Fordham Competition Law Institute

44TH ANNUAL CONFERENCE ON INTERNATIONAL ANTITRUST LAW AND POLICY
Day 1: 14 September 2017 | 9 a.m.-5 p.m.
reception immediately following

CLE Course Materials & Speaker Biographies

Fordham Law School
Skadden Conference Center | 150 West 62nd Street
New York City
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Arthur J. Burke
Partner, Davis Polk

Arthur J. Burke is a partner in Davis Polk’s Litigation Department in New York and Northern California. He has represented clients in a variety of antitrust, securities, corporate governance and general litigation matters. Currently, he is heavily involved with the widely reported investigations and parallel civil litigation into benchmarking manipulations (FX, LIBOR and ISDAfix). He is also routinely sought out by some of the largest technology companies and financial institutions in the world to advise them on the antitrust aspects of transactions and other litigation and regulatory matters. His clients have included such companies as Comcast, Bank of America, JPMorgan Chase, Citigroup, Royal Bank of Scotland, NBCUniversal, Reckitt Benckiser, Ingram Micro and Tyco Electronics. He is active in the ABA Section of Antitrust Law and is a former Chair of the Section’s Media and Technology Committee. He is currently a member of the Council of the Antitrust Section. He received his J.D., magna cum laude, from University of Michigan Law School and his B.A., magna cum laude, and B.S. from University of Pennsylvania.

Cristina Caffarra
Vice President and Head of European Competition Practice, Charles River Associates

Dr. Cristina Caffarra leads the Competition Practice of CRA in Europe—a team of more than 100 specialist economists working on competition matters across the EU. She is an expert in the application of modern industrial economics to competition law, as well as the empirical analysis of markets in the context of competition investigations. She has provided economic advice in some of the most high-profile cases of the last 20 years on issues of merger control, assessment of vertical restraints, findings of dominance, evaluation of unilateral conduct, as well as use of intellectual property rights, information exchange, collusion and the assessment of damages. She has provided expert economic advice before the European Commission and the competition authorities of several member states, and she has testified as expert witness on multiple competition-related matters before the European and national Courts. She has advised on some of the major merger investigations of recent years, as well as numerous Art 101 and Art 102 cases including exclusionary and exploitative abuses, margin squeeze and investigations of conduct around standard essential patents, interchange fees, market coordination/abuse in matters such as enforcement of IPRs, LIBOR, CDH, manipulation of benchmarks, the economics of search, as well as the economics of multi-sided platforms. She is on the Editorial Board of the European Competition Law Journal, lectures in competition economics and has published articles and presented papers on the economics of competition law at numerous international and academic conferences.

Terry Calvani
Of Counsel, Freshfields, Bruckhaus, Deringer

Terry Calvani practices antitrust law in the Washington, D.C., office of Freshfields Bruckhaus Deringer US LLP. Previously he served as Commissioner of the U.S. Federal Trade Commission (1983-1990) where he was acting Chairman during 1985 and 1986, and later as a member of the board of directors of the Irish Competition Authority where he held the criminal investigations portfolio. During that period, he was an active member of advisory committees for the EU Competition Directorate. Following his graduation from the Cornell Law School, where he was articles editor of the Law Review, he practiced with Pillsbury, Madison & Sutor. From 1974 to 1983, he was professor of law at Vanderbilt School of Law teaching courses on antitrust law. Following his term on the FTC, he returned to private practice with the Pillsbury firm until his appointment in Ireland. In addition to Vanderbilt, he has taught antitrust law at Duke University School of Law, the Harvard Law School, Trinity College, Dublin and Cornell Law School, and is currently a Lecturer in Law at Columbia University School of Law where he will teach antitrust this spring term.

Anthony Collins
Judge, General Court of the European Union

Since September 2013 Anthony M. Collins has been a Judge at the General Court of the European Union. He was elected President of its Eighth Chamber in September 2016. He graduated from Trinity College, Dublin with a degree in Legal Science in 1984. Two years later he was called to the Bar of Ireland and practiced at it for four years before becoming a Legal Secretary (référendaire) at the Court of Justice of the European Communities, working with former Chief Justices Thomas F. O’Higgins and John L. Murray. In 1997 he returned to practice at the Bar of Ireland and simultaneously became Director of the Irish Centre for European Law, which post he held until 2000. He was called to the Inner Bar in 2003, where he continued to specialize in all aspects of public and administrative law, not least the law of the European Union. As a practitioner he regularly appeared before the Superior Courts of Ireland and the EU Courts in Luxembourg, representing public and private clients. He is currently a Bencher of the Honourable Society of King’s Innns, Dublin and an Adjunct Professor of Law at University College Cork. He has co-authored a number of legal textbooks and has been regularly engaged in legal publication as both an editor and as an author.

William L. Daly
Deputy Commissioner, National Hockey League

Bill Daly, was named the National Hockey League’s first-ever Deputy Commissioner by Commissioner Gary B. Bettman on July 22, 2005 — an appointment that was unanimously endorsed by the NHL’s Board of Governors. His appointment came after serving for more than eight years as the League’s Chief Legal Officer. In his current role, Daly is the chief consultant to Commissioner Bettman on virtually every topic impacting the League. Principal among his duties is negotiating and administering the League’s Collective Bargaining Agreements (CBA) with the NHL Players’ Association (NHLPA) and with the NHL Officials’ Association (NHLOA). In 2004-05, and again in 2012-13, he was the League’s lead negotiator in CBA negotiations with the NHLPA. Due in large part to the economic framework established and later improved upon in collective bargaining, the NHL has experienced unprecedented competitive balance and record revenue growth, and has reached an all-time high in terms of the health and popularity of the game. In addition to his continued oversight of the NHL Legal Department and collective bargaining, Mr. Daly is involved in, and ultimately responsible for, virtually all other areas of the League’s business and operations. He also serves as President of the NHL Foundation — the organization responsible for administering and directing charitable dollars and initiatives for the League and its Clubs — and also serves on the Board for the NHL Players’ Emergency Assistance Fund. Mr. Daly also represents the NHL on the Board of Directors for the Hockey Hall of Fame and the Board of Directors for USA Hockey. Beyond his duties with the NHL, Mr. Daly serves as a board member for the Sports Lawyers Association and has also served on boards for the Sports Development Corporation of the City of New York, and the Sports Law and Antitrust Law Committees of the Association of the Bar of the City of New York. Prior to joining the NHL on December 13, 1996, he spent six years as an attorney with the New York law firm of Skadden, Arps, Slate, Meagher & Flom, LLP. He is a graduate of Dartmouth College, where he played varsity football, and New York University School of Law.
Speakers (continued)

Wenlian Ding
Deputy Chief Justice, Intellectual Property Bench, Shanghai People's Court

Wenlian Ding is the Deputy Chief Justice of the Intellectual Property Bench at the Shanghai High People's Court. Justice Ding joined the court in 1997, and initially worked on civil and business cases. In 2001, he joined the intellectual property team. He has been the presiding judge in several antitrust cases, including those involving vertical agreements on appeal such as the case in Shanghai High People's Court, Bangrui Yonghe Technology Trading Co., Ltd. v. Johnson & Johnson (Shanghai) Medical Equipment Co., Ltd. and Johnson & Johnson Medical (China) Ltd., [2012] Hu Gao Min San (Zhi) Zhong Zi No. 63, August 1, 2013. He holds a master’s degree from East China University of Political Science and Law.

Andrew Finch
Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice

Andrew Finch became the Acting Assistant Attorney General on April 10, 2017. He previously worked in the Antitrust Division from 2003-2005 as Counsel to the Assistant Attorney General. In that role he worked closely with Division staff and management on policy initiatives, civil merger and non-merger investigations, matters proceeding to trial, and appeals. He also developed expertise on the application of antitrust law to intellectual property. Most recently, he was a partner in the Litigation Department at Paul, Weiss, Rifkind, Wharton & Garrison LLP. At Paul Weiss, he advised clients on antitrust and litigation issues across a broad range of industries. He served as a law clerk for Judge Dennis G. Jacobs of the U.S. Court of Appeals for the Second Circuit. Before his clerkship, he graduated from the University of Chicago Law School, where he was a John M. Olin Student Fellow in Law and Economics and was elected to the Order of the Coif.

Sir Nicholas Forwood
Counsel, White & Case LLP

Sir Nicholas Forwood QC was called to the English Bar in 1970, practiced in London, moved to Brussels in 1979, set up barristers chambers specializing in EU and competition law, and practiced for 20 years before the Court of Justice and Court of First Instance. Called to the Irish bar 1981, he made Queen’s Counsel in 1987 and was appointed judge of the Court of First Instance (now the General Court of the EU) in December 1999. For 16 years he took part in leading judgments in competition, judicial review, state aid, IP, broadcasting rights and other cases. At White & Case he advises on EU law matters, particularly competition. A door tenant at Brick Court Chambers, he acts as an arbitrator, provides independent expert opinions and other occasional advice.

Doris Hildebrand
Managing Partner, European Economic & Marketing Consultants

Doris Hildebrand is managing partner of EE&MC - European Economic & Marketing Consultants GmbH, in Brussels, Düsseldorf, and Vienna. EE&MC is a group of competition economists fully dedicated to and specialized in the application of economics in competition law. In the late 90s, she was one of the founders of the more economics based approach that is now developing towards the European School of thought. Her most recent book, *The Role of Economic Analysis in the EU Competition Rules — The European School* (fourth edition May 2016) describes this European School by combining theoretical insights with practical experiences in real EU competition cases. She is a professor of economics at the University of Brussels, teaching courses on EU Competition Policy. Other academic affiliations were at the University of Groningen, NL, University of Maastricht, NL, and the Harvard University. She holds a master's degree and Ph.D. in social and economic sciences from the University of Economics in Vienna. She earned a LL.M. degree and a state doctorate in law from the University of Brussels. Her law Ph.D. commission was chaired by then EU Competition Commissioner Karel van Miert, who together with Hildebrand initiated the more economics based approach in EU competition law in 1998. Her client assignments over the past years include Airbus, ARD BP, The Coca-Cola Company, Danish Crown, Deutsche Post AG, Deutsche Telekom AG, Heineken, Linde, Microsoft, Porsche, Philips, Procter & Gamble, REWE, Rossmann, Shell, Talamex/HDI, Vodafone, ZDF and many others. She is a sworn-in, authorized antitrust expert at the Higher Cartel Court in Austria and examines competition issues on a regular basis for courts as well as for competition and regulatory authorities. She publishes extensively on competition economics and speaks regularly on conferences.

James Keyte
FCLI Director and Adjunct Professor of Law, Fordham Law School Partner, Skadden Arps

James A. Keyte is director of the Fordham Competition Law Institute and, as an adjunct professor at Fordham Law, teaches the Comparative Antitrust Law and Enforcement course. As a partner at Skadden, he handles a wide variety of antitrust litigation, transactional and advisory matters across numerous industries. In the litigation area, he has handled a number of cases involving alleged price-fixing, monopolization, litigated mergers, other restraints of trade and class actions. In addition, he has handled or played significant roles in a number of sports-related litigations and trials. In the transactional arena, he has represented numerous clients before the Department of Justice and the Federal Trade Commission, as well as parties involved in litigated mergers. Mr. Keyte also counsels on general antitrust matters. He has advised numerous clients on compliance with basic antitrust statutes, including issues relating to competitor collaborations, unilateral conduct and distribution. He also counsels a number of clients on intellectual property matters with antitrust implications. He is the past chair of the Trade, Sports and Professional Associations Committee. He is a former senior editor of the *Antitrust Law Journal* and a current editor of *Antitrust Magazine*. He also authors a monthly antitrust column for the *New York Law Journal*. He holds a J.D. from Loyola Law School and B.A. from Harvard University.

Ana Paula Martinez
Partner, Levy & Salomão Advogados

Ana Paula Martinez is a partner with Levy & Salomão Advogados, Brazil. From 2007 to 2010, she was the head of Brazil’s D&O Antitrust Division, and co-headed the cartel sub-group of the International Competition Network with the U.S. Department of Justice. Before entering government, she was an associate with Cleary Gottlieb Steen & Hamilton in Brussels. She is a member of the International Bar Association and of the American Bar Association Sections of Antitrust Law. Named “Lawyer of the Year 40 and under” at the 2016 and 2014 GCR Awards, she has been included by GCR on its lists “Top Women in Antitrust” and “40 under 40”. Chambers & Partners, Legal 500, Who’s Who Legal and Best Lawyers listed her among the world’s leading competition practitioners. She is licensed to practice in Brazil and New York and served as an antitrust advisor to Unicad, to the World Bank, and to the government of Colombia. Currently she is a nongovernmental advisor to the ICN. She holds a LL.M. from the University of São Paulo (USP) and from Harvard and a Ph.D.
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from USP. She is a member of the ETHIC Intelligence Certification Committee and serves as an advisor to the David Rockefeller Center for Latin American Studies at Harvard, to the Institute for Consumer Antitrust Studies of Loyola University Chicago, and to Inspecr. She is the author of the books Fighting Cartels: Intersection between Administrative and Criminal Systems (Singular, 2013) and Competition Policy in Developing Societies: A Tool for Sustained Growth? (Saarbrücken, LAP LAMBERT Academic Publishing, 2013).

Greg McCurdy
Director, Litigation and Global Competition Law, Uber Technologies, Inc.

Greg McCurdy is director of litigation and global competition law at Uber Technologies, Inc., where he counsels on antitrust issues and manages competition law cases in the United States and abroad. Previously, Greg co-lead the team that provides legal and policy advice to Uber’s government relations and communications teams on legislation and policy regulating Transportation Network Companies. Before joining Uber in March 2015 Greg was a lawyer at Microsoft for 15 years based in Paris, Seattle, New York City, and Washington, D.C. Greg started at Microsoft as its first antitrust litigator in Europe and spent eight years managing the antitrust proceedings with the European Commission in Brussels and the appeals to the European courts in Luxembourg. After moving to Microsoft’s HQ near Seattle, Greg also worked on the US antitrust class actions and the Korean FTC proceeding. Greg is also a former co-chair of the International Bar Association’s Antitrust Committee. Before joining Microsoft Greg practiced commercial litigation in New York City and clerked for federal judges in the Southern District of New York and at the D.C. Circuit. Greg graduated from NYU Law School and Harvard College.

Amit Mehta
Judge, U.S. District Court for the District of Columbia

Amit Mehta was appointed to the U.S. District Court for the District of Columbia on December 22, 2014. Born in Patan, India, Judge Mehta received his B.A. in Political Science and Economics from Georgetown University in 1993 and his J.D. from the University of Virginia School of Law in 1997. After law school, he worked in the San Francisco office of the law firm Latham & Watkins LLP before clerking for the Honorable Susan P. Graber of the United States Court of Appeals for the Ninth Circuit. Following his clerkship, he worked at the Washington, D.C.-based law firm Zuckerman Spaeder LLP from 1999 to 2002. In 2002, he joined the District of Columbia Public Defender Service as a staff attorney. He returned to Zuckerman Spaeder in 2007, where his practice focused on white-collar criminal defense, complex business disputes, and appellate advocacy. He served on the Board of Directors of the Mid-Atlantic Innocence Project and is the former co-chair of the District of Columbia Bar’s Criminal Law and Individual Rights Section Steering Committee. He is also a former Director of Facilitating Leadership in Youth, a nonprofit organization dedicated to after-school activities and mentoring for at-risk youth.

Andreas Mundt
Chair, ICN Steering Group, and President, Federal Cartel Office of Germany

Andreas Mundt has been President of the German Bundeskartellamt (Federal Cartel Office) since December 2009. In September 2013 he was elected as the Steering Group Chair of the International Competition Network and was re-elected for a second term in May 2015. Since 2010 he has been a Member of the Bureau of the OECD Competition Committee. After qualifying as a lawyer following studies at the University of Bonn and the University of Lausanne, Switzerland, he entered the Federal Ministry of Economics where he worked from 1991 to 1993. He then joined the staff of the Free Democratic Party in the German Parliament from 1993 to 2000, where he was in charge of the portfolio of labour and social law. In 2000, he joined the Bundeskartellamt as rapporteur, with responsibility for banking and card payment systems issues. He was Head of the International Section of the Bundeskartellamt from 2001 to 2005 and Director of General Policy from 2005 to 2009.

John Pecman
Commissioner, Competition Bureau of Canada

John Pecman was appointed Commissioner of Competition on June 12, 2013 for a five-year term. Prior to that, he held the position of Senior Deputy Commissioner of the Bureau’s Criminal Matters Branch, where he directed significant investigations under the price-fixing and bid-rigging provisions of the Competition Act. Under his leadership, the Bureau’s enforcement actions have preserved competition in a variety of major areas of the Canadian economy, including the automotive, manufacturing, e-commerce, telecommunications and retail sectors. He is also responsible for reinvigorating the Bureau’s role in advocating for Canadian consumers by promoting the benefits of increased competition in regulated sectors of the economy. He realigned the Bureau’s internal structure to create a stronger, more adaptive agency and maximize the impact of its work for Canadians. Since 2015, the Bureau operates under a new organizational structure, improved decision-making processes and an integrated strategic planning approach in order to increase organizational synergies, provide greater flexibility in allocating resources to strategic priorities, and establish a more complementary balance between the Bureau’s enforcement and competition promotion activities. He is an economist with an M.A. from McMaster University and has worked at the Competition Bureau as an investigator, manager, and executive for more than 30 years. He has worked in every enforcement branch at the Bureau, and has held increasingly senior positions since joining the organization in 1984.

Giovanni Pitruzzella
Chairman, Italian Competition Authority

Giovanni Pitruzzella was appointed President of the Italian Competition Authority on 29 November 2011. Before his appointment, he was an administrative law lawyer. He has been full professor of Constitutional Law since 1994 and, from 1986 to 1993, he was associate professor of Institutes of Public Law. Previously he chaired several Governmental Commissions and the Independent Authority regulating strikes in essential public services. He has been legal consultant of parliamentary bodies, ministers and regional governments. In 2013, he was appointed by the President of the Republic as an expert advising the Parliament on economic and institutional reforms and was later asked expert advice on constitutional reforms. He has published six monographs, edited several books, and co-authored a textbook on Constitutional Law now at its 17th edition. He regularly publishes in law journals.

Ewoud C. Sakkers
Head of Unit, European Competition Network, Directorate-General for Competition, European Commission

Ewoud Sakkers has been with the Directorate-General for Competition of the European Commission since 1997. Initially in DG Competition he worked in the so-called Merger Task Force. From 2001, he worked in the area of antitrust enforcement in DG Competition, where he was a head of unit in the cartels directorate. Since July 2010, he is head of unit of the European Competition Network in the Policy and Strategy directorate. Prior to joining DG Competition, he worked in the trade policy department of the European Commission, on
anti-dumping and anti-subsidy issues. Before that, he was in-house legal
counsel with KPN, the Dutch telecommunications company. After spending
an initial year of (undergraduate) university education in the United States, he
obtained his law degree at the University of Utrecht in the Netherlands in 1990.
In 1991 he obtained an LLM degree in European Law from the College of Europe
in Bruges, Belgium. His publications include a major chapter on cartels in The
EC Law of Competition. He is also the co-author of the loose-leaf European
Cartel Digest.

Shira A. Scheindlin
Of Counsel, Stroock & Stroock & Lavan LLP, and JAMS Mediator and
Arbitrator

Former U.S. District Court Judge Shira Scheindlin is a member of the Litigation
Practice Group at Stroock and serves as an arbitrator/mediator under the
auspices of JAMS. Appointed to the bench in 1994 by President Bill Clinton, she
presided over numerous criminal and civil cases during her 22-year tenure with
the Southern District of New York. Among many important cases, her opinions
in electronic case management are recognized as case law landmarks, and she
is the co-author of the first casebook on electronic discovery. She previously
served as an Assistant United States Attorney for the Eastern District of New
York, a Magistrate Judge in the Eastern District of New York, and General
Counsel for the New York City Department of Investigation. Earlier in her
career she spent many years in private practice, including a stint as a litigation
associate at Stroock. She is a frequently published author and lecturer and
has been an adjunct professor for more than 30 years, teaching at Brooklyn
and Cardozo Law Schools. She has also served on several committees
of the Association of the Bar of the City of New York and is a former chair
of the Commercial and Federal Litigation Section of the New York State
Bar Association.

Pablo Trevisán
Commissioner, National Commission for the Defense of Competition,
Argentina

Since 2016, Pablo Trevisán is a Commissioner of the Comisión Nacional de
Defensa de la Competencia (Argentine Competition Commission, CNDC),
in Buenos Aires, Argentina. From 2002 to 2016, he was a partner of Estudio
Trevisán Abogados SC, Buenos Aires, in charge of the Competition Law
Department. He has also been General Counsel of BACS Banco de Crédito
y Securitización SA and has worked on antitrust matters in the offices of
White & Case in Brussels. He is a PhD Candidate in Legal Sciences, from
Universidad Católica Argentina, Buenos Aires, with a thesis on Antitrust Private
Enforcement. In 2014, he was a Visiting Research Fellow of Fordham School of
Law, New York. He holds an LL.M. from the London School of Economics and
Political Science. Since August 2017, he is a member of the International Task
Force, Section of Antitrust Law, American Bar Association. He is a Professor of
Competition Law at various Argentine universities (such as UCA, Universidad
Torcuato Di Tella, CEDEF, Universidad Austral, ESEADE and FORES, among
others). He is author of several articles and research works on antitrust
and competition law and has been lecturer and speaker at conferences and
seminars on his area of expertise. He has been recognized as a leading lawyer
in his field (among others, Who’s Who of Competition Lawyers and Economists,
Who’s Who of Life Sciences – Regulation, Chambers, GCR 100, Euromoney,
Expert Guides, LACCA) and is a former NGA for Argentina at the International
Competition Network (ICN). He is a member &amp; former chair of the Buenos
Aires Bar Association’s Competition Committee. Since 2013, he is a member of
International Advisory Board of the Institute for Consumer Antitrust Studies at
Loyola University, Chicago. He is a member of the Executive Committee of the
LSE Alumni Association.
Information Guide

Court of Justice of the European Union

A guide to information sources on the Court of Justice of the European Union (CJEU), with hyperlinks to further sources of information within European Sources Online and on external websites

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Introduction

On 4 December 2012, the Court of Justice of the European Union celebrated its 60th anniversary. Although 60 years amount to neither half nor three quarters of a century, the Court of Justice nevertheless decided not to let this anniversary pass unnoticed. Indeed, during the last 10 years the judicial system of the European Union has undergone major reforms which, viewed as a whole, constitute a real transformation. Reference can be made in this regard to the entry into force of the Treaty of Nice, two enlargements which resulted in the institution’s workforce almost doubling and in multiplication of the languages of the case and working languages, the creation of the Civil Service Tribunal, substantial modernisation of internal working methods, the entry into force of the Treaty of Lisbon with the resulting extension of the Court’s jurisdiction, the establishment of the urgent preliminary ruling procedure, and the computerisation of procedure with the launch of the e-Curia system.


Overview

The Court of Justice of the European Union (CJEU) rules on the interpretation and application of Union law. There is no appeal against a judgement from the Court. It is assisted by a General Court (previously the Court of First Instance - CFI), which deals with most cases of direct action and those concerning the administration of the EU institutions and competition law. Appeals to the CJEU against General Court rulings are allowed on points of law. A Civil Service Tribunal was created in 2004 to ease the workload of the CFI. Appeals to the General Court against Tribunal rulings are allowed on points of law.

The Court was - and is - often referred to as the European Court of Justice, with the abbreviation ECJ still frequently used in preference to CJEU.

The CJEU/ECJ is an EU institution and has no relation to the European Court of Human Rights (Council of Europe) based in Strasbourg, nor to the International Court of Justice (United Nations) in The Hague.

History

The Court of Justice of the European Communities was set up in 1952 as part of the European Coal and Steel Community (ECSC). With the advent of the European Economic Community (EEC) and the European Atomic Energy Community (EAEC) in 1957, the Court was established as a common Court for all three Communities. Articles 251-281 of the Treaty on the Functioning of the European Union (TFEU) set out the main provisions concerning the Court.

The 1993 Treaty on European Union gave the ECJ power to 'impose a lump sum or penalty payment' if a Member State fails to comply with a judgement (a power first used in July 2000, when the judgement in case Commission v. Greece (C-387/97) ordered Greece to pay €24,600 for each day it delayed implementing an earlier judgement concerning waste disposal in Chania, Crete).
The TEU also extended the ECJ’s right to review the legality of acts to include those adopted by the European Parliament, and brought the European Central Bank under the Court’s jurisdiction.

The Treaty of Amsterdam (see Summaries of EU legislation) gave the ECJ new responsibilities, covering:

- fundamental rights
- asylum
- immigration
- free movement of persons
- judicial co-operation in civil matters
- police and judicial co-operation in criminal matters (with restrictions)

The ECJ has made a number of rulings which are significant for the Court itself and for EU law:

- The 1963 Van Gend en Loos judgement established the principle of ‘direct effect’, by stating that: ‘independently of the legislation of Member States, Community law ... not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.’

- In 1964, in Costa v. ENEL, the Court ruled that Community law is supreme, taking precedence over national law: ‘the law stemming from the treaty ... could not, because of its special and original nature, be overridden by domestic legal provisions ... without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.’

- The 1991 judgement in the Francovich case gives individuals the right - under certain circumstances - to claim compensation for injury suffered where the State fails to implement EC Directives punctually and properly.

To help ease the workload of the ECJ, a Court of First Instance (CFI) was created by Decision 88/591 (after the 1986 Single European Act had given the Council power to create such a court - see Summaries of EU legislation). The CFI began work on 25 September 1989 and heard its first case in November the same year.

In an article written to mark the 20th anniversary of the Court, Marc Jaeger, President of the CFI, wrote in Is it time for reform? that the creation of the Court:

- pursued a threefold objective: to equip the European legal system with a court for hearing actions requiring close examination of complex facts; to establish a second court in order to improve the judicial protection of individual interests; and to enable the Court of Justice to concentrate its activities on its fundamental task of ensuring uniform interpretation of Community law. This is how, initially, the Court of First Instance was allocated the task of hearing, amongst others, cases on competition law.

The Treaty of Lisbon has extended the Court’s jurisdiction in a number of areas, as summarised in the CJEU section of the Draft General budget of the European Union for the financial year 2011:

The legal jurisdiction of the institution, and more specifically the jurisdiction of the Court of Justice and the General Court, has now been significantly extended in several fields (the area of freedom, security and justice, police and judicial cooperation in criminal matters, visas, asylum, immigration and other policies
linked to the movement of persons, the common foreign and security policy ...). Furthermore, it is worth noting that, with the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights of the European Union becomes a binding legislative text and acquires the same legal status as the Treaties (the Charter is however not binding on certain Member States to which derogations apply).

It is reasonably probable that this extension of the Court’s jurisdiction will, sooner or later, have a direct effect on the Court’s level of activity.

The impact of the application of the Charter of Fundamental Rights and of the Union’s accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms was highlighted in a January 2011 Joint communication from the CJEU and ECHR:

As regards the Charter, it was observed that it has swiftly become of primary importance in the recent case-law of the CJEU. Since 1 December 2009, the date on which the Treaty of Lisbon entered into force and the date on which that treaty conferred on the Charter the status of primary law of the EU, it has been cited in some thirty judgments. Thus the Charter has become the reference text and the starting point for the CJEU's assessment of the fundamental rights which that legal instrument recognises.

**Legal basis**

Article 13 of the Treaty on European Union (TEU) identifies the Court of Justice of the European Union as one of the Union’s institutions.

Article 19 of the TEU gives an overview of the Court, with 19(3) stating:

The Court of Justice of the European Union shall, in accordance with the Treaties: (a) rule on actions brought by a Member State, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions; (c) rule in other cases provided for in the Treaties.

In the Treaty on the Functioning of the European Union (TFEU), provisions on the CJEU are set out in Articles 251-281.

Articles 251-253 focus on the Court of Justice; Articles 254-256 concern the General Court; Article 257 sets out provisions on specialised courts which may be attached to the General Court; the remaining Articles address opinions, actions, penalties, jurisdiction and similar matters.

**Structure and composition**

**Court of Justice**

The Court of Justice currently comprises 28 judges - one per Member State - and eight Advocates-General. All are appointed by agreement between the Member States, for a six-year, renewable term; in common with the General Court, the membership of the Court of Justice is partially renewed every three years. Under Article 253:
The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurists of recognised competence;

The role of an Advocate-General is to act with complete impartiality and independence, and - under Article 252 - to:

make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

The submission - or opinion - of an Advocate-General is made in court at the end of the oral proceedings. It summarises the relevant legal issues and suggests how the case should be resolved. Although the opinion of an Advocate-General is not binding on the Court, it is usually a good guide to the final judgment.

Judges in both the Court of Justice and General Court elect a President to their respective Courts for a three-year term. The President administers the work of the Court, fixes dates and times of sittings, and presides at hearings and deliberations. A President is elected to each of the Chambers in which the Court sits. There are eight Chambers, which meet with either three or five judges. Presidents of the three-judge Chambers are elected for one year; those of five-judge Chambers for a three-year term.

Under terms first agreed in the Treaty of Nice, the Court of Justice may sit in a Grand Chamber comprising 13 judges (including the President of the Court and the Presidents of the five-judge chambers) that will generally deal with cases previously handled by the full Court in plenary session (used only in exceptionally important cases, such as where it must compulsorily retire the European Ombudsman or a Member of the European Commission who has failed to fulfil his/her obligations). Recently, for example, Grand Chambers have sat and ruled on preliminary references on an extremely important issue i.e. the legal basis upon which an EU citizen resident in another Member State for more than 10 years could be deported Tsakourdis (2010) and P.I. (2012).

Article 253 requires the Rules of Procedure of the Court of Justice (version of 25 September 2012) to be approved by the Council.

The Statute of the Court of Justice (March 2010 version) is laid down in a Protocol attached to the TFEU, as required by Article 281 of the Treaty. Regulation (EU, Euratom) 741/2012 of 11 August 2012 ‘amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto’ aimed to adapt the working methods of the General Court and to ensure better distribution of the Court’s workload (see also Press Release PRES/12/350 and European Parliament Library Briefing Amendment of the Statute of the Court of Justice).

General Court

Article 254 of the TFEU states that the number of judges of the General Court (previously the Court of First Instance or CFI):

shall be determined by the Statute of the Court of Justice of the European Union. The Statute may provide for the General Court to be assisted by Advocates-General.
Under Article 48 of the Statute (March 2010 version), the General Court has 28 judges. It has no Advocates-General, but members (judges) may be asked to perform the task of an Advocate-General.

Article 254 of the TFEU requires that members of the General Court:

shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office.

The General Court has eight Chambers, with judges usually sitting in Chambers of three or five judges, but occasionally as a single judge and sometimes as a Grand Chamber of 13 judges or - when justified by the legal complexity or importance of a case - as a full Court (plenary).

Under Article 254, the General Court establishes its Rules of Procedure (version of 1 July 2013) in agreement with the Court of Justice. The Rules require the approval of the Council.

Civil Service Tribunal

In 2004, through Decision 2004/752/EC, the Council established the European Union Civil Service Tribunal, as a Judicial Panel attached to the CFI (now the general Court). Created to relieve the pressure on the CFI, the Tribunal started work in 2005 and immediately took over 117 staff cases pending before the Court.

The Tribunal comprises seven judges, who normally sit in Chambers of three. There are also provisions for the Tribunal to sit in a Chamber of five Judges or as a single Judge. Particularly difficult or important cases may be referred to the full court. Tribunal Judges elect a President for a renewable term of three years.

The Rules of Procedure (version of 1 July 2011) of the Tribunal were first adopted in 2007.

Following the entry into force of the Treaty of Lisbon, the Civil Service Tribunal is formally a ‘specialised court’, under Article 257 of the TFEU. Specialised courts are attached to the General Court and can be established by the European Parliament and the Council.

Role

The European Community is based on the rule of law. Its unique characteristic - which distinguishes it from other international organisations - is that it creates legislation with which members are bound to comply. In the words of the ECJ judgment in the case of Van Gend en Loos:

the Community constitutes a new legal order of international law for the benefit of which the [Member] States have limited their sovereign rights ...'

Under Article 19 of the Treaty on European Union, the role of the Court is to:

ensure that in the interpretation and application of the Treaties the law is observed.

In clarifying and expounding EU legal rights, the Court has often adopted a more liberal and much wider interpretation of EU legislation than a mere literal reading would merit.
Many of its decisions have had important consequences for the lives of individual citizens and businesses.

For example:

**Employment rights**

The Defrenne case where the Court held that the Treaty provisions prohibiting discrimination were so fundamental that they could be enforced by an individual not only vertically against their government but horizontally against their employer. Consequently, a Belgian air hostess was able to pursue a claim for equal pay for work of equal value compared to her male colleagues.

In Dekker the ECJ declared that a woman, who was refused employment because she was pregnant, had been directly discriminated against contrary to Community law. This ruling was expanded in the Hertz judgement to make it clear that it also applied during the period of pregnancy and maternity leave and in Brown where the Court ruled that dismissal of a woman employee during pregnancy for absences due to pregnancy related illness was unlawful discrimination.

BECTU in which the Court established that paid annual leave was the legal right of all employees including those on short-term fixed contracts and in the Dominiguez decision, which confirmed that such entitlement could not even be made conditional on a minimum period of 10 days’ actual work.

**The right to an effective judicial remedy**

In Johnston a woman officer in the Northern Ireland police force alleged sex discrimination arising out of a policy not to issue firearms to female staff purportedly on grounds of public safety. The procedure involved was by way of Ministerial certificate which claimed not to be challengeable before the courts. The policy led to the ending of full time contracts being offered to women. The ECJ ruled that excluding review of this procedure by the UK courts was contrary to the principle of a right to an effective judicial remedy.

**Trade**

In the 1979 Cassis de Dijon decision the Court clarified the Community principle of the free movement of goods. As a result traders have the right to import into their own country any product coming from another Member State, provided that it was lawfully manufactured and marketed in the State of origin. The right is however, subject to some very strictly applied restrictions that may be necessary, for example, for the protection of health or the environment.

**Professional Sport**

The Bosman decision in 1995 shook up the existing transfer regime in European soccer. The Court ruled that professional sport was an economic activity and so governed by the Community principle of the free movement of persons. Consequently, the exercise of that activity was not be hindered by restrictive rules governing transfer or using quotas for players who were nationals of other Member States. The Bosman principle was expanded in later rulings to apply to professionals from third countries which had entered into an association agreement (Deutscher Handballbund) or a partnership agreement (Simutenkov) with the European Communities.
Services

In Cowan a UK tourist who was seriously injured following an assault on the Paris Metro was according to the Court, as a tourist, a recipient of services and therefore could not be discriminated against on the grounds of nationality under the French criminal injuries scheme. Although the French rule denying compensation to non-French nationals did not itself act as barrier to free movement to provide/receive services, the Court ruled that non-discrimination in protection from harm had to be a corollary of that right. As a result he was entitled to claim the same criminal compensation as a French national.

Proceedings

Court of Justice

The four most common types of proceedings brought before the Court of Justice are:

- Requests for a preliminary ruling. Preliminary rulings help ensure that Community law is interpreted in a standard way throughout the Member States. A ‘preliminary ruling reference’ is made by a national court or tribunal which needs a decision on a question of Community law before it itself can give a judgement. The ECJ’s decision is then applied to the national case. The ECJ is responsible for ensuring uniform application of EU law within the EU and under the Treaty of Nice in principle retains competence for investigating questions referred for a preliminary ruling; however, pursuant to Article 256 of the TFEU the Statute may entrust to the General Court the responsibility for preliminary rulings in certain specific matters.

- Proceedings for failure to fulfil an obligation. The Commission can initiate these proceedings if it has reason to believe that a Member State is failing to fulfil its obligations under EU law. These proceedings may also be initiated by another Member State. In either case, the Court investigates the allegations and gives its judgment. The accused Member State, if it is found to be at fault, must set things right at once.

- Proceedings for annulment. If any of the Member States, the Council, Commission or (under certain conditions) Parliament believes that a particular EU law is illegal they may ask the Court to annul it. These ‘proceedings for annulment’ can also be used by private individuals who want the Court to cancel a particular law because it directly and adversely affects them as individuals. If the Court finds that the law in question was not correctly adopted or is not correctly based on the treaties, it may declare the law null and void.

- Proceedings for failure to act. The Treaty requires the European Parliament, the Council and the Commission to make certain decisions under certain circumstances. If they fail to do so, the Member States, the other EU institutions and (under certain conditions) individuals or companies can lodge a complaint with the Court so as to have this violation officially recorded.

The Court of Justice can only decide matters of EU law - it is not a court of appeal against decisions of national courts.

The working language of the Courts is French, which is used for judges' confidential deliberations. In preliminary rulings, the ECJ uses the same language as the referring court; in a direct action the language of the case is chosen by the applicant. The only 'authentic' text of a judgement is the one in the language of the case.
General Court

The General Court (previously the European Court of First Instance) hears cases brought by 'natural or legal persons' in direct actions against EU institutions. It does not hear cases brought by the institutions or Member States. Initially, the ECFI's jurisdiction was limited to cases concerning competition, those involving staff of the Community institutions, and those brought against the European Commission under the ECSC Treaty which involved levies, production quotas, prices, restrictive agreements or concentrations. However, the Treaty on European Union and the Treaty of Nice extended the ECFI's jurisdiction.

Details of the current jurisdiction of the General Court are set out in Article 256 of the TFEU. According to the Court’s website, the Court has jurisdiction to hear:

- direct actions brought by natural or legal persons against acts of the institutions, bodies, offices or agencies of the European Union (which are addressed to them or are of direct and individual concern to them) and against regulatory acts (which concern them directly and which do not entail implementing measures) or against a failure to act on the part of those institutions, bodies, offices or agencies; for example, a case brought by a company against a Commission decision imposing a fine on that company;
- actions brought by the Member States against the Commission;
- actions brought by the Member States against the Council relating to acts adopted in the field of State aid, 'dumping' and acts by which it exercises implementing powers;
- actions seeking compensation for damage caused by the institutions of the European Union or their staff;
- actions based on contracts made by the European Union which expressly give jurisdiction to the General Court;
- actions relating to Community trademarks;
- appeals, limited to points of law, against the decisions of the European Union Civil Service Tribunal;
- actions brought against decisions of the Community Plant Variety Office or of the European Chemicals Agency.

Civil Service Tribunal

Under Article 270 of the TFEU, the Tribunal has jurisdiction to hear disputes between the EU and its staff. Such disputes concern issues about working relations (e.g. pay, career progress, recruitment, disciplinary measures) and social security (e.g. sickness, old age, invalidity, accidents at work, family allowances).

According to the Tribunal website, it also has jurisdiction:

- in disputes between all bodies or agencies and their staff in respect of which jurisdiction is conferred on the Court of Justice of the European Union (for example, disputes between Europol, the Office for Harmonisation in the Internal Market (OHIM) or the European Investment Bank and their staff).

Workload

Each year the Court provides a retrospective and selective overview of what it regards as the important judgements of the past year, across the range of its jurisdiction. This case summary and review, along with Statistical analysis of all cases (brought, completed and
pending, subject matter, historical comparisons etc) is published in the Annual Report of the Court.

The historical expansion and growth of litigation at ECJ level can be gauged from the following table:

<table>
<thead>
<tr>
<th>Year</th>
<th>ECJ - cases brought (cases completed) [cases pending]</th>
<th>CFI/General Court - cases brought (cases completed) [cases pending]</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970</td>
<td>79</td>
<td>-</td>
</tr>
<tr>
<td>1975</td>
<td>130</td>
<td>-</td>
</tr>
<tr>
<td>1980</td>
<td>279</td>
<td>-</td>
</tr>
<tr>
<td>1985</td>
<td>433</td>
<td>-</td>
</tr>
<tr>
<td>1990</td>
<td>384 (302) [583]</td>
<td>59 (82) [145]</td>
</tr>
<tr>
<td>1991</td>
<td>343 (288) [638]</td>
<td>95 (67) [173]</td>
</tr>
<tr>
<td>1992</td>
<td>440 (344) [734]</td>
<td>123 (125) [171]</td>
</tr>
<tr>
<td>1993</td>
<td>490 (792) [432]</td>
<td>596 (106) [661]</td>
</tr>
<tr>
<td>1994</td>
<td>351 (292) [491]</td>
<td>409 (442) [628]</td>
</tr>
<tr>
<td>1995</td>
<td>415 (287) [619]</td>
<td>253 (265) [616]</td>
</tr>
<tr>
<td>1996</td>
<td>423 (348) [694]</td>
<td>229 (186) [659]</td>
</tr>
<tr>
<td>1997</td>
<td>445 (456) [683]</td>
<td>644 (186) [1,117]</td>
</tr>
<tr>
<td>1998</td>
<td>485 (420) [748]</td>
<td>238 (348) [1,008]</td>
</tr>
<tr>
<td>1999</td>
<td>395 (543) [896]</td>
<td>384 (659) [732]</td>
</tr>
<tr>
<td>2000</td>
<td>503 (526) [873]</td>
<td>398 (344) [786]</td>
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<tr>
<td>2001</td>
<td>504 (434) [943]</td>
<td>345 (340) [792]</td>
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<tr>
<td>2002</td>
<td>477 (513) [907]</td>
<td>411 (331) [872]</td>
</tr>
<tr>
<td>2003</td>
<td>561 (494) [974]</td>
<td>466 (339) [999]</td>
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<tr>
<td>2004</td>
<td>531 (665) [840]</td>
<td>536 (361) [1174]</td>
</tr>
<tr>
<td>2005</td>
<td>474 (574) [740]</td>
<td>469 (610) [1033]</td>
</tr>
<tr>
<td>2006</td>
<td>537 (546) [731]</td>
<td>432 (436) [1029]</td>
</tr>
<tr>
<td>2007</td>
<td>581 (570) [742]</td>
<td>522 (397) [1154]</td>
</tr>
<tr>
<td>2008</td>
<td>593 (567) [768]</td>
<td>629 (605) [1178]</td>
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<tr>
<td>2009</td>
<td>562 (588) [742]</td>
<td>568 (555) [1191]</td>
</tr>
<tr>
<td>2010</td>
<td>631 (574) [799]</td>
<td>636 (527) [1300]</td>
</tr>
<tr>
<td>2011</td>
<td>688 (638) [849]</td>
<td>722 (714) [1308]</td>
</tr>
<tr>
<td>2012</td>
<td>632 (595) [886]</td>
<td>617 (688) [1237]</td>
</tr>
</tbody>
</table>

The problems posed by this substantial rise in workload (which slowed down the delivery of judgements) together with the prospect of additional countries joining the Union were addressed in a number of papers presented in the run-up to the Intergovernmental Conference (IGC) of 2000, prior to the adoption of the Treaty of Nice:

- An independent Working Party chaired by Ole Due - a former President of the ECJ - delivered a report on the future of the Communities’ court system in February 2000 (the Due Report).
- In March 2000 an 'Additional Commission contribution to the Intergovernmental Conference on institutional reform - Reform of the Community courts’ (COM (2000)109) was issued by the Legal Service of the Commission. It proposed greater responsibilities for the national courts in preliminary ruling procedures, extending the jurisdiction of the CFI in direct actions and modifying membership of the Courts.

Based on these papers and discussions, the Treaty of Nice (see Summaries of EU legislation) instituted major reforms to the Union's legal system, seeking to share tasks
between the ECJ and the CFI more effectively by expanding the role of the CFI and leaving the ECJ to deal with more important issues.

In 2004, the Court proposed amendments to its Rules of Procedure, with a view to shortening the duration of proceedings. The amendments were adopted in July 2005, following a discussion within the Council, and entered into force in October 2005. According to The Court of Justice in 2005: changes and proceedings (extract from the Court’s Annual Report 2005):

The cumulative impact of the measures adopted to improve the effectiveness of the Court's working methods and of the arrival of 10 new judges following enlargement remains very evident in the statistics concerning the Court's judicial activity in 2005. A reduction of approximately 12% in the number of cases pending and a very substantial decrease in the duration of proceedings before the Court may be noted.

The Introduction of the Civil Service Tribunal in 2005 was a significant step towards freeing up the system, and was followed in 2007 by changes to the ECJ Statute and Rules of Procedure in order to establish an urgent preliminary ruling procedure, enabling questions relating to the area of freedom, security and justice referred for a preliminary ruling to be dealt with quickly. The new procedure entered into force early in 2008 (see extract from the Court’s Annual Report 2007 The Court of Justice in 2007: changes and proceedings).

From 2008, the Court has attempted to improve efficiency by making 'wider use of the various procedural instruments at its disposal to expedite the handling of certain cases, in particular the urgent preliminary ruling procedure, priority treatment, the accelerated or expedited procedure, the simplified procedure and the possibility of giving judgment without an opinion of the Advocate General'. The possibility offered by Article 20 of its Statute of determining cases without an opinion of the Advocate General where they do not raise any new point of law', saw some 53% of judgments in 2012 delivered without an Opinion, compared to 46% in 2011 and 50% in 2010 (see Annual Report 2012, Annual Report 2011 - Proceedings of the Court of Justice section). On 6 November 2012, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings was published in the Official Journal.

Celebrating the 20th anniversary of the CFI in September 2009, CFI President Marc Jaeger noted in Is it time for reform? that the CFI's workload poses a real challenge to the Court, which:

... must evolve and adapt to the new reality of the cases before it. This is absolutely vital if the Court is to be able to continue to perform fully the role assigned to it. Two avenues are available: the first would consist in radically redefining the Court's very conception of its decisions. It could condense them in the extreme, without setting out the multiple stages in reasoning or replying in detail to all of the arguments raised. To my mind, that cure would be worse than the disease. In the complex areas with which it deals, where much is at stake, the Court of First Instance has built its legitimacy on the intelligibility, transparency and reasoning of its case-law. In the background, there is the idea that a judicial decision must not only determine the dispute before the court, but also enable stakeholders, whether private or institutional, to understand, accept and adapt to the legal environment outlined by the court in interpreting and applying the law.

It is therefore the second avenue which should be explored, namely that of reforming the judicial structure. With regard to the Court of First Instance, the Treaties have laid down two mechanisms for meeting the pressing need to
increase judicial productivity to a level which can be maintained: increasing the number of judges, and the staff at their disposal, or creating a new, specialist court with jurisdiction over a specific area, to be ceded by the Court of First Instance (similar to what has already happened, in 2005, with Community staff cases). Intellectual property litigation (in particular Community trade mark cases) could lend itself to such a transfer of jurisdiction.

The 2012 Annual Report reveals the following snapshot of the work of the two main courts:

**Court of Justice**

The ECJ completed 527 cases in 2012 (net figures, that is to say, taking account of the joinder of cases), a drop compared with the previous year (550 cases completed in 2011).

Of those cases, 357 were dealt with by judgments and 168 gave rise to orders.

In 2012 the Court had 632 new cases brought before it (without account being taken of the joinder of cases on the ground of similarity), which although a decrease of some 8% compared with 2011 (688 new cases) still constitutes the second highest annual number of cases brought in the Court’s history.

In 2012, the number of references for a preliminary ruling (404) was the second highest reached in the Court’s history - the largest number being for 2011 (423; 385 in 2010; 302 in 2009).

The number of appeals lodged in 2012 was 136, which was fewer than the 162 in 2011, but still far more than the 97 lodged in 2010. The number of direct actions continued to fall: from 221 in 2007 to 73 in 2012.

The average time taken to deal with references for a preliminary ruling fell from 16.4 months in 2011 to 15.7 months in 2012.

The average time taken in 2012 to deal with direct actions and appeals was 19.7 months and 15.3 months respectively (compared with 20.2 and 15.4 months in 2011 and 16.7 and 14.3 months in 2010).

**General Court**

In 2012, 617 new cases were registered at the General Court - compared to 722 in 2011 and 636 in 2010. Fewer cases were completed in 2012 (688) than in 2011 (714), but more than in 2010 (527).

**Administration and location**

Each of the Courts and the Tribunal has its own Registrar, appointed for six years, whose duties include maintaining the files of pending cases and drawing up minutes of judgements, orders and other decisions. The Courts are supported by various departments.

As at 31 December 2011 there were 2076 posts (civil servants, temporary and contract workers) authorised for the Court of Justice (see the court in figures).
All three courts sit in Luxembourg. The central postal address, telephone and fax numbers are:

Court of Justice of the European Communities L-2925 Luxembourg
Tel: 00 352 4303 1
Fax: 00 352 4303 2600 (switchboard)

A detailed contacts list is available via the EU Who is who directory.

Information sources in the ESO database

Find updated and further information sources in the ESO database:

2.8 Court of Justice of the European Union [all categories]
- Key Source
- Legislation
- Policy-making
- Report
- Statistics
- News source
- Periodical article
- Textbook, monograph or reference
- Background
2.8.a European Court of Justice
2.8.b General Court

Further information sources on the internet

- Court of Justice
  - Homepage
    - General presentation
    - Court of Justice
    - General Court
    - Civil Service Tribunal
    - Press releases
    - Annual report
    - Legal publications (includes Judgments and Opinions, Texts governing procedure, and Library, Research and Documentation)
    - Case law (simple search)
    - Case law (advanced search)
    - Case law (browse by number)
    - Digest of the case-law (summaries)
    - Reflets: Quick information on legal developments of Community interest (in French only; issues since 2010 in English via the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union website)
    - Alphabetical Table of Subject-matter (in French only)
    - Annotations of judgments
    - Historic case-law judgments in the 2004 and 2007 accession languages
    - Application of Community law by national courts: a survey
    - Courts of the Member States of the European Union: state of the court systems as at 1 January 2007 (in French only)
• Europa
  o The Court of Justice
  o Europe on the move: How the European Union works
  o Policy areas: Institutional affairs
  o Summaries of EU legislation
    ▪ European and international courts
    ▪ The decision-making process and the work of the institutions (includes a sub-section on Enforcement of Community instruments, with links to a number of fact sheets, including: The direct effect of European law, Precedence of European law, Proceedings for failure to fulfil an obligation, Proceedings for failure to act, Action for liability, The reference for a preliminary ruling)

• European Commission: DG Communication
  o RAPID press releases database - Court of Justice’s Documents (pre-set search)
  o EU news: Institutional affairs

• European Union: EUR-Lex
  The text of proposed and adopted legislation relating to the Court of Auditors can be found via EUR-Lex:
  o Proposed - 01 General, financial and institutional matters - 01.40.50 Court of Justice
  o Adopted (01 General, financial and institutional matters - 01.40.50 Court of Justice)
  o Treaty on European Union Articles 13, 19
  o Treaty on the Functioning of the European Union Articles 251-281

• Court of Justice of the European Union: Opinions and judgments since June 1997 (on the search form, use appropriate terms in 'Words in the text' or search by 'Names of parties' using 'court of justice')

• European Parliament: OEIL
  Homepage. Search by Words or phrases or (choose 'state and evolution of the Union' - 'Institutions of the Union' - 'Court of Justice, Court of First Instance')

• European Commission: PreLex
  Homepage. In standard search use ‘court of justice’ or other appropriate term

• European Parliament
  o Committee on Legal Affairs (JURI)

• European Parliament: Fact Sheets
  o Fact Sheet on The Court of Justice, the Court of First Instance and the Civil Service Tribunal and on Sources and scope of European Union law

Eric Davies
ESO Information Consultant
Original compilation: July 2000 (Eric Davies)
Revised: 2005 (Rohan Bolton), 2009 (Eric Davies), 2011 (Eric Davies), 2012 (Kenneth Wilson)
Latest revision: September 2013
CONVERGENCE AND DIVERGENCE IN THE EU AND U.S. APPROACHES TO DOCUMENT REQUESTS IN COMPLEX MERGERS

IN RECENT YEARS, THE EUROPEAN Commission’s document production practices with regard to complex mergers have moved increasingly towards the Second Request procedures used by the Federal Trade Commission and the Antitrust Division of the Department of Justice, most notably in the scale and nature of the requests for documents made to parties. Indeed, whereas previously the European Commission would request hundreds, more rarely thousands of documents, in recent cases there has been an increase by a factor of ten and, in some cases, of a hundred.

As a result, the document production demands in complex mergers in the European Union, which, in many cases, may also be subject to a Second Request in the United States, are becoming, at least superficially, increasingly similar in both jurisdictions. Stopping the analysis here, however, would be far too simplistic. First, this development has the potential to impact the timelines of international transactions. Second, this apparent convergence belies significant procedural and legal differences between U.S. and EU document request practices and procedures. These differences are of practical importance for companies and lawyers involved in complex mergers. They are also areas in which EU law and practice is likely to develop in the coming years, building on both the U.S. experience and the procedural law of the European Union.

In the following sections, we examine these EU developments and compare them to U.S. practice and experience. First, we set out the procedure and process by which the EU makes document requests to parties in complex cases (Internal Document Request) and compare this with the Second Request Procedure. We then discuss points of divergence, in particular relating to EU rules on legal professional privilege, the conduct of reviews, and the limitations of the current procedural rules in relation to disclosed documents and consider the practical implications of these for merging parties. Lastly, we consider the likely areas of debate and development in EU procedural law that this convergence with the Second Request process might foreshadow.

The Internal Document Request and Second Request Procedures

The Internal Document Request Procedure. Under the EU’s merger control regime, the European Union Merger Regulation (EUMR), the European Commission (EC) ordinarily obtains internal documents either by way of what are known as 5(4) documents, which are provided as part of a notifying party’s formal filing, or by way of requests for information. The latter can be made during pre-notification (although these do not have the same formal status as those issued post-filing), or in Phase I or Phase II of the EU merger control process.

Typically, the Internal Document Request will be made, in cases likely to go to Phase II, early in the initial part of Phase I. But this is not always the case. There have been instances of complex mergers that were cleared in Phase I following a
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...lengthy pre-notification period where the process--including both responding to the Internal Document Request and the finding of a remedy--were front-loaded to meet the Phase I timeline. These were cases where the transactions would have almost certainly been subject to a Phase II investigation had the remedy not been approved by the EC.

The EC is not limited in the number of requests for information it may make. Follow-up document requests may be made at any point during the EU merger control process.

The Internal Document Request typically will take the form of a list of questions directed to custodians identified by the EC as being likely to have the requested information (custodians having been identified through questions on the merging parties’ corporate structures sent in pre-notification or very early in Phase I). The scope of the Internal Document Request may vary and, for example, relate only to documents or also include the contents of the relevant custodians’ inboxes. Based on these questions, the merging parties and their advisers, will usually prepare a list of search terms and search rules (including connectors, proximity rules and, potentially, also exclusionary search terms) that, coupled with the scope of the search, will often be the subject of extensive *77 discussion with the EC and subsequent revision. This, however, is not always the case. The EC has also sent both questions and search terms simultaneously without providing parties with the opportunity for significant discussion or revision. In other cases, the EC has requested that the parties conduct the relevant searches and then provide the EC with a list of all search terms and any other search methodology used.

The parties usually will be obliged to provide all non-privileged material responsive to the search terms (whether or not this is actually responsive to the relevant question rather than just to a search term) by the end of Phase I or the beginning of Phase II, so that the EC can draw on these materials for its Statement of Objections in complex cases (should the case not be resolved or satisfactory remedies found by that juncture). Further, in addition to a report setting out how the material was processed and searched, the EC is increasingly requiring parties to provide, alongside their submission, a log of the documents for which legal professional privilege is claimed.

Given the fixed timelines of the EU merger review process and the limited flexibility that this gives to the EC’s case teams, unless the Internal Document Request is started early enough in pre-notification (and, indeed, that advisors have already laid the groundwork for the Request), this can make large scale document searches quite challenging within the available time. Moreover, in some cases, the EC has made an Internal Document Request during its review process with very short time limits; in the Huntsman/Rockwood case, the EC stopped the clock on the merger clearance process for over a month in light of the parties’ inability to respond to a large scale Internal Document Request within a 12-day time limit.4

While there are strict time limits for document production because of the Phase I and Phase II time limits imposed on the EC, there is no fixed procedure for the EC’s approach which, while not wholly discretionary, can vary, sometimes significantly, between cases, sectors, and even case teams. We have encountered cases in the same sector giving rise to similar issues in which one case team made a wide-ranging and significant Internal Document Request, including the contents of custodians’ inboxes generating hundreds of thousands of responsive documents. The other case team’s approach led to only a few hundred additional documents being disclosed due to the limited scope, numbers of custodians, and search terms used. Similarly, the questions forming the basis of the Internal Document Request tend to be driven by the facts of a particular case and can thus also vary significantly from case to case.

*77 Second Request Procedure. By contrast, although also subject to significant case-by-case modification, both the timing and the process of the Second Request are well established, with the DOJ and FTC both providing models of the Second Request itself and the DOJ providing a Model Second Request Timing agreement.7 At the same time, depending on the scale and scope of the request, the Second Request process is more temporally flexible and open ended, taking typically between four and seven months (although occasionally up to nine) for “substantial compliance” to be achieved before the waiting period commences.

Following the issuance of the Second Request, the agency will often require parties to agree to a so-called “timing agreement” to allow the agency additional time to review the transaction in exchange for the agency’s continued engagement with the parties and certain other limitations to the Second Request (such as search terms and custodians). The agreement may also address the timing for production of documents and interrogatory responses, as well as the schedule for depositions and white papers, may require the parties to give advance notice of substantial compliance and even address jurisdictional and procedural issues for trial. In addition to any constraints imposed by the timing agreement, the timing of substantial
compliance will depend on other factors, such as the number of product or geographic markets involved, the complexity of the issues, and the number of custodians who need to be searched.

Merging parties and their advisers will need to bear in mind the contrasting approaches of the EU and U.S. in relation to the timing and scope of a potential Internal Document Request when planning their clearance processes in transatlantic and other international mergers. It would also be helpful for the EC to consider whether the more established U.S. procedures can be built into the EUMR process to complement the increasing scale and scope of the EC’s Internal Document Request despite the stricter EUMR time limits.

**Points of Divergence: Privilege and the Conduct of Reviews in Second Requests and Internal Document Requests**

Despite increasing convergence between certain procedural aspects of EU and U.S. merger control, there remain important points of difference. This section will focus on some of the most marked and potentially significant issues in relation to the EU rules on legal professional privilege and in the conduct of the search and review process entailed in responding to these Requests.

*Privilege in Internal Document Requests.* In broad terms, the accepted grounds of legal professional privilege under EU law (and thus far accepted by the EC in Internal Document Requests as being sufficient for withholding documents on grounds of privilege) are as follows:

- Written communications with an independent (i.e., not in-house), EU-qualified lawyer made for the purposes of and in the interests of the exercise of the parties’ rights of defense.\(^6\) This privilege can extend to earlier written communications between a lawyer and her client that relate to the subject matter of the procedure;\(^7\)

- Internal notes circulated within a company that are confined to reporting the text or the content of communications\(^8\) with an independent EU-qualified lawyer which contains legal advice;\(^8\) and,

- Working documents and summaries prepared by the client even if not exchanged with an independent EU-qualified lawyer or not created for the purposes of being sent to an EU-qualified lawyer, provided they were prepared for the purposes of seeking legal advice from such a lawyer (although the fact that a document has been discussed with a lawyer is not sufficient to generate legal professional privilege).\(^9\)

In the context of international mergers, where parties are often not EU-based and may not have solely consulted EU-qualified lawyers, these rules are potentially problematic. This issue has been amplified by document requests in which, given the volume of documents in question, the numbers of documents containing legal advice which may not fit strictly within the categories of legal professional privilege as set out above, can run to the hundreds if not thousands.

U.S. law takes a broader approach to the protection of privilege than EU law. For example, it is significant that under U.S. law (and unlike EU law), the attorney-client privilege extends to communications between in-house counsel and staff of the company and may also extend to communications among counsel of the two parties, pursuant to a common interest privilege. Moreover, unlike the position under EU law, attorney-client privilege is recognized regardless of where an attorney is qualified to practice. Although this does tend to result in significantly larger volumes of documents in the privilege review process in the U.S. than in the EU, it also arguably ensures that legal advice given in the context of a merger is treated more consistently, and gives the parties greater comfort and certainty on the question of the privileged status of the advice they have received in relation to the merger transaction. Having set out the strict legal position, it should be noted, however, that to date the EC has, in the authors’ view, generally taken a pragmatic approach and in practice has not challenged U.S. or other non-EU lawyers’ advice as not being privileged in EU merger control proceedings. The EC has, however, requested in-house lawyers’ documents in non-merger antitrust cases.

Further potential complications arise from these differences in approach to privilege as a result of the bilateral agreements between the EC and non-EU regulators (most notably the Department of Justice and Federal Trade Commission) to share information in relation to a particular transaction under investigation (subject to the granting of a waiver by the parties).
Parties may have to conduct additional reviews to ensure that material which would be covered by privilege in one jurisdiction is not accidentally obtained by authorities in that jurisdiction from the EC as a result of the differences between approaches to privilege.

This may also be a point of some concern for the EC, as, under the model waiver permitting the EC to share information with non-EU regulators, the European Union is under an obligation not to disclose information with respect to which the parties assert privilege under the rules of the non-EU jurisdiction. The U.S. agencies have, in their practices, recognized this risk, and have built into their model confidentiality waiver (to facilitate the exchange of confidential information between the U.S. and non-U.S. competition authorities), an explicit provision that the FTC and DOJ will not seek information that is protected by U.S. legal privilege. If information privileged under U.S. law is received by the U.S. agencies from a non-U.S. competition authority, the agencies will treat that information as inadvertently produced privileged information. Indeed, consistent more generally with the approach of the U.S. agencies to inadvertently produced privileged information (described below), that material will also not be produced to non-U.S. authorities or, if already produced, the agencies will request its return.

The issue of EU privilege is also likely to give rise to practical issues where the EC is now frequently requiring parties not only to conduct a relatively complex privilege review, but also to provide privilege logs giving the basic information about allegedly privileged documents, including the grounds of privilege claimed. This follows the approach suggested by the General Court in the antitrust context in Akzo and appears to be in response to recent cases where the EC was concerned that materials that may not have been privileged were incorrectly treated as privileged by notifying parties. While most, if not all, Second Requests similarly require production of a privilege log, to address the same concerns as those raised by the EC, the parties may have greater flexibility and ability to negotiate the content and timing of the privilege logs.

Although understandable given the EC’s concern in relation to the withholding of non-privileged material, this new approach adds to the burden put on parties in collecting and reviewing responsive material, particularly for Internal Document Requests that are broad in scope, requiring production of thousands or even tens or hundreds of thousands of documents in a very short time. To conduct the necessary privilege review in addition to the normal substantive reviews, large review teams have, in a similar manner to the process in a U.S. Second Request, been required to meet the EC’s ambitious deadlines. However, unlike a U.S. Second Request process, we understand that the EC has yet to accept the use of “Technology-Assisted Review” in merger control, which is increasingly being accepted by the U.S. agencies.

**Technology-Assisted Review in the United States and the European Union.** Technology-Assisted Review entails use of a computer software algorithm to search a party’s electronic records to identify documents that are substantively relevant and a subset of those documents that are privileged. Such review typically is based on a predictive coding protocol agreed upon with the agency conducting the merger review. The protocol may include the definition of the data, sample size, batches, control set, reviewers, confidence level, and margin of error for a population of documents (i.e., documents from selected custodians, for a specified time period, and in some cases, which are identified by way of specified electronic keyword searches). A proprietary software system is “trained” using a “seed set” to determine privilege or relevance based on the review of a sample of the total document population by a human reviewer, usually a lawyer involved in the matter. The output of this process can then be put through quality control exercises based on random sampling and reviewed by lawyers to bring the dataset within the agreed tolerances in the predictive coding protocol.

Since 2012, the DOJ has made provision for the use of Technology-Assisted Review in its Model Second Request, recognizing that it both lowers costs for parties and reduces the size of the document production received by the DOJ, while still providing the agencies with a comprehensive set of documents to fully and fairly assess the competitive effects of the transaction. Similarly, in the FTC’s Model Second Request issued in August 2015, the FTC made provision for the use of Technology-Assisted Review by disclosing parties. In the case of the DOJ, between 2012 and 2014, it has negotiated around a dozen Technology-Assisted Review protocols with parties, many of them in merger investigations.

The DOJ has expressed some concerns about combining Technology-Assisted Review with search terms (indeed, in our experience, the DOJ has a strong preference for parties to use one or the other method, but not both) and also with foreign language or certain other types of materials (such as databases, Internet material, spreadsheets, images, audio or video files). Nonetheless, in the DOJ’s view, the document sets produced via Technology-Assisted Reviews have been generally smaller and more responsive, with substantial benefits for both the DOJ and the parties. The DOJ has noted that producing parties still prefer to use manual reviewers, particularly for privilege reviews, despite concerns about accuracy and consistency.
Nonetheless, Technology-Assisted Review appears to be one way in which timing challenges posed by the Internal Document Request could be met.

Outside the antitrust field, courts in several EU Member States have accepted Technology-Assisted Review as an appropriate means of conducting disclosure exercises in litigation matters. In 2016 the English High Court approved the use of Technology-Assisted Review in Pyrrho Investments v. MWB Property Ltd & Ors, with the judge noting that there was no evidence that Technology-Assisted Review leads to less accurate disclosure (adding that there was, in fact, some evidence to the contrary), that its use will lead to greater consistency, and that in a case, where the number of documents was large (over 3 million), the cost of manual search would have been enormous by comparison with Technology-Assisted Review. This decision relied, in part, on a similar finding by the Irish High Court in Irish Bank Resolution Corporation Ltd & Ors v. Quinn & Ors, where Mr. Justice Fullam noted that studies indicated that Technology-Assisted Review was more effective than manual review and, even if only as effective as manual review, was still more expeditious and economical.

Developments in the United States and, indeed, in a non-antitrust context in EU Member States point to one way in which the EC could consider squaring the circle of increasing the scope and scale of the Internal Document Review in a manner similar to the U.S. Second Request without affecting the long-established timeline under the EUMR. In the meantime, parties and their advisers need to be aware of and take into account the differences in approach across jurisdictions.

**Claw-back of Inadvertently Disclosed Privileged Material.** Whether or not Technology-Assisted Review is used to provide responsive materials to the EC’s Internal Document Requests in the future, there remains the risk that privileged material may be inadvertently disclosed to the EC by parties. In the U.S. context, this does not give rise to concerns because of the ability of a disclosing party to “claw-back” any inadvertently disclosed privileged material from the DOJ and the FTC. Consistent with Federal Rule of Civil Procedure 26(5)(B), it is the DOJ’s and FTC’s policy to either sequester or return any inadvertently privileged material disclosed by a party.

By contrast, the European Union does not have a similar rule for inadvertently privileged material disclosed in the context of proceedings under the EUMR. Where such disclosure happens it is at the discretion of the case team or the Hearing Officer as to whether such materials are returned to the parties or whether the EC considers privilege to have been waived in such materials. The former has, to the knowledge of the authors, been the approach taken by the EC. However, this does not preclude the latter approach being taken in future cases. This has been a point of concern for disclosing parties in proceedings under the EUMR. To avoid any uncertainty in this regard, particularly given the increasing numbers of documents being produced and the consequent increased risk of inadvertent disclosure, the public adoption of a similar rule or best practice could be a straightforward means for the EC to solve this issue.

**Potential Issues Under EU Procedural Law with Internal Document Requests**

The EC’s evolving approach to the Internal Document Request has further potential implications for parties and their advisers in transatlantic mergers, in particular in relation to the provision of potentially misleading or incomplete information and parties’ rights of defense.

**Provision of Misleading or Incomplete Information.** Given the scale and scope of the Internal Document Requests that the EC appears increasingly to send to parties, there is a concomitantly increased risk that, in the time available, incomplete or inconsistent documents may be submitted to the EC’s case team. In the former situation, as has happened in several cases, the EC may consider that the submission is incomplete. This may be due to a party’s data retention policies or the document/e-mail management approach of particular custodians. Nonetheless, if the EC is not satisfied with a party’s explanation of why the information is not complete, under Article 11(3) EUMR, it has the power to stop-the-clock on the merger clearance process, thereby extending the clearance deadline if the information is necessary and has not been provided. The EC will not restart the clock until the receipt of complete information, which can cause significant delays to merger proceedings.

Where the EC is concerned that the information supplied by a party is inconsistent with the contents of its notification to the extent that the latter was misleading, the EC, under Article 14 EUMR, has the power to impose fines of up to 1 per cent of the aggregate global turnover of the party concerned if it has at least negligently provided incorrect, misleading, or incomplete information in a notification (or, indeed, has not provided the information within the required time limit).
This issue arose in *Munksjö/Ahlstrom* where, following the EC’s approval of the merger in 2013, the EC opened a proceeding in May 2014 due to differences between information on the relevant market/market shares in the original notification and in internal documents submitted later. * In that case the investigation was closed without further sanction, but it points to a real risk where increasingly large document sets are being disclosed to respond to the EC’s Internal Document Requests.

Companies can and should take steps to ensure that such situations do not occur by improving document management systems well in advance of important merger transactions (particularly where a company is involved in many mergers), as the EC’s concerns appear likely to grow in tandem with the size of the Internal Document Request. For parties, the risk of the EC using its powers to stop-the-clock under Article 11(3) EUMR should not be discounted. Indeed, in complex mergers in which an Internal Document Request is likely, that risk may need to be factored into the overall timeline for the transaction to minimise the potential negative impact of such an event.

More generally, parties should consider—if they are concerned that there may be significant inconsistencies between, for example, the board level materials likely to accompany a notification and internal materials found in the course of the Internal Document Request review process—whether it is worthwhile to conduct a pre-notification search and review. This should identify inconsistent materials for which the party may need to provide explanations. To do so early in the process would furthermore avoid the post-notification time pressures and potential clearance delays.

**Rights of Defense.** The EC’s approach to Internal Document Requests in more recent times also has the capacity to give rise to concerns in relation to a party’s rights of defense, which may not arise in quite the same way under U.S. law. (This may be attributable, as some have argued, to the differences between the European system, where the EC is both prosecutor and judge, and the U.S. system, where the agencies are required to persuade a court to enjoin a transaction from being completed). *20*

The question of rights of defense has not, it appears, been at issue in previous cases in relation to the Internal Document Request. However, in bringing the system under the EUMR closer to both the U.S. Second Request and, arguably, to the requests for documents made to parties in EU non-merger antitrust proceedings, there seems an increased likelihood that large-scale Internal Document Requests could give rise to questions in relation to the provision of reasons for seeking such evidence, the proportionality of doing so, and the fair and objective treatment of such evidence:

* Given the scale and scope of Internal Document Requests being made by the EC, recent case law on requests for information in the context of non-merger antitrust proceedings indicates that the EC may be required to give a fuller statement of reasons in requesting such information from parties. At present, in the authors’ experience, the reasons given are brief and may fall foul of the requirement, as described in Advocate-General Wahl’s opinion in *Schwenk Zement KG v. European Commission*, that measures adopted by the EC “must disclose clearly and unequivocally the reasoning followed by the institution which adopted that measure in a way that enables the persons concerned to ascertain the reasons for it and enables the EU Courts to review the legality of those reasons.” In *Schwenk* (which related to antitrust proceedings under Article 101 Treaty on the Functioning of the European Union (TFEU) on anticompetitive agreements between undertakings), the EC sent a request for information to a third party (Schwenk Zement) which Advocate-General Wahl described as having questions which were “extraordinarily numerous” covering “very diverse types of information.” The Court of Justice of the European Union (CJEU), following Advocate-General Wahl, held that the request was inadequately reasoned, and the relevant decision by the EC was annulled. Given the similarity between Article 18(3) of Regulation 1/2003 (which applies to requests for information sent in matters concerning Articles 101 and 102 TFEU) and Article 11(3) EUMR (which applies to requests for information sent in merger cases), it is likely that the CJEU’s decision could also be held to apply to Internal Document Requests, giving rise to a potential obligation on the EC to sufficiently explain its reasoning in sending the request.

* The Internal Document Request may also give rise to *81* questions about the proportionality of the EC’s decision. As per the terms of Article 11(3) EUMR, such a request must, of course, be necessary. Given the margin of investigative discretion afforded to the EC, it is not likely that necessity would be in issue, but it cannot be excluded that an unduly broadly scoped or large Internal Document Request could give rise to questions on this point. A request must, additionally, be proportionate, and this is likely to become an issue where the requested information is difficult to obtain, particularly because of its volume. As the General Court (at the time, the Court of First Instance) stated in *SEP v. Commission* (in the context of antitrust
proceedings):  
 It is not enough for the information requested to be connected with the subject matter of the inquiry. What is also necessary is that an obligation imposed on an undertaking to supply an item of information should not constitute a burden on that undertaking which is disproportionate to the requirements of the inquiry.\textsuperscript{22}

Given that the principle of proportionality underpins all investigations undertaken by the EC, it is suggested that this principle is just as readily applicable to proceedings under the EUMR and may thus become more significant for future Internal Document Requests.

• In reviewing the evidence, particularly given the large number of documents likely to be disclosed in responding to an Internal Document Request, the EC is under an obligation to treat the evidence provided objectively and fairly. This means, in essence, that, although not tasked with rooting out all exculpatory evidence on behalf of a party, the EC should investigate all the facts and circumstances of the evidence provided, whether inculpatory or exculpatory.\textsuperscript{23} This follows from the approach taken by the General Court (at the time, the Court of First Instance) in \textit{Airtours v. Commission}.\textsuperscript{24} In that case, the Court held that the EC’s findings in its merger decision were based on an incomplete and incorrect assessment of the material submitted, both in misreading the particular piece of evidence at issue and in not taking the exculpatory evidence of the parties into account. The Court’s guidance may, in the authors’ experience, create some tension with the approach taken by the EC where there has been a tendency to primarily use the inculpatory material found, following the EC’s review of the response to the Internal Document Request, to support the theory of harm in relation to a particular transaction.\textsuperscript{25}

While the above are all important issues of principle, any disputes between notifying parties and the EC are very unlikely to be resolved by the European Courts within the strict EUMR clearance time limits (which may incentivize parties in many cases to accept burdensome or disproportionate requests rather than seeking to challenge them). Legal challenges on the grounds of these principles are thus not likely to be effective in the actual clearance process such that parties, for practical purposes, will need to find a way through these issues in cooperation with the EC.

Conclusion

Based on current trends, Internal Document Requests will become an increasingly important part of the EU’s investigatory process in complex mergers and thus a potential source of delay in the clearance process. Advisers in international mergers will consequently need to take into account the practical, timing, and legal implications discussed above.

At the same time, the EC could usefully seek to ensure greater methodological convergence with the DOJ and the FTC, drawing on the experience of the Second Request process in the United States, while also considering the implications of EU procedural law for such requests to avoid increasing legal and procedural issues for the EC and for notifying parties. Both merging parties and the EC are, in many senses, likely to be engaged in a very interesting process over the coming years to discover best practices for Internal Document Requests.

Footnotes

\textsuperscript{1} Vanessa Turner is a partner at Allen & Overy LLP in Brussels and London and an Associate Editor of \textit{Antitrust}. Max Kaufman is an associate at Allen & Overy LLP in London. The authors thank Elaine Johnston, Puja Patel, Louise Tolley, Emily Bourne, and Carlo Sushant Chari of Allen & Overy LLP for their assistance in their preparation of this article. All views expressed in this article are personal and any errors or omissions are the authors’ own.

\textsuperscript{1} The EC also increasingly requests significant volumes of economic data in complex merger cases. While this may also have implications for merging parties, it will not be discussed further in this article.

Phase I is comparable to the initial waiting period under the HSR and lasts 25 working days unless commitments are offered, in which case it is extended to 35 working days. Phase II is comparable to the Second Request stage under the HSR, and the EUMR provides for a standard investigation period of 90 days. If parties offer commitments more than 55 days from the start of Phase II, this will extend the investigation period to 105 working days. The parties (within the first 15 days of Phase II) or, at any time, the EC (with the consent of the parties) may also extend the investigation period by 20 working days.


Akzo, 2007 E.C.R. II-3523, ¶ 123.


Id. at 5.

[2016] EWHC (Ch) 256, followed in David Brown v. BCA Trading Ltd & Ors [2016] EWHC (Ch) 1464.

[2015] IEHC 175.

The Hearing Officer is the EC official mandated to be the arbiter of any issue in relation to the procedural rights of the parties during the EC’s review of a transaction.


See Donna E. Patterson & Carl Shapiro, Transatlantic Divergence in GE/Honeywell: Causes and Lessons, ANTITRUST, Fall 2001, at 18.


It is not clear whether the EC always has the resources to fully review increasingly large volumes of materials. It should be noted that, due to the differences between the EU and U.S. merger clearance process, the selective use of inculpatory evidence is not such a significant concern for parties in the U.S., where, even if the agencies take this approach to inculpatory evidence, they will still have to face a rebuttal case in court on a preliminary injunction motion.
On April 15, 2015, the European Commission levied formal charges against Google, the culmination of a long-simmering and politically charged investigation into the Internet giant's search practices. Despite various inquiries in recent years, the announcement marks the first time a government regulator has gone so far as to charge Google with an antitrust violation. The charges—which assert that Google abused its dominant position in the European search engine market to favor its own "vertical" services—are coupled with the launch of a formal investigation into allegations that Google currently bundles its Android mobile operating system with Google applications. The news has been met with a defiant response by Google, as well as both praise and criticism from state governments and antitrust commentators.

The recent EC decision is not the first time a prominent government agency has examined Google's potential anti-competitive behavior. In 2013, the Federal Trade Commission concluded its own investigation into Google's search practices, recognizing a pro-competitive basis for Google's prioritization of certain content. Complainants had alleged that Google utilized an algorithm specifically tailored to favor the return of Google's own content above that of competitors during an Internet search. This practice, known as "search bias," resulted in the supposed favoring of "vertical" Google content—at Google's competitors' expense.

The FTC ultimately concluded that these design changes were aimed at improving the user experience (by offering more responsive content) and that any harm to competitors was purely incidental. Indeed, the FTC found that Google frequently conducted testing to measure the effects of these changes on consumers, as well as determining that other general search engines had embraced similar tweaks. In declining to file charges against Google, the FTC stated that to "second-guess a firm's product design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence" would be inappropriate from an antitrust perspective.

The FTC was, however, able to secure a number of concessions from Google, including the company's promise to provide competitors with access to certain patents, allow advertisers increased flexibility to manage ads on Google's AdWords platform and grant certain websites an "opt out" option from Google searches. Despite these remedies, the decision was largely hailed as a victory for Google that allowed the company to bypass the financial and reputational drain of a prolonged antitrust battle similar to the one Microsoft endured in the 1990s.

The FTC's 2013 decision was largely met with positive reactions from antitrust commentators, many of whom saw the investigation as (in the words of former FTC chairman James Miller) a "shameless attempt at rent-seeking" by Google's rivals. In early 2015, The Wall Street Journal obtained a copy of an FTC staff report, which referred to the FTC's 2013 decision not to file charges as a "close call." The Wall Street Journal article suggested that the decision may have been influenced by a political agenda, a claim that the FTC vehemently denied in a press release shortly after the article's publication.
Action in Europe

While the FTC was conducting its Google investigation, the European Commission was proceeding with its own inquiry into Google's search practices. The EC specifically looked at three primary areas: (1) search bias, (2) copying (or "scraping") of content from other search engines and (3) restrictions on the use of certain Google advertising features. The EC eventually reached a tentative settlement with Google on the first issue (which had become the focus of the investigation) that would have allowed competitors to purchase space near the top of Google search results pages. The proposed remedy was met with a flurry of harsh criticism from EU government officials and commissioners, as well as Google's European competitors, arguing that the EC had failed to extract an adequate settlement to quell search bias fears.

Despite Google's public appeal that its search algorithm was pro-competitive and benefited consumers, it appears that intense political pressure culminated in EC antitrust head Joaquin Almunia's decision in September 2014 to re-open the Google investigation. Additionally, Almunia initiated a separate investigation track focused on Google's supposed bundling of its mobile phone Android operating system with Google applications.

Less than a year later, new EC antitrust chief, Margarethe Vestager, announced the EC's decision to file charges on the search bias issue, while simultaneously formalizing the EC's investigation into Google's use of Android. Vestager noted that the EC's decision to file charges was based on the "preliminary conclusion that Google had abused its dominant position to systematically favor its own comparison shopping service, Google Shopping, over rival services on its general search page." Meanwhile, the Android investigation would focus on whether Google improperly utilized its market leading position in mobile operating systems to hinder the development of competitors' products by, for example, requiring the bundling of Android with Google applications.

Google responded to the charges with a mix of public statements and an internal memo that focused on the pro-competitive justifications for Google's alleged search bias and the high degree of competition amongst search engines and vertical services. Specifically, Google highlighted competition from general search engines (like Bing and Yahoo), specialized websites (like Amazon and eBay) and social media as vying for "vertical" sale and marketing opportunities. On the Android issue, Google countered that Android is an open-source operating system that can be freely accessed and that the pre-loading of certain applications on Android enhances the user experience.

Much of the commentary that followed the announcement was muted in its support of the EC's decision. In fact, a number of commentators viewed the EC's decision as typical of the European Union's focus on European protectionism, a practice that critics argue has stifled the rise of major European tech companies capable of competing with U.S. giants such as Google and Facebook. Other commentators were quick to draw a comparison to the EU's decision to challenge Microsoft's bundling practices, an investigation that led to a €2.2 billion fine for Microsoft. In fact, Microsoft has found itself connected to the recent EC charges in more ways than one—a recent New York Times article suggests that Microsoft has deep ties to a number of the entities that lobbied the EC to bring its antitrust campaign, perhaps in an attempt to stifle the growth of a key rival.

Issues and Impact

There are no indications that the announcement of charges will affect the United States' position on the issue. The decision is, however, indicative of key differences in U.S. and EU approaches to antitrust enforcement. The 2013 FTC decision was largely based on the fact that, despite potential incidental harm to competitors, consumers were benefited by Google's practices. U.S. antitrust law seeks to protect consumers first and foremost, whereas EU law requires an additional focus on competitors' welfare.

The EC decision is also fraught with potential political implications. President Barack Obama recently cautioned the EU against making "commercially driven" decisions against major U.S. tech companies. Indeed, shortly before the EC announcement, Daniel Sepulveda, deputy assistant secretary in the U.S. State Department Bureau of Economic and Business Affairs, warned the EU against basing its decision on a
protectionist agenda, publicly stating that it is "important...that the process of identifying competitive markets and remedies be based on impartial findings and not be politicized."¹⁰

So where do the parties go from here? Vestager has stated that the EC is open to settlement options, but noted that any acceptable settlement will need to differ significantly from the previous proposal that was based too heavily on "a particular look of the screen" rather than a change in corporate principles.¹¹ Google now has approximately 10 weeks to respond to the charges, a process that ultimately could entail a hearing request before the commission and, in the event fines or an injunction are imposed, an appeal to the EU appeals court in Luxembourg.

An EC victory would almost certainly have a widespread impact on other U.S. tech companies currently facing antitrust scrutiny in Europe.¹² Additionally, many will continue to closely watch the Android investigation, as some of Google's largest competitors (Microsoft and Apple, for example) also routinely provide their operating system in conjunction with various applications.

Of the many issues raised by the EC's Google investigation, one of the most interesting centers on whether antitrust investigations in the tech industry are inevitably antiquated. Since tech companies are rapidly innovating, an antitrust claim centered on perceived anti-competitive use of these technologies is often obsolete by the time a decision is rendered. Nonetheless, while the outcome of the instant case remains uncertain, it is clear that the EC does not fear plotting its own course of antitrust enforcement, the next step in the continuing divergence of U.S. and EU competition regulation. It is also starkly evident that this path, at least in the tech context, is riddled with dangers posed by the political motives of state actors and, perhaps, the self-interested agendas of competitors as well.

Endnotes:


2. In the late 1990s, the U.S. Department of Justice, along with 20 individual states and the District of Columbia, filed suit alleging that Microsoft had utilized monopoly power to bundle products and commit a host of other antitrust violations. After a multi-year process that involved numerous appeals and remands, Microsoft settled with the Justice Department, but was later subject to suits by private parties that resulted in significant settlements and an extended European Commission investigation that ended with a massive fine. A. Douglas Melamed and Daniel L. Rubinfeld, U.S. v. Microsoft: "Lessons Learned and Issues Raised," in ANTITRUST STORIES (Eleanor M. Fox & Daniel A. Crane eds., 2007).


4. The advertising issues were settled separately.


8. If the EC prevails in the instant case, it could seek a fine of over €6 billion, approximately 10 percent of Google's annual revenue.


11. Fairless, supra note 5.

12. The EC is also investigating certain tax concessions granted to Apple and Amazon, as well as Facebook's privacy protections.

Shepard Goldfein and James Keyte are partners at Skadden, Arps, Slate, Meagher & Flom. Michael Singer, an associate at the firm, assisted in the preparation of this column.
Efficiency Consideration and Merger Enforcement: Comparison of U.S. and EU Approaches

Robert Pitofsky*
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Abstract

Discussion in this Essay is designed to explore recently introduced efficiency considerations and to compare developing law in the United States and the European Union. The following sections discuss why incorporation of efficiency factors has been controversial, explore efficiency analysis in connection with mergers under U.S. law, explore comparable developments in EU law, and, finally, offer a comparison of developments in the two jurisdictions.
ESSAY

EFFICIENCY CONSIDERATION AND MERGER ENFORCEMENT: COMPARISON OF U.S. AND EU APPROACHES

Robert Pitofsky*

INTRODUCTION

The question of introducing efficiency considerations into merger review has been lively and controversial for many years. Of course, most mergers are between companies that are too small or too remote in competitive effects to endanger competition. A relative few—less than five percent in both the United States and the European Union—approach monopoly or dominant firm dimensions, or threaten the welfare of consumers by allowing combined firms to raise prices or reduce output without effective response from others, and, as a result, are carefully examined.

Both dangers to competition are now acknowledged in U.S. and EU law. The question addressed here is whether some few mergers, close to the line of legality, can be justified by considerations of efficiency.

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Both the United States and the European Union appear to have accepted, in recent years, that mergers can contribute to efficiency (for example by introducing cost savings, economies of scale, or facilitating innovation), and these efficiencies may occur in markets where they are likely to be passed on to consumers to an extent that the efficiencies outweigh any likely anticompetitive effect. Both jurisdictions have been slow to reach this conclusion and formally to introduce efficiency considerations into merger analysis. Even today, there are critics who doubt that the acknowledgement of relevance of efficiencies is more than an empty commitment, and who believe efficiency is not a practical factor in merger review.¹⁴

Discussion in this Essay is designed to explore recently introduced efficiency considerations and to compare developing law in the United States and the European Union. The following sections discuss why incorporation of efficiency factors has been controversial, explore efficiency analysis in connection with mergers under U.S. law, explore comparable developments in EU law, and, finally, offer a comparison of developments in the two jurisdictions.

I. PROS AND CONS OF INTRODUCING EFFICIENCY CONSIDERATIONS INTO MERGER ANALYSIS

It has been widely accepted for some years in U.S. scholarship that there is a strong case for introducing efficiency consideration into merger review,⁵ and yet both the United States and the European Union have been slow to accept formally the relevance of efficiency considerations. There are several reasons why the issue is controversial. First, efficiency issues are not expressly recognized in statutes covering merger review in either jurisdiction, though consideration of such issues is not expressly foreclosed either.⁶ Second, opponents of taking efficiency con-

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Efficiency Considerations into account have emphasized that efficiencies are
difficult to quantify, especially since they rely entirely on a pre-
diction of the beneficial results of a not yet consummated
merger, and are thus even harder to trade off against anticompet-
titive effects.7 Advocates argue that the problem can be handled
by placing the burden of proof of the existence of efficiencies
squarely on the people advocating the merger, and requiring
that any claimed efficiencies be clear and substantial.8 Third,
skeptics point out that if there are efficiencies of scope or scale,
or of innovation, those can be achieved by internal expansion of
a single firm, or by less restrictive alternatives like joint ventures
or licensing arrangements.9 Advocates for efficiency consider-
ation concede the point, and therefore insist that any claimed ef-
ficiencies be “merger specific”—i.e., as a practical matter, the ef-
ficiency cannot be achieved other than through the proposed
merger.10 Finally, many have pointed out that if the merger
leads to monopoly or near monopoly, any short-term benefits to
consumers will be outweighed in the long term by the ability of
the combined firm to extract monopoly rents.11 Both jurisdic-
tions have responded to this legitimate concern by specifying
that efficiency considerations will not justify mergers to monop-
oly or near monopoly.12

9. See, e.g., Rockford Mem’l Corp., 717 F. Supp. at 1289; VI Areeda & Hovenkamp, supra note 5, ¶ 973b, at 53-61; Pitofsky, supra note 5, at 242.
10. See, e.g., United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1175 (N.D. Cal. 2004); Rockford Mem’l Corp., 717 F. Supp. at 1289; VI Areeda & Hovenkamp, supra note 5, ¶ 973a, at 52-53; Coate, supra note 4, at 196-97; de la Mano, supra note 7, at 1.
II. EFFICIENCY CONSIDERATIONS IN U.S. MERGER ENFORCEMENT

The treatment of efficiencies in the United States began with a notable misstep. In 1962, in *Brown Shoe Co. v. United States*, the U.S. Supreme Court, in the first merger case it considered after the Clayton Act was thoroughly revised in 1950 to augment governmental power to challenge mergers, concluded that efficiencies realized in mergers could weigh against the legality of a merger:

[Another] significant aspect of this merger is that it creates a large national chain which is integrated with a manufacturing operation. The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain operations are beneficial to consumers.

The Court went on to state that it was important to protect "viable, small, locally-owned businesses" and attributed its decision to allow consumers to pay higher prices than otherwise would be necessary to an intention on the part of Congress to maintain "fragmented industries and markets."

The misstep was fortunately short-lived. In *FTC v. Proctor & Gamble, Co.*, the Supreme Court did not repeat the assertion that efficiencies might turn out to be anticompetitive, but went so far as to comment:

[P]ossible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.

For several decades, the Supreme Court's position remained that efficiencies, at best, are neutral with respect to the merits of a merger. Although the Supreme Court undertook no
additional merger reviews raising substantive issues, the situation in the United States became increasingly unstable because lower courts, aware of the Supreme Court's hostility to claims of efficiency as a mitigating factor, nevertheless examined efficiency questions in merger cases. Throughout the period prior to the mid-1990s, the government's Merger Guidelines acknowledged that efficiencies might lead the government, as a matter of prosecutorial discretion, not to challenge a merger, but the various formulations with respect to prosecutorial discretion were always framed in language that indicated strong skepticism that efficiencies would ever change the result of an otherwise illegal combination.

The posture of efficiency considerations in the United States changed in 1997 when the Federal Trade Commission ("FTC") and Department of Justice ("DOJ") amended their Horizontal Merger Guidelines to acknowledge that efficiency considerations not only could influence prosecutorial discretion, but could justify otherwise illegal mergers facing challenge in

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19. See, e.g., FTC v. Univ. Health, Inc., 938 F.2d 1206, 1222 (11th Cir. 1991) (acknowledging that claims of efficiency can rebut the government's prima facie case, but finding insufficient evidence in the record); United States v. United Tote Inc., 768 F. Supp. 1064, 1084-85 (D. Del. 1991) (holding efficiency claims not sufficient to overcome evidence of anticompetitive effects, particularly because "there are no guarantees that these savings would be passed on to the consuming public").

20. For example, the 1982 Merger Guidelines state,

Except in extraordinary cases, the Department will not consider a claim of specific efficiencies as a mitigating factor for a merger that would otherwise be challenged. Plausible efficiencies are far easier to allege than prove. Moreover, even if the existence of efficiencies were clear, their magnitudes would be extremely difficult to determine.


Because the antitrust laws, and thus the standards of the Guidelines, are designed to proscribe only mergers that present a significant danger to competition, they do not present an obstacle to most mergers. As a consequence, in the majority of cases, the Guidelines will allow firms to achieve available efficiencies through mergers without interference from the Department.

Some mergers that the Department otherwise might challenge may be reasonably necessary to achieve significant net efficiencies. If the parties to the merger establish by clear and convincing evidence that a merger will achieve such efficiencies, the Department will consider these efficiencies in deciding whether to challenge the merger.

The Guidelines struck the principal theme, at the outset of the efficiency section, by noting that efficiencies generated by merger can enhance the merged firm's ability and incentive to compete, and later, that cognizable efficiencies may be "sufficient to reverse the merger's potential to harm consumers in the relevant market." The new acknowledgement of the role of efficiencies in merger enforcement was designed to be narrow (too narrow in the view of many in the U.S. academic community and at the Bar), and included the following qualifications:

1. The alleged efficiencies must be verifiable (i.e., not vague or speculative);
2. The efficiencies must be timely, likely and sufficient to overcome anticompetitive effects;
3. The efficiencies must be merger-specific (i.e., "unlikely to be accomplished in the absence of the proposed merger");
4. The efficiencies must not grow out of an anticompetitive reduction in output or service (for example, if the reduction in costs results from closing one of two competing outlets, that is hardly an efficiency likely to benefit consumers); and
5. "Efficiencies [will] almost never justify a merger to monopoly or near-monopoly."

In the final paragraph, the Guidelines address the differences in types of efficiency, noting that efficiencies resulting from production shifts that reduce cost of production are most "likely to be susceptible to verification, merger specific and to be substantial"; that efficiencies relating to research and development can be substantial but are "generally less susceptible to verification"; and that efficiencies relating to procurement, management or capital costs are the least likely to make a difference because they are often not merger specific or substantial. While the U.S. Guidelines never make the point expressly, the whole tone of the section strongly indicates that the burden of proof is squarely on the party asserting the efficiency claim.

There is no recorded instance in the United States where an otherwise illegal merger was found by a court not to violate the antitrust laws because of the presence of efficiencies. On the other hand, there is increasing evidence that efficiency claims, as

22. *Id.*
23. *Id.*
24. *Id.* at 32.
spelled out in the Guidelines, have had the effect of persuading enforcement authorities not to challenge proposed mergers. In the recently published *Commentary on the Horizontal Merger Guidelines*, jointly published by the FTC and the Department of Justice in 2006, the U.S. enforcement agencies issued a report designed to explain how they interpret the Horizontal Merger Guidelines and to make enforcement decisions more transparent. Part of the process involved publication of brief explanations of why each agency decided to challenge, or declined to challenge, reported transactions. In the section of the commentary on efficiencies, the agencies noted five proposed mergers that were not challenged, where efficiency claims led to that decision, or were significant factors along with other considerations.26

### III. EFFICIENCY CONSIDERATIONS IN EU MERGER ENFORCEMENT

Like the United States, EU law does not expressly allow or expressly prohibit efficiency considerations to be taken into account in merger enforcement. Article 2(1)(b) of the European Community Merger Regulation ("ECMR") does allow "technical and economic progress provided it is to the consumers' advantage" to be taken into account, which would appear to open the door to efficiency claims.27 On the other hand, the next phrase in the ECMR provides that any such technical progress should "not form an obstacle to competition", which arguably closes the same door.28 Because of such obscure language, and confusion about the way the Commission addressed efficiencies in the Aerospatiale/DeHavilland29 and GE/Honeywell30 cases, in 2001 the Commission acknowledged the presence of confusion and formally invited discussion of the role, if any, of efficiency consider-

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26. See id. at 50, 53, 55, 58 (Nucor-Birmingham Steel, Genzyme-Novazyme, Toppan-DuPont, Verizon-MCI, SBC-AT&T).
27. EC Merger Regulation, art. 2(1)(b), O.J. L 24/1, at 7 (2004).
28. Id.
ations. The majority of responders advocated that efficiency considerations should be taken into account since they might contribute to overall economic efficiency and the welfare of consumers.\(^{31}\)

In 2004, the Commission added a detailed description of efficiency considerations to its Horizontal Merger Guidelines.\(^{32}\) The main themes of the EU Efficiency Guidelines are strikingly similar to those of the United States, but in the process of spelling out the Guidelines, some minor but interesting differences emerge. The overarching theme, touched upon in the introduction to Section VII of the Guidelines, relating to efficiencies, is that efficiencies can be generated by a merger that may enhance the ability or incentive of the merged entity to act pro-competitively for the benefit of consumers, and thereby counteract any adverse competitive effects. Efficiencies in the context of innovation and research are no less relevant than efficiencies leading to reduction of costs.\(^{33}\)

The EU discussion of efficiencies is divided into three categories: (1) benefit to consumers, (2) merger specificity, and (3) verifiability.\(^{34}\) While the United States does not break out discussion in separate categories, the essential direction of the EU Guidelines is similar to that of the United States.

### A. Benefit to Consumers

Among the factors that are quite similar to the U.S. approach, the EU Guidelines emphasize that the efficiencies must be substantial and timely—not simply result from restrictions in output—and are unlikely to justify any mergers that lead to or approach monopoly.\(^{35}\) While the EU Guidelines, like the DOJ-FTC Guidelines, do not explicitly reject a total welfare standard in judging efficiencies (i.e., incorporate as efficiencies benefits to producers as well as consumers), it is fairly clear on the face of the EU Guidelines that a consumer welfare standard is intended.

One difference is the emphasis in the European Union on

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34. See id. paras. 76-88, O.J. C 31/5, at 13-14 (2004).
cost efficiencies that lead to reductions in variable or marginal costs. The EU Guidelines describe variable costs as more likely to result in lower prices to consumers.\textsuperscript{36} The U.S. Guidelines more or less ducked the issue, although they do refer at several points to "marginal" cost reductions.\textsuperscript{37} Since in the long term all fixed costs become marginal costs, the position advocated in the economic community that marginal cost savings are more valuable than fixed cost savings, and more likely to be passed on to consumers, is of questionable validity. It is difficult to believe that a major reduction in the cost of fixed assets as a result of a merger would not be likely to reduce costs to consumers—certainly in the long run—just as would a major reduction in the cost of ingredients.\textsuperscript{38}

B. Merger Specificity

Like the United States, the EU Guidelines emphasize that the efficiencies must be "merger-specific"—i.e., could not be achieved to a similar extent by less anticompetitive alternatives.\textsuperscript{39} In both jurisdictions, the burden of proof to demonstrate there exists no less anticompetitive alternative, is placed squarely on the party claiming the efficiency.\textsuperscript{40}

C. Verifiability

At least on the surface, the EU Guidelines regarding verification may be more stringent than in the United States. Efficiencies, where reasonably possible, must be "quantified."\textsuperscript{41} Also, the Guidelines emphasize that because the relevant information is in the hands of the parties advocating the merger, they have the burden of proof to show the extent to which the efficiencies would outweigh any adverse consumer effects.\textsuperscript{42}

\textsuperscript{36} See id. para. 80, O.J. C 31/5, at 13 (2004).
\textsuperscript{37} See \textit{Horizontal Merger Guidelines}, supra note 2, § 4.
\textsuperscript{38} See 2006 Merger Commentary, supra note 25, at 57-58. In the Commentaries on the U.S. guidelines, discussed earlier, the U.S. enforcement agencies report they do consider reductions in fixed costs, though it is clear that they are given less weight than reductions in variable costs. See id. at 59.
\textsuperscript{39} See EC Horizontal Merger Guidelines, para. 85, O.J. C 31/5, at 14 (2004).
\textsuperscript{40} See id.; see also \textit{Horizontal Merger Guidelines}, supra note 2, § 4.
\textsuperscript{41} See EC Horizontal Merger Guidelines, para. 86, O.J. C 31/5, at 14 (2004).
\textsuperscript{42} See id. para. 87, O.J. C 31/5, at 14 (2004).
IV. DIFFERENCES BETWEEN THE UNITED STATES AND THE EUROPEAN UNION

There are a few modest differences between the U.S. and EU approaches. First, unlike the United States, the European Union requires that efficiencies and the resulting benefits to consumers should be "quantified."43 Since efficiencies are a prediction before the merger actually goes through, too much emphasis on quantification may undermine the validity of the efficiency claim. Second, the EU describes the type of internal documents that would support an efficiency claim; particularly, internal documents used by management to decide on the merger and historical examples of efficiencies and consumer benefit.44 The U.S. Guidelines do not spell out such details, although perhaps it is self-evident that is the kind of data that would be most useful. Third, the U.S. Guidelines explain that certain types of efficiency are most persuasive: Efficiencies resulting from shifting production enabling firms to reduce costs are more likely to be susceptible to verification; efficiencies relating to procurement, management, or capital costs are least likely to be merger-specific or substantial.45 The EU Guidelines do not expressly address the subject, although some comments indirectly suggest the European Union would be more hospitable to claims of efficiency leading to innovations than the United States.46

Finally, the U.S. Guidelines address the question of whether efficiencies in one market can outweigh adverse competitive affects in a separate and distinct market.47 The EU Guidelines never take up the question. Since the U.S. Guidelines are exceptionally obscure on the point,48 Europe may be demonstrating the better part of wisdom in simply ducking the question.

There are small differences between the Guidelines in the

45. See Horizontal Merger Guidelines, supra note 2, § 4.
47. See Horizontal Merger Guidelines, supra note 2, § 4.
48. See id. § 4 n.36. ("In some cases, however, the Agency in its prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s).")
two jurisdictions, but the similarities clearly outweigh the differences. In both jurisdictions, the efficiency defense is deliberately described in a way that makes it difficult to establish. As with the United States, there is no recorded instance in the EU where an otherwise illegal merger was found by a court as legal as a result of efficiencies. There are, however, in the United States, a substantial number of instances where efficiencies have led prosecutors not to challenge a merger.\footnote{49} In the European Union, there are several press releases in recent years suggesting that investigations were terminated because of likely efficiencies. For example, in \textit{Korsnas/AD Cartonboard}, the press release states that "the transaction is likely to create synergies which would appear likely to be at least partly passed on to consumers."\footnote{50}

\section*{V. \textsc{holding efficiencies against the legality of a merger}}

As noted, for a brief period of time, efficiencies under U.S. law could be held against the legality of a merger.\footnote{51} Current law and current guidelines have firmly rejected that position.\footnote{52} In the European Union, several decisions appear to have held efficiencies against the legality of a merger, and no case law or guideline provision indicates that is an erroneous result. An example in the EU involves the 1991 Commission decision blocking the merger between Aerospatiale, a French manufacturer of aircraft and other space systems, and De Havilland, a Canadian company that manufactured turbo-prop aircraft.\footnote{53} The proposed merger was vulnerable on many conventional grounds, but was notable because the Commission decision found a violation, in part, due to the ability of the combined firm to furnish a complete range of products that would offer cost advantages to buyers, and would reduce the fixed costs of pilot and mechanic training and the cost of maintaining different in-house inventories.\footnote{54} While the Commission never squarely concluded that the

\footnotesize{\textsuperscript{49} See \textit{supra} note 26 and accompanying text.\\
\textsuperscript{50} Commission Press Release, IP/06/610 (May 12, 2006).\\
\textsuperscript{51} See \textit{supra} notes 13-16 and accompanying text (discussing \textit{Brown Shoe Co. v. United States}, 370 U.S. 294 (1962)).\\
\textsuperscript{52} See \textsc{Horizontal Merger Guidelines}, \textit{supra} note 2, \S\ 4.\\
\textsuperscript{54} See \textit{id.} \¶ 32.}
efficiencies counted against the legality of the merger, it did note that the merged group would enjoy benefits that would be out of the reach of competitors, and implied that that fact added to the reasons for blocking the transaction.\(^{55}\)

More recently, controversy over using possible efficiencies to challenge mergers has emerged in the conglomerate merger area in connection with the concept of “portfolio” or “range” effects. The theory appears to be that a combination by merger of companies producing complimentary products gives the merged entity the opportunity to reduce price (by bundling or otherwise), or improve quality to the detriment of competitors, and in the long run, of consumers. Under the theory, mergers are less likely to be approved when the combined company produces products that are more attractive to buyers. For example, in Boeing—McDonnell-Douglas,\(^ {56}\) the Commission extracted conditions before it approved the merger, knowing that the combination would produce “commonality benefits” which, in turn, would lower costs to consumers.\(^ {57}\)

In 2001, the Commission took a far more controversial stance in blocking the merger of General Electric, the world’s largest manufacturer of jet engines, and Honeywell, the world’s largest manufacturer of aircraft control systems.\(^ {58}\) Again, the theory was that the combined company would have the opportunity to lower price and improve products through mixed bundling or technological tie-ins.\(^ {59}\)

Possibly these opinions, which appear equivalent to the early determination in the United States (in Brown Shoe) that efficiencies could be held against the legality of mergers, will not constitute a lasting approach. The opinion of the European Court of First Instance in GE/Honeywell, affirming on traditional grounds the decision to block the merger and finding portfolio or comparable theoretical effects not proven, may be a sign that

\(^{55}\) See id. ¶ 69 (suggesting competitors would not be able to withstand pricing pressure).


\(^{57}\) See id. ¶¶ 41, 124.


\(^{59}\) See id. ¶¶ 162, 478-81, 483.
the European Union is changing direction on the role of efficiencies in merger analysis.⁶⁰

The role of the Advocate General and the development of direct effect

The Court of Justice of the EU (ECJ) is assisted by eight Advocates General according to Article 252 of the TFEU, although the Council can by a unanimous decision rise the number of Advocates General. The institution is unique, although similar institutions exist in some member states. The duty of the Advocate General is to deliver Opinions on the cases brought to the ECJ and it must be done in an open and impartial manner.

The procedure of the selection of Advocates General follows the same scheme as that used for the appointment of judges of the ECJ. The conditions for appointment are that the candidates’ independence is beyond all doubt, and they must be qualified for the highest judicial offices in their home country or they must be jurisconsults of recognised competence. The member state governments agree on who they want to appoint as Advocate General and he or she is appointed for a period of six years which might be renewed according to Article 253 of the TFEU. An Advocate General may, just like a judge, be removed from his position if the other Advocates General and the judges decide unanimously that he or she does not longer fulfills the obligations. Five of the eight Advocates General are nominated from the five largest member states of the Union, i.e. Germany, France, the United Kingdom, Italy and Spain. The other three positions rotate between the other member states.

The most important work performed by the Advocates General is to deliver a written Opinion, named “reasoned submission”. The role of the Advocate General is to propose an independent legal solution. It is important to note that the Court is not obligated to follow the Opinion delivered by the Advocate General. Even though the Opinion does not bind the Court it has an impact on the decision in many cases, and in fact, in most cases the ECJ follows it. In the Chen case (C-200/02) the ECJ used the reasoning of Advocate General Tizzano, citing it almost literally, and came to the same conclusion.

The Advocate General’s Opinion usually considers all the different views and arguments that potentially might apply to the case, while the judgment of the ECJ is not exhaustive and is more tailored to the specific legal issue at hand. In cases where the ECJ comes to the same conclusion as the Advocate General sometimes it can be difficult to know if the reasoning is the same, since the Opinion provides a more detailed analysis of all facts in the case. However, not all cases require an Opinion by an Advocate General. The last section of Art. 20 of the Statute of the Court provides that if the ECJ “considers that the case raises no point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General”.

If a member state is a party to the proceedings, the Advocate General from that member state will not be appointed to give an opinion in the case in order to avoid any kind of political pressure that could jeopardise his or her independence and impartiality. An Advocate General is not responsible for any special area of law, although in practice they might be appointed to deal with cases in which the question of law is related to a certain field. For instance, if an Advocate General has recently given an Opinion in a case he or she might as well be appointed for all the upcoming cases which deal with a similar question of law. However this is not always the case.
Analysis

To be able to understand the influence by the Advocate General as an institution it is important to look at the “big picture” and not only at whether the ECJ followed the Opinion of the Advocate General in particular cases or not. The influence of the Advocate General has to be described over a period of time and its value cannot be determined only by examining the individual cases. For instance the principle of direct effect, which was first established in 1962 in the famous case Van Gend en Loos (26/62), has developed over time. The issue before the ECJ was simply whether to introduce this constitutional principle into Community law or not. Even though the ECJ reached a judgment which was in contrast to the Opinion of Advocate General Roemer, both ECJ and Roemer stated that certain provisions in the Treaty were capable of having direct effect. The establishment of the principle of direct effect made it possible for individuals to invoke Community law rights before national courts and it was a step towards further integration within the European Community. Another concrete example where an Advocate General contributed to an argument that has been useful for the ECJ in later cases is Reischl’s argument on personal bar (estoppel) in his Opinion in the Ratti case (148/78).

The introduction of direct effect had a major constitutional impact and it also concerned the hierarchy of laws. However it is important to remember that this principle was under development for many years, and it still may not have reached its final step as regards horizontal direct effect of certain acts, i.e. directives. During the recent years several Advocates General have argued for an expansion of the applicability of the principle of direct effect of directives, i.e. to include horizontal direct effect as well. The Advocate General has the possibility to criticise the case-law of the ECJ. Advocates General Lenz and Jacobs for example argued that the ruling in Marshall I (152/84) that directives can only have vertical direct effect should be overruled, however their argumentation did not succeed before the ECJ. The further development of horizontal direct effect of directives must be considered in broad terms since the ECJ has used other grounds to justify its ruling in cases between individuals when it comes to directives. For instance in Mangold (C-144/04) the ECJ found that a provision of a directive was a general principle which was capable of having horizontal direct effect. Only the future will tell whether directives can be used and applied between individuals directly without the use of other sorts of justifications, such as indirect direct effect, general principles and so on. A further question will be under what conditions this would be possible. One might also question if the development of direct effect of directives might have already reached its final step.

Conclusion

The Advocate General acts as an independent institution providing the ECJ with arguments in order to reach a judgment, although, as explained earlier, his or her arguments may well be rejected. The institution is of crucial importance for the development of EU law for several reasons. First, the task of the Advocate General is to provide a wider argumentation than the judges can do in the final judgment. Second, his opinion is important not just for the ECJ itself but also for national courts, as well as for the parties to the dispute in question who can use those arguments.

Scholarly sources


* The full paper is 13 pages.

A closer look at the office of the Advocate General through the lens of state liability case-law
In "Student papers"

Arango Jaramillo and Others v European Investment Bank, Case C-334/12 RX-II, 28 February 2013
In "Case-law"

Försäkringskassan v Elisabeth Bergström – Case C-257/10
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The Structure of the Courts

UK Supreme Court
Appeal only, on points of law
Justices of the Supreme Court

Court of Appeal
Appeal only, on points of law to either the Criminal or Civil Divisions:
Lord Chief Justice, Heads of Division and Court of Appeal judges

High Court
Chancery, Queen’s Bench and Family Divisions. All three divisions hear appeals from other courts, as well as “first instance” cases.
High Court and Deputy High Court Judges

Crown Court
Jury trial for all indictable and some either-way criminal offences. Appeals against conviction and sentence from the magistrates’ court.
Circuit judges, Recorders and juries

Magistrates’ Court
Trial for most criminal offences. Some civil matters.
Magistrates, District Judges (Magistrates’ Courts), Deputy DJ (MCs)

County Court
Trial for most civil cases.
Circuit judges, Recorders, District Judges, Deputy District Judge

Family Court
Trial for most family cases.
High Court Judges, Circuit judges, Recorders, District Judges, Deputy District Judge and Magistrates

Employment Appeal Tribunal
Appeals from the Employment Tribunals
Employment Appeal Judges and members

Employment Tribunal (England & Wales; Scotland)
Claims about matters to do with employment
Employment Judges and members

Upper Tribunal
Appeals from the First-tier Tribunal
Upper Tribunal Judges

First-tier Tribunal
Appeals from executive agency decisions
Tribunal Judges and members

There are a number of other tribunals outside of this structure (for example, School Exclusion Panels) - their supporting legislation explains their individual appeal routes.
UK and US Privilege: Comparison and Contrast

Nilam Sharma, Esq.
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London
UK

- Legal advice privilege may apply to the confidential communications (written and oral) between the lawyer and the client that come into existence for the purpose of giving or receiving legal advice, in respect of the client’s legal rights and obligation. ‘Client’ is narrowly defined for the purposes of the application of legal advice privilege. This means that communications between a lawyer and the corporation’s employees are not covered by the privilege. Documents produced by employees who are not considered the ‘client’ will not be covered by the privilege.

- It is unlikely that an audit of the company’s compliance regime will generally fall within the scope of litigation privilege because litigation must be a real likelihood rather than a mere possibility although the chance of litigation need not be greater than 50%. Although a company may consider that litigation may result from non-compliance with local laws and regulations, it is unlikely that there are specific claims that a company could define as being a ‘real likelihood’.

- Privileged information may be disseminated within the organization without the waiver of privilege, but it is advisable to request undertakings to keep the information confidential from the individuals who receive the information.

- Privilege can be waived expressly or impliedly, so it is important that confidentiality is preserved and privileged information is only disclosed on the express basis that privilege is not waived.

US

- Attorney-client privilege and the work product doctrine operate much the same way as the UK’s legal professional privilege and litigation privilege.

- However, attorney-client privilege can apply to communications with third parties (including a company’s employees) if the purpose of the communication with the third party is to help the attorney provide legal advice to the client. Documents created by employees in response to requests for information from attorneys can attract privilege.

- Although lawyer investigations into a corporate client’s internal practices will usually be considered privileged, there are some instances when the courts have found that privilege did not apply to these investigations. Care should be taken in creating documents and communicating for the purposes of the lawyer’s investigation into compliance. Management should make it clear the purpose for which the investigation is being undertaken and ensure that the purpose of the investigation is for the client to take legal advice, and not for any other business-related purpose.

- Documents created as a result of the investigation are unlikely to be protected by the work product doctrine because the advice would be rendered before a claim has arisen or the client is subpoenaed.

- Disclosure of a single copy of a privileged document to third parties, including regulators (even if that disclosure takes place abroad), results in complete loss of privilege as to the entire subject matter of the privileged documents. However, sharing documents with other parties with a common interest will not waive privilege.
Europe

- In relation to investigations by the European Commission, privilege and confidentiality apply to written communications between lawyer and client provided the communication is made for the purpose and in the interest of the client’s right of defence. However, the privilege does not apply to in-house or non-EU qualified lawyers.

- Each member state of the EU has its own rules in relation to privilege and confidentiality. Some jurisdictions lack any concept of privilege, and several jurisdictions do not extend the privilege to in-house communications. Perhaps most concerning is the fact that, in many of these civil law jurisdictions, privilege covers only documents in the hands of a lawyer. Accordingly, any other document, even a letter of legal advice from a lawyer, will not necessarily be privileged in the client’s hands.

- In Russia, although some attorney-client communications may be privileged, this does not extend to communications with in-house lawyers.

The Law

England & Wales

Documents that are covered by legal privilege are protected from disclosure. Legal privilege comprises two main types:

- Legal advice privilege. This applies to confidential communications (written and oral) between a lawyer and his client that come into existence for the purpose of giving or receiving legal advice, in respect of the client’s legal rights and obligation. The “client” is tightly defined for these purposes. Communications between the lawyer and the client’s employees or third parties are not covered.

- Litigation privilege. This arises once litigation is in reasonable prospect. Documents and communications that come into existence at the request of a lawyer or at the request of a client with the intent to pass them on to the lawyer (including those generated by third parties, for example, witnesses and experts), will be privileged from disclosure, provided that they are made with the dominant purpose of use in, or for obtaining evidence for, or giving or receiving legal advice in connection with the litigation.

Legal Advice Privilege

Three Rivers

The leading cases on privilege in England & Wales is Three Rivers District Council v The Governor and Company of the Bank of England (No 5) [2003] EWCA Civ 474 and No 10 [2004] UKHL 48. These cases arose from the long-running litigation between the Bank of England and the liquidators and creditors of the collapsed Bank of Credit and Commerce International (BCCI) and concerned the Bank’s obligations to disclose material created during the Bingham Inquiry into the BCCI collapse.

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1 PLC – A world tour of the rules of privilege, 30 Jul 2009, written by Jane Larner and Stephen Lacey of Linklaters.
2 Ibid.
In No 5 the Court of Appeal decided that employees of the Bank were third parties for the purposes of claiming privilege. Documents they prepared could not attract legal advice privilege. Only those within the unit (the BIU) created by the Bank to deal with external lawyers in coordinating its response to the Bingham Inquiry were within the ‘client’ such that their communications with lawyers could attract legal advice privilege.

Subsequently, in No 10, the Court of Appeal looked at communications between the BIU and the Bank’s external lawyers. It held that these could attract legal advice privilege only if they were made for the purpose of the giving or receiving of ‘legal advice’, which the court said was advice on the party’s legal rights and obligations. Advice on how the Bank should present material to the Bingham Inquiry was ‘presentational’ and therefore not privilege. The court even queried whether legal advice privilege should exist.

These decisions caused much consternation. No 5 applied a narrower interpretation of ‘client’ than was previously understood and failed to give guidance for delineating this concept. It raised the question of whether every employee outside the small group dealing with external lawyers on a daily basis would always have to be treated as a third party. The Court of Appeal’s view of ‘legal advice’ in No 10 meant that practical advice risked falling outside the protection of legal advice privilege even where the communication was between the lawyer and ‘client’ as defined by No 5. The concern was that the uncertainties created by these judgments would lead to far fewer clients being prepared to confide in their lawyers.

The Bank won permission to appeal No 10 in 2004. As the issues involved were of general importance to all lawyers in the UK, the Law Society, the Bar Council and the Attorney-General all submitted intervening briefs.

Following a four-day hearing concluding on 29 July 2004, their Lordships overruled No 10 after just 15 minutes’ deliberation. In their reasoned judgment, handed down on 11 November 2004, the Lords reaffirmed the existence of legal advice privilege and held that the Court of Appeal’s view of ‘legal advice’ was too narrow. Provided a lawyer has been instructed to act in a ‘relevant legal context’, then any confidential communication between client and lawyer directly related to the performance of the lawyer’s duties should be protected, not just those communications containing advice on the law.

The Lords declined, however, to consider the Court of Appeal’s definition of ‘client’ in No 5, which will remain the guiding authority on that point.

Practical considerations: Defining the client

Consider carefully how best to define the ‘client’ at the outset of the retainer. There are divergent opinions on whether it is better to define the client very widely, narrowly or not at all and each case should be considered on its facts.

Giving too wide a definition of the ‘client’ could be considered as artificial should an issue ever arise.

Defining the ‘client’ as a very narrow group could give rise to practical issues for a large corporate entity and may give rise to problems if more people become involved with instructing the lawyers later on.

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3 PLC, Privilege: an overview, maintained, written by PLC Dispute Resolution in association with Allen & Overy LLP
While not defining the ‘client’ at all gives wider scope for arguments about who the client was in any subsequent challenge it leaves the position uncertain. Whatever definition is adopted in the retainer letter the court is likely to look at what actually happened during the course of the transaction and which parties were in fact charged with communicating with the lawyers.

Legal advice privilege will not cover internal documents generated by employees of the client even if they are necessary to provide information to lawyers to obtain legal advice (No 5) although these may be covered by litigation privilege.

Need for relevant legal context

If in doubt as to whether the advice was given in a relevant legal context an objective two stage test should be applied:

- Does the advice relate to rights, liabilities, obligations or remedies of the client either under private law or under public law?
- If it does, the advice will only be covered if it falls within the policy underlying the justification for legal advice privilege in English law.

If the advice involves risk management, then it is likely to be privileged since it arguably comes within the relevant legal context.

Wider communication

Communication of privileged advice from the recipient within the company to a company’s board of directors should not cause loss of privilege (either in the original document or in the subsequent communication), nor should oral submissions of advice at a board meeting (per Mann J in USP Strategies Plc & Another v London General Holdings Ltd & Ors [2004] EWHC 373 (Ch)). However, internal communications forming preparations for the instructions requesting legal advice will not be privileged.

Although it is unlikely that disclosure to the board could result in loss of privilege (since it goes against the policy reasons underlying the concept), clients could be advised that where the in-house legal team (assuming they are the ‘client’) pass on legal advice, they include the following wording:

- The documents are privileged.
- Providing them does not amount to a waiver of privilege.

Clients should also obtain confirmation that the documents will be held in confidence. An alternative would be to ensure that there is a long-standing instructions between the board and the legal department with equivalent effect.

Although in USP Strategies, Mann J held that legal advice privilege would also attach to transmission of advice by the client to third parties outside the client organization and outside the group of individuals who can be described as the client within the organization, ensure that the third party

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4 Ibid.
5 Ibid.
gives appropriate undertakings about the documents. Even where such undertakings are obtained, it is safer to resist disseminating privileged material widely.

Defining the lawyer

The underlying purpose of privilege is to allow free access to a lawyer’s professional skill and judgment. In this context, this includes all members of the legal profession: solicitors, barristers, in-house lawyers and foreign lawyers...

The position of in-house lawyers is difficult. Some of what they do is covered by legal advice privilege but that part of their work which is business advice or administration will not be privileged. In-house lawyers with management or compliance roles need to know that no privilege attaches to communications relating to these roles and they should therefore avoid including communications relating to their executive/compliance function in the same document as communications relating to their legal function. Confusion here could lead to loss of privilege in the whole document.

Litigation Privilege

To attract litigation privilege, the communication must have been made for the dominant purpose of litigation which is pending, reasonably contemplated or existing.

Dominant purpose

The ‘purpose’ is broad and can cover many aspects of the litigation process.

The ‘purpose’ test is one of dominance and not exclusivity. Documents are frequently brought into existence for more than one purpose. It will be necessary to determine whether the dominant purpose is litigation and close scrutiny of the purpose for which the document was created may be undertaken by the court.

The court will look at the purpose of the document objectively. The following will not be necessarily determinative of the issue:

- Statements within a document that it was prepared to enable the lawyer to advise on the litigation.
- Evidence put to the court that the document was prepared for a particular purpose.

Litigation must be pending, reasonably contemplated or existing

Litigation must be a real likelihood rather than a mere possibility (USA v Phillip Morris Inc and British American Tobacco (Investments) Ltd [2003] All ER (D) 191 (Dec), approved by Court of Appeal [2004] All ER (D) 448 (Mar)), although the chance of litigation need not be greater than 50%. Neither a distinct possibility that sooner or later someone might make a claim, nor a general apprehension of future litigation is enough.

Waiver of privilege

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6 Ibid
7 Ibid
8 Ibid.
Privilege may be waived in several different ways:

- By placing privileged material before the court.
- By loss of confidentiality in the material (confidential being an element of privilege). However, note that disclosure to another person on confidential terms will not necessarily lead to a loss of privilege.
- By express or implied waiver. However, note that the express or implied waiver must be by or on the authority of the owner of the privilege. The Judicial Committee of the Privy Council has held that where privileged documents have been disclosed to an individual on express terms that privilege in them is not waived, then privilege will not be lost in those documents (*B v Auckland District Law Society* [2003] UKPC 38), although this is only persuasive and not binding authority. This approach was also taken in *USP Strategies*.

**United States**

US jurisdictions recognize several legal privileges, with two being the most common: the attorney-client privilege and the work product doctrine.\(^9\)

The attorney-client privilege protects confidential communications between an attorney and his client that are made:

- In the course of legal representation.
- For the purpose of providing legal advice to the client by the attorney.

It protects only the communication and not the underlying facts. A client cannot shield documents from disclosure simply by sending them to his lawyer. The privilege applies whether the lawyer is in-house or with an external law firm.

The work product doctrine protects documents and tangible things prepared in anticipation of litigation by an attorney or an attorney’s agent. It does not provide absolute protection. However, it does not prevent disclosure of an attorney’s mental impressions, conclusions, opinions or legal theories with respect to actual or reasonably anticipated litigation.

**Attorney-client Privilege**\(^10\)

3.17 – Focus on lawyer. The lawyer’s role is often at issue in corporate client communications. Simply stated: the lawyer must be acting as a lawyer. However... this issue may arise not only from the task the attorney performed (e.g., investigative), but also from the status of the attorney (e.g., in house counsel...).

3.18 – In-house counsel. No distinction should be made for the purpose of attorney-corporate client privilege between an attorney who is employed in-house and one who is outside the corporate organization...

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\(^10\) Gergacz, *Attorney-Corporate Client Privilege*, 3rd edition
3.20 – Multiple roles of in-house counsel. In-house corporate counsel may perform multiple roles within the firm. Although the existence of multiple roles will not preclude the in-house attorney from participating in privileged communications, it is important that the corporation indicate that the legal role was being assumed when the communication in question was made.

3.35 – Lawyers as investigators – In some situations an attorney may perform an investigation for the corporation at its direction. Is the individual performing the investigation as corporate counsel or as an investigator? If the investigation is performed in a business role, any inquiry about privilege ceases. No legal background would be necessary or even particularly useful in completing the task. Any competent fact-finder would do. That the investigator is a lawyer would be incidental. Conducting parallel investigations (one legal and one business)... may not yield a privilege finding for the lawyer-led one if evidence was not provided that the two investigations were conducted independent of one another.

By way of contrast, the lawyer conducts an investigation as a part of providing legal advice. Thus, legal training, skill and background bear on analyzing, and even acquiring, the facts.

Such an investigation provides information about: the client’s legal risk whether the client is in compliance with the law. These are legal questions that a lawyer’s investigation facilitates being answered. Three factors may be useful when evaluating whether lawyer-investigations may be privileged. Note that the analysis may include several issues: the role of the lawyer in the investigation, whether the investigation had a mixed legal and business purpose, and perhaps the role of agents who assisted with the investigation.

1. Who ordered the investigation?

For privilege to apply, the investigation’s purpose must be to provide information from which the attorney can develop legal advice. If the attorney ordered an investigation as a part of providing legal advice, the tie to law-related activities is strong. However, if as is often the case, management retains counsel to perform an investigation, care should be taken that business rationales do not become the motive. If they are, then the investigation will most likely not be privileged. Although strong precedent exists for cloaking an internal investigation with privilege, its aim must be to provide the corporation with legal advice. In *Upjohn v United States* 449 U.S. 383, for example, management ordered the investigation, but note the care with which the legal advice purpose was emphasized.

2. Document why the investigation was ordered.

The documentation should emphasize that the investigation was necessary so that counsel could provide the corporation with legal advice. Memos between management and counsel, letters that retain investigating counsel, board of directors minutes, and press releases are examples of places where care should be taken in describing why the investigation is being undertaken. Mixed signals about the purpose (e.g. provide legal advice and calm the financial markets) increases the probability that it will be deemed to be a business activity and thus not privileged.

3. Focus on how the investigative findings have been used.

The investigation itself must be used so that counsel can provide legal advice to the corporation. That legal advice, of course, may in the end recommend management action. So, in a sense, these actions are based on the investigation, but only after it has been filtered through the counsel’s legal advice. Management actions are triggered because of the legal advice, not because of the investigatory findings themselves. If management, on its own, used the findings for a business purpose a question may arise
about the investigation’s purpose. For privilege to arise, the investigation is not to enable management to make decisions, it is so counsel can provide legal advice.

The issue of “lawyer as investigator” has risen in a number of major corporate privilege cases. Typically, the corporation is under investigation by a government agency (usually the SEC) and hires outside counsel (or uses available in-house counsel) to investigate the matter. *Upjohn* involved this type of investigation. *Upjohn* hired outside counsel and used its own in-house counsel to investigate questionable corporate payments made overseas. No question about whether counsel was acting as a lawyer or investigator was raised in that case.

These types of ad hoc, attorney-led investigations are generally considered law-related and the attorneys considered lawyers for purposes of the privilege. As the Supreme Court in *Upjohn* noted, “The first step in resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.” But not all judges have agreed with this conclusion and therefore some uncertainty exists about the status of the lawyer-investigator in these situations.

To illustrate, *Diversified Industries v Meredith* 572 F.2d 596 (8th Cir. 1978) first held that the lawyer would not be acting as a lawyer in the investigatory role. On a rehearing before the Eighth Circuit en banc, the opposite conclusion was reached. Each opinion contained a strong dissent.

A law firm was hired by Diversified to investigate questionable corporate practices and report them to the board. An issue arose whether corporate employee communications with the law firm created an attorney-client privilege for the corporation. The en banc approach was to recognize the attorney-investigator as a lawyer for privilege purposes. The nature of the investigation into statutory violations and the ensuing report to the corporation were more valuable when done by lawyers than when done by lay investigators. It involved more than mere fact-gathering because of its tie to legal advice. Thus, although the attorneys conducted the investigation, it was a means to carry out their legal role rather than an end in itself. As Judge Heaney wrote in *Diversified*, “Lawyers are acting in a professional capacity when they undertake a comprehensive examination of a corporation’s activities in order to determine whether the corporation is operating in accordance with the law and make recommendations on how to avoid illegal activities in the future.”

Thus, although the cases generally find the lawyer-investigator function as performed in *Upjohn* and *Diversified* to be “legal” for privilege purposes, such a conclusion should not be automatic. The investigative efforts of counsel, although a fact-gathering exercise, must be prompted by the legal expertise of counsel and the legal judgment that can be useful during the course of the investigation.

3.35, Footnote 1 – See also *Cruz v Coach Stores, Inc.*, 196 F.R.D. 228 (S.D.N.Y. 2000) (investigative audit was not privileged. It was commissioned by in-house counsel and her executive superior, who used the findings to dismiss implicated employees. It was not conducted consistent with *Upjohn’s* factors: Corporate employees were not informed that it was confidential and that its purpose was so the corporation could receive legal advice.); *In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459 (S.D.N.Y. 1996). Although *Kidder* was a work product case, its conclusion that the investigation was conducted primarily for a business purpose should be useful for privilege questions, too. The court found that Kidder’s internal problems created a business crisis in which management was primarily concerned with reactions by the public, the financial press and its competitors. This finding outweighed any “litigation preparation” purpose for the investigation. For privilege issues, the case may be used to illustrate the perils of mixed purpose internal investigations. The attorney who conducts one may not be deemed to have been acting in a legal role.
Thus, investigating counsel should, at the outset, evaluate the privilege implications of management’s intent. Use of boilerplate rational to overcome business-related intentions will not be sufficient to establish privilege (this was used by counsel in making the work product showing in Kidder). Two suggestions can be made:

1) Corporate management must understand the risks to the privilege when investigative counsel is retained as part of a strategy to manage a business crisis, which includes legal issues. Privilege will only attach when the primary purpose is to provide legal advice. If primary legal purpose cannot be documented and carried forward throughout the investigation, then the privilege will be at risk.

2) If two investigations are not feasible (one focusing on assisting business crisis management; the other focusing on gathering information to provide legal advice), counsel should act as if none of the investigative work may be protected from discovery.

3.55 – Corporate employees empowered to receive communications from counsel. ... The basic question would be: Who, given the corporate structure, should receive counsel’s communication in order to facilitate the organization taking action on it? Thus, the focus should be twofold: the role of the employee in the organization and the nature of the communication. The greater the employee’s involvement in the corporation’s using the attorney’s communication, the clearer that employee, in the corporate organization setting, replicates the individual client under the traditional privilege doctrine. Consequently, the assertion of the corporate privilege would also be stronger.

Work product doctrine

While litigation need not have begun in order for the work-product doctrine to apply, a mere possibility of litigation is not enough. With regard to civil litigation, the work-product doctrine applies only to materials prepared in anticipation of litigation after a claim has arisen, or as commencement of litigation becomes likely or imminent. In the context of a criminal grand jury proceeding, one court has held that the only material protected are those prepared after the attorney’s client has received a subpoena.

Advice on matters that “may or even likely will ultimately come to litigation” may not fall within the work-product doctrine if the advice is rendered before a claim has arisen or the client is notified of possible criminal liability.

Waiver of privilege

The purpose of work-product immunity is to facilitate the adversarial process, a purpose frequently furthered by selective disclosures. Thus, unlike the disclosure of privileged communications, an attorney does not waive automatically work-product protection by showing the work product to a third person. A waiver only occurs if work-product materials are disclosed to others with the actual intention that an opposing party see the materials or under circumstances that substantially increase the opportunities for an opponent to obtain the information.

As with the attorney-client privilege, an exchange of work-product materials between attorneys representing parties sharing a community of interest does not waive the protection afforded by the

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11 Bureau of National Affairs, Attorney-Client Privilege and Work-Product Doctrine: Corporate Applications, 22-4th, BNACPS No 22-4 s XVI.

12 Bureau of National Affairs, Attorney-Client Privilege and Work-Product Doctrine: Corporate Applications, 22-4th, BNACPS No 22-4 s XVII.
doctrine. A community of interest exists when parties are defendants in separate lawsuits brought by the same opposing party for the same alleged wrongful conduct, or when a party exchanges work product with a non-party who is either threatened with similar litigation or has a mutual interest in the outcome of the suit.

US v UK Differences

Because of the shared origins and many similarities between the US and UK legal systems, there tends to be a common perception that the laws on privilege are broadly similar in both jurisdictions. This is true to a large extent, as the US attorney/client privilege and work product doctrine are the approximate equivalents of legal advice privilege and litigation privilege in the UK. However, in addition to the developments in legal advice privilege in *Three Rivers*, there are important differences between the two jurisdictions:

- **Third party communications in the absence of litigation.** One key difference between the two jurisdictions is that in the US, attorney-client privilege can apply to communications to third parties if the purpose of the communication to the third party is to help the attorney provide legal advice to the client, for example, where a financial adviser is hired by an attorney to assist the attorney in understanding the client's financial information. By contrast, these communications would not be protected under UK law unless litigation was reasonably in prospect at the time.

- **Selective waiver.** A further important difference is the possibility of selective waiver in the UK, which allows the sharing of a copy of a legally privileged communication with a third party without losing privilege. Under UK law, as long as the document has not entered the public domain and remains confidential, then privilege will not necessarily be lost by the fact that the document has been shared with a third party, provided the document was disclosed (by way of example to a regulator) for a limited purpose. This is not the case in the US. There, the majority view is that disclosure of a single copy of a privileged document to third parties, including regulators (even if that disclosure takes place abroad), results in complete loss of privilege as to the entire subject matter of the privileged documents.

- **Definition of the ‘client’.** Following the House of Lords’ refusal to review *No 5*, the Court of Appeal’s narrow definition of the ‘client’ remains good authority in England. This is in contrast to the position in the US. When examining the classes of employees that could create privileged documents, the US Supreme Court in *Upjohn* rejected the proposition that only a narrow class of employees could create privileged documents. In that case it was argued that only the ‘control group’ of employees responsible for acting on the legal advice received could create privileged documents. The Supreme Court, though, held that the documents created by other Upjohn employees in response to requests for information from attorneys could attract privilege.

**EU**

Distinct rules apply in the context of investigations by the European Commission.

Neither Articles 81 and 82 of the Treaty on the Functioning of the European Union (known as the EC Treaty or Rome Treaty before the Lisbon Treaty came into force on 1 December 2009), nor any of the

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14 Ibid.
regulations implementing them, contain any provisions in relation to legal privilege. The principles
governing such privilege have largely been developed through the case law of the European Court of
Justice (ECJ). The AM&S case (AM&S v Commission [1982] ECR 1575) established the principle that
Regulation 17 (setting out the rules implementing Articles 81 and 82) must be interpreted as protecting
the confidentiality of written communications between lawyer and client. (Regulation 17 has now been
replaced by Regulation 1/2003, the Modernisation Regulation, but the position remains the same.)

This principle is subject to two conditions:

- The communications must be made for the purpose and in the interests of the client's right of
defence.

- The communications must emanate from independent lawyers established within the EU (that
  is, the privilege of in-house and non-EU qualified lawyers is not respected).
Comparison of Privilege and Confidentiality Issues in European jurisdictions

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<td>France(^{15})</td>
<td>The relationship between a lawyer (avocat, admitted to the local bar) and his client is protected by professional confidentiality obligations (articles 226-13, New Criminal Code), which prohibit a professional who is subject to a confidentiality obligation from divulging information he obtained from his client. In addition, any material written by a lawyer in relation to a matter handled on behalf of a client, correspondence between a lawyer and a client, and correspondence between a lawyer and his opposing lawyers in relation to the matter, is protected by professional confidentiality unless there is express indication to the contrary (articles 66-5, Law of 31 December 1971). A client cannot release his lawyer from his obligation to keep these documents confidential but is not himself bound by this confidentiality obligation.</td>
<td>Correspondence between avocats and their clients is legally privileged and cannot be disclosed.</td>
<td>In-house counsel (juristes d'entreprise) do not hold the title of avocat. Avocats are considered to form a separate profession from in-house counsel and work only in law firms. In-house counsel are not covered by the rules of confidentiality of correspondence that apply to avocats. Only the in-house counsel's communications with external lawyers (that is, avocats) are privileged, and not correspondence with the management or employees of their company. However, this situation may change in a near future as the 2009 Darrois report recommends that avocats be allowed to work as in-house counsel without losing their status of avocat. One consequence of this would be that correspondence involving in-house counsel who also hold the title of avocat would be protected by the rules of confidentiality of correspondence. This proposal is currently under discussion and is not yet applicable.</td>
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\(^{15}\) PLC, Dispute Resolution: France, 1 Mar 2010, written by Joël Alquezar, Alexandre Bailly and Vanessa Bénichou, Winston & Strawn
| Germany | The relationship between a lawyer and his client is protected by a number of professional confidentiality regulations. In the absence of the consent of the client, a lawyer is prohibited from divulging any confidential information or documents obtained in the course of his professional activities (section 203(1), Criminal Code). This obligation to preserve confidentiality is mirrored by the right of the lawyer to refuse to divulge such information (sections 383 and 142(2), Civil Procedure Code, and section 53 of the Criminal Procedure Code).

In addition, documents entrusted to a lawyer in his professional capacity, and which remain in his possession, are protected from disclosure (section 97, Criminal Procedure Code). However, documents located at the client’s premises that are not related to the client’s defence of criminal or regulatory offences are not privileged from seizure by regulatory and other investigative bodies.

Since the parties are generally not obliged to disclose documents, the need for privilege does not usually arise. However, third parties requested to testify as a witness or to produce documents may need to invoke privileges. There are a number of privileges under German law, for example:

- Family privilege, which applies to close relatives of a party.
- Subject matter privilege, which applies to certain kinds of information (for example, trade secrets of non-parties).
- Public servant privilege, relating to matters that public servants learned of in their official capacity.
- Professional privilege, which applies to various persons who, by virtue of their profession, are entrusted with confidential information (for example, attorneys, certified auditors or tax advisers).

The legal situation regarding privilege for in-house counsel is far from clear under German law. Arguably, in-house counsel can invoke professional privilege if their position and status within the company is comparable to that of an independent outside attorney. This can be the case if the in-house counsel is all of the following:

- Admitted to the Bar.
- Predominantly engaged in legal advice for his employer.
- Granted, due to his position in the hierarchy of the company, a certain degree of independence when acting in the capacity of legal counsel.

| Italy | Specific rules relating to the disclosure of correspondence between counsel are set out in the Ethical Code for Italian Lawyers (Codice Deontologico Forense) (Ethical Code). The following correspondence cannot be filed or referred to in the court proceedings (Article 28, Ethical Code):

- Correspondence between the parties' counsel expressly qualified as confidential.
- Correspondence between the parties' counsel relating to the negotiation of an amicable settlement.

There is no recognised doctrine of privilege in Italy. However, there are certain circumstances in which Italian law will protect particular documents and communications from disclosure where it is necessary to safeguard the lawyer-client relationship. For example, a lawyer cannot be obliged to give evidence of any information acquired by reason of his profession, including conversations and communications with his clients (article 206, Italian Code of Criminal Procedure), nor can he be obliged to disclose any document, data or information which is in his possession.

The Ethical Code does not apply to in-house counsel. If the in-house counsel is registered with the Italian Association of In-house Lawyers (AIGI), he must follow the rules of conduct provided by the AIGI's Code. Although this does not contain specific provisions regarding confidential correspondence, it provides that in-house counsel must keep all the information of which they become aware by reason of their professional activity confidential (Article 6, AIGI Code), including after the termination of their employment.

| Need further information |

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16 PLC, Dispute Resolution: Germany, 1 Mar 2010, written by Stefan Rützel, Stephan Wilske and Wolf H von Bernuth, Gleiss Lutz

17 PLC, Dispute Resolution: Italy, 1 Mar 2010, written by Monica Iacoviello and Andrea Carlevaris, Bonelli Erede Pappalardo Studio Legale
Correspondence between the parties’ counsel can only be produced if it relates to the implementation of an agreement concluded between the parties (for example, letters of intent and letters containing draft proposals). In addition, correspondence sent by the opposing party’s counsel can be produced if it contains the assurance that an obligation of the client shall be fulfilled.

Correspondence between the parties, and between one party’s counsel and the other party, is not confidential and can be produced in court.

If a lawyer intends to send a confidential or without prejudice letter or document to a lawyer in another member state, he should clearly express that before communicating the letter or document (Article 5(3), European Lawyers Code of Conduct). If the prospective recipient of the letter or document is unable to ensure that the letter will remain confidential or without prejudice, he should inform the sender without delay.

| The Netherlands | Correspondence between Dutch lawyers is confidential in nature and cannot be used in court, except where the client's interests require this. However, even in such a case, the prior consent of the other party or the president of the local bar is required. | Those entrusted with a duty of confidence by status or by profession (such as priests, doctors, lawyers and notaries) cannot be forced to reveal confidential information (article 843a sub 3, Dutch Act on Procedure in Civil Matters (Wet-boek van Burgerlijke Rechtsvordering) (Rv) and article 165 sub 2b, Rv). The Professional Conduct Rules of the Bar forbid a lawyer from testifying to facts that were revealed to him by his client in the course of the exercise of his profession, although a client can give his lawyer permission to use specific confidential information. | This right to legal privilege relates only to information revealed to lawyers in their professional capacity. | Need further information |

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Information about the client revealed to the lawyer by third parties is not subject to legal privilege, except where it has been revealed to him within a separate client relationship.

Lawyer-client communications held at the client’s office are protected from seizure by regulatory and other investigative bodies.

Spain19

Lawyers (*abogados, for whom membership of the bar is obligatory*) must keep confidential all facts and matters they come to know through the conduct of their professional obligations (*article 542, Law of Judicial Authority (Ley Organica del Poder Judicial)). This is reinforced by the imposition on lawyers of a duty not to disclose facts and documents that have come into their possession as a result of their professional activities (*Spanish Professional Conduct Code (June 2000) and General Statute for Spanish Lawyers (Estatuto General de la Abogacía Español, approved by Royal Decree 658/2001 of 20 June)). Clients may not release their solicitor from this duty, although they are not bound by it themselves. However, relevant documents in the client’s possession continue to benefit from confidentiality and do not have to be disclosed to investigative bodies.

Disclosure of confidential information contrary to professional confidentiality obligations is punishable with a prison term, fine and/or disqualification from practice (*article 199.2, Spanish Criminal Code*).

| Spain19 | Lawyers (*abogados, for whom membership of the bar is obligatory*) must keep confidential all facts and matters they come to know through the conduct of their professional obligations (*article 542, Law of Judicial Authority (Ley Organica del Poder Judicial)). This is reinforced by the imposition on lawyers of a duty not to disclose facts and documents that have come into their possession as a result of their professional activities (*Spanish Professional Conduct Code (June 2000) and General Statute for Spanish Lawyers (Estatuto General de la Abogacía Español, approved by Royal Decree 658/2001 of 20 June)). Clients may not release their solicitor from this duty, although they are not bound by it themselves. However, relevant documents in the client’s possession continue to benefit from confidentiality and do not have to be disclosed to investigative bodies. | Need further information | Need further information | Need further information |

19 Ibid
<table>
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<tr>
<th>Switzerland&lt;sup&gt;20&lt;/sup&gt;</th>
<th>Information received by an independent lawyer from a client or from third parties in the context of an attorney-client mandate remains confidential. Lawyers are obliged not to disclose such information and can invoke a privilege based on the applicable procedural laws to protect it.</th>
<th>Certain documents are legally privileged, particularly correspondence between lawyers and their clients. Lawyer-client privilege only extends to lawyers registered in the lawyers register. The information is protected if it is in the lawyer's possession. The protection will include correspondence between lawyer and client, memoranda, notes and, to some extent, documents received from the client. All such material is protected provided it relates to legal advice. No protection is granted to information relating to other services by external lawyers. Privilege does not extend to material in the client's possession. As a result, correspondence between lawyer and client found at the premises of the client or third parties is not protected. An exception to this general rule exists in criminal proceedings, while in regulatory investigations the issue is subject to debate.</th>
<th>Lawyers employed by a company whose business does not involve offering legal services cannot register with the lawyers register. This is because they do not qualify as being independent, a requirement for entry into the register. Therefore, in-house counsel do not benefit from this type of privilege and cannot legally hold back company documents which are in their custody. However, the government has drafted a bill that will, if approved by parliament, grant in-house counsel registered with a special company lawyers register a right to decline to disclose documents which are related to their work as in-house counsel.&lt;sup&gt;21&lt;/sup&gt;</th>
<th>Need further information</th>
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<tr>
<td>Russian Federation&lt;sup&gt;22&lt;/sup&gt;</td>
<td>An advocate may not disclose confidential client information. In addition, he cannot appear as a witness in court proceedings, nor be questioned on the information he has gained in the course of carrying out his professional duties as an attorney at law (2002 Russian Federation law No 63-FZ on Advocacy and the Bar). In contrast, a Russian lawyer (who can be anyone who has completed a law degree) does not benefit from such protection against disclosure and must disclose any information requested by an authorized regulatory or</td>
<td>Generally, there is no concept of privileged information. The Arbitrazh Procedure Code does not confer privilege on any type of documents. However, attorney-client communications are subject to privilege, which cannot be waived. Russian legislation recognizes as privileged any information or communications between an advocate (a lawyer who is qualified to represent clients in court) and his client, if they are produced in the course of the provision of legal assistance by the advocate to the client.</td>
<td>Documents written by an in-house lawyer (domestic or foreign) are not privileged, and even confidential information (for example, personal data or commercial secrets) must be disclosed at the request of the courts.&lt;sup&gt;23&lt;/sup&gt;</td>
<td></td>
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</tbody>
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<sup>20</sup> Ibid

<sup>21</sup> PLC, Dispute Resolution: Switzerland, 1 Mar 2010, written by Urs Feller, Marcel Frey and Bernhard Lauterburg, Prager Dreifuss Attorney at Law

<sup>22</sup> PLC – A world tour of the rules of privilege, 30 Jul 2009, written by Jane Larner and Stephen Lacey of Linklaters.

<sup>23</sup> PLC, Dispute Resolution: Russian Federation, 1 Mar 2010, written by Timur Aitkulov and Roman Khodykin of Clifford Chance.
investigative state body. This extends to communication between lawyer and client held at the client’s premises.
Implications for Companies

The above table shows the scale of the difference among the concepts of legal privilege in the various jurisdictions. Perhaps most concerning for large companies is the fact that, in many of these civil law jurisdictions, privilege covers only documents in the hands of a lawyer. Accordingly, any other document, even a letter of legal advice from a lawyer, will not necessarily be privileged in the client’s hands.

In the past, this absence of privilege for documents in a company’s hands in these jurisdictions might have been less of an everyday concern, given the absence of the disclosure obligation in litigation in most civil law jurisdictions. However, that view can no longer be maintained, in light of the increase in regulation, and, particularly, the ability of regulators across the world to demand access to documents.
Supreme Court
The court of final appeal in civil and criminal matters. Appeals may be made only where the Court grants permission in limited circumstances as set out in the Constitution. Can decide on the constitutionality of a bill if referred to it by the President. Can determine a question of the permanent incapacity of the President if it arises. Most cases are dealt with by three judges though up to seven judges can sit.

High Court
Has full original jurisdiction in, and power to determine, all matters, whether of law or fact, civil and criminal. Power to determine the validity of any law having regard to the Constitution. Appeal court from the Circuit Court in civil matters.

Central Criminal Court
Criminal division of the High Court. Tries serious crime including murder, rape, treason and piracy.

Court of Appeal
Deals with appeals from the High Court in civil cases and appeals from the Circuit Criminal Court, the Central Criminal Court, or the Special Criminal Court in criminal cases. Cases are dealt with by three judges.

Special Criminal Court
Established for the trial of offences in cases where it is determined that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. Cases are dealt with by three judges.

Circuit Court
Court of limited and local jurisdiction organised on a regional basis. Civil: Claims up to the value of €75,000. Family Law: Divorce, judicial separation, nullity and other ancillary matters. Criminal: Jury trial of offences other than those triable in the Central Criminal Court. Appeal court from the District Court in all matters.

District Court
Court of limited and local jurisdiction organised on a local basis. Civil: Claims up to the value of €15,000. Family law: Maintenance, custody, access and domestic violence. Criminal: Non-jury trial of offences including most road traffic offences. The Small Claims Procedure operates within the District Court.
THE IRISH LEGAL SYSTEM

It is perhaps the vanity of every generation to believe that it is experiencing a unique moment of radical cultural transformation; yet there do seem grounds for believing that this is so in relation to the Irish legal system. In the past decade there have been changes, at a structural and philosophical level, of an intensity that has not previously occurred over centuries.

THE HISTORICAL BACKGROUND

Perhaps the best way of understanding these changes is to cast an eye over the past. You do not need to be reminded of the fact that Irish history is complex and troubled. Some general observations are, however, possible.

The first is that the old Irish system of law — the Brehon Law — was completely obliterated by the Seventeenth Century. Nothing remains of it in the present legal dispensation, which derives from a complex amalgam of foreign and domestic sources.

At the beginning of the Nineteenth Century, in the wake of the failed 1798 Rebellion, the Act of Union was passed. This had the effect of taking Ireland into a political union with Britain. It also changed the legal system. Thenceforth, the source of legislation for Ireland was Westminster rather than Dublin.

As you know, the movement for independence in the early part of the Twentieth Century led to a Treaty in 1921, which provided for the qualified independence of Twenty-six Irish counties (An Saorstat — “The Free State”) on a dominion model akin to Canada and enabled six of the Northern counties — which became known as Northern Ireland — to remain as part of the political and legal union with Britain. The Treaty was followed by a brief, though very painful, civil war in which the pro-Treaty forces were victorious.

THE 1922 CONSTITUTION

The 1922 Constitution, a creature of the Treaty, promulgated by the Saorstat, contained new elements that challenged the principle of parliamentary sovereignty: it prescribed a series of fundamental rights and gave the judiciary power to strike down legislation inconsistent with their protection. The 1922 Constitution did not, however, fulfil its potential role of transforming the legal system from one of the positivist deference to Parliament into one based on constitutional values championed by the judiciary. This was because the Constitution contained a provision enabling its provisions to be amended by legislation within the first eight years of its commencement. The legislature was quick to see the possibility of immunizing itself from judicial control: it passed a statute extending the eight-year period to sixteen years. The judiciary interpreted the
relevant constitutional provision as permitting such an extension.

Clearly, this meant that the legislature could keep on extending the period, with the result that the powers of judicial review would be delayed indefinitely. It is not surprising that the judges lost a taste for activism which could be thwarted so easily. They went so far as to hold that legislation that was inconsistent with the Constitution should be interpreted as implicitly having amended the Constitution.

One should not ignore the wider culture context. The Irish legal profession at the time was inured to the British common law tradition where judges interpreted legislation rather than struck it down. The barristers were as much a part of this tradition as the judges: they were very slow to change their mental approach to their role. (We can see some similarities in Britain today with the enactment of the Human Rights Act, about which Professor Gearty will be speaking later.)

*203 THE 1937 CONSTITUTION PROMULGATED

The next milestone in the development of the Irish legal system was the promulgation of a new Constitution in 1937. Whilst professing to be a Constitution for the island as a whole, it came into being on the votes of only those resident in the Free State. This Constitution continues in force today, having been amended twenty times. It has transformed Irish legal culture. Whatever the merits or demerits of certain of its specific provisions, the Constitution has transformed the mindset of Irish lawyers from the incrementalist philosophy of the common law into a way of thinking that looks for the broad principle, expressed in more abstract and, at times, rhetorical language. Irish judges are well used to debating such concepts as due process, equality, and fundamental rights. While they have been guided by constitutional judicial precedents from other jurisdictions, including the United States of America and Canada, the Irish courts have engaged in an elaborate and sophisticated process of developing an essentially indigenous intellectual standard of analysis. Of course not all of this jurisprudence is impressive: some of the decisions of the past decade have disappointed scholarly commentators. Nevertheless, the body of Irish constitutional law as a whole represents an impressive achievement by the judiciary, which bears comparison with the work of courts of far larger countries with a much longer tradition of constitutionalism.

SEPARATION OF POWERS

Let us look briefly as the main features of the 1937 Constitution. There are provisions specifying the respective roles of legislature (Oireachtas), executive and judiciary. These incorporate the doctrine of the separation of powers. The Oireachtas is composed of two Houses: the Dail, whose members are elected at national elections, and the Seanad, whose members are elected largely by local political representatives. The Dail is the equivalent of the British House of Commons; the Seanad is not unlike the House of Lords, at all events so far as its relative power in initiating and blocking legislation is concerned.

The relationship between the legislature and executive is broadly similar to the British model. The Government, headed by a Prime Minister (Taoiseach) emerges from a vote of the legislature. That vote establishes who shall be Taoiseach; the Taoiseach then elects his or her Government, composed of members of the Oireachtas, overwhelmingly from the Dail.

*204 As in Britain, the Government’s will dominates the parliamentary process. Political party discipline in Ireland is very strong; members who vote against the party whip are likely to be excluded from the parliamentary party. While there are no formal barriers to legislation emerging from an Opposition initiative or from a Private Member’s Bill, this happens so rarely in practice as to be highly newsworthy when it occurs.

THE INDEPENDENCE OF THE JUDICIARY

The Constitution contains traditional protection for the independence of the judiciary. A judge of the Supreme Court or High Court may not be removed from office except for “stated misbehaviour or incapacity” on the basis of resolutions passed by the Dail and Seanad. In contrast to the removal of the President, no special majority of either House is required. So no judge has been removed and, since the process for removal has never been put in motion, it is not clear how broadly the concept of “stated misbehaviour” should be interpreted. Clearly it encompasses misconduct by a judge in the context of the administration of justice; it is not so clear whether all such misconduct, however venial, will be capable of warranting the
removal process.

Nor is it clear whether conduct of a different character also falls within the scope of “misconduct.” Presumably a judge guilty of a serious criminal offense or, perhaps, a less serious offense involving some dishonourable characteristic such as dishonesty, could be removed. What is still entirely uncertain is whether conduct that is dishonourable but not contrary to the criminal law could warrant removal, consistent with the terms of the Constitution.

THE APPOINTMENT OF JUDGES

The appointment of judges is a matter of some controversy. The Constitution leaves this function to the Government. Undoubtedly the political allegiances of candidates for appointment has some effect — and in some cases crucial effect — on how the Government of the day made its selection. The accepted wisdom is, however, that, once appointed judges have tended to leave their party political sympathies behind them and decide cases with scrupulous objectivity. Nevertheless, concern for the risk of political preference playing too great a role in the appointment of judges led to the enactment of legislation in 1995 establishing a Judicial Appointments Advisory Board, made up of the Chief Justice, other senior judges, the Attorney General, nominees of the barristers’ and solicitors’ professions and some lay representatives. This Board has the task of recommending eligible candidates for judicial office. The Government is entirely free to depart from the list of recommended candidates but, if it does, it must publish the fact and expose itself to whatever political controversy that results.

Interestingly there have been very little public discussion on the legal and political philosophies of judicial appointees, even though the courts have very significant power to shape the development of the law on such controversial issues as abortion, euthanasia and the social regulation of private property. There have been no strong calls to have the appointment process subject to legislative scrutiny or to popular election.

THE PHILOSOPHICAL BASIS OF FUNDAMENTAL RIGHTS PROTECTION

The next feature of the 1937 Constitution that is worth noting is related to just such controversial issues. The Constitution, in Articles 40 to 44, contains important protections for certain fundamental rights. Some of these are part of the traditional repertoire: the rights to life, property, personal liberty, freedom of expression and assembly and association, for example. The philosophic inspiration for protection of these rights comes from British, French and American experience of centuries ago. Other provisions spring from a different philosophical source: natural law philosophy, especially as interpreted in the Thomist tradition. Thus Article 43 provides as follows:

1. 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

2. 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

2° The State, accordingly, may as occasion requires delimit by law the exercise of said rights with a view to reconciling their exercise with the exigencies of the common good.

More controversial was Article 41 in its original formulation:

1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

2. 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

2° The State, accordingly, may as occasion requires delimit by law the exercise of said rights with a view to reconciling their exercise with the exigencies of the common good.
1. The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2. The State therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

2. In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

3. The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

2. No law shall be enacted providing for the grant of dissolution of marriage.

3. No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.

*207* Undoubtedly the prohibition on legislation providing for divorce had the support on the large majority of the electorate in 1937. Indeed in 1986 a proposal to amend the Constitution to provide for divorce was defeated by a substantial majority and in 1995 the proposal to make this change was approved by only a narrow majority: 818,852 votes in favour, 809,728 votes against.

**UNENUMERATED PERSONAL RIGHTS**

Article 40.3 of the Constitution is perhaps the most significant provision, though on first sight it looks fairly innocuous. Having protected certain specific rights earlier in the Article, Article 40.3 goes on to provide:

1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen ....
What may be noted about Article 40.3.1 is that it does not profess to identify what are the “personal rights” of the citizen that merit respect, defense and vindication. The fact that Article 40.3.2 identifies certain specific rights which require particular protection supports the inference that other unenumerated personal rights must be protected by Article 40.3.1.

The High Court and Supreme Court came to this conclusion in the decision of Ryan v Attorney General [1965] IR 294, where the plaintiff sought to persuade the judges that they should strike down, as contrary to Article 40.3.1, legislation prescribing the addition of quantities of sodium fluoride in water supplies. The plaintiff contended that this would be injurious to her; she asserted that her right to bodily integrity was a constitutionally-protected unenumerated right and that the legislation interfered with that right.

Both courts accepted that the plaintiff had established that her asserted right to bodily integrity was indeed an unenumerated personal right protected by Article 40.3.1 though they rejected her case on the scientific evidence. Ryan thus represents the precedent decision supporting the entitlement of the court to identify an open-ended list of unenumerated personal rights. Professor Casey, in Constitutional Law in Ireland (3rd ed., 2000), p. 395 notes that the following, previously unenumerated, rights have been identified by the courts as falling under the protection of Article 40.3.1:

(a) the right to strike;
(b) the right to dissociate;
(c) the right to privacy;
(d) the right to earn one’s living;
(e) the right to communicate;
(f) the right to access to the courts;
(g) the right to legal representation on criminal charges;
(h) the right to protection of one’s health;
(i) the right to travel;
(j) the right to marry and found a family;
(k) the right to know the identity of one’s natural mother;
(l) the right to fair procedures in decision making.

Most people of liberal persuasion would be pleased enough with this list; critics have, however, contended that, under the guise of identification of the pre-existing, though unenumerated, constitutional rights, the courts have engaged in a process of tacit judicial legislation in harmony with their own political philosophical preferences.

THE SHIFT TOWARDS POSITIVISM IN THE SUPREME COURT

A major development has taken place in the past decade. The Supreme Court has unceremoniously rejected the natural law philosophy underlying the fundamental rights provisions and replaced it with a frankly positivist doctrine. This was most apparent in the decision of Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995 [1995] 1 IR1, where the Court appeared to contradict the express language of the Constitution in
denying that it was based in part on a natural law philosophy. Commentators, including those who would not necessarily have any objection to the outcome of the Court’s decision, have been strongly critical of the Court’s philosophical approach.

Dr. Gerard Quinn, in a paper delivered on 6 July 2000 at the University of San Sebastian Summer School, entitled Judicial Activism Under *209 the Irish Constitution: Issues and Perspectives: From Natural Law to Popular Sovereignty, has stated:

No matter how much one might applaud the unceremonious abandonment of a clearly undemocratic portion of jurisprudence one is still uneasy with the result. First of all, the Court gives the impression that natural law thinking had not achieved an elevated status in Irish constitutional in the past. In fact it had and the Court’s reasoning in this regard fails to convince. Secondly, the outcome is reminiscent of the situation pertaining under the 1922 Constitution. What would the courts do if the people undemocratically voted to abolish democracy and to purge human rights from the Constitution especially as regards foreigners? Would the court really take the view of ‘Gesetz als Gesetz’ (the law as the law)?

**THE GROWING INFLUENCE OF EUROPEAN LAW**

As well as the two great influences of the common law and the 1937 Constitution, there is now a third major influence on the Irish legal system. This is European Law. As you know the concept of European Law embraces two different types of law: that of the European Union and Community and that of the European Convention on Human Rights. The general political and legal trends are towards an amalgamation of these two sources but at present they need to be considered separately.

*European Union and Community Law*

As to European Union and Community law, the Irish Constitution was amended in 1972 in a very open-ended manner to give a favoured position to the law of the European Communities. Article 29.4.3 of the Constitution provides that:

> [n]o provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents law enacted, acts done or measures adopted by the Communities or institutions thereof, from having the force of law in the state.

*210 Two later constitutional amendments, in 1987 and 1992 respectively, were necessitated by the Single European Act of 1986 and the Maastricht Treaty of 1992.*

The precise relationship between the fundamental rights provisions of the Constitution and the provisions of European Union and Community Law remains a matter of controversy among academic commentators. As can be appreciated, important issues of policy are involved in determining how respect for national constitutional norms of States that are members of the European Union and Community can be reconciled with the goals of the Union and Community.

As a practical matter, the principles of European Union and Community Law have now penetrated the Irish legal system and not just in the areas of customs, trade barriers and the movement of capital, labour, products or services. Broader social and economic policies are involved, including gender equality and consumer protection. Thus, throughout the European Community, effect has been given to a product liability directive emanating from Brussels in 1985, imposing strict liability on producers for defects in their products, which is modelled largely on the law in the United States of America. Curiously, there has been very little litigation as a result. In Ireland, which implemented the directive (belatedly) in 1991, there has hardly been a case by which the Act has been invoked and this low incidence of litigation is mirrored in other jurisdictions. The contrast with the experience in the United States of America may perhaps be explained in part by the absence of juries in civil litigation of this kind in Europe, the rule that a losing plaintiff must generally pay the successful defendant’s legal expenses, the unlawfulness of contingent fee arrangements and the generally low level of damages awards.

Whereas twenty, or even fifteen, years ago most legal practitioners could treat European Community Law as an area of
specialist interest which need not necessarily concern them, today every legal practitioner must have an understanding of the main features of European Community Law. For example, most of our system of private international law has been transformed by European Conventions.

*211 The European Convention on Human Rights

The European Convention on Human Rights has quite different formal relationship with the Irish legal system. It is an international treaty but it has not yet been incorporated into our domestic law. Following the Belfast Agreement, moves are afoot to make such a change, probably by way of legislation rather than by constitutional amendment.

Even though the Convention is not part of the Irish domestic law, the judgments of the European Court Human Rights in which Ireland has been found to have violated a provision of Convention have led to changes in the domestic law on civil legal aid (Airey v Ireland (1979) 2 EHRR 305), homosexual offenses (Norris v Ireland, (1989) 13 EHRR 186) and the provision of specific information about the identity and location of foreign abortion clinics (Open Door v Ireland, (1993) 15 EHRR 244). Moreover, the Irish courts have increasingly evinced a willingness to look to the European Convention for guidance as to how they should interpret the scope of rights that are rooted in the Irish Constitution. This is particularly apparent in the context of contempt of court though not, curiously, defamation. The decision of the Supreme Court in an important case last year, de Rossa v Independent Newspapers, 30 June 1999, on the question of what guidance juries should be given by the trial judge on the quantum of damages in defamation cases, appears to have taken a position that is inconsistent with the approach prescribed by the European Court of Human Rights in Tolstoy Miloslavsky v United Kingdom (1995) 20 EHRR 442.

THE LEGAL PROFESSION IN IRELAND

Let us now turn to consider the legal profession in Ireland. You will have the opportunity to see for yourselves the physical environment of the court and the workplaces of barristers. As you know, the profession is still divided into barristers and solicitors. There are well over 1,000 barristers and over 6,000 solicitors. The work that barristers do varies widely but most barristers, as a major part of their practice, will act as advocates appearing in court. Their area of specialization may be criminal law, commercial law, family law, constitutional law, European law, defamation or personal injuries litigation ... the full list is far longer.

Solicitors have had a right of audience in all the Irish courts for the past three decades but they tend to exercise it, with the rarest of exceptions, *212 only in the lowest court — the District Court. Formerly, solicitors could be appointed as Judges only at District Court level. Now they may be appointed also at the next level, as Circuit Court Judges. A Circuit Court Judge can in due course be appointed to the High Court, the foremost court of original jurisdiction. Thus, albeit by a somewhat indirect route of progress, solicitors may reach the High Court as Judges and in turn be eligible for promotion to the Supreme Court.

THE COURT STRUCTURE

It may be useful to say a few words about each of these four courts, as well as the Court of Criminal Appeal and the Special Criminal Court.

The District Court

As I mentioned, the District Court is the lowest court. It has limited, though very wide-ranging, jurisdiction in both civil and criminal matters. The judges have to have had several years’ experience in practice as a barrister or solicitor. There are no juries in the District Court. There is a special small claims procedure, introduced in 1991, and modified in 1993, whereby the clerk of the District Court may try to seek a compromise solution to litigation between parties involving consumer contracts or minor property damage claims.
**The Circuit Court**

The Circuit Court similarly has wide-ranging jurisdiction in civil and criminal matters. Its civil monetary limit is £30,000 — about 26,000 dollars. (The parties can agree to confer unlimited jurisdiction on the court). In criminal matters the Circuit Court hears all prosecutions for indictable crime, save treason, piracy, certain offences under the *Offences Against the State Act 1939*, murder, rape and aggravated sexual assault. Criminal prosecutions in the Circuit Court involve trial by jury. (I should mention that the Constitution guarantees trial by jury for all offences save those that are “minor.” The jurisprudence on what constitutes a minor offence is confused and intellectually unconvincing: see Casey, op. cit., pp. 318-323.)

*213 The High Court*

The High Court, by virtue of Article 34.3.1° of the Constitution, is vested with “full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.” It hears cases where the amount claimed is in excess of £30,000. The range of its civil work is impressive: personal injury litigation, judicial review of administrative action (a growth area of litigation in the past fifteen years), commercial and company (corporation) matters, family law proceedings (which are also distributed between the Circuit Court and District Court), intellectual property litigation, chancery matters generally and, perhaps most significantly, challenges to the constitutional validity of legislation that has been enacted.

The High Court’s criminal jurisdiction, as we have seen, includes prosecutions for treason, certain offences under the *Offences Against the State Act 1939*, murder, privacy, rape and aggravated sexual assault. When exercising its criminal jurisdiction, it is called the Central Criminal Court. Prosecutions for criminal offences, as in the Circuit Court, involve trial by jury.

**The Special Criminal Court**

There is, however, a Special Criminal Court, established under Article 38.3 of the Constitution, which involves trial by a non-jury court. Article 38.3 provides as follows:

1° Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.

2° The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.

The *Offences Against the States Act 1939* set up this Court. It is composed of three judges from the other Courts. The normal practice is for one judge each to come from the High Court, the Circuit Court and the District Court. The origins of the establishment of Court are, of course, conflict on the island relating to partition and the political divisions in the north. The Court does not, however, restrict itself to prosecutions relating *214* to allegedly subversive activities: cases with no political dimension have also come before it. At present, in the aftermath of the *Belfast Agreement*, a Committee chaired by Anthony Hederman, former Attorney General and retired Judge of the Supreme Court, is examining the *Offences Against the State* legislation with a view to making recommendations for its reform.

**The Court of Criminal Appeal**

Mention may here be made of the Court of Criminal Appeal. (Legislation was enacted in 1995 envisaging its abolition but that evil day has not yet dawned.) This Court hears appeals against conviction or sentence in the Circuit Court, the High Court (Central Criminal Court) or Special Criminal Court, with a limited right of further appeal to the Supreme Court. The composition of the Court of Appeal is clearly unsatisfactory. It is a three-judge court, consisting of a Supreme Court judge
and two judges of the High Court. An obvious weakness flows from this structure. The court lacks any coherent continuity. Its ad hoc character means that no tradition of expertise is allowed to develop. One may also question whether the mixing of judges from the Supreme Court and High Court is a sensible use of resources.

**The Supreme Court**

Finally, let us consider the Supreme Court. It is now composed of eight judges. It hears appeals from the High Court in civil matters. (It also has an elaborate appellate jurisdiction from lower courts based on a “case stated” procedure.) As has been mentioned, it has appellate jurisdiction from decisions of the Court of Criminal Appeal in limited circumstances.

**THE ARTICLE 26 PROCEDURE**

The Supreme Court has an important original, as opposed to appellate, jurisdiction. This arises under Article 26 of the Constitution. The President of Ireland has a complete discretion to refer a Bill that has been passed by both Houses of the Oireachtas (Legislature) to the Supreme Court to determine whether the Bill or any provision of it is consistent with, or repugnant to, the Constitution. The Attorney General (or his or her representative) argues in favour of the Bill’s validity. Counsel appointed by the Court argue against its validity. The Court must determine the issue one way or the other within sixty days after the date of reference. If the Court upholds the validity of the Bill, the President must sign it into law; if it finds it repugnant, the President is naturally prohibited from doing so.

The Supreme Court has been called on fourteen times to make an adjudication under the Article 26 procedure. It has upheld the scrutinised Bill on six occasions, found it repugnant to the Constitution on six other occasions and is at present in the course of examining two Bills.

The Article 26 procedure has two obvious advantages, one immediately apparent, the other perhaps less so. First, there is surely merit in preventing an unconstitutional legislative measure from becoming law. Once a Bill is enacted, subsequent adjudication on its validity depends on a party with the necessary locus standi, legal sophistication, motivation and financial resources to challenge it in proceedings taken in the High Court. That could take several years to occur. Where the constitutional invalidity detrimentally affects financially disadvantaged people, of the nature of things it will be less likely to be challenged. The second advantage in the Article 26 procedure is that its very existence undoubtedly has had a cautionary effect on politicians who are tempted to introduce a popular, but probably unconstitutional measure, possibly impacting on a vulnerable minority.

There are, however, difficulties with Article 26. It is hard for counsel engaged to attack a Bill’s validity to envisage all possible permutations of circumstances that may occur in the future. Often it is only in the light of experience that the legislation’s invalidity will emerge. Moreover, the sixty-day time limit could present difficulties in cases where the Bill’s validity depends on a disputed scientific issue (such as arose in Ryan v AG — the fluoridation case — which was not an Article 26 reference). How can the Court be expected to hear all the complicated expert evidence in such a relatively short period?

A third difficulty, created by Article 34.3.3 of the Constitution, is that, once the Supreme Court has upheld the validity of a Bill under Article 26, no subsequent challenge to the validity of the Act that it then becomes is permitted. This could result in injustice where it later becomes plain that the legislation is, in fact, unconstitutional or where subsequent amendments to the Constitution would have had the retrospective effect of altering the validity of the legislation in the absence of Article 34.3.3. In the light of these difficulties the Constitution Review Group appointed to examine the Constitution recommended in its report in 1996 that Article 34.3.3 be deleted, and an All-Party Oireachtas Committee on the Constitution, appointed subsequently, has come to the same conclusion.

**LEGAL EDUCATION**

Legal Education in Ireland is similar to the British rather than the North American model. The normal pattern of progress to become a lawyer is for a student just out of school — aged seventeen or eighteen — to study for a law degree at University
and then to proceed to the professional training courses, either at the Honorable Society of King’s Inns, in the case of becoming a barrister, or the Law Society of Ireland, if the intention is to become a solicitor. The whole process takes around six years.

There are other routes into both professions which do not require students to have acquired a University law degree. The thinking behind this, in the case of King’s Inns, is that the barristers’ profession should be open to all, including those who wish to change their vocational choice. Thus, there are many successful barristers who have had an earlier career as a doctor, civil servant, politician, teacher, nurse or engineer. Of course, becoming a lawyer is a slow and expensive process and the early years at the Bar involve only a very small income. This means in practice that only those who have financial resources, or access to such resources through a parent or a partner, can contemplate the career.

My own preference would be for the North American model of legal education. Law is not a particularly difficult subject (apart, perhaps, from the rule against perpetuities!) but its study benefits greatly from maturity and some experience of the world. Even the brightest seventeen-year old — and many of those who study law at university are the brightest students in the country — will find it difficult to grasp the broader social and economic contexts of judicial decision-making.

For a number of years, the majority of those studying for University law degrees has been female. At Trinity College, which I teach, two-thirds of the students are female.

In the past decade or so, there has been a growth in hybrid degrees — Law and French, French law, Law and German, Law and Irish, Law and Business and so on. This diversification has been good for the Law Faculties, widening their perspectives. The students who travel abroad in the course of studying for these degrees (or as part of the European-inspired Socrates scheme) gain hugely from the challenge.

**LEGAL RESEARCH**

This brings us to the area of your particular expertise: legal research. As you probably are aware, Irish legal research is in a vibrant state. It was not always so. In the early and middle decades of the Twentieth Century, there was a very high quality system of official law reporting — the *Irish Reports* — which continues today in all its excellence. The *Irish Law Times Reports* and, from 1936 to 1964, *Irish Jurist Reports* also give a very useful service to practitioners. The statues were published, with increasing girth, at an inexpensive price.

What was almost entirely missing were legal textbooks. The accepted wisdom was that there was no market for them. There was the odd exception — such as the late John Morris Kelly’s incisive text *Fundamental Rights in Irish Law and the Constitution* — but practitioners and students had to rely either on old Irish practitioners’ texts of the Nineteenth century or English texts, with all the attendant difficulties relating to increasing statutory differences. Incidentally, this reliance must have had a stultifying effect on the development of a distinctive Irish jurisprudence on common law subjects such as contract and tort and must have contributed to the delay in the awakening among practitioners of the fact that the 1937 Constitution had teeth and that these teeth, if duly exercised, could bite sharply on unconstitutional legislative and executive action.

All was changed with the publication in 1975 of Professor John Wylie’s *Irish Land Law*. The publisher was a relatively obscure English company. Yet the book was a resounding success, in terms of its scholarship and its market penetration. In retrospect it is easy to see why this should have been so. Irish land law is a complex accumulation of centuries of caselaw, compounded by a morass of legislation. The radical reforms carried out in England in 1925 have no counterpart in Ireland, North or South. The book therefore was hugely attractive to legal practitioners throughout Ireland and also to students from Queen’s University Belfast (where Professor Wylie used to teach) to University College Cork. I can think of no other legal subject which would have such a widespread appeal.

*218* The effect of the success of this book was to encourage its publisher and, increasingly, other publishers, large and small, to commission texts on Irish law. Over the past twenty-five years there has been an explosion in textbook publications. Of course, Ireland’s developing economy and the growth of the European dimension have greatly contributed to this process. (Incidentally, you may have noticed that Irish lawyers, many working abroad, have contributed disproportionately to European Union and Community Law texts. All lists are invidious but such names as Grainne de Burca, John Temple Lang, Deirdre Curtin, David O’Keeffe and Leo Flynn immediately come to mind.)
As regards law reporting, the Irish Reports Monthly is in a vibrant state. You no doubt are familiar with BAILII’s great initiative. Lexis has good Irish materials and other computer retrieval services are multiplying.

Let us attempt the vain task of summarizing the present state of the Irish legal system. It has the benefit of several intellectual streams flowing into it: English common law, the 1937 Constitution and European Union and Community Law, as well as that of the European Convention on Human Rights. Having had a coherent philosophical basis, it is in a state of transition and has yet to find a new Codestar. The legal professions of barrister and solicitor are thriving; solicitors are still slow to exercise their right of audience in the Superior Courts but have been appointed the Circuit Court bench. Legal education and law publishing are thriving.

As you will see for yourselves when you walk around the streets of Dublin, there is a sense of vitality and confidence among the citizens, which is reflected in the legal system. Let us hope that this continues over the coming years.

Footnotes

a1 Professor, Trinity College Dublin.
Worst-Case Scenario: How Mergers Go Wrong In China

By Melissa Lipman

Law360, New York (May 27, 2015, 6:55 PM EDT) -- With merger reviews worldwide, the hoped-for best-case scenario is generally the same: a speedy review and either the all-clear sign or divestitures limited to what the companies have already identified and proposed.

But the worse-case scenario, particularly for potentially problematic deals, can vary from country to country.

Though China's Ministry of Commerce, or MOFCOM, has been making improvements to its merger system recently, particularly for simple deals that qualify for its fast-track process, when things go wrong it can still mean drawn-out reviews and unusual remedies ranging from mandates to license patents to orders to keep the two businesses separate in China indefinitely.

"If you take all the deals they review, and just say what percentage have they imposed conditions or blocked, it's as low as the percentage in U.S. or EU," said Winston & Strawn LLP's H. Stephen Harris Jr. "But if you look at ones they have blocked, they are disproportionately foreign-to-foreign deals."

Here Law360 looks at just how bad things can get and what attorneys and their clients can do to minimize some of the risks.

The Review Can Take Longer — a Lot Longer

Of the major jurisdictions in which most significant deals between multinationals will have to file, China is almost always the slowest. And in some cases, MOFCOM is the slowest by a significant margin.

"The vast majority of deals wind up in Phase II, and the most difficult mergers ... are going to wind up in Phase III," said Gibson Dunn's Adam Di Vincenzo. "Which means in many cases, even if you've got a second request in the U.S. and a prolonged review in the EU, China is going to take longer."

So, just how slow can it get? In one case, eight months after the parties submitted their notification to MOFCOM, the agency still had not formally signed off on the filing as complete, Harris said.

"I think eight months without acceptance is the record," said Harris, who worked on the deal, which was ultimately pulled amid the slow MOFCOM review and opposition in Europe. "We got probably eight requests for information, big long lists of requests for documents..."
and probably had four to five meetings in China, and it was not accepted."

Once the MOFCOM team that decides whether the filing is complete is done with the deal, it hands the matter off to a case team, and the process has to start all over again.

"You have a lot of to-ing and fro-ing on the draft filing with the people who deal with notifications. Then, even if you get it accepted as complete ... it gets allocated to a review team, and then you start again," said Rachel Brandenburger, senior adviser to Hogan Lovells. "At least to the lawyers and the business on the outside, this doesn't seem very efficient."

At the extreme, the entire process can take well over a year, as in the cases of mining giant Glencore PLC's acquisition of Xstrata PLC and MediaTek Inc.'s $3.9 billion merger with MStar Semiconductor Inc.

ON THE BRIGHT SIDE

China's merger control can frustrate foreign companies, but experts say the situation is improving. Here are three key changes:

» The simplified merger process introduced in April 2014 got about a third of the more than 200 deals notified last year in China through review in a matter of weeks — not the months typical in a regular filing.
» MOFCOM's staff is starting to warm to having discussions with counsel for the parties and allowing foreign attorneys to sit in on meetings.
» The newest version of the agency's merger guidelines issued last year show a growing sophistication in its competition analysis.

While there is no silver bullet to speed the way through the chronically understaffed agency for a deal that doesn't qualify for the new fast-track process, getting antitrust counsel involved in the case early can help.

For starters, antitrust attorneys can help figure out how long the financing for a deal might need to hold up to get through the Chinese process.

"The reason that I implore my corporate lawyers in my firm to get us involved early [is so we can] ask the client early if they or the target ... do business in China or we can do some independent research on that ... to find out," Harris said. "We really need to know early [because] provisions are fairly common on timing, on risk shifting, on regulatory clearance and the effects missing a particular deadline would have on a deal closing ... and China has really changed how we think about those clauses."

And ultimately the best thing companies can do to manage MOFCOM's review process is to get their filings in as soon as possible, Di Vincenzo said.

"You want to put it out in front of virtually every other filing," Di Vincenzo said. "You want to make sure ... you've got your best possible case on the horizontal picture in front of MOFCOM within two weeks or less of your announcement."
Part of the goal there is to keep other transactions from claiming a spot ahead of yours in MOFCOM's overloaded pipeline, according to Di Vincenzo. And making sure the filing is as complete as possible can stave off MOFCOM concerns down the road that a company held out on providing data or documents until later phases of the review process, which can be a reason for further delay.

"From their perspective, they are going out and testing what you've told them with third parties, and if something is missing, they don't get the opportunity to ask a third party if what you've said is true," Di Vincenzo said.

**MOFCOM Looks Beyond Conventional Antitrust Concerns**

Companies moan and groan about the Chinese government's practice of looking at issues other than the traditional antitrust ones when reviewing transactions. But that approach is built right into the Anti-Monopoly Law through provisions calling for the protection of the Chinese socialist market economy.

"People roll their eyes at that phrase ... but it means something," Harris said. "It's in the law, and it means something different than just consumer welfare."

At a practical level, that can mean a much tougher review for mergers that involve high-tech companies, significant intellectual property holdings, natural resources, or important Chinese companies or brands, according to Brandenburger.

"The sorts of cases that they look hard at has been clear for a while and, I think, is relatively predictable," Brandenburger said. "I don't know that there's anything that's going for a longer review outside those sorts of parameters."

And companies that fall within sensitive areas should be prepared to learn about entities within the Chinese government that may have nothing to do with antitrust enforcement.

"I did a deal in the dairy industry, [and] I learned about an agency that regulates the dairy industry in China that I never knew about ... that demanded certain things that had nothing to do with the Anti-Monopoly Law," Harris said.

Transactions can end up drawing the attention of various state-owned, partially privatized or state-guided companies, each of which "has a champion within the various regulatory bodies, many of which are more powerful than MOFCOM," according to Harris. Those companies may funnel their concerns through those other agencies rather than going directly to MOFCOM.

For example, foreign companies that sell key raw materials into China may find themselves staring down trade issues in addition to competition concerns, Di Vincenzo said.

Merging parties can stave off some problems by identifying major competitors in China that are government-owned or companies they supply in China that do a lot of business with state-owned entities, Harris said.

"But you may never figure out it's coming from six small companies in this obscure province that's not even on your client's radar," Harris said. "Some of them come really out of left field."

That being said, trying to get a clear picture of potential trouble spots can help companies come up with remedies that will get the deal through, whether that means keeping a factory open or drafting more traditional divestitures.
"Sometimes the deal isn’t still worth doing with that remedy, but we can almost always come up with a remedy," Harris said.

**The Remedies Can Get Creative**

A review process that includes more than traditional antitrust concerns unsurprisingly can lead to remedies that companies would never see in the U.S. or Europe.

Just ask Western Digital Corp. and Hitachi Global Storage Technologies Ltd., one of four sets of merging companies that have been **given the green light** only on the condition that they keep their assets in China separate. By contrast, MOFCOM has outright blocked only two transactions.

While "hold-separate" agreements are familiar in the U.S., where agencies will often ask companies to maintain the status quo in a closed deal so they can investigate, MOFCOM is the only major competition enforcer to use an indefinite version of the agreement as a remedy.

"I use it as an example to clients to get their attention that this is a different kind of agency that likes to do different kinds of things," Harris said. "That is one that gets Western antitrust lawyers scratching their heads — until they start understanding how MOFCOM looks at this."

Western Digital applied to lift the hold-separate agreement after the minimum two-year period laid out in the 2012 merger decision had passed, but the company said in December it was still working with the regulator after agreeing to pay about $100,000 in fines and to reorganize a department employing some former Hitachi workers.

It is worth noting, however, that MOFCOM has not imposed a new hold-separate order in a merger decision since August 2013.

Decisions putting unusual conditions on IP rights, however, continue.

Take MOFCOM's **decision in early 2014** on Microsoft Corp.'s acquisition of Nokia Oyj's handset business.

Not only did the agency require Microsoft to agree to limitations on enforcing its standard-essential patents, a topic that has prompted concern in many corners of the globe, it also put conditions on Microsoft's non-standard essential patents for smartphones. Microsoft had to promise to continue to license patents to Chinese smartphone makers and agree to avoid seeking injunctions unless a would-be licensee is acting in bad faith.

But that's not all. MOFCOM also put conditions on Nokia's use of patents that weren't included in the transaction, including barring the Finnish company from seeking injunctions against companies trying in good faith to license its standard-essential patents.

Some of the agency's other greatest hits include requiring companies to keep certain plants open, requiring InBev to promise not to buy more than the 37 percent of Shingdao it already owned in order to go ahead with its 2008 acquisition of Anheuser-Busch Cos. and requiring OAO Uralkali to continue supplying potassium chloride to Chinese buyers to buy OAO Silvinit.

"The remedies themselves can sometimes appear to have as an objective the protection of a Chinese competitor in whatever sector is being affected by the merger," Brandenburger said. "If you look at this purely against a benchmark of U.S. or EU law, you say this is not what the law should be doing, but if you read it in context of what the Anti-Monopoly Law in China is, which has wider objectives, you can't necessarily say that it's not within the
objectives of that law."

--Editing by Kat Laskowski and Kelly Duncan.

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Introduction

Nearly every global transaction of significant size will be subject to merger control reviews in multiple jurisdictions across Asia and the Pacific. The coordination of such reviews across disparate and sometimes widely varying regimes can have a significant impact on deal timing, certainty and value. This impact may be felt not only through jurisdictional questions of where to file, but also through the ongoing management of a multi-stream review, including filing preparation, anticipation of review timelines, merits review and even remedies negotiations.

The list of likely filing jurisdictions in the Asia-Pacific region is only growing. In 1990, fewer than 12 jurisdictions worldwide had merger control laws.¹ Today, more than 90 countries have introduced actively engaged regimes,² with Asia-Pacific jurisdictions in particular seeing a dramatic rise in vigorous reviews of both global and domestic transactions. In the past nine years, new laws or important amendments in China, India and Singapore have propelled regulators in those jurisdictions onto a world stage alongside regulators in Australia, Japan, South Korea and Taiwan. At the same time, member states in the Association of Southeast Asian Nations (ASEAN)³ have committed to introduce national competition policy and law in each member state, and new merger control regimes in Brunei, Cambodia, Laos, Myanmar and Thailand are expected to join those already established in Singapore, Indonesia, the Philippines and Vietnam.⁴

Each country has its own specific laws (many of which are covered in greater detail in the other jurisdiction-specific chapters of *The Asia-Pacific Antitrust Review 2017*), and local counsel should always be consulted in every jurisdiction in which a filing is required. This article sets forth a general overview of the various regimes in Asia and the Pacific, including whether notification is mandatory or voluntary and whether approval must be obtained prior to or following closing of the transaction. This chapter also sets forth how regulators in the major jurisdictions of the region ascertain whether a transaction qualifies for filing, procedural considerations on timing, substantive merits considerations and negotiation of remedies (if required).
Overview of current regimes

Asia-Pacific merger control regimes either have mandatory filing provisions or permit voluntary notifications, and those with mandatory filing provisions may require notification either before or after closing of a transaction. A transaction requiring multiple filings must ascertain the character of each required notification, as these will have a material impact on the timeline to closing and the substantive assessment of antitrust risk on the transaction (if any). The following table classifies the character of each regime in the major Asia-Pacific jurisdictions.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Regulator</th>
<th>Mandatory or voluntary</th>
<th>Pre- or post-closing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>Australian Competition and Consumer Commission (ACCC)</td>
<td>Voluntary</td>
<td>N/A</td>
</tr>
<tr>
<td>China</td>
<td>Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM)</td>
<td>Mandatory</td>
<td>Pre-closing</td>
</tr>
<tr>
<td>India</td>
<td>Competition Commission of India (CCI)</td>
<td>Mandatory</td>
<td>Pre-closing</td>
</tr>
<tr>
<td>Indonesia</td>
<td>Commission for the Supervision of Business Competition (KPPU)</td>
<td>Mandatory</td>
<td>Post-closing</td>
</tr>
<tr>
<td>Japan</td>
<td>Japan Fair Trade Commission (JFTC)</td>
<td>Mandatory</td>
<td>Pre-closing</td>
</tr>
<tr>
<td>New Zealand</td>
<td>Commerce Commission</td>
<td>Voluntary</td>
<td>N/A</td>
</tr>
<tr>
<td>Pakistan</td>
<td>Competition Commission of Pakistan</td>
<td>Mandatory</td>
<td>Pre-closing</td>
</tr>
<tr>
<td>Philippines</td>
<td>Philippines Competition Commission (PCC)</td>
<td>Mandatory</td>
<td>Pre-closing</td>
</tr>
<tr>
<td>Singapore</td>
<td>Competition Commission of Singapore (CCS)</td>
<td>Voluntary</td>
<td>N/A</td>
</tr>
<tr>
<td>South Korea</td>
<td>Korean Fair Trade Commission (KFTC)</td>
<td>Mandatory</td>
<td></td>
</tr>
</tbody>
</table>
Taiwan Taiwan Fair Trade Commission (TFTC) Mandatory Pre-closing

Vietnam Vietnam Competition Authority (VCA) Mandatory Pre-closing

As a general matter, jurisdictions fall into one of three categories: mandatory pre-closing filings, mandatory post-closing filings and voluntary filings.

**Mandatory pre-closing filings**

China, Japan, India, Pakistan, South Korea, the Philippines, Taiwan, Thailand and Vietnam all have mandatory pre-closing filing regimes. These jurisdictions have national laws prohibiting implementation of a transaction prior to approval. Failure to secure approval prior to closing can expose parties to significant penalties. These vary by jurisdiction, but can include fines (potentially of up to 10 per cent of worldwide turnover), potential divestiture orders to unwind a transaction and severe reputational damage.

National laws prohibiting implementation prior to approval may be interpreted as applying only to those parts of a transaction relevant to the particular jurisdiction in question, or they may apply to the entirety of the transaction worldwide. In most cases, the exact scope of the prohibition will not be specified in the national law, and the interpretation will be left to the (formal or informal) practice of the specific regulators. In China, Japan, South Korea and Taiwan, the regulators interpret the scope of the prohibition on implementation to be worldwide (ie, to reach all parts of a transaction). In other jurisdictions, the answer is not so clear cut. Knowing the scope of the bar on closing allows merging parties to consider whether there may be an option to accelerate closing of the global transaction by holding certain local assets separate until a pending approval is granted.

**Mandatory post-closing filings**

Both Indonesia and South Korea have post-closing filing obligations (although the South Korean filing can be pre-closing if one of the parties has worldwide sales or assets exceeding 2 trillion Korean won and the transaction does not involve a share acquisition on an open exchange). In Indonesia, the KPPU encourages companies to consult with it voluntarily prior to closing to provide greater certainty and minimise the risk that the KPPU would take actions to impose remedies or even unwind a transaction after implementation. A pre-closing submission will diminish the intensity of a post-closing review, but will not eliminate the need for a post-closing filing. Similarly, in South Korea parties may choose voluntarily to notify a transaction to the KFTC prior to closing, although this will not extinguish the requirement to notify post-closing as well.

While jurisdictions with post-closing obligations will not impact the timeline to closing, they still require vigilance to ensure that filings are submitted in a timely manner and approval is received as necessary. In Indonesia, notifications must be submitted within 30 working days after the closing date or legally effective regulatory approval. In South Korea, notifications must be submitted within 30...
calendar days after the date of closing. Failure to obtain approvals post-closing can expose the parties to fines in both Indonesia and South Korea.

Voluntary filings

Merger notifications to the Australian Competition and Consumer Commission, New Zealand’s Commerce Commission, and the Competition Commission of Singapore are made on a voluntary basis. As a result, these jurisdictions do not have any automatically operating bar on closing a transaction prior to approval. Nevertheless, if the transaction in question has the potential to raise serious questions regarding its compatibility with the competition laws in each jurisdiction, these regulators do have the power to step in and seek:

• injunctions preventing implementation;
• orders requiring divestiture of already-acquired shares and assets; and
• fines for giving effect to a merger that lessens competition.

As a result, the decision on whether to file should not be taken lightly, and an attempt to shorten a transaction’s closing timeline by deciding not to file may backfire if a regulator opens an investigation and subsequently takes action against the parties.

Filing assessment in mandatory filing jurisdictions

Other merger control chapters in this review provide detailed information on individual filing requirements for their specific jurisdictions. This chapter will not duplicate the expert advice of each local counsel, but provides an overview for considering filing assessments in the Asia-Pacific region. From an overarching perspective, determination of filings in mandatory jurisdictions involves fulfilment of two fundamental questions: does the proposed transaction qualify as a ‘concentration’, ‘merger’, or other reportable acquisition of shares or control under the local laws; and if so, are the local thresholds – properly applied – met in the current case.

Does the proposed structure qualify as a reportable transaction?

To assess the notifiability of a transaction in any jurisdiction, the first step will always be to determine whether the deal has been structured as a reportable transaction within the definition of the applicable national merger control laws of each jurisdiction. Jurisdictions typically take one of two broad approaches with regard to defining a reportable transaction. They will watch for acquisitions that either confer ‘control’ upon an acquiring company or represent an acquisition of voting rights above a particular threshold level.

Control itself, as used in the antitrust context, is a sometimes vague and ill-defined concept that generally means the right or ability to direct a target’s commercial decisions – either through ownership of 50 per cent or more of an entity’s voting rights or else through board representation paired with unilateral veto rights over key decisions, such as approval of the annual budget and business plan or appointment and removal of senior management.

Nevertheless, the concept of control can vary substantially in its application by different regulators. Article 3(2) of the European Union Merger Regulation (EUMR) is the original inspiration for the concept, as adopted in many other jurisdictions (including those in the Asia-Pacific region), and thus sheds a helpful light on the issue. The EUMR defines control as any means that ‘confer the possibility
of exercising decisive influence on an undertaking’. Often, ultimate discretion in finding the presence of control will lie with the individual regulator, as is the case with MOFCOM or the CCI.

Perhaps in part as a reaction to this discretionary concept, many Asia-Pacific regulators have done away with the concept of control entirely, preferring instead to rely purely on whether a transaction results in the acquisition of above a certain shareholding threshold of a target’s voting rights (such as 20 per cent in most cases in Japan and South Korea, 25 per cent in India and 33 per cent in Taiwan).

Thus, depending on the jurisdiction, transactions may qualify as reportable if they involve:

- acquisitions of control over a target undertaking by a single acquiring entity, usually in the form of acquiring 50 per cent or more of the voting rights in the target (acquisition of ‘sole control’);
- acquisitions of control over a target undertaking by two or more entities, usually through acquisition of substantial minority shares, paired with board representation granting unilateral veto rights over strategic commercial behaviour (acquisition of ‘joint control’);
- mergers of two formerly independent undertakings;
- acquisitions of minority shares over a certain threshold level, regardless of the presence of control (‘minority investments’); or
- the creation of a joint venture between two or more companies that otherwise meets one or more of the above criteria.

By contrast, restructurings or transactions where one person or company already controls 50 per cent or more of the other companies involved in the transaction will ordinarily be exempt from reporting.

Joint ventures themselves pose particularly complex issues with regard to reportability, particularly in the Asia-Pacific region. Unlike the European Union (and Singapore), where only the establishment of those joint ventures that perform ‘all the functions of an autonomous economic entity’ on a ‘lasting basis’ will qualify as reportable transactions, nearly every Asia-Pacific regulator considers that all joint ventures must generally be evaluated for notifiability under the merger control rules. In practice, a joint venture established to take over only one specific function of its parents (such as R&D or production), without outward, customer-facing activities, would not be notifiable in most jurisdictions around the world. Such a joint venture lacks a ‘full-function character’ and so would be exempted from filing in the European Union and most of its member states. In Asia and the Pacific, however, no such exemption will ordinarily apply, a practice change that can surprise even sophisticated European and US advisers.

Certain Asian jurisdictions do make a distinction between whether a joint venture represents an entirely new business (a ‘greenfield’ joint venture) or the sharing of ownership over an already established business (a ‘brownfield’ joint venture). Thus, in Indonesia, a greenfield joint venture is reportable, while a brownfield joint venture must be considered either as a ‘share acquisition’ or an ‘asset transfer’, depending on the deal structure. In India, the rules and guidance are not explicit on the subject, but practice suggests that while greenfield joint ventures are not reportable, brownfield joint ventures should be subjected to the revenue and asset thresholds to determine their notifiability.

Following from the above, then, while acquisition of 50 per cent or more of a target’s voting rights can be safely assumed to be reportable if the other relevant thresholds are met, acquisitions of a minority interest may or may not be reportable, depending on the jurisdiction. The following table sets forth the treatment of minority investments in the major Asia-Pacific jurisdictions.
### Table 2 – Treatments of minority share acquisitions

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Treatment of minority investments</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>Reportable if the investment confers sole or joint control (ie, decisive influence) over a target’s strategic decisions.</td>
</tr>
</tbody>
</table>
| Japan        | Reportable if:  
|              | • the acquisition of shares represents more than 20% of the voting rights in the target, where the acquiring group is the largest shareholder in the target; or  
|              | • the acquisition of shares represents more than 10% of the voting rights in the target, where the acquiring group is ranked among the top three largest shareholders in the target. |
| South Korea  | Reportable if the acquisition represents 20% of voting rights in the target (15% for a domestic listed company). |
| Taiwan       | Reportable if the acquisition represents more than 33% of the voting rights in the target. |
| India        | Reportable only if the acquirer post-transaction will hold 25% or more of the total shares or voting rights of the target. |
| Philippines  | Reportable where the acquirer post-transaction will hold 35% or more of the voting shares of a target entity (or, already holding in excess of 35%, will subsequently hold more than 50% of the voting shares of the target). |
| Singapore    | Reportable if the investment confers sole or joint control (ie, decisive influence) over a target’s strategic decisions. |
| Vietnam      | Reportable if the buyer is at a level that, as provided for by law or by the target’s bylaws, is sufficient to dominate the financial policies and operations of the target company for the purpose of obtaining economic benefits from the business operations of the target company. |
| Australia    | Reportable if control is conferred; even if control is not conferred, a minority investment can contravene section 50 of Australia’s Competition Act, and the ACCC will determine through consideration of intra-company relationships, directors’ duties and other factors including the actual ownership share of the minority interest, the |
existence of any arrangements that may enhance the influence of the minority interest, the size, concentration, dispersion of the rights of the remaining shareholders, and the board representation and voting rights of the minority interests.\(^8\)

New Zealand Reportable if control is conferred, although the Commerce Commission generally considers that there is no change of control below a 20% shareholding.

**How are the specific thresholds to be applied?**

Once it has been confirmed that a transaction falls into a reportable category, the parties must determine whether the relevant filing thresholds in each individual jurisdiction have been met. In essence, each regulator wants to understand whether the parties (individually or combined) have a sufficiently significant nexus to their jurisdiction to justify merger control review and operation of the local competition laws.

As a result, filing thresholds in Asia-Pacific jurisdictions are normally based either on financial criteria (such as revenues and assets) or market share data. The table below sets forth at a quick look the applicable financial filing thresholds for offshore share acquisitions in the Asia-Pacific jurisdictions with mandatory pre-closing filings.

**Table 3 – Financial filing thresholds for share acquisitions in mandatory pre-closing jurisdictions**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Financial filing thresholds for share acquisitions.</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>A mandatory pre-closing filing is required if:</td>
</tr>
<tr>
<td></td>
<td>• combined worldwide turnover exceeds 10 billion yuan and each of at least two parties has China turnover exceeding 400 million yuan; or</td>
</tr>
<tr>
<td></td>
<td>• combined China turnover exceeds 2 billion yuan and each of at least two parties has China turnover exceeding 400 million yuan.</td>
</tr>
<tr>
<td>Japan</td>
<td>A mandatory pre-closing filing is required if:</td>
</tr>
<tr>
<td></td>
<td>• the aggregate amount of domestic revenue of the acquiring group exceeds ¥20 billion; and</td>
</tr>
<tr>
<td></td>
<td>• the aggregate amount of domestic revenue of the target group exceeds ¥5 billion.</td>
</tr>
</tbody>
</table>

South Korea A mandatory pre-closing filing is required if:
• one party has worldwide asset value or sales above 200 billion Korean won and the other has worldwide asset value or sales above 20 billion Korean won; and
• each party has sales in Korea of at least 20 billion Korean won.

A mandatory pre-closing filing is required if:
• one party has Taiwanese turnover in excess of 15 billion new Taiwan dollars (or, if that party is a financial institution, it has Taiwanese turnover in excess of 30 billion new Taiwan dollars); and
• the other party has Taiwanese turnover in excess of 2 billion new Taiwan dollars.

India
A mandatory pre-closing filing is required if either the ‘Parties Test’ or the ‘Group Test’ is met, and the ‘Target Test’ is met as well (does not apply to asset acquisitions).

Parties Test (satisfied if the parties jointly meet):
• assets in India exceeding 20 billion rupees;
• turnover in India exceeding 60 billion rupees;
• worldwide assets exceeding US$1 billion, including assets in India exceeding 10 billion rupees; or
• worldwide turnover exceeding US$3 billion, including turnover in India exceeding 30 billion rupees.

Group Test (satisfied if the post-transaction group (including target) meets):
• assets in India exceeding 80 billion rupees;
• turnover in India exceeding 240 billion rupees;
• worldwide assets exceeding US$4 billion, including assets in India exceeding 10 billion rupees; or
• worldwide turnover exceeding US$12 billion, including turnover in India exceeding 30 billion rupees.

Target Test£ (satisfied by target only – not applicable in asset acquisition):
• turnover in India exceeding 10 billion rupees; and
• asset value in India exceeding 3.5 billion rupees.
A mandatory pre-closing filing is required if:

- (i) the value of the gross assets of the acquirer is 300 million rupees or more, or the combined value of the assets of the acquirer and the target is 1 billion rupees or more; or (ii) the annual turnover of the acquirer is 500 million rupees or more, or the combined turnover of the acquirer and the target is 1 billion rupees or more; and

Pakistan

- (i) the transaction relates to the acquisition of shares or assets with a value of 100 million rupees or more; or (ii) in case of an acquisition of shares in an undertaking, the acquirer will hold (together with shares previously held) more than 10% of the voting shares in another undertaking; or (iii) in case of an asset management company carrying out asset management services, it will hold (directly and indirectly, including through all of its other investments) more than 25% of the total voting rights in an undertaking; or (iv) the value of the total assets under management of an asset management company is 1 billion rupees or more.

Philippines

A mandatory pre-closing filing is required if: (i) the aggregate value of the assets in the Philippines that are owned by the target exceed 1 billion Philippine pesos; or (ii) the gross revenues from sales in, into or from the Philippines of the target exceeds 1 billion Philippine pesos.

Individual application of each threshold varies by jurisdiction, so consultation with expert local counsel is essential. To calculate revenues, generally the term includes the consolidated net sales to third-party customers made in the most recently completed financial year, allocated according to the location of the customer. Thus, in China the threshold will only be met by sales to third parties made to customers in mainland China (specifically excluding those in Hong Kong, Macao and Taiwan). By contrast, in India the CCI considers that all revenues generated by an Indian entity or subsidiary, including those ‘sales’ made intra-company to parent entities located in other countries, should be counted towards the thresholds.

Similarly, each jurisdiction tends to take its own approach as to how to consider the ‘location’ of a customer. Some regulators prefer that location be prepared on the basis of a customer’s billing location, assuming that this makes the best proxy for where the decision to purchase was actually made. Others believe that products shipped to a country represent a more reliable proxy – especially where a billing address may refer only to a cost processing centre rather than to a material nexus such as manufacturing facilities. This can be of particular complexity in technological and manufacturing industries. Consider how to ‘locate’ a smartphone manufacturing customer that makes its purchasing decisions in its California headquarters, but directs products to be shipped to facilities in Malaysia operated by its third-party contract manufacturer, which itself is based in, with billings going to, Taiwan. The answer will vary by regulator, proving that while the thresholds may look straightforward at first glance, genuine local expertise is indispensable.

Certain jurisdictions also look to market thresholds as well to determine if filings are necessary. The introduction of a market share test presents significant difficulties, given that it presupposes a properly defined product and geographic market. It is difficult to test the appropriateness of a definition without alerting a regulator to the potential notifiability of a transaction, which can be counterproductive as many conservative regulators will simply instruct parties to file regardless rather
than sign off on a product market definition without an in-depth analysis. Of the mandatory, pre-closing filing jurisdictions in the Asia-Pacific region, only Taiwan and Vietnam rely on market share thresholds:

- in Taiwan, a mandatory, pre-closing filing will be required where the combined firm will hold a market share of 33 per cent or more in a Taiwanese market, or where either the acquirer or target has an individual market share of 25 per cent or more in any particular market in Taiwan. However, the TFTC often uses idiosyncratic methods to calculate ‘markets’ for these jurisdictional purposes, and will often classify products by customs codes and import categories rather than undertaking an economic market definition; and
- in Vietnam, a mandatory pre-closing filing will be required where the parties operate on the same relevant product market in Vietnam, and their combined market share post-transaction will be above 30 per cent.

Australia, Singapore and New Zealand also use market shares as a proxy to help parties ascertain whether their transactions have a sufficiently significant competitive nexus to those jurisdictions to warrant a voluntary consultation. These shares vary by jurisdiction. In Australia, a filing may be encouraged if the parties have a combined share of 20 per cent or more. New Zealand and Singapore both vary the threshold depending on the pre-transaction levels of concentration in the relevant industry – ordinarily, a filing would not be needed unless the parties’ combined share exceeds 40 per cent. For very concentrated industries, however (where the top three firms account for 70 per cent or more of a market), a filing may be encouraged if the parties’ combined share exceeds 20 per cent.

Procedural considerations

Anticipating review timelines

In coordinating filings over multiple jurisdictions, the overall impact on the potential transaction timeline is of key importance. Correctly anticipating an accurate timeline beneficially affects financing costs, the overall risk profile and cost of the transaction, the certainty of closing, the parties’ respective stock prices, negotiation over termination provisions and more. Review timelines and anticipated timing of approvals also play a role of paramount importance in negotiating (and collecting) antitrust-related break-up fees as well – in 2014 and 2015, publicly reported termination fees in prominent deals ranged from below US$125 million (eg, Expedia/Orbitz (US$115 million), Scientific Games/Bally Technologies (US$105 million), Infineon/International Rectifier Corp (US$70 million)) to more than US$2 billion (eg, Actavis/Allergan (US$2.1 billion), Halliburton/Baker Hughes (US$3.5 billion)).

Overview: Merger Control

Table 4 – Indicative timelines in mandatory pre-closing filing jurisdictions

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Pre-notification</th>
<th>Phase I</th>
<th>Phase II</th>
<th>RFI stops clock?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Country</th>
<th>Completeness review required before formal acceptance</th>
<th>Phase I/Phase II distinction</th>
<th>Maximum review period</th>
<th>Pre-acceptance information</th>
<th>Post-acceptance information</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>30 calendar days</td>
<td>No</td>
<td>90 calendar days</td>
<td>No</td>
<td>60 calendar days</td>
</tr>
<tr>
<td>India</td>
<td>Completeness review required before formal acceptance (variable)</td>
<td>Yes</td>
<td>210 calendar days maximum, however, most transactions cleared within about 70 calendar days</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Japan</td>
<td>Required (typically two to four weeks)</td>
<td>No</td>
<td>120 calendar days from formal acceptance of the initial notification, or 90 calendar days from formal acceptance of additional requested information, whichever is later</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Korea</td>
<td>Not required</td>
<td>Yes</td>
<td>90 calendar days</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Pakistan</td>
<td>Not required</td>
<td>Yes</td>
<td>90 business days</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Philippines</td>
<td>Completeness review required before formal acceptance (within 15 calendar days)</td>
<td>No</td>
<td>60 calendar days</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Taiwan</td>
<td>Not required</td>
<td>Yes</td>
<td>30 calendar days (with the parties’ consent)</td>
<td>Yes (resets clock to Day 1)</td>
<td></td>
</tr>
<tr>
<td>Vietnam</td>
<td>Completeness review required before formal acceptance</td>
<td>Yes</td>
<td>30 business days (can be extended an additional 30 business days)</td>
<td>Yes</td>
<td></td>
</tr>
</tbody>
</table>
Each jurisdiction has its own idiosyncrasies in terms of review periods but, as a general rule, for a transaction without meaningful competitive issues, an initial Phase I review can be completed in around 30 to 40 calendar days. Some jurisdictions require pre-notification contacts or completeness reviews prior to filing (usually from two to eight weeks), while others permit submission of a filing without prior consultation. For transactions with significant competition issues, most jurisdictions also have a more in-depth Phase II review that will typically add an additional 90 calendar days. Some jurisdictions (notably India) do not observe a Phase I/Phase II distinction, but nevertheless endeavour to complete reviews in a timely manner (and commensurate with the level of competition issues). In addition, China makes provision for an extended Phase II period (often referred to as Phase III) that can extend its review by a further 60 calendar days with the consent of the parties. Vietnam has similar provisions, although these are more rarely utilised in practice.

Table 4 sets forth a high-level breakdown of the various timelines in the Asia-Pacific jurisdictions with mandatory pre-closing filing requirements.

As can be seen from Table 4, the availability of pre-filing contacts has the ability to add significant time to an expected review, even for non-issue cases. In addition, the availability (and propensity) of the relevant regulators to use requests for information to stop (or even restart) the review clock can also add significantly to the published, on-paper review times, and must be anticipated as well.

The KFTC, the JFTC and the TFTC are all experienced, conservative regulators that generally follow (to a greater or lesser degree) their respective, established patterns. Certain regulators, however, including both MOFCOM and the CCI are far less predictable, even with regard to relatively straightforward procedural matters, which can pose difficulties in anticipating an accurate review timeline.

For example, reviews in China ordinarily take significantly longer than comparable reviews in other jurisdictions, even though MOFCOM (and other Chinese state bodies) has taken serious measures to improve the process. In China, for those cases reviewed under the ordinary procedure, review of transactions with no meaningful competition or industrial policy concerns routinely extends into Phase II. The Anti-Monopoly Bureau of MOFCOM is chronically understaffed, and MOFCOM’s practice of consulting a multitude of stakeholders during the course of its review (including other relevant ministries, the National Development and Reform Commission, Chinese trade associations and important customers and suppliers), inevitably adds time and complexity to even no-issue reviews. For cases with serious competition or industrial policy concerns, a review can last over a year, although this has been improving over the past several years. The table below sets forth the average time, in months, that MOFCOM required to conditionally approve transactions under review for the past four years (from the date of initial submission to the date of approval).

**Table 5 – Average duration of MOFCOM review – conditional decisions 2012–2016**

<table>
<thead>
<tr>
<th>Year</th>
<th>Average duration (months)</th>
<th>Longest review (months)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>8.4</td>
<td>11.1 (Western Digital/Hitachi)</td>
</tr>
<tr>
<td>2013</td>
<td>11.1</td>
<td>13.5 (Glencore/Xstrata)</td>
</tr>
</tbody>
</table>
The CCI’s review is similarly unpredictable, but for different reasons. With no Phase I/Phase II distinction and a 210-calendar-day statutory maximum review period, review in India can be quite daunting, especially for cases that do not pose significant issues. In addition, many procedural rules in India have been established through local practice rather than through established, published guidelines, reducing clarity on issues such as completeness review, evaluation of the CCI’s jurisdiction to review, and calculation of the likely review period for individual transactions.

Simplified procedure v ordinary procedure

Most mandatory, pre-closing filing jurisdictions in the Asia-Pacific region do not permit filing of a simplified form for cases without competition issues (although certainly less information can be included in the ordinary filings for such cases regardless of jurisdiction). However, in 2014, China introduced a new simplified procedure\(^\text{10}\) that has dramatically improved the review process for qualifying transactions in that jurisdiction.

From 2011 to 2013 (and into 2014), MOFCOM experienced historically slow review times (as evidenced in the preceding table). For a case under the ordinary procedure, the nominal timeline for the regular procedure includes the following steps:

- preparation of a draft notification (approximately two to six weeks);
- review of draft notification for completeness (approximately four to eight weeks);
- Phase I (30 calendar days);
- Phase II (90 calendar days, if required);
- extended Phase II, or Phase III (60 calendar days, if required); and
- a procedural option to pull and refile the transaction, beginning again at Phase I.

Even for cases with no competition or industrial policy issues, MOFCOM reviews routinely extend well into Phase II and sometimes even into Phase III, inevitably leaving MOFCOM as the last approving jurisdiction in a ‘no issues’ transaction.

Under the simple procedure, however, transactions may be eligible for accelerated treatment, which, while not eliminating the time required for preparation of a notification or completeness review, has overwhelmingly resulted in Phase I approval. Parties must affirmatively apply to MOFCOM for such treatment (the rules will not automatically apply), and MOFCOM retains the discretion in all cases to deny entry, notwithstanding the presence of one or more of the following factors. Nevertheless, for cases meeting one or more of the following characteristics, there is now a far clearer path to approval:

- in an overlap market, the combined market share of all parties is less than 15 per cent;
- in the case of a vertical relationship, the parties have individual market shares of less than 25 per cent in both the upstream and downstream markets;
• if there is no horizontal overlap or vertical relationship, no firm has an individual market share of 25 per cent or greater in any market relevant to the transaction;
• where parties establish a joint venture outside of China or acquire an undertaking outside of China, and that joint venture or target does not ‘engage in economic activities’ within China; and
• where control over a joint venture changes character from joint control to sole control by one of its original parents.

From its introduction in May 2014, the procedure has proven overwhelmingly popular and effective. In 2015, MOFCOM cleared 249 proposed transactions published under the simple procedure. Of these, 89.5 per cent were cleared during Phase I, with an additional 9 per cent cleared in Phase II and 1.5 per cent cleared in Phase III. An additional five transactions were abandoned because of outside forces or were still pending before MOFCOM. The simplified procedure is not perfect, given the untrammelled discretion permitted to MOFCOM to accept or reject an application, and given the attendant public notice period that permits (and even encourages) the lodging of complaints by Chinese competitors and other stakeholders. However, as the numbers show, MOFCOM has shown an impressive early track record in using the simplified procedure to improve significantly its handling of ‘no issue’ cases since 2014.

Waivers and inter-regulator cooperation

Increasingly, in transactions requiring competition filings in multiple jurisdictions, regulators will seek to coordinate their reviews, both in terms of timing and substance. As a result of confidentiality protections in individual jurisdictions, ordinarily a waiver will be required from both parties in order for regulators to be able to share documents or exchange views on a particular transaction. In many cases, the reviews by the US agencies (the Federal Trade Commission (FTC) and Department of Justice (DOJ)) and by the European Commission (EC) provide the main signposts from which other jurisdictions can navigate their individual reviews. Granting waivers to permit coordination can often have the effect of increasing the efficiency of review in multiple jurisdictions, as the detailed analyses ordinarily undertaken by these regulators can often help dispel (or focus) potential issues when markets are of a global geographic scope. In addition, coordination can promote consistency of approach on remedies, if necessary, and can potentially have a disciplinary effect on regulators that might otherwise adopt a divergent analysis.

Nevertheless, there can be dangers in coordination as well. Particularly where competitive issues are more pronounced in the US and EU, sharing of information may result in Asia-Pacific regulators diverting important time and resources to issues that are not material in their particular jurisdictions. In addition, not every jurisdiction may scrupulously observe its own confidentiality protections, which could potentially lead to exposure of highly confidential commercial information outside of the review process.

The US agencies and the EC coordinate their reviews on important cases quite tightly, and it is more and more the case that Asia-Pacific regulators will be included in that coordination. There are several examples of bilateral inter-regulator coordination in the region. For example, the JFTC and KFTC concluded a coordination agreement in July 2014, while MOFCOM and the ACCC signed a memorandum of understanding (MOU) in May 2014, permitting the agencies ‘to exchange information on the definition of markets and theory of harm as well as impact assessments and the design of merger remedies, subject to confidentiality and privacy requirements in each jurisdiction’.

However, for the purposes of overall review, the key agreements are those between the Asia-Pacific
regulators and the US agencies and EC, respectively, which permit truly global, cross-border coordination. These agreements are set forth in the table below.

Table 6 – Inter-regulator coordination agreements

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>United States (DOJ and FTC)</th>
<th>European Commission</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• MOU on Antitrust and Antimonopoly Cooperation (2011)</td>
<td>• Practical guidance for merger cooperation between DG COMP and MOFCOM (2015)</td>
</tr>
<tr>
<td></td>
<td>• Guidance for Case Cooperation Between the Ministry of Commerce and the DOJ and FTC on Concentration of Undertakings (Merger) Cases (2011)</td>
<td></td>
</tr>
<tr>
<td>China</td>
<td></td>
<td></td>
</tr>
<tr>
<td>India</td>
<td>• MOU on Antitrust Cooperation (2012)</td>
<td>• MOU on Cooperation (2013)</td>
</tr>
<tr>
<td>Japan</td>
<td>• US–Japan Cooperation Agreement (1999)</td>
<td>• Agreement between the EC and the government of Japan concerning cooperation on</td>
</tr>
</tbody>
</table>
Multi-jurisdictional merits review

Substantive review of anticompetitive concerns

From a substantive perspective, there has been a general global convergence regarding the level of anticompetitive effects that must be posed by a potential transaction (and uncompensated by countervailing, merger-specific pro-competitive efficiencies) in order to warrant intervention by a regulator. While individual jurisdictions may have different phrasing for the operative provision, if a transaction risks eliminating or restricting competition, Asia-Pacific regulators will act to prohibit the transaction or else to seek remedies to eliminate the concerns. Partly as a result of global inter-regulator coordination and increasing convergence on anticompetitive theories, regulators in mandatory pre-closing jurisdictions such as MOFCOM, the KFTC, the JFTC and the TFTC tend to take a similar approach with regard to competitive analysis in cross-border cases.

One substantive area in which Asia-Pacific regulators have consistently shown keen interest is the assessment of transactions involving intellectual property, and in particular those touching on standard essential patents (SEPs) – that is, those patents declared indispensible for the design and manufacture of products adopting a universal standard, such as those articulated by a standard setting organisation. Issues relating to SEPs arise commonly in transactions in the technology, media and telecommunications industries, and these industries play a disproportionately large role in the national economies of Asia-Pacific countries.

As a result, MOFCOM, the KFTC, the JFTC and the TFTC will pay particular attention to intellectual property and SEP issues, and may even focus on such questions where regulators in other parts of the world, such as the EC and the US agencies, show little or no interest in their competitive values. This area of focus inevitably becomes intertwined with questions regarding application of industrial policy and fashioning of remedies, which are discussed in more detail below, however, it is crucial for parties with important intellectual property portfolios (and especially SEPs) to consider carefully the potential (or perceived) competitive effects that the proposed combination could create when seen...
through the eyes of regulators for whom questions of technology, media and telecommunications are paramount.

**Focus on global v local effects**

While there has been a general global convergence regarding the substantive approach to evaluation of anticompetitive effects, that approach may produce notably varied results when applied by regulators in jurisdictions that apply a broader or narrower geographic focus on the markets in question.

Large transactions will often require a filing in one or both of the US or the EU, in addition to requiring filings in the Asia-Pacific region. Transactions with such scope ordinarily (though not always) relate to industries with a worldwide, rather than local, geographic scope. Regulators such as the DOJ, the FTC and the EC have all shown their willingness in the past to conduct their analyses and impose remedies on the basis of consideration of a transaction’s global effects. When one of those regulators is already (or soon to be) engaged in protecting competitive interests on a worldwide scale, certain national regulators in Asia and the Pacific may be more inclined to leave the ‘world’ to the US and EU and focus more particularly on effects in their home jurisdictions – even in the face of evidence of a global market.

China, Taiwan, Korea, Japan and Singapore all exist on a continuum between lesser and greater acceptance of a worldwide analysis.

MOFCOM will ordinarily insist on provision of China-specific market data, even where other regulators and industry reports have pointed strongly to a global market. As discussed in more detail below, MOFCOM is under a statutory obligation to consider a transaction’s effects on China’s national economic development and industrial policy, and so must take steps to ensure its evaluation appropriately considers local effects.

Similarly, the TFTC will ordinarily request Taiwan-specific market data to review. However, especially for foreign-to-foreign transactions, the TFTC is more willing to accept the presence of a global market and less inclined to intervene in a truly global transaction as long as the interests of Taiwanese customers do not differ materially from those of others worldwide.

The KFTC is more inclined to undertake its analysis on the basis of global share data, without insisting on Korean-specific market shares. Nevertheless, the KFTC will ensure that the concerns of Korean customers and suppliers are carefully considered in its analysis even of foreign-to-foreign global transactions.

The JFTC and the CCS are more willing to accept global share data and global competitive analyses for a foreign-to-foreign transaction. Nevertheless, any time a transaction poses a particular connection to areas of national interest and importance in Japan or Singapore (such as finance, technology or international shipping, for example), the respective regulators will ensure that their analysis protects local interests from anticompetitive harm.

**Role of economic analysis**

The role of economic analysis and the relative weight and importance it plays in a regulator’s assessment also varies between jurisdictions. In the US and the EU, the regulators employ relatively
large teams of economists and tend to focus heavily on economic analysis. For example, the US agencies tend to use sophisticated economic analyses including merger simulation models, and employ upward pricing pressure as a screening test to identify potentially problematic cases. In the EU, reliance on economic quantification tends more to vary from case to case, and to play a less important role than static structural analysis and the application of presumptions tied to market share data.

In the Asia-Pacific region, many regulators are becoming increasingly educated regarding the importance of economic analysis, and it is more and more serving as a complement to traditional structural analyses. For example, in China (as in the EU), market structure continues to play an important role – sometimes even a decisive role. Nevertheless, in many recent conditional approvals, MOFCOM has shown a willingness to use economic analyses, concentration analyses based on the Herfindahl–Hirschman Index or ratio of concentration for the top few suppliers, and even price increase forecasts to support its competitive analysis. While parties’ combined market shares will remain one of the key factors informing MOFCOM’s initial views of a transaction, its acceptance of and reliance on sophisticated economic tools demonstrates its willingness to make use of the full range of tools at its disposal.

By comparison, regulators in other jurisdictions such as Japan, Korea, India and Taiwan are generally happy to review and consider economic data, but tend to engage less with analyses presented by parties and are less likely to hire their own economic experts to evaluate and test the parties’ conclusions.

**Consideration of industrial policy concerns**

On a global basis, antitrust and competition regulators have articulated a well-recognised and accepted overarching goal of conducting merger reviews in order to ensure the continued protection of consumer welfare, both locally and worldwide. Notwithstanding this admirable worldwide goal, regulators in many jurisdictions either overtly or covertly use merger control to advance or achieve national industrial policy and economic development goals. These might include:

- supporting or defending ‘national champions’;
- securing advantageous trading conditions for domestic suppliers, distributors or customers; and
- diplomatic retaliation for real or perceived slights from other nations.

In its most interventionist form, this could include targeting transactions for divestitures of particularly attractive assets that could then be diverted to strengthen domestic competitors.

Certain jurisdictions, such as China, make clear the importance of industrial policy considerations in their review – indeed, unlike most other jurisdictions, China’s Anti-Monopoly Law explicitly empowers MOFCOM to take into consideration the impact of a transaction on industrial policy and national economic development. However, the role of industrial policy often comes into merger review in less obvious ways in other jurisdictions. For example, in the US, the national security implications of foreign investment review (the CFIUS review by the inter-agency Committee on Foreign Investment in the US) may take into account industrial policy concerns for the US, while the European Commission – while nominally politically independent – is often perceived as advancing particular EU interests. In Asia-Pacific regions other than China, industrial policy concerns also appear to sometimes play a role in outcomes, especially when a country’s particular industries and interests are implicated by a transaction.
In China, merger control law expressly permits consideration of industrial policy, and MOFCOM routinely solicits comments and input from other ministries, as well as important Chinese customers, competitors and suppliers (often through domestic trade associations). The powerful National Development Reform Commission (NDRC) and the Ministry of Industry and Information Technology (MIIT) will also be invited to comment on nearly every significant filing – the NDRC has broad administrative and planning control over the entire Chinese economy, while the MIIT is the state agency responsible for, inter alia, regulation of the production of technological and industrial goods. Other ministries and state actors may also be allowed to give input, depending on the case, and MOFCOM will not unilaterally override a complaint from an important stakeholder, even if it is not grounded in traditional competitive issues.

Although some have criticised Chinese merger control being as ‘overly political’ as a result of other stakeholders’ ability to intervene, the Chinese system is in many regards more transparent than most jurisdictions about the role given to other considerations and interests in the merger review process. Merger review in China (and to a lesser extent in other Asia-Pacific jurisdictions) will inherently touch on industrial policy at a domestic level, and parties pursuing notifiable transactions must take special care to anticipate such issues and to work with both their domestic operations and government relations teams at the soonest practicable moment to identify (and if necessary mitigate or eliminate) these concerns, whether through commercial, diplomatic or other channels. Parties that pursue such transactions with no more than blind faith in the rigorous defensibility of their competitive story will find such arguments a poor weapon where the transaction imperils domestic interests, and risk seeing unanticipated delays and obstacles complicate their review processes.

**Negotiation of remedies**

Parties with filings in multiple jurisdictions must also carefully plan and anticipate potentially divergent approaches from Asia-Pacific regulators, should the negotiation of remedies become necessary. As a general matter, all regulators in the region approve the overwhelming majority of notified transactions unconditionally. Even MOFCOM, rightfully perceived as the most active regulator with regard to the imposition of conditions for merger approval, has only imposed conditions in 26 transactions (and prohibited two more), out of a total number of filings that now exceeds 1,400 since 2008.

Nevertheless, regulators in Asia-Pacific do sometimes require remedies that would be unacceptable to, or considered unnecessary by, regulators in other jurisdictions. In the event that the US agencies or the EC conclude that a potential transaction poses significant competitive issues and that remedies might be appropriate, most Asia-Pacific regulators will seek to coordinate their remedies with those jurisdictions, both in terms of timing and substance, in order to maximise efficiencies. If no remedy will be required in the US or the EU, however, there may be no such central regulator with a sufficient centre of gravity to ensure uniformity of approach in other jurisdictions. Moreover, even if remedies are required in the US or EU, Asia-Pacific regulators focused on domestic effects may nevertheless feel that additional measures may be necessary to protect local interests.

Over the past five years, MOFCOM in particular has gained in confidence in negotiating remedy packages that diverge from those favoured in other jurisdictions, and has shown a willingness to use not only a combination of behavioural and structural remedies above and beyond what may be required elsewhere, but also its own ‘hold separate’ remedy unique to China.
First, despite the attendant requirements of ongoing monitoring and supervision, MOFCOM has shown itself more flexible in accepting behavioural remedies that its US and EU counterparts might reject, including obligations to:

- lower catalogue list prices on certain products by 1 per cent each year on the Chinese market for 10 years, while not reducing discounts to Chinese dealers (Thermo-Fisher/Life Technologies (2014);
- ensure stable supply and sufficient product choice to Chinese customers (Uralkali/Silvinit (2011));
- ensure supply to downstream customers an principles of fairness, rationality and non-discrimination (including not selling at ‘unreasonably high’ prices) (Henkel/Tiande (2012));
- ensure continued interoperability of products (ARM/Giesecke/Gemalto NV (2012));
- ensure licensing of SEPs at fair, reasonable and non-discriminatory terms (Google/Motorola Mobility (2012); Microsoft/Nokia (2014); Nokia/Alcatel-Lucent (2015)); and
- ensure licensing of non-SEP patents on non-exclusive terms and commercially reasonable terms (in the event that such intellectual property is in fact licensed) (Microsoft/Nokia (2014); Merck/AZ Electronic Materials (2014)).

MOFCOM often employs structural remedies as well, either mirroring or going beyond those required by the US agencies and the EC. For example, in its approval of Glencore/Xstrata (2013), MOFCOM went beyond the requirements of any other regulator by imposing a divestiture order of mining assets located in Peru (which were eventually purchased by a Chinese buyer).

MOFCOM and other Asia-Pacific regulators have in the past imposed stringent remedies where the European Commission has concluded that remedies were not required. This was the case not only with MOFCOM in the Google/Motorola Mobility case mentioned above, but also with regard to the Microsoft/Nokia case, in which not only MOFCOM but also the KFTC and the TFTC required their own licensing-based remedies in order to approve the transaction.

Moreover in Seagate/Samsung (2011) and Western Digital/Hitachi (2012) hard-disk drive cases, MOFCOM not only adopted the same structural remedies imposed in the US and EU, but also imposed its unique ‘hold separate’ remedy prohibiting operational integration between the merger firms until further approval was given. Although the initial waiting periods were indicated to be one year for Seagate/Samsung and two years for Western Digital/Hitachi, MOFCOM in fact did not permit integration of either transaction until October 2015.16 MOFCOM also imposed its hold separate remedies in other foreign-to-foreign transactions in which no other competition regulator imposed conditions, including Marubeni/Gavilon (2013) and MediaTek/MStar (2013) – by the end of 2016, neither of those hold separate prohibitions had been lifted.

The potential for divergence with regard to remedy negotiations again underscores the importance of anticipation and management in coordinating competition filings across multiple jurisdictions for a single filing. From filing analysis, to anticipated timelines, to substantive analysis and remedies, successfully navigating merger review by the Asia-Pacific competition regulators requires careful planning, organisation and execution of the utmost order.

**Notes**

3. The 10 ASEAN member states include Brunei, Indonesia, Cambodia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.
5. Offshore transactions trigger post-closing obligations in South Korea, unless (i) one of the parties to the transaction belongs to a business group with consolidated worldwide gross asset value or sales revenues equal to or exceeding 2 trillion Korean won, or (ii) the transaction does not involve a share acquisition transacted on an open stock exchange market.
6. See KPPU No. 3 of 2012 on Guidelines for Mergers, Consolidations and Acquisitions. See also Government Regulation No. 57 of 2010 on Mergers or Consolidations of Business Entities and Acquisitions of Shares of Other Companies.
7. See, for example, Anti-Monopoly Law of the People’s Republic of China, article 22.
9. The Target Test de minimis exemption is currently scheduled to expire on 4 March 2016.
11. PaRR Statistics, MOFCOM may grant ‘simplified’ status but some deals linger, 14 April 2016.
15. See Anti-Monopoly Law of the People’s Republic of China, article 27(5).
Substantive analysis in China’s horizontal merger control: a six-year review and beyond

Haixiao Gu* and Andrew L. Foster†

ABSTRACT

China has made strides in putting the Anti-Monopoly Law merger control regime to work, especially considering it has only been in force for about six years. Despite absorbing some basic ideals and methods employed by advanced jurisdictions into its legislation and enforcement, China’s horizontal merger analysis still has its own idiosyncratic features. This article examines relevant legislation and Ministry of Commerce’s analytical methods in practice. It reveals that there is a lack of comprehensive legal standards regarding competitive effects and a tendency towards over-reliance on structural presumptions. For China’s merger control to become more effective, it is critical to make strong use of available economic techniques and to resolve the possible tension between competition policy and industrial policy. Cooperation with other mature enforcers will also play an important role in improving the effectiveness of the young merger control regime.

KEYWORDS: Horizontal merger analysis, MOFCOM, coordinated effect, unilateral effect, structural presumption, efficiency, economic development

JEL CLASSIFICATIONS: K21, K42, L4

I. INTRODUCTION

Since China introduced its formal merger control regime under the Anti-Monopoly Law (the AML) in August 2008, it has become increasingly influential in the realm of global merger control. With a fast growing track record, the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM), the agency responsible for merger review, is playing an increasingly decisive role in many global deals and now has the ability to help shape the international economic landscape.

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China founded its merger control regime to a large extent on concepts and methods developed by more mature antitrust jurisdictions, especially the European Union (EU) and, to a lesser degree, the USA. However, China’s regime, though still developing, already displays certain unique characteristics. This uniqueness partially reflects the tensions between competition policy and economic development, and partially the intrinsic institutions of a country in the process of economic transition.

As legislation, guidelines, and decisions have accumulated; it is now becoming possible to take a broader view of MOFCOM’s substantive methods and processes. Until now, MOFCOM’s prohibitions, conditional decisions, and lengthy review periods have received perhaps the most intense spotlight. This article, however, concentrates on MOFCOM’s substantive standards and analytical methods in horizontal merger review. In doing so, we try to shed light on the patterns and trends of horizontal merger analysis in China and to provide some implications on what may be to come in the future.

The article is set out as follows. Section II sketches out a general picture of modern horizontal merger analysis with the aim of revealing the ideas and values behind the now economics-guided and efficiency-oriented dominant paradigm. It acts as a reference against which we can explore the characteristics of China’s horizontal merger control regime. Section III conducts a short but in-depth analysis of China’s legislation and guidelines on substantive issues, which (at least partially) reflect the driving forces behind China’s horizontal merger analyses. Section IV examines MOFCOM’s enforcement from a selection of its published decisions. Finally, Section V offers some suggestions on how China may develop a more effective regime with respect to horizontal merger control.

II. AN OVERVIEW OF MODERN HORIZONTAL MERGER ANALYSIS

Merger control regimes, as a part of AML, have undergone tremendous change. The earliest merger control regime was introduced in 1914 when the USA enacted the landmark Clayton Act. This first regime was mostly borne of populist ideals, which gave primacy to the preservation of small business. The early prevalent structure–conduct–performance (SCP) paradigm consolidated this notion by asserting that even a small increase in market concentration is likely to lessen competition. Thus, before the 1970s, US horizontal merger control policy adopted a squarely structural approach in which the absolute or relative size of the merging partners served as the dispositive criterion.1 Although merger control regimes in other jurisdictions generally arose much later, in their early stages they, too, often applied some variant of the structural test.

With the rise of the effects-based teachings of the Chicago school of economics2 in the 1970s, the SCP paradigm began to lose its primacy in merger control policy.

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2 The Chicago School originated in the work of Aaron Director in the late 1940s and early 1950s. In the late 1970s and early 1980s, the Chicago School ushered in a new era of an efficiency-oriented antitrust policy and legal analysis dominated by neoclassical economic theory in the USA. The Chicago School emphasizes
Indeed, the Chicago revolution profoundly changed the scenery of all AMLs. Under the substantial influence of the Chicago school and post-Chicago school, merger analysis in the USA has become a conceptually rich framework that is largely consistent with the perspectives of theoretical economics and rectified notions about competition.

This development in the USA has exerted great influence abroad. The merger control policies of other developed jurisdictions such as the EU, UK, Canada, Australia, and others occasionally diverge in important ways from the policy of the USA, but the gap is narrowing and there is a noteworthy global convergence towards this effects-based paradigm.

**Basic principles and values of modern merger analysis**

The objective of merger control is to protect consumers by prohibiting mergers which will create or enhance market power.

According to modern ideology, competition is valued for the very reason that it promotes economic efficiency and protects consumers. Although there is lively debate over which economic welfare standard should be pursued—consumer welfare or total welfare—regulators in most developed countries accept that the basic goal of AML should be to enhance economic efficiency and to safeguard consumers. A weakening of competition means that the conduct of producers can lead to outcomes that are at odds with consumer benefit, which can be expressed in terms of lower prices, higher quality, more innovation, etc.

Thus, the objective for merger control is to prevent mergers which could create or enhance the merged firm’s ability or incentives to exercise market power. ‘Market power’ refers to the ability of any given firm to profitably increase prices, reduce output, or diminish innovation without constraint from its competitors. Non-price efficiency explanations for many phenomena, including industrial concentration, mergers, and contractual restraints that antitrust law acutely disfavoured in the 1950s and 1960s. See William E Kovacic and Carl Shapiro, ‘Antitrust Policy: A Century of Economic and Legal Thinking’ (2000) 14 J Econ Perspect 43.

In the 1990s, the Chicago School has fallen under attacks from so-called Post-Chicago Economics. Post-Chicago Economics relies on game-theoretic models, which emphasize strategic behaviour among economic agents and facilitate identification of anti-competitive behaviour otherwise allegedly missed by Chicago School. Post-Chicago economic analysis was born out of, and in essence is defined by, criticisms of the Chicago School. But the post-Chicago criticisms of antitrust doctrine are largely ‘internal’, and there are no disputes about basic approaches or fundamental values established by the Chicago School. See Jonathan B Baker, ‘A Preface to Post-Chicago Antitrust’ in Roger van den Bergh, Roberto Pardolesi and Antonio Cucinotta (eds), *Post-Chicago Developments in Antitrust Analysis* (Edward Elgar 2002) 60–75. Until now, the impact of the Post-Chicago School on US antitrust case law is very limited. However, merger control policy, particularly, the merger guidelines are heavily influenced by it.

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effects may coexist with price effects, or can arise in their absence. Due to the critical role of dynamic competition and innovation in generating long-term consumer benefits, far greater emphasis should be placed on non-price competition. However, for simplicity of exposition, this article generally discusses merger analysis in terms of price effects.\(^6\)

This consumer welfare-oriented theme contrasts sharply with the traditional goal of preserving any specific market structure conducive to competition. And there is also a gradual shift away from use of merger control to further other (broader) policy objectives, such as industrial policy\(^7\) or 'public interest'.\(^8\) A consensus has emerged among developed countries that it is suboptimal, at least once a country has reached a certain level of development, to use AMLs to promote such goals, and vindicating such values can sometimes undermine economic efficiency.\(^9\) By excluding these social or political (and often subjective) aims, a coherent, objective body of substantive rules can be framed for merger control.

**Merger control is not aimed at protecting competitors**

One widespread but fundamentally misguided teaching is that the AMLs were enacted to preserve rivals’ opportunity to compete. On the contrary, an efficiency-oriented merger policy should not forbid mergers which make merged firms more efficient and enable them to defeat their rivals while at the same time better at meeting consumers’ demand. In fact, substantial gains in efficiency could in theory offset the price increase effect of a merger and should be considered positively in merger analysis.\(^10\) Thus, when a given merger increases efficiency and consumer welfare, it should be deemed pro-competitive, regardless of the effects on its rivals.\(^11\)

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\(^6\) When anti-monopoly authorities investigate whether a merger may lessen non-price competition, they can employ an approach analogous to that used to evaluate price competition.

\(^7\) Countries may adopt industrial policies for many different reasons, such as to correct market failures, to assure technology transfer to domestic firms, to assure that domestic industries have access to critical inputs or key markets, to create national champions, to foster economic development, or to incorporate wider strategic considerations. These endeavours are not always inconsistent with enhancing consumer welfare and efficiency, but they sometimes conflict with competition policy. See OECD, 'Competition Policy, Industrial Policy and National Champions' DAF/COMP/GF(2009)9 <http://www.oecd.org/daf/competition/44548025.pdf> accessed 21 July 2014.

\(^8\) 'Public interest' may be defined quite broadly and can include a number of criteria such as employment effects and income distributions, restrictions on foreign ownership and control, promotion of national champions and efficiency. It may have some overlap with industrial policy objectives. When the public interest test is dominated by efficiency considerations, it can resemble an efficiency defence. In most cases, however, public interest factors go well beyond the generally accepted competition policy objectives of promoting competition and efficiency, so the inclusion of public interest increases the risk of inconsistent implementation of competition policy.

\(^9\) However, industrial policy or public interest objectives continue to be embraced on a fairly widespread basis by developing and transitioning countries, particularly in the domain of merger control. Possible explanations include greater influence of business interests in such countries and a more pressing need to promote some public interest objectives given the stage of economic development in such countries. See OECD (n 4) 10–11.

\(^10\) In fact, significant marginal or variable cost savings can result in lower prices despite a lessening of competition—even fixed cost savings may lead to future price reductions. A merger may also create dynamic efficiencies through the introduction of new products or innovations.

\(^11\) Notably, Germany is an exception among developed economies. According to its new merger guidelines, the purpose of merger control in Germany is ‘to protect competition as an effective process’, which the
Economics provides a useful tool to protect competition and efficiency in merger analysis

The efficiency-based objective can be best achieved by a merger control policy solidly grounded in economics. Economic theories provide important insights into what the probable effects of a merger will be on the marketplace and how to define relevant markets and evaluate anti-competitive effects in a manner coherent with the aims of AML. Economics is an effective tool to keep the system on course to benefit consumers and efficiency.

Theories and analytical methods of competitive harm of horizontal mergers

The framework of merger analysis compares the possible anti-competitive effect (mainly a supra-competitive price increase) with countervailing factors such as entry, efficiency, and purchaser power. The evaluation of competitive harm is the core issue of merger analysis. Theories of competitive harm of horizontal mergers can be categorized under two general headings—coordinated effects and unilateral effects.

Coordinated effects

The logic of coordinated effects is rooted in the oligopoly theory developed by Chamberlin (1933) and Stigler (1964), and strengthened by the insights of super-game model. These theories posit that the reduction in the number of industry members would facilitate express or tacit coordination amongst competitors, and the possibility of successful collusion depends on whether market conditions can contribute to solving the ‘cartel problem’, that is, the difficulties inherent in reaching and enforcing collusive agreements.

The approach for assessing coordinated effects is a typically Stiglerian framework. Thus, first, market concentration is evaluated to see if the market structure is sufficiently tightly arranged to make the market vulnerable to collusion. Often the Herfindahl–Hirschman Index (HHI) or a similar approach guidelines explain ‘may sometimes coincide with protecting competitors’. This objective reflects a longstanding principle of German competition law and is not always consistent with the concepts of consumer welfare or total welfare. See Bundeskartellamt, ‘Guidance on Substantive Merger Control’ (2012) <http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20-%20Substantive%20Merger%20Control.pdf?blob=publicationFile&v=6> accessed 10 June 2014.


17 Herfindahl–Hirschman index (HHI) is calculated by summing the squares of the market shares of all the firms engaged in the market. The higher the post-merger HHI and the increase in the HHI, the greater are the potential competitive concerns of a horizontal merger. According to 2010 US horizontal merger guidelines, a market in which the HHI is less than 1500 are regarded as unconcentrated and mergers in such markets are unlikely to have anti-competitive effects. Markets with HHIs between 1500 and 2500 are categorized as moderately concentrated. A merger which would increase the HHI by more than 100 is considered likely to increase market power. A highly concentrated market is one with an HHI above
(eg CRₙ ¹⁸) is used. Secondly, factors that bear on the likelihood of successful coordination are examined, such as product homogeneity, certain industry practices, the extent of excess capacity, transparency of pricing or other competitive decisions, and stability of demand, etc. But this approach does not provide a precise metric to gauge the likelihood of anti-competitive impact. Anti-monopoly agencies show particular sensitivity to coordinated effects in acquisitions eliminating a ‘maverick’ firm. A maverick firm typically has different pricing incentives and prices below the rest of the market, and plays a disruptive role in any coordination. The agencies could appraise the anti-competitive effect of a merger by identifying its effect on the maverick’s incentives to constrain coordination. ²⁰

Unilateral effects
Unilateral effects²⁰ originate from classic oligopoly models developed in the 19th century and the auction models developed in recent decades. The basic idea underlying theories of unilateral effects is that the merged firm will have an incentive to raise prices because of the elimination of direct competition between the two firms that have merged.²¹ Thus if one merging firm served, before the merger, as a competitive constraint on the ability of the other merging firm to raise prices to supra-competitive levels, then the transaction may enable them to alter their actions (ie increase prices) independent of the actions of their non-merging rivals.

In a differentiated product market, which is the most common setting for cases with potential unilateral effects, the focus of the analysis is the competitive constraints between the merging firms, which depend on the closeness or the cross-elasticity of demand between the particular products of the merging firms. Analysts use diversion ratios²² to measure the closeness. In mergers taking place in the

2500 and a merger increasing concentration by more than 100 in such a market would be considered likely to raise significant competition concerns. EU also has similar HHI thresholds but EU Horizontal Merger Guidelines use concentration levels of 1000 and 2000 as the two key levels. It is noteworthy that the HHI thresholds are not a rigid screen. Rather, they provide an easy way to dismiss mergers that are highly unlikely to create market power problems and to identify some others which should be examined further.

¹⁸ CRₙ is the sum of the market shares of each of the top ‘n’ firms in a relevant market.
²⁰ In European terminology these are referred to as ‘non-coordinated’ effects rather than ‘unilateral’ effects. See EU Horizontal Merger Guidelines (n 5).
²² The diversion ratio between firm A and firm B is the percentage of lost sales following a price increase by firm A that is captured by competing firm B. This index is a measure of the closeness of competition between the merging firms. A high diversion ratio indicates that the two firms’ products are close substitutes so a merger of them is more likely to lead to significant price increase effects. Diversion ratio is important
context of auctions or bargaining, the analysis is similar. The anti-competitive unilateral effects in these settings are closely related to competitive constraints between the merging parties, reflected by the probability of one merging firm existing as the ‘runner-up’ when the other merging firm wins the business.\(^{23}\) In homogeneous product markets, the analytical approach is somewhat different. Analysis should focus on non-merging firms’ ability to expand their output, which can make the merger unprofitable, and the market share of merging parties acting as the sale base enjoying the price rise.\(^{24}\)

**The trend of horizontal merger analysis**

Compared with the past, merger analysis in the USA has increasingly become less formally structured and less focused purely on share data and absolute or relative undertaking size. Other developed jurisdictions, including the EU, have become more receptive to effects-based and advanced economic arguments. The substantial convergence between different jurisdictions reflects the ongoing trend in merger enforcement.

**Rise of unilateral effects**

The biggest shift in merger enforcement in recent years in western countries has been the ascendancy of unilateral effects as a theory of anti-competitive effects.\(^{25}\) The formalization of the unilateral effects analysis has expanded merger enforcement beyond collusion concerns or market dominance concerns.

**Decline of the structural paradigm**

The structural presumption has declined in recent decades due to more importance being attached to entry and efficiency. The progress in theories and methods of anti-competitive effects analysis has further undermined this old-fashioned paradigm. It has generally been recognized that there is no reliable connection between HHI or market share and price increase effect.\(^{26}\) While structural analysis remains a starting point for the merger evaluation, the role of HHI or market share is reduced to an

but not conclusive. Gross margin can also have impact on the change in pricing incentives brought about by a merger. Furthermore, if we want to know the change in price, information about the curvature of the demand curves is also needed.

\(^{23}\) These effects are also likely to be greater, the larger advantage the runner-up merging firm has over other competitors and the more profitable were the pre-merger winning bids.


\(^{25}\) See OECD (n 24). And, for example, the US agencies revised the merger guidelines in 2010 to emphasize the remarkable changes in enforcement brought by the incorporation of unilateral effects. And the EU enacted its Horizontal Merger Guidelines in 2004 to expand its dominance test in a way that would make it also cover ‘unilateral’ or ‘non-coordinated effects’, even though the merging firms do not have the largest market share. And in both the US and EU, the number of cases involving unilateral effects has increased. In the USA, for example, see *FTC v Staples Inc* 970 F Supp 1066 (DDC 1997); *FTC v Whole Foods Mkt Inc* 502 F Supp 2d 16 (DDC 2007); *FTC v CCC Holdings Inc* 605 F Supp 2d 26 (DDC 2009); *United States v Oracle Corp*, 331 F Supp 2d 1098 (ND Cal 2004). In the EU, for example, see COMP/M.5644 *Kraft Foods/Cadbury* (decision, 6 January 2010); COMP/M.5658 *Unilever/Sara Lee* (decision, 17 November 2010).

\(^{26}\) ICN (n 5).
intuitive index of the potential anti-competitive concern. For coordinated effects, other industrial characteristics play an equal or possibly even more important role in merger assessment in mature jurisdictions. For unilateral effects in differentiated product markets, structural indexes can be actively misleading because market shares do not necessarily indicate the competitive constraints between the merging firms.

Furthermore, a merger control policy that favours dynamic over static competition would place less weight on market share and concentration and more weight on incentive to innovate when assessing market power.

*Increased importance of economic, effects-based analysis*

Partially as a result of the decline of the structural paradigm, over the last 10 years, many mature jurisdictions have modified their merger control statutes to adopt an effects-based substantive standard for the review of mergers.\(^\text{27}\) This wave of legislative reform has significantly contributed to the convergence of methods and tools used by competition authorities. Anti-monopoly agencies in developed countries are increasingly relying on direct evidence such as historical price increases, diversion ratios, or econometric evidence of price increases as they assess mergers; and this could possibly increase the reliability and sophistication of horizontal merger analysis.

**III. LEGISLATION IN CHINA ON HORIZONTAL MERGER ANALYSIS: DIVERGENCE AND CONVERGENCE WITH MATURE JURISDICTIONS**

Since the implementation of the AML in August 2008, China has been endeavouring to develop a legal framework for its merger control policy. Until now, in addition to the AML, there have been several bodies of legal rules concerning merger control. Most of these rules deal with procedural issues, while others address substantive standards and analytical methods. These substantive regulations—especially those promulgated in recent years—at least superficially bear a distinct similarity to those of western jurisdictions, including the EU Horizontal Merger Guidelines and the 2010 US Horizontal Merger Guidelines. But they are also endowed with certain unique Chinese characteristics.

**Articles 27 and 28 of the AML**

Concentrations of undertakings under the AML include mergers, acquisitions of equity interests or assets, and obtaining control of another undertaking by

\(^{27}\) Competition authorities generally rely on one of two main standards to assess whether a merger has anti-competitive effects: the dominance test and the substantial lessening of competition (SLC) test; some countries have a hybrid test, which combines the dominance and the SLC standards. Under the dominance test a merger is anti-competitive if it creates or consolidates a dominant position in the market. Under the SLC test, a merger is considered to be anti-competitive if it is likely to substantially lessen competition in the market. Compared with the dominance test, the SLC test focuses on the effects of the merger on the market rather than on structural threshold such as market shares. Under the SLC test, the assessment of a merger is more concerned with whether the merger will likely cause price increase. Today the SLC test or hybrid tests are used in the majority of developed jurisdictions. See OECD, ‘Report on Country Experiences with the 2005 OECD Recommendation on Merger Review’ (2013) <http://www.oecd.org/daf/competition/ReportonExperienceswithMergerReviewRecommendation.pdf> accessed 20 July 2014.
contractual or other means. The establishment of joint ventures also falls under these rules as ‘concentrations’. For the sake of convenience, we will use the word ‘merger’ to refer to all these types of concentrations. Mergers are governed by Articles 20–31 of the AML, and the substantive standard for merger review is set forth in Articles 27 and 28.28

Article 27 lists the factors that must be considered in merger review, which include: (i) the market share of the merging undertakings in the relevant market and their ability to control market; (ii) the degree of market concentration in the relevant market; (iii) the effect of the concentration on market entry and progress of technology; (iv) the effect of the concentration on consumers and other undertakings; (v) the effect of the concentration on China’s national economic development; and (vi) other factors affecting market competition, as determined by MOFCOM.

The factors listed in (i) and (ii) emphasize the role of market shares and market concentration to provide a rough merger analytical approach—in other words, a typical structural paradigm. Because there is no elaboration on any theory of competitive harm, it is unclear why a merger could be anti-competitive and why MOFCOM’s decision must be based on these factors. Furthermore, although the enumerated factors in Article 27 nominally accord some weight to the effect of mergers on consumers, the requirement for consideration of ‘the effect of the concentration on China’s national economic development’ and the concern with the impact on other enterprises permit MOFCOM to consider non-competition issues such as industrial policy and the impact of a merger on China’s own competitors to the merging firms.

Article 28 of the AML sets up a general and vague standard to assess the legality of a merger. It merely states that concentrations of undertakings that will or may eliminate or have a restrictive effect on competition shall be prohibited by the AML. At first reading, this sounds like an effects-based criterion and appears to be literally tougher than the ‘substantial lessening of competition’ standard applied in the USA or the ‘significant impediment to effective competition’ standard of the EU. Notably, it does not articulate a goal of preserving particular market structures. Its vagueness persists because no further explanation of the meaning of eliminating or restricting competition has been forthcoming. Moreover, this Article entitles MOFCOM to balance the positive and negative effects of mergers on competition, and if a merger’s positive effects on public interest outweigh its negative effects on competition it can also be cleared. So Article 28 provides a framework accommodating both efficiency and ‘public interest’. But nowhere has the welfare standard or the assessment of ‘public interest’ been clarified.

In summary, these articles in the AML do not articulate any theory of competitive harm or any reasonable analytical framework. Instead, they are a blend of competition and non-competition mandates, which sow the seeds of tension for future regulations and enforcement.

**Market definition guidelines**

In July 2009, about one year after the promulgation of the AML, the Anti-monopoly Commission of the Chinese State Council issued the first anti-monopoly guidelines,

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the Guidelines on Relevant Market Definition\(^29\) (the Market Definition Guidelines). The concept of relevant markets discussed in the AML is further detailed in these Guidelines. The Market Definition Guidelines are applicable not only to merger review but also to investigation of horizontal and vertical agreements and abuse of market dominance. They accept important principles and methods applied in mature jurisdictions, and formulate a complete framework integrating both demand-side substitution and supply-side substitution. The Market Definition Guidelines signal an embrace of modern antitrust economics and stand as a noteworthy development.

**Interim provisions on the assessment of competitive effects of concentration of undertakings**

To clarify the pattern of its merger analysis, MOFCOM published the Interim Provisions on the Assessment of Competitive Effects of Concentrations of Undertakings (the Provisions)\(^30\) on 29 August 2011, after the release of the 2010 US Horizontal Merger Guidelines. The Provisions are the first guidance from MOFCOM and provide at least partial guidance on how MOFCOM will evaluate horizontal, vertical, and conglomerate mergers. We only comment on those parts concerning horizontal mergers.

First of all, the biggest advance in the Provisions is the establishment of the competitive harm theories used in China’s horizontal merger control. Article 4 of the Provisions affirms the theories of anti-competitive effects of horizontal mergers, and states that when evaluating anti-competitive effects of mergers, ‘the first consideration is whether the concentration will give a firm the ability, motive and possibility to independently eliminate or restrict competition or will increase such ability, motive and possibility. Where there are a small number of firms in the relevant markets, it must also be considered whether the concentration will give the firms the ability, motive and possibility to jointly eliminate or restrict competition or will increase such ability, motive and possibility’. It is evident then that not only do the Provisions introduce both modern theories of unilateral and coordinated effects, but they also appear to attach more importance to unilateral effects than to coordinated effects. This can be seen from the primacy given to the evaluation of the merged firm’s ‘independent’ ability to eliminate or restrict competition.

Secondly, on the surface, the Provisions are aimed at elaborating upon the factors set out in Article 27 of the AML, one by one. By giving flexible and reasonable explanations of these factors, the Provisions appear to endorse a less structural approach—one incorporating efficiency, entry, and purchaser power. This is, to a certain extent, in line with antitrust economics.

Article 5 of the Provisions explicitly lists seven factors for the assessment of whether the merged firm will have ‘the ability to control the market’. In addition to a number of factors similar to those enumerated with respect to establishment of market dominance in Article 18 of the AML,\(^31\) Article 5 introduces the substitutability

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\(^31\) However, it seems that the threshold to establish ‘market control power’ would be lower than that to establish ‘dominant market position’.
between the products or services of merging parties and the production capacity of non-merging parties, which are crucial tools for evaluating unilateral effects. Article 5 can therefore be seen as a framework which includes both structural factors and competitive constraints between firms. However, despite its reference to coordinated effects as one of the two anti-competitive effects, the Provisions do not contain any further information about how MOFCOM will diagnose such coordinated effects.

Article 6 refers to two statistical tools that are widely used by competition authorities to assess the level of market concentration, namely the HHI and the CRₙ, mentioned above. Article 6 further points out the rule for assessing the anti-competitive effects of mergers on the basis of the level of concentration. Notably, the higher the degree of concentration and the higher the increase of the concentration level post-merger, the more likely it is that MOFCOM will consider that a merger will have anti-competitive effects. MOFCOM’s adoption of these economic tools shows that it is following the practices of its western counterparts. However, MOFCOM neither specifies any threshold for HHI or CRₙ that it regards as indicating that a merger might deserve further investigation, nor does it articulate whether these tools exist as a beginning or end point of its analysis—this gives rise to practical uncertainty.

Article 7 introduces the ease of market entry as a countervailing factor to anti-competitive effect. This Article reveals the way mergers may increase entry barriers and emphasizes the possibility, timeliness, and sufficiency of entry.

Articles 8–10 generalize the potential efficiencies of mergers, and identify the effect of mergers on technical progress, consumers, and other undertakings. These Articles leave the impression that, at least theoretically, efficiency is thought to be a positive counterbalance by MOFCOM. But it is still obscure whether the consumer welfare standard or the total welfare standard prevails.

It is worth noting that Article 11 states that mergers can benefit economic development by promoting economies of scale and efficiency, or can harm economic development by damaging competition. This Article seems to explain the impact of mergers on national economic development in a way consistent with protection of competition and efficiency.

Finally, Article 12 explicitly refers to factors including public interest, efficiency, the failing firm defence and purchaser power as countervailing factors in MOFCOM’s merger review.

In summary, the Provisions, to some degree, reflect MOFCOM’s openness to modern antitrust economics and theories. This is a significant progress when compared with Article 27 of the AML, as it confirms that there is some alignment between MOFCOM’s ideas and international best practice, and points to improved transparency for MOFCOM’s decision-making.

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32 Article 5 of the Provisions also mentions the substitutability between the products or services of merging parties and those of non-merging firms. However, if products or services offered by non-merging firms are close substitutes for those sold by a merging party, the substitutability between the products or services of merging parties will normally be low. See Carl Shapiro, 'The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years' (2010) 77 Antitrust L 701–59.
However, it should be noted that although Article 5 may value a more specific criterion, namely whether the merged firm will obtain or enhance ‘the power to control the market’, the Provisions do not clearly suggest such a market power objective. Rather, since Article 1 of the AML explicitly articulates non-economic goals including public interest and economic development, the Provisions do include these factors. Even though Article 11 of the Provisions appears to reconcile the aim of improving efficiency with that of promoting national economic development, in practice, national economic development can have a flexible meaning which goes beyond this explanation and is not necessarily in line with the efficiency objective. The tension between the modern analytical approach and non-competition concerns remains unsolved. As a result, it will also be very difficult for MOFCOM to form a coherent analytical framework based on antitrust economics welfare standards—whether consumer welfare standard or total welfare standard.34

IV. APPLICATION OF SUBSTANTIVE ANALYSIS BY MOFCOM IN PRACTICE

Since the enactment of the AML, MOFCOM has published 26 decisions, comprised of 24 conditional clearances and two prohibitions.35 Given that MOFCOM only publishes decisions relating to prohibitions and conditional approvals, it is impossible to gauge its substantive analysis of horizontal aspects for all transactions that have been reviewed. Nonetheless, as set out in Table 1, we have identified 16 conditional clearances in which there were horizontal issues, and note that both of the prohibited transactions also had horizontal aspects.

As MOFCOM’s analysis has become more sophisticated and it has gained experience in its reviews, these decisions have become comparatively more detailed and economically grounded. Information contained in these decisions enables us to study the key aspects of the corresponding cases. By analysing these decisions, we hope to provide insight into the factors that prompt MOFCOM’s intervention and to better understand the nature of its enforcement practices.

MOFCOM often identifies the presence of unilateral or coordinated effects affecting its decisions, but still does not conduct very detailed analyses of these issues in each instance. While issues such as ease of entry and the proper scope of the geographic and product markets receive significant attention, MOFCOM has not yet engaged in substantive analysis of certain important economic factors, such as the presence of transaction-specific, pro-competitive efficiencies.

33 See n 28.
35 As of August 2014, MOFCOM has accepted 945 notifications and concluded 875 of them. Among all the concluded cases, 849 (or approximately 97%) received unconditional clearances and 24 cases have been cleared with conditions. MOFCOM has only prohibited two transactions in the life of its merger reviews, including the P3 Network case discussed below. <http://www.china.com.cn/zhibo/2014-09/11/content_33487367.htm> accessed 20 September 2014.
Table 1. Substantive analysis adopted by MOFCOM in horizontal merger cases

<table>
<thead>
<tr>
<th>No.</th>
<th>Case</th>
<th>Year</th>
<th>Unilateral effects</th>
<th>Coordin. effects</th>
<th>Economic analysis</th>
<th>HHI analysis</th>
<th>Other economic models</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>InBev/Anheuser-Busch</td>
<td>2008</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>2</td>
<td>Coca-Cola/Huiyuan</td>
<td>2009</td>
<td>✓</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>3</td>
<td>Mitsubishi Rayon/Lucite</td>
<td>2009</td>
<td>✓</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>4</td>
<td>Pfizer/Wyeth</td>
<td>2009</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>5</td>
<td>Panasonic/Sanyo</td>
<td>2009</td>
<td>✓</td>
<td>✓</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>6</td>
<td>Novartis/Alcon</td>
<td>2010</td>
<td>✓</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>7</td>
<td>Uralkali/Silvinit</td>
<td>2011</td>
<td>✓</td>
<td>✓</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>8</td>
<td>Alpha V/Savio</td>
<td>2011</td>
<td>✓</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>9</td>
<td>Seagate/Samsung</td>
<td>2011</td>
<td>–</td>
<td>✓</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>10</td>
<td>Western Digital/Hitachi</td>
<td>2012</td>
<td>–</td>
<td>✓</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>11</td>
<td>UTC/Goodrich</td>
<td>2012</td>
<td>✓</td>
<td>–</td>
<td>✓</td>
<td>✓</td>
<td>–</td>
</tr>
<tr>
<td>12</td>
<td>Glencore/Xstrata</td>
<td>2013</td>
<td>✓</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>13</td>
<td>Marubeni/Gavilon</td>
<td>2013</td>
<td>✓</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>14</td>
<td>Baxter/Gambro</td>
<td>2013</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>–</td>
</tr>
<tr>
<td>15</td>
<td>MediaTek/MSStar</td>
<td>2013</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>–</td>
</tr>
<tr>
<td>16</td>
<td>Thermo Fisher/Life</td>
<td>2014</td>
<td>✓</td>
<td>–</td>
<td>✓</td>
<td>✓</td>
<td>Price increase</td>
</tr>
<tr>
<td></td>
<td>Technologies</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>forecast</td>
</tr>
<tr>
<td>17</td>
<td>The P3 Network</td>
<td>2014</td>
<td>✓</td>
<td>–</td>
<td>✓</td>
<td>✓</td>
<td>–</td>
</tr>
<tr>
<td>18</td>
<td>Corun/Toyota China/</td>
<td>2014</td>
<td>–</td>
<td>✓</td>
<td>✓</td>
<td>–</td>
<td>CRm, CR4</td>
</tr>
<tr>
<td></td>
<td>PEVE/Sinogy/</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Toyota Tsusho (JV)</td>
<td></td>
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</tr>
</tbody>
</table>

**Unilateral effects**

In practice, MOFCOM has in several cases specifically referenced its application of a unilateral effects theory. Nevertheless, due to the brevity of its decisions and the absence of detailed explanations regarding the impact of its consideration of national economic development under Article 27(5), it is difficult to evaluate how determinative unilateral effects approaches have actually been in informing MOFCOM’s decisions. In addition, it should be noted that, contrary to jurisdictions such as the EU, MOFCOM is only obligated to publish decisions which result in a prohibition or a conditional approval, meaning that only 26 decisions have been published to date. Thus, although MOFCOM has applied unilateral effects in a number of its decisions, there has been little detailed or thorough analysis to date.

In general, when a proposed transaction would result in high market shares, or give the merged entity a leading position, MOFCOM appears to take the increased control that the merged entity can unilaterally have over the relevant market(s) into serious consideration. In its earlier decisions these analyses rested almost

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36 It should be noted that, on one occasion, MOFCOM did acknowledge that high market shares might not indicate anti-competitive effects on the market. In the Thermo Fisher/Life Technologies decision, the
exclusively on structural presumptions. Thus, in one early case—*Mitsubishi Rayon/Lucite* (2009)—MOFCOM noted that the combined market share of the parties post-transaction would reach 64% in the market for methyl methacrylate (MMA) in China, with a significant gap between the merging parties and the remaining competitors. In addition, Mitsubishi Rayon was active in both the MMA market and two downstream markets. Therefore, with a dominant position in the MMA market, Mitsubishi Rayon would theoretically be able to exclude and eliminate competitors in the MMA market, and foreclose downstream players. While unilateral effects appear to have been important to MOFCOM in reaching its decision, its analysis relies exclusively on the structural profile of the transaction, without articulating any more profound analysis of the potential effects of the merger.

Similarly, in the *Pfizer/Wyeth* case (2009), the combined market share of the parties was 49.4%, whereas the second largest player in the swine mycoplasmal pneumonia vaccine market was only 18.35% and there was no other company with a market share of more than 10%. Considering the high technology barrier to the market, MOFCOM concluded that the merged entity would have the ability to expand and control prices, taking advantage of the economies of scale. The fact that MOFCOM identified the potential for the merging firms to take advantage of efficiencies resulting from the transaction as a potential reason for concern again underscores MOFCOM’s early adherence to the dominance of the structural paradigm.

In investigating Uralkali’s 2011 takeover of Silvinit, MOFCOM found that there were only a few companies engaging in the global manufacture and sales of potassium chloride (KCl) and the merged entity would become the second largest KCl exporter in the world, with a market share of 33%. The combined entity would possess more potassium and enhanced production, supply and export capacity, and therefore more control on the global market for KCl. In China, MOFCOM defined the market to limit it only to imports of KCl, which would have given the merged entity a share of 50%. Of particular note was the importance of KCl as an important raw material used in fertilizers in China. Thus, while MOFCOM did not specifically refer to Article 27(5) of the AML in its decision, it appears that national economic development concerns likely played a role in its decision, especially given its very narrow market definitions which not only carved out the role of imports specifically, but segmented imports further into imports by land or by sea. MOFCOM specifically alluded to potential coordinated effects, finding that, post-merger, the two largest suppliers in the industry would hold a 70% share, but in regard to unilateral effects it relied purely on the structural analysis.

In certain decisions, however, MOFCOM appears to have taken a more in-depth approach to unilateral effects. For example, in its *Panasonic/Sanyo* decision (2009), the market for lithium coin-cell secondary batteries was highly concentrated and Panasonic and Sanyo were the top two manufacturers with a combined market share of 61.6%. MOFCOM noted that after the transaction Panasonic would be able to unilaterally raise prices, taking into consideration the limited presence of other

agency found that for reactive dyes, reverse transcriptase, thermal cyclers, and transfection reagents, although both parties to the transaction had a high market share, the transaction was unlikely to restrict or eliminate competition in the above four markets considering the large number of competitors in such markets, unlimited production capacities, and relatively low market technical barriers.
competitors as well as the insignificant buyer power of most mid-sized and small-sized downstream companies. Similarly, the only competitors in the market for automobile Ni-MH batteries were Panasonic, Sanyo, and PEVE (a joint venture established by Panasonic and Toyota), where PEVE held a dominant share of 77%. MOFCOM concluded that the combination would enable Panasonic to lessen the market competition through its influence on PEVE.

In the Alpha V/Savio case (2011), MOFCOM found that Uster (a company of which Alpha V was the largest (but still minority) shareholder) and Loepfe (a wholly owned subsidiary of Savio) were the only two manufacturers of electronic yarn clearers for automatic winders worldwide. Post-transaction, it could not be excluded that Alpha V would have the ability to control the entire market through the two companies, notwithstanding its only minority shareholding in Uster. Important for MOFCOM were the high technology barriers arising from patents, proprietary technology, and trade secrets in the relevant market for electronic yarn clearers for automatic winders.

As MOFCOM has matured and gained additional experience, its application of unilateral effects has become somewhat more detailed and substantive. For example, in the UTC-Goodrich transaction (2012), MOFCOM appeared to consider that the two parties were each other’s closest competitors. MOFCOM investigated the bidding history in the relevant market and found that UTC had won most of the bidding contests from 2007 to 2011, while Goodrich was one of the few other suppliers that had been awarded a contract. Although there were six suppliers in the world, UTC (72%) and Goodrich (12%) were the two largest among them. Thus, the merged entity would be much larger than any other competitor. As a result, the proposed transaction would further strengthen UTC’s dominant position and it might act unilaterally to exclude or eliminate competition.

Likewise, in Baxter’s 2013 acquisition of Gambro, MOFCOM specifically found that the parties were each other’s ‘main’ competitor, and collectively held more than half of each market for CRRT monitors, CRRT dialyzers, and CRRT blood tubes both globally and in China. MOFCOM held that the transaction would enable Baxter to exercise a relatively powerful control over the markets by eliminating Gambro as a strong competitor, thereby harming competition. Nevertheless, MOFCOM’s preference for structural approaches was still in evidence. Thus, in Baxter/Gambro, MOFCOM also undertook HHI concentration analyses and noted that the deltas post-acquisition in China would reach 1204, 3456, and 1920. However, MOFCOM failed to articulate thresholds or elaborate on why these specific levels posed a threat to competition. It also relied heavily on the mere presence of elevated market shares in supporting its decision.

In its 2013 decision conditionally approving the merger of MediaTek and MStar, MOFCOM clearly complemented its structural approach with a unilateral effects analysis. From a structural perspective, the parties collectively held 61% of the global market and 80% of the Chinese market, and the remaining players were considered unable to exert significant competitive constraints upon the merged entity. In addition, however, MOFCOM found that MediaTek and MStar were the ‘major suppliers’ of LCD TV control chips, with their products being highly comparable and sharing many common customers. They were found to be very similar (ie each
other’s close competitors), as each was ranked first or second respectively in the relevant markets, and were regarded to act as constraints upon each other with regard to innovation, services, and prices.

In its 2014 P3 Network decision, where MOFCOM prohibited the P3 Network by Maersk, Mediterranean Shipping and CMA CGM, the agency found that the three companies were the three largest players in the industry with a combined market share of 46.7%. Post-transaction this ‘tight consortium’ would have much stronger control over the market, in part due to unilateral effects limiting market entry. The three companies would have consolidated their networks and eliminated effective competition between major competitors in the relevant market, which might further heighten the entry barriers. It would also have been difficult for new players that could serve as competitive constraints to emerge. MOFCOM appeared to consider the importance of preserving competitive structure as well, notwithstanding efficiencies. As for existing competitors, MOFCOM worried that the transaction would be a significant threat because of the three companies’ enhanced control on the market. Given the overcapacity of China’s state-owned carriers and the significant losses they have suffered in recent years, increased competition inevitably would have made it more difficult for these companies to operate. In addition, MOFCOM also mentioned the weak bargaining power held by downstream customers and ports, and concluded that those stakeholders’ welfare might be harmed by the increased dominance shared by Maersk, Mediterranean Shipping, and CMA CGM. MOFCOM did not articulate whether this was motivated by a consumer welfare or total welfare standard. On the contrary, it seems that industrial policy factors and consideration of the preservation of competitors may have had a role in this decision.

In the Glencore/Xstrata deal (2013), MOFCOM closely scrutinized the enhanced market position Glencore would have possessed on the industrial chains of copper, zinc, and lead. MOFCOM noted upfront that China was a major importing country of copper concentrate, zinc concentrate, and lead concentrate; the imports of which constituted 68.5%, 28.7%, and 27.3% of the total supply respectively, whereas the parties’ combined market share was relatively high in each of the manufacture and supply markets (but no combined share was higher than 20%, which appeared to be much lower than those in other conditional clearances). In addition, as in Uralkali/Silvinit (discussed above), we see MOFCOM narrowly defining markets to look solely to ‘imports’ without considering total availability and production, notwithstanding similarities in quality, pricing, transport, and the like. This might suggest a reliance on AML Article 27(5) and the impact of industrial policy in China, though this is not explicitly mentioned in the decision.

MOFCOM found that, post-transaction, Glencore would possess more copper resources and a strengthened industrial chain of copper, which would increase the company’s control over the manufacture, supply and trade of copper concentrate, and thereby change the existing supply conditions, raise entry barriers, and harm downstream customers’ welfare. Similarly, Xstrata’s manufacturing capacity of zinc concentrate and lead concentrate would increase Glencore’s control over the supply and trade markets for the two products, enhance its integration of the industrial chain of zinc, and have more influence on the price of lead concentrate. We note again, as in Pfizer/Wyeth, the tension between MOFCOM’s concern that a
transaction would increase the power of a competitor—particularly through efficiency-enhancing characteristics such as integration—and the goal of protecting customers’ welfare.

In summary, MOFCOM clearly appears to be maturing in its competitive analyses and converging to some degree with modern economic practice in merger control. This can be seen above, in its more robust analysis of unilateral effects through the closeness of competition in the UTC/Goodrich, Baxter/Gambro, and MediaTek/MStar decisions in particular. In addition, in 2014, MOFCOM has made important strides in using advanced economic analysis, particularly in the Thermo Fisher/Life Technologies decision, in which it used HHI and price increase forecasts to focus its attention on potentially problematic product groups, as well as in its conditional approval of the Corun/Toyota China/PEVE/Sinogy/Toyota Tsusho joint venture, in which it relied upon both concentration ratios and CR4 models in its analysis.

Nevertheless, even as its techniques have advanced, there are still instances in which structural analysis remains predominant and in which protection of competitors and competitive structure appears to be a motivating consideration.37

Coordinated effects
In addition to examining unilateral effects, MOFCOM has also touched upon the theory of coordinated effects in a more limited number of cases, concerning a more limited number of markets. Notwithstanding mentioning the talisman of ‘coordinated effects’, however, MOFCOM has ordinarily not provided any in-depth reasoning or analysis to support its concerns regarding coordination.

From a practical standpoint, practitioners ordinarily expect competition regulators engaged in an assessment of potential coordinated effects to undertake modern economic analyses. Thus, particularly in the USA, HHI numbers will be prepared and analysed. While the use of such tools has been increasing in China, MOFCOM still does not make regular use of such basic economic techniques.

Of the six conditional clearances in China involving discussions on coordinated effects, only one has made particular use of HHIs—and there in product markets separate from the one earmarked for potential coordinated effects. In the Baxter/Gambro case (2013), as discussed in the unilateral effects section above, MOFCOM carried out an HHI analysis of the markets for CRRT monitors, CRRT blood tubes, and CRRT dialyzers. Nevertheless, for the market in which it found coordinated effects—that of haemodialysers—no HHI analysis was undertaken. Instead, the finding of potential coordinated effects rested on pre-transaction contractual links (in the form of OEM manufacturing) between Baxter and Gambro’s main competitor, Nippon. After the transaction, MOFCOM believed that Nippon and the merged entity would together hold 48% of the market and that this would increase the risk of coordinated effects when coupled with the pre-existing contractual relationship. More in-depth analysis beyond these structural observations, however, does not appear. On the positive side, it should be noted that, of the nine conditional horizontal cases decided since the beginning of 2012, MOFCOM has undertaken an HHI

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37 See eg MOFCOM’s approach in the P3 Network prohibition discussed above, as well as its conditional approvals in Uralkali/Silvinit and Glencore/Xstrata, discussed above.
analysis in five of them. It is somewhat puzzling, therefore, that we have never seen HHI applied in conjunction specifically with a coordinated effects analysis of the same relevant product market.

Leaving aside economic tools, however, regulators often evaluate potential coordinated effects through a thorough examination of whether a particular market is vulnerable to coordinated conduct.

To date MOFCOM has only publicly discussed one market that it found particularly vulnerable to coordinated interaction by competitors—the global hard disk drive (HDD) market. The Seagate/Samsung and Western Digital/Hitachi transactions each eliminated a major competitor and collectively resulted in what was essentially a 5-to-3 concentration in the industry. MOFCOM found that the transaction might lead to anti-competitive effects, partly because of certain unique characteristics of the market, namely: (i) a relatively high level of transparency; (ii) relatively few manufacturers and main purchasers; (iii) homogeneous products; (iv) a relatively clear high-level understanding of competitors’ technology, costs, production, and sales; and (v) frequent sharing of the same distributors. Under MOFCOM’s analysis, which was shared by other mature regulators, these characteristics could be considered to contribute to the facilitation of parallelism or tacit coordination amongst competitors. These concerns relating to coordinated effects led MOFCOM to impose its first ever ‘hold separate’ remedies in these cases, under which the parties’ were prevented from integrating their businesses for a set period of time under reapplication and reconsideration by MOFCOM.38

In addition, as we have seen above in Baxter/Gambro, MOFCOM may also consider a merging party’s close relationship with a third-party competitor to be capable of increasing the likelihood of coordination. In another example, a Panasonic/Toyota joint venture manufacturing Ni-MH automobile batteries known as PEVE has twice been cited by MOFCOM as potentially contributing to coordinated effects due to its close relationships with Panasonic. Thus, in reviewing Panasonic’s 2009 acquisition of Sanyo, MOFCOM considered that, following the proposed transaction, PEVE would remain as one of the few competitors left in the market with Panasonic, which would have a significant share of the market. Given the links between PEVE and Panasonic, MOFCOM naturally questioned the continuing incentive of the two companies’ incentives to compete vigorously one against the other. Exactly the same issue emerged again in MOFCOM’s 2014 conditional clearance of a proposed joint venture amongst Corun, Toyota China, PEVE, Sinogy, and Toyota Tsusho. Showing an increasing maturity and facility with economic analysis, this time MOFCOM applied a more advanced economic model, using a four-firm concentration ratio to ascertain that the combined shares of Corun, Panasonic, PEVE, and Johnson Controls could be as high as 97%. Given the apparent common interest to be shared by Corun, PEVE, and Panasonic, MOFCOM again found that these links might greatly reduce the firms’ incentives to compete vigorously.

38 These time periods were one year for Seagate/Samsung and two years for Western Digital/Hitachi. Although both probationary periods have ended, there has been no public indication that MOFCOM has reconsidered its holdings in those decisions.
Examining MOFCOM’s coordinated effects analyses, it is apparent that the agency has become somewhat more open to employing economic analysis in the reasoning of its decisions. HHI analyses and other economic models (e.g. CR4) have been gradually adopted, but the regulator has only sporadically conducted in-depth evaluations of such effects, and often has done so without describing its methods or goals in detail. Nevertheless, in more recent cases MOFCOM appears to be relying less on a purely structural analysis.

**Market definition**

This article has touched on MOFCOM’s practical approach to market definition above, in its enforcement history with regard to unilateral effects. As a general rule, while MOFCOM may consider global markets were appropriate, in practice its analysis focuses tightly on competitive effects within the national boundaries of China. Although this is unsurprising given MOFCOM’s required consideration of national economic development under AML Article 27(5), it remains in tension with the Market Definition Guidelines discussed above, which theoretically reflect the adoption of mainstream techniques.

In most cases, MOFCOM does not appear to rely heavily on traditional means of ascertaining the appropriate scope of a relevant product market through analysis of the effects of a hypothetical small but significant and non-transitory price increase on demand substitution or other traditional economic tools. Instead, perhaps due to lack of sophistication in market definition or partially driven by its consultation with other important stakeholders such as Chinese customers, suppliers, and trade associations, MOFCOM’s practical market definitions occasionally show significant divergence from practices by regulators in other jurisdictions.

This can be seen, for example, from MOFCOM’s frequent focus on the parties’ share of import markets into China, discounting domestic production or local competitors. MOFCOM followed this approach not only in the 2011 Uralkali/Silvinit decision discussed above, but also in its 2013 examination of the Marubeni/Gavilon transaction, in which the defined market appeared to be limited to imports of soybeans into China.

This may also have been the case with regard to the HDD cases, and Panasonic/Sanyo. In the HDD cases, MOFCOM determined that the relevant product market in the context of the proposed merger was the market for all HDD products. By contrast, the US FTC and EU Commission found that only with regard to the 3.5 inch desktop HDD or 2.5 inch mobile HDD markets would the two acquisitions result in likely anti-competitive effects. In MOFCOM’s opinion, the merger would have decreased competitive pressure and increased the possibility of coordination—as a result, MOFCOM intervened in all HDD markets. This may have been the result of balancing practical concerns regarding MOFCOM’s chosen ‘hold separate’ remedies in these cases, which were being applied for the very first time. Effective separation of particularized product lines may have been impossible from a practical standpoint in establishing the required hold separates.

In Panasonic/Sanyo, MOFCOM found the relevant market to be NiMH HEV batteries, with Panasonic and Sanyo as the major suppliers of the NiMH batteries used
in most current HEVs. The US FTC, however, held that improvements in Li-ion technology made Li-ion HEV batteries a superior alternative to NiMH HEV batteries. In addition to Panasonic and Sanyo, there were some other firms which had already supplied Li-ion HEV batteries to automakers for future HEVs. As NiMH HEV batteries were used in future HEVs, they would compete directly against Li-ion HEV batteries. In the HEV battery market overall, therefore, the transaction may not have raised competitive concerns.

As MOFCOM increases the use of economic tools in other areas of its competitive analyses, it may find more opportunity to do the same with regard to its approach to market definition.

Efficiencies and entry

As noted above, the AML permits MOFCOM to consider the impact of merger-specific efficiencies in evaluating the competitive balance of a proposed transaction. MOFCOM’s notification forms dutifully request merging parties to provide such information on efficiencies, and its legislation indicates that MOFCOM will take material merger-specific efficiencies into account in its analyses.

At least in its public decisions, however, MOFCOM has not discussed or balanced potential efficiencies in its assessments of the competitive impact of transactions. Rather in at least three examples MOFCOM has appeared to raise competition concerns for merger-specific efficiencies. Thus, in Pfizer/Wyeth, discussed above, MOFCOM considered resulting economies of scale for the merged entity to give it a greater ability to control prices, rather than an incentive to lower them for consumer welfare. Similarly, in Glencore/Xstrata, discussed above, MOFCOM considered that the expanded vertical integration of the merged firm would also give it an unfair advantage over competitors.

More recently, in MOFCOM’s 2014 prohibition of the proposed P3 shipping network, MOFCOM appeared to ignore the significant potential efficiencies to be gained from centralization and integration of three shipping companies’ scheduling and logistics operations, and to focus instead on the change to market structure and the absolute reduction in the number of competitors. Although combining the companies’ complementary assets would appear to benefit competition in the market, MOFCOM appears to concentrate on the merged firms’ strengthened economic position, perhaps conflating it with the idea of a strengthened position of market power.

Although MOFCOM has not always considered pro-competitive efficiencies, it has often considered ease (or rather, difficulty) of entry as an important factor in evaluating the strength of the combining parties’ positions. In most horizontal cases (including 14 of the 18 cases examining horizontal overlaps), MOFCOM assessed the significance of barriers to entry, but did not provide in-depth analysis. In the Glencore/Xstrata case discussed immediately above, the parties’ hoped-for efficiencies were considered to be a barrier to entry for others. In the Alpha V/Savio case also discussed above, the intellectual property rights of the parties were considered to be a barrier to entry, and in the P3 Network decision, the parties’ oligopolistic positions also constituted a barrier to entry.
V. CONCLUDING REMARKS—ON THE WAY TO EFFECTIVE HORIZONTAL MERGER CONTROL

China’s AML is only six years old and China’s merger control regime continues to develop and mature both in terms of regulations and enforcement. This development must continue rapidly if China is to meet the demands of increasing levels of M&A notifications, globalization, and especially the country’s greater focus on market-oriented economic reform. The upgrading of the role of the market in guiding China’s economy will require the government to promote competition policy vigorously, to create a sound environment for enterprises to compete with each other.

Effective merger control requires comprehensive and transparent substantive legal standards based on sound and robust economic principles. As MOFCOM’s confidence, expertise, and maturity continue to increase, it is more important than ever that it makes strong use of available economic techniques and provides clear guidance to illuminate its enforcement practices. An increased reliance on economic analysis will provide a firmer basis supporting MOFCOM’s decisions, result in more effective enforcement efforts and lead to a harmonious convergence in the international merger control regime.

As MOFCOM continues to develop its merger control regime, it should avoid a legal standard based on rigid structural presumptions or formulaic concentration numbers. Instead, the agency should focus more on the effect of the transactions, and develop a reasonable analytic framework incorporating both unilateral effects and coordinated effects in which these two different competitive harms are explicitly divided and their respective analytical approaches are clarified. For coordinated effects analyses, market characteristics should be examined in addition to structural indices. When assessing unilateral effects, diversion ratios or cross-elasticity may provide a useful tool to determine the competitive constraints between the merging parties. Furthermore, in an increasingly complex and fast changing business environment, MOFCOM should incorporate non-price competition into its merger analysis, and routinely consider non-price aspects of competition, including service, product quality, and especially innovation.

MOFCOM would also benefit from bringing more rigorous economic analysis into its assessments of the relevant product and geographic markets. With its Market Definition Guidelines clearly paralleling the paths of more mature regulators, it would bring increased clarity and certainty to MOFCOM’s review process to bring its practice in line with its own regulations and guidelines.

As it matures, MOFCOM may also consider providing a more in-depth analysis of potential efficiencies created by a proposed transaction. Although China’s AML encompasses non-competition objectives as well, the paramount goal of efficiency remains central to global competition enforcement. Modern economic theory demonstrates clearly that the creation of strong efficiencies may be sufficient to overcome even material increases in absolute combined share without causing anti-competitive effects. Thus, while each transaction may either eliminate at least one competitor or generate a closer relationship between certain market players, and thereby result in change to the market structure, use of robust economic analysis may nevertheless instruct us that prices can still decrease in such situations. It is important for antitrust
authorities to consider the entire picture of the market at issue, and merger-specific efficiencies must be considered as an indispensable part of this picture.

Competition policy—including merger policy—does not operate in a vacuum. It is part of wider public policy towards business, markets, and the economy. Article 1 of the AML specifies its goals as ‘preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, and promoting the healthy development of the socialist market economy’. In addition, AML Article 27(5) also permits MOFCOM to consider the impact of transactions on China’s national economic development. It is inevitable that competition policy and industrial policy will become intermingled in certain cases. From a legal perspective, MOFCOM is entitled to take industrial policy factors into consideration, but an attempt in merger control to achieve a broader policy objective may well have anti-competitive side effects.

On a practical and short-term level, MOFCOM could articulate such concerns more clearly in its decisions, to give guidance to other firms considering similar transactions in the future. As MOFCOM’s enforcement activities become further refined, we can hope for greater elucidation of the role that each of these factors play in MOFCOM’s analyses. In the long run, however, we suggest that competition policy be placed above any consideration of industrial policy because efficiency and competition are essential for long-run consumer welfare and economic development.

Finally, for a young anti-monopoly authority, effective enforcement of domestic competition laws also depends on cooperation with other mature enforcers. Coordination and cooperation are most prevalent in those cases in which remedies have been required by other mature regulators in addition to being required by MOFCOM. In these cases—particularly where a structural remedy such as divestiture is required—such cooperation tends to have a convergent effect. This can be seen, for example, in the Baxter/Gambro and UTC/Goodrich cases, in which MOFCOM’s structural remedies mirrored those required by other enforcers. However, this certainly is not always the case, as is perhaps best highlighted by the Western Digital/Hitachi decision, in which MOFCOM went beyond the structural divestiture required by the EU Commission and the US FTC to impose its own, unique hold separate remedy. In addition, such cooperation and coordination should not be taken to suggest that MOFCOM will not act independently of mature regulators. Its decision to impose remedies in high-profile cases unconditionally cleared by other authorities—such as Google/Motorola and Seagate/Samsung—demonstrate this clearly.

Nevertheless, it is clear that coordination can bring benefits to MOFCOM’s analysis. For example, in MOFCOM’s analysis in its conditional approval of Thermo Fisher/Life Technologies—one of the most complicated global transactions reviewed by MOFCOM to date—MOFCOM collaborated with antitrust agencies in a number of jurisdictions including the US FTC and the EU Commission. As a result, MOFCOM’s decision reveals a highly structured competition analysis and sophisticated use of antitrust economic tools. It may provide an example of how antitrust enforcement can be significantly improved when one jurisdiction borrows successful techniques from advanced jurisdictions. However,
for MOFCOM to cooperate most effectively with other enforcement agencies, the merging parties must provide waivers to the other authorities specifically allowing sharing of confidential information with MOFCOM. Such waivers are not uncommon to allow sharing, for example, between the US agencies and the EU Commission. Unfortunately, despite the strict statutory confidentiality protections put into place by the AML, merging parties still appear to have practical concerns regarding the preservation of confidentiality with other, less mature regulators. As international confidence in MOFCOM’s analysis and procedures grows, merging parties may grow more comfortable with providing waivers that would allow more in-depth cooperation.
Must-have content
Media & Sports
*Brazil’s experience*

Ana Paula Martinez
Fordham, September 2017

**Soccer as Must-Have Content in Brazil**

Brazilian Consumer's Preferences

- Soccer: 49%
- Volleyball: 1%
- Swimming: 1.70%
- Athletics: 1.80%
- MMA: 1.80%
- Basketball: 4.40%
- Tennis: 9.40%
- Others: 31%

Source: Paraná Pesquisas, 2017
Soccer Broadcasting Rights

- “Pelé Law” originally established that broadcasting rights belonged to leagues, and 20% of the collected amount should go to athletes.
- 2011 amendment: 5% (not 20%) should go to the athletes union, which would then distribute to athletes.
- In 1987, the 13 most important soccer teams in Brazil formed the “League of the Thirteen”, launching a Brazilian championship and jointly negotiating broadcasting rights.
- Broadcasting rights negotiated every 3 years.
- Broadcasting rights held simultaneously by home and visiting teams, and not only by the home team.

Key Figures (Brazil, 2016/2017)

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<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Brazilian population</td>
<td>206 million</td>
</tr>
<tr>
<td>Free-to-air penetration</td>
<td>97%</td>
</tr>
<tr>
<td>Pay-TV subscribers</td>
<td>18.6 million (31% penetration)</td>
</tr>
<tr>
<td>Number of smartphones</td>
<td>208 million</td>
</tr>
<tr>
<td>(total number of mobile devices: 242 million)</td>
<td></td>
</tr>
<tr>
<td>Landline internet</td>
<td>27 million households</td>
</tr>
<tr>
<td>YouTube viewers in Brazil</td>
<td>82 million</td>
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Source: ANATEL, IBGE, FGV-SP and YouTube
League of the 13 case

- 1997 complaint filed against (i) League of the 13, for alleged cartel practices for jointly negotiating broadcasting rights, and (ii) TV services providers, for exclusionary practices
- Main concern was about the acquisition of broadcasting rights of the main soccer matches/teams by the dominant media group in Brazil, Globo, which had preference to acquire such rights
- 2 settlements executed in 2010:
  - CADE and the League of the 13: no cartel violation. Obligations (i) organize separate bids considering free-to-air TV, pay TV, pay per view, mobile, and Internet platforms; (ii) not include English clauses in its contracts
  - CADE and Globo. Obligations: not include English clauses/right of first refusal in its contracts with football teams/leagues

League of the 13 case

- League of the 13 “imploded” in 2012, in the middle of the negotiation of broadcasting rights for the 2012-2015 seasons
- Teams started to negotiate individually or in smaller groups, which is tricky in Brazil (rights are held both by home and visiting teams)
- Bilateral negotiations between Globo and Brazilian teams outside the framework of the League of the 13 circumvented, in practice, the 2010 CADE Settlement
New complaint (2014)

- In 2014, Brazil Public Prosecutors’ Office filed a complaint before CADE urging the agency to intervene in how broadcasting rights were negotiated, claiming that collective negotiations are needed to ensure competition
- Prosecutors also claimed that big teams are abusing their power in the market, in detriment of the smaller teams
- Case dismissed due to the 2010 settlements

Preliminary Investigation (2016)

- In 2016, CADE launched a preliminary investigation over the negotiation of soccer broadcasting contracts executed by Globo and Esporte Interativo (pay-per-view) and the soccer teams, effective till 2019
- CADE issued RFIs to stakeholders/competitors asking for measures to increase competition in and for the market
- Investigation is still pending
Brazil’s Soccer Confederation CBF (2017)

- Historically, Globo was the one broadcasting matches of the Brazilian national team (free-to-air TV)
- Different models tested recently:
  - Matches broadcasted by state-run channel TV Brasil, + telecom provider Vivo broadcasted on mobile phones + Itaú bank aired matches on its website and social media platforms
- CBF has just launched a tender for broadcasting rights for the 2017 - 2022 friendly matches and World Cup qualifiers

Legislative Discussions
Legislative Discussions

- 2015 bill to amend the Pele Law:
  - Broadcasting rights negotiation for regional and national championships should be collective
  - Contracts should not have English clauses/right of first refusal
  - At least two packages have to be offered, one for free-to-air TV and the other one for pay-TV services, including pay-per-view

- 2017 study commissioned by Congress on negotiation of broadcasting rights by soccer teams
Background Slides

Regulatory Framework

- Law 4,117/1962: creates the Telecommunications Code, regulates radio and free-to-air TV broadcasting
- Law 12,485/2011: regulates Pay-TV Services’ creation, programming, packaging and distribution (telecom service under ANATEL)
- ANCINE (Film & TV Agency/Min. Culture): regulates and oversees movie and audio-visual content
- Min. of Science, Technology, Innovation and Communications: sets broadcasting policies and grants radio and TV license rights
Content Regulation

- Content broadcasting is a service of national interest
- At least 5% of daily programming must be devoted to news services and 5 hours/week must be educational programs
- Advertising is capped at 25% of the daily programming
- Pay-TV providers should offer a basic package of channels available to all subscribers
- Minimum Brazilian content and minimum content produced by Brazilian independent producers to be included during peak viewing hours
- VOD and Internet-delivered services (OTT) remain unregulated

Antitrust framework

- Dominant position is presumed when “a company or group of companies” controls 20% of a relevant market
- The law prohibits acts "that have as object or effect" to (i) Limit free competition; (ii) Control a relevant market; (iii) Increase profits on a discretionary basis
- Over 100 abuse of dominance investigations in Brazil, the majority of which involves exclusive dealings
- Fines of up to 20% of the company’s pre-tax turnover in the economic sector affected by the conduct in the year prior to the beginning of the investigation
- Behavioral remedies also available
Sport TV case (CADE, 2006)

- Television programming provider Globosat had exclusive arrangements with key sports events, the most significant of which were football championships. Some of the exclusive arrangements dated from 1991.
- Globosat is affiliated with Globo Group, the largest media group in Brazil, which provides free-to-air and pay-TV services (SKY and Net).
- CADE found that the arrangements harmed competition in the market for sports network broadcasting (the upstream market) and in the provision of retail satellite television (the downstream market).
- Globosat was required to relinquish its exclusive rights to some of the events, including the football championships, for a period of three years and to end its exclusive arrangements with Sport TV, SportTV2 and Premiere Sports, key sports channels in Brazil, offering under non-discriminatory conditions, the channels to Globo Group’s competitors.
Overview

- Must-Have Content in Canada: Hockey and Vertical Integration
- Canadian Regulatory Regime
- Antitrust Cases and Regulatory Interventions
- Areas for Future Observation
Hockey Broadcasting in Canada and Vertical Integration

- BCE
- Rogers
- TSN
- SportsNET
- FibeTV
- Rogers 4K TV
- MLSE
- Montreal Canadiens
- Toronto Maple Leafs

Minority Interest: 37.5%
Canadian Regulation

- Canadian Radio-television and Telecommunications Commission ("CRTC")

- Regulatory framework relating to vertical integration ("VI Code")
  - Standstill rule
  - Final offer arbitration
  - No "head-start" rule
  - Exemption of "new media" from exclusivity rules

Rogers / NHL

- 12-year, $5.2 billion exclusive agreement

- Antitrust Analysis
  - Foreclosure and raising rivals’ costs
  - Enhanced market power in advertising markets

- Key Findings
  - VI Code can be an effective mechanism
  - Alternative sports channels can compete effectively absent national NHL rights
  - Alternative ways for advertisers to reach hockey audience
BCE / Rogers / MLSE

- In 2012, BCE and Rogers purchased 75% interest in MLSE

- Antitrust Analysis
  - Foreclosure and raising rivals’ costs
  - Prevention of entry

- Key findings
  - VI Code limited ability to raise costs and foreclose
  - No evidence of a substantial impact on competition in market for content
  - Insufficient evidence to conclude there was a poised entrant

Regulatory Interventions by the Competition Bureau

- Bureau Mandate and Advocacy

- CRTC’s 2014 / 2015 “Let’s Talk TV” review
  - Dramatic changes in viewing habits
  - Bureau advocated in favour of VI Code
  - CRTC 2015 decision and regulatory changes
Conclusion

• Scope for antitrust intervention must be informed by the highly regulated nature of the industry

• Vigilance will be required in monitoring this rapidly-evolving space
  • Emergence of technology firms and distribution platforms
  • Leverage through ownership of content creators
What is eCommerce?
Old and new business models are converging.

- Webster says e-commerce is the “buying and selling of goods and services over the Internet.”
- eCommerce is old commerce plus more software, data & new biz models
- Convergence: Walmart sells online & Amazon has stores; taxis use mobile apps

What is Ridesharing?

- Ridesharing (TNC) per Google: “passenger travels in a private vehicle driven by its owner, for free or for a fee, especially as arranged by means of a website or app.”
- Peer-to-peer (P2P) rides including carpool, but
- Livery: NYC v. NYS on legacy regulations on taxi, limo, etc.
Taxi, TNC & Private Cars are all ways to get from A to B in a city

- Street hailing or using an app, can both get you a ride quickly
- Cost, speed, convenience vary over time & location
- Car ownership has big fixed costs, but low per trip costs, comparable to TNCs
- Inconvenience and cost of driving, traffic and parking factor into choice of car, taxi or TNC rides

FOR MANY YEARS TAXI SUPPLY DID NOT MEET DEMAND AT PEAK TIMES
Supply/Demand Imbalance
Off Peak & During Peak Drive Times

Daily Flux in Demand for Rides

Fixed Taxi Supply & Fixed Prices = Supply/Demand Imbalance

Idle drivers
Excess traffic

Demand not served

1,800 SF taxis
2,300 LA taxis
13,587 NYC yellow cabs

Daily ride demand
Taxi Supply
Unreliable taxi service helped motivate widespread car ownership (2.3 cars per US HH)

Car Ownership & Usage Stats

- Today’s cars are parked 95% of the time
- Big capital cost & inefficiency
- Traffic & parking congestion problems
- Ride-sharing changes that by competing not only with Taxi, but far more with private car usage
- In 2015 taxi + ridesharing = 4% of global miles traveled, but by 2030 Morgan Stanley estimates that at 26% =
- Rapid Growth in Ridesharing

Many ridesharing & taxi apps around the world
Why are they growing so fast? Efficiency & Low Cost
TNCs match Supply & Demand via Flexible Supply, Part-time Drivers & no Supply Caps

Car owners are substituting TNC trips for personal car trips

- "On a typical weekday, TNCs make over 170,000 vehicle trips within San Francisco, which is approximately 12 times the number of taxi trips, and 15% of all intra-San Francisco vehicle trips." SFMTA report June 2017, p. 1.

- 9% of US consumers who sold a personal vehicle chose not to replace it and rely on TNC trips instead

- Parking usage is declining:
  - San Francisco city garage occupancy down 30% since 2007
  - Parking demand is down in new condo buildings
How do people get around San Francisco?
TNCs grew from 0 to 9% of trips in 7 years

From where did the big TNC trip growth come?

Austin, Texas Natural Experiment:
Lyft & Uber Stop Service May 2016 to May 2017
How did Riders Respond?

University of Michigan Economic Study:
42% use 7 other TNCs
45% use private cars

Figure 1: Mode Used Most Often—Post Suspension
Strong growth of TNC & small decline in Taxi trips at LAX shows that TNCs compete with Taxis, but mostly substitute for private car trips.


Car Makers & Big Tech Invest in Ridesharing & AVs
Conclusions

• Technology & eCommerce are creating huge efficiencies and benefits for urban mobility:
  – Reliable service in all over metro areas even at rush hour, low wait times & low/flexible prices
• Old and new local transport models are converging as the mobile web, GPS and data analysis modernize business models & regulation
• TNCs are taking share from private car usage & car makers are responding with mobility solutions

THANK YOU!
E-Commerce & Competition in LatAm Challenges Ahead

Pablo Trevisán
Commissioner
Comisión Nacional de Defensa de la Competencia (CNDC)
Argentina

Fordham Antitrust Conference
FORDHAM UNIVERSITY
New York, 14-15 September 2017
• Restructuring CNDC
• Drafting New Competition Bill
• Comeback to the International Arena
• Improving Performance Indicators

...cases, cases, cases.
Increased Average Productivity
Since 2016

Average 2007-2015: 75

Stock Evolution
December 2015 – August 2017
Reestructuring the CNDC

More information: http://www.produccion.gob.ar/comisiones/cndc

E-Commerce & Competition in LatAm
Growth and Regional Impact
E-Commerce in Latin America
Growth and Regional Impact*

E-Commerce Sales Volume Growth in Argentina in 2016
51%

E-Commerce Sales Volume in 2016
$102.700 millions

Of Total Sales Paid by Credit Card
88%

Digital B2C buyers in Latin America 2014-2017, in millions as % of internet users

E-Commerce in Latin America
Expected Growth of E-Commerce (in Billions of US$)*

Argentina: home to the majority of Latin America's tech unicorns
A global mindset among its entrepreneurs has made Argentina
a thriving tech startup hub.

*eMarketer 2016, here
E-Commerce in Latin America

Latin America UNICORNS: the Argentine Effect

Globant develops software for big. Its exclusive focus on emerging technologies, as opposed to traditional IT companies, has driven rapid growth and earned the company a reputation as one of Latin America's most innovative businesses.

OLX is one of the world's leading online classifieds companies. Like its Craigslist inspiration, OLX — the initials stem from "online exchange" — connects people buying and selling second-hand goods, as well as job- and home-hunters.

The Latin America's largest online travel agent and the fifth-largest in the world, operating throughout the region, as well as the US and Spain. Its biggest market is Brazil, where it has an important subsidiary.

Credit Cards & Other Electronic Means of Payment

The Argentine Case
Credit Cards & Other Electronic Means of Payment

The Argentine Case: HIGHLIGHTS

Relevant Markets

- Issuance;
- Acquiring;
- Terminals/Interfaces for Electronic Payments.

Issues

- Lack of competition in consumption financing.
- Lack of transparency: undercovered financing costs.
- Competition Restrictions with other means of consumption financing.
- Higher fees (3% and 1.5%)
  - International benchmarking.
- Technological delay: especially on the introduction of alternative means of payment.

Credit Cards & Other Electronic Means of Payment

The Argentine Case: CAUSES

PRISMA has dominant position in the electronic payment market

- Dominant position in different segments:
  - Payments and ATM networks (Banelco)
  - Online payment (Pagomiscuentas)
  - Interface for electronic payments provision (Lapos, SPS Decidir)

PRISMA is considered monopolistic in the acquiring and processing markets (Visa concentrates 58% of the total amount of electronic transactions volume)

Vertical integration with main Banks (private and public)

Entry barriers to new players

- Low acquiring margin.
Credit Cards & Other Electronic Means of Payment
The Argentine Case: RECOMMENDATIONS

To the Central Bank of the Argentine Republic (BCRA)

To review the electronic means of payment legal framework towards the promotion of a more competitive market, particularly to promote: (i) new entrance to the acquiring market; (ii) multi-brand acquiring; (iii) mechanisms to reduce entry barriers in alternative means of payment, etc.

To the SeCom

To open an investigation over PRISMA and its owners for alleged anti-competitive conducts under the terms of Act 25,156.

To both BCRA and SeCom

To propose modifications to the Credit Cards Act in order to enable acquirers to differentiate prices; to empower the BCRA to regulate the interchange fee following international best practices and to establish mechanism to guarantee financial cost transparency in credit card transactions.

BCRA Communications: “A6212”, “A6043”, “A6269” and “A6285”
Other E-Commerce Cases in Argentina
Bigbox, Cabify & Mercadolibre

Other cases in Argentina (1): BigBox case

The case:

**BIGBOX** is a company that acts in the market of “experiential gifts”: the consumer gives away a previously bought “coupon”, in order to exchange it for any of the experiences included in a predetermined catalogue.

**VALIJA CHICA**, a firm that acts in the same market, claims that BIGBOX is abusing his market power by celebrating exclusive agreements with the experiences providers.

**CNDC preliminary* conclusions:**

- BIGBOX lacks sufficient power to eliminate a competitor;
- There is a vast number of providers that could be offered through this modality;
- The exclusive contracts are time-limited;
- Entry barriers in this market are low.

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*NOTE: The CNDC has raised his opinion number 65 (August, 17) to the Secretary of Commerce for its final resolution
Other Cases in Argentina (2): MercadoLibre and Cabify

Mercado Libre:
- Complaint against MERCADOLIBRE claiming that they changed the terms of use of its website to exclusively pay all sell items with MERCADOPAGO (with no option to select other mean of payment)
- Claimant alleged that MERCADOLIBRE incurred in exclusionary practices, bundling and tying services.

Cabify:
- Complaint against CABIFY for predatory pricing.
- Claimant stated that the average price per km is 68% lower than the price charged by the members of claimant’s association.
- They also mentioned that the company is allegedly subsidizing their drivers to build a large fleet.

Other Relevant Cases in Latin America
Brazil, Uruguay, Chile & Mexico
Other Relevant Cases in Latin America: Brazil

**Buscapé vs. Google**
- Buscapé is a Brazilian price comparison platform launched in 2011. The company together with Bondfaro and Microsoft, sued Google for using its dominance in Internet searches to favor its Google Shopping engine.
- They alleged that Google in Brazil is abusing its dominant position by incurring in discrimination and favoritism to Google Shopping in detriment of other competing price comparison websites.
- The case is still being analyzed.

**Cease and Desist Agreements in Credit and Debit Card Market**
- ABRANET a Brazilian Internet Association, alleged practices of abuse of dominant position in the market of facilitation and monitoring of commercial transactions through the Internet apparently committed by REDECARD a Brazilian multibrand acquirer.
- Facilitators are agents that offer consumers to perform electronic transactions without informing their financial data, and allowing online shops to receive the payments without accreditation to different credit card companies.
- Through the TCC the company commits to refrain from incurring in any conduct that might harm free competition. Also, will have to pay BRL 7.45 million as a pecuniary contribution (2014).

---

**Other Relevant Cases in Latin America: Brazil**

**TCC in Credit and Debit Card Market: Round two - 2017**
- Put an end to the exclusivity between Hipercard (payment Brand) and Rede (the accreditor) both part of the same economic group.
- Hipercard will have to allow Rede’s competitors to operate their credit and debit card transactions through its payment Brand.
- REDE must allow other accrediting brands to use his Pinpad equipments – machines
- CADE’s General Superintendence is investigating Cielo, Bradesco, Banco do Brasil, Elo, Alelo, Amex and Ticket due to similar practices.
### Other Relevant Cases in Latin America: Uruguay

#### CPATU VS UBER (Res. 93/016) - 2016
- The Car Owners Centre with Taximeter of Uruguay (CPATU) filed a complaint against Uber Uruguay for the alleged commission of anticompetitive practices, in the private passenger transport market (in Montevideo).
- The Commission dismissed the case but stated that there is an asymmetry in the providers market. There is a coexistence of taximeter services with entry barrier of licenses and maximum price fixation by the regulator and the Uber service with no entry barriers and with market-base prices.
- The Commission set a non-binding recommendation: design a regulatory framework to foster competition, with a leveled playing field, reducing barriers of entry to new entrants.

#### Apps to request Taximeter Service’s investigation (Res. 49/015) – 2015
- Aimed to analyze if there were any anticompetitive restrictions on the usage of apps to enable users to request for taximeter services.
- CPATU would allegedly hindered the usage of an app to request a taxi service online that it did not own, applying sanctions even to their own employees that used that service.
- Fines CPATU and orders the immediate termination of that behaviors, allowing the free usage of any chosen mean of taxi service request.

### Other Relevant Cases in Latin America: Chile

#### TRANSBANK and Credit Cards Market’ Recommendations - 2017

**FNE - Proposal of modification to Debit and Credit Cards market**
- Transbank is a Turnover Support Company (SAG), which is controlled by the main banks in Chile.
- It is necessary to promote structural changes in the industry of means of payment in Chile to open the market and to end the monopoly of Transbank.
- It is necessary to change how Transbank gets its revenues, replacing the current “Self-Regulation Plan”, by independently setting an explicit exchange rate and fixing processing and purchasing fee commissions according to their economic cost.
- These measures will help to end Transbank’s ability to carry out monopolistic discrimination and help to encourage new incoming firms.
Other Relevant Cases in Latin America: Chile

TRANSBANK and Credit Cards Market’ Recommendations - 2017

TDLC – Proposal of modification to Debit and Credit Cards Act
- Modify the rules on Banking Turnover Support Societies (SAGB), allowing them to provide services to third parties to reduce barriers to entry;
- Forbid the joint action of the issuing banks in the acquisition, to generate new acquirers with viable scale to compete;
- To regulate the joint action of issuers in acquiring processing to generate acquirers independent of issuers;
- Eliminate the dependence of the acquirers on the issuers and the unilateral imposition of non-discrimination rule by means of payment;
- Regulate the conditions of interconnection between network providers and acquiring service providers to avoid blocking incomers;
- Establish interchange fees between acquirers and issuers
- Regulate the conditions under which international brands deliver their licenses

Other Relevant Cases in Latin America: Mexico

Passenger Transportation Services (PTS): COFECE’s opinion - 2015

- PTS provided through mobile platforms is a new product on the market and a result of technological advancements and the innovation process
- PTS contribute to social welfare.
- COFECE recommends formal recognition of these services as a new category for transportation.
- "The corresponding legal framework should be limited to guarding primary public objectives regarding passengers’ protection and not to the imposition of unjustified restrictions to competition and free market access."
- The Commission also suggests that, as long as there are no modifications to the legal framework, any interpretation might be resolved in favor of the public interest.
E-Commerce & Antitrust in Latin America
Regulatory Challenges & Competition

Future Regulatory Challenges & Competition

- May efficiencies and network effects decrease competition?
- Might e-commerce marketplaces facilitate collusion and the exercise of buyer power?
- Are traditional antitrust tools sufficient to address competition issues online?
- Can antitrust agencies act in a preventive way, by ordering measures to suspend practices that could potentially harm free competition?

http://www.oecd.org/development/electroniccommerce.htm
Thank you

Pablo Trevisán
Commissioner
Comisión Nacional de Defensa de la Competencia (CNDC)
ARGENTINA

Fordham Antitrust Conference
FORDHAM UNIVERSITY
New York, 14-15 September 2017
Introduction

- The web has quickly become a powerful channel for the distribution of goods and services, leading to significant changes in distributors' strategies, depending on whether they saw the Internet as an opportunity or a threat to their existing sales networks.

- As suppliers of sophisticated goods have relied on selective distribution as the cornerstone of their supply policies, it has been argued that Internet sales have "shaken selective distribution out of its comfort zone" (S. Wartinger).

- In particular, suppliers fear that using third-party platforms, like Amazon or eBay, might have a negative impact on the product's image or on their quality, because the customers cannot benefit from a special shopping experience, intensive customer service and care, and the aura of exclusivity.

- In Europe, some suppliers reacted by introducing an outright ban on sales via the Internet, while other suppliers introduced an absolute ban on members of a selective distribution system making use of third-party platforms.
The general ban of internet sales is illicit... what about the clauses which ban sales via third-party platforms?

- The illegality of a general ban on sales via the internet is unquestionable, especially after the ruling of the ECJ in the Pierre Fabre Dermo-Cosmétique case (2011) but that judgment was confined to the specific facts of the case, involving an absolute ban on Internet sales.

So, the contractual clauses which ban sales via third-party platforms remain controversial.

These contractual clauses have determined the opposition of some distributors and third-party undertakings, fuelling a debate as to whether an absolute ban on the use of a third-party platforms constitutes an illicit restriction of competition and, if so, whether such a restriction can be exempted.

- The debate also regards the preliminary question as to whether a selective distribution system relating to prestige, luxury, high quality, highly technical or sophisticated products is compatible with art. 101 (1) TFUE.

The EU legal framework

- In Europe, the legal framework used to assess the lawfulness both of a selective distribution system and a ban of making use of third-party platforms, is based on:
  a) art. 101 TFUE;
  b) Vertical Restraint Block Exemption Regulation (Regulation n. 330/2010 “VRBER”);
  c) the Guidelines on vertical restraint, published by the Commission in conjunction with the adoption of the Regulation, which are not legally binding.

- In the case where a restrictive measure cannot be excluded from the scope of art. 101 TFEU, it will still be necessary to determine whether the measure is among those which may be exempted, under the applicable Block Exemption Regulation (VRBER).

- Provided that certain thresholds relating to the market share held by both the suppliers and its distributors are satisfied, the benefit of exemption is granted.

- The Regulation also indicates the measures which cannot benefit at the outset from an exemption. The measures in question are those which include “hardcore restrictions”, referred to in art. 4 of that Regulation.
Focus on selective distribution

- Using selective distribution may be a way to increase competition on parameters other than price (brand image and quality of pre- and after sale services)

- In general, VBER approach is that block exemptions unless hardcore restrictions are present

- No need for revision of general approach to selective distribution agreements in VBER, but
  - hardcore restrictions not permissible
  - certain clauses may harm competition in specific cases (e.g. brick-and-mortar requirement).

The ban on the use of third party platforms as an hardcore restriction

- Some scholars have argued that an absolute ban on the use of third party platforms, within a selective distribution system, is a restriction of competition by object that violates art. 101 TFUE and a hardcore restriction pursuant to art. 4 (c) VRBER (L. Solek and S. Wartinger; A. Ezrachi).

- This provision requires that the members of selective distribution systems operating at retail level are not restricted in their active or passive sales to end-users. An absolute ban prevents the distributor from selling its products via the third party platform, and hence from passively selling its products to customers who wish to purchase the products from such a platform and are located outside the physical trading area of the distributor. These customers may be regarded as a separate customer group, different from customers that purchase products via other distribution channels.

- To argue the illegality of the restriction in question, art. 4 (b) is also invoked, which qualifies as a hardcore restriction of every measure which has as its object the restriction of the territory into which, or the customer to whom, the distributor may sell.
The german case: in particular the “ASICS” decision

• Such interpretation influenced the decision adopted by several German Courts and the German Federal Cartel Office (Bundeskartellamt). The German Federal Cartel Office’s ASICS decision (26 August 2015) is especially relevant.

• The German Agency decided that the distribution system in question contained provisions that were restrictions by object. Among them, a restriction on the use of the ASICS brand names on third-party platforms in order to guide customers to the website of an authorized ASICS retailer, and a per se prohibition of supporting online price comparison engines.

• These restrictions were deemed to hinder access to sale channels that are of particular importance for end customers. In the view of the German Competition Agency, for many retailers a prohibition of sales via online marketplaces in a selective distribution system leads to a major restriction of their possibility of making online sales to end customers.

• Moreover, the prohibitions in question were considered hardcore restrictions within the meaning of art. 4 (c) of the VBER.

The “Coty” case

➢ So far, the EU Courts have not dealt with the case of restrictions of sales via third party platforms within selective distribution systems. Recently, a German Court has requested the ECJ for a preliminary ruling.

➢ Coty Germany is one of Germany’s leading suppliers of luxury cosmetics. It sells its products via a selective distribution system and justifies this system in the following terms: “the character of Coty Prestige’s brands requires selective distribution in order to support the luxury image of these brands”. Coty has introduced the prohibition on the use, by the distributors of those products, in a discernible way of non-authorised third-party undertakings for internet sales of the contract goods. When one of the distributors ignored the ban, Coty sued.

➢ The Higher Regional Court of Frankfurt asked the European Court of Justice:
  a) whether selective distribution systems that serve to protect the luxury image are permissible under EU competition law;
  b) whether manufactures may ban members of their selective distribution system from using third-party platforms in a discernible manner for online sales.
The opinion of the ECJ Advocate General Wahl

- European competition law does not see price competition as the only possible model → legitimate requirements – such as the maintenance of a distribution system capable of providing specific services as regards to high quality and high technology products - may justify a reduction of price competition in favor of competition relating to factors other than price.
- In this context, established case law of the ECJ has recognized the legality, from an antitrust law perspective, of selective distribution systems based on qualitative criteria.
- Since the Metro case (1977) the ECJ has emphasised that the nature and the intensity of competition may vary according to the nature of the goods and services in question and the economic structure of sectoral market concerned. These factors may justify the existence of differentiated distribution channels adapted to the characteristics of the various products.
- By its reasoning – in the view of Advocate General - “the Court has implicitly but necessarily acknowledged that a reduction of intra-brand competition might be accepted when it is essential to the stimulation of inter-brand competition”;

The “Metro criteria”

> Purely selective distribution systems are not caught by the prohibition in art. 101 (1) when three conditions are met (the Metro criteria):

1. First, it must be established that the properties of the product necessitate a selective distribution system, having regard to the nature of the products, and in particular their high quality or highly technical nature, in order to preserve their quality and to ensure that they are correctly used
2. Second, resellers must be chosen on the basis of objective criteria of qualitative nature which are determined uniformly for all potential resellers and applied in a non discriminatory manner.
3. Third, the criteria defined must not go beyond what is necessary;
Some parameters to consider in the assessment

- The Court has held that selective distribution systems based on qualitative criteria may be accepted in the high-quality consumer goods production sector, in order to maintain a specialist trade capable of supplying specific services for such products.

- In the view of the AG, “those properties may lie not only in the physical qualities of the product concerned (high-technology quality products, for example), but also in the luxury image of the products”;

- The head of a selective distribution network is generally free to organize that network, but the restrictions imposed on authorized distributors must satisfy the conditions above mentioned.

Conclusions of the AG

- The clause at issue in the Coty case is legitimate in the light of the qualitative objectives pursued and is proportionate: it may be justified by the need to preserve the luxury image of the products in question and it can serve to the objective of preserving and monitoring the quality criteria, which requires, in particular, that certain services be provided when the products are sold and also that the products sold be presented in a specific way.

- As the Commission has indicated in par.54 of its Guidelines, the supplier may require quality standards for the use of the Internet site to resell its goods, just as the supplier may require quality standards for a shop or for selling by catalogue or for advertising and promotion in general. On the contrary, in making use of third-party platforms the authorised distributors no longer have control over the presentation and image of the products.

- In addition, according to the opinion of AG Whal, the clause at issue is not a hardcore restriction in the light of art. 4 of VEBER. This provision should be seen in the context of the more general and fundamental objective of combating the phenomena of market foreclosure.
What comes next?

- With two conflicting approaches at hand, uncertainty and inconsistency remain.

- So in Europe we await the ECJ’s judgement in the Coty case, that could bring more clarity regarding rules on online sales.

- It will be interesting to see if the Court of Justice decides to follow the analysis of the AG, explicitly based on the importance of competition not solely based on prices or the legitimacy of a reduction in competition within the same brand (intra-brand competition) where it is indispensable to stimulate inter-brand competition.

Thanks for your attention!
E-Commerce and Vertical Restraints

Does economics matter? Yes, it does

EU Frame

European School

Vertical online restraints
The EU Legal Frame

Post-Lisbon, the social market economy concept is the new guiding principle in the application of EU competition law

2009 Lisbon Treaty on European Union (TEU)

| Article 2 TEU | “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and ...” |
| Article 3 TEU | 1. The Union’s aim is to promote peace, its values and the well-being of its peoples. 
2. ... 
3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and ... |

Equality and Social Fairness

The equality principle employs the social aspect of competition: fair play and fair distribution of wealth gains

Consensus world-wide

- Market system
  - is an effective instrument to meet the demand from consumers for goods and services
  - motivates profit-maximising companies to increase productivity, to expand, to innovate and to create jobs
- These exposed market forces are the generator of prosperity thereby creating wealth
- ‘Where no wealth is created in the first place, none can be re-distributed.’ (see Mario Monti, Competition in a Social Market economy, 2000)

Distribution of wealth: No consensus

- Liberalism: Focus on efficiency without equitable development
- Socialism: Equitable development without efficiency
- Social Market Economy: Efficiency with equal opportunities
Social Market Economy Concept

Is this concept a success story?

Yes: Since WWII, this concept is applied in Germany

- Balancing of consumer/citizen interests with the profit-oriented efficiency enhancing interests of companies
- Unification of the principle of freedom with equality and social fairness objectives
- Representation of a humanistic societal order by implementing producer and consumer preferences through a holistic conception based on the values of the EU

Frame for the European economy

The European model of a social market economy comprises of

- (1) a legal framework
- (2) a pre-defined economic order based on social constituents

Social Market Economy Concept & European School

<table>
<thead>
<tr>
<th>European School</th>
<th>Chicago School</th>
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<tbody>
<tr>
<td>Focus on the creation of wealth gains and the equal and fair re-distribution of these gains in society</td>
<td>Total welfare standard = consumer surplus + producer surplus</td>
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<tr>
<td></td>
<td>&quot;Chicago trap&quot;: increase in producer surplus is enough to clear a merger even if consumer prices increase</td>
</tr>
<tr>
<td>Utilities</td>
<td>„Richness“</td>
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### Contrasting the Schools of Thoughts

The most striking difference is in vertical restraints

<table>
<thead>
<tr>
<th>European School</th>
<th>Chicago School</th>
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<tbody>
<tr>
<td>- Companies with economic power need to behave in the same way as companies without economic power: focus on <strong>competition on the merits</strong> with special responsibilities (<strong>equality objective</strong>) see INTEL-ECJ</td>
<td><strong>’Big is beautiful’</strong></td>
</tr>
<tr>
<td>- Vertical agreements may create economic power to the detriment of consumers</td>
<td>- Vertical restraints are lawful since they do not harm competition at all</td>
</tr>
<tr>
<td>- Focus on <strong>consumer utilities</strong> with respect to price, choice, quality, innovation, et al. (holistic approach)</td>
<td>- moreover, they are even <strong>needed</strong> to increase innovation and service efforts</td>
</tr>
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<td></td>
<td>- Focus on <strong>price theory</strong></td>
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### Vertical Restraints & Chicago School

Because of double marginalisation, a chain of monopolies is worse* than one monopoly

In a vertically related industry with an upstream and a downstream monopolist in which each firm maintains the price-setting power of its product, the retail price is above the monopoly price set by a vertically integrated firm.

*Firms are worse off in terms of profits under Double Marginalization: 2 units x (€10 - €4) = €12

* Higher profits under Monopoly: 4 units x (€8 - €4) = €16

The economic logic is that despite negative anti-competitive effects, vertical integration is in theory more beneficial than a monopoly.
Online Vertical Restraints: Selective distribution cases

**European School:** No general monopoly theory assumptions but solid case-by-case analyses supported by consumer surveys

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**“Coty” case & European School considerations**

**Equality principle**
- Brick-and-mortar and online shops compete on equal footings
- Same qualitative selection criteria apply for a brick-and-mortar shop in a shopping mall and an online-shop on a platform (technology neutral)

**Different usage of on-line platforms in MS**
- 62% of German retailers use them (Poland: 36%, Italy 13%, Belgium 4%)
- mainly SMEs and strong on-line platform-branding in Germany

**Freedom principle**
- Restrictions by a brand owner below a 30%-market share possible (VABER)

**However, no application of VABER in case of hard-core restrictions**
- Cumulative effects of bans on online-platforms (many SMEs)
- Market partitioning based on different consumer preferences/habits

**Solution: Case-by-case analysis based on consumer surveys**
- Consumers finally decide whether the sale of a specific branded product on a specific on-line platform harms or enhances the brand image in question

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**Conclusions**

National authorities and courts apply the European School

- Because of the Chicago/European School “fight” within the Commission, the Commission is currently not in the driving seat
- Increasing policy guidance by national authorities on how to address online vertical restraints
- Increasing role of national courts
- Proper guidance by the European Court of Justice expected soon
- In general, courts in Europe apply the Social Market Economy Concept / European School of the Lisbon Treaty