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AGENCY DECISION MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Summaries of contributions --

28-29 November 2016

This document contains summaries of contributions received for the discussion on agency decision-making in merger cases: from a prohibition decision to a conditional clearance (124th Meeting of Working Party No. 3 on Co-operation and Enforcement on 28-29 November 2016).

More documents related to this discussion can be found at <http://www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm>

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**AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO
A CONDITIONAL CLEARANCE**

-- Summaries of Contributions --

This document contains summaries of the various written contributions received for the roundtable on agency decision-making in merger cases: from a prohibition decision to a conditional clearance (124th Meeting of Working Party No 3 on Co-operation and Enforcement, 28-29 November 2016). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

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AUSTRALIA

In many cases, remedies are useful to allow the efficiencies of mergers to be realised, while addressing competition concerns. However, there are always limitations associated with remedies, and in some cases these limitations may be insurmountable. These issues are explored in greater detail in this paper.

When considering a potential remedy, the Australian Competition and Consumer Commission (ACCC) will primarily consider the strength of its competition concerns with the proposed acquisition, and how well the remedy addresses those concerns. In most cases, the ACCC tests proposed remedies with market participants to assist in that assessment and the remedies usually go through multiple iterations before a final version is settled.

In cases where a remedy clearly addresses the ACCC's competition concerns and is likely to be enforceable, the ACCC is more likely to accept the remedy. The stronger the concerns, the greater the degree to which the ACCC will need to be satisfied that the remedy addresses those concerns, and that it can be effectively implemented. Where a proposed acquisition would have a particularly grievous impact on competition, it may be the case that there is no acceptable remedy that can address the ACCC's competition concerns.

Similarly, a proposed remedy may be too complex to be effectively implemented and as such incapable of being a sufficient resolution of the ACCC's competition concerns.

These issues are illustrated by the examples described in this submission. In particular, in its review of Sea Swift's proposed acquisition of Toll Marine Logistics, the ACCC decided to oppose the acquisition, which included a decision not to accept remedies offered by the merger parties. This was because the behavioural remedies offered would not have resolved the ACCC's competition concerns and were difficult to monitor and enforce.

After the ACCC opposed the acquisition, Sea Swift sought authorisation from the Australian Competition Tribunal (Tribunal) for the acquisition. The Tribunal granted Sea Swift conditional authorisation. In its decision, the Tribunal accepted the conditions of authorisation as offered by Sea Swift. It accepted the potential benefits put forward by the applicant and did not accept the identified shortcomings. While the Tribunal applies a different statutory test to that applied by the ACCC (net public benefit versus substantial lessening of competition), this was still a disappointing outcome. For this reason, the ACCC is considering how it might more effectively articulate its concerns about merger remedies in future Tribunal cases.

The submission also outlines challenges relating to the appropriate role of merger remedies where governments privatise monopoly assets. In these circumstances, if the purchaser holds an interest in a business at other levels of the supply chain, merger remedies may be able to deal with infrastructure access issues (albeit in a way that is inferior to properly considered access regulation). However, the ACCC has recently commented publicly on the fact that merger remedies cannot address competition issues arising from the monopoly characteristics of the infrastructure that exist regardless of ownership.

BELGIUM*

The Belgian Competition Authority has not prohibited a merger in the last five years. The challenge that they face is limiting merger remedies to what is required in the public interest, notwithstanding pressure by third parties. Except in simplified procedures, market definitions, impact on competition and remedies are market tested by sending out requests for information. The Competition College tends to give significant weight to views expressed by customers and positive views of competitors, and to be sceptical with regard to negative views expressed by direct competitors. The BCA tends to consider a monitoring trustee necessary in order to ensure the correct implementation of behavioural remedies, and often relies on divestiture trustees to ensure a correct implementation of the remedies.

BIAC

The Business and Industry Advisory Committee (“BIAC”) of the Organization for Economic Cooperation and Development (“OECD”) is pleased to submit this paper to assist in Working Party 3’s discussion on the issue of the trade-off between prohibition decisions and conditional clearances relating to mergers. This paper builds on BIAC’s prior contributions, specifically *Public Interest Considerations in Merger Control* (“*Public Interest*”).

BIAC strongly favours competition agencies pursuing conditional clearances over prohibition decisions whenever possible. BIAC supports the principles for merger remedies recently articulated by the International Competition Network (“ICN”) Merger Group, including the purpose of a remedy being “to maintain or restore competition otherwise lost due to the merger, while permitting, if possible, the realization of efficiencies and other benefits”, as well as the use of a remedy tailored to the harm in order to ensure the least intrusive remedy without compromising its effectiveness. Further, when considering whether to accept remedies that do not solve every competition concern raised by a merger, BIAC is of the view that the agency should be prepared to accept remedies that allow it to conclude that on balance, the efficiencies and other pro-competitive effects of the transaction outweigh the anti-competitive effects.

The apparent rise in merger prohibitions noted by the Secretariat in its background paper is cause for concern. In BIAC’s view, conditional clearances are capable of addressing competition concerns associated with a proposed merger in the great majority of cases. Unlike prohibition decisions, however, conditional clearances can also take into account and permit the realization of additional benefits of a proposed merger sought by the parties, such as synergies in the merging entities’ operations, thereby allowing for greater efficiencies. Such efficiencies may also include broader, dynamic efficiency benefits. These benefits would be lost to the merger parties and indeed the economy as a result of a decision to prohibit the transaction. Furthermore, in multijurisdictional mergers, a decision validly taken by the competition authority in one country to prohibit a merger may destroy the benefits of the merger in other jurisdictions where the proposed transaction does not raise anti-competitive considerations that rise to the same level.

Decisions on remedies are not made in a theoretical vacuum and must take into account procedural considerations. BIAC recognizes that fashioning appropriate merger remedies can, in many cases, require the application of considerable resources by both the merging parties and the competition authority; however, the difficulties inherent in fashioning effective remedies should not, in and of themselves, drive the decision to prohibit a merger. The merging parties and the agencies will have to work together and each share in the burden of fashioning appropriate remedies.

CANADA*

In Canada, the Commissioner of Competition (the “Commissioner”) cannot unilaterally prohibit a merger or impose remedies on merging parties. In the vast majority of merger cases where the Commissioner concludes that a transaction is likely to prevent or lessen competition substantially, a remedy is formalized in an agreement between the Commissioner and the parties to the transaction. These consent agreements are registered with the Competition Tribunal (the “Tribunal”) and have the force and effect of a Tribunal order. Since 1986, more than 70 consent agreements involving mergers have been registered with the Tribunal; 19 in the past 5 years. Examples of remedies negotiated within the last five years range from the divestiture of all of the assets of the Canadian business to the divestiture of certain retail locations or pharmaceutical products. In one instance, the Bureau has also required the implementation of administrative firewalls to prevent the sharing of competitively sensitive information.

Where the parties do not agree to an acceptable remedy in a consent agreement and do not otherwise abandon the transaction, the Commissioner may seek an order from the Tribunal to remedy the anti-competitive effects of a transaction. This may sometimes include seeking an order to prohibit a transaction entirely. In the vast majority of instances, the structural remedies sought or agreed to by the Commissioner involve the divestiture of assets rather than an outright prohibition or dissolution of the merger. However, situations do arise where prohibition or dissolution will be required when less intrusive remedies, which would otherwise eliminate the substantial lessening or prevention of competition, are unavailable.

Since the introduction of the merger provisions in Canada’s Competition Act (the “Act”) in 1986, the Commissioner has applied to the Tribunal to challenge thirteen transactions. In seven of these matters, the Bureau sought prohibition or dissolution. While the Tribunal did not order dissolution or prohibit a merger in its entirety, in several of these matters remedies were obtained. There have been three proposed mergers in the past five years that parties have voluntarily abandoned based on concerns raised by the Bureau and, in certain instances, competition agencies in other jurisdictions.

The Act provides a trade-off framework in which gains in efficiency that are likely to be brought about by a merger (and that would likely be lost as a result of the order) are evaluated against the likely anti-competitive effects of the merger. Under Canadian merger law, efficiencies do not need to eliminate the likely anti-competitive effects of the merger to be cognizable. The Bureau’s approach to analysing mergers, including efficiencies, is set out in more detail in its Merger Enforcement Guidelines.

The Bureau’s general approach for remedial action is to find a viable and effective structural remedy that is tailored to the harm, but where a tailored remedy is not possible, it may be necessary to seek dissolution or prohibition. In terms of assessing whether a remedy is acceptable, the Commissioner must be satisfied that the remedy is sufficient to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger. There will also be situations where a remedy must go beyond that which is necessary to restore competition to an otherwise acceptable level in order to fully eliminate the substantial prevention or lessening of competition. The Bureau’s current policy on merger remedies is set out in its Information Bulletin on Merger Remedies in Canada. The Bureau has also recently published its template for merger consent agreements to provide stakeholders with better insight into the Bureau’s expectations when negotiating remedies in the mergers context and to improve transparency and predictability in how the Bureau enforces the Act.

COLOMBIA*

Colombian competition law (Law 1340/2009) establishes that a merger should be blocked if it “tends to produce an undue restriction of competition”, which could happen, in general, whenever it affects “competition freedom, consumer welfare or market efficiency”. However, competition law also provides that an objectionable transaction can be cleared by imposing remedies that are “suitable to ensure effective preservation of competition”.

The Superintendence of Industry and Commerce (SIC) has blocked two mergers in the last five years, one in 2015 and the other one in 2016. The SIC has recently cleared important mergers in the supermarket sector and in the beverage sector (non-alcoholic drinks), subject to remedies.

In 2013 the SIC issued the “Merger Control Guidelines” (updated once), which contain the main criteria that the SIC considers to evaluate potential vertical/horizontal and unilateral/coordinated effects. The Merger Control Guidelines also indicate the minimum requirements of a remedy proposal from the parties, and, according to the kind of harm, the general SIC considerations regarding the effectiveness of structural and behavioural remedies. For example, in horizontal mergers, behavioural remedies are considered to be less effective to eliminate or mitigate competition concerns.

Regarding structural remedies, one of the main challenges that competition authorities face in small economies, such as Colombia, is that a large number of firms have a virtual presence in local markets, as their main assets (if not all) and headquarters are located in other countries. In such cases, if a merger has the potentiality to harm competition, usually no effective local divestitures can be ordered to eliminate or mitigate competition concerns. When a proposed merger involves large foreign companies for which Colombian business is not a significant proportion of their global income, but their merger can cause substantial harm for local competition, the SIC has to consider whether to block the transaction or impose strict remedies, or accept the merger in order to avoid the parties exiting the local market causing further loss of competition.

Colombian competition law explicitly gives priority to structural over behavioural remedies as they are thought to be more effective in preserving competition. In any case, competition law requires the SIC to monitor and supervise compliance with imposed remedies, in a time period established in the decision.

COSTA RICA*

(Superintendence of Telecommunications)

The Superintendence of Telecommunications (SUTEL) has processed 33 merger requests in the last 5 years. In one case SUTEL rejected the merger, as remedies proposed did not fully address SUTEL's concerns. SUTEL, as the sectorial competition body, must consult regarding merger cases with the competition agency COPROCOM, so that the latter can determine whether the merger can: i) result in substantial power or increase the likelihood of exercising substantial power in the relevant market; ii) facilitate coordination, expressly or tacitly, among or between operators or providers; and/or iii) cause adverse effects on end users.

ESTONIA*

The Estonian Competition Authority has prohibited two concentrations since 2001, when merger control was introduced. The first prohibition decision was issued in 2008, and concerned the acquisition by the pharmacy chain Terve Pere Apteek OÜ (that belonged to the largest wholesaler of pharmaceuticals in Estonia – AS Magnum Medical) of a small pharmacy (OÜ Saku Apteek). In 2011, the Competition Authority prohibited a 2-to-1 concentration in the postal services' market (AS Eesti Post / AS Express Post).

Since 2001, the Estonian Competition Authority has cleared eight mergers with remedies, of which two were structural remedies. In Estonia, as a small country, there may be difficulties with finding an acceptable purchaser to divest assets (the consolidated nature of certain industries excludes most incumbents from being considered as potential purchasers).

GERMANY

Remedies have proved to be a major instrument for the effective implementation and enforcement of merger control rules in Germany. The Bundeskartellamt assesses the remedies with a view to whether they are suitable, necessary and proportionate. Remedies have to completely remedy the competitive harm identified in the Bundeskartellamt's investigation in a timely manner. This is the case if the remedies completely prevent the expected negative impact on market conditions and market structures or at least reduce the anticompetitive effects of the merger to an acceptable degree that does not meet the requirements for a prohibition.

The Bundeskartellamt has no discretion when deciding whether or not to accept commitments. If the commitments fully and effectively remedy the competition problems, clearance subject to remedies has to be granted under the principle of proportionality. If the proposed commitments are not sufficient to remedy the competition issues with the required degree of certainty, the Bundeskartellamt must prohibit the merger.

The Bundeskartellamt has recently published a guidance document on remedies for public consultation. The Guidance describes the most important types of remedies, explains the requirements remedies have to fulfil in order for the Bundeskartellamt to accept them, sets out the procedure in which remedies are implemented. Additionally, the Guidance incorporates the Bundeskartellamt's case practice and experience, as well as the case law of the Court of First Instance (Düsseldorf Higher Regional Court) and the German Federal Court of Justice.

ITALY*

The Authority favours clearance with remedies over prohibition decisions. Between 2005 and 2016, the Authority blocked the transaction in 4 cases out of 40, and cleared 27 mergers with remedies.

When reviewing mergers, the Authority attempts to ascertain whether the transaction is likely to be harmful for competition. If so, the merger should be prohibited, otherwise the merger may be cleared with remedies. In line with the EC approach, the Authority follows the standard of proof based on the balance of probabilities (the merger is “more likely than not” harmful) as it is flexible enough to account for all future potential scenarios that merger review must consider. Once the balancing act establishes the competitive harm that the merger is likely to bring, the question is whether there exist remedies that remove the harm. The Authority may impose conditions to the transaction even when no remedy proposal was made by the parties. Prohibition decisions are generally taken when there is no remedial action appropriate to resolve the competition problem and/or the remedies are costly and risky in terms of implementation, monitoring and effectiveness.

As a general principle, the Authority only accepts remedies that address all competition concerns raised by the merger. The Authority favours structural remedies, as it has faced difficulties in monitoring compliance with behavioural remedies. Remedies can only be offered (or imposed) in Phase II, when the Authority has clearly identified the competition concerns and remedies can be binding. However, the timeline for Phase II (only 45 calendar days with the possibility of extending it up to 30 days) implies that a more extensive use of pre-notification talks can play an important element for an effective merger review process and for a preliminary identification of appropriate remedies. Early contacts with the merging parties, to discuss the transaction and the notification information requirements, and to identify relevant markets and potential competition concerns, can provide an opportunity to engage a discussion on potential remedies and to gather preliminary views of competitors on all these aspects.

JAPAN

The Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) can issue cease and desist orders (a kind of administrative measures) under the Antimonopoly Act when a business combination would substantially restrain competition in a particular field of trade. As to the business combination review, the JFTC, however, has never issued cease and desist order for nearly half a century in the past.

This is because, the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (hereinafter referred to as the “Business Combination Guidelines”) provide that “Even though the effect of a business combination may be substantially to restrain competition in a particular field of trade, such restraint may be remedied by certain appropriate measures taken by the company group. (Such measures are hereinafter referred to as ‘remedy(ies)’ .)”

The Business Combination Guidelines provide that the “remedies should, in principle, be structural measures such as the transfer of business and should basically be those that restore competition lost as a result of the combination in order to prevent the company group from controlling the price and other factors to a certain extent.” Exceptionally, the guidelines also provide that “in a market featuring a rapidly changing market structure through technological innovations, there may be cases where it is appropriate to take certain types of behavioural measures.”

With regard to ensuring the implementation of the remedies, the JFTC confirms that the remedies will be implemented or have been implemented by having the parties concerned describe the remedies and the deadline for the implementation of remedies in the prior written notification of the planned business combination.

In addition, the implementation of the remedies is ensured through the following things: i) if the remedies are not implemented by the deadline stipulated in said plan, the JFTC may issue cease and desist orders, ii) if there has been a description which is contrary to the fact in the notification, the JFTC may issue cease and desist orders, and criminal penalties may be imposed against the false description.

Practically, there are some mechanisms to reduce the risk of not being implemented the remedies. For example, the JFTC has taken the following measures: i) a report drawn up by the independent audit team related to the status of compliance with the remedies. (“monitoring trustee”); ii) the disposal of the business by a third party (“divestiture trustee”), in case the parties did not reach an agreement to conclude contracts concerning the disposal of the business with buyers within a certain period of time.

KOREA*

The Korea Fair Trade Commission (KFTC) examines an average number of 600 merger cases a year.

The KFTC has adopted and implemented guidelines on merger remedies (the "Guideline") in order to improve the predictability in the design and choice of remedies. In choosing an appropriate remedy for a particular merger, the KFTC assesses whether the remedy can eliminate all the likely concerns, whether the remedy is enforceable and its implementation can be monitored, and whether the remedy is expected to address quickly the concerns. The KFTC also tries to strike a balance between anti-competitiveness and efficiencies in determining whether to block the deal.

In a recent case (SKT-CJH), the KFTC decided to block the merger as it would likely lead to competitive concerns in most part of the target's business and divestiture of certain assets was not available and sufficient to address the concerns. In another case (Essilor-Daemyung Optical), the KFTC decided to block the deal as the behavioural remedies proposed were considered insufficient.

LATVIA*

In 2012-2016 there has been no prohibition decision taken by the Competition Council of Latvia ('the CC'). Over the same period, there have been six conditional clearances with both structural and behavioural remedies imposed.

The CC's practices regarding prohibitions and remedies are not reflected in 'best practice' documents or in other guidelines; however, the CC relies on the practice and experience of the European Commission as well as other competition authorities in Europe (mainly guidelines and examples from other merger cases in similar sector).

In the past, the CC has in most cases applied behavioural remedies in problematic merger cases and the main argument is that in a small market like Latvia the use of structural remedies is less likely to be effective. Since the OECD Accession review of Latvia in 2014 and recognising the difficulties in monitoring behavioural remedies, the CC started using structural remedies in problematic merger cases. For example, in the VI/ZMKI/VPG merger in 2015, divestiture of business activities in the waste management sector and the appointment of an independent monitoring trustee were the remedies which enabled clearing the merger. In this case, it was agreed that the market participant that would carry out the actual separation and divestiture would be impartial and independent (not connected in any way with the merging party). In addition the trustee (chosen by the merging party and approved by the CC) monitored the whole separation and divestiture process as well as prepared reports that were submitted to the CC.

The CC considers the opinion of third parties/ public crucial both in deciding whether to prohibit a merger as well as designing and implementing remedies. After identifying the problematic markets, the CC searches for past merger cases where remedies have been imposed (for example, the European Commission, other national competition authorities' decisions) in the same or similar industries. The CC also meets with merging parties to indicate its main concerns (often before the official statement of objection is sent) as well as other stakeholders (competitors and other market players that are active in related markets). This allows addressing the CC's main concerns in a timely manner and allows the merging parties to come forward with additional information and justifications or possible remedies.

LITHUANIA

During the last five years, the Competition Council cleared more than 150 mergers (concentrations), three of which were subject to remedies, and prohibited two mergers.

Both decisions concerning the Competition Council's refusal to clear the merger were appealed. However, there is still no final court decision in either case. The Competition Council's approach to accepting remedies has never been tested in the courts.

The Competition Council's practice regarding prohibitions and remedies is not yet reflected in 'best practice' documents or in other guidelines. At the moment, there are no concrete plans to issue guidance in the near future.

In regard to the design of remedies, the Competition Council has encountered in its practice challenges concerning lack of time, viability of a business, time limit for commitments, purchaser requirements, appointing a trustee, and implementation of remedies.

Structural remedies are considered to be more appropriate than behavioral remedies. The divestiture of business or its assets, which may harm competition in relevant markets, is considered to be a most suitable remedy and is thought to remove the restriction of competition in relevant market.

Concerning market testing, the Competition Council does seek opinions of third parties. The Council announces a brief summary about the concentration on its website. All parties concerned within the time limit can present their opinions. Non-confidential versions of remedies are also announced on the Competition Council's website, and parties concerned can provide their opinion and suggestions. Furthermore, the Competition Council sends questionnaires to selected market participants for their opinion.

MEXICO*

(Mexican Federal Economic Competition Commission)

The Mexican Federal Economic Competition Commission COFECE is the authority responsible for reviewing merger cases in Mexico (except for those concerning telecommunications and radiobroadcasting markets, which are reviewed by IFT, the Federal Institute of Telecommunications) and determining whether they should be approved, remedied or prohibited. In the last years, merger activity in Mexico has reached historic levels in terms of number, size, and complexity. Only in 2015, the COFECE reviewed 149 mergers valued MXN 24.4 billion *(Mexican pesos), 33% more than mergers reviewed in 2014.

In cases where the merger may cause competitive harm and neither structural nor behavioural relief, nor a combination of the two, would preserve competition in the market, the COFECE will seek to block the merger, or unwind a consummated merger. Before prohibiting the deal, the COFECE tries to find appropriate remedies that cure the competition harm, prohibitions being the last resort option. The COFECE refers structural remedies when dealing with horizontal mergers and behavioural remedies for vertical mergers. Common behavioural remedies accepted by the COFECE include elimination of exclusivity clauses, dissemination of advertisements and publication of annual reports. In some cases, the best solution may be a combination of behavioural and structural remedies. The COFECE, like many agencies, prefers structural over behavioural remedies. Designing and choosing remedies is challenging, since it involves a prospective analysis to predict the likely outcome of each option.

The proposed merger between the main airlines in the country, Mexicana-Aeroméxico during 2000 and 2007 (Files: CNT-25-95 and CNT-095-2012) were prohibited by the COFECE twice. On both occasions, the Commission denied the merger, considering that the take-off and landing slots allocation regime was a significant barrier to entry for new competitors. The COFECE recently denied the Sherwin Williams Company-Comex merger (File CNT-095-2012) arguing that the deal would strengthen their market power and the proposed remedies would not eliminate competition concerns.

MEXICO

(Federal Telecommunications Institute)

In Mexico, merger control, as established in the Federal Economic Competition Law (FECL), aims to prevent damages to competition resulting from the combination of independent economic agents. In that sense, the LFCE sets thresholds to determine whether a transaction has to be notified to the competition authorities and to be authorized before it can be carried out.

In some cases, it is possible for the antitrust agencies to authorize a merger if the economic agents propose remedies that eliminate or mitigate the concerns of the authorities on competition issues. According to the FECL, a merger may be authorized, objected, or authorized subject to conditions, to prevent possible adverse effects to the competition process.

The most common remedies can be classified in two groups. The first group, known as “structural remedies” includes among other measures, the transfer of assets representing a certain market share to a viable (currently active) competitor, the divestiture of assets or parts of the business affected, and a temporal or permanent removal of barriers to entry (e.g. granting non-exclusive licenses to produce a patented product). The second group of remedies, known as “behavioural remedies”, concern with the future behaviour of the economic agent resulting from the transaction. The establishment of these remedies depends on the risks identified, the relevant market and the nature of the industry in which the merger will be carried out. In general, behavioural remedies are less favoured by antitrust agencies because they require a high level of monitoring and compliance enforcement.

Merger applications in the telecommunications and/or broadcasting sectors have to be filed with the Federal Telecommunications Institute (IFT), and in any other sector have to be submitted to the Federal Economic Competition Commission (COFECE). Nevertheless, when both the IFT and the COFECE consider that a merger falls within their jurisdiction, they have to submit the case to the Mexican Specialized Courts for Economic Competition, Broadcasting and Telecommunications, in order to determine if the file has to be handled by the IFT or the COFECE.

Regarding unilateral and coordinated effects, the FECL provides two moments in which the merging parties may submit their proposed remedies. First, in the notification document, when the economic agents know or have information on the potentially anticompetitive effects of the merger. Second, after the IFT finds anticompetitive risks from the merger, and notifies this concern at least ten days prior to the scheduled hearing of the IFT’s Board of Commissioners. The Board of Commissioners has the power to either accept or modify the proposed remedies, or to deny the merger’s authorization. During the mergers procedures, the authority has the power to request information to all economic agents participating in the relevant market or any related market. Once the IFT has authorized a merger subject to remedies, it has to periodically review compliance as long as it deems necessary.

Since its establishment on September 2013, the IFT has reviewed 14 mergers; every merger application has been authorized; four applications were authorized subject to the fulfilment of conditions or remedies, and the rest were authorized without conditions. Some relevant cases include the TVI’s acquisition by Grupo Televisa; the acquisitions of DirecTV, GSF Telecom and Nextel México by AT&T; and a broadcasting licences auction.

NETHERLANDS*

The merger control provisions in the Dutch Competition Act largely mirror those applicable at EU level. ACM first identifies the competition issues raised by the merger that lead to a significant impediment of effective competition. It is subsequently up to the merging parties to address these competition concerns by offering a remedy (or by an efficiency/failing firm defence). The remedy should address all issues identified or else the merger will be prohibited.

The conditions that the Netherlands Authority for Consumers and Markets (ACM) includes in Phase I decisions must remove the identified competition concerns and be implemented before the transaction is closed. Conditions that ACM includes in Phase II decisions must ensure that the concentration does not significantly impede effective competition. These conditions generally involve divestment of the businesses that give rise to the impediment of competition, or severance of links between the undertakings concerned and these businesses.

In general, ACM favours structural over behavioural remedies. Behavioural remedies are more problematic, since their effectiveness is harder to assess, they have oversight costs and often leave room for multiple interpretations which makes more difficult to enforce. Proposed remedies should be as clear as possible and able to act quickly in addressing competitive concerns and propose an adequate, effective and proportional solution to the competition concerns identified by ACM. In ACM's experience, drafting a clear and understandable remedy takes time and can include several meetings/calls with parties.

ACM may request information from customers, suppliers and/or competitors on the envisaged transaction or relevant markets. Third parties may submit their comments on the proposed transaction to ACM and may be invited by ACM to express their view on ACM's preliminary assessment (Statement of Objections) during phase II.

Remedies are market tested. The market test is initiated after parties have submitted a remedy which is sufficiently concrete. To assure that the market test is effective, it is required that the competition concerns and the countervailing remedy are described in a manner easy to understand. ACM decides who is consulted during the market test, for example competitors, (main) clients or experts. Such third parties have to sign a non-disclosure agreement. Based on the comments received, a revision of the remedy may be required. In exceptional cases these revisions are market tested as well.

To ensure the effectiveness of a remedy, ACM may rely on trustees, for example monitoring, hold-separate and divestiture trustees, especially when experience with or knowledge of a sector is required. These trustees report to ACM, however all costs related to their tasks, including their fees, are paid for by the merging parties.

In 2015, ACM adopted 88 merger decisions. The vast majority of ACM's merger decisions were taken in Phase I, without further investigation. In 2015, five merger cases were reviewed in Phase II, of which two related to notifications received in 2014. Of those five cases; one merger was cleared, one was approved with remedies and one was prohibited. Two merger analyses continued in 2016. Some mergers are also withdrawn by parties at the pre-notification stage (2 applications withdrawn in 2015, 11 withdrawn in 2014, 8 withdrawn in 2013). In several cases, the withdrawal seemed due to the parties' anticipating a prohibition decision.

NORWAY*

The Norwegian competition law regime is to a large degree harmonized with European Union competition law.

In the period between 2011 and 2016, the Norwegian Competition Authority issued seven prohibition decisions and twelve conditional clearances. Over the years, the NCA has developed and refined its practice regarding merger remedy design. The remedies imposed by the NCA have been progressively better designed, bigger in scope and deeper in detail. The NCA recently initiated an internal project to evaluate conditional merger clearances. The project will try to identify factors that are likely to ensure the success (or lack thereof) of the implemented measures.

The biggest challenge in remedies design is associated with the fact that the incentives of the merging parties are not aligned with those of the competition authority. The parties have no incentive to offer remedies that are likely to establish a strong competitor, but rather have incentives to offer the divestment of their less profitable assets, to identify weak potential buyers, to delay the remedy process or to deteriorate the divestiture package before completion of divestiture. In order to address these issues, the NCA has introduced in its practice more upfront and fix-it-first solutions in cases where it is difficult to assess the viability of a proposed divestiture package and/or there are indications that the number of potential suitable purchasers is limited, together with standstill obligations.

The NCA in most cases market tests remedies. In case the remedies proposed are clearly disproportional or unable to address the NCA's competition concerns, the NCA rejects the proposed remedies without performing a market test.

The role of divestiture, hold separate and monitoring trustees has become increasingly important in the NCA's practice and trustees are appointed more frequently than in the past.

PORTUGAL

In Portugal, merger analysis under Article 41(4) of the Portuguese Competition Act prohibits mergers that create significant impediments to effective competition in the domestic market or a substantial part of it, in particular if the impediments derive from the creation or reinforcement of a dominant position.

The Portuguese Competition Act also foresees that, at any time of the proceeding, the Parties present remedies to eliminate the concerns identified by the Portuguese Competition Authority (PCA). Notifying parties to the merger should follow the Guidelines on Merger Remedies issued by the PCA on 28 July 2011. These Guidelines are the result of accumulated substantial experience by the PCA which has fine-tuned its standards of remedies analysis and implementation. The Guidelines are also inspired on the practice and guidelines of the European Commission and other competition authorities.

The PCA's overall experience with the remedies procedure has been positive, as it has allowed the PCA to address competition concerns swiftly, in the benefit of consumers and businesses, thus allowing it, in the last five years, to issue nine conditional clearance decisions. During this period the PCA also blocked one merger in the media sector as remedies offered by the parties were not considered to sufficiently and effectively address the competition concerns identified during the assessment.

One conditional clearance decision of the PCA was challenged in Court by a third party to the concentration. The Court ruled in favour of the PCA.

RUSSIAN FEDERATION

The number of deals falling under the control of the FAS Russia has decreased dramatically since the last amendments to the Russian antimonopoly legislation. This allows the authority to pay more its time and attention to the quality of the decisions taken on merger notifications and the necessary market analysis for that.

The **transactions falling under the FAS Russia's control** are those involving commercial and non-commercial organisations, as well as foreign persons and (or) organisations supplying goods on the territory of the Russian Federation for over one billion rubles within a year preceding the date of the transaction. Types of such transactions include mergers, acquisitions, creation of new commercial organisations, transactions with stocks/shares. The Federal Law of July 26, 2016 No. 135-FZ "On Protection of Competition" (the Law on Protection of Competition) establishes precise situations when these types of transactions should undergo the antimonopoly control. For instance, the thresholds established by law for the cases involving transactions with stocks (shares) may constitute 25%, 50%, 75% of stocks or 1/3, 2/3 of shares in the authorized capital that a purchasing company or a group of companies acquires as a result of transactions.

As a result of considering a transaction, the FAS Russia may issue **several types of decisions on merger notifications**, such as approvals, approvals with prescription ("conditional clearances"), decisions on prolongation of consideration, refusals. The major point of decision-making consists in verifying whether the anticipated deal will result or may result in restriction of competition, including as a result of creation or strengthening of a dominant position of the applicant or of the entity created as a result of the transaction.

While **taking decisions on merger notifications**, the FAS Russia is guided by the Law on Protection of Competition, according to which the antimonopoly authority should conduct analysis and assessment of the competitive environment in the relevant product markets. The analysis involves determining the market research time period; defining the market's boundaries; calculating market volume and shares of economic entities in the market; and other steps finishing with assessing the state of competition in the market and preparing the analytical report.

The **conditions** the FAS Russia imposes may be behavioural and structural. However, the latter are quite rarely used in the Russian antitrust practice.

The FAS Russia's **recent examples of decisions on merger notifications** includes the following cases: JSC «Gazprombank» willing to acquire the Moscow United Electric Grid Company (MOESK) (*prohibition*), the French enterprise «OSV Chambéry International» acquiring 99% shares of the charter capital of the Russian LLC "Alstrom Tver" (*conditional clearance*), the Polar Airlines acquiring the Airline Yakutia (*conditional clearance*), two of the largest Russian retail chains M-Video and Eldorado (*conditional clearance*).

In conclusion, it should be noted that conditional clearances are favoured by the FAS Russia more than prohibitions since they allow post-control and ensure preclusion of limiting competition, thus having an important preventative value.

SLOVENIA*

In 2015, the Slovenian Competition Protection Agency (SCPA) examined 31 notified concentrations. It did not block any transactions, but four mergers were cleared conditionally subject to remedies at the end of either Phase I or Phase II.

The SCPA would prohibit a merger when there is a probability that harm to competition is more likely than not to occur. The SCPA prefers to accept remedies rather than to prohibit a merger, especially when mergers generate high pro-competitive effects. Remedies should eliminate all identified competition concerns and at the same time preserve efficiencies and synergies. The proposed remedies have to be able to prevent the likely negative impact on prices, quality of service or innovation as a result of the merger. In addition, the SCPA requires that the proposed commitments can be put in place in a short time and that their effect will last for a sustained period of time. Finally, the appropriate remedy is determined on a case-by-case basis, taking into account the circumstances, available information and time constraints.

The SCPA does not have own guidelines on remedies, but follows the European Commission guidelines and best practices.

The main challenge of SCPA in the accepting remedies is assessing whether the proposed remedies would eliminate the competition concerns identified and whether the SCPA will be capable of monitoring their effects on the competition in the market. Before taking a final decision, the SCPA market tests remedies and in many occasions the SCPA decided to accept or reject remedies based on the comments received in market test. If the SCPA finds that the proposal remedy is insufficient to eliminate competition concerns, it can reject it without a market test.

The SCPA has until now imposed only behavioural remedies (i.e. access to network at fair and non-discriminatory prices, commitments on future behaviour of the merged entity, etc.). However, in its experience, the commitments to grant access to key infrastructure on non-discriminatory terms were difficult to monitor and rarely led to actual and timely entry of new competitors. Also firewalls have proven very difficult to monitor. In general, the SCPA finds that while behaviour remedies can effectively remove competition concerns in vertical or conglomerate mergers, they can be insufficient in preventing anti-competitive effects caused by horizontal mergers.

SPAIN*

Several characteristics of the Spanish merger control system and the case law of the Spanish Supreme Court make difficult to issue prohibition decisions for mergers reviewed by the Spanish Competition Authority. Most notifying parties know that prohibition decisions are a last resort instrument rarely applied in Spain. In particular, the Spanish Supreme Court has established (Sogetel/Vía Digital case judgement, 2005) that prohibition decisions must only be adopted if conditions cannot be imposed and, additionally, these conditions must be proportionate (only offset competition risks arising from the merger), adequate (eliminate the anti-competitive risks generated by the merger) to solve competition concerns, and causing the least intervention (the option easiest to implement and less obstructing the parties activities). Also, any Phase II decision by the Spanish Competition Authority approving a merger subject to remedies or prohibiting it, can be modified by the Spanish Government for “reasons of general interest” other than the promotion of competition. Intervention by the Spanish Government has only taken place once (Antena 3 / La Sexta case; 2012), and it softened the conditions imposed by the Spanish Competition Authority, which the parties deemed too harsh.

In this context, most problematic mergers are approved conditionally, usually using complex remedies. Remedies are always the result of an informal negotiation procedure between the notifying parties and the Spanish Competition Authority. Both structural and behavioural remedies are explored, in order to verify whether they can overcome the identified competition problems, under the principles of proportionality, adequacy and least intervention. Structural remedies are usually easier to implement and monitor, but are not always a viable option, for example, due to lack of proportionality, the nature of the market and the affected assets or the difficulties to find potential buyers. When accepting structural remedies, the Spanish Competition Authority usually requests the inclusion of a clear divestment timetable and a divestment trustee, with a mandate to sell at any price. In the most problematic cases, an up-front buyer, or crown-jewel divestments might be required. Commitments are always formally market tested at least once.

Monitoring effective implementation of remedies is a priority of the Spanish Competition Authority. Monitoring is usually based on a mix of periodic information obligations, trustee reports and specific information requests to the parties or third stakeholders. The Spanish Competition Authority analyses the gathered information and issues periodic compliance reports (after hearing the notifying parties) identifying non-compliance issues. Infringement procedures are opened in cases of non-compliance: in the last five years the Spanish Competition Authority has imposed fines in four cases for non-compliance with remedies.

SWEDEN

In the last five years the Swedish Competition Authority (SCA) has handled a number of merger cases where commitments have been submitted. In addressing the question of agency decision-making, the contribution presents four such mergers, providing a brief background to the case and the remedies in question. In two of the cases, remedies were offered but ultimately not accepted, while in the other two cases, the mergers were cleared subject to remedies.

The contribution then explores questions of agency guidelines, design of remedies, the role of market tests and the views of third parties, and the mechanisms for ensuring the effective implementation of remedies, while drawing on the SCA's enforcement experience from these recent cases.

The main conclusion from these four merger cases with remedies is that, unsurprisingly, structural remedies are preferred to behavioural as they are easier to assess, implement and monitor.

In this context it is relevant to note that if the SCA finds that commitments submitted in a case will eliminate the identified competition concerns, the SCA can conditionally approve the merger. However, in order to prohibit a merger, the SCA must submit a summons of application to the Patent and Market Court. The Court, rather than the SCA, will then rule on the case.

CHINESE TAIPEI*

The Fair Trade Act (FTA) provides that when the overall economic benefit of a merger outweighs likely disadvantages from the competition harm, the Fair Trade Commission (FTC) will not prohibit the merger but may approve it with conditions or undertakings attached. Thus, the net effect between the economic benefit and the disadvantages in terms of the competition harm resulting from the merger is the basis of the substantive test.

The FTC has established the “Fair Trade Commission Disposal Directions on Handling Merger Filings” (“Merger Directions”) to set standards of reviewing mergers and improve transparency.

Between January 2011 and September 2016, the FTC did not prohibit any merger but cleared 13 mergers conditionally. The remedies were mostly behavioural; only a few of them were structural. Before making the decision, depending on the specific case, the FTC solicits the opinions of related competent authorities, specialists and scholars, specialized research institutions, related businesses, merging enterprises and the public by sending them written requests or holding seminars.

UNITED KINGDOM

The UK's merger control regime follows a two-phase process. If at the end of an initial Phase 1 investigation, the Competition and Markets Authority (CMA) finds that a merger gives rise to a substantial lessening of competition (SLC), the CMA will refer the merger for in-depth Phase 2 investigation unless the merging parties can offer remedies (referred to as undertakings in lieu (UILs)) which address the CMA's competition concerns in a clear-cut manner. If the CMA proceeds to a Phase 2 investigation, the CMA may ultimately clear the merger without remedies, clear it subject to remedies, or prohibit it. Procedurally, prohibition is one form of remedy amongst many. In general, the CMA prefers structural remedies over behavioural remedies, as they are more likely to be effective and require little ongoing monitoring or enforcement.

When considering what remedy is appropriate, the CMA is required to have regard to the need 'to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it'.¹ Over the years, merging parties (and interested third parties) have challenged remedies decisions taken by the CMA and its predecessor, the Competition Commission. Frequently, these challenges have focused on the proportionality of the authority's approach in requiring certain remedies packages, or rejecting others. While the authority's approach has been upheld in each case, the case law has developed a number of important principles which the UK authorities must adhere to when considering the proportionality of the remedies which it accepts or imposes in merger investigations. These include that the remedy must be no more onerous than is required to achieve the authority's legitimate aim, and be the least onerous if there is a choice of equally effective measures. As prohibition is likely to be considered a particularly onerous remedy, the CMA will carefully consider whether there is any lesser remedy which would be equally effective in remedying the identified SLC.

Remedies are, by their very nature, forward looking. When designing remedies, the CMA therefore faces an element of future uncertainty, not only in relation to the implementation of the remedy in the short term, but also the ongoing effective operation of the remedy in the longer term. The CMA has identified a number of factors which may increase the successful implementation of remedies,² such as the use of effective interim measures in completed mergers and giving appropriate incentives for parties to implement remedies. In all cases, the CMA will seek views on the likely effectiveness of its proposed remedies by consulting publicly and, where appropriate, will approach stakeholders directly to encourage their engagement. Where the CMA has particular concerns regarding the implementation of a chosen remedy (for example, regarding the viability or attractiveness to a purchaser of certain divestment assets, or the deterioration of those assets during the divestment process), the CMA has various tools at its disposal. For example, it may require the appointment of a monitoring trustee to report on the ongoing management of the divestiture package, or impose an 'upfront buyer' condition, requiring the merging parties contractually to commit to sell the assets to a CMA-approved purchaser before proceeding with the merger.

¹ s.73(3) (Phase 1) and s.35(4) (Phase 2) Enterprise Act 2002.

² [Understanding past merger remedies: report on case study research](#), CMA, July 2015

UNITED STATES

When one of the US agencies reviews a transaction and concludes it would be anticompetitive, it carefully considers whether to go to court to block that transaction or, alternatively, whether to allow the transaction to proceed because there is an adequate and enforceable remedy. The agencies have each issued guidance setting forth their approach to analyzing remedies that may be offered to mitigate an otherwise unlawful merger; the most effective remedy for a horizontal merger is divestiture of one of the two parties' standalone business in the affected markets. More complicated settlements, especially where an asset package is cobbled together from separate assets from each party to the merger or where imprecise behavioral commitments would need to be monitored, present more risk, and the agencies' confidence that the settlement will preserve competition will be lower. Consumers should not have to bear the risk that a complex settlement may fail to preserve competition. Consequently, in some situations, a well-structured settlement can preserve competition. In other situations, however, there may be no settlement that can remedy a transaction in the agencies' judgment. In such cases, the agencies will not hesitate to challenge the transaction. A series of recent mergers reviewed by the agencies are offered as examples of their approach to deciding whether to challenge a merger or accept a settlement with remedies.