.

Also in the retail grocery distribution sector, the IAA closed its investigation into the proposed acquisition by BDC Italia of the entire share capital of Auchan, since the scope of the transaction had substantially changed since its first notification. The companies continued their negotiations into 2020, filed the deal again, and the IAA eventually cleared the transaction subject to the sale of a number of stores to a third independent company.

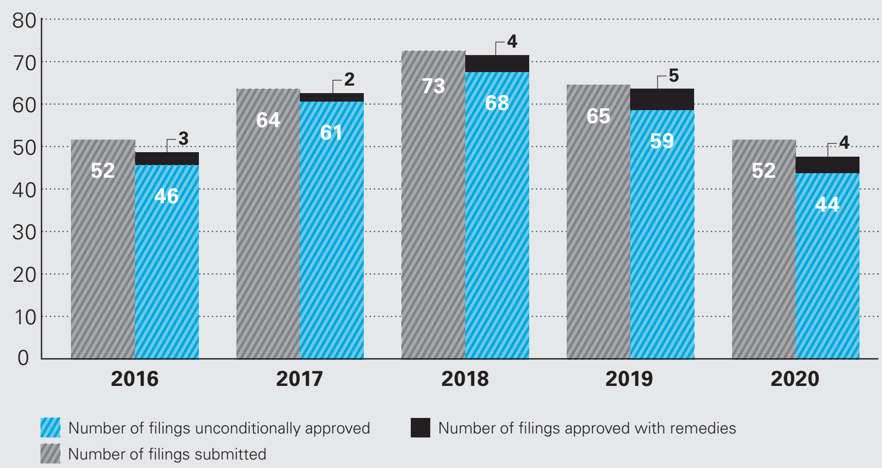
“Due to the increasing complexity and number of merger filing regimes worldwide, as well as the difficulties for authorities to progress with merger reviews in the COVID-19 context, merger timelines have become much more unpredictable

Impact on merging parties

Due to the increasing complexity and number of merger filing regimes worldwide, as well as the difficulties

Merger filings at the Italian Antitrust Authority (IAA)*

*as of 3 December 2020



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Applying a centralized approach to filing in the relevant jurisdictions is critical to obtaining quick and successful clearance

for authorities to progress with merger reviews in the COVID-19 context, merger timelines have become much more unpredictable and, in some cases, protracted.

In Italy, COVID-19 initially led to a severe disruption in merger review processes. However, it appears that, as of the time of writing, the IAA is working at its normal level again. In general, a centralized and consistent approach for all merger filings worldwide is the best way to streamline the process and achieve the required clearances as quickly as possible.

Recent changes in priorities

There have been no noticeable changes in merger enforcement priorities in the past year in Italy. The IAA remains an aggressive enforcer toward any merger that could potentially lead to competition concerns, across all industries, as evidenced by the variety of sectors subject to in-depth investigation in 2019.

Consistent with the broader European trend, we expect that the IAA will increasingly focus on mergers in digital and IT industries.

Key enforcement trends

The IAA has in the past year conducted extensive investigations into several proposed mergers, all involving behavioral remedies. This does suggest a trend toward far-reaching and innovative remedies.

The IAA appears to not shy away from detailed market investigations in order to be able to identify the feasibility of proposed remedies in various sectors.

In 2019, the IAA conducted a study analyzing the implementation and the degree of effectiveness of the measures imposed in merger control, on the basis of the information contained in its case files and collected from purchasers of divested assets through an online questionnaire.

The review focused on structural remedies, especially the divestiture of assets, imposed by the IAA between 2007 and 2017. In order to adequately assess their effectiveness, the IAA sent the purchasers of the divested assets questionnaires—which had a relatively high response rate.

In order to maximize the effectiveness and efficiency of the IAA's activities, in line with international best practice, the study suggests that preference should be given to structural remedies while behavioral remedies should be limited to cases in which the former are not feasible. The results of the review will be used to draft an internal operating manual that also takes into account best international practices.

Recent studies and guidelines

In July 2019, the IAA, together with the Italian Data Protection Authority and the Italian regulator for electronic communications, adopted a joint document laying down guidelines and policy recommendations concerning Big Data, and addressing some of the concerns raised by the digital economy with regard to privacy.

The underlying study that informed the guidelines focused on assessing market power in digital ecosystems characterized by the exploitation of Big Data. An important element in this assessment is the vertical and conglomerate integration of digital operators.

This amplifies the ability to capture, process and exploit data in providing services to consumers and businesses, and allows for incredibly accurate profiling.

Another significant element in assessing market power on data-driven markets is also represented by external growth, such as acquisitions by dominant players of potentially disruptive startups—so-called "killer acquisitions."

The guidelines recommended a change in the standard of review of concentrations. In particular, a change in the law is proposed to allow the IAA to review transactions that may have the effect of restricting potential competition.

The guidelines also suggest the possibility of including an additional value-based threshold, which would allow the authority to review smaller transactions that take place in the digital sector and that are not captured by current thresholds.

Looking ahead

Other than the possible development described above, no significant changes to Italian merger control rules are expected in the near future.

However, as the IAA has traditionally operated in line with the rules and guidelines stipulated by the European Commission, the latter's revision of the Market Definition Notice, initiated earlier this year, is likely also to impact how the IAA will eventually define markets in merger control cases.

Clearer guidelines and the use of more robust economic evidence for market definition purposes in the future would be welcomed by practitioners.

Accurate as of January 2021

THE INSIDE TRACK QUESTIONS

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

Parties should leave enough time for the merger control filing process when eying new deals. This is not only because of the increasing complexity of merger control regimes worldwide, but also due to the administrative delays flowing from the authorities' internal work reorganization following the COVID-19 crisis. There may also be delays due to the increased workload of regulators having to deal with a backlog of cases in a few months.

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

The possibility of applying a centralized approach to filing in the relevant jurisdictions is critical to obtaining quick and successful clearance. This ensures consistency in arguments and efficiency in merger control workstreams.

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

As described before, the increasing use of far-reaching behavioral remedies in merger cases is certainly a development to be monitored in the future.

LON1020063_Italy_09

Global merger control: Japan

The Japan Fair Trade Commission (JFTC) has been active in merger enforcement in 2020, despite the COVID-19 pandemic, and digital, data and technology markets continue to be key areas of focus

December 17, 2019

The Japan Fair Trade Commission (JFTC) issued amended Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination and Policies Concerning Procedures of Review of Business Combination

April 1, 2020

The JFTC established a new division, the Office of Policy Planning and Research for Digital Markets

Japan

By Toshio Dokei, Takako Onoki, Hideo Nakajima

Key developments

The Japan Fair Trade Commission (JFTC) has been active in merger enforcement in 2019 and 2020, similar to recent years, despite the COVID-19 pandemic.

Digital, data and technology markets generally continue to be areas of focus for the JFTC. On December 17, 2019, the JFTC issued amended Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination and Policies Concerning Procedures of Review of Business Combination. The merger guidelines were originally prepared in 2004 and the merger policies in 2011.

The amendments followed the Japanese government's publication of its Growth Strategies Action Plan and Growth Strategies Follow-Up in June 2019. The plans included a pledge to update rules for merger review by the end of 2019, in order to conduct reviews appropriately in accordance with developments in the digital market.

In addition, on April 1, 2020, the JFTC established a new division, the Office of Policy Planning and Research for Digital Markets. The Office conducts large-scale, comprehensive and thorough surveys of the digital market, promotes an understanding of the reality of transactions in the digital market, and collects a wide range of information on the digital market with the cooperation of external experts.

How the competition authorities treat transactions involving nascent competitors or technology, or so-called "killer acquisitions," has been the focus of attention around the world, and Japan is no exception. In addition to clarifying its views on this in the amended merger guidelines and merger policies, the JFTC conducted reviews of six non-notifiable merger cases during 2019/20.

These included M3's acquisition of shares in medical database company Nihon Ultmark. The case did not meet requirements for a pre-notification with the JFTC under the Japanese Anti-Monopoly Act (AMA), but the JFTC investigated, apparently by its own initiative. The JFTC concluded the review subject to remedies proposed by the parties.

The transaction was consummated when the JFTC initiated the investigation, which is also remarkable. At the time the JFTC closed the investigation, the amended merger guidelines and merger policies had not been finalized, although drafts had been published.

In its review of Bristol-Myers Squibb's acquisition of Celgene, the JFTC reviewed the competitive influence of a pharmaceutical product that was still in the research and development stage by one of the parties, on the assumption that it was expected to be launched in the near future.

This was in accordance with the amendments made in the merger guidelines, which let the JFTC determine the effects of a merger on competition by considering the reality of research and development when the parties are engaged in the development of overlapping products or services.

In August 2020, the JFTC cleared the proposed integration of digital platforms, Z Holdings Corporation (including Yahoo) and LINE Corporation, subject to remedies. The JFTC focused its review on three business segments: news distribution, advertising and code settlement. The clearance was made subject to remedies for the code settlement business.

The JFTC continues to believe in the importance of economic analysis and used economic analysis in two out of ten cases published in FY2019 JFTC Annual Collection of Major Merger Cases. Economic analysis was also used to review the merger between Z Holdings and Line.

Recently, whether or how mergers of regional banks should be accepted has become a political issue. This was triggered by the merger of Fukuoka Financial Group and The Eighteenth Bank, which was pre-notified to the JFTC on June 8, 2016 and was given a clearance by the JFTC on

August 24, 2018 subject to proposed remedies in April 2019.

While the merger discussions were ongoing, Japan's Financial Services Agency (FSA) and the JFTC were debating the regulations governing banking mergers and in May 2020, a new law to exempt the application of the AMA for certain regional bank mergers was passed. The law is applicable for ten years from November 27, 2020. Under the legislation, certain regional bank mergers can be exempted from JFTC review subject to approval by the Prime Minister or the FSA commissioner.

In November 2020, the JFTC published proposed amendments to rules and regulations for online procedures, including the merger notification procedure. Triggered by the changes caused by COVID-19, the government is promoting online procedures, and the JFTC's proposed amendments form part of that push. The JFTC rules and regulations were amended on December 21, 2020. Accordingly, the JFTC started accepting merger notifications by email from February 1, 2021.

Impact on merging parties

Despite the numerous impacts of COVID-19 on all aspects of the economy and the regulatory agencies, the JFTC's work has continued mostly unabated, notwithstanding the disruptions and challenges caused by remote working.

However, due to potential COVID-19 disruptions, parties may want to build in time for potential delays in agency review. For example, companies may want to negotiate longer termination dates to account for slower than usual industry input necessary for agency investigations.

The JFTC has been placing more emphasis on internal documents and the amended merger policies clarify that it may ask parties to submit documents including board meeting minutes, documents analyzing the effect of the merger, or emails of officers or employees of the parties involved in the transaction.

Under the AMA, the JFTC has authority to review non-notifiable mergers, but it has not been actively doing so until recently. The amended merger policies clarify the JFTC's authority for review of non-notifiable mergers as well as clarifying situations where the JFTC would likely review non-notifiable mergers.

> “
> **Acquisitions of nascent competitors in platform industries is one of the hottest topics, with questions arising over when the JFTC should be involved because such markets are prone to tipping**

The JFTC conducted a review of six non-notifiable merger cases during 2019/20, including the M3-Ultmark deal. Companies should consider a pre-consultation with the JFTC when the planned transaction meets, or may meet, the criteria for which the Commission recommends pre-consultation, even if the deal does not require a pre-notification.

Cross-jurisdictional merger control cooperation continues, despite COVID-19. During complex merger reviews that affect multiple jurisdictions, the JFTC may, in certain circumstances, communicate and share information with other antitrust enforcement agencies. It is therefore crucial for companies involved in cross-border deals to examine how they could get the authorities to have a positive influence on each other.

Recent changes in priorities

The JFTC applies merger control rules consistently across all industries. At the same time, the JFTC's enforcement priorities are also influenced to some extent by the government's public policies. Promoting competition and innovation in the digital market is one of the government's top priorities.

Recently, the JFTC has been actively investigating non-notifiable and consummated mergers. The JFTC may challenge any merger, regardless of whether it is reportable under the AMA.

Key enforcement trends

One of the JFTC's major interests is in killer acquisitions. In the amended merger guidelines, the JFTC added its views on competitive influence in deals involving digital platforms, acquisitions of nascent competitors and vertical or conglomerate mergers. The amendments to the merger policies with regard to non-notifiable transactions are made to catch killer acquisitions. In January 2021, the JFTC cleared Google's acquisition of Fitbit subject to proposed remedies. The target did not meet the domestic turnover threshold for a pre-notification, but the JFTC reviewed the case.

Acquisitions of nascent competitors in platform industries is one of the hottest topics, with questions arising over when the JFTC should be involved because such markets are prone to tipping—when a particular platform quickly gains market share—through enhanced network effects and economies of scale.

Recent studies and guidelines

The amendments to guidelines and policies issued in December 2019 were designed to help the JFTC conduct its reviews appropriately in accordance with developments in the digital market.

Amendments to the merger guidelines include, among others, the characterization of digital platforms, including multi-sided markets and a definition of relevant markets where competition is based on quality rather than price; exceptional situations where the JFTC conducts substantial review even when a transaction meets the safe harbor criteria; cases where parties are conducting research and development for overlapping products and services; and vertical and conglomerate mergers.

For example, the JFTC has clarified how it defines a multi-sided market where multiple layers of users exist. According to the amended merger guidelines, the JFTC basically defines a relevant market by each layer of users, and considers the characteristics of the multi-sided market when it determines the proposed transaction's influence in the relevant markets.

When competition is based on quality rather than price, the merger guidelines require the JFTC to "take into consideration the extent to which users replace the product with another product or purchase the product in another region in cases where, in a certain region, a product suffers a deteriorating quality".

On market characteristics, the JFTC has clarified that it may determine the network effect and economies of scale when looking at competitive influence on the relevant markets. For example, the JFTC determines the so-called direct network effect when the value of the parties' products increases by securing a certain number of users subsequent to the proposed merger, resulting in a further increase in the number of users for the products.

Particularly in a case where many users use only one service, direct network effects are considered to affect competition to a greater extent than when many of the users use multiple services. The JFTC also determines indirect network effects when the parties' competitive power increases in a market because of the increased value of their product in another market, as a result of securing a certain number of users subsequent to the proposed merger.

When it comes to the JFTC's focus on deals involving nascent competitors or technology, the amended merger guidelines clarify when the Commission should conduct a substantial review even when such transactions meet safe harbor criteria.

For example, the JFTC would conduct substantial reviews when a party has potential competitiveness that is not reflected in the market share—for instance when it owns competitively important data or intellectual property rights, even if such transactions meet the safe harbor criteria. The merger guidelines now provide guidance as to how the JFTC should analyze competitive influence when it comes to acquisitions of startup companies holding important data.

The merger policies clarify that the JFTC will conduct merger review for non-notifiable cases when the transaction value exceeds ¥40 billion (US$370 million) and the deal is expected to affect domestic consumers.

The amended policies therefore suggest companies should consult with the JFTC voluntarily when the transaction value exceeds ¥40 billion and when one or more of the following factors is met: the acquired company has an office in Japan or conducts research and development in Japan; the acquired company targets domestic consumers, for example by having a website in Japanese; or the total domestic sales of the acquired company exceed ¥100 million.

As the exemption rules for mergers between regional banks apply from November 2020 until November 2030, certain mergers between regional banks would be exempted from the JFTC's review.

Looking ahead

Promoting competition and innovation in the digital market is one of the most important public policies for the Japanese government. The JFTC is therefore likely to investigate transactions in this market, whether or not they are notifiable, if they are likely to affect the competitive or innovative environment in Japan.

THE INSIDE TRACK

What should a prospective client consider when contemplating a complex, multijurisdictional transaction?

Early planning and coordination with advisers and colleagues worldwide is important to obtain timely clearance for complex, multi-jurisdictional transactions. The timing of filings should be planned backwards, starting from the expected closing or long-stop date.

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

Thorough pre-filing analysis can make all the difference in obtaining clearance quickly. Front-loading the process and ensuring all parties involved have a deep understanding of the business before making a JFTC filing ensures swift engagement with the Commission.

In addition, establishing a good relationship with the JFTC case team and communicating with them closely is key to effective and smooth proceedings.

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

A non-notifiable and consummated merger case the JFTC investigated on its own initiative. Under the AMA, the JFTC has authority to do so, but it had not been common for the JFTC to investigate such cases previously.

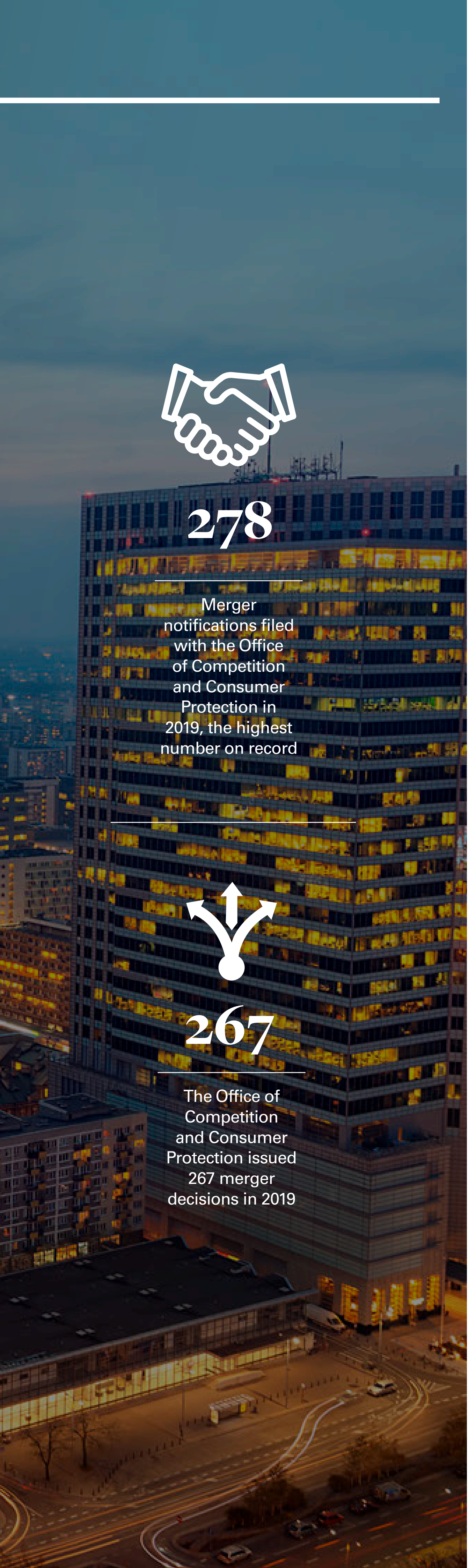
LON1020063_Japan_08

Global merger control: Poland

The most important development at the Office of Competition and Consumer Protection is its increased focus on procedural infringements, a trend that has also been visible in other jurisdictions and the EU

Poland

By Katarzyna Czapracka and Jakub Gubański



278

Merger notifications filed with the Office of Competition and Consumer Protection in 2019, the highest number on record

267

The Office of Competition and Consumer Protection issued 267 merger decisions in 2019

Key developments

The most important development is the increased focus on procedural infringements, a trend that has also been visible in other jurisdictions and the EU.

First, in November 2019, the Office of Competition and Consumer Protection (Urząd Ochrony Konkurencji i Konsumentów, or UOKiK) fined Engie Energy PLN 172 million (€40 million) for refusing to provide information to the UOKiK for its probe into alleged gun-jumping in relation to the financing of the construction of the Nord Stream 2 pipeline. This was followed, in July 2020, by a PLN 213 million fine for Gazprom for failing to cooperate in the same probe.

While there are particular circumstances related to the UOKiK's investigation into the Nord Stream 2 project, this is a strong indication that the UOKiK is likely to impose substantial fines for failure to provide requested information or for providing incorrect or misleading information. A statutory fine of up to €50 million can be imposed for this type of infringement.

Second, in October 2020, the UOKiK imposed the record fines for alleged gun-jumping of PLN 29 billion on Gazprom, and of over PLN 234 million on five remaining companies participating in the construction of the Nord Stream 2 pipeline. To be clear, the circumstances of this case were quite specific: the parties initially submitted a merger filing concerning the establishment of a JV, but withdrew it when it became clear that the UOKiK was likely to oppose the deal. The parties then restructured the deal and proceeded on the basis that a notification was no longer required. The UOKiK asserted that a joint undertaking may be established when two or more entities unite their economic interests (even if a separate entity is not created). In the Nord Stream case, this has been achieved by signing a financing agreement, which according to the UOKiK was key to the execution of the project, and led de facto to a creation of a joint undertaking.

In September 2020, the UOKiK has imposed another fine for alleged gun-jumping of PLN 0.7 million on AmeriGas Polska, which according to the UOKiK, took over control of Gas Distribution Center without required merger clearance. Once again it was not a straightforward case. The companies entered into a lien agreement that guaranteed AmeriGas additional powers to influence key management decisions of Gas Distribution Center. Under Polish law, conclusion of a lien agreement on shares or stocks does not require the consent of the UOKiK, provided that the entrepreneur does not exercise the rights arising from those shares or stocks (except for the right to sell them). In the case at hand, the UOKiK considered that AmeriGas exercised these rights, e.g. by blocking the sales of an organized part of the assets of Gas Distribution Center, and therefore, a notification was required.

In December 2019, the UOKiK also issued two decisions imposing fines for alleged gun-jumping. Both cases were local: one concerned a deal between a local supermarket chain and its franchisee; the other, Polish state-owned companies. The fines were quite small, particularly when compared to the fines imposed in the Nord Stream cases.

The first case involved controversial questions relating to the interpretation of the notion of a notifiable concentration, and is relevant for transactions involving acquisition of assets and staggered acquisition of control.

The owner of supermarket chain Dino acquired land on which retail outlets had been built, as well as certain contracts and assets from its franchisee. The transaction was notified to the UOKiK, but the authority adopted an expansive

€50 million

A statutory fine of up to €50 million can be imposed for failure to provide requested information or for providing incorrect or misleading information

interpretation of the notion of "concentration." It found that the transaction had already been implemented when Dino acquired the land, reasoning that the land was the key asset in the supermarket business. The UOKiK cleared the acquisition and fined Dino PLN 100,000 for this infringement.

Earlier in 2019, the UOKiK also launched an investigation into the acquisition of a 40 percent stake in Eurozet, the owner of several Polish radio stations, by Polish media conglomerate Agora. The remaining 60 percent was acquired by a Czech investment fund.

The UOKiK is investigating whether Agora obtained control over Eurozet as a result of this transaction. In October 2019, Agora notified the UOKiK of the proposed acquisition of a remaining 60 percent stake in Eurozet, which would lead to its sole control of the company. The UOKiK launched a Phase II investigation into this transaction in November. In January 2021, the UOKiK has issued a blocking decision and prohibited the acquisition of Eurozet by Agora. According to the UOKiK, the concentration would have resulted in the development of a powerful radio group that would be able to limit competition on the market for radio advertising and broadcasting of radio programmes.

The UOKiK has also recently become very active in requesting Article 9 referrals in cases with a strong Polish element that are reviewed at the EU level. This is something that companies should keep in mind when notifying a deal with a strong Polish element in Brussels.

In the past couple of years, the UOKiK has submitted four referral requests under Article 9, three of which were granted. Notably, two of the Article 9 requests concerned the media sector, which, together with the Agora case, could suggest a particular focus on this market.

Impact on merging parties

Aside from the increased focus on procedural infringements, 2020 has largely been defined by the COVID-19 crisis, which has generally delayed merger control proceedings in Poland. During the spring, the deadlines for the UOKiK to issue decisions were suspended.

The authority has continued to accept merger control filings for review, but there were delays in obtaining clearance. Although deadlines were resumed in May 2020, some delays should still be expected.

Prior to the COVID-19 crisis, the pace of the UOKiK's work was satisfactory. Last year was a record year in terms of the number of merger notifications, with 278 notifications and 267 decisions issued.

Despite the increase in workload, the average duration of merger control proceedings completed in Phase I was 33 calendar days: the statutory Phase I deadline for the UOKiK to issue a decision is one month, but the clock is stopped each time the UOKiK issues a request for information (RFI), which may significantly extend the proceedings. For example, the longest Phase I case in 2019 lasted 202 days.

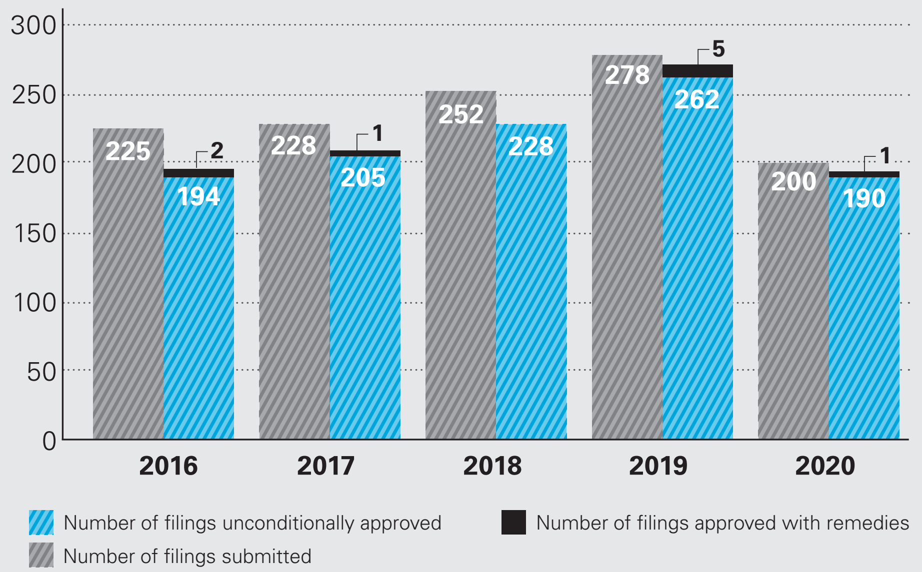
Phase II proceedings, by contrast, are significantly longer than the statutory review period, with the average duration of a Phase II case being 266 calendar days. Last year, the shortest Phase II case was 130 days, and the longest 381 days. As in other jurisdictions, the number of merger notifications in the last few months fell due to COVID-19 leading to fewer transactions.

The timeframe in which the UOKiK issues a decision heavily depends on the quality of a merger filing. Parties planning a notification should consider what types of issues the authority will have questions about, what elements should be explained in more detail, and what are the potential "grey areas" that have to be addressed.

There are certain important points that should be always kept in mind when drafting a filing. It should be clear and understandable to avoid potential information requests from the authority. In some instances, the case handlers have limited experience in dealing with a particular market or business sector and can ask additional questions if something is unclear, especially when the transaction concerns new

Merger filings at the Office of Competition and Consumer Protection

*as of 30 November 2020



or emerging markets that have not previously been analyzed by the European Commission or the UOKiK.

Gaps in documentation provided should be avoided, as the UOKiK takes a formal approach to filing. Parties should also be responsive to any RFIs and try to resolve as many issues as possible by email or phone.

Communication with the UOKiK is generally smooth, and direct contact with the case handler is possible by phone or email. However, when it comes to obtaining the UOKiK's official standpoint, for instance, with respect to the anticipated time for completing the merger review or potential queries, the authority is reluctant to provide information by email or phone. Instead, it sends official letters, which typically significantly prolongs the proceedings.

As a result of the COVID-19 outbreak, new foreign direct investment (FDI) rules were adopted in June 2020 and became effective on July 24, 2020. In addition to merger control, merging parties now need to take into account the new FDI rules each time they contemplate a transaction with a Polish element.

The new rules tightly regulate major acquisitions by foreign investors without a registered office in the European Economic Area or Organisation for Economic Cooperation and Development countries for at least the past two years.

The UOKiK will apply the new FDI rules, in addition to potential merger control rules, to transactions that involve the acquisition of control or a qualifying holding in a protected entity by a foreign investor. The new FDI rules protect companies registered in Poland, fulfilling one or more of several criteria.

These criteria include generating income in Poland of at least €10 million in at least one of the two preceding financial years; being publicly listed in Poland; holding assets classified as parts of critical infrastructure; being involved in the development or modification of important software; or operating in strategic sectors.

The new FDI law is supposed to remain in force until July 2022, although it could be extended beyond that.

> **"After submitting a notification, it is crucial to be proactively involved in the proceedings, establish a good working relationship with the case handler, and promptly reply to all queries raised by UOKiK**

The UOKiK is responsible for the enforcement of the new FDI rules and because there is an overlap between the monetary thresholds included in the new FDI rules and the merger control thresholds, the majority of cases requiring an FDI clearance would also be caught under the merger control rules. The UOKiK suggested that there would be close coordination between the two sets of proceedings, so there are likely to be longer waiting periods in cases requiring both merger control and FDI clearance, in particular before the UOKiK becomes more experienced in processing FDI notifications.

The FDI rules adopted in 2020 make the UOKiK's FDI clearance dependent on public interest issues, such as the impact of affected transactions on the public order, public security or public health in Poland.

FDI and merger control proceedings will both be handled by the UOKiK, and UOKiK officials have indicated that there would be close coordination between the two procedures, potentially even putting the same case handlers in charge of both processes. It would therefore not be surprising if cases requiring an FDI approval had a strong political dimension.

130 days

The shortest duration of merger control proceedings completed in Phase II in 2019

Recent changes in priorities

Unfortunately, only a handful of the UOKiK's merger decisions each year are accompanied by a detailed justification, making it hard to deduce any clear-cut trends or enforcement priorities. The UOKiK's decisional practice indicates that it is particularly cautious when reviewing cases on highly concentrated markets, in particular where the transaction results in a high combined share.

If there is a focus on specific industries, it is on sectors that are traditionally close to consumers, such as media, retailing, financial and insurance services and telecoms.

Most cases in 2020 show that the UOKiK is particularly focused on deals involving local markets such as retail markets for daily consumer goods or pharmaceutical products, or emerging markets that were not previously analyzed, such as e-commerce.

Similar to the national competition authorities in other EU Member States, the UOKiK frequently relies on European Commission decisions in determining the relevant markets in its merger proceedings. That said, the UOKiK is not bound by the market definitions established by the European Commission and, even in cases where the geographic market is eventually defined as broader than the national market, the UOKiK usually requests the notifying parties to provide separate data on areas like market share and competitors for Poland.

In several cases, such as the market for commercial real estate rental, the UOKiK decided to delineate the relevant market in a way that clearly diverged from the established line of European Commission decisions, arguing that unique, specific conditions justified a different approach.

Key enforcement trends

As in previous years, the vast majority of cases decided in 2019 were unproblematic. The UOKiK initiated Phase II procedure in only 11 cases. Five conditional clearance decisions were issued in 2019 and one in 2020.

The number of conditional clearance decisions increased, compared with previous years—no conditional clearance decisions were issued in 2018, one conditional clearance decision was issued in 2017, and two conditional clearance decisions were issued in 2016- which may suggest that the UOKiK is more open to finding a solution. Blocking decisions are very rare and there have been no such decisions in 2019 or 2020. One blocking decision was issued in 2021 so far (see the Eurozet/Agora case).

Like other enforcers, the UOKiK prefers structural over behavioral remedies. Many of the transactions conditionally approved by the UOKiK in 2019 and 2020 involved local markets and the remedies were divestments in local markets with the largest combined share.

An interesting example is the Vectra/Multimedia Polska case, cleared conditionally by the UOKiK in January 2020. The case involved the acquisition of fixed-line telecoms provider Multimedia Polska by its competitor Vectra. Remedies imposed involved the sale of overlapping operations in eight towns. In another 13 municipalities, Vectra agreed to allow the customers of the merged entity to change operators before the expiry of their existing contracts.

But the UOKiK can be creative in remedies cases. For instance, in 2019, the UOKiK conditionally cleared a merger between multiplex cinema operators Multikino and Cinema 3D. To address the UOKiK's concerns regarding one local market, Multikino committed not only to selling one 3D multiplex cinema to a suitable purchaser, but also to ensure contractually (subject to the UOKiK's approval) that the buyer would run the cinema at least until 2026.

The remedy accordingly went beyond a divestment and obliged Multikino to contractually warrant future conduct. Such interference in the independence of the remedy taker post-divestment will inevitably complicate the remedy implementation.

Another noteworthy case concerned the acquisition of ACP Europe and Eurocylinder by Air Products & Chemicals, which was cleared subject to behavioral and structural commitments. Interestingly, one of the commitments requires the purchaser not to charge Polish wholesale customers prices for liquid CO^2 higher than the maximum prices set according to a specific algorithm. The remedy is effectively a form of price regulation.

Remedy cases typically involve a very lengthy review. For example, in the Vectra/Multimedia Polska case, the review process lasted close to one-and-a-half years. Unlike in the EU and in some other jurisdictions, there is virtually no scope for obtaining a conditional clearance in a Phase I review in Poland.

Recent studies and guidelines

The UOKiK had not, at the time of writing, published any studies or guidelines that directly concern merger control. The authority is now also in charge of processing FDI notifications and it has issued guidelines that aim to clarify the FDI rules adopted in 2020.

Last year was also marked by the resignation of UOKiK president Marek Niechciał in December 2019 after three-and-a-half years in the role. He was replaced by former UOKiK vice-president responsible for consumer protection, Tomasz Chróstny, who joined the authority in August 2019 from the Ministry of Entrepreneurship and Technology, where he served as director of the Department of Economic Analysis.

It remains to be seen whether this will lead to any changes in the UOKiK's review of merger cases.

Looking ahead

The UOKiK has not announced any expected changes to merger control rules for the near future. However, some procedural changes will likely be adopted, as the UOKiK is currently in the process of preparing the implementation of the ECN+ Directive.

Broadly, it would be good to see the UOKiK providing greater clarity in relation to best practices with respect to pre-notification and consultations in cases where it is not entirely clear whether the transaction is caught under the merger control rules.

There is currently no guidance on the pre-notification phase in Poland and it is also difficult to obtain any guidance from the authority as to whether the transaction is notifiable. While certain informal consultations

> "Some procedural changes to merger control will likely be adopted in the future, as the UOKiK is currently in the process of preparing the implementation of the ECN+ Directive

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After submitting a notification, it is crucial to be proactively involved in the proceedings, establish a good working relationship with the case handler, and promptly reply to all queries raised by the antitrust authority

with the UOKiK are possible before submitting a notification, this method of cooperation has limited efficiency.

The UOKiK is rather reluctant to take any decisive approach before a filing, especially in borderline cases. Therefore, at the end of the day, it is often up to the notifying party and its counsel to decide whether a notification is required.

Another problem that would be good to solve is jurisdictional thresholds, in particular as applied to extraterritorial joint ventures (JVs). Under Polish merger control rules, both full-function JVs and non-full-function JVs must be notified to the UOKiK.

Jointly established undertakings might be subject to notification even if they are solely controlled by one of the parent companies. Additionally, according to the UOKiK's merger control guidelines, a JV transaction could be caught under Polish merger control rules if at least one of the parent companies generates turnover in excess of €10 million in Poland.

In consequence, transactions that have no meaningful nexus to the Polish market, such as the establishment of a JV responsible for the construction of an electric plant in Japan, may require Polish clearance.

It would be helpful to adjust the thresholds to consider the geographic scope of the JV's activity. It would also be desirable to bring the approach to non-full-function JVs and JV transactions that do not involve the acquisition of joint control more in line with the rules applicable at the EU level and other European jurisdiction.

THE INSIDE TRACK QUESTIONS

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

Such transactions often require the assistance of a skilled team of antitrust advisers. This ensures that the client is properly advised and assisted in the conduct and coordination of a detailed and timely review of merger control issues in various jurisdictions.

The adviser's local footprint also ensures that the client is smoothly guided through and alerted to antitrust risks that may jeopardize the completion of the transaction. It is important to ensure coherence between filings in various jurisdictions, while taking into account local differences and the fact that national competition authorities might communicate with each other in ongoing proceedings.

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

Achieving quick clearance requires a clear and informative merger notification that is supported with convincing evidence proving that the transaction would not lead to competition concerns. This requires not only an in-depth knowledge of the transaction dynamics, but also efficient cooperation between different teams of advisers and smooth communication with the client.

After submitting a notification, it is crucial to be proactively involved in the proceedings, establish a good working relationship with the case handler, and promptly reply to all queries raised by the antitrust authority.

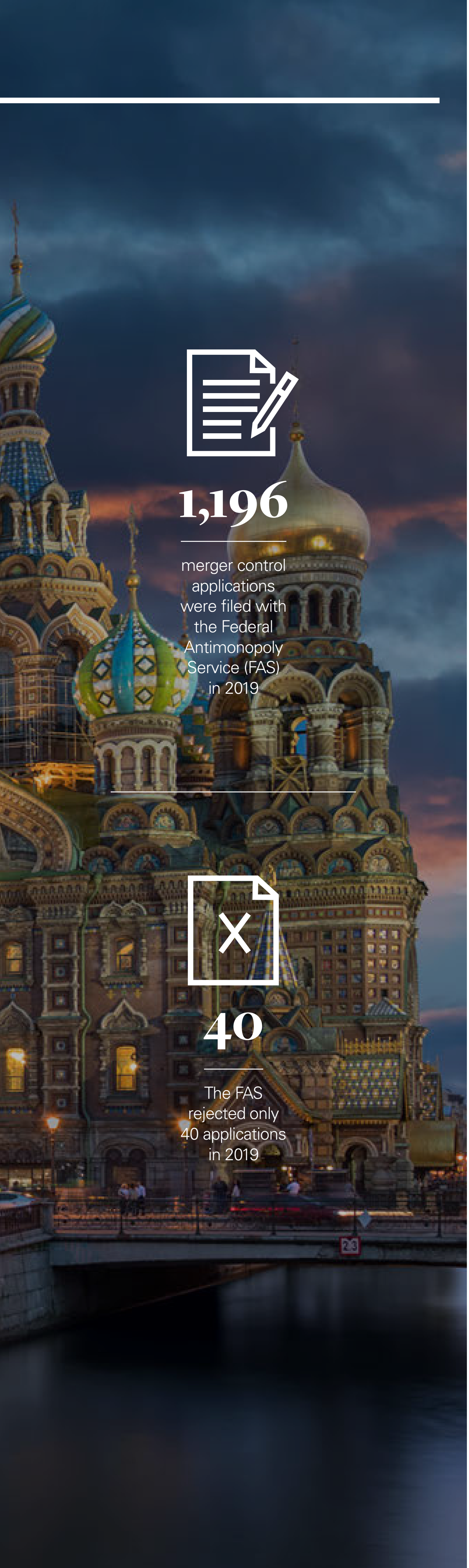
What merger control issues did you observe in the past year that surprised you?

The very high fines imposed in the Nord Stream 2 case, both for procedural violations on Engie and Gazprom, and for gun-jumping on all members of the Nord Stream 2 investment, were surprising. It is worth noting that the fines for gun-jumping imposed in the Nord Stream 2 case were the highest financial sanctions available to the UOKiK, equaling, in case of each undertaking, 10 per cent of its annual turnover (a fine of more than PLN 29 billion was imposed on Gazprom). The fines imposed in the Nord Stream 2 case were also the highest individual fines in the UOKiK's history for both procedural and substantive infringements.

LON1020063_PL_10

Global merger control: Russia

Protection of the public interest remains a priority for the Federal Antimonopoly Service (FAS), and since merger control is directly interconnected with control of foreign investments, including into "strategic" sectors, strengthening control in this sphere inevitably affects the merger control process and trends



1,196

merger control applications were filed with the Federal Antimonopoly Service (FAS) in 2019

40

The FAS rejected only 40 applications in 2019

Russia

By Igor Ostapets

Key developments

There were no specific significant transactions that were reviewed by the Federal Antimonopoly Service (FAS) in 2019, and the FAS did not have a particular focus on any specific spheres, as far as merger control is concerned.

That said, protection of the public interest remains a priority—and since merger control is directly interconnected with control of foreign investments, including into "strategic" sectors—strengthening control and increased activity of the FAS in this sphere inevitably affects the merger control process and trends.

Because of this, the FAS has become more active in the courts, enforcing foreign investment laws. One major development was the confirmation by the Constitutional Court of the FAS's extensive interpretation of one of "strategic" activities — geological studies at, and exploration and extraction of minerals from, subsoil plots of federal significance —which can affect mergers involving foreign investors and Russian targets operating in this sphere.

There was also an increase in the number of referrals of merger filings to the prime minister for his decision on whether or not to conduct a full-scale foreign direct investment (FDI) review of the transaction, a process that was introduced in 2017. Back then, the FAS said that this right would be invoked in rare, exclusive cases only, but in the past year the authority has referred more cases than before to the prime minister.

Otherwise, the FAS continues to develop its digitalization strategy, although the adoption of the fifth "digital" package of amendments to the Competition Law is moving quite slowly. At the time of writing, it is still with the government and has not yet been submitted to the State Duma for review. Similarly, a promised procedure for online submission and review of merger control applications has not yet been adopted.

Impact on merging parties

There is a growing tendency towards (sometimes excessive) formalism by FAS officials, as well as the extension of terms for review of applications. This of course varies according to the specific transaction at hand and on the department at the FAS that is responsible for applications. Some of them are generally slower and reluctant to communicate; some are willing to cooperate and work quickly. However, most of the transactions we filed in 2019 and 2020 did not receive approval within the initial 30-day period.

The COVID-19 pandemic to some extent contributed to this. For one thing, the FAS stopped accepting merger control applications filed in person through its incoming correspondence office. There is now a dedicated drop-box for applications and the registration number for the application would be known the following day, rather than immediately as previously.

Similarly, the FAS stopped hand-delivering decisions and said they would be sending these by email, for applications not marked as confidential, or by mail. While the process is smooth for applications not marked as confidential, for confidential ones it can sometimes become complicated.

In the case of confidential applications, the FAS will not provide any information on the status of an application by phone and refuses to send documents by email, even to the authorized representative whose details were provided in the application, so the applicant is effectively put in an information vacuum as to the status of review of its application. Clients are therefore told not to mark applications as confidential unless strictly necessary, or to be prepared for a longer timing for the application review.

Additionally, in the wake of the Bayer-Monsanto merger, the FAS has been trying to investigate the digital aspects of all major transactions. As the FAS clarified following its review of that deal, the pure combination of the market shares of Bayer and Monsanto on the markets of seeds and plant protection products did not give rise to dominance issues. What triggered the FAS's concerns was the parties' combined knowledge and power in technology, digital agriculture platforms and package solutions in the agricultural sector involving a digital aspect.

In cases following the Bayer-Monsanto deal, the FAS has started trying to identify the digital solutions being offered by parties.

Recent changes in priorities

While the FAS does not seem to be politically influenced as far as merger control is concerned, public interest is taking on increased importance, and in most cases serves as a trigger for delays in merger reviews.

It is more difficult to get approval for transactions where a target is in an industry that is of special interest to the state, and which therefore is "on the edge" of merger control and foreign investments regulation—such as pharma, production of equipment or tools and rendering services for the development of subsoil fields, the chemical industry, or IT solutions for state-owned companies.

In these sensitive industries, the review will most likely be extended and merger control approval is highly unlikely to be issued within the 30-day Phase I period, even if the transaction does not pose any competition concerns. This is because the FAS will investigate internally—and possibly with the involvement of other governing bodies, including those that are usually involved in the FDI review process, such as the Federal Security Service—as to whether the transaction poses any sensitivity for the state and requires a full-scale FDI review.

One of the triggers for extended review is the FAS's invoking the prime minister's right as the chairman of the Government Commission on Control over Foreign Investments to decide that the full-scale FDI review is required with respect to any transaction by any foreign investor with regard to any Russian company, if this is needed for the purpose of ensuring national defense and state security.

Recent experience indicates that the FAS has been using this procedure more frequently for transactions that were filed as part of the regular merger procedure. Practically, going through this procedure is extremely time-consuming. The FAS must first receive information on the transaction, conducting at least a preliminary review and assessment of the merger control application; form a position on the transaction's sensitivity, and obtain opinions on this from various governing bodies; and only then send the materials for the prime minister's review. There is no statutory period for this stage.

99

In 2019, the FAS issued conditional decisions in only 99 cases

If the prime minister decides that an FDI review is needed, a full-scale filing needs to be prepared and filed with the FAS, with the review taking not fewer than three, but more often six or more, months. The review of the merger control application is suspended for all these months of the pre-FDI and the FDI review processes.

Also notable is other FAS activity on enforcement of the foreign investment laws, which can affect the merger control process for applications filed with respect to targets not necessarily "strategic" but considered as such by the FAS in the course of review.

In particular, the FAS has been extensively interpreting "geological studies at, and exploration and extraction of minerals from, subsoil blocks of federal importance" as a strategic activity. Following the adoption of the foreign investments regulation back in 2008, only companies with a license for development of subsoil blocks of federal importance, such as oil fields with a certain size of reserves, uranium mines, and subsoil blocks subject to exploration within a defense and security zone, were considered "strategic" companies. Acquisition of control over these by a foreign investor would trigger the FDI review.

Later on, the FAS, while considering merger control applications with respect to specific transactions, established that drilling on subsoil blocks of federal importance, as well as provision of equipment for the purposes of exploration for oil at such subsoil blocks, are also considered strategic activities, so entities involved in these activities should also qualify as strategic.

In one of the 2020 cases the FAS established, and the Constitutional Court confirmed, that oil extraction is a complex process. Accordingly, oilfield services in general, if provided on subsoil blocks of federal importance, and have as their purpose either geological studies or extraction of minerals (meaning, that these would not be completed without such services), are considered strategic activities. Thus, entities providing such services for the purposes of development of such subsoil blocks are also strategic.

Key enforcement trends

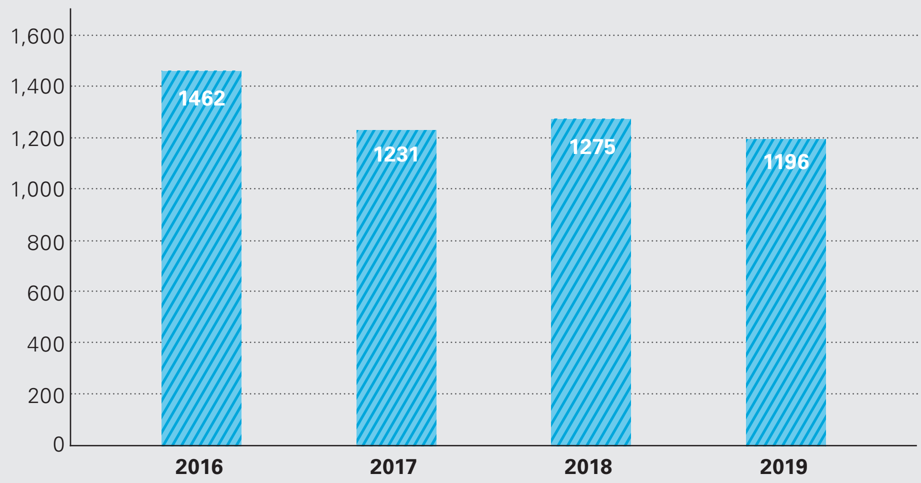
Generally, the FAS is not particularly demanding in terms of requesting divestments and other remedies, even for large transactions. Bayer's 2018 Monsanto acquisition remains the unique example of a deal in which the FAS requested serious remedies.

Otherwise, if the aggregate market position of merging entities triggers any competition concerns, the FAS usually issues conditional approvals, for example approvals with attachment of orders on the acquirer and its group (or, more rarely, to the target) listing measures aimed at securing competition on the relevant market.

Such measures typically include an obligation not to terminate contracts with respect to specific products or services or with specific customers; not to increase prices for specific products or services, or report to the FAS on any such increase; or not to discriminate among customers.

There have been several examples of orders that lacked proper justification for their issuance. Instead of itself finding

Number of filings submitted to the Federal Antimonopoly Service



> While the FAS does not seem to be politically influenced as far as merger control is concerned, public interest is taking on increased importance, and in most cases serves as a trigger for delays in merger reviews

the parties dominant on the market post-transaction, the FAS stated that the order shall be complied with "in case of parties' dominance on the market". Considering that in Russia the FAS has exclusive competence to assess entities' dominance in the market, orders of such kind create extreme uncertainty for their recipients.

According to FAS statistics, of 1,196 merger control applications filed in 2019, the FAS rejected only 40 (4 percent) and issued conditional decisions in only 99 cases (10 percent). The remaining applications received unconditional approvals.

The highlight of the deals blocked by the FAS is the acquisition by taxi aggregator Yandex.Taxi of Russian taxi provider Vezet, which the FAS refused in June 2020. Back in 2017, the FAS issued a conditional approval of the merger of Yandex.Taxi and Uber, allowing the creation in the market of a powerful combined taxi aggregator.

While reviewing the Yandex.Taxi/Vezet deal, the FAS concluded that the merger would enhance Yandex's dominant position in the market of taxi services. The aggregate market share of the merging companies would amount to 70 percent in the federal Russian market, plus more than 80 percent in 19 local markets, and more than 50 percent in 32 local markets.

Recent studies and guidelines

A remarkable development in the merger control sphere is the joint effort of the FAS and the Association of Antimonopoly Experts (AAE) to draft the full-scale Merger Control Guidelines addressing all aspects of the merger control process, with the aim of clarifying existing controversial issues.

The work started in spring 2019 and is now in its final stage. The FAS has shown great willingness to cooperate and to contribute to the drafting of the voluminous document, and there have been numerous meetings between the AAE working groups and representatives of various departments of the FAS with different levels of seniority.

During these meetings, FAS staff have been open to discussion, devoting considerable time to negotiating controversial issues and trying to form a unified position. The work has been supervised by FAS deputy heads Andrey Tsyganov and Sergey Puzyrevsky, while legal department head Artem Molchanov and deputy head Mariana Matyashevskaya led the drafting work on the FAS side.

In addition to this, the FAS also continued its work on enhancing cooperation with competition authorities in other jurisdictions while reviewing global mergers. For this purpose, the FAS adopted guidelines establishing the procedure for issuance of confidentiality waivers by parties to a transaction that is being reviewed by several competition authorities.

Such waivers would allow the FAS to exchange information on the transaction with other competition authorities and look set to have immediate practical application.

Looking ahead

The introduction of the full-scale online review as announced by the FAS would be welcome. This would facilitate filing preparations and communications with the authority, especially during these times affected by the COVID-19 pandemic. The relevant legal acts, however, have not yet been developed at the time of writing.

No significant changes to merger control regulation and process are expected until the fifth "digital" package of amendments to the Competition Law is adopted. Back in 2018, the FAS expressed a view that the package would be adopted by the end of 2020. However it has not yet been submitted to parliament.

THE INSIDE TRACK QUESTIONS

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

The most critical are timing and process organization. In Russia, filing is quite a formalistic procedure, so the client needs to reserve sufficient time to properly prepare the necessary documents, including those requiring notarization and apostille, as well as other materials, to avoid the package being treated as incomplete and returned to the parties or the review being extended due to bureaucratic reasons.

Other essential aspects are proper multi-jurisdictional assessment, which is important even for purely Russian deals, as the worldwide activities of a Russian-based group can trigger filing requirements outside Russia, and the analysis of the FDI aspects of the planned transaction.

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

A thoroughly prepared filing and good communication with the FAS during the review are key. The FAS has often attached particular importance to a detailed description of control over the acquirer, including disclosure of ultimate beneficial owners.

It is important to get to the FAS's questions quickly—preferably before or without issuance of a formal request for information—and to answer them quickly. The FAS has its own procedures and timing and, in this sense, parties should be willing to help them complete their review quickly. Here, marking applications as confidential may negatively impact communications with the FAS and timing.

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

Back in 2013, the FAS adopted guidelines for assessment of joint ventures containing non-compete undertakings. The guidelines, similar to EU practice, allowed such undertakings, subject to certain criteria.

In one of the transactions we worked on in 2020, we saw that certain FAS departments still have a negative approach to such undertakings, and intended to order their removal from transaction documentation, despite their alignment with the guidelines. Such absence of a unified position on the issue FAS itself had clarified was surprising. Fortunately, we managed to persuade the department that the guidelines needed to be followed.

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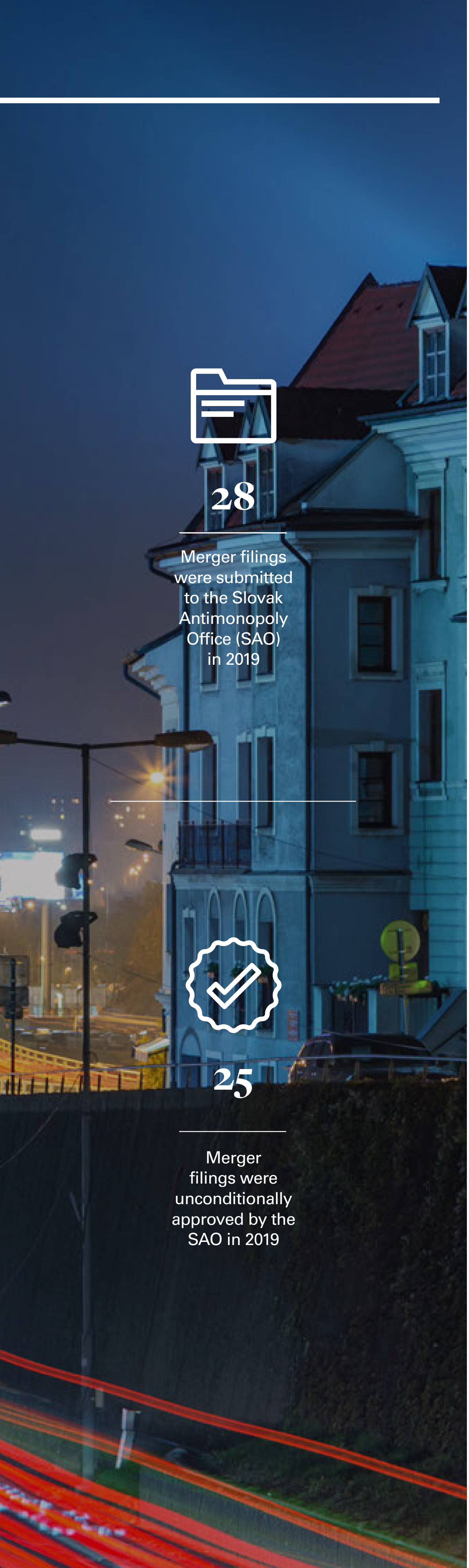
Global merger control: Slovakia

The Slovak Antimonopoly Office (the "AMO") continues to be particularly diligent in its review of mergers in markets with a possible impact on consumers and has increased its focus on the ownership of data and the competitive advantage that may accrue from gaining access to or the merging of significant data pools



Slovakia

By Michal Pališin and Martin Melicher

Key developments

Although deal flow has certainly been affected by the COVID-19 situation, resulting in the notification of a significantly lower number of transactions in 2020 and 2021 so far, this has not had a major impact on the merger clearance process or its timing.

From the substantive point of view, as in previous years, the AMO continues to be particularly diligent in its review of mergers in markets with a possible impact on consumers, such as retail and healthcare. To a certain extent, this corresponds with the enforcement priorities of the AMO published in April 2020, which included healthcare, e-commerce, the sale of motor vehicles and information systems.

The AMO also increased its focus on the review of aspects related to the ownership of data, including client databases and the competitive advantage that may accrue from gaining access to or the merging of significant data pools.

Apart from the above, the AMO continues to pursue gun-jumping cases even in less obvious contexts, such as the acquisition of minority non-controlling stakes as part of single transactions involving the subsequent acquisition of control. Gun-jumping also continues to be among the published enforcement priorities of the AMO.

The focus on gun-jumping is associated with another notable trend that sees the AMO increasingly scrutinizing the ownership background of parties to a transaction. This can happen when a transaction is repeated in a modified party set-up after the previous deal was blocked or about to be blocked. The AMO is also ready to act ex officio based on information published in the media and to obtain information from other public authorities, which may be important for its assessment of the case.

In addition, a revamp of the Slovak merger control regime has been approved and becomes effective on 1 June 2021. Among other goals, the AMO, as the main author of the new legislation, has introduced an abolition of the notification obligation regarding the establishment of foreign-to-foreign joint ventures not involving contribution of assets with activities in Slovakia and commencement of clearance periods only on the date on which the AMO deems the filing complete.

Impact on merging parties

Careful preparation and an upfront assessment of effects is required for mergers in sectors with significant impact on consumers, or where a party holds extensive data involving more substantial overlaps. This includes an analysis of narrow local markets, which the AMO is likely to review. It may also be useful to consider the preparation of solid economic evidence to support the case.

The timing of reviews is generally predictable, following prescribed statutory deadlines once the AMO is satisfied with the completeness of the filing and has obtained sufficient understanding of the transaction and its impact through the pre-notification process.

However, the breadth and depth of information requested during the pre-notification stage significantly vary, and the pre-notification stage can exceed the statutory deadline for a Phase I review by several multiples. The timing of the pre-notification process substantially depends on the complexity of the case and the case team's workload.

Case handlers are generally cooperative, yet in complex, borderline cases it may still be difficult to predict the outcome, especially if the parties are not prepared to readily offer structural remedies. The AMO has traditionally been very reluctant to accept behavioral remedies.

Generally, in more complex cases, it is advisable to start the pre-notification as soon as possible, subject to a sufficient level of analysis and strategy preparation. Furthermore, if market research is anticipated, it may be worth trying to agree with the AMO to conduct the research, at least partially, in the pre-notification phase.

Given the increased focus of the AMO, as well as other competition authorities, on gun-jumping, substantial attention must be paid to the structuring of the transaction, including the formulation of pre-completion or interim covenants to prevent the emergence of control before obtaining merger clearance.

Recent changes in priorities

The AMO has increased its focus on the competition implications of merging or acquiring significant data sets including consumer databases. It dealt with them in a more or less comprehensive manner in multiple merger cases in 2019 and 2020 spanning diverse sectors.

Since gun-jumping remains a priority, the AMO has also confirmed that it is ready to pursue such cases in less obvious contexts, such as the acquisition of minority non-controlling stakes as part of de facto single transactions involving the subsequent acquisition of control.

Key enforcement trends

In general, self-instigated third-party interventions and challenges are very rare in Slovakia. More often, competitors voice their concerns over a particular case during market research, which is routinely conducted by the AMO, even in less problematic cases. Prohibition decisions and even conditional clearances are also relatively rare in Slovakia and in fact, no such decisions were issued in 2019, in 2020 or so far in 2021.

However, in an attempted acquisition of alternative postal operator Cromwell by Tatra Billing, PMK Invest and Copy General International, a prohibition decision was imminent before the parties withdrew the filing.

Although the details of the reasons that led to the finding of a threat of significant impediment to competition were not included in the termination decision, it appears that the merger raised horizontal concerns primarily on the printing and mailing markets, on which both Tatra Billing and Cromwell were active. Furthermore, apparently the parties were not ready to offer remedies and decided to withdraw the filing.

In any event, PMK Invest (together with Media IN) later applied for a clearance of the transaction without the participation of Tatra Billing, and this modified deal was cleared without remedies. Nevertheless, according to the decision, the AMO also scrutinized the buyers' ownership background to ensure that they were not connected to Tatra Billing.

Meanwhile, in the precedent-setting decision concerning Grafobal Group Development's acquisition of a 49 percent stake in a subsidiary of water utility company BVS, the AMO presented its view regarding the context in which the preparatory steps leading to a concentration may already constitute a premature implementation of a merger in breach of gun-jumping rules. This is of significant importance for both transactional and competition lawyers, who will need to take this into account when structuring transactions.

In brief, in the AMO's view, even the sole step of acquiring a minority, non-controlling stake preceding the subsequent full acquisition of control—for example, based on the fulfillment of precedent conditions may constitute a notifiable transaction if it can be proven that this step has a common economic aim of a subsequent acquisition of control, and therefore forms a single transaction.

Recent studies and guidelines

However, a significant revamp of the Slovak merger control regime has been approved and becomes effective on 1 June 2021.

Looking ahead

As indicated above, a revamp of the Slovak merger control rules has been approved in its final form and becomes effective on 1 June 2021 (further as the "New Competition Act"), which replaces the previous Act on the Protection of Competition, having been prepared in connection with the implementation of the European ECN+ directive (Directive (EU) 2019/1) aimed at making national competition authorities more effective enforcers.

Originally, the text of the draft suggested the introduction of far reaching changes (including a new notification threshold for catching off-radar transactions). However, some of those changes were dropped and only a few limited changes were kept. In this respect, the draft bill originally included a new notification threshold to cover off-radar transactions that could have had a significant impact on competition in Slovak markets, but this was removed due to numerous objections in the interdepartmental review. However, the AMO stated that it may introduce a somewhat similar amendment in the future.

Nevertheless, the New Competition Act includes the abolition of the notification obligation regarding the establishment of foreign-to-foreign joint ventures without activities in Slovakia.

The New Competition Act further introduces a mechanism subjecting a concentration that would not have met the notification thresholds due to a decrease in revenues in the relevant accounting period caused by COVID-19 to merger clearance, provided that the thresholds would have been met for an accounting period preceding the accounting period affected by the pandemic.

Furthermore, the review periods will begin only on the date on which the AMO deems the filing complete.

Apart from the merger control-related amendments, the New Competition Act also covers other major changes with respect to the liability regime, including the introduction of the concept of joint and several administrative liability for payment of the fine for the members of the undertaking's group subject to proceedings, and the possibility to impose sanctions on an undertaking-wide basis (in particular, in the merger control context).

The New Competition Act also includes transitional provisions, based on which the proceedings on the notification of a concentration commenced pursuant to the previous legislation will be terminated if such notified concentration is not subject to the merger control pursuant to the New Competition Act.

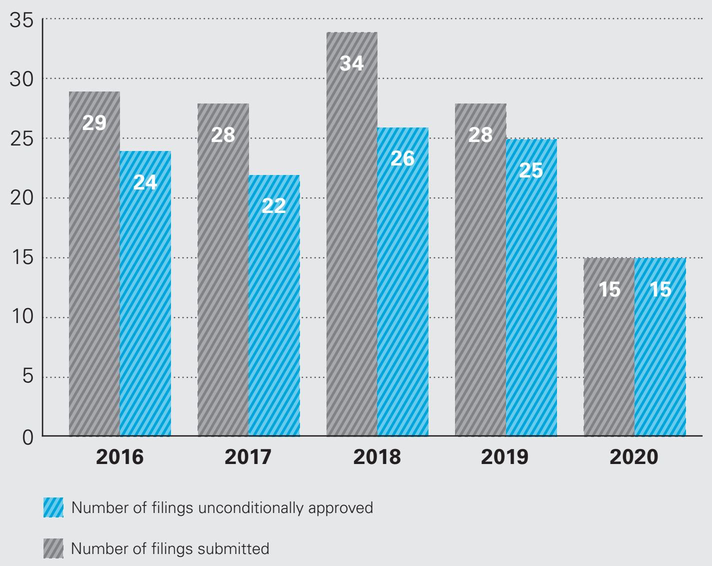
Outside of the framework of the contemplated legislative changes, the predictability of the outcome of a review in more complex cases could be increased.

In particular, if there are any substantial concerns that may jeopardize a transaction's approval, such concerns should be clearly voiced and substantiated at the latest in the notification prepared by the AMO for the commencement of Phase II. Sometimes these notifications are too vague to allow parties to adequately predict the developments in the case and reconsider further approaches before the end of the proceeding.

Furthermore, the introduction of a fast-track dispute resolution procedure, at least with respect to procedural or less important substantive matters, would be much appreciated from a procedural efficiency point of view. This could be comparable to the role of a hearing officer in proceedings conducted by the European Commission.

Without such a fast-track procedure, notifying parties do not have an effective and timely way to address actions affecting their rights in the course of the clearance process when such protection is needed, taking into account the generally very challenging clearance deadlines imposed under transaction documentation.

Merger filings with the Slovak Antimonopoly Office



THE INSIDE TRACK QUESTIONS

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

Engage an experienced counsel who routinely handles and manages multijurisdictional mergers to prepare a solid multijurisdictional analysis to identify the affected jurisdictions and to define a commercial risk-based filing strategy. Give handling of the filing to a single managing counsel to ensure consistency and a uniform approach in the relevant jurisdictions.

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

The involvement of an experienced merger control adviser from the very beginning of the transaction certainly makes a difference. Moreover, crucial aspects also include a thorough preparation, including a review of approaches to similar cases in other jurisdictions, and prior consultation with economists specializing in competition law if the notification relates to a more complex case.

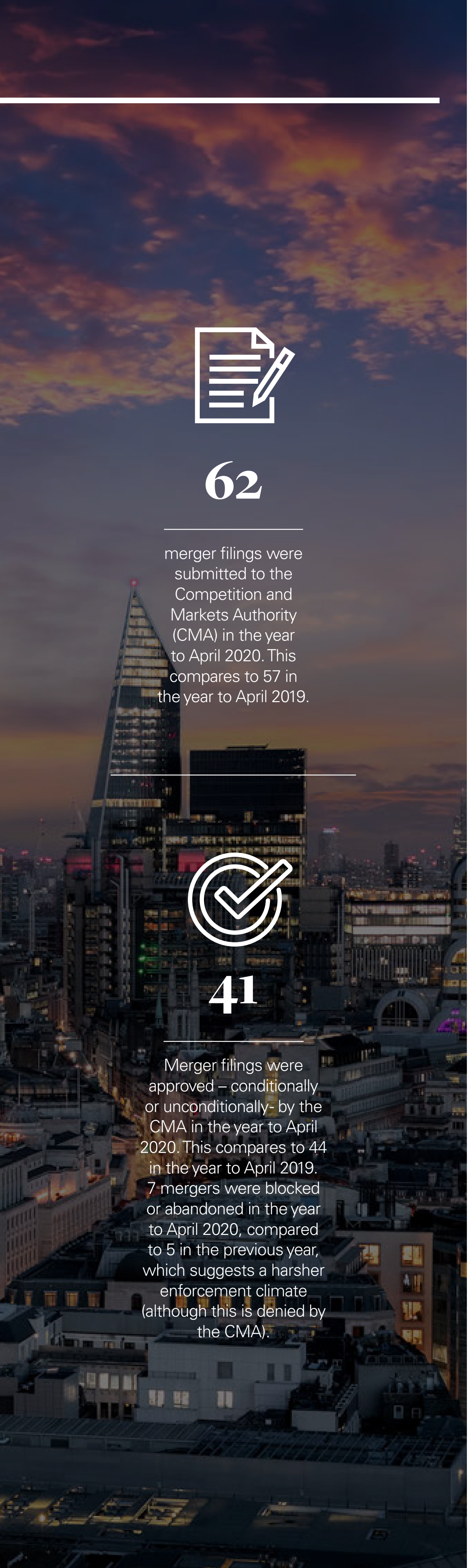
Counsel should also establish a good and proactive working relationship with the case team, devote time to describe the markets and the parties' activities in them—especially if the AMO does not know the relevant markets well—and be ready to push back on potentially unnecessary requests for information.

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

Although not entirely surprising, the gun-jumping decision in the Grafobal Group case showed that the AMO is up-to-speed with current merger control trends and serious about gun-jumping issues despite their novel contexts.

Global merger control: United Kingdom

There have been several interesting developments in merger control in the UK over the past year, including the official separation of the UK from the EU merger control regime and the proposal of a new national security regime that will see notification for certain transactions become mandatory in the UK for the first time.



62

merger filings were submitted to the Competition and Markets Authority (CMA) in the year to April 2020. This compares to 57 in the year to April 2019.

41

Merger filings were approved – conditionally or unconditionally- by the CMA in the year to April 2020. This compares to 44 in the year to April 2019. 7 mergers were blocked or abandoned in the year to April 2020, compared to 5 in the previous year, which suggests a harsher enforcement climate (although this is denied by the CMA).

United Kingdom

By Marc Israel, Mark Powell, Kate Kelliher

Key developments

There have been several interesting developments in merger control in the UK over the past year. These developments include cases where the Competition and Markets Authority (CMA) has investigated mergers in cases that appear, at least on one level, to have limited connection to the UK.

There has also been greater enforcement of procedural matters such as alleged breaches of interim enforcement orders, colloquially known as "hold separate" orders.

A major development in merger control in the UK in 2020 was the expansion of the list of sectors in which the UK government can intervene on public interest grounds.

If jurisdictional tests set out in the Enterprise Act 2002 are satisfied, the government can intervene so that the merger is reviewed on public interest grounds, as well as on competition grounds.

Over the past year, as a result of the coronavirus pandemic, the range of public interest considerations (PICs) has been extended from the three PICs previously specified, which were national security, plurality of the media and stability of the financial system.

The Enterprise Act allows the government to specify additional PICs. In the same way that stability of the financial system was added as a PIC after the global financial crisis, the coronavirus pandemic has led the government to include another PIC, specified as "the need to maintain in the UK the capability to combat, and to mitigate the effects of, public health emergencies".

Changes culminated in November with the publication of the new National Security and Investment Bill (NSIB), which will create a stand-alone investment review regime for national security cases, completely divorced from competition law in the UK for the first time.

The other cases in which a PIC may be relevant – media plurality, financial stability and public health emergencies– will not change, and are linked to the Enterprise Act merger regime.

The NSIB, on the other hand, will be a separate regime, operating alongside the merger control regime. It will require mandatory notification for certain deals involving the acquisition of shares and/or voting rights in companies active in 17 designated sensitive sectors, including defense, energy, transport and artificial intelligence.

The regime will see such deals reviewed for potential national security concerns, with the Secretary of State for Business, Energy and Industrial Strategy (SoS) empowered to impose conditions on transactions, and potentially unwind or block them where sufficient national security concerns are unearthed. The new regime takes obvious inspiration from its US cousin, the Committee on Foreign Investment, although is arguably broader in certain aspects in that, as currently drafted, it will apply to all investors – not just those from outside the UK.

The scope of target companies that will fall within its auspices is also very broad as it is expected to apply to all companies in the sensitive sectors with sales in the UK, whether or not they are UK-registered or have an active presence in the country.

Of particular note is the retrospective power to review deals that have already been concluded. This means that although the NSIB has not yet entered into force, once it does, deals closed from 12 November 2020 will fall within its scope. In addition, once enacted, the law will allow the SoS to review deals that were not notified up to five years following completion. The UK Department of Business, Energy and Industrial Strategy ran a consultation on the scope of the sensitive sectors that will be subject to mandatory notification, which closed on 6 January 2021. In the meantime, the NSIB is making its way through parliament with adoption expected in the first half of 2021.

This interventionist approach is also evident in general merger control practice. For example, in Roche's acquisition of US gene therapy company Spark Therapeutics, the CMA was able to find that the share of supply test was satisfied, in spite of Spark having no UK sales. The CMA justified its finding on two grounds, based on the 'share of supply' test under the Enterprise Act. Firstly, the "number of UK-based employees" engaged in activities relating to hemophilia A treatments, and, secondly, the number of UK patents procured by the merging parties for these treatments.

Similarly, in connection with Amazon's acquisition of a 16% stake in Deliveroo, the CMA asserted jurisdiction on the basis that the minority stake gave Amazon 'material influence' over Deliveroo, and conducted an indepth review of the deal even though Amazon had exited the restaurant delivery market in the UK.

While both deals were ultimately found not to give rise to competition problems in the UK and were cleared accordingly, there are various cases from the past year in which the CMA's concerns resulted in a transaction being blocked.

In blocking the merger between Sabre and Farelogix, both of which supplied software solutions to help airlines sell flights via travel agents, the CMA found that the share of supply test was satisfied on the basis of revenue in the supply of IT solutions to UK airlines, even though Farelogix had an (indirect) agreement with only one UK airline.

The decision to block the deal came after the US District Court of Delaware had recently cleared it, ruling against the US Department of Justice, which had challenged the merger.

Another development in the past year has been the CMA's consideration of the effects of the coronavirus pandemic in reaching its decisions. The CMA has given careful consideration to the impact of the pandemic on the merging parties and competition in the relevant markets more generally. However, in no case has the CMA found that the impact of the pandemic was sufficient reason to clear a problematic merger, notwithstanding the severe adverse impact it has had on the target company. For example, the CMA blocked the acquisitions

> **"Internal documentary evidence has played an important role in the CMA's competitive analysis for some time now, and it's good discipline to ensure that all documents and emails are considered potentially disclosable**

£1 million

The UK government can invoke public interest considerations (PIC) to intervene in mergers in certain sectors if the UK turnover of the target is more than £1 million. These cases will fall under the new NSIB regime once it comes into force.

of Footasylum by JD Sports, and StubHub by viagogo, even though the pandemic has materially impacted on their businesses. In the Amazon/Deliveroo case, the CMA initially found that the pandemic would lead to Deliveroo going out of business but subsequently reversed that finding and ultimately concluded that the transaction would not harm competition.

Impact on merging parties

As has been the case for some time, internal documentary evidence has played an important role in the CMA's competitive analysis. However, the extent of requests for internal documents, including emails, has steadily increased even in Phase I investigations.

Relevant internal documents are typically those produced to inform business strategies, investment decisions and for general planning purposes. In the Sabre/Farelogix deal, internal documents provided an important insight into the parties' ability to compete, their perception of competitive threats and how this affected their strategic thinking. The documents were then used to support the CMA's theories of harm.

Similarly, the CMA examined a large number of internal documents in its investigation of Amazon's minority investment in Deliveroo. It focused particularly on the likelihood of Amazon re-entering the online restaurant delivery market; whether Deliveroo may have started to deliver more non-food items in competition with Amazon; and what future competition between the parties might look like.

These decisions show that the CMA views internal documents as a reliable way of gauging parties' intentions, both in the past and the future. Companies looking at potential mergers should put emphasis on document management, both in terms of information memoranda and other market-facing materials, but also with respect to internal communications, some of which will pre-date any merger plans.

It is good discipline to ensure that all documents and emails are considered potentially disclosable in future merger reviews and to draft clearly and unambiguously.

While economic evidence has always played an important role when assessing the likelihood and potential effect of competition issues in mergers, developments over the past few years suggest that greater account may be taken of merging parties' arguments on efficiencies. Nonetheless, it remains very difficult to convince the CMA that efficiencies are likely to outweigh any potential adverse impact on competition that it may have identified.

Although, post-Brexit, the CMA is no longer bound by rulings of the European Courts, their judgements may still be important. In a decision of the General Court in May 2020 its criticism of the European Commission for failing to take efficiencies analysis into account in its assessment of the merger between telecoms companies Three and O2, suggests that an increasing focus on efficiencies may be beneficial in complex cases – both when dealing with the European Commission and with the CMA.

The impact of COVID-19

Despite the global disruption caused by COVID-19, the CMA made it clear from the outset that there would be limited impact on its merger control operations.

In guidance released in April, the CMA set out some expected changes to its procedures. It said there would be a likely delay in certain aspects of investigations, particularly at the pre-notification stage; no imposition of penalties where businesses were unable to comply with requests for information as a result of the pandemic; and that all meetings—including hearings and site visits—would take place remotely.

However, no changes of substance were made. Notifications were still accepted, statutory deadlines for the CMA's work were unaffected, and there was no loosening of the standards applied.

In fact, the CMA, anticipating the likely deluge of "failing firm" defense claims, published specific guidance on this issue. This confirmed that the failing firm defense would only be accepted in exceptional circumstances, pandemic or no pandemic.

In the Amazon/Deliveroo case, the CMA's provisional findings, published at the height of the pandemic, found that Deliveroo would fail if it did not get the investment from Amazon, but subsequent evidence led the CMA to reverse its findings in the failing firm defense when it later cleared the transaction.

In practice, the pandemic has had little impact on the merger clearance process, both procedurally and substantively.

Recent changes in priorities

The publication of the new NSIB makes clear that national security is a top priority for government review. Numerous cases from the past year under the existing regime bear this out, including Inmarsat/Connect Bidco, Cobham/Advent and Mettis/Aerostar, all saw the SoS issuing a public interest intervention notice on national security grounds. These interventions tended, historically, to be made in the context of defense-related transactions, but now are being made in a wider set of circumstances.

This is further exemplified by the expanded list of sectors contemplated for inclusion in the new NSIB, including energy, transport, communications and artificial intelligence. Outside the investment review proposals, it is evident that the UK government is increasingly concerned with mergers in the technological and cyber spheres.

In addition, in May 2019, it commissioned an assessment to review previous decisions taken in the context of digital mergers, assess whether they were reasonable, and evaluate whether cleared mergers led to a deterioration in market conditions.

The review recommended actions such as the increased use of dawn raids in merger investigations to help predict the evolution of a business, something which is inherently tricky in the fast-moving technology world.

It also showed a greater willingness to accept uncertainty in counterfactuals, and a greater willingness to "test the boundaries of the legal tests and constraints" that regulators face.

In June 2019, the CMA then launched a call for information on digital mergers, to help it update the Merger Assessment Guidelines in the context of digital markets. The consultation focused on issues such as the relevant market features for assessing mergers in digital markets; how these features might impact the possible theories of harm; and the evidential weight that should be attached to internal documents indicating that the purpose of the transaction is to eliminate a competitive threat or a high transaction value relative to the market value or turnover of the target.

The results of the consultation are still pending at the time of writing. While concerns have been raised that some deals may be "killer acquisitions," the CMA has approved mergers after considering such concerns, such as Visa's acquisition of fintech network Plaid.

In that case, while the CMA found that Plaid would have been an increasing competitive threat to Visa in the future, sufficient competition would continue to exist post-merger from other suppliers and other types of services enabling consumer-to-business payments. The merger was ultimately abandoned when challenged by the Department of Justice in the US.

December 8, 2020

The CMA published the DMT's advice to Government

Digital markets more generally continue to be a focus point for the CMA. Following the publication of its market study report on online platforms and digital advertising in July 2020, in December 2020 the CMA published the advice produced by its Digital Markets Taskforce (DMT) to the Government on the design and implementation of the UK's new pro-competition regime for digital markets. The so called 'Strategic Market Status (SMS) regime' will apply to "the most powerful tech firms with substantial, entrenched market power where the effects of that market power are particularly widespread or significant. Overseeing the proposed SMS regime would be a specialist Digital Markets Unit (DMU) which would function as a "centre of expertise and knowledge" and a pro-active enforcer of digital markets. As far as next steps are concerned, the Government has committed to establish the DMU within the CMA from April 2021 and to consult on these proposals for a new pro-competition regime and legislate to put the DMU on a statutory footing when parliamentary time allows.

Key enforcement trends

Greater CMA scrutiny is certainly a notable trend, with the CMA's annual plan for 2020/21 noting an "unprecedented number" of Phase II merger investigations.

The CMA has not been shy about asserting its competence to review mergers that might appear, at first blush, to fall outside its jurisdiction — including both Roche/Spark and Sabre/Farelogix. In both cases, the target parties had minimal UK presence (and limited, if any, turnover in the UK), but the CMA asserted jurisdiction on the basis of the share of supply test, using frames of reference that the parties considered to be highly questionable.

This approach has led, in part, to an uptick in challenges to CMA merger decisions. For example, Sabre is challenging the CMA's prohibition decision, even though Farelogix has now been sold to another party. JD Sports is also challenged the CMA's decision that found that the completed acquisition of a rival, Footasylum, was anti-competitive and required the divestment of the Footasylum business, with the Competition Appeals Tribunal (CAT) remitting the case back to the CMA in December 2020 for reconsideration (the CMA applied for permission to appeal the CAT's judgement but the CAT denied this; on the 17 December 2020 the CMA renewed its application for appeal at the Court of Appeal – the case is ongoing). In another case, the CMA prohibited FNZ's acquisition of GBST, which it is now reviewing again after acknowledging some mistakes in the way market shares had been calculated – although it may still conclude again the merger ought to be prohibited.

There is no doubt that the impact of COVID-19 will also increasingly feature in merger review cases going forward. In both Sabre/Farelogix and JD Sports/Footasylum, the CMA acknowledged the impact of coronavirus on the parties' businesses, but ultimately found that the impact of the pandemic did not mitigate competitive concerns.

However, the pandemic did prompt the CMA to allow JD Sports additional time to sell Footasylum.

Likewise, in Amazon/Deliveroo the CMA's provisional findings indicated a willingness to accept that Deliveroo could potentially be facing a market exit due to the impact on its liquidity position caused by COVID-19. Ultimately, however, the CMA concluded that Deliveroo had managed to reverse its fortunes and the deal was cleared on the ground that it was not expected to result in a substantial reduction of competition.

2000

UK government estimates that there will be almost 2000 cases per year scrutinized under the National Security and Investment Bill (NSIB), with around 10 of these expected to result in some form of remedy

Recent studies and guidelines

The CMA's April 2020 guidance on merger assessments during the coronavirus pandemic confirmed that the CMA would not be changing the way it undertakes merger control assessments or any merger control deadlines, despite the outbreak. The guidance made clear that the CMA would be seeking to operate on a "business as usual" basis for merger control purposes.

The CMA also published supplemental guidance on the use of the failing firm defense, in anticipation of an increase in mergers involving failing firm claims. The guidance made it clear that there would be no change to the application of the defense, but noted that events that occur during the CMA's review of a transaction—including the impact of the outbreak on a firm's operations—can be incorporated into the assessment of competitive effects for merger control purposes.

In addition, the government published guidance following changes to the turnover and share of supply tests for the purposes of intervening in mergers in certain sectors. The guidance explains why the government amended the Enterprise Act, describes the legal and practical effects of the amendments, and offers advice to businesses and others about how they may be affected by the changes. Following this, the CMA published an update to its Merger Assessment Guidelines which explain the substantive approach of the regulator to its analysis when investigating mergers. The CMA notes that since the current guidelines were published (in 2010) markets have evolved and changed at a rapid pace. The central focus of that evolution appears to be on digitalisation with the CMA writing that the guidelines build on recommendations made by the Furman and Lear reports in 2019 on how the CMA should approach its assessment of digital mergers. The CMA writes that these changes have not introduced new theories of harm or economic principles in the field of merger control but they do suggest some development of them, for example, in expanding the section on "loss of future competition" (a theme particularly relevant in digital markets in relation to so called "Killer Acquisitions"). The consultation on the updated guidelines closed in January 2021 and are expected to be published shortly.

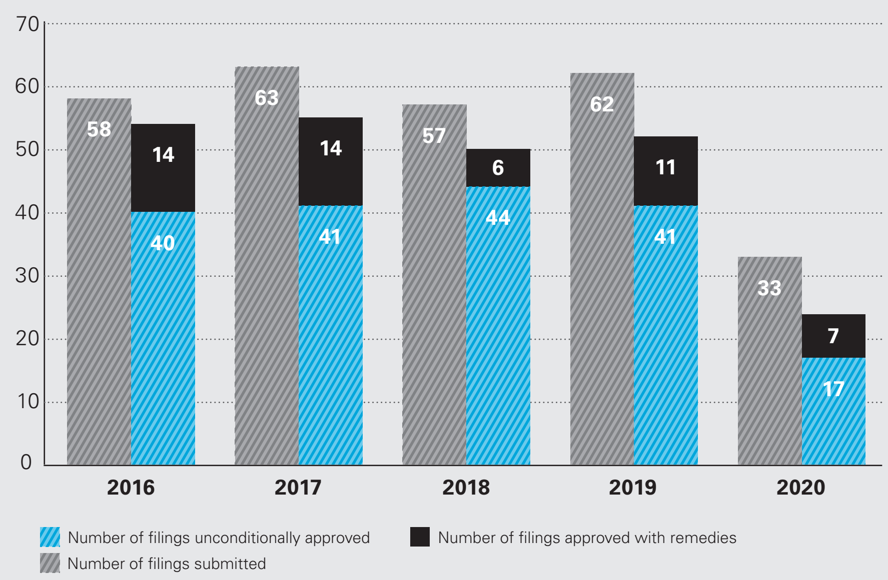
Looking ahead

The new NSIB regime is expected to lead to the mandatory notifications of around 1,000 to 2,000 deals a year with a further 70 to 95 transactions expected to be called in for review. As the existing regime under the Enterprise Act sees, on average, fewer than one intervention a year, the government expects interventions to be a much more common feature of the merger landscape.

Trigger events that will require the parties to notify their transaction under the NSIB will include acquisitions that bring a party's share of equity or voting rights over various thresholds of 15 percent, 25 percent, 50 percent or 75 percent, as well as the acquisition of material influence—for example through increased board representation conferring material influence over the company.

Under the NSIB the government will assess all national security issues under the new regime, which will operate separately from, but alongside, the Enterprise Act. Currently, when the SoS believes that a PIC arises, he or she instructs the CMA to investigate. The CMA then reports to the government on competition issues and also

Merger filings with the Competition and Markets Authority (CMA)



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The CMA will take on responsibility for merger cases that were previously reserved to the European Commission; typically, those are the larger and more complex cases. The CMA is ready for this challenge

summarizes representations on the public interest issue. Under the NSIB, the CMA would no longer have this role. However the CMA will continue to review mergers on competition grounds and also if the SoS intervenes in respect of other PICs under the Enterprise Act, namely financial stability and public health emergencies.

Other key changes in the proposed NSIB legislation includes the introduction of the ability for the SoS to intervene and review deals on national security grounds for up to five years, or—if the SoS is aware of the transaction— six months after they close. This compares to the CMA's ability to take action only up to four months post-completion under the Enterprise Act, a time limit that will continue to apply to the competition aspects of mergers even if the national security implications can be reviewed for up to five years post-closing.

Guidance from the government on the scope of the mandatory notification requirement under the NSIB regime will be welcome. In any event, it is clear that engagement with the government on cases in the designated sectors will be essential to ensure as smooth a regulatory process as possible.

Brexit

Following the end of the Brexit transition period on December 31,2020, UK turnover is no longer counted as EU turnover for the purposes of establishing which merger control authorities may have jurisdiction over the transaction. Consequently, some deals may now be notifiable in the UK as well as to the European Commission (or in certain EU Member States).

Since the conclusion of the Trade and Cooperation Agreement on Christmas Eve 2020, the UK is now the master of its own destiny when it comes to merger control. Deals that would previously have benefitted from the EU 'one stop shop' may now require notification under EU merger control rules and merit separate CMA attention meaning deal makers may now be facing parallel review by both authorities.

This also means an increased workload for the CMA. The CMA expects that this expanded responsibility will increase its merger workload by between 40 percent and 50 percent, with an additional 30 to 50 Phase I investigations and approximately six additional Phase II investigations each year.

Notwithstanding the CMA's autonomy over these cases it is expected that it will continue to work closely with the EU, and EU Member States, when considering the impact on competition of mergers, and the design of potential remedies that may be necessary.

THE INSIDE TRACK

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

For deals in potentially sensitive sectors such as cyber-related or artificial intelligence, clients should consider the proliferation of global foreign direct investment rules, including the new NSIB regime in the UK, as well as greater scrutiny of such deals under merger control regulations.

Even deals that pre-date the entry into force of the NSIB will be capable of retrospective review so investors should consider now whether their transactions could have potential national security implications.

Finally, clients should continue to be careful with the content of internal documents.

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

Navigating a smooth path through merger control approvals depends on various factors. These include being prepared and, where possible, doing as much work as possible upfront so you are ready to respond to questions from authorities. It also helps to think early about potential remedies even if you are confident that they will not be needed. In addition, to the extent possible, engaging with customers early on to determine their likely reaction and to be able to react to any concerns they may have is also very worthwhile.

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

The growing trend of the CMA to pursue procedural infringements, such as alleged breaches of "hold separate" orders or the provision of allegedly incomplete (or late) information in merger cases, has been notable. Even in cases that have been cleared, there is an increasing appetite to pursue companies for such alleged infringements.

While some cases appear clear-cut, others are more questionable. It is a wake-up call for both clients and advisers. On the other hand, the General Court judgment in Three/O2 about the standard of proof in oligopolistic markets is a welcome development that will have wide-reaching implications.

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Global merger control: United States

US antitrust agencies were active in merger enforcement in 2019 and 2020, reflecting the agencies' commitment to antitrust enforcement, particularly in transactions involving nascent competitors and technologies

United States

By Noah Brumfield, Rebecca Farrington, Anna Kertesz, Heather Greenfield

Key developments

US antitrust agencies were active in merger enforcement in 2019 and 2020, similar to recent years, despite the COVID-19 pandemic.

In the first half of 2020, the Federal Trade Commission (FTC) was even on pace for one of its busiest years in two decades. The FTC sued to block five mergers, caused eight mergers to be abandoned and reached seven settlements with divestitures.

The Department of Justice's (DOJ) 2021 projection of 70 merger investigations is consistent with 2020 and 2019.

2019 was equally busy for merger enforcement; the DOJ and FTC issued second requests at the highest rate in three years in 2019. State antitrust enforcers were also active, with state attorneys general challenging UnitedHealth's acquisition of DaVita and T-Mobile's merger with Sprint, despite settlements with federal antitrust agencies.

The enforcement activity levels reflect the agencies' commitment to antitrust enforcement. This appears particularly true for transactions involving nascent competitors or technology, where a business or technology has begun impacting competition in a relevant market, but is anticipated to impact competition even more in the future.

This focus is evidenced by the FTC's challenges to Edgewell Personal Care's proposed takeover of Harry's, Illumina's merger with Pacific Biosciences, and the DOJ's challenge to Sabre's acquisition of Farelogix. These cases also reflect that the agencies are still focused on killer acquisition theories, with the DOJ alleging, for example, that Sabre's purchase of Farelogix was an attempt to neutralize or eliminate an innovative competitor.

Digital, data and technology markets generally also continue to be areas of focus for the antitrust agencies. The FTC even established the Technology Enforcement Division (TED) in 2019, which focuses on investigating antitrust conduct in technology markets.

The FTC is also examining prior acquisitions by large technology firms that were not reportable under the Hart-Scott-Rodino (HSR) Act, suggesting that non-reportable technology transactions will face increasing scrutiny in the future.

The DOJ reorganized in 2020, with a section solely devoted to technology matters, including the review of technology and digital platforms mergers.

With this level of enforcement activity, including bringing difficult and sometimes novel cases, it is not surprising that the FTC and DOJ lost key merger challenges in federal court.

After a string of victories, the FTC lost its challenge of Evonik's US$625 million acquisition of hydrogen peroxide manufacturer PeroxyChem. The court rejected the FTC's novel "swinging" supply theory—that suppliers are able to easily shift facilities between providing different products—for defining the relevant product market.

The DOJ successfully resolved 100 percent of its merger challenges in 2017 and 2018, but lost its challenge of Sabre's US$360 million proposed acquisition of Farelogix in the airline booking industry in 2019. The court rejected the DOJ's characterization of Farelogix as a nascent competitor finding instead that Farelogix, although an innovator in the past, was no more innovative than other competitors.

State antitrust enforcers also suffered a significant merger loss this past year in federal court when 14 attorneys general challenged the T-Mobile/Sprint merger, and failed to show how a deal that had received FCC and DOJ approval harmed competition.

Impact on merging parties

Despite the numerous impacts of COVID-19 on all aspects of the economy and the regulatory agencies, the antitrust agencies have adapted to the practical challenges created by the pandemic through implementation of a successful HSR e-filing system. Investigations and litigation have continued mostly unabated, despite typical disruptions and challenges caused by remote working.

However, it is sensible for parties to build in time for potential delays in agency review caused by COVID-19 disruption. They may want to negotiate longer termination dates to account for slower than usual industry input necessary for agency investigations. Parties might also consider whether any closing conditions may be in jeopardy, including because a material adverse effect may have occurred as a result of the economic impact of COVID-19.

With a rise in bankruptcies due to COVID-19, there has been an increase in the "failing firm" defense. This is an absolute defense to an otherwise unlawful merger, but only can be asserted where a financially distressed party's exit from the relevant market is imminent.

For example, Dairy Farmers of America contended that Dean Foods' bankruptcy was indicative of a grave possibility of business failure. In its approval subject to divestiture, the DOJ acknowledged that the dairy industry, due in part to diminished school milk demand, was impacted severely by COVID-19.

The failing firm defense is not a panacea, however, given the stringent requirements. The alternative weakened firm defense is easier to establish and was accepted by a federal court in T-Mobile/Sprint, although this predated COVID-19.

Cross-jurisdictional merger control cooperation continues, regardless of COVID-19. Parties should plan for cross-border considerations such as timing requirements and potentially divergent theories of harm. During complex merger reviews that affect multiple jurisdictions, the DOJ and FTC may, in certain circumstances, communicate and share information with other antitrust enforcement agencies.

For example, the DOJ and the UK's Competition and Markets Authority (CMA) shared confidential information about Sabre's acquisition of Farelogix, and the DOJ dealt with accusations that it had improperly coordinated with the CMA to block the deal.

In response to criticism, the DOJ reiterated that it conducts separate investigations and reaches independent conclusions when sharing information with other antitrust enforcement agencies. This example underscores the potentially high level of coordination among regulators, and parties facing multiple merger control regulators can benefit from streamlining information collection through a single, cohesive process to ensure strategic alignment on key issues across jurisdictions.

June 2020

The DOJ and FTC replaced the 1984 Non-Horizontal Merger Guidelines with the Vertical Merger Guidelines

In addition to international cooperation, there has been and continues to be coordination between federal and state agencies on merger investigations. Sometimes, however, the federal and state agencies do not agree on a resolution, and parties need to plan for the possibility that state and federal investigations may diverge.

The most recent example of this involved the T-Mobile/Sprint merger. The DOJ approved a divestiture package, while 14 attorneys general elected to challenge the merger settlement in federal court. The court did not agree that the merger, with the divestiture to Dish Network, would harm consumers.

Despite this, parties should be prepared for a potential increase in state-led antitrust enforcement that deviates from federal enforcement. For example, Colorado recently passed a bill enabling the Colorado attorney general to challenge mergers that the federal agencies investigate and decline to challenge, which was previously prohibited under the Colorado Antitrust Act.

> **"The antitrust agencies have adapted to the practical challenges of the pandemic through implementation of a successful HSR e-filing system, and investigations have continued mostly unabated**

Recent changes in priorities

The antitrust agencies have increasingly been focusing on transactions involving nascent or killer acquisitions. The agencies also continue to investigate non-reportable, finalized mergers, and agency actions at the time of writing that suggest that non-reportable technology mergers could soon be an enforcement priority.

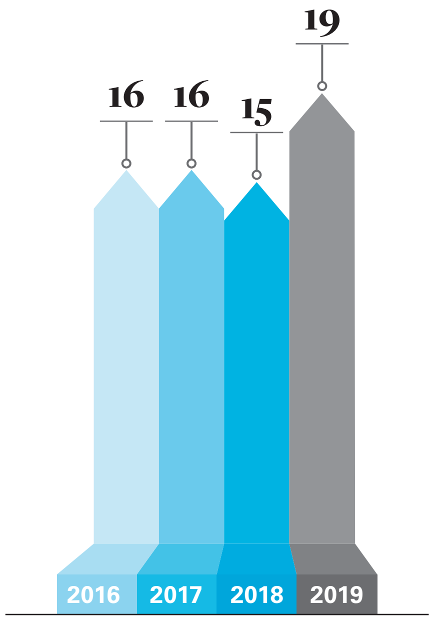
The agencies may challenge any merger, regardless of whether it is reportable under the HSR Act or how much time has passed since consummation, although it is rare for an agency to challenge a transaction long after consummation or clearance. For example, the FTC has challenged Axon's completed 2018 non-reportable US$13 million acquisition of VieVu, a body-worn camera competitor, and an FTC administrative trial is scheduled.

Since February 2020, the FTC also has been engaged in a study of prior non-reportable acquisitions by large technology companies from 2010 to 2019. The FTC issued special orders under section 6(b) of the FTC Act to large technology companies requesting information about prior unreported acquisitions since 2010.

The use of special orders for antitrust purposes is rare—indeed the last time the FTC issued such orders was in 2014 when it studied patent assertion entities.

The latest requests for information, in part, were driven by the FTC learning through its hearings on competition and consumer protection in the 21st century in 2018 and 2019 that digital platform companies had conducted hundreds of non-reportable transactions in recent years.

The study could lead to the FTC taking steps to unwinding years-old deals or, more likely, serve as the basis for future amendments to HSR reporting requirements. In September 2020, FTC former chairman Joseph Simons said the commission may issue a special order requiring certain large technology



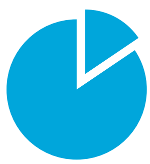
Number of merger filings rejected (i.e., blocked or prohibited) by the US antitrust agencies

firms to notify transactions falling below the HSR reporting thresholds.

The 6(b) study, which is closely examining how small companies perform after they are acquired by large technology companies, may also serve as a mechanism for the agencies to sharpen their enforcement practices with respect to nascent acquisitions. There could be similar reviews of other sectors such as the healthcare industry in the future, in particular the dialysis, pharmaceutical and hospital industries.

In an unrelated trend, there has been an unusual level of DOJ scrutiny of deals related to the cannabis industry. There are indications that this was due to political implications, as suggested by a DOJ whistle blower, but the DOJ found no wrongdoing after conducting an investigation.

The agencies issue second requests for information in only about 2 percent of reported transactions, yet the DOJ has issued ten second requests in the cannabis industry since March 2019—29 percent of the DOJ's 2019 second requests. Regardless of the motivation for this, parties and counsel in this industry should be aware of the high rate of second requests when evaluating transactions.



2%

The antitrust agencies issued second requests for information in only about 2 percent of reported transactions

Key enforcement trends

The agencies have been focusing increasingly on acquisitions of nascent competitors and related theories of killer acquisitions. In particular, they have raised concerns about acquisitions of nascent competitors in platform industries because these markets are prone to quickly gaining market share by being a favored platform through enhanced network effects and economies of scale.

Accordingly, the agencies are carefully reviewing acquisitions of smaller players, especially those that are innovative or disruptive. Successive acquisitions of potential entrants could qualify as an antitrust violation where the takeover of a potential competitor could be viewed as excluding a nascent threat.

In the Edgewell/Harry's case, the parties ultimately abandoned their US$1.37 billion shaving industry transaction after the FTC voted 5-0 to challenge it. The FTC alleged that Edgewell's acquisition of Harry's, which was founded as a direct-to-consumer wet-shave brand, would eliminate an innovative and disruptive competitor that reduced prices.

Interestingly, the FTC's perception of Harry's as an innovative but smaller competitor in a concentrated industry did not stem from the introduction of a ground breaking product, but from the sale of a no-frills century-old product at a low price point. This is a good reminder that innovation takes many forms, and the agencies do not limit their focus on nascent competitors to those developing cutting-edge or technologically advanced products.

In the case of the Illumina/Pacific Biosciences deal, the parties abandoned their US$1.2 billion next-generation DNA sequencing systems transaction after the FTC authorized an administrative complaint alleging that the acquisition would harm competition by eliminating Pacific Biosciences as an innovative force that pushed other competitors to develop new products.

Pacific Biosciences did not have a large market share and had lost more than US$100 million just a year earlier. However, the FTC claimed that Illumina had monopoly power and that it attempted to stamp out Pacific Biosciences' competition, as the latter's technological advancements made its product more comparable to Illumina's. This serves as a warning to companies considering transactions with what might be described as a uniquely innovative, but not established or profitable competitor.

The DOJ has also pushed for a novel new process for resolving merger objections, and has demonstrated a willingness to use arbitration as an alternative to going to court to challenge potentially anticompetitive mergers.

The DOJ was prepared to challenge Novelis's proposed US$2.6 billion acquisition of Aleris. The parties agreed to divest certain facilities if the DOJ won on a single-issue arbitration, which focused on whether the relevant product market for aluminum auto body sheets included only procurement or both procurement and design.

This was the first time that a federal antitrust agency used its arbitration authority and the DOJ's challenge was successful, which could lead the agencies to consider arbitration more often.

The antitrust agencies have also continued to enforce negotiated remedies. In 2020, Alimentation Couche-Tard (ACT), a Canadian gas station and convenience store operator, agreed to pay a US$3.5 million civil penalty to settle FTC allegations that it violated an order requiring the divestiture of ten retail gas stations by June 2018. According to the FTC's complaint, although ACT ultimately divested the gas stations, it had missed the deadline in the consent agreement.

The DOJ also continues to bring enforcement actions against consent decree violators. For example, CenturyLink agreed to settle the DOJ's allegations that it violated the court-ordered final judgment over its merger with Level 3. The settlement included the establishment of a monitoring trustee and an extension by two years of the original non-solicitation agreement in one geographic area.

Additionally, the DOJ settled Live Nation and Ticketmaster's violation of a final judgment that prohibited retaliatory conduct toward concert venues that used different ticketing companies, by extending all obligations on Live

Nation by five years, and appointing a monitoring trustee and an antitrust compliance officer.

The DOJ also created a civil conduct task force to enforce judgments and consent decrees, and issued the Merger Remedies Manual, an update to the 2004 policy guide to merger remedies. The manual reflects the DOJ's renewed focus on enforcing obligations in consent decrees through the newly created Office of Decree Enforcement and Compliance and preference for structural remedies.

Recent studies and guidelines

In June 2020, the DOJ and FTC replaced the 1984 Non-Horizontal Merger Guidelines with an updated version of the document, referred to as the Vertical Merger Guidelines (VMG). After 35 years, the prior guidelines no longer accurately reflected the agencies' approach to investigating the competitive impact of vertical mergers.

The VMG apply to vertical mergers that combine firms or assets at different stages of the same supply chain, as well as "diagonal" mergers that combine firms or assets at different stages of competing supply chains. The VMG also apply to vertical issues that can arise from mergers of complements, but do not apply to mergers of complements or portfolio additions where there is no apparent risk of competitive effects involving the same supply chain.

The VMG are a reflection of the agencies' current approach. They focus on potential harm, including foreclosure, raising of rivals' costs, access to competitively sensitive information and resulting coordination, as well as the potential procompetitive effects of a vertical merger, such as streamlining production, increased innovation and the elimination of double marginalization (EDM).

Still, there are some important issues that are not addressed in the VMG. The draft VMG issued in January 2020 suggested a market share screen if the parties' market shares in the relevant market were less than 20 percent, and the related product was used in less than 20 percent of the relevant market.

While this "safe harbor" was omitted from the final VMG, the market share threshold reflects how vertical effects are evaluated as a practical matter. The guidelines also do not address remedies in vertical merger cases. This omission may be due to agency divergence, as the DOJ has been reluctant to issue behavioral remedies for vertical harms.

It will be interesting to see how the agencies apply the VMG to vertical and diagonal mergers going forward. While the guidelines do provide transparency for how the agencies assess vertical mergers, they mostly gather previously known information about vertical mergers, are general, and lack explicit guidance on how the agencies analyze vertical mergers in a practical sense.

> "Senator Amy Klobuchar, ranking member of the Senate judiciary subcommittee that includes antitrust, predicts a record year of law-making for antitrust in 2021

The VMG do not contain concrete screens or data points, unlike both the 2010 Horizontal Merger Guidelines and the 1984 Non-Horizontal Merger Guidelines. Recognizing these shortcomings, FTC commissioner Rohit Chopra criticized the VMG as focusing too heavily on economic theory rather than real-world modern market realities.

For example, the VMG emphasize the benefits of EDM; however, it is unclear whether EDM is always actually realized. Additionally, while the agencies rarely litigate vertical merger cases, courts had noted previously that the old guidelines were outdated. With the rush to publish over two FTC commissioner objections, it is unclear how heavily courts will rely on the VMG.

Looking ahead

We do not expect significant merger control changes without a change in the political balance in Congress or change in the administration.

However, Senator Amy Klobuchar, ranking member of the Senate judiciary subcommittee that includes antitrust, predicts a record year of law-making for antitrust in 2021. Over the past year, Democrats have floated various modifications to merger control law, some of which garnered bipartisan support.

Klobuchar and Senator Chuck Grassley introduced bipartisan legislation, the Merger Filing Fee Modernization Act of 2019, which would increase filing fees to provide the agencies with more enforcement resources.

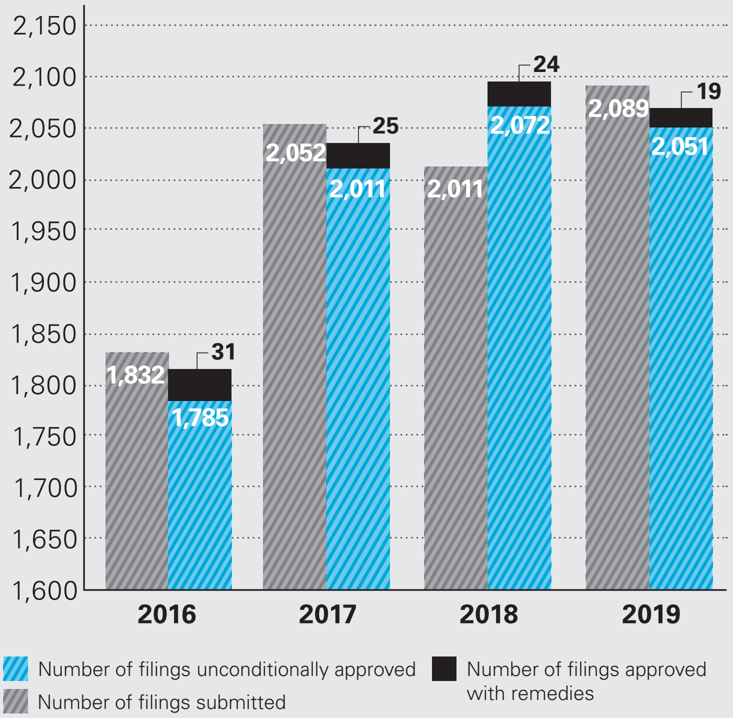
Klobuchar also introduced the Consolidation Prevention and Competition Promotion Act of 2019, which would modify the Clayton Act's prohibition on mergers that "substantially" lessen competition to "mergers that, as a result of consolidation, may materially lower quality, reduce choice, reduce innovation, exclude competitors, increase entry barriers or increase price".

Lowering this standard could produce an uptick in enforcement actions, as "material" is defined as "more than a de minimis amount of harm to competition", and the proposal shifts the burden from the agencies to the merging parties to prove that the consolidation does not harm competition.

In 2019, Senator Elizabeth Warren also released a draft of new antitrust legislation, the Anti-Monopoly and Competition Restoration Act. Among other provisions, this would amend the Clayton Act to ban mega-mergers that meet certain revenue thresholds or market share thresholds.

The legislation would shift the

Merger filings with the US antitrust agencies



burden to the merging parties to prove that a merger is not anticompetitive in large mergers that meet certain revenue thresholds or market share thresholds, or if either company has violated antitrust laws within the previous seven years. Currently, the agencies bear the burden of showing that a merger may substantially lessen competition or tend to create a monopoly.

The House Judiciary's subcommittee on antitrust has also been active, holding a series of bi-partisan hearings on digital platforms in order to document competition problems in the digital economy, and to evaluate whether the current antitrust framework is able to properly address them. Among other issues, the hearings probed previous acquisitions by large technology companies, suggesting that the technology sector could be the impetus for bipartisan changes to merger control rules.

Accurate as of February 2021

THE INSIDE TRACK

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

Early planning and coordination between companies and advisers enables timely clearance for complex, multijurisdictional transactions. Anticipating and planning for a clear process for lawyers to review and advocate across jurisdictions with different agency procedures also helps to minimize the burden on parties, who often face multiple similar, yet distinct, requests for information from competition authorities.

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

Thorough pre-filing analysis can make all the difference in obtaining clearance quickly. By front-loading the process and having a deep understanding of all aspects of a business before making the HSR filing, advisers can engage quickly with the FTC or DOJ.

It is important to pre-collect and prepare key documents and other information normally requested through a voluntary access letter, to enable the reviewing agency to focus their area of investigation earlier. A deep dive early in merger discussions also enables the parties to anticipate and mitigate deal risk, and plan for potential divestitures or other remedies, if necessary.

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

Historically, after the HSR filing, US antitrust agencies would use an informal process to allocate or "clear" the investigation of the merger to one of the agencies. During the last year, however, the FTC and DOJ engaged in protracted clearance disputes, even in industries where historically the transactions had always cleared to one of the agencies. A dispute can impact deal timing by erasing most, if not all, of the initial HSR waiting period. Familiarity with the agencies enables advisers to win back time lost from the initial waiting period by jumping at opportunities during the clearance dispute to advocate about the benefits of the transaction.