



## POLICY ROUNDTABLES

# Definition of Transaction for the Purpose of Merger Control Review 2013

### Introduction

The OECD Competition Committee debated Definition of Transaction for the Purpose of Merger Control Review in June 2013. This document includes an executive summary of that debate and the documents from the meeting: an analytical note by the OECD staff and written submissions: Australia, Bulgaria, Canada, Colombia, the Czech Republic, Estonia, the European Union, Germany, Hungary, India, Indonesia, Italy, Japan, Korea, Mexico, Poland, Romania, the Russian Federation, the Slovak Republic, South Africa, Chinese Taipei, Turkey, Ukraine, the United Kingdom, the United States, BIAC and a summary of the discussion.

### Overview

This topic was suggested as a follow-up discussion to the Competition Committee Report to the OECD Council on the experiences of member countries under the 2005 OECD Recommendation on Merger Review.

The 2005 Recommendation provides that a merger regime's jurisdictional thresholds should be based on clear and objective criteria. It provides however no guidance as to the concept of a "merger transaction". Significant differences exist among jurisdictions in this regard. For example, in the case of share acquisitions, some jurisdictions use percentage thresholds to identify at what level the acquisition of shares in another corporation is a "merger transaction", some focus on the value of the transaction or size of the parties, and others apply an "acquisition of control/material influence" model.

Other areas discussed in the roundtable covered how different jurisdictions address in their merger systems the acquisitions of minority shareholdings, the acquisitions of physical and intellectual assets and business lines, and the creation of a joint venture or the acquisition of an existing one.

### Related Topics

- Country Experiences with the 2005 OECD Recommendation on Merger Review (2013)
- Remedies in Merger Cases (2011)
- Minority Shareholdings and Interlocking Directorates (2008)
- Dynamic Efficiencies in Merger Analysis (2007)
- Managing Complex Mergers (2007)
- Recommendation of the Council on Merger Review (2005)

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**DEFINITION OF TRANSACTION FOR THE PURPOSE OF MERGER CONTROL REVIEW**

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## **FOREWORD**

This document comprises proceedings in the original languages of a Roundtable on the Definition of Transaction for the Purpose of Merger Control Review held by the Competition Committee (Working Party No. 3 on Co-operation and Enforcement) in June 2013.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

## **PRÉFACE**

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la détermination des opérations de fusion aux fins de leur contrôle qui s'est tenue en juin 2013 dans le cadre du Comité de la Concurrence (Groupe de travail no 3 sur la coopération et l'application de la loi).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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## TABLE OF CONTENTS

FOREWORD.....	2
PRÉFACE .....	2
EXECUTIVE SUMMARY .....	5
BACKGROUND NOTE .....	11
CONTRIBUTIONS FROM DELEGATIONS	
Australia .....	37
Bulgaria ( <i>Version française</i> ) .....	47
Canada .....	49
Colombia .....	59
Czech Republic .....	65
Estonia .....	73
European Union.....	77
Germany .....	87
Hungary .....	95
India.....	105
Indonesia .....	111
Italy.....	115
Japan.....	125
Korea .....	129
Mexico.....	135
Poland.....	141
Romania .....	149
Russian Federation .....	153
Slovak Republic .....	157
South Africa .....	161
Chinese Taipei.....	169
Turkey .....	175
Ukraine .....	179
United Kingdom.....	187
United States .....	197
BIAC .....	203
 SUMMARY OF DISCUSSION .....	 215
 ***	
 SYNTHÈSE.....	 233
NOTE DE RÉFÉRENCE .....	239
COMPTE RENDU DE LA DISCUSSION .....	269



## EXECUTIVE SUMMARY

*By the Secretariat\**

Considering the Secretariat's background paper, the discussion at the roundtable, and the written submissions, several key points emerge:

- (1) *The definition of a merger transaction plays an important role in a well-functioning merger review regimes that seek to be effective, efficient, and transparent. While notification thresholds are used to identify transactions that have a sufficiently material nexus to a given jurisdiction, the definition of a merger transaction seeks to identify those transactions that are "suitable" for merger review, i.e., transactions that result in a more durable combination of previously independent assets and have a reasonable likelihood of outcomes that conflict with the policy goals of a competition law regime.*

Appropriate jurisdictional thresholds play a critical role in a well-functioning merger review regime that seeks to be effective, efficient, and transparent. There are two commonly used jurisdictional thresholds that determine whether any given transaction is subject to merger review and/or notification requirements: (1) notification thresholds, which most commonly refer to the size of the transaction or of the parties and seek to eliminate transactions that most likely have no material impact in a given jurisdiction; and (2) the definition of a merger transaction which seeks to identify transactions that are "suitable" for merger review. "Suitability" is related to the fact that merger review is a one-off review process to determine whether a more durable combination of previously independent assets is likely to materially change incentives as to how the assets are used in the competitive process, which in turn could lead to results that conflict with the policy goals of a competition law regime.

Jurisdictional thresholds must strike a balance between the desire to know of most transactions that are sufficiently material and may harm competition through more durable changes in the market place, and the need to keep the process manageable and predictable, and the cost reasonable for all sides involved. The need to balance these two, potentially conflicting goals in a cost/benefit framework is more commonly recognized with respect to the setting and the adjustment of notification thresholds. But the roundtable discussion confirmed that such a cost/benefit approach is useful also with respect to the definition of a merger transaction. Several roundtable participants explained how they considered the benefits as well as the costs of changes to their definition of a merger transaction when considering whether to narrow or to widen the applicable definition.

A cost/benefit analysis depends not only on the applicable notification thresholds and definition of a merger transaction, but also on a number of additional factors that vary from jurisdiction to jurisdiction, including on the mandatory nature of the notification, the criteria that are used to

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\* This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion at the roundtable, the delegates' written submissions, and the Secretariat's background paper.

determine notification obligations, the initial information requirements, the speed of review, the assumptions about the potential competitive harm of certain types of transactions, and the effectiveness of alternative competition law tools to review potentially anti-competitive transactions that fall outside the definition of a merger transaction.

The interdependence of these factors explains why there is no single solution for how to optimally balance the effectiveness, efficiency, and transparency goals of a merger review regime and why, despite the development of internationally recognized best practices for the merger review process, definitions of a merger transaction in various jurisdictions differ substantially.

- (2) *Definitions of what constitutes a “merger transaction” can be based either on “objective,” numerical criteria, or on more “economic” criteria that seek to align the definition of a merger transaction more closely with the changes in the relationship between parties that could lead to competition concerns. Each approach has its own advantages and shortcomings. Both approaches are commonly used in merger review regimes, and some merger review regimes use a combination of the two approaches.*

An objective approach to the definition of a “merger transaction” typically relies on percentage thresholds for share acquisitions, such as the acquisition of a 50% interest or of a 25% interest in the target. Objective criteria make the system more predictable and transparent. But as roundtable participants confirmed, they can invite parties to structure their transactions “around” the thresholds to avoid notification and review. At the same time, setting an objective threshold too low to make avoidance strategies more difficult could impose unnecessary costs on all sides involved, as it could capture too many transactions that are highly unlikely to have any adverse effects on competition.

“Economic” criteria are more directly aligned with the mechanism through which a transaction might harm competition, by focusing on whether a transaction will enable a firm to acquire the ability to exercise some form of influence over a previously independent firm. Different legal systems define different levels of intensity of influence, such as “decisive influence,” “significant influence,” “material influence,” or “competitively significant influence.” These definitions capture the reason for possible competitive concerns more directly than objective criteria and therefore “target” more effectively potentially problematic transactions. They also make it more difficult to game the system. At the same time, though, they require more case specific interpretation. They can therefore create uncertainty and make the process less transparent. Guidelines by competition authorities, informal guidance, and consistent decision making can to some extent address potential problems in this respect.

Some jurisdictions combine objective and economic criteria. The roundtable heard from jurisdictions that use lower percentage thresholds in their definitions of a merger transaction in combination with economic criteria that indicate a closer relationship between the two parties involved in the transaction. Some countries use objective criteria and economic criteria side-by-side so that, for example, acquisitions of a 25% interest or 50% interest in another firm; of “control” over another firm; of a significant competitive influence over another firm; and of all or substantial parts of the assets of another firm, are all considered merger transactions. Each of these thresholds can be independently applied to determine whether a transaction is considered a merger transaction.

- (3) *The growing recognition that minority shareholdings, and even purely passive minority shareholdings, may have anti-competitive effects in certain circumstances has triggered a discussion in several jurisdictions about whether their merger control regimes should be widened in order to reach minority shareholdings that confer less than outright control over the target firm. The key question for many jurisdictions is whether sufficiently clear lines can be drawn between those instances of minority shareholdings that more likely could lead to harmful effects, and those that most likely will not and therefore should stay outside the notion of a merger transaction in order to avoid unnecessary costs.*

It is well understood today that under certain conditions minority shareholdings may have anti-competitive effects. The holder of the minority interest may have the ability to influence the target to compete less aggressively, or it may decide to behave less competitively not to affect its financial interest in the target company. Even with a purely passive financial interest the holder may have a unilateral incentive to compete less aggressively as it benefits through its minority interest if the target faces less competition. In addition, the roundtable emphasized that in some cases the minority shareholding could make the target less attractive for alternative investors, thus substantially reducing the possibility that the target could become a more powerful competitor. These concerns raise important policy questions for a merger review regime, including whether the definition of a merger transaction should be widened to reach minority shareholdings that confer less than outright control over the target firm, and whether it should reach even completely passive minority shareholdings.

Different jurisdictions have approached this challenge in very different ways. One rather common approach among some member countries is the use of fixed percentage thresholds to define when the acquisition of a minority interest will be considered a merger. Another approach focuses on whether the holder of a minority interest can exercise a competitively significant influence over the target.

The roundtable demonstrated that questions about minority shareholdings generate the most discussion in merger review regimes that rely exclusively on the “acquisition of control” concept to define a merger transaction, which requires that a party acquires a “decisive influence” over the target. Minority shareholdings that do not confer decisive influence remain outside the scope of merger review. During the roundtable some jurisdictions discussed their concerns about this perceived “gap” as well as ongoing discussions about how to extend the scope of their definitions of a merger transaction so as to reach certain minority shareholdings through their merger review laws.

While many participants shared the view that merger review laws should be able to reach certain minority shareholdings that do not confer outright control, the roundtable also confirmed that there is no general consensus on this issue. Some expressed doubt that there was good evidence that minority shareholdings were sufficiently likely to have harmful effects. The roundtable also confirmed that currently very few jurisdictions reach purely passive minority shareholdings or shareholdings for investment purposes under their merger review laws. There is therefore no good empirical evidence whether this type of transactions regularly creates competitive concerns.



- (4) *Acquisitions of assets of a target company are a more “direct” way than share acquisitions to bring about durable, structural changes in the market place. These transactions may affect how assets are used in the competitive process, and therefore are generally considered merger transactions. Difficult questions can arise when the acquired assets represent less than the entire assets of a firm or of a line of business. In those cases, many merger review regimes require a determination of whether the acquired assets are sufficiently material to potentially have adverse competitive effects in order to determine whether the acquisition is considered a merger transaction.*

The roundtable discussion confirmed that most jurisdictions apply a flexible approach to the question of whether acquisitions of limited assets constitute a merger transaction and engage in a broader examination of all relevant circumstances to determine whether the acquired assets are substantial enough to bring about structural changes on the market.

Several jurisdictions require that the acquired assets must represent at least “part of an undertaking,” which means that there must be a transfer in control over assets with a market presence that generates clearly attributable revenues. Transfers of a customer list alone would not likely be considered a merger transaction under this approach.

Other jurisdictions adopt a wider approach and consider that the acquisition of any asset that plays an essential role in trading activities, attracts customers, or has an impact on the competitive process could be considered a merger transaction. Accordingly, roundtable participants discussed examples where the acquisition of a single trademark, a store that was not operative at the time of the transaction, a greenfield site for the construction of a supermarket, and a domain name could be considered a merger transaction. In all these cases, the focus is on whether the acquired asset is likely to impact the acquirer’s position in the market place. This inquiry into effects of the asset transfer on the purchaser’s competitive position might bring the jurisdictional question relatively close to a substantive assessment of competitive effects, although it will always remain much less detailed.

Acquisitions of assets will be considered a “merger transaction” only if they result in structural changes with a certain durability. Non-exclusive licenses of intellectual property rights, for example, would not be considered a merger transaction. It appears that most jurisdictions would at a minimum require a longer-term, exclusive license of an intellectual property right to consider the transaction a merger transaction.

- (5) *Many jurisdictions use their generally applicable rules for share and asset acquisitions to determine whether or not a joint venture is a “merger transaction,” and have no joint venture-specific jurisdictional rules. Joint ventures tend to raise more difficult jurisdictional questions in jurisdictions that rely on the acquisition of control/decisive influence standards in their definitions of a merger transaction. In these cases, there is a need to determine whether the parent companies can exercise the requisite level of “control” and, in most cases, whether the joint venture is a sufficiently independent market player.*

Many merger review regimes do not see a need to separately address joint venture formation. They apply the same jurisdictional test to all transactions. The formation of any joint ventures with some integration of assets will typically include acquisitions of shares or assets, or some assets that were previously independently owned will be used to form a new “enterprise” in which some or all of the parents can exercise control or have a material influence. This would be sufficient to bring the transaction under the generally applicable definition of a merger transaction. In these jurisdictions the definition of a merger transaction also makes no difference

between the formation of a joint venture and the acquisition of a minority interest. As the roundtable discussion confirmed, this approach casts the net rather wide and may reach a large number of joint ventures, but simplified notification and/or review procedures can be used to avoid unnecessary costs.

Other jurisdictions have joint venture-specific provisions in their definitions of a merger transaction. In particular jurisdictions following the European “control/significant influence” model find a need to specifically consider how joint ventures fit into the merger transaction definition. There is in general a requirement that at least two parents acquire “decisive influence” over the joint venture, and that the joint venture be “full function,” i.e., is must be acting on the market as an autonomous economic entity. Thus, a joint venture may involve the acquisition of shares or assets that results in a structural, durable change in the market, but in the absence of “decisive influence” by the joint venture parents, or in the absence of an autonomous entity that acts on the market place, there would be no merger transaction. The application of these two criteria to various joint venture situations can create difficult problems. The roundtable discussion confirmed that guidelines and consistent, transparent decision making practice are important in this area to make the jurisdictional decisions predictable for parties, even though this approach cannot entirely eliminate all difficulties that can come up in individual cases.

- (6) *While it is generally accepted that jurisdictional thresholds in merger review should use bright line tests and objective criteria, this idea appears to be more influential with respect to notification thresholds. With respect to the definition of a merger transaction, concerns about the ability to reach all or nearly all theoretically problematic types of transactions appear to have a greater influence than concerns about using bright line tests. Guidelines, informal guidance, and consistent and transparent decision making can ensure that the definition of what constitutes a merger transaction remains predictable in practice.*

The tension between using objective and transparent criteria and targeting potentially harmful transactions through more open-ended standards is frequently resolved in favor of using more flexible standards and fact-specific inquiries. For example, the roundtable discussed the use of the more flexible “material/significant influence” standards in deciding whether the acquisition of minority interests or the formation of joint ventures constitute a “merger transaction,” and the use of inquiries into whether an acquired asset is capable of affecting the purchaser’s competitive position when deciding whether an assets acquisition is a merger transaction. These more flexible standards appear to enable a competition authority to use some very preliminary assessment of likely competitive effects of a transaction to determine whether a transaction qualifies or should qualify as a merger transaction.

Throughout the roundtable participants confirmed that these more flexible standards can better target potentially problematic transactions but also create difficult questions in individual cases. Grey areas can exist where case-specific decisions must be made to determine whether a given transaction qualifies as a merger transaction. But participants also emphasized that guidelines, informal guidance, and consistent and transparent decision making practice are important tools to alleviate concerns that flexible standards and case-specific assessment could undermine the goal of greater transparency and predictability.



## BACKGROUND NOTE

### THE CONCEPT OF A MERGER TRANSACTION

*By the Secretariat\**

This paper examines how various jurisdictions define what transactions fall within the scope of their merger review laws (a "merger transaction")<sup>1</sup> and therefore can be subject to review. The determination that something is a merger transaction can mean different things in different merger review regimes, depending on whether notifications of merger transactions are mandatory or voluntary, and on whether - in merger review regimes with mandatory notification systems - jurisdiction to review and duty to notify are two separate concepts (so that certain reviewable merger transactions are not subject to mandatory notification and waiting periods) or are identical. But regardless of how a merger regime has organised the review process, common to all is the need to define in a first step which types of transaction they consider "suitable" for merger review.

A discussion of jurisdictional thresholds, including the definition of merger transaction, is a highly technical subject. But it is nevertheless important, as appropriate jurisdictional thresholds play a critical role in a well-functioning merger review regime that seeks to be effective, efficient, and transparent.<sup>2</sup> It is uncontroversial that a sound definition of a merger transaction should, in light of these goals, (i) target the "right" types of transactions, i.e., those that lead to structural, more durable changes in the market place and could ultimately jeopardise the policy goals of a competition law regime; (ii) avoid capturing too many transactions that typically pose no competition law risks or are more appropriately controlled by different instruments in a competition regime's tool box; and (iii) use as much as possible bright line tests based on objective, clear and transparent criteria to establish whether a transaction is subject to review.

But there are tensions between these goals, and there is no single solution for how to optimally balance them. This is so in particular because additional factors that are specific to each merger review regime will influence what the best solution might be, including notification thresholds, initial information requirements, speed of review, assumptions about the potential competitive harm of certain types of transactions, and the effectiveness of alternative enforcement instruments. It is therefore not surprising that, despite the development of internationally recognised best practices for the merger review process, different jurisdictions continue follow different approaches and that definitions of a merger transaction differ substantially. Changes to the definition of a "merger transaction," although they occur less frequently than changes to notification thresholds, are not uncommon, which underscores the importance, but also the complexity of the subject.

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\* This note was prepared for the Secretariat by Andreas Reindl (consultant to the OECD).

<sup>1</sup> This paper will use the term merger transaction as a neutral term to describe transactions that fall within the scope of the applicable merger review law, recognising that individual laws may use their own distinct terms, such as merger event, concentration, or merger.

<sup>2</sup> OECD, Recommendation on Merger Review, [C\(2005\)34](#), Article I(A)(1)(2); ICN, Recommended Practices for Merger Notification and Review Procedures, RP VI.A. Comment 1 ("Effectiveness, efficiency, transparency and predictability are fundamental attributes of a sound merger control regime"). On the topic of the definition of a merger transaction, *see also* ICN, Defining "Merger" Transactions for Purposes of Merger Review (2007).

All these differences and the trade-offs among the above principles matter little for transactions that lie at the core of merger review laws. For example, an outright acquisition of all shares of a previously independent target will invariably be considered a merger transaction. There would be not much difference if the acquiring firm obtains an 80% interest rather than 100% ownership of the target, or substantially all of the target's assets that are necessary to carry on the target's business. Merger review laws also would typically apply when two firms combine previously independent lines of business into a newly formed and jointly controlled entity that becomes a new market player.

But the more one moves from the core toward transactions at the "fringe," the more apparent the differences among various jurisdictions become. For example, when a firm acquires only a small interest in the target or more limited assets that in themselves do not represent a going business, or when two firms combine parts of their activities into some looser form of joint operation, different merger review regimes have made different policy decisions as to whether these transactions should represent a merger transaction.

This paper will discuss the concept of a merger transaction primarily by exploring how various merger review regimes apply the concept of a merger transaction to transactions on the "fringe" - where jurisdictions must make policy decisions about what types of transactions they want to control under their merger review systems - and how effectively they can target those transactions without compromising the efficiency and transparency goals of merger review. The discussion is organised around the main types of transactions that are typically relevant in merger review, share acquisitions, the acquisition of assets, and joint ventures. Each of these three areas raises a distinct set of questions. But it is common to all three areas that concerns about the ability to reach all or nearly all theoretically problematic types of transactions appear to have the greatest influence on the definition of a merger transaction. The idea that jurisdictional thresholds should use bright light tests and should be carefully targeted to avoid catching too many benign transactions appear to be less influential. Notification thresholds appear to be the more commonly used and more effective instrument to provide to greater objectivity and to better calibrate the reach of merger review laws.

## **1. Definition of a merger transaction – a functional approach**

The definition of a merger transaction and notification thresholds are the two commonly used jurisdictional thresholds that determine whether any given transaction is subject to merger review and/or notification requirements. Notification thresholds, which most commonly refer to the size of the transaction or of the parties, seek to eliminate transactions that most likely have no material impact in a given jurisdiction.<sup>3</sup> The definition of a merger transaction has a different function, as it seeks to identify transactions that are "suitable" for merger review. "Suitability" is related to the fact that merger review is a one-off review process to determine whether a more durable combination of previously independent assets likely will materially change incentives as to how to use the assets in the competitive process, which in turn could lead to results that conflict with the policy goals of a competition law regime. "Suitability" thus focuses on whether transactions lead to structural changes and whether there is a reasonable likelihood that they could interfere with competitive market outcomes. Less "suitable" for this type of review are in particular transactions that lead to minor structural changes that are highly unlikely to have anticompetitive

<sup>3</sup> For a more detailed discussion of notification thresholds, including its function of ensuring a sufficient nexus, *see, e.g.*, ICN Recommended Practices, Recommendation II; ICN, Setting Notification Thresholds for Merger Review (2008) ("ICN Notification Threshold Report"). For an overview of the impact on national merger review regimes, *see, e.g.*, OECD, Report on Experiences of Member Countries under the 2005 OECD Recommendation on Merger Review (OECD Merger Recommendation Report) (forthcoming 2013); Maria Coppola & Cynthia Lagdameo, Taking Stock and Taking Root: A Closer Look at Implementation of the ICN Recommended Practices for Merger Notification & Review Procedures, in: The International Competition Network at Ten 297 (Paul Lugard ed. 2011).

effects and where the costs associated with review therefore would not be justified, and more transitory arrangements where the parties' future individual decisions that cannot be reasonably foreseen at the time of review may have a greater impact on competition.<sup>4</sup>

Jurisdictional threshold criteria must strike a balance between the desire to know of most transactions that may harm competition through more durable changes in the market place, and the need to keep the process manageable and the cost reasonable for all sides involved. Setting or adjusting jurisdictional thresholds could be envisaged as a process along some marginal cost/benefit curves. The reach of a merger review regime should be extended only to that point where the cost of reviewing additional transactions would exceed the benefits of prohibiting or remedying the additional (rare) transaction that would cause competitive harm. Conversely, the scope of merger review should be reduced so long as the cost savings (benefits) from reviewing fewer notified transactions exceed the additional cost to society that result from the consummation of an anticompetitive merger that slips through the net.<sup>5</sup>

Using an analogy to the principles that govern the development of norms for substantive competition law analysis, this trade-off could also be described by focusing on cost minimisation. Accordingly, the goal of jurisdictional thresholds should be to minimise the sum of costs resulting from type I errors (notified transactions that raise no competition problems), type II errors (problematic transactions that escape merger review) and compliance and enforcement efforts (that may increase when uncertain or subjective criteria are used).<sup>6</sup>

This calculation is of course not an exact science as good data on benefits or costs are not available. Plus, notification thresholds and the definition of a merger transaction will have interdependent effects: A jurisdiction may employ a very wide definition of a merger transaction but use high notification thresholds and therefore limit the number of affected transactions; high notification thresholds could also reduce compliance and enforcement costs as there may be a substantial number of transactions where the qualification as merger transaction is uncertain, but the parties are not affected as the transaction falls below notification thresholds. The cost/benefits analysis also will depend on additional factors, including on whether notification is obligatory,<sup>7</sup> the initial information requirements, and the speed of review. Costs may also depend also on the effectiveness of alternative competition law tools to review potentially

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<sup>4</sup> Intra-group restructuring can also be excluded from merger review because it does not change incentives to use assets in the competitive process.

<sup>5</sup> Discussed in more detail in ICN, Notification Threshold Report, *supra* note 3, at 4, with references to Konkursverket, Tröskelvärden för koncentrationsprövningar – Bättre omsättningsgränser för anmälan av företagskoncentrationer 31-33 (2006), available at [http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/rap\\_2006-3.pdf](http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/rap_2006-3.pdf); English summary available at [http://www.kkv.se/upload/Filer/ENG/Publications/rap\\_2006-3\\_summary.pdf](http://www.kkv.se/upload/Filer/ENG/Publications/rap_2006-3_summary.pdf) For recent practical examples where a similar approach has been used, see OECD Merger Recommendation Report, *supra* note 3, at 11 (including examples of reforms in Brazil, Germany, and Italy).

<sup>6</sup> ICN Notification Threshold Report, *supra* note 3, at 4.

<sup>7</sup> In merger review regimes without mandatory notification requirements, the function of the definition of a merger transaction is essentially to limit the competition authority's discretion to select a transaction for review. In some jurisdictions that follow this approach, such as Australia or New Zealand, the definition of a merger transaction is so wide (in principle, capturing any acquisition of shares and assets) that it imposes no material limits on the competition authority's ability to reach any acquisition of shares or assets; more relevant limits exist, for example, in the UK merger regime. But this wide definition has little consequences for the regime's cost/benefit calculation because the vast majority of transactions that fall within the definition of a merger transaction will never be affected by merger review. In that sense, the definition of a merger transaction in regime without mandatory notification systems plays a slightly different role than in regimes where notification of a merger transaction is mandatory.

anticompetitive transactions that fall outside the definition of a merger transaction. If, for example, review of anticompetitive agreements is an effective way to address concerns that certain transactions may lead to more effective coordination between parties because they facilitate an exchange of information, the cost of a more limited definition of a merger transaction will be less and the case for expansion will be weaker.

Given the great variations in various cost/benefit factors, one cannot expect to identify the one “optimal” or “correct” definition of a merger transaction that would be applicable across jurisdictions. This is so because the definition of a merger transaction is only one in a number of criteria that determine the costs and benefits of any given solution. Nevertheless, the cost/benefit approach emphasises what goals should be taken into account when determining whether jurisdictional thresholds of a merger review regime function properly or should be revised; in particular it emphasises that the goal of an effective merger review regime should not be to chase after all sources of potential harm, but only after those where benefits of increased government activity likely exceed additional costs. It also highlights that decisions about extending the jurisdictional scope should not be based on an individual, highly publicised cases that lead to quick concerns about "enforcement gaps," but on a series of observations that provide a more reliable basis for assumptions of potential costs and benefits.<sup>8</sup> And it highlights that an approach to merger definition that works in one jurisdiction does not necessarily work equally well elsewhere from a cost/benefit perspective.

This approach also explains how new learning and a better understanding of the substantive risks associated with certain types of transactions can lead to pressures to change the definition of a merger transaction. If a consensus develops that certain transactions may potentially cause greater harm than previously perceived, the expected costs of leaving those transactions outside merger review would increase. Questions will arise whether real or perceived "enforcement gaps" need to be narrowed by expanding the scope of merger review. This connection between substantive concerns and the possible jurisdictional response by the merger review regime was correctly emphasised in the background paper for the previous roundtable of Working Party No. 3 on minority shareholdings.<sup>9</sup>

## **2. Different criteria used in the definition of a merger transaction**

There are essentially two types of criteria that are used in different jurisdictions to define what constitutes a "merger transaction:" "objective," numerical criteria, and more "economic" criteria that seek to align the definition of a merger transaction more closely with the changes in the relationship between parties that could lead to competition concerns. Combinations of the two can be used. And there are some jurisdictions that use a wide definition of a merger transaction that catches in principle any acquisition of shares or assets and is not narrowed down by the use of additional objective or economic criteria.

Percentage thresholds for share acquisition are an example for an "objective" approach. Examples from various jurisdictions include the acquisition of a 5%, 10%, 20%, 25%, 35%, or 50%<sup>10</sup> interest in a target firm. This list demonstrates that there is a wide range of thresholds that various merger review regimes consider relevant. But objective thresholds should not be picked arbitrarily, as they should serve as proxies for potential effects a given transactions might have on the relationship between the acquiror

<sup>8</sup> Generally, it may be easier to reduce the scope of a merger transaction if it is possible to identify a certain class of transaction that almost invariably do not raise any competitive concerns and/or are simply not appropriately reviewed under a merger review system. Finding empirical support for a widening of the scope of a merger review regime may be more challenging.

<sup>9</sup> OECD, *Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates*, DAF/COMP(2008).

<sup>10</sup> These examples are taken from the merger review regimes in Brazil, Canada, Germany, and Japan. All are discussed later in the text.

and the target. For example, acquiring a 50% interest means outright control over the target, an interest of 25% can suggest the existence of important, statutory minority shareholder rights that may confer influence over the target's commercial behaviour. Lower thresholds are typically linked to a minority stake in the target at which it is considered more likely that the holder may have other, sufficient means to influence the target's commercial behaviour.

In particular when percentage thresholds are established at the lower end of the scale, a combination with additional criteria that indicate a closer relationship between the two parties involved in the transaction might be preferable. The Japanese merger review regime illustrates this point well. In addition to a 50% interest threshold for share acquisitions it has two lower thresholds of a 10% or 20% interest in the target. But in each case a review will be triggered only if additional indicators suggest some influence over the target: in the case of a 20% interest, the holder must be the largest shareholder; in the case of a 10% interest, the holder must be among the three largest holders of voting rights and a number of other criteria must be taken into account that suggest some ability to influence the target.<sup>11</sup>

"Economic" criteria used in the definition of a merger transaction are more directly aligned with the mechanism through which a transaction might harm competition, by focusing on whether a transaction will enable a firm to acquire the ability to exercise some form of control over a previously independent firm. Different legal systems define different levels of intensity of control, such as "decisive influence," "significant influence," "material influence," or "competitively significant influence," although it is less clear than from an economic perspective these differences are particularly meaningful. These definitions capture the reason for possible competitive concerns more directly than percentage thresholds. Perhaps they also reflect a concern that fixed percentage thresholds might invite parties to game the system. At the same time, though, they require more interpretation and guidance as to factors that will be taken into account and can therefore create uncertainty. Examples include the EU's merger review regime that uses an acquisition of "control/decisive influence" standard<sup>12</sup>, which has also been adopted by many other merger review regimes in Europe and elsewhere, for example in China.<sup>13</sup> Also included in this group are the merger review regimes in the United Kingdom,<sup>14</sup> Germany,<sup>15</sup> and Canada<sup>16</sup> which use (in addition to other definitions of a merger transaction) less demanding "material influence," "competitively significant influence," or "significant influence" standards.

Guidelines issued in some jurisdictions that explain the concept of a merger transaction can help to make the applicable standard more predictable. But they can also illustrate the potential risks of the more open-ended "influence" standards. Both the Canadian and the UK Guidelines, for example, provide fairly long list of different relevant factors that might be relevant in the analysis of whether the requisite "influence" exist," emphasising that in the end the totality of circumstances will matter much more than the

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<sup>11</sup> Japan Fair Trade Commission, Guidelines to the Application of the Antimonopoly Act Concerning Review of Business Combinations (revised version, 2010), Parts I(1)(A) and I(1)(B).

<sup>12</sup> Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, O.J. L 2004/1 (2004) (EUMR), Article 3 (1) and (2).

<sup>13</sup> Anti-monopoly Law of the People's Republic of China, Article 203).

<sup>14</sup> Enterprise Act 2002, Section 26(3). It should be noted that the Enterprise Act provides for three levels of control. In addition to "material influence," control can also exist as de jure control (controlling interest) or de facto control (ability to control). This paper will focus on the material influence standard which is the most relevant one for comparative purposes.

<sup>15</sup> Gesetz gegen Wettbewerbsbeschränkungen (GWB).

<sup>16</sup> Competition Act, Section 91.



presence or absence of a single factor.<sup>17</sup> That is of course understandable from an enforcer's perspective, but the wide discretion of the competition authority to decide on a case-by-case basis whether it has (or wants) jurisdiction over a transaction may create some problems from the perspective of parties seeking greater clarity and predictability.

**Box 1. Using guidelines to make “influence-” based definitions of a merger transaction more predictable - The example of Canada**

Factors used by the Canadian Competition Bureau to determine whether a particular minority shareholding, an interest in a combination, agreement or other relationship or interest confers material influence:<sup>18</sup>

- voting rights attached to the acquirer’s shareholdings or interest in a combination;
- the status of the acquirer of partnership interests (e.g., general or limited partner) and the nature of the rights and powers attached to the partnership interest;
- the holders and distribution of the remaining shares or interests (whether the target business is widely or closely held, and whether the acquirer will be the largest shareholder);
- board composition<sup>4</sup> and board meeting quorum, attendance and historical voting patterns (whether the acquirer will be able to carry or block votes in a typical meeting);
- the existence of any special voting or veto rights attached to the acquirer’s shares or interests (e.g., the extent of shareholder approval rights for non-ordinary-course transactions);
- the terms of any shareholder or voting agreements;
- the dividend or profit share of the minority interest as compared to the acquirer’s equity ownership share;
- the extent, if any, of the acquirer’s influence over the selection of management or of members of key board committees;
- the status and expertise of the acquirer relative to that of other shareholders;
- the services (management, advisory or other) the acquirer is providing to the business, if any;
- the put, call or other liquidity rights, if any, that the acquirer has and may use to influence other shareholders or management;
- the access the acquirer has, if any, to confidential information about the business; and
- the practical extent to which the acquirer can otherwise impose pressure on the business’s decision-making processes.

It is generally the combination of factors – not the presence or absence of a single factor – that is determinative in the Bureau’s assessment of material influence.

<sup>17</sup> Competition Bureau, Merger Enforcement Guidelines (2011), Section 1.6; Office of Fair Trading and Competition Commission, Merger Assessment Guidelines (2010), Section 3.2.8-3.2.12, and more detailed, OFT, Mergers, Jurisdictional and Procedural Guidance (2009), Section 3.15-3.28. Given that the UK has a merger review regime without mandatory notification, the risks for parties associated with the use of less well defined "influence" standards are considerably less than in a mandatory notification regime.

<sup>18</sup> Competition Bureau, Guidelines, *supra* note 17, Section 1.6

Some jurisdictions use a series of different definitions to describe transactions that constitute merger transactions. A good example of such an approach is the German merger review law. According to Section 37 GWB, a merger transaction exists when a firm acquires a 25% interest or 50% interest in another firm; "control" over another firm; a significant competitive influence over another firm; or all or substantial parts of the assets of another firm. Each of these describes an alternative merger transaction scenario. This approach relies on two general concepts, "control" (which is identical to the EUMR's control/decisive influence concept) and "competitively significant influence" (which is less demanding), but adds some specific thresholds that should create greater clarity, in order to cover a broad range of various scenarios on how transactions may affect incentives to compete. As these are alternative definitions, a given transaction could be considered a merger transaction under two or more definitions. The qualification has no practical consequences because it does not affect the review process or substantive analysis of the transaction.

Canada could be considered another example of such an approach. It relies primarily on two statutory, general definitions of a "merger transaction," i.e., the acquisition of (de jure) control and of a "significant influence." But the Bureau also explains that it will presume that transactions that are notifiable according to Part IX of the Competition Act will also lead to the acquisition of a "significant interest" in a target: in the case of share acquisitions, the acquisition of a 20% (in a public corporation) or of a 35% interest (in a privately held corporation) will trigger a duty to notify (assuming the notification thresholds are met), and therefore would be presumed to lead to a significant influence.<sup>19</sup>

The U.S. merger review regime is an example of a jurisdiction that adopts yet another approach.<sup>20</sup> It relies on arguably one of the broadest definition of what constitutes a merger transaction. The language of Section 7 of the Clayton Act - "no person...shall acquire... the whole or any part of the stock or assets of another entity..." - can catch almost any acquisition of shares or assets,<sup>21</sup> and is in principle limited only by a statutory exemption for certain share acquisitions for investment purposes.<sup>22</sup> The above described cost/benefit calculation works here through other factors: The U.S. merger regime relies primarily on a set of "objective," numerical thresholds to significantly narrow down the group of merger transactions that are reportable, i.e., subject to mandatory notification requirements under the Hart Scott Rodino Act.<sup>23</sup> For the functioning of the merger review regime the HSR notification thresholds are of much greater significance, which explains why in descriptions of the U.S. merger review regime they typically receive much greater attention than the (wider) statutory definition of a merger transaction.

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<sup>19</sup> *Id.*, Section 1.7.

<sup>20</sup> Other jurisdictions follow a similar model with a very wide notion of share and asset acquisitions that fall within the definition of a merger transaction. Among them are Australia and New Zealand, two jurisdictions with a voluntary review system. As noted later, India follows a similar approach.

<sup>21</sup> 15 U.S.C. §18.

<sup>22</sup> Discussed (in conjunction with exemptions from notification requirements) *infra*, Section 3.1.

<sup>23</sup> Hart Scott Rodino Antitrust Improvements Act (HSR Act), 15 USC § 18a. Very limited initial information requirements further limit the cost of the merger review regime, despite its basic wide definition of a merger transaction. The costs/benefit calculation is affected also by the fact that the agencies can review and challenge an anticompetitive transaction that falls under the definition of a merger transaction but outside the notification requirements, thus limiting the potential costs of type II errors that can result from high notification thresholds.

### **3. Merger scenarios and selected "problem areas"**

#### **3.1 *Share acquisitions and minority shareholdings***

As noted earlier, outright acquisitions of a target in the form of share acquisitions raise very few questions with respect to jurisdictional thresholds. Whatever definition of a merger transaction jurisdictions use, all would consider the acquisition of all or a large percentage of shares a "merger transaction," either because it confers control over the target, because the acquired interest exceeds a numerical threshold, or share acquisitions in general are considered merger transactions.

The area that has lately received renewed attention is the application of merger review laws to acquisitions of minority interests that do not confer the same type of outright control over the target. Of course, many competition regimes around the world have recognised the potential competitive effects of minority shareholdings for quite some time and made such transactions subject to merger review. But the international competition world has seen a renewed interest in the topic, primarily concerning new insights into the substantive evaluation of potential competition law risks. The 2010 U.S. merger guideline include a new section on the evaluation of partial acquisitions.<sup>24</sup> In the same year, the OFT published a new report on minority shareholdings.<sup>25</sup> But there has also been renewed interest in the jurisdictional questions of merger review. Working Party No. 3 has discussed both aspects of this topic only a few years ago.<sup>26</sup>

The European *Ryanair/Air Lingus* saga has generated much public discussion of the topic as well.

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<sup>24</sup> U.S. Department of Justice and U.S. Federal Trade Commission, Horizontal Merger Guidelines (2010), Section 13.

<sup>25</sup> OFT, Minority Interests in Competitors, A Research Report prepared by DotEcon Ltd (2010).

<sup>26</sup> OECD, Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates, [DAF/COMP\(2008\)30](#) (OECD, Minority Shareholdings).

**Box 2. Ryanair/Aer Lingus – Limited v. extensive jurisdiction to review minority stakes in a rival**

Ryanair and Aer Lingus are two Irish airlines. Aer Lingus is the national flag carrier whose business fortunes have been waning although it remains a viable player in the airline market. Ryanair is Europe's largest low cost carrier, and has become one of Europe's largest airlines overall. They compete head-on on numerous routes.

In late 2006 Ryanair acquired a stake in Aer Lingus and mounted a public bid for the entire shareholding in Aer Lingus which was opposed by Aer Lingus. The European Commission prohibited the public bid in June 2007.<sup>27</sup> Aer Lingus sought a decision from the Commission ordering Ryanair to divest its minority shareholding. The Commission refused, reasoning that it did not have jurisdiction to do so: Ryanair had never implemented the acquisition of a "controlling" stake in Aer Lingus and therefore the Commission could not order it to divest all shares acquired as part of a consummated merger that was prohibited under the EUMR; the acquisition of a minority stake would have to be considered an independent transaction and as it did not confer "decisive influence" it did not fall under the EUMR jurisdiction.<sup>28</sup> Both parties appealed. In July 2010, the General Court upheld both aspects of the decision. It confirmed that the European Commission does not have the ability to examine or require divestment of the minority stake.<sup>29</sup>

Ryanair's renewed (third) bid for the remaining shareholding in Aer Lingus was prohibited by the European Commission in February 2013. The Commission found that the merger would create substantial competitive problems on numerous routes where the two were the only or at least the closest competitors, and dismissed the proposed remedy as ineffective.<sup>30</sup> Ryanair has lodged an appeal with the General Court against this decision.

In the United Kingdom, the OFT commenced its own investigation into Ryanair's minority stake in Aer Lingus in October 2010. The UK authorities have jurisdiction to review Ryanair's acquisition of a minority interest in Aer Lingus under the "material influence" standard of the Enterprise Act 2002. Legal challenges by Ryanair against the OFT's jurisdiction were finally dismissed by the Court of Appeal in 2012 and in the same year the OFT referred the case to the Competition Commission for further investigation.<sup>31</sup>

On May 30, 2013 the Competition Commission provisionally decided that Ryanair's 29.8% stake could reduce competition on routes between Great Britain and the Republic of Ireland and that Ryanair may have to reduce its shareholding in Aer Lingus. Its provisional findings suggest that Ryanair's shareholding obstructs Aer Lingus's ability to merge or combine with another airline to build scale and achieve synergies to remain competitive, that Ryanair can hinder plans to issue shares and raise capital, and that it could prevent Aer Lingus from selling valuable slots at Heathrow.

Although there has not been an "enforcement gap" in this case, the question is whether there are more, similar transactions out there that create (fairly obvious) competition concerns but where the European Commission has no jurisdiction to intervene and where, perhaps, unlike in *Ryanair* no EU member state has an opportunity to intervene either.

<sup>27</sup> Case COMP/M.4439, Ryanair/Aer Lingus, Decision of June 27, 2006.

<sup>28</sup> Case COMP/M.4439, Ryanair/Aer Lingus, Note rejecting Aer Lingus' Request, October 11, 2007.

<sup>29</sup> Case T-342/07, Ryanair v. Commission, 2010 ECR II-3457.

<sup>30</sup> Case COMP/M.6663, Ryanair/Aer Lingus, Decision of February 27, 2013.

<sup>31</sup> Office of Fair Trading, OFT refers Ryanair's minority stake in Aer Lingus to Competition Commission, Press Release, June 15, 2012.

### 3.1.1 *Competitive concerns*

It is well understood today that under certain conditions minority shareholdings can have anticompetitive effects.<sup>32</sup> Depending on the circumstances, they can lead to unilateral effects as minority shareholdings can increase incentives to reduce output/raise price. The holder of the minority interest may have the ability to influence the target to compete less aggressively. But even with a purely passive financial interest the holder may have a unilateral incentive to compete less aggressively as it benefits through its minority interest if the target faces less competition. In addition, in some cases there could be worries that the minority shareholding makes the target less attractive for alternative investors, thus substantially reducing the possibility that the target could become a more powerful competitor.<sup>33</sup> This would essentially also be a unilateral effects story. Minority shareholdings can lead to coordinated effects as they can facilitate coordination among competitors.<sup>34</sup> Harmful effects are more likely in the case of minority shareholdings involving competitors, but can in principle even occur where the minority interest is held in a vertically related firm.<sup>35</sup>

Depending on the circumstances, minority shareholdings can establish different relationships between the two firms involved. From an economic perspective, a distinction can be made between "active" minority shareholdings that enable the shareholder to influence the target's decision making process and commercial conduct, and "passive" minority shareholdings where the shareholder has a purely financial interest in the target and no influence over the target firm's competitive conduct. In legal systems there can be even further differentiation between different degrees of active minority shareholdings, trying to distinguish those that lead to outright control similar to the majority ownership, and those that confer a lesser, but nevertheless competitively relevant, degree of influence.

### 3.1.2 *Jurisdictional thresholds*

Given that minority shareholdings have the potential to harm competition, the important policy question for a merger review regime is whether it should have a wide enough definition of a merger transaction to reach minority shareholdings that confer less than outright control over the target firm, and whether they should reach even completely passive minority shareholdings. Generally speaking, situations where minority shareholdings confer influence over the target have been the main concern for merger review regimes; few merger regimes use definitions of a merger transaction that reach truly passive minority shareholdings.

As minority shareholdings of any kind are not uncommon, the challenge is in particular whether clear enough lines can and should be drawn between those instances of minority shareholdings that more likely could lead to harmful effects, and those that most likely will not, and therefore should stay outside the

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<sup>32</sup> There is also agreement that minority shareholdings tend to result in fewer efficiencies than full acquisitions, although there can be some, as well as some benign business rationales for acquiring non-controlling interest in a competitor.

<sup>33</sup> BSKyB v the Competition Commission et al, [2008] CAT 25, *conf'd*, BSKyB, [2010] EWCA Civ 2 (High Court); a similar rationale can be found in the Competition Commission's preliminary findings in *Ryanair*, Competition Commission, Ryanair may have to reduce its stake in Aer Lingus, Press Release, May 30, 2013.

<sup>34</sup> All this is well documented in OECD, *Minority Shareholdings*, *supra* note 26, 20-38, and in OFT, *Minority Interests in Competitors*, *supra* note 25.

<sup>35</sup> While there is less recent literature on this topic, vertical concerns related to (pre-existing) minority interests have featured in a number of decisions under the EUMR. *See, e.g.*, Case M.3653, Siemens/VA Tech July 13, 2005); Case M.5406, IPIC/Man Ferrostaal (March 13, 2009).

notion of a merger transaction. Different jurisdictions have approached this challenge in very different ways.

#### *Regimes using fixed percentage thresholds*

Certain jurisdictions use fixed thresholds to define at what levels the acquisition of a minority stake constitutes a merger transaction. Already earlier mentioned examples include Germany which has a 25% threshold, and Japan, which has thresholds of 20% and 10%, although each will be triggered only if additional, case specific factors are present that indicate the possibility that the minority interest will also confer the ability to influence the target's conduct.<sup>36</sup> These percentage thresholds have obvious benefits as they rely on objective and predictable jurisdictional criteria. The example of Germany also illustrates the risks of fixed thresholds, as there had reportedly been the perception that parties structured their transactions "around" the 25% threshold to escape review, which led to the introduction of the "competitively significant influence" standard as an additional definition of a merger transaction.

A far more extensive reach of a merger review law toward minority shareholdings exists in Brazil following the 2012 competition law reforms.<sup>37</sup> According to Article 90 of the new competition law, minority interests of at least 5% constitute a merger transaction when the shareholder and the target are in a horizontal or vertical relationship. In the absence of a horizontal or vertical relationship between the parties, the relevant threshold increases to 20%. No further requirements appear to exist to determine whether the minority interest leads some level of influence, comparable to those that exist, for example, in Japan. Thus, Brazil appears to be one of the few jurisdictions where purely passive interests over a very low de-minimis threshold are covered by the definition of a merger transaction.

There is not yet much experience with the application of the new law, and it is thus too early to evaluate the new provisions. They have the advantage of using clear thresholds (leaving aside that there may be disputes about whether parties are in a vertical or horizontal relationship) and making circumvention almost impossible, but they cast their net very wide. Experience in light of notified mergers will show whether there are sufficiently many transactions where such low interest acquisitions lead to material competition concerns that justify the - potentially costly - wide definition of a merger transaction.

#### *Minority shareholdings in regimes with "control/decisive influence" standards*

Minority shareholdings generate the most questions in merger review regimes that rely exclusively on the "acquisition of control" concept to define a merger transaction in the sense of acquiring a decisive influence over the target. Not surprisingly, therefore, the topic has attracted a great deal of attention in Europe, where EU competition law and many EU member states follow this approach. Acquisitions of minority interests can of course meet the "decisive influence" threshold, depending in particular on additional rights and shareholder contracts that accompany the minority shareholding, and the dispersion of other shareholdings, but many times they will not.

In the course of the last revision of the then ECMR, the European Commission had already considered whether the notion of a merger transaction should be changed in order to capture a wider range of minority shareholdings,<sup>38</sup> but ultimately dismissed the need for reform. It reasoned that alternative enforcement mechanisms provided sufficiently effective tools to adequately cover the "gap," and an expansion of the

<sup>36</sup> See *supra*, Section 2.

<sup>37</sup> Competition Act of 2011 (effective May 29, 2012).

<sup>38</sup> European Commission, Green Paper on the Review of Council Regulation 4064/89, COMP(2001)745 (December 11, 2001).

scope of merger review would be too costly. But the debate has returned and the Commission is currently actively considering whether there is a need to adjust its merger review system, how large the perceived or real "enforcement gap" actually is, and how cost effective reforms could be implemented. At least from the publicly available information it remains a little unclear whether, apart from *Ryanair*,<sup>39</sup> there are so many cases pointing to a significant enough enforcement gap to justify reform, considering also that expanding the EUMR's jurisdictional scope would not be costless.<sup>40</sup>

*Reaching minority shareholdings through "material/significant influence" standards*

Other jurisdictions, including some European jurisdictions, cast their nets wider and include at least certain minority shareholdings that confer a lesser degree of control on the shareholder. Germany is a jurisdiction where minority shareholdings can fall under the definition of a merger transaction in a variety of circumstances. Even if a minority shareholding does not confer EUMR-type "control" over the target (Section 37(1)(3) GWB and falls below the 25% threshold in Section 37(1)(2) GWB), there would be a merger transaction if it confers on the holder a "competitively significant influence." (Section 37(1)(4) GWB).

The provision in Section 37(1)(4) GWB was introduced 1989 in reaction to the perception that some parties gamed the system by structuring potentially harmful transactions so as to remove them from the reach of German merger control, in particular by acquiring rights below the 25% level and avoiding the acquisition of formal control rights equivalent to those that a 25% interest would confer.<sup>41</sup>

The statute provides no specific details on when a transaction results in a competitively significant influence, and its precise contours are not easily understood. The literature has observed that the relevance of the provision when introduced the first time was inversely related to the difficult interpretive questions it raised.<sup>42</sup> Since then, however, the provision has played a much more important role in particular in the media and energy sectors. And decision making practice has developed a number of relevant elements, including, for example, appointment of senior management, information and control rights, shareholder agreements, and the economic relationship between the parties. In the end, the inquiry is focused on whether the target's decisions concerning competitively relevant actions are no longer adopted independently but can be influenced as a result of the minority shareholdings. Pure long-term contractual relationships that create some sort of economic dependence without any additional rights, however, do not appear to fall under the definition of a merger transaction.<sup>43</sup>

The lower bound of the relevant minority interest appears to be as low as 10%, although at least in one decision the Federal Cartel Office considered the acquisition of a 9% interest a relevant merger transaction. The decision was reversed on appeal, although the court did not in principle rule out that a 9%

<sup>39</sup> And even in *Ryanair* one could argue that there was no enforcement gap because a member state was able to review the transaction. More generally, the more minority shareholding cases that escape from the EUMR can be dealt with in certain member states, the smaller the "enforcement gap."

<sup>40</sup> It appears that much of the evidence consists of reviewed mergers where a pre-existing minority interest in a third party was held by one of the parties to the merger and the (reviewed) merger created a competitive relationship between the third party and the other merger party that ultimately led to concerns. To the extent the pre-existing minority shareholdings in these cases were competitively benign, a wider jurisdiction to review such transaction would not have had any benefits.

<sup>41</sup> Veelken, in Immenga/Mestmäcker, Wettbewerbsrecht: GWB, ¶186 (4th ed. 2007).

<sup>42</sup> Richter, in Wiedemann, Handbuch des Kartellrechts ¶116 (2nd ed. 2008).

<sup>43</sup> BGH, KVR16/99, Judgment of November 21, 2000, WuW/E DE-R 607, 612, Minderheitsbeteiligung im Zeitschriftenhandel; Richter in Wiedemann, *supra* note 42, ¶121.

interest, if accompanied by sufficient "ancillary" measures, could confer the requisite level of "influence."<sup>44</sup> The provision applies also to vertical relationships. In fact, it has played a particularly prominent role in the energy sectors where the Cartel Office relied on the provision to prevent the major players in the German energy market from acquiring minority interests in municipality owned energy firms.

UK merger control law is significantly different from German merger control as it is based on a voluntary notification system, but it is similar in its ability to reach acquisitions of minority interests that confer influence below the level of outright control. According to Section 26 of the Enterprise Act 2002, a "merger situation" exists where two enterprises cease to be distinct, which occurs when they are brought under common ownership or control. The notion of control includes situations where the shareholder acquires a "material influence" over the target.<sup>45</sup>

The Act does not specify under what circumstances material influence can be found. In practice, a broad range of factors are considered, including the size of shareholdings and dispersion of other shareholdings, the shareholder's identity, special voting rights, board representations, and voting rights restrictions. Ultimately, the competition authority will seek to determine whether the shareholder can materially influence the policy of the target in the market place.<sup>46</sup>

### **Box 3. BSkyB/ITV – Reaching minority shareholdings under the "material influence" standard**

In 2006, BSkyB, the leading UK pay-TV provider, acquired an ~ 18% interest in ITV, the UK's biggest commercial (over the air) broadcaster. There was some suspicion that the transaction was motivated by a desire to thwart third parties from taking over ITV. The Government intervened, and the OFT initiated an investigation. It found that the transaction was a merger transaction and raised competitive concerns. The case was referred to the Competition Commission in 2007 for further review.

The Competition Commission found that the minority stake conferred "material influence" on BSkyB, as it would de facto be able to block special resolutions of ITV and could therefore limit ITV's strategic options such as its ability to raise funds. BSkyB's status of a major industry player would give it additional influence.

In its substantive analysis, the Competition Commission identified a different set of concerns, including that BSkyB could influence ITV's content production strategy and investment in HDTV technology. It concluded that there was likely to be a substantial lessening of competition as a result of a loss of rivalry between ITV and BSkyB in the all-TV market. It concluded that divestiture to below 7.5% would be an effective remedy.<sup>47</sup>

The Competition Appeal Tribunal upheld in 2008 the Competition Commission's findings both with respect to jurisdiction and with respect to the substantive analysis, including a suitable remedy (which had also been accepted by the Secretary of State). The CAT found on the question of BSkyB's ability to block special resolutions including those to raise funding the jurisdictional test and the competition assessment overlapped. It was relevant for a finding of BSkyB's material influence and for the conclusion that it could impair ITV's competitive position.<sup>48</sup>

<sup>44</sup> Cartel Office, B6-27/04, Bonner Zeitungsdruckerei (September 8, 2004), WuW/E DEV 968, *rev'd*, OLG Düsseldorf (Ct. Appeals), VI-Kart 26/04 (V) (July 7 2005), WuW DE-R 1581.

<sup>45</sup> *See also supra*, note 14.

<sup>46</sup> OFT, Jurisdictional and Procedural Guidance, *supra* note 17, ¶ 3.15.

<sup>47</sup> Competition Commission, Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc (2008) (a formal decision in this case was taken by the Secretary of State).

<sup>48</sup> British Sky Broadcasting Group Plc v. The Competition Commission, [2008] CAT 25.



In 2010, the High Court dismissed BSkyB's appeal from the CAT's decision, upholding all previous decisions concerning jurisdiction and substantive competition law evaluation.<sup>49</sup>

In practice, a shareholding of 25% is considered to confer material influence in light of rights conferred on minority shareholders in the relevant company law. A 15% interest appears to be a relevant lower bound, although it is not excluded that material influence can be found with a lesser interest.<sup>50</sup>

Thus, both European jurisdictions discussed here have fairly extensive abilities to reach minority shareholdings, although in order to accomplish this they had to rely on statutory language that does not provide clearly defined boundaries as to what transactions fall under merger review, and on decision making practice that has in each jurisdiction developed a catalogue of criteria which can be applied with some degree of flexibility in each case. Neither jurisdiction is able to intervene against passive minority shareholdings that confer only a purely financial interest in the target.

#### *Casting an even wider net with certain exemptions*

The treatment of passive minority shareholdings for purposes of defining a merger transaction follows a different approach in U.S. merger review law, and it would appear that a broader range of minority shareholdings can be reached as merger transactions than, for example, in the United Kingdom and Germany. According to Section 7 of the Clayton Act, a merger transaction is any acquisition of “*the whole or any part of the stock or other share capital*” of another firm; such a transaction can be prohibited where “*the effect of such acquisition may be substantially to lessen competition.*”<sup>51</sup> Therefore, all acquisitions of equity shares in a target company could be considered merger transactions.<sup>52</sup> This very broad definition is mitigated by Section 7(3) which provides that which holds that “[*t*]his section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about the substantive lessening of competition.”

The “investment exemption” in Section 7(3), which has no cap on the percentage of stock that can be owned “passively,” can eliminate certain types of minority shareholdings from the scope of U.S. merger review law. But the exemption has a very limited scope in practice, which is shaped largely by the same exemption in HSR filing rules.<sup>53</sup> A transaction will be considered “solely for investment” only if the acquirer does not gain influence over the actions and business conduct of the target and does not use some mechanism to bring about a substantial lessening of competition. Excluded from Section 7(3) are situations where the shareholder gains active control over the target, the ability to influence the actions of

<sup>49</sup> British Sky Broadcasting Group Plc v. The Competition Commission, [2010] EWCA Civ 2.

<sup>50</sup> OFT, Jurisdictional and Procedural Guidance, *supra* note 17, ¶ 3.20.

<sup>51</sup> Throughout this paper it is important to keep in mind the difference between transactions that are considered merger transactions under Section 7 Clayton Act and those that are reportable under the HSR Act and implementing rules, 16 CFR §§801-803.

<sup>52</sup> U.S. v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957).

<sup>53</sup> The HSR Act provides for cap, as it exempts share acquisitions for investment purposes up to 10%, HSR Act, Section (a)(C)(9). The most prominent violator of HSR reporting requirements in connection with the “investment exemption” is probably Bill Gates, who agreed to pay a US \$800,000 civil penalty for failure to report the acquisition of a small stake in another corporation; he could not benefit from the investment exemption because he also was a member of the board of directors of the same corporation. U.S. Department of Justice, Bill Gates to Pay \$ 800,000 Civil Penalty for Violating Antitrust Premerger Notification Requirements, Press Release, May 3, 2004. This and more recent enforcement actions suggest that the agencies are monitoring closely that the exemption cannot be abused by persons acquiring more than a strictly passive minority stake.

the target by means other than control, or gains access to commercially sensitive information. These criteria suggest that the jurisdictional test of whether a transaction is a merger transaction is not materially different than the substantive analysis of possible anticompetitive effects.<sup>54</sup>

Whether the "solely for investment" exemption can ever benefit acquisitions of minority rights in a direct competitor is a little unclear,<sup>55</sup> although the agencies have sometimes, as part of remedial intervention, accepted purely passive investments in a competitor that remained well below 10%.<sup>56</sup> As the remedies were designed to ensure that the transactions no longer had the likely effect of substantially lessening competition, passive investments under similar circumstances and in a similar range might in principle benefit from the exemption in Section 7(3) Clayton Act.

A similar approach to minority shareholdings can be seen in India where the recently introduced merger review regime appears to largely follow the U.S. model with respect to the definition of a merger transaction. It has of course done so without the benefit of many years of decision making practice which has resulted in considerable uncertainty and concerns about unreasonably wide and unclear jurisdictional thresholds.<sup>57</sup> The Competition Act defines a merger as an acquisition of control, shares, voting, rights, *or* assets of another enterprise,<sup>58</sup> suggesting that any acquisition of a small interest in another firm can, in principle, be considered a merger transaction. This wide concept of a merger transaction is narrowed down by exemptions that exclude certain minority shareholdings from the definition of a merger transaction. Under a Regulation issued by the Indian Competition Commission, share acquisitions of up to 25% are exempted if they are solely for investment purposes and do confer on the purchaser control over the target.<sup>59</sup> Not covered by this exemption are minority share acquisitions in a competitor.<sup>60</sup>

### 3.1.3 Conclusions

Share acquisitions, and in particular share acquisitions below a de jure control level are a good illustration of the desire of many merger review regimes to reach a wide range of transactions that confer

<sup>54</sup> See, e.g., *U.S. v. Tracinda Inv. Corp.*, 477 F.Supp. 1039 (C.D. Cal. 1979) (test for "solely for investment" exemption inherently no different than the analysis proscribed by Section 7 itself).

<sup>55</sup> Areeda & Hovenkamp, *Antitrust Law*, ¶ 1204(b) (investment exception should benefit only investors, in particular institutional investors); Paul C. Cuomo et al, *Partial Acquisitions: Recent MOFCOM Action Suggests Possible Divergence with U.S. Standards*, *CPI Antitrust Chronicle*, January 2012, at 3, footnote 5 (partial stock acquisition in competitors cannot benefit from Section 7(3) Clayton Act).

<sup>56</sup> See, e.g., U.S. Federal Trade Commission, *FTC Requires Restructuring Of Time Warner/Turner Deal: Settlement Resolves Charges That Deal Would Reduce Cable Industry Competition*, Press Release, September 12, 1996 (9.2% non-voting interest permitted); U.S. Department of Justice, *American Airlines Cleared to Acquire Stock in Argentine Airline*, Press Release, July 8, 1998 (8.5% interest permitted); U.S. Department of Justice, *Department Announces Tentative Settlement in the Northwest-Continental Lawsuit*, Press Release, November 6, 2000 (7% interest permitted).

<sup>57</sup> For a summary of the developments and concerns, see, e.g., Tony Reeves & Dan Anderson, *India's New Merger Control Regime: When Do You Need to File*, 26 *Antitrust* 94 (2011).

<sup>58</sup> The Competition Act 2002, No. 12 of 2003, as amended by the Competition (Amendment) Act 2007, Section 5.

<sup>59</sup> The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 as amended up to 4th April, 2013, Schedule I. A second exemption, added in 2013, covers share acquisitions of up to 5% in the target, where the purchaser already holds a 25% or greater interest in the target, but only up to a 50% interest and only if the incremental share acquisitions do not confer on the purchaser control over the target.

<sup>60</sup> Reeves & Anderson, *India's New Merger Control Regime*, *supra* note 57, at 97.

on the purchaser the ability to influence conduct of the target. But almost no merger review regime appear to be satisfied with simple and objective percentage of interest thresholds, perhaps because they could be too easily circumvented or because they would have to be chosen so low that the competition authority would be confronted with too many unnecessary cases. As a result, the more extensive reach of merger review laws frequently comes at the cost of open-ended definitions and a set of potentially relevant variables that need to be applied on a case by case basis.

The focus on an ability to influence the target's commercial conduct also means that passive shareholdings (purely financial interests) rarely covered by definitions of a "merger transaction," despite the fact that they could have harmful effects. One exception to this general approach appears to be Brazil where every share acquisition above a 5% threshold is covered unless the parties are totally unrelated. Only experience will show whether this approach was overly cautious or will be beneficial overall.

### **3.2 *Asset acquisitions, in particular the acquisitions of limited assets***

In virtually all mainstream merger review regimes an acquisition of a target company in the form of an asset acquisition falls within the definition of a merger transaction. These transactions use a more "direct" way than share acquisitions to bring about durable, structural changes in the market place that may affect how assets can be used in the competitive process, and therefore should be treated like share acquisitions. The same applies where the acquired assets form the whole of a distinct line of business of the seller, and/or when the acquisition does not involve the outright transfer of full ownership rights but are some similar contractual arrangement that vests long term, and perhaps irrevocable rights to manage assets in the purchaser, such as lease agreements that transfer control over assets, managerial rights, and business risks.

Like in the case of share acquisitions, however, more difficult questions can arise when things change from the outright acquisition of ownership rights in the entire assets of a firm or a business. There can be questions, in particular, concerning the size/value/significance that the assets must have to be so competitively significant that the transaction merits merger review. Essentially all jurisdictions extend the reach of their merger review laws beyond the acquisition of the totality of a business' assets, but there are differences as to what level of "granularity" various merger review laws reach. Some require that the acquired assets form enough of a unity that a particular business activity can be transferred and continued by the purchaser or that the assets represent a distinct source of revenue. Other jurisdictions consider essentially every asset transfer that is significant enough to be capable of changing the competitive position of the purchaser a merger transaction.

#### **3.2.1 *Requiring the acquisition of more substantial assets***

Compared with some other major jurisdictions, EU competition law applies a more restrictive concept as to when asset acquisitions can be considered a merger transaction. According to the EUMR provisions addressing asset acquisitions,<sup>61</sup> there will be the requisite change in control over an "undertaking" if the purchaser acquires the possibility of exercising decisive influence by way of ownership of, or the right to use, all or part of the assets of another undertaking.<sup>62</sup> Although the "...right to use...part of the assets of another undertaking..." language could be interpreted very broadly, in practice the acquired assets must

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<sup>61</sup> European Commission, Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, O.J. C /1 (2008) (CJN).

<sup>62</sup> EUMR, Article 3(2)(a).

represent at least "part of an undertaking," which means that there must be a transfer in control over a business with a market presence which generates clearly attributable revenues.<sup>63</sup>

The revenue attribution requirement will lead to borderline cases that will require a case-specific analysis of broader circumstances. For example, the transfer of individual assets like power plants has been found to meet this requirement. But in other circumstances the simple transfer of assets might be insufficient for a "merger transaction," and there may be a need to transfer know how and marketing facilities in addition to assets to enable the purchaser to engage in revenue generating activities vis-à-vis third parties. Similarly, an agreement to transfer all existing customer relationships, even if only for a certain group of customers, has been found to constitute a merger transaction." But the "revenue attribution" requirement makes it less likely that transfers of only customer lists or of an individual IPR fall under the definition of a merger transaction.<sup>64</sup>

The United Kingdom uses a different statutory concept, but its position vis-à-vis asset acquisitions appears to be not so different from that developed under the EUMR. According to the Enterprise Act 2002, all acquisitions of the activities or part of the activities of a business can in principle be considered merger transactions. Whether transferred assets are substantial enough requires a case-by-case assessment that, according to the UK merger guidelines, takes into account the totality of all relevant circumstances.<sup>65</sup> The transferred assets must enable a business activity to be continued and revenues directly related to the transferred assets must be identifiable. A purchase price that includes payment for the transfer of goodwill would be a strong indication that a business enterprise has been transferred, as it would suggest that the purchaser acquires not only "naked" assets, but the ability to use the assets in a business activity.<sup>66</sup> On the other hand, transfers of individual rights like IPRs would not in themselves regarded as merger transaction. And although the transfer of customer lists can be an important factor in determining whether a business has been transferred, but it appears that the transfer of a customer list in itself would not be considered a merger transaction.

Japan appears to have a slightly more restrictive scope when it comes to asset acquisitions. The Merger Guidelines to Application of the Antimonopoly Act Concerning Review of Business Corporations suggests that asset acquisitions must concern a "substantial part" of a business, which elsewhere is described as a portion of a business that must function as a single business unit that must have a distinct value to the selling business. In addition, the Guidelines use numerical thresholds to define "substantiality," referring to the revenues generated by the sold assets relative to the total revenues of the seller and to absolute revenues attributable to the sold assets, to identify a merger transaction.<sup>67</sup>

### 3.2.2 *Casting a wider net to reach more limited asset acquisitions*

Other jurisdictions apply their merger review laws to a broader range of asset acquisitions. A case in point is U.S. merger review law. According to Section 7 Clayton Act, "...no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation..."<sup>68</sup> Courts have confirmed that this is a wide definition of a merger transaction as the statute

<sup>63</sup> CJN, *supra* note 61, at ¶24.

<sup>64</sup> But it is in principle not excluded that the necessary criteria for an "asset" can be met. CJN, *supra* note 61, at ¶24.

<sup>65</sup> OFT, Jurisdictional and Procedural Guidance, *supra* note 17, Section. 3.12.

<sup>66</sup> *Id.*, Section 3.10.

<sup>67</sup> JFTC, Guidelines Concerning Review of Business Combinations, *supra* note 11, Section 4(3).

<sup>68</sup> The language covering asset acquisitions was introduced in Section 7 by the 1950 Celler-Kefauver Act, when it was recognised that a prohibition against anticompetitive share acquisitions could easily be

uses "generic, imprecise terms encompassing a broad spectrum of transactions," and that "[a]s used in this statute, and depending upon the factual context, "assets" may mean anything of value."

The statutory language has been found to be sufficiently broad to include property or property rights, real or personal, tangible or intangible, which are subject to transfer and which have been used by the seller and could be used by the buyer competitively. Customer lists, sales routes and sales volumes, exclusive licenses, a franchise, and trademarks and patents have been found to be assets within the purview of section 7. The only limiting – and not very demanding – requirement to distinguish asset acquisitions that are merger transactions from those that are not is that the transferred asset is capable of having some competitive use after it came under control by the purchaser.<sup>69</sup>

Along the same lines, a relatively broad range of asset acquisitions would be considered a merger transaction under Section 37 of the German GWB. The relevant provision refers broadly to ownership or user rights in all or parts of the assets of a firm. Enforcement practice has focused on whether the assets covered by a transaction (i) have been material for the position of the seller (determined by a flexible combination of qualitative and quantitative criteria); and (ii) are capable of impacting the purchaser's position on the market.<sup>70</sup> Thus, in applying this jurisdictional test, some assessment of the circumstances in which an asset transfer occurs appears to be required.

Under this interpretation, the transfer of a single store (out of several hundred stores that belonged to a larger chain), customer lists, or of a trademark used in business have been found to fall under the definition of a merger transaction.<sup>71</sup>

### 3.2.3 *What transactions are asset "acquisitions?"*

A flexible approach in jurisdictional requirements can also be observed with respect to the form in which the acquiror gains control over assets. A narrow interpretation of the term "acquisition" might suggest that only formal transfers of ownership should be included, but virtually all mainstream jurisdictions have consistently used a wider interpretation to ensure that their jurisdictional thresholds reflect competitive realities. Therefore, a wide range of other forms in which the acquiror gains the right to control how the other party's assets are used will be considered "acquisitions."<sup>72</sup>

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circumvented through an all asset deal. The reference to corporations subject to the jurisdiction of the Federal Trade Commission appears to restrict the jurisdictional scope compared to share acquisitions, but case law has virtually eliminated this limitation.

<sup>69</sup> The breadth of the statutory concept of a merger transaction is mitigated by broad exceptions from the obligation to notify a merger transaction that exclude, for example, certain real estate transactions and assets acquisitions in the ordinary course of a business, unless they represent "all or substantially all of the assets of an operating unit." See 16 CFR §802.

<sup>70</sup> BGH, KVR 14/91, Judgment of July 7, 1992, Warenzeichenerwerb; BGH, KVR32/05, Judgment of October 10, 2006, National Geographic I; Richter in Wiedemann, *supra* note 42, Para. 81.

<sup>71</sup> *United States v. Columbia Pictures Corp.*, 189 F.Supp. 153 (SDNY 1960). Along the same lines, Canadian merger review law appears to reach any acquisition of an "essential" asset as a "merger transaction," which may include distribution facilities, a retail outlet, a brand name or intellectual property rights. Competition Bureau, Guidelines, *supra* note 17, Section 1.13.

<sup>72</sup> In *United States v. Columbia Pictures Corp.*, 189 F.Supp. 153, 182, the court supported its wide interpretation of the term "acquisition" in the following terms: "The statute imposes no specific method of acquisition. It is primarily concerned with the end result of a transfer of a sufficient part of the bundle of legal rights and privileges from the transferring person to the acquiring person to give the transfer economic significance and the proscribed adverse 'effect.'"

For example, it has already been mentioned that the acquisition of intellectual property rights can constitute a relevant asset acquisition.<sup>73</sup> This does not only apply to full transfer of ownerships, but also to a transfer by long-term, preferably irrevocable, exclusive license that brings about a durable change in the market.<sup>74</sup> On the other hand, non-exclusive licenses of IPRs would generally not be considered "acquisitions."<sup>75</sup> That simple distinction can break down quickly and a more detailed evaluation of case-specific circumstances may be required, as license arrangements are flexible instruments that allow an allocation of rights according to the parties' business needs. For example, licensor may grant an exclusive license but nevertheless retain certain limited exploitation rights with respect to the licensed IPR. At least in the U.S. merger review regime, this does not appear to affect the characterisation of the transaction as a "merger transaction,"<sup>76</sup> but in these types of situations different outcomes in different merger review regimes appear more likely.

Similar issues can of course come up with respect to other property rights. Again, formal transfer of ownership would not be required and transactions with substantially similar effects will also be considered "acquisitions." What is important is the relatively durable right to use certain assets.<sup>77</sup> This can be accomplished, for example, through a lease agreement that gives the lessee the control over the target's management and resources. Much of this is well presented in the European Commission's CJN,<sup>78</sup> but appears to apply along the same lines across jurisdictions.

The "fringe" that raises the most difficult questions appears to exist in situation where the creation of a purely economic relationship provides one side means to influence the business decisions of the other side, in the absence of structural links or contracts that confer rights to control/influence management decisions. The question here is whether, and under what circumstances, the creation of such an economic dependence situation could be considered an "acquisition." A wide interpretation of the concept "acquisition" that might be able to reach in principle purely contractual relationships can be found, for example, in the European Commission's discussion of various means to acquire control over another business. According to the Commission, a situation of economic dependence might lead to the requisite level of control where long term contracts or credits confer decisive influence, provided they are coupled with structural links.<sup>79</sup> The Commission's discussion as well as the case law cited in support of its views, suggest that some structural links, like a shareholding, right to appoint management, or at least an option that can be converted into ownership rights, will typically be required and will be considered in combination with the "other," economic links in order to establish "control/decisive influence." This may suggest that in practice purely economic relationships that are so "intense" that they confer on one side the

<sup>73</sup> See *supra*, Sections 3.2.1 and 3.2.2. As discussed above, there may be differences among jurisdictions as to the circumstances in which the transfer of an IPR might be considered an "acquisition."

<sup>74</sup> In *United States v. Columbia Pictures Corp.*, 189 F.Supp. 153, for example, a 14-year exclusive license agreement that gave the licensee the right to exploit a large library of movies through television broadcast was considered an "acquisition."

<sup>75</sup> European Commission, Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, O.J. C 95/1 (2008) (CJN), ¶24.

<sup>76</sup> Interesting in this context is a proposed amendment to the HSR premerger notification rules which seeks to clarify that a transfer of exclusive patent rights in the pharmaceutical industry result in a potentially reportable asset acquisition under the HSR Act. See U.S. Federal Trade Commission, FTC Seeks Public Comments on Proposed Amendments to the Premerger Notification Rules Related to the Transfer of Exclusive Patent Rights in the Pharmaceutical Industry (August 13, 2012).

<sup>77</sup> See, e.g., EUMR, Article 3(2)(a).

<sup>78</sup> CJN, *supra* note 75, ¶18.

<sup>79</sup> CJN, *supra* note 75, ¶20.

ability to substantially influence the other do not often occur without some additional, "legal" (structural or contractual) means to strengthen the influence. Alternatively, such purely contractual relationships creating economic dependence may exist, but bringing them under the scope of merger control laws may be inappropriate, given the difficulty to create clear and predictable boundaries.

Instructive is in this respect also the discussion concerning the reach of Article 37(1)(4) GWB, already discussed above, and its "competitively significant influence" standard in the definition of a merger transaction. In principle, the language of the provision would appear wide enough to capture transactions where purely economic ties result in such a degree of economic dependence that the requisite level of influence over another firm or group of assets is met. But commentary on the provision points out that such a wide interpretation would raise concerns about legal certainty especially in a merger review regime with mandatory notification and sanctions for failure to notify and obtain approval for reportable transactions; accordingly, the creation of a "competitively significant influence" might require that the transaction involves some more permanent "legal" means (which can of course be complemented by an analysis of arrangements that create economic influence) to establish influence such as the acquisition of an interest in the target.<sup>80</sup>

### 3.2.4 *Conclusions*

Perhaps even more consistently than in the case of share acquisitions, there appears to be a great willingness in many jurisdictions to engage in a broader examination of all relevant circumstances to determine whether an acquisition of assets is a merger transaction. The notion of acquisition is interpreted with some flexibility. And especially the need to inquire into effects of the asset transfer on the purchaser's competitive position might bring this jurisdictional question relatively close to a substantive assessment of competitive effects, although it will always remain much less detailed. Many times, of course, notification requirements will mitigate the effects of such a broad definition of a merger transaction. But the impression remains that competition authorities enjoy a fair amount of discretion in deciding when an asset acquisition falls under merger review.

### 3.3 *Joint ventures*

The "core/fringe" explanation for parallels and differences among major merger review regimes applies also to the area of joint ventures. When two or more parties form and control a joint venture that involves a genuine integration of assets with a certain permanence and ends competition among the parents in the field of the joint venture, almost invariably the creation of the joint venture will be considered a merger transaction.<sup>81</sup> But given the flexible notion of what constitutes a joint venture, there are many different types of cooperation that come under this label. And the more the joint venture emphasises collaboration and de-emphasises asset integration, the less clear its "independent" role in the market is, the greater the differences among jurisdictions become.<sup>82</sup>

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<sup>80</sup> Veelken, in Immenga/Mestmäcker, *supra* note 41, ¶¶ 93-94.

<sup>81</sup> Provided, as discussed below, that at least one of the parents has decisive influence over the joint venture's activities, which in many European merger review regimes is an additional important element.

<sup>82</sup> Differences in the qualification of a joint venture can substantially affect the parties: if the joint venture is a "merger transaction," there may be notification requirements and waiting periods, but a final decision on the lawfulness of the venture and therefore legal certainty can typically be obtained much faster than if the joint venture is reviewed as a restrictive agreement. Different standards of review would apply as well, although there appears to be agreement among most mainstream jurisdictions that certain collaborative aspects of a joint venture (or the entire joint venture if it cannot be properly characterised as a merger in substance) would be subject to review under restrictive agreement standards, even if the joint venture

Very generally speaking, there are two approaches to the question of how the definition of a merger transaction applies to joint ventures. Many merger review regimes do not see a need to separately address joint venture formation; the formation of joint ventures that have some integration of assets will typically include the acquisitions of shares or assets, or some assets that were previously independently owned will be used to form a new "enterprise" controlled by the parents, which would be sufficient to bring the transaction under the generally applicable definition of a merger transaction. Other jurisdictions have joint venture-specific provisions in their definitions of a merger transaction. In particular jurisdictions following the EUMR's "control/significant influence" model may find a greater need to specifically consider how joint ventures fit into the merger transaction definition; and they tend to include a narrower range of joint ventures under their definition of a merger transaction. These differences lead to the well-known phenomenon that an international joint venture may be considered a merger transaction with notification obligations in some jurisdictions, whereas it may be considered a non-notifiable restrictive agreement in others.<sup>83</sup>

In U.S. merger review law, for example, the acquisition of assets or voting securities in the context of the formation of a joint venture would be considered a merger transaction according to the generally applicable rules in Section 7 Clayton Act, although a reporting obligation would again depend on HSR rules. An acquisition of assets may exist when the joint venture parents have enough rights to acquire "control" over assets contributed to the joint venture.<sup>84</sup> As before, these rules cast a wide net over the type of joint ventures that would be considered a merger transaction. The qualification as a merger transaction under this wide definition and possible HSR reporting requirements do not necessarily determine the standards for the substantive assessment. In certain cases a reportable joint venture may be evaluated as collaboration among competitors rather than under the horizontal merger guidelines.<sup>85</sup>

The general definition of a merger transaction would also apply in the United Kingdom. The formation of a joint venture would lead to a merger transaction where two or more enterprises cease to be distinct and the requisite degree of control over the enterprise by at least two parents exists. Different parents could have different degrees of "control," for example if one holds a controlling interest but the other one has "material influence." A similar approach to joint ventures exists in Germany. A merger transaction would be found if as a result of the formation of a joint venture, two or more parents hold an interest in the joint venture of at least 25%, or have a competitively significant influence over the joint venture's activities.

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formation is considered a merger transaction. And, ultimately, one would expect that similar analytical questions about the competitive effects of a joint venture will be asked, regardless of the characterisation and the applicable procedural framework. Different remedies may apply as well, although, again, the practical differences might not be substantial.

<sup>83</sup> An example of such a joint venture is the formation of Covisint, an online supply platform created by the three major Detroit-based car manufacturers GM, Ford, and (then independent) Chrysler. The formation of Covisint was reviewed as a merger transaction, among others, in the United States and in Germany, but not under ECMR (because no parent had "decisive influence" over the joint venture); the European Commission reviewed the joint venture as a restrictive agreement under Article 101. *See* U.S. Federal Trade Commission, FTC Terminates HSR Waiting Period for Covisint B2B Venture, Press Release, September 11, 2000; Federal Cartel Office, Decision B 5 - 34100 - U 40/00, Covisint (September 25, 2000); European Commission, Commission clears the creation of the Covisint Automotive Internet Marketplace, Press Release IP/01/1155 (July 31, 2001). The decision was reviewed as a merger also in Brazil, although the clearance decision was issued after such a long review process that the parents had already sold their joint venture.

<sup>84</sup> *See, e.g., Addamax Corp. v. Open Software Foundation, Inc.*, 888 F.Supp. 274 (D. Mass. 1995).

<sup>85</sup> Depending on the degree of integration, the effects on competition among the parents, and the duration of their collaboration, certain joint ventures could be analysed.



Because these jurisdictions apply the same jurisdictional test to all transactions, there is also no difference between the qualification of joint venture formation and the acquisition of a minority interest as merger transactions. Certain instances of minority shareholdings will require a different substantive analysis than joint ventures, but that does not affect the assessment of whether they are merger transactions.

The jurisdictional reach under the EUMR is more limited in joint venture situations. This is so because a merger transaction will be found to exist only if at least two parents acquire "decisive influence" over the joint venture, and because the joint venture must be "full function," i.e., is must be acting on the market as an autonomous economic entity. Thus, a joint venture may lead to a structural, durable change in the market, but in the absence of "decisive influence" by the joint venture parents, or in the absence of an autonomous entity that acts on the market place, there would be no merger transaction.

Both requirements may lead to questions concerning jurisdictional thresholds in joint venture situations that other merger review regimes might be able to avoid. A brief discussion of various joint venture scenarios illustrates this point: If a single purchaser acquires control over assets that represent an undertaking,<sup>86</sup> the transaction would represent a "merger transaction," regardless of whether the acquired undertaking is considered "full function" or not.<sup>87</sup> But when more than one party is involved, things can get a little unclear. It appears that if two parties form a joint venture by jointly acquiring an undertaking from a third party, there is no need to assess "full functionality;" the acquisition that leads to a joint venture would always be considered a merger transaction. But if the two parties form a new venture by contributing their own assets (which could include assets representing an "undertaking"), a merger transaction will be found only if the resulting joint venture is "full function."<sup>88</sup> Things seem to be a little unclear when a purchaser becomes a joint venture partner with respect to an undertaking that was previously owned individually by the other joint venture partner; "full functionality" of the jointly owned business may be required, but an argument to the contrary appears plausible as well.<sup>89</sup>

Thus, transactions that appear to result in very similar structural changes in the market place might be subject to different jurisdictional rules. The concept of a merger transaction may have a slightly narrower scope when at least two parties form a joint venture by contributing a business than when a single purchaser acquires a business.<sup>90</sup> It may well be that in practice these difficult questions do not create material problems for parties, for example because parties in this type of transactions will have an incentive to have their joint venture vetted under merger review laws and the competition authority normally will be reluctant to refuse their request. Nevertheless, it shows that inserting the need to apply the "full function" requirement into the determination of a jurisdictional threshold can raise difficult questions that can be avoided in other merger review regimes. One jurisdiction that has decided to avoid these challenges is China, where after some consideration the decision was ultimately made to eliminate the full function requirement from jurisdictional rules governing joint ventures.<sup>91</sup>

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<sup>86</sup> See *supra*, Section 2.

<sup>87</sup> CJN, *supra* note 75, ¶24.

<sup>88</sup> CJN, *supra* note 75, ¶92.

<sup>89</sup> CJN, *supra* note 75, ¶86.

<sup>90</sup> Much of the preceding discussion follows Lars-Peter Rudolf & Bettina Leupold, Joint Ventures – The Relevance of the Full Functionality Criterion under the EU Merger Regulation, 3 J. Europ. Comp. L. & Practice 439 (2012).

<sup>91</sup> As discussed above, China largely followed the model of the EUMR when designing its merger regime. The AML does not specify when joint ventures are considered "merger transactions," and it was left to MOFCOM, the competition authority in charge of merger review, to publish implementing rules to clarify

The "control/decisive influence" element may also lead to interesting questions, for example if the European Union were to consider extending the notion of a merger transaction to catch at least certain types of minority shareholdings that currently fall outside merger review.<sup>92</sup> In the current situation, the acquisition of minority interests in the joint venture context fall under the definition of a merger transaction only if the "decisive influence" requirement is met. The creation of a joint venture with three parents with equal shares and no particular control rights or instruments would currently not be considered a merger transaction. All three parents would be considered minority shareholders without "control/decisive influence."<sup>93</sup> If the jurisdictional scope of the EUMR were to be extended to reach minority shareholdings that do not confer "control/decisive influence," this could have repercussions on the jurisdictions over "non-controlled" joint ventures. A broader jurisdictional scope that would reach non-controlling minority shareholdings would capture joint ventures where the parents hold non-controlling interests as well, potentially increasing the scope of merger review under the EUMR substantially. This may in turn require the use of minority interest-specific jurisdictional rules try to distinguish between "normal minority interests" and "joint venture minority interests."

#### 4. Conclusions

Despite the substantial differences in the ways various merger review regimes define a "merger transaction," the brief comparative discussion of some of the more challenging areas shows some common themes. Most importantly, many jurisdictions have an extensive reach of the merger review laws that covers transactions far beyond the "core" transactions such as acquisition of a de jure control over the target or asset acquisitions with a similar scope.<sup>94</sup>

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open questions, including jurisdictional questions. Draft Provisional Rules included a full function requirement for joint ventures, thus excluding from the scope of a merger transactions non-full function joint ventures. But MOFCOM's final Rules on the Notification of Concentration between Undertakings, published in 2009, does not include a full function requirement, thus subjecting a wider range of joint ventures to merger review.

<sup>92</sup> See *supra*, Section 3.1.2.

<sup>93</sup> See the example *supra*, note 83.

<sup>94</sup> Another area demonstrating the need to expand the jurisdictional scope of merger review regimes through sometimes more flexible rules that depend on individual circumstances are "creeping" acquisitions and interrelated transactions; in each case, each individual transaction in a series of transactions would not meet jurisdictional thresholds, but jurisdiction over all would exist if all transactions were considered as one. The concern here is that a narrow, transaction-by-transaction application of jurisdictional thresholds would allow parties to engage in transaction engineering in order to avoid merger review of what is in commercial reality a single transaction (with potentially anticompetitive effects).

A number of jurisdictions have developed aggregation rules so that their jurisdictional thresholds correspond to competitive realities. Under the notification rules of the HSR Act, for example, all separate acquisitions of shares, assets, and non-corporate interests during a six month period are aggregated to determine whether notification thresholds are met. 16 CFR §801.13. The EUMR has a two year aggregation rule for transactions between the same parties. EUMR, Article 5(2)(2). In addition, closely related transactions can under certain circumstances be treated as one. EUMR, recital 20 This can mean, for example, that all step-by-step share purchases in a target are treated as one single reviewable transaction once the last, decisive transaction has occurred, not only the last transaction that confers the requisite "control" on the target; of course, if the last, control-conferring transaction is not implemented, all previous transactions remain outside the EUMR's jurisdiction. This aggregation rule is also extended to a series of distinct, but economically related transactions where neither transaction would be carried out without the other. Especially in the latter case, the jurisdictional rule becomes dependent on a case-by-case assessment of all circumstances to assess the economic aim pursued by the parties, but this may be a necessary step to ensure the effectiveness of the system.

For one, this may suggest that there is not a great deal of confidence that alternative enforcement instruments can effectively reach transactions that are somewhere at the "fringe" of merger review and regularly intervene against those that may have anticompetitive effects. There may be detection issues as well as questions whether enforcement standards and evidentiary requirements under provisions prohibiting anticompetitive agreements and anticompetitive unilateral conduct make an ex-post control of such transactions ineffective. Certainly, the application of merger review to transactions on the "fringe" has benefits for competition authorities as parties must bring their deals to the competition authority's attention and the ex-ante review mechanism strengthens the hand of the reviewing authority. And, of course, there may be transactions where alternative enforcement instruments simply do not help, like non-consensual acquisitions of minority interests.

As noted at the beginning of the paper, there has been a strong push in the international debate on merger review procedures toward "objectivising" jurisdictional thresholds. Between the two key components of jurisdictional thresholds, this debate has focused on notification thresholds much more than on the definition of a merger transaction. In the context of notification thresholds, using market shares as notification thresholds is in principle not unreasonable if the goal is to filter out transaction that are unlikely to cause harm, but their use has nevertheless been discouraged because they are not objective and insert uncertainty and the need to evaluate case specific circumstances into the determination of jurisdiction.<sup>95</sup>

In the context of the definition of a "merger transaction," the same type of case specific evaluation of a wide set of criteria, which confers some degree of discretion on a competition authority, appears to be much less objectionable. The tension between using objective and transparent criteria and targeting potentially harmful transactions through more open-ended standards is not infrequently resolved in favor of using more flexible standards and fact specific inquiries. In fact, it appears that more flexible "material/significant" influence standards, or inquiries into whether an acquired asset is capable of affecting the purchaser's competitive position, might enable a competition authority to use some very preliminary assessment of likely competitive effects of a transaction to determine whether in its view the transaction qualifies (or should qualify) as a merger transaction. A certain discretion to make judgment calls is perhaps a necessary mechanism to make a merger review regime effective and reasonably targeted at potentially problematic transactions.

There has certainly not been an organised "outcry" that this approach does not work, even though there are some costs in terms of legal certainty and predictability. This suggests that jurisdictions have been successful in mitigating concerns about unnecessary costs that result from broad or unclear definitions of a merger transaction by using higher notification thresholds and/or less costly review procedures as effective tools to eliminate review for a large number of obviously unproblematic transactions, thus limiting the number of "fringe" cases where less than bright line definitions really matter. In addition, many competition authorities appear to have managed to use guidelines, informal guidance, and consistent decision making practice to make the process reasonably predictable. But where such "cost containment" mechanisms do not exist, there may be more legitimate concerns that expanding the reach of a merger review regime to cover more "fringe" transactions might result in too much uncertainty and costs that exceed any benefits that such a move might have.

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<sup>95</sup> ICN Notification Threshold Report, *supra* note 3, at 4.

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## AUSTRALIA

### 1. Introduction

The *Competition and Consumer Act 2010* (the CCA) is Australia's national competition and consumer law. The Australian Competition and Consumer Commission (ACCC) is the independent Australian Government agency responsible for administering and taking enforcement action under the CCA.

In relation to mergers and acquisitions, the CCA does not apply a jurisdictional threshold based on acquisition of control/influence or criteria such as market share or value of transaction. Instead, section 50 of the CCA (section 50) contains an 'effects test' that prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in any market in Australia.<sup>1</sup> Thus the ACCC is potentially able to review any merger or acquisition that may substantially lessen competition. This broad application means that section 50 generally applies equally to 'middle of the road' transactions and to 'borderline cases' as defined in 9 April 2013 letter to delegates. Nevertheless, some issues have arisen in the application of the merger provisions of the CCA which will be outlined in this submission.

#### 1.1 *Pre-notification of mergers and notification threshold*

There is no compulsory pre-notification requirement for mergers in Australia. Nevertheless, acquiring firms are encouraged to notify the ACCC well in advance of completion of an acquisition if competition concerns may arise.

Similarly, there is not a threshold for acquisitions of either shares or assets below which section 50 does not apply. However, the ACCC has developed a notification threshold to help to filter and limit the merger reviews it conducts to those mergers that may potentially raise competition concerns. Notifications of acquisitions which have a low risk of raising competition issues are dealt with expeditiously via a 'pre-assessment' process allowing these to be cleared without a public review.

In Australia's experience, mergers that fall outside the notification threshold will rarely require investigation by the ACCC. However, it is feasible that a merger that does not meet the notification threshold may still raise competition concerns and the ACCC may investigate such mergers, notwithstanding the threshold.

Merger parties are encouraged to notify the ACCC well in advance of completing a merger where both of the following thresholds are met:

- The products of the merger parties are either substitutes or complements;
- The merged firm will have a post-merger market share of greater than 20 per cent in the relevant market/s.

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<sup>1</sup> Proposed acquisitions that may breach s.50 may be granted authorisation under Division 3 of Part VII of the CCA if the Australian Competition Tribunal is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to occur.

## 1.2 Section 50 of the CCA

Section 50 of the CCA provides that:

- a. A corporation must not directly or indirectly:
  - (a) acquire shares in the capital of a body corporate, or
  - (b) acquire assets of a person.

If the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market.

- b. A person must not directly or indirectly:
  - (a) acquire shares in the capital of a corporation, or
  - (b) acquire any assets of a corporation.

If the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market.

Section 50 applies to acquisitions of property within Australia including but not limited to acquisition of shares in Australian companies, acquisition of domestic businesses, local intellectual property, and local plant and equipment. It also applies to acquisitions of property wherever situated, if the acquirer is incorporated in Australia, carries on business in Australia, is an Australian citizen or is ordinarily resident in Australia.

Section 50 applies to corporations and persons, including both incorporated and non-incorporated entities through Part XIA of the CCA (the Competition Code).<sup>2</sup> Section 50 also applies to the Commonwealth and to the state and territory governments insofar as they are carrying on business.

The CCA applies to both direct and indirect acquisitions, including by way of purchase, exchange, lease, hire or hire purchase.<sup>3</sup> Joint acquisitions and acquisitions of equitable as well as legal interests are also subject to s. 50. However, s.50 does not apply to the acquisition of an asset by way of a charge or in the ordinary course of business.<sup>4</sup> Exceptions to the s.50 merger laws are possible where an acquisition is specified and specifically authorised by Commonwealth (i.e. Australian government) legislation but acquisitions cannot be exempted by Australian state or territory laws.

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<sup>2</sup> The Competition Code has been implemented by each Australian state and territory government. The intention is to extend the operation of Part IV of the CCA to all sectors of the community through the enactment of complementary State and Territory legislation.

<sup>3</sup> Section 4(1) of the CCA.

<sup>4</sup> Section 4(4) of the CCA.

## 2. Issues arising in application of section 50

### 2.1 *Partial shareholdings and minority interests*

There is no threshold shareholding for the purposes of section 50. Furthermore, as section 50 refers to the effect of an acquisition on competition in any market, not to control of a company, all partial acquisitions are reviewable under the CCA.

Although majority shareholding will typically ensure control of a company, ownership of considerably less than the majority of shares may allow for the exercise of control in certain circumstances. A minority shareholding can result in unilateral or coordinated horizontal anti-competitive effects by altering the incentives of the parties, allowing the target and acquirer to share strategic information, or by altering control or influence over the target. Partial shareholdings can also have vertical anticompetitive effects by increasing incentives for input or customer foreclosure or through the use of strategic information.

The ACCC takes particular account of any cross directorships arising from partial acquisitions where the overlap may provide the opportunity to limit competition between rival firms. The ACCC also takes into consideration the legal responsibilities of company directors under the *Corporations Act 2001* and at common law when considering whether minority acquisitions are in breach of section 50 of the CCA.<sup>5</sup>

#### **Box 1. Example of minority acquisition – review ceased due to insufficient information**

*Consolidated Press Holdings Limited (CPH) and Illyria Nominees Television Pty Limited (Illyria) – completed acquisition of shares in Ten Network Holdings Limited*

Ten Network Holdings (Ten) operates three free to air (FTA) television channels in each of the capital cities of Sydney, Melbourne, Adelaide, Brisbane and Perth. A high percentage of the Australian population resides in these cities. At the time of the completed acquisition, ONE HD was one of Ten's channels and the only dedicated FTA sports channel in Australia. It competed for the acquisition and supply of television sporting content with dominant pay TV operator FOXTEL and related entities.

The completed acquisition was made by two entities, CPH and Illyria and resulted in each entity holding an 8.94% shareholding in Ten.<sup>6</sup> Both entities already had established interests in the media industry, including the acquisition of sporting content for the FOX SPORTS pay TV channel.<sup>7</sup> CPH's related entity, CMH, and News Corporation each owned 25 per cent of FOXTEL which supplied sporting content to subscribers. At the time of the acquisition, Mr Lachlan Murdoch was a non-executive director of News Corporation.

The ACCC commenced a public review of the completed acquisitions in November 2010. The investigation involved complex matters including the issue of control/influence of Ten's board arising from partial shareholdings and a dynamic media industry. A focus of the review was whether CPH and Illyria had the ability and incentive to influence the competitive strategies of Ten, and in particular the ONE HD channel, to favour their interests in pay TV operations.

In July 2011, the ACCC announced that there was insufficient information available at that time to establish a breach of section 50 of the CCA and the review was terminated.

<sup>5</sup> A director is required under the Corporations Act to act in good faith in the best interests of the company.

<sup>6</sup> CPH is the private investment firm of James Packer. Illyria is the private investment firm of Lachlan Murdoch specialising in media assets.

<sup>7</sup> Through Premier Media Group Pty Ltd which is jointly owned by CPH's related entity Consolidated Media Holdings and News Corporation (News).



**Box 2. Example of review involving acquisition of minority interests – proposed acquisition opposed**

*Seven Group Holdings Limited - proposed acquisition of Consolidated Media Holdings Limited*

In October 2012, the ACCC announced that it would oppose the proposed acquisition by Seven Group Holdings (Seven) of the balance of shares that it does not already own in Consolidated Media Holdings (CMH).

Seven owned 25.3% of the shares in CMH and around 33% of the shares in Seven West Media (Seven Network). CMH owns 50% of FOX SPORTS Australia (FOX SPORTS) and, indirectly, 25% of FOXTEL. Seven sought clearance from the ACCC on the basis that it was actively considering acquiring the remaining shares in CMH and asked the ACCC to review a proposal for an acquisition of all of the shares in CMH.

The proposed acquisition would lead to Seven having substantial interests in a major free to air network (Seven) and the largest subscription television company in Australia (Foxtel), as well as a 50% shareholding in the company (Foxsports) involved in the acquisition of the rights to the majority of Australian sports that are broadcast by FOXTEL.

The ACCC concluded that the proposed acquisition would be likely to result in a substantial lessening of competition in the market for free to air television services.

In particular, the ACCC was concerned that the proposed acquisition would put Seven Network in a position of advantage over other free to air networks in relation to joint bids and other commercial arrangements with FOX SPORTS for the acquisition of sports rights. Being able to come to such arrangements with FOX SPORTS would enhance Seven Network's ability to acquire the rights to premium sports.

Access to premium sporting content is vital to the ability of free to air networks to compete strongly. Premium sports provide a free to air network with a high degree of ratings certainty, as viewer interest in major sports is generally consistent over many years, whereas interest in other programs or formats fluctuates more rapidly over time. The consistent ratings of major sports enable free to air networks to implement cross promotion and lead in strategies around sporting events, leading to a ratings 'halo' effect whereby broadcasting premium sports increases the network's ratings overall. The ACCC considered that the proposed acquisition would significantly reduce the ability of Seven Network's competitors to acquire such content and compete effectively for viewers and advertisers in the free to air television market following the proposed acquisition, potentially leading to a reduction in the quality or choice of free to air television programming available to viewers (for example, with respect to scheduling or production features), and also potentially enabling the Seven Network to charge increased advertising rates.

### **3. Greenfield acquisitions**

The ACCC is of the view that the CCA is currently able to address acquisitions of greenfield sites that substantially lessen competition in any market. However, some private corporations have questioned the ACCC's view. The Australian government has indicated that it will make further amendments to the CCA to confirm the ACCC's ability to prevent anti-competitive acquisitions of greenfield sites if successful challenges are made to the ACCC's view.<sup>8</sup> The ACCC's current review of a proposed acquisition by Woolworths Limited (Woolworths) of a supermarket site in Glenmore Ridge on the outer western fringe of Sydney is an example of the ACCC's approach to greenfield acquisitions. Woolworths is Australia's largest grocery retailer, and one of the two major supermarket chains (MSCs) operating in Australia. It operates over 800 supermarkets across Australia.

<sup>8</sup> Dr Craig Emerson, Minister for Small Business, Independent Contractors and the Service Economy, Minister for Competition Policy and Consumer Affairs, Minister Assisting the Finance Minister on Deregulation, *Government to secure powers to deal with creeping acquisitions*, Media Release, 22 January 2010 (<http://www.craigemersonmp.com/files/012110%20Creeping%20acquisitions%20media%20release%20.pdf>).

### **Box 3. Woolworths proposed acquisition of supermarket site in Glenmore Ridge**

In addition to considering greenfields acquisitions under s.50, there may be certain circumstances where a pattern of greenfield acquisitions by a dominant firm could potentially breach the abuse of market power provisions in the CCA where available sites are limited and it can be shown that the acquisitions were made for the purpose of foreclosing new entry. The ACCC has investigated such claims of land banking but none have progressed to litigation.

The ACCC released a Statement of Issues<sup>9</sup> in September 2012 on the proposed acquisition by Woolworths of a greenfield supermarket site at the Glenmore Ridge Village Centre.

The Glenmore Ridge Village Centre is a 2.11ha block of undeveloped land in the recently released Glenmore Ridge residential estate.<sup>10</sup> The site is presently zoned as a 'Local Centre' and thus, subject to council and regulatory approvals, can house a supermarket and complementary specialty shops.

The ACCC expressed a preliminary view in the Statement of Issues that the proposed acquisition would be likely to result in a substantial lessening of competition in the local Glenmore Park retail grocery market. Woolworths already has a significant presence in that market and the target site is the only site in Glenmore Park that would be suitable for an alternative supermarket operator to enter the market. The ACCC's preliminary view was that the proposed acquisition would be likely to have the effect of preventing or hindering competition that may otherwise have been brought to the local market by an alternative supermarket operator. This competition is unlikely to be otherwise introduced into the local market because of the lack of other available suitable sites for supermarket development.

This review is continuing.

### **3.1 Creeping acquisitions of assets and shareholdings**

An individual acquisition of assets or shares has a 'creeping' effect where it enables the acquirer to incrementally enhance its market power, but where the impact on competition of each incremental and sequential acquisition individually is less than substantial. However, collectively the acquisitions may give rise to competition concerns and may eventually substantially lessen competition in a market.

There are several types of creeping acquisitions including:

- A process by which a company sequentially acquires a number of smaller firms or assets that may have a cumulative effect upon its market share, although no single acquisition by itself would necessarily result in a substantial lessening of competition in the relevant market.
- A process by which a company incrementally increases its shareholding in a single competitor company (or a company in another market where potential vertical integration issues are a concern).
- A process by which a company incrementally increases its shareholding in a number of companies in the same or related markets sequentially.

<sup>9</sup> A Statement of Issues published by the ACCC sets out the ACCC's preliminary views on a merger, drawing attention to particular issues of varying degrees of competition concern, as well as identifying the lines of further inquiry that the ACCC wishes to undertake.

<sup>10</sup> The Glenmore Ridge residential estate is located approximately 53 kilometres west of the Sydney Central Business District in New South Wales.

The first dot point is the most significant policy issue for Australia because there are a number of markets in Australia that are already quite concentrated and in which consumer and political concerns about competition already exist.

The ability of the CCA to deal with creeping acquisitions is not settled. In 2003, the committee reviewing the *Trade Practices Act 1974*<sup>11</sup>, reached the view that section 50 in its [then] present form was adequate to enable the ACCC to address creeping acquisitions that raised competition concerns.<sup>12</sup> In contrast, in 2004, the Senate Economics Reference Committee considered that section 50 should be strengthened to deal with creeping acquisitions to ensure that the ACCC had the power to prevent such acquisitions.<sup>13</sup> The Commonwealth Government did not accept the recommendation of the Senate Committee in relation to creeping acquisitions.

During 2008 and 2009, the Australian government consulted on a number of models to address creeping acquisitions. There was ultimately no clear consensus in favour of any individual model and views varied as to whether there was a broader substantive problem to be addressed. However, as a result of the consultations, the Government identified two areas where clarification was considered appropriate.

Thus, the CCA was amended in December 2011 by<sup>14</sup>:

- Removing the requirement that a market be a ‘substantial market’ to fall within the scope of s.50.
- Rewording the substantial lessening of competition test to apply to ‘any market’ rather than ‘a’ market.

While the amendments do not directly address creeping acquisitions and the ACCC’s ability to consider the aggregate effect of incremental acquisitions, the amendments were intended to clarify that the ACCC and the courts can examine small markets, such as local retail markets, which may be small geographically but where the competitive effects of creeping acquisitions are most likely to arise. The amendments are also intended to clarify that the ACCC or a court can consider the competitive effects of an acquisition in multiple markets, including those upstream and downstream of the market in which the acquisition occurs when considering incremental acquisitions in any market.<sup>15</sup> The effect of these changes to the ACCC’s approach to merger assessment is discussed later in this submission.

There has been much discussion in Australia about the competitive effect of creeping acquisitions in certain retail sectors, particularly creeping acquisitions by Coles and Woolworths, Australia’s two major supermarket chains whose operations also extend into liquor, hardware and fuel retail markets. There is some political and consumer perceptions and concern about the size and expansion of both Coles and Woolworths within and across markets and the impact of this particularly on independent retailers.

When considering a retail acquisition involving Coles or Woolworths the ACCC’s approach has been to focus on the competitive effects of the individual acquisition in the relevant local retail market. While the broader market impact is also considered, single acquisitions that do not have a substantial competitive effect at the local retail level are generally unlikely to cause broader concerns.

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<sup>11</sup> Now the *Competition and Consumer Act 2010*

<sup>12</sup> *Review of the Competition Provisions of the Trade Practices Act 1974*, 2003.

<sup>13</sup> The Senate, Economics Reference Committee, *Effectiveness of the Trade Practices Act in Protecting Small Business*, March 2004.

<sup>14</sup> *Competition and Consumer Legislation Amendment Bill 2011*

<sup>15</sup> Competition and Consumer Legislation Amendment Bill 2011, *Explanatory Memorandum*, p. 9.

#### **Box 4. Woolworths proposed acquisition of independent supermarket in Hawker ACT**

The Australian Competition and Consumer Commission released a Statement of Issues in December 2012 on the proposed acquisition by Woolworths of the business, business assets and liquor licence of the Supa IGA supermarket in the Hawker group centre in Canberra (Hawker Supa IGA).<sup>16</sup> The Hawker Supa IGA is a 2000m<sup>2</sup> supermarket that sells a full range of groceries and fresh produce. The supermarket and the associated liquor licence are currently owned by Dealore Pty Limited. If the acquisition proceeds, the supermarket will be rebranded as Woolworths.

The ACCC's preliminary view is that the proposed acquisition may result in a substantial lessening of competition in the local retail supermarket market by removing the Hawker Supa IGA as an independent rival in the market. The Hawker Supa IGA's differentiated product and service offering represents a competitive response to the offer of rival supermarket chains, providing additional choice to consumers. Given the market is characterised by high barriers to entry, new entry at a sufficient scale to replace the lost competitive tension is unlikely.

The ACCC considers that the proposed acquisition would be unlikely to cause competition concerns in the state-wide retail supermarket market as the transfer of a single supermarket would result in only a very small increase in state wide market share for Woolworths. Similarly, the ACCC considers that the proposed acquisition is unlikely to have raise concerns in the wholesale grocery supply market in either New South Wales or the Australian Capital Territory.

This review is continuing.

Woolworths and Lowe's proposed acquisition of Gays hardware stores in Ballarat

In May 2012, the ACCC released a Statement of Issues on the proposed acquisition by Woolworths Limited and Lowe's Companies Inc (Joint Venture) of three hardware stores in the Ballarat area from G Gay & Co (the Gay Stores).<sup>17</sup> The Joint Venture also owns Danks which is a wholesaler distributor of hardware products and the operator of a number of retail banner groups. The ACCC expressed its preliminary view in the Statement of Issues that the proposed acquisition may raise competition concerns with respect to the retail supply of hardware and home improvement products to consumers in the Ballarat area.

The Joint Venture owns and operates Masters stores, a recent 'big box' format entrant into the hardware and home improvement retail sector in Australia. The Joint Venture has commenced development of a site in Wendouree, Victoria (in the Ballarat area) and expects to begin trading a Masters store at the site in August 2013.

The three Gay Stores that are the subject of the proposed acquisition are privately operated multi-category retail stores in the Ballarat area that sell a wide range of hardware and home improvement products.

The ACCC announced in October 2012 that it would oppose the proposed acquisition.<sup>18</sup> The ACCC concluded that the proposed acquisition would be likely to result in a substantial lessening of competition through the removal of what will be one of Woolworths' two closest competitors in the Ballarat area. The remaining suppliers of hardware and home improvement products in the Ballarat area are either significantly smaller than the Gay stores or have a limited product offering and marketing presence, such that they would be unlikely to compete effectively against the Woolworths' Masters store and Bunnings. The ACCC further concluded that the threat of new entry into the Ballarat area would be unlikely to replace the competitive constraint offered by the Gay stores on the Masters and Bunnings stores.

<sup>16</sup> ACCC, Statement of Issues, *Woolworths Limited - proposed acquisition of supermarket site at Glenmore Ridge Village Centre*, 20 September 2012.

<sup>17</sup> ACCC, Statement of Issues, *Woolworths Limited and Lowe's Companies Inc (Joint Venture) – proposed acquisition of G Gay & Co hardware stores in Ballarat*, 16 May 2012.

<sup>18</sup> *ACCC to oppose Woolworths/Lowe's proposed acquisition of G Gay & Co hardware stores*, ACCC Media Release, 4 October 2012.

There may be instances however where multiple contemporaneous, or near contemporaneous acquisitions, of shares or assets can be treated as a single acquisition. For example if during a company takeover the acquirer enters into multiple contracts for the purchase of shares in the takeover target the ACCC will treat these separate contracts as constituting a single acquisition for the purpose of section 50. Equally where small parcels of shares or assets of a single company are acquired in quick succession, for example several acquisitions of less than 1% of the total shareholding acquired over a period of months, then the ACCC will consider the totality of those acquisitions rather than the isolated effect of each acquisition.

## **5. Joint ventures**

Section 50 of the CCA applies to joint ventures to the extent that the joint venture involves the acquisition of assets or shares. While the ACCC's merger review will often necessarily involve consideration of ancillary agreements between joint venture parties, the ACCC will generally only give its view on the acquisition element of the joint venture and therefore whether it would challenge the acquisition in the Federal Court pursuant to section 50. Related agreements that involve potentially anti-competitive conduct may be at risk of breaching section 45 of the CCA<sup>19</sup>. Although the test in sections 50 and 45(excluding the per se provisions) is an SLC based test, the ACCC does not provide a view on whether the making or giving effect to these agreements is likely to breach section 45 on the basis that the agreements may be modified over time.

It may be possible to obtain immunity for any residual agreements through Part VII of the CCA. In particular, the ACCC can authorise businesses to engage in anti-competitive arrangements or conduct when it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

While this approach to assessments involving joint ventures generally works effectively, it can raise some challenges where it is unclear in the initial stages of the review of the extent to which the acquisition elements of the joint venture are substantive to the operation of the joint venture. There may be some circumstances where it will become apparent during a merger review that the arrangements would be better considered in the authorisation context, particularly where public benefits are raised which are not relevant to the merger assessment.

## **6. Changes in merger regime**

As noted above, the CCA was amended in December 2011 to clarify that the ACCC and the courts can examine local markets where the competitive effects of creeping acquisitions are most likely to arise, as well as the competitive effects of creeping acquisitions in upstream and downstream markets.

The amendments are yet to be tested before the court but confirm the ACCC's ability to challenge mergers where the ACCC considers they will substantially lessen competition in local markets. The ACCC reports that the amendments have not had a major impact on the way that it enforces section 50 of the CCA. This is because it had previously taken the view that the term 'substantial market', which was replaced with the term 'any market', could apply broadly to include local and regional markets. Furthermore, the ACCC's analysis of acquisitions focuses on the competitive effects in markets rather than the size of those markets.

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<sup>19</sup> Certain agreements between joint venture parties that may otherwise be considered cartel provisions under the CCA are exempted if the cartel provision is for the purpose of the joint venture Sections 44ZZRO and 44ZZRP of the CCA.

## **7. Objective criteria and ‘gaming’**

While the flexibility of the regime minimises the extent of borderline cases, there have been some examples where transactions have been structured in a way that they were not acquisitions under s.50 and therefore the ACCC did not conduct a review. For example, in 2009 the New South Wales State Government proposed to licence a private operator to conduct public lotteries in that state under the Public Lotteries Act 1996. The ACCC decided not to conduct a merger review of this proposal, on the basis that the initial grant of either an operator or product licence in accordance with the Public Lotteries Act 1996 was not an acquisition under s.50 of the TPA. This view is limited to the initial grant of the operator or product licences, and does not extend to the transfer of a licence from one operator to another.



## BULGARIE

### PRÉSENTATION DE LA LÉGISLATION BULGARE RELATIVE À LA RÉGLEMENTATION DES CONCENTRATIONS ENTRE ENTREPRISES

La Loi de la protection de la concurrence (LPC), qui est actuellement en vigueur est entrée en fonction le 28.12.2008 après l'adhésion de la Bulgarie à l'Union européenne en 2007. La rédaction et l'adoption d'une nouvelle législation a été faite dans le but d'améliorer notre cadre juridique et de la conformité avec la législation européenne dans le domaine des fusions entre des entreprises.

La Loi de 2008 introduit de nouveaux seuils plus élevés pour le chiffre d'affaires, qui doivent être atteints pour qu'il soit obligatoire de notifier une opération devant la Commission de protection de la concurrence.

Conformément à l'art. 24, par. 1 de la LPC, les entreprises sont obligées d'informer la Commission de la protection de la concurrence (CPC) de leur intention de procéder à la concentration lorsque le montant du chiffre d'affaires total de l'ensemble des entreprises participant à la concentration est supérieur à 25 millions leva. La loi introduit une exigence supplémentaire avec deux critères alternatifs - le chiffre d'affaires d'au moins des deux entreprises participantes à l'opération ou le chiffre d'affaires de la société cible sur le territoire de la Bulgarie pour l'année financière précédente doit dépasser 3 millions de leva.

Le cadre juridique de la fusion ne fait pas de rapport entre le pourcentage du capital dans une société qui est objet d'une acquisition avec l'obligation de notifier l'opération. L'achat d'actions dans le capital d'une société conduit à la concentration si cela donne des droits à exercer une influence déterminante sur la compagnie et de déterminer son comportement sur le marché.

Dans sa pratique, l'autorité bulgare de concurrence a examiné des cas où l'acquisition de 10% et 17% était associée à la possibilité d'exercer un contrôle. Dans ces deux cas, les statuts prévoyaient que l'assemblée générale des actionnaires peut accepter des décisions sur des questions stratégiques seulement dans un esprit de partenariat. Cela donnait à chacun des actionnaires minoritaires le droit de bloquer l'adoption de ces décisions.

Dans les cas où une acquisition de participations minoritaires du capital ne confère pas de contrôle à la base juridique (*de jure*), la Commission a examiné si l'actionnaire minoritaire était en position d'exercer un contrôle à *de facto basis*. Celui-ci est fait par une majorité stable dans la procédure de prise de décisions aux assemblées générales des actionnaires pendant les trois dernières années. Dans sa pratique, CPC est dirigée par les instructions de la Commission Européenne, en vertu desquelles, dans ces cas, la période d'examen ne doit pas être inférieure à trois ans pour qu'on considère que le contrôle est exercé sur une base durable.

Dans un des cas examinés par l'autorité bulgare on a constaté que le contrôle à *de facto basis* est exercé pendant les deux dernières années et demie, ce qui n'atteignait pas trois ans complets. Alors CPC a décidé de faire une demande par le Réseau international de concurrence ECN aux autres États membres pour savoir de quelle manière ils procèdent en des cas pareils. La réponse la plus fréquente était que les autorités suivent la pratique européenne et observent dans ces cas une période de trois ans. Seulement une autorité nous a répondu qu'il est suffisant qu'un actionnaire minoritaire a imposé son influence



déterminante même à une assemblée générale des actionnaires pour qu'on considère qu'il existe un contrôle exercé à *de facto basis*.

En principe, l'acquisition des intérêts minoritaires qui ne fournissent pas le contrôle de jure ne sont pas soumis à notification. Parfois le pouvoir financier et le pouvoir du marché de l'acheteur des actions conduit à l'hypothèse qu'il y aura une influence déterminante sur la stratégie commerciale de l'entreprise.

CPC a examiné un grand nombre de cas dans lesquels l'objet d'acquisition est le contrôle sur des actifs. Les cas les plus courants sont liés à l'expansion des chaînes de commerce modernes. Dans ces cas on acquiert un contrôle sur la base des contrats avec une durée extrêmement longue sur des surfaces commerciales qui vont fonctionner comme des hypermarchés, supermarchés et maxi-discount.

Ces contrats à long terme étaient au-delà de 10 ans et même de 20 ans. La Commission a considéré que ces cas sont réputés comme des concentrations, parce que ces actifs offrent un accès indépendant au marché et la période pendant laquelle ils seront utilisés est assez longue. Ces acquisitions ont été associées à une légère augmentation des parts de marché.

LPC prévoit que la création d'une entreprise commune mène également à la réalisation d'une concentration. Alors la loi exige que l'entreprise soit de plein exercice et qu'elle accomplisse toutes les fonctions d'une entité économique autonome. Notre autorité demande toujours une motivation détaillée des parties notifiantes. Cette motivation sert à prouver que l'entreprise commune va accomplir toutes les fonctions d'une entité économique autonome et qu'elle aura ses propres clients, ses actifs et son encadrement supérieur.

Jusqu'à présent, nous n'avons pas eu de cas dans lesquels la création d'une entreprise commune conduit à douter qu'il s'agit d'un accord restrictif. Dans les cas examinés par CPC les entreprises communes ont été créées pour reprendre une activité nouvelle et différente des activités de ses sociétés mères. Dans d'autres cas les entreprises communes ont été créées pour reprendre des activités économiques de leurs sociétés mères mais resteront des entités économiques autonomes et les parties notifiantes ont présenté des preuves de cela. En même temps dans nos cas examinés les entreprises communes créées n'avaient pas de hautes positions sur le marché, conduisant à des doutes que cela va restreindre la concurrence.

En ce qui concerne les exemptions des transactions qui ne constituent pas des concentrations, la loi identifie comme telles l'acquisition temporaire des parts de capital par des institutions financières et de crédit dans le but de les revendre, ainsi que des acquisitions des participations par des holdings financiers achetées comme un investissement et non pour déterminer la stratégie commerciale des entreprises. Une exception à la définition de la concentration est aussi l'acquisition d'actions auprès des liquidateurs des sociétés en cette qualité.

LPC ne prévoit pas de restrictions pour des acquisitions de contrôle par des entreprises disposant d'une puissance significative sur le marché. CPC examine chaque cas individuellement pour déterminer si l'opération va créer des effets verticaux ou des effets horizontaux liés à une augmentation substantielle de la position sur le marché. Un cas récemment examiné par CPC était la fusion entre un participant du marché, qui occupe une part de marché de 74% et une entreprise qui est l'un des plus petits acteurs du marché, avec une part de 0,5%. Dans ce cas, la Commission a considéré que l'opération ne menace pas la concurrence sur ce marché, grâce à l'augmentation insignifiante de la position sur le marché. CPC a constaté aussi que l'acheteur ne prévoit pas d'élargir ses activités dans le pays ce qui peut lui permettre d'augmenter son influence sur le marché.

## CANADA

Canada's Competition Bureau (the "Bureau") is pleased to provide this submission to the OECD Competition Committee's 18 June 2013 roundtable on "Definition of transaction for the purpose of merger control review". The Bureau, headed by the Commissioner of Competition (the "Commissioner")<sup>1</sup> is an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act* (the "Act")<sup>2</sup> and certain other statutes. In carrying out its mandate, the Bureau strives to ensure that Canadian businesses and consumers have the opportunity to prosper in a competitive and innovative marketplace.

### 1. Overview of merger notification and review in Canada

Under the Act, the Commissioner has jurisdiction to review and challenge mergers of all sizes and in all sectors of the economy. While the statutory definition of a "merger" is broad, only certain classes of proposed mergers that exceed applicable monetary thresholds are subject to mandatory pre-merger notification.

For the purposes of the Act's principal provision enabling the Commissioner to challenge a merger before the Competition Tribunal (the "Tribunal")<sup>3</sup> (i.e. section 92), a "merger" is defined as:

"the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of *control over or significant interest in* the whole or a part of a business of a competitor, supplier, customer or other person."<sup>4</sup> [*emphasis added*]

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<sup>1</sup> The Commissioner is responsible for the administration and enforcement of the Act, including merger enforcement. The Mergers Branch of the Competition Bureau is responsible for the conduct of merger reviews.

<sup>2</sup> R.S.C., c. C-34.

<sup>3</sup> The Competition Tribunal, an adjudicative body that operates independently of any government department, is the specialized court that determines, on application by the Commissioner, whether a proposed merger is likely to prevent or lessen competition substantially. It determines and orders the appropriate remedy.

<sup>4</sup> Section 91 of the Act. A transaction that does not fall within the definition of "merger" may in some instances be subject to review under the civil provision in section 90.1 of the Act as outlined in the Bureau's *Competitor Collaboration Guidelines* (23 December 2009), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html> at paragraph 1.2(a). As between section 92 (the substantive merger control provision) and section 90.1, transactions that fall under the definition of "merger" (i.e. acquisition of control or a significant interest in a business) in section 91 will be assessed as such, and not under section 90.1. The Act also prohibits simultaneous duplicate proceedings under section 90.1 and certain other provisions in the Act, such as section 92.

Generally, the Act defines “control” to be *de jure* control with respect to corporations,<sup>5</sup> whereas, the Act does not define a “significant interest”. The Bureau’s interpretation of a “significant interest” is explained in its *Merger Enforcement Guidelines* (“MEGs”).<sup>6</sup> The Bureau considers both quantitative and qualitative factors when assessing whether an interest is significant. Qualitatively, a significant interest is held when the person acquiring or establishing the interest obtains the ability to *materially influence* the economic behaviour of the target business.<sup>7</sup> The MEGs state that an interlocking directorate would rarely qualify, *in and of itself*, as the establishment of a significant interest (i.e. a “merger”). Rather, interlocking directorates may be features of transactions that otherwise qualify as mergers, and may be reviewed as appropriate.<sup>8</sup>

While the statutory definition of a merger is broad, only certain classes of transactions that exceed applicable monetary thresholds are subject to mandatory pre-merger notification under the Act<sup>9</sup> and cannot be completed until the expiration of the applicable statutory waiting period.<sup>10</sup> The Commissioner has the ability under the Act to waive the notification requirement and/or terminate the applicable waiting period,<sup>11</sup> either action can be used as a means of simplifying the notification procedure for transactions that are unlikely to raise potential competition concerns.<sup>12</sup>

The Act includes clear and objective criteria to assist in determining whether a proposed transaction is subject to mandatory pre-merger notification.<sup>13</sup> Specifically, notification of a proposed transaction is

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<sup>5</sup> More specifically, in the case of a corporation, control generally means more than 50% of the votes that may be cast to elect directors of the corporation, and which are sufficient to elect a majority of such directors. In the case of a partnership, control means an interest that entitles the person to more than 50% of the partnership’s profits or assets upon dissolution.

<sup>6</sup> (6 October 2011), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html>.

<sup>7</sup> Influence over economic behaviour can include decisions with respect to pricing, purchasing, distribution, marketing, investment, financing and licensing of intellectual property. Factors that may be relevant to the analysis of whether a minority interest confers material influence are listed in section 1.6 of the MEGs.

<sup>8</sup> See sections 1.15 to 1.17 of the MEGs.

<sup>9</sup> It is an offence to complete a notifiable transaction without submitting a notification (or receiving a waiver of the obligation to notify) pursuant to the Act. Subsection 65(2) of the Act.

<sup>10</sup> Notifiable transactions are subject to an initial 30-day waiting period during which the proposed transaction may not be completed. If, during this initial waiting period, the Commissioner issues a supplementary information request (“SIR”), the proposed transaction may not close until the expiry of a second 30-day waiting period that commences when the Commissioner has received a complete SIR response from each recipient of a SIR. Where parties complete or are likely to complete a notifiable transaction before expiration of an applicable waiting period (i.e. initial or subsequent 30-day period), the Commissioner may apply to a court for a remedy under the Act, including, among other things, a prohibition order, a dissolution or divestiture order, or administrative monetary penalties. Section 123.1 of the Act.

<sup>11</sup> Paragraph 113(c) and subsection 123(2) of the Act.

<sup>12</sup> The Act provides that in lieu of a notification filing, the parties may submit a request for an Advanced Ruling Certificate (“ARC”). Where an ARC is issued, the parties are exempt from any further notification requirements as long as the transaction is completed within one year of the issuance of the ARC. Where an ARC is not issued, a notification filing is required unless the Commissioner waives this requirement on the basis that the ARC request supplied substantially similar information to that required in a notification filing. Further, the Act provides that the statutory waiting period, or a part thereof, may be abridged when the parties are notified that the Commissioner does not intend to challenge the merger at that time.

<sup>13</sup> The *Notifiable Transaction Regulations*, SOR/87 348 (“NTRs”), together with Pre-Merger Notification Interpretation Guidelines provides parties with guidance in determining whether the applicable notification

required where *both* size-of-parties and applicable size-of-transaction thresholds are exceeded. The size-of-parties threshold requires that the parties to the transaction, together with their affiliates, have combined assets in Canada or annual gross revenues from sales in, from or into Canada in excess of C\$400 million.<sup>14</sup> As discussed further below, there are specific size-of-transaction criteria for each of the following classes of transactions: an acquisition of assets; an acquisition of voting shares; an amalgamation; a combination; and the acquisition of an interest in a combination, together with a common dollar value threshold that must be exceeded. For 2013, this dollar value is C\$80 million.<sup>15</sup>

In addition, each size-of-transaction threshold incorporates the concept of a change in ownership of an “operating business” with a nexus to Canada. “Operating business” is defined in the Act as “a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work.” For example, for the size-of-transaction test for an acquisition of shares to be met, the voting shares to be acquired must be of a corporation that carries on an “operating business” or that controls a corporation that carries on an operating business in Canada. For an acquisition of assets, the assets must be of an operating business.<sup>16</sup>

To facilitate the application of the statutory notification criteria and aid parties in determining whether a proposed transaction is notifiable, the Bureau has for many years issued public guidance. In particular, the Bureau has published a number of Pre-Merger Notification Interpretation Guidelines (some of which are noted in this submission) and a *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act*. Often, such guidance documents are drafted after consultations with stakeholders. Indeed, the Bureau is currently in the process of developing three new Interpretation Guidelines, some of which may be ready for publication this year. Moreover, the Bureau’s Merger Notification Unit (which accepts and processes merger filings) provides informal consultations on notification issues on a case-by-case basis (as well as formal written opinions, for a fee).

## 2. Acquisition of shares

For notification purposes, the size-of-transaction threshold for an acquisition of voting shares will be met where (i) the assets in Canada of the target corporation (and its subsidiaries) or gross revenues from sales in or from Canada generated from those assets, exceeds C\$80 million, and (ii) the acquisition would result in an acquiring person (and its affiliates) holding voting shares, (a) in the case of a corporation whose voting shares are publicly traded, in excess of 20% of all of the votes attached to the target corporation’s voting shares, or (b) in the case of a corporation that does not have any voting shares that are publicly traded, in excess of 35% of all of the votes attached to the target corporation’s voting shares. If an acquiring party already exceeds the aforementioned percentage thresholds of 20% or 35% (i.e. via existing share ownership), as applicable, then the applicable threshold is 50%.

If an acquisition of shares is not notifiable, the Commissioner may nonetheless review (and challenge) the acquisition if it results in a person acquiring a significant interest in the target corporation. In the case

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thresholds have been exceeded. The Interpretation Guidelines are available on the Bureau’s website: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03357.html>.

<sup>14</sup> The Act provides that the parties to a proposed acquisition of shares are the person(s) acquiring the shares and the corporation whose shares are to be acquired (as opposed to the vendor of the shares).

<sup>15</sup> As discussed below under Part 7, the size-of-transaction dollar value threshold was increased by amendment in March 2009.

<sup>16</sup> See also, the Bureau’s *Pre-merger Notification Interpretation Guideline Number 1: Definition of “Operating Business”* (Section 108 of the Act), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03358.html>.

of *voting shares*, the Bureau generally considers that a significant interest in a corporation exists when one or more persons directly or indirectly hold enough voting shares to, (i) obtain a sufficient level of representation on the board of directors to materially influence that board, or (ii) block special or ordinary resolutions of the corporation.<sup>17</sup> In the absence of other relationships, ownership of less than 10 percent of the voting interests in a business generally will not be treated as ownership of a significant interest. While inferences about situations that result in a direct or indirect holding of between 10 percent and 50 percent of voting interests are more difficult to draw, a larger voting interest is ordinarily required to materially influence a private company than a widely-held public company.<sup>18</sup>

### 3. Acquisition of assets

For notification purposes, the size-of-transaction threshold for an acquisition of assets will be exceeded where the value of the assets in Canada to be acquired, or the annual gross revenues from sales in or from Canada generated by those assets, exceeds C\$80 million.

If an acquisition of assets is not notifiable, the Commissioner may nonetheless review (and challenge) the acquisition if it results in a person acquiring a significant interest in a business. As discussed in the MEGs, asset transactions (whether notifiable or not) that generally qualify as the acquisition of a significant interest in a business (i.e. a “merger”) include, without limitation, the purchase or lease of an unincorporated division, plant, distribution facilities, retail outlet, brand name or intellectual property rights from a target company.<sup>19</sup> Further, the acquisition of a subset of the assets of a business that is capable of being used to carry on a separate business is also considered to be the acquisition or establishment of a significant interest in a business.<sup>20</sup>

### 4. Joint ventures

Pursuant to the Act, the formation of an unincorporated combination is exempt from the substantive merger review provisions (section 92) if it is undertaken for a specific project or program of research and development, and certain criteria are met.<sup>21</sup> Such criteria include the following: (i) the project/program would not likely take place or would not reasonably be likely to take place in the absence of the combination because of the risks involved in relation to the project/program and the business to which it relates; (ii) no change of control over any party to the combination would result; (iii) all persons who formed the combination are party to a written agreement that, (a) imposes an obligation on at least one of the parties to contribute assets to the combination, (b) governs the continuing relationship between the parties, (c) restricts the range of activities that may be carried on by the combination, and (d) provides that the agreement terminates on completion of the project/program; and (iv) the combination is not likely to prevent or lessen competition except to the extent reasonably required to undertake and complete the project/program.

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<sup>17</sup> Section 1.9 of the MEGs. As noted above, in its assessment of whether the interest confers an ability to materially influence the economic behaviour of the target business, the Bureau will consider the factors listed in section 1.6 of the MEGs.

<sup>18</sup> Section 1.10 of the MEGs. When a transaction involves the purchase of non-voting shares, the Bureau examines whether the holder of the minority interest can materially influence the economic behaviour of the business despite its inability to vote its shares.

<sup>19</sup> Section 1.13 of the MEGs.

<sup>20</sup> *Ibid.*

<sup>21</sup> Section 95 of the Act. The exemption does not apply to corporate joint ventures or the acquisition of assets of a combination.

The formation of a combination may be notifiable under the Act if the size-of-parties and applicable size-of-transaction thresholds are exceeded. The size-of-transaction threshold for a combination of at least two persons that propose to carry on business other than through a corporation, will be met where: (i) at least one of the persons contributes assets from an operating business; and (ii) the aggregate value of the assets in Canada or the gross revenues from sales in or from Canada generated from those assets exceeds C\$80 million. The Act also has a size-of-transaction test for the acquisition of an interest in a combination.<sup>22</sup>

Pursuant to section 112 of the Act, an unincorporated combination is exempt from notification requirements if certain criteria are met,<sup>23</sup> including the following: (i) all persons who propose to form the combination have a written agreement or intend to have a written agreement that, (a) imposes an obligation on at least one of the parties to contribute assets to the combination, (b) governs the continuing relationship between the parties, (c) restricts the range of activities that may be carried on by the combination, and (d) provides for the orderly termination of the agreement; and (ii) no change of control over any party to the combination would result from the combination. This exemption typically only applies to the formation of a combination, and does not apply to the acquisition of an interest in a combination by a new party.<sup>24</sup>

It is possible that parties to a proposed combination may structure their combination, or argue that the combination is structured, such that no assets are being contributed to the joint venture and, as a result, these combinations fall outside the scope of the Act's notification provisions. The Bureau is aware of instances where transactions that raise potential competition concerns have been exempt from notification under section 112 of the Act.

## 5. Amalgamations

For notification purposes, an amalgamation will be notifiable where: (i) the assets or annual gross revenues from sales in or from Canada of the continuing corporation (and subsidiaries) exceed C\$80 million; and (ii) each of at least two of the amalgamating corporations, together with its affiliates, have assets in Canada, or annual gross revenues from sales in, from or into Canada, that exceed C\$80 million.<sup>25</sup>

## 6. Exemptions

No industry sector is specifically exempt from the substantive provisions respecting merger control contained in the Act. However, the Tribunal may be prohibited from making an order with respect to a merger involving banks, trust companies or insurance companies under the substantive merger control provision of the Act (section 92) if the Minister of Finance certifies the names of the parties and that the

<sup>22</sup> The size-of-transaction test for the acquisition of an interest in a combination will be met where: (i) the combination carries on an operating business other than through a corporation; (ii) the aggregate value of the assets in Canada that are the subject-matter of the combination or the gross revenues from sales in or from Canada generated from those assets exceeds C\$80 million; and (iii) as a result of the acquisition, the person acquiring the interest will be entitled to over 35% of the profits of the combination or of its assets on dissolution, or where the person acquiring the interest is already so entitled, the acquiring person will be entitled to over 50% of such profits or assets.

<sup>23</sup> Section 112 of the Act. The exemption does not apply to corporate joint ventures.

<sup>24</sup> See the Bureau's *Pre-merger Notification Interpretation Guideline Number 4: Exemption for Combinations that are Joint Ventures (Section 112 of the Act)*, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03361.html>.

<sup>25</sup> See also, the Bureau's *Pre-merger Notification Interpretation Guideline Number 6: Amalgamation (Subsections 110(4) and 110(4.1) of the Act)*, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03363.html>.

merger is in the public interest.<sup>26</sup> The Tribunal may be similarly prohibited where a merger has been approved under the *Canada Transportation Act*,<sup>27</sup> and the Minister of Transportation has certified the names of the parties.<sup>28</sup>

There are no special notification thresholds or exemptions from pre-merger notification requirements for any specific industry sector. However, certain general exemptions from the pre-merger notification requirements of the Act, include the following: (i) a transaction where all of the parties are affiliates of each other; (ii) a transaction that the Minister of Finance has certified under the Act to be in the public interest; (iii) a transaction that has received an advance ruling certificate under section 102 of the Act; and (iv) a transaction in respect of which the Commissioner has waived the obligation to notify.<sup>29</sup> In addition, certain specific exemptions in respect of acquisitions of voting shares, assets or interests, are specified in the Act, including the following: (i) acquisitions of real property or goods in the ordinary course of business, provided the person(s) making the acquisition would not hold all or substantially all of the assets of a business or an operating segment of a business;<sup>30</sup> (ii) certain acquisitions solely for the purpose of underwriting; (iii) certain acquisitions that result from a gift, intestate succession or testamentary disposition; (iv) certain creditor transactions made in the ordinary course of business;<sup>31</sup> and (v) certain acquisitions of a Canadian resource property (whether as an acquisition of an asset or of voting shares of a corporation that does not have any significant assets other than the resource property), provided the acquiring person incurs expenses to carry out exploration or development activities with respect to the property.<sup>32</sup> In addition, certain acquisitions that are to be undertaken to give effect to an asset securitization transaction are exempt from pre-merger notification requirements.<sup>33</sup>

## 7. Objective criteria and “gaming the system”

The Act includes criminal and civil sanctions for completing a notifiable transaction without submitting a notification or completing a notifiable transaction prior to the expiry of the applicable waiting period.<sup>34</sup> These possible sanctions appear to be effective in ensuring compliance, as in the Bureau’s experience, the failure to notify is rare and in most instances inadvertent.

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<sup>26</sup> Paragraph 94(a) of the Act.

<sup>27</sup> S.C. 1996, c. 10.

<sup>28</sup> *Supra* note 28.

<sup>29</sup> Section 113 of the Act.

<sup>30</sup> See also the Bureau’s *Pre-merger Notification Interpretation Guideline Number 2: Exemptions for Acquisitions in the Ordinary Course of Business (Paragraph 111(a) of the Act)*, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03360.html>.

<sup>31</sup> See also the Bureau’s *Pre-merger Notification Interpretation Guideline Number 7: Creditor Acquisitions (Paragraph 111(d) of the Act)*, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03364.html>.

<sup>32</sup> See s. 111 of the Act, which also sets out the specific criteria to be satisfied for the exemptions to apply.

<sup>33</sup> See s. 15 of the NTRs, which also sets out the specific criteria to be satisfied for the exemptions to apply.

<sup>34</sup> See *supra* notes 9 & 10.

The Bureau is not aware of frequent instances of parties restructuring transactions to avoid pre-merger notification under the Act.<sup>35</sup> However, as noted above, it is possible that parties have not submitted a notification based on the exemption from notification for joint ventures (section 112 of the Act).

## 8. Changes in the merger regime

There were significant amendments to the merger provisions of the Act in March 2009, including the creation of a two-stage merger review process. Although there was only a minor change to the types of transactions subject to notification,<sup>36</sup> the size-of-transaction monetary threshold was increased in March 2009, from C\$50 million to C\$70 million (except for amalgamations which remained at C\$70 million), and an annual review and indexing mechanism was introduced. The size of transaction threshold for 2013 is C\$80 million. The increased monetary thresholds have reduced the number of transactions that otherwise would have been notifiable.

There have been no recent statutory amendments with respect to the definition of a “merger”; however, the guidance in the MEGs pertaining to the definition of a merger has evolved over time including in the most recent version of the MEGs (published in October 2011).

While the Commissioner has the ability to review effectively any merger, the March 2009 amendments reduced the amount of time the Commissioner has to challenge a transaction after it has been substantially completed, from three years to one year.<sup>37</sup> Given the relatively short one year period, parties to a non-notifiable transaction may be more likely to engage in strategic behaviour to avoid detection than was previously experienced.

The main challenges with respect to non-notifiable mergers now are timely detection, given this one year limitation period, and the ability to obtain an effective remedy where the transaction has already closed.<sup>38</sup> As a result of a number of non-notifiable transactions that raised potential competition concerns following the 2009 amendments,<sup>39</sup> policies and practices have been implemented to assist in detecting non-notifiable mergers that may raise substantive competition concerns. Non-notifiable transactions that the

<sup>35</sup> Section 14 of the Notifiable Transaction Regulations permits the adjustment of the aggregate value of assets or gross revenues from sales when a transaction or event has occurred after the close of the relevant period for which such amounts are to be determined for the purposes of Part IX of the Act, where such transactions or events would impact whether the proposed transaction is notifiable. See also the Bureau’s Pre-merger Notification Interpretation Guideline Number 10: Notifiable Transactions Regulations – Transactions and Events (Section 14 of the Regulations), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03367.html>. The Bureau has not experienced frequent or significant notification avoidance strategies through the application of s. 114 of the NTRs.

<sup>36</sup> One change was made to the size-of-transaction test for amalgamations (see Part 5 above), which added a size-of-party threshold to that test (separate and apart from the size-of-party test applicable to all transaction types in Part IX of the Act).

<sup>37</sup> Section 97 of the Act.

<sup>38</sup> As noted in the Bureau’s Information Bulletin on Merger Remedies in Canada (22 September 2006), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02170.html>, issues surrounding the ability to obtain an effective remedy post-closing include: deterioration of assets that may be the target of divestiture, the sharing of confidential competitively sensitive information between former competitors, and the general difficulty of seeking a divestiture or dissolution order where the parties’ respective businesses have already been integrated or rationalized (i.e. “unscrambling the eggs”).

<sup>39</sup> See, e.g. Speech by former Commissioner, Melanie Aitken, at the 2011 Competition Law and Policy Forum, Northwinds Professional Institute, Cambridge, Ontario (24 February 2011), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03377.html>.



Bureau may want to review are detected mainly through complaints from market stakeholders (e.g. customers, suppliers, competitors, etc.) or market monitoring using media sources and mergers and acquisitions databases. In addition, as part of the Bureau's continued commitment to transparency, in March 2012, the Mergers Branch introduced a publicly accessible Merger Register. The Merger Register is a monthly report of concluded merger reviews that indicates the names of the parties to the transaction, the industry sector involved, and the outcome of the Bureau's review.

In addition to these efforts, the Commissioner has engaged in litigation in respect of two non-notifiable transactions in the past three years; namely, the acquisition of Babkirk Land Services ("BLS") by CCS Corporation ("CCS") and a proposed joint venture between Air Canada and United Continental Holdings, Inc.<sup>40</sup>

In *CCS*, the Commissioner applied for an order before the Tribunal in respect of CCS's acquisition of the shares of Complete Environmental Inc. ("CEI") and ownership of its wholly-owned subsidiary BLS. The Commissioner was successful in obtaining an order from the Tribunal requiring CCS to divest the shares or assets of BLS.<sup>41</sup> The Tribunal's order was upheld by the Federal Court of Appeal.<sup>42</sup> The Commissioner received notice on April 11, 2013, that an application for leave to appeal to the Supreme Court of Canada has been filed. One issue raised in *CCS* involved a consideration of the definition of "merger" for the purposes of section 92 of the Act. The respondents argued that CEI was not, at the relevant time, a "business" for the purposes of the definition of "merger" in the Act, arguing that it was not actively accepting and treating hazardous waste, and was not otherwise operational in relation to the supply of secure landfill services.<sup>43</sup> The Tribunal rejected the argument that the transaction was not a merger for the purposes of the Act, finding that CEI was actively engaged in the development of the Babkirk Site as a hazardous waste treatment facility that included a secure landfill.<sup>44</sup> This case is also important, in that it confirmed for stakeholders that the Bureau is prepared to challenge a closed non-notifiable transaction.

## 9. Conclusion

In summary, Canada's regime for merger notification and review is characterized by, among other things, the following core attributes: 1) clear and objective criteria for mandatory pre-merger notification coupled with ongoing and substantive guidance from the Bureau regarding the application of those

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<sup>40</sup> The Commissioner of Competition v. CCS Corporation et al., 2012 Comp. Trib. 14 ("CCS") (File No.: CT-2011-002), aff'd 2013 FCA 28; The Commissioner of Competition v. Air Canada, United Continental Holdings, Inc. United Airlines, Inc., and Continental Airlines, Inc., File Nos.: CT-2011-004 and CT-2012-001, (Consent Agreement) ("Air Canada / UCH").

<sup>41</sup> The Commissioner's concern was in relation to a secure landfill for hazardous solid waste at a site in North-Eastern British Columbia (the "Babkirk Site"). See Bureau's Press Release, "Competition Bureau Successful in Precedent-Setting Merger Challenge" (29 May 2012), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03468.html>.

<sup>42</sup> Supra note 40. See also Bureau's Press Release, "Federal Court of Appeal Decision Clears the Way For Restored Competition in Hazardous Waste Disposal Market" (11 February 2013), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03535.html>.

<sup>43</sup> CCS at para. 48.

<sup>44</sup> The steps taken by CEI to develop the Babkirk Site are enumerated in paragraph 53 of the Tribunal's decision. The Tribunal considered the definition of "business" in s. 2(1) of the Act, noting that it was not exhaustive and did not make reference to any requirement of generating profits or revenues. CCS at paras. 51 & 54. The Tribunal's ruling on whether the transaction was a "merger" for the purposes of the Act, was not appealed at the Federal Court of Appeal.

criteria<sup>45</sup> 2) a simplified procedure for transactions that are notifiable but are unlikely to raise potential competition concerns (i.e. the Commissioner may waive the notification and/or waiting period under the Act); and (3) the ability of the Commissioner to challenge non-notifiable transactions, subject to a one-year limitation period following substantial completion of the transaction.

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<sup>45</sup> The pre-merger notification regime provided under the Act, together with Bureau guidelines and policies, are consistent with all or substantially all of the recommendations in the OECD, Recommendation of the Council on Merger Review, (23 March 2005), online: <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=195&InstrumentPID=191&Language=en&Book=False>, and the International Competition Network, Recommended Practices for Merger Notification Procedures, online: <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.



## COLOMBIA

### 1. Acquisition of shares

Colombia's competition regime (Law 155 of 1959, Law 1340 of 2009 and Decree 2153 of 1992) does not provide for an express definition of the term "merger". Nonetheless, the Superintendence of Industry and Commerce (SIC) has established, through decisions and guidelines, that the standard to be used in order to determine whether a given transaction constitutes a merger is the *acquisition of control* concept.

Colombian guidelines define "merger" as any mechanism used to *acquire control* of one or several enterprises, regardless of the legal mechanism used to perform such acquisition. The term *acquisition of control* is defined as "*the possibility to influence directly or indirectly the enterprise policy, the initiation or termination of the activity of the enterprise, the variation of the activity to which the enterprise is devoted or the allocation of assets or rights which are essential to the development of the activity of the enterprise*".<sup>1</sup>

Even though the concept of *acquisition of control* provides the SIC with flexibility to review transactions that may raise competition concerns, it has sometimes been criticized as vague. The SIC has reduced this vagueness through case law, by using provisions from Colombia's corporate law,<sup>2</sup> which establish objective presumptions to determine when a corporation is controlled or subordinated to another.<sup>3</sup>

Accordingly, the SIC considers that there is an *acquisition of control* –among others-, whenever as a result of the transaction: i) one of the undertakings will own more than 50% of the capital (shares) of the other party, either directly or through other undertakings; ii) one of the undertakings will obtain, either directly or through other undertakings, the majority of votes in the board of directors or the shareholders meeting; iii) one of the undertakings will have, either directly or through other undertakings, the necessary votes to obtain the majority of members in the board of directors of the other party to the transaction; iv) one of the undertakings, either directly or through other undertakings, exercises a dominant influence in the decisions of the governing bodies of the other undertaking, as a result of shareholders agreement.

The aforementioned list is not exhaustive, reason why other situations may also be considered as *acquisition of control* for the purpose of Colombian merger review. Although these other situations do not fall within the category of acquisition of shares, they are considered an *acquisition of control* in SIC's decisions as they fall within the definition provided in the SIC's guidelines.

Accordingly, through case law the SIC has established that an "acquisition of control" also occurs whenever: i) one or more corporations are dissolved, without being liquidated, to be absorbed by another

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<sup>1</sup> Although section 4, article 45, Decree 2153 of 1992 define the term acquisition of control, this is done in an isolated manner, and it was only through decisions and guidelines that this concept was established as the standard to define "merger".

<sup>2</sup> Decree 410 of March 2 of 1971, "Through which the Code of Commerce is issued", article 261.

<sup>3</sup> Superintendence of Industry and Commerce, Resolution 21820 of September 1, 2004, case Proban – Agropecuarias, Page. 19.

corporation or to create a new corporation;<sup>4</sup> ii) purchase of assets (provided it complies with a given standard);<sup>5</sup> iii) the creation of a common enterprise by competitors (provided it complies with a given standard);<sup>6</sup> iv) fabrication and distribution contracts, whenever they grant to one undertaking the economic control of a line of business of another corporation.<sup>7</sup>

### **1.1 Acquisition of minority interests and interlocking directorates**

As a general rule, acquisitions of minority shares in another corporation do not fall within the definition of “merger”, reason why they are not subject to *ex ante* review.

However, an acquisition of minority shares is considered a merger if, as stated in the previous section, it grants one undertaking the majority of votes on the board of directors or the shareholders meetings of the other company; the necessary votes to obtain majority in the corporate bodies of the other company; or the dominant influence in the decisions of the other company by means of a shareholders agreement or any other means legal instrument.

The abovementioned criteria has allowed the SIC to effectively address the competitive concerns that arise from mergers that have an effect in the Colombian market. So far, the SIC has not become aware of transactions that, although not covered within the *ex-ante* review regime, should be perused by the authority because of the possible anticompetitive effects they pose. For this reason, the SIC has not considered modifications to its merger regime on this specific topic.

By including within the mandatory pre-merger review system the acquisition of minority shares that do not confer control, the agency would probably incur in unnecessary costs by reviewing a high number of transactions that do not raise competitive concerns.

Colombia’s legal framework also provides effective tools to address the anticompetitive effects of interlocking directorates. Article 5 of Law 155 of 1959 prohibits interlocking directorates, reason why such practice will be considered an infringement of the competition regime if performed. Because of this outright prohibition, interlocking directorates are not considered mergers in Colombia, nor are they filed by parties before the SIC or analyzed by the latter as such.

## **2. Acquisition of assets**

According to SIC’s case law, an acquisition of assets is considered a merger transaction when it grants the acquiring company the possibility to exploit a *line of business* that, absent the transaction, would not be under its control. Only those transactions where the acquiring company obtains sufficient assets to participate in a line of business (or to consolidate its participation), a merger will be deemed to exist.

This includes scenarios where only intangible assets (trademarks, patents, etc.) are transferred, provided such assets are the crucial ones to develop and compete in a line of business. For example, in the case Haceb - Icasa, the former (a producer of refrigerators), purchased from the latter (also a producer of refrigerators), the trademark Icasa, which was well known in Colombia to identify refrigerators. The

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<sup>4</sup> Superintendence of Finance, Resolution 468 of March 14 of 2006, case Davivienda – Banesuperior.

<sup>5</sup> Superintendence of Industry and Commerce, Resolution 30238 of June 15 of 2010, case Colmena - Sideandes, Page 16.

<sup>6</sup> Superintendence of Industry and Commerce, Resolution 15917 of June 6 of 2003, case Agri Avícola, Superpollo and others, Page 27 and 28.

<sup>7</sup> Superintendence of Industry and Commerce, Resolution 16453 of July 23 of 2004, case Squash – Gatorade, Page 3 and 4.

transaction included the purchase of other related rights and the lease of machinery for a given period of time. The SIC considered this transaction as a merger and stated that the “*purchase of intangible assets, between competing companies may result in a merger, whenever it grants the possibility to produce a line of business and acquire the good will that a competitor had, thereby increasing the concentration in the market.*”<sup>8</sup>

Expanding the criteria of when the acquisition of assets constitutes a merger subject to *ex ante* notification may unnecessarily subject too many transactions that pose no risk to competition to the pre-merger system. This may, in turn, impose excessive costs for companies and heavy administrative duties for the SIC.

### 3. Joint ventures

Colombia’s competition law does not provide express rules on when a joint venture should be considered a merger. This has resulted in criticism to the competition regime as it is not always easy to determine when a transaction is a joint venture or a merger, and therefore when a company must comply with the pre-merger notification obligation.

Taking this into account, in recent decisions the SIC clarified when a joint venture amounts to a merger. In these decisions the agency has also provided guidance on how to determine whether a joint venture that does not amount to a merger should be considered pro-competitive.

According to SIC’s case law,<sup>9</sup> a joint venture between competitors constitutes a merger –and therefore should be notified if it complies with the objective criteria established by the law-, when the following elements are present:

- i. The operation is designed as permanent and it eliminates a competitor from the market: The operation has a vocation of permanence and eliminates in a definitive manner, or at least for a substantial period of time, competition within the relevant market.
- ii. The operation does not consist simply in the transfer of a concrete function from the participating enterprises, but it is the union of a line of business or a market: This means that the entity created as a result of the transaction shall not only perform specific activities of the allied enterprises. On the contrary, it should have independent presence or access to a given market, and should be designed to offer products or services, at least substantially, to any person who demands them.
- iii. The business resulting from the joint venture must have full functions in the market: The result of the transactions (be it the union of two previously competitive businesses in one, the creation of a separate enterprise, a research center, etc.) should have independent resources at least to have the potential to develop in an autonomous way in the market, as a separate business from the ones operated by the allied companies.

<sup>8</sup> Superintendence of industry and Commerce, Resolution 21819 of September 1<sup>st</sup> of 2004, case Haceb – Icasa.

<sup>9</sup> Superintendence of Industry and Commerce, Resolution 4851 of 2013, case Roma-Axxa.

In those cases in which the operation does not comply with the previously described elements, it will be considered as a collaboration agreement between competitors, and will not be subject to pre-merger notification. The pro-competitive or anticompetitive character of such agreement will be determined by the SIC using its ex post functions, which include the possibility of investigating possible anticompetitive agreements.

The SIC has considered that, in general, collaboration agreements between competitors (that do not amount to a merger), do not produce undue restrictions on competition whenever the following elements are present:<sup>10</sup>

- i. Competitors that are part to the collaboration agreement have less than 15% of the relevant market: In cases in which competitors have less than 15% of the market it is highly unlikely that the agreement may result in an undue restriction of competition, as other competitors may establish sufficient competitive pressure.
- ii. The agreement produces efficiencies: The agreement must produce efficiencies, either in the production, acquisition, distribution or commercialization of the relevant products.
- iii. There is an indispensable character of the restrictions: The restrictions to free competition that are generated as a result of the collaboration agreement between competitors must be indispensable to reach the efficiency objectives that the agreement wants to achieve.
- iv. Benefits for consumers: Consumers should have a fair share of the benefits resulting from the agreement. For such reason, the efficiencies created through restrictions on competition should produce sufficient benefits for consumers, so that they compensate the restrictive effects.
- v. No elimination of competition: The agreement must not allow the elimination of competition with respect to a substantial part of the products or services of the companies involved.

Even though the criteria used by the SIC has provided transparency to the competition regime, there is still criticism with regards to the unpredictability that is present in the area of joint ventures. In particular, companies and attorneys are concerned with joint ventures that do not constitute mergers, as they may be subject to ex post investigations or sanctions.

Since non-merger joint ventures are not authorized by the SIC, companies and attorneys must assume the risk of assessing whether the transaction is pro-competitive or anticompetitive. Even if they consider the transaction is not anticompetitive, the SIC may investigate the joint venture and consider that it is, thereby imposing a sanction. In the opinion of some, this reduces the security and predictability of the system.

Since mergers are reviewed ex ante and cleared if they pose no anticompetitive risk (which gives security to the parties to the transaction), and joint ventures are not, there is an incentive for parties to file collaboration agreements as mergers before the SIC to obtain clearance from the agency, when technically the transaction cannot be reviewed ex ante by the agency.

In this sense, an important topic of debate for the country is whether there should be an ex ante review system for joint ventures that do not amount to mergers, in order to give security and predictability to the market.

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<sup>10</sup> Ibid.

#### 4. Exemptions

Colombia's competition law exempts two types of mergers from ex ante notification requirements:

- i. First, mergers that fall within the criteria established by law to be notified, but which will result in the parties having less than 20% of the relevant market, must not be submitted for ex ante analysis before the SIC. The law understands that these mergers are authorized without being analyzed by the competition agency, as they are not likely to raise competitive concerns. In this case, the parties should just inform the agency that they will perform the merger, and that no competition analysis should proceed because parties have less than 20% of the market.

It is worth mentioning that this exception has received criticism from practitioners and academics, which consider that it makes the notification system insecure and unpredictable.

According to critics, one of the most important debates in merger cases is the definition of the relevant market, reason why including market shares as a notification standard is not appropriate, as the share varies depending on how the market is defined.

Moreover, if the merging parties do not submit the transaction for ex ante analysis, but only inform that they have less than 20% of the market and are therefore authorized by law to perform the merger, they may be subject to ex post investigations and sanctions by the SIC. Indeed, not submitting a transaction for analysis when having the obligation to do so constitutes an infringement to the competition law, even if the parties informed the agency that they were performing the merger without the authorization from the SIC because they had less than 20% of the market. Accordingly, if the parties make the wrong market definition and in the end it is concluded that they had more than 20% of the market and had to inform the transaction, they may be subject to sanctions. This situation makes the notification system, in the opinion of some, unpredictable in this particular area.

Finally, the 20% market share exemption may provide incentives to merging parties to define the market in a broad way, thereby not having the obligation to submit the merger for ex ante review.

- ii. Second, mergers between companies that belong to the same (business group or corporate conglomerate) are exempt from submitting their transaction for ex ante review.

Some critics of this exemption have claimed that it is unnecessary because in economic terms the companies involved in the transaction are already merged, and the operation will just have corporate effects and not competition effects.





## CZECH REPUBLIC

### 1. General features of a transaction which constitutes a concentration of undertakings

The protection of competition in a market of products and services against its elimination, restriction, other distortion or imperilment (“distortion“) in the territory of the Czech Republic is regulated by the Act No. 143/2001 Coll., on the Protection of Competition and on Amendment to Certain Acts, as amended (hereinafter referred to as “**the Competition Act**“).

Transactions which constitute a concentration of undertakings are defined in Article 12 of the Competition Act while the guidance is provided by the Office for the Protection of Competition (hereinafter referred to as “the Office“) in the Notice on the concept of concentration of undertakings within the meaning of the Competition Act (hereinafter referred to as “the Notice“). The guidance summarizes the Office's experience with applying rules in order to define which transactions are considered to be concentrations of undertakings within the meaning of the Competition Act. The aim of the Notice is to help the undertakings to determine whether their transactions constitute a concentration of undertakings subject to the Office’s approval. The Notice is available on the Office's websites.<sup>1</sup>

#### 1.1 *Definition of a concentration of undertakings*

1. Pursuant to Article 12 (1) of the Competition Act, a concentration of undertakings results from a merger of undertakings which operated independently in the market before the merger.
2. Article 12 (2) of the Competition Act stipulates that the acquisition of an enterprise (or its part) of another undertaking is also considered to be a concentration of undertakings.
3. Pursuant to Article 12 (3) of the Competition Act, a concentration of undertakings results also from the acquisition of the possibility to control directly or indirectly, jointly or solely another undertaking, in particular by acquisition of equity shares, business or membership interests or by a contract or by any other means granting the possibility to control another undertaking.
4. Establishing an undertaking jointly controlled by two or more undertakings that perform all the functions of an autonomous economic entity on a lasting basis constitutes a concentration of undertakings within the meaning of Article 12 (5) of the Competition Act.

Further, any type of transaction described above should meet two general criteria in order to be considered a concentration of undertakings within the meaning of the Competition Act.

Firstly, only those transactions that result in a lasting or long-term change in the market structure can be considered concentrations of undertakings. In its decision-making practice, the Office finds a period exceeding eight or more years to be sufficient (this is in line with the European Commission's approach).

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<sup>1</sup> See <http://www.uohs.cz/en/legislation.html>. The Office expects that during the summer of 2013 the Notice will be updated.

However there was a case of a transaction which was intended to last for 3 to 5 years at least, but its duration was shortened. This transaction also gave rise to a concentration of undertakings.<sup>2</sup>

Secondly, only those transactions which take place between undertakings who acted prior to transaction as independent entities in a market shall be deemed as concentrations of undertakings within the meaning of the Competition Act. When assessing this requirement, independence is defined as a situation where undertakings which are parties to the transaction are not prior to the transaction part of the same group. It means, these undertakings are not controlled prior to the transaction directly or indirectly by another merging undertaking or by the same entity.

## **2. Merger by amalgamation or by absorption**

A merger of two or more undertakings (Article 12 (1) of the Competition Act) may be the result of absorption or amalgamation. Where a concentration of undertakings consists in absorption, a company or more companies or a cooperative or more cooperatives cease to exist as separate legal entities and their assets are transferred to one or more already existing companies or cooperatives (that take part in the absorption) that retain their legal identity. Where a concentration of undertakings consists in amalgamation, two or more companies or cooperatives cease to exist as separate legal entities and their assets are transferred into a newly created entity.

A concentration of undertakings within the meaning of Article 12 (1) of the Competition Act may occur even if there is no real merger in case activities of previously independent undertakings are combined in a newly created single economic unit. This situation may arise if two or more companies which retain their legal identity enter into a contract establishing a common economic management. If the result is a de facto merger of concerned undertakings that constitutes a full-function common economic unit the Office considers such a transaction to be a concentration of undertakings. A prerequisite for establishing a full-function common economic unit is the existence of a permanent, single economic management. Other relevant factors include internal profit and loss compensation or a revenue distribution among companies within the group and their joint liability towards entities outside this group. Such a de facto merger may be further reinforced by cross-shareholding among undertakings forming the economic unit in question.

## **3. Acquisition of an enterprise of another undertaking or a part thereof**

As stated above, a concentration of undertakings within the meaning of Article 12 (2) of the Competition Act results also from the acquisition of an enterprise of another undertaking or its part on the basis of a contract (for example a sales contract or a lease contract), an auction or by other means. In order to assess the acquisition of an enterprise or its part by another undertaking as a concentration, it is not important what kind of a contract leads to the acquisition of an enterprise. In addition to that, Article 12 (2) of the Competition Act covers also acquisitions of enterprises which are not based on a contract, such as the acquisition of an enterprise resulting from an intestate or testamentary succession.<sup>3</sup>

It is not difficult to establish whether a transaction constitutes a concentration of undertakings within the meaning of Article 12 (2) of the Competition Act in cases where the whole enterprise of an undertaking is transferred, which means that all assets and rights needed for enterprise operations are transferred. By contrast, difficulties may arise when defining “a part of an enterprise“. The Competition Act explains this

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<sup>2</sup> See for example case S158/2002 *Caisse des Dépôts et Consignations/Charterhouse Capital/Télédiffusion de France*.

<sup>3</sup> However, this can be considered a concentration of undertakings only if a heir is an entrepreneur or is not an entrepreneur but already controls another undertaking.

term as a part of an enterprise of an undertaking to which turnover achieved by the sale of goods in a relevant market can be clearly assigned.

So far, the Office's decision-making practice has shown that a part of an enterprise is usually considered to be a set of assets (tangible, intangible, personal) that are able to perform, on their own, an economic activity and to which turnover achieved by this set of assets can be clearly assigned. However, this does not mean that such turnover needs to be expressed in exact figures or that separate accounting needs to be kept for this set of assets (it is sufficient to know an output parameter of a production line).

A concentration of undertakings in the form of the acquisition of an enterprise may result also from the transfer of a customer base (such as a portfolio of insurance contracts), if a particular turnover may be assigned unequivocally to such assets. Further, a concentration of undertakings may originate from the transfer of brand, licence or patent provided that such objects of acquisition can generate turnover for acquirers and establish their market position, all this as a consequence of a switch of customers related to the brand, licence or patent.<sup>4</sup> The Office would similarly consider the transfer of an Internet domain of an e-shop that constitutes a trading channel which is perceived by its customers to be “a brand” to which these customers are accustomed. If this domain was acquired for example by an operator of another e-shop who already has contracts with suppliers of goods, it may be expected that this operator will be able without any delays effectively run a sale of goods via Internet and customers of the acquired e-shop will switch to this operator.

#### **4. Acquisition of control**

Pursuant to Article 12 (3) of the Competition Act, a concentration of undertakings includes a situation where one or more persons who are not entrepreneurs already control at least one undertaking, or where one or more entrepreneurs acquire the possibility to directly or indirectly control another undertaking.

Controlling entities are those that directly or indirectly exercise a decisive influence on strategic commercial behaviour of another undertaking. In assessment whether control was acquired, no legal rebuttable or irrebuttable presumption associated with the acquisition of a particular share of registered capital and voting rights in an acquired undertaking is taken into account.

Control is defined in the Competition Act as the possibility to exercise a decisive influence on commercial behaviour of another undertaking. The Competition Act provides a list of examples of what is considered to be the control. Control may be based on a) a property right or right to use attached to an enterprise (or its part) of a controlled undertaking, or b) a right or other matters of law that confer a decisive influence on composition, voting and decision-making of a controlled undertaking's bodies.<sup>5</sup>

In any case, it needs to be assessed if the control is exerted or not, by establishing whether an entity (solely) or a group of entities (jointly) effectively exercises a decisive influence on commercial behaviour of another undertaking.

This assessment is based on a number of legal and/or factual elements. A property right or a right to use an enterprise of a controlled undertaking, rights conferring a decisive influence on composition, voting and decision-making of a controlled undertaking's bodies are important elements, but not the only ones on

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<sup>4</sup> These situations are assessed similarly by the European Commission, see paragraph 24 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (“Consolidated Jurisdictional Notice”). The Office has not dealt with such situations in its practice yet.

<sup>5</sup> See Article 12(4) of the Competition Act.

which basis a control can be established. Also purely factual relations can be of key importance. This is why under exceptional circumstances a situation of economic dependence may result in a de facto control. This may occur, for example, if important long-term supply contracts or long-term credits provided by suppliers or customers exist and are combined with structural links (such as ownership of shares or influence on composition or decision-making of undertaking's bodies) which provide a decisive influence on strategic commercial behaviour of an undertaking.<sup>6</sup>

If there is a transaction where one or more undertakings acquire shares of another undertaking which enable them to exercise a control over this undertaking, such a transaction constitutes a concentration of undertakings irrespective of the fact whether an acquired shareholding is a majority or minority one. By contrast, if an acquirer does not acquire the possibility to control, such a transaction shall not constitute a concentration of undertakings.

The concept of "control" defined in the Competition Act is in the Office's view relatively transparent, even if it does not include any objective criteria (such as a particular threshold of acquired shares as a result of which the acquisition of control and thus a concentration of undertakings shall occur). The Office is not aware of the fact that the concept of control would be an obstacle to legal certainty of undertakings. Furthermore, as stated above, the Office issued the interpretation Notice (available on the Office's websites) to increase transparency in application of the Competition Act. The Office also issues in individual cases, at undertakings' requests, written opinions.<sup>7</sup>

## **5. Acquisition of minority shares which do not confer the right to control**

Acquisitions of shares, which do not confer the right to control the other undertaking (non-controlling minority interests), are not considered to be concentrations of undertakings within the meaning of the Competition Act. As a consequence, the Office does not have powers to intervene in these transactions even if they raise competition concerns. For this reason, the Office does not monitor these transactions.

In this respect, it should be noted that recently the Office has not received any complaints against the acquisition of non-controlling minority interests that would suggest a possible distortion of competition. In the Czech Republic no public debate on the need to control these types of transactions has started, neither there have been proposed amendments to the Competition Act so that the Office would have powers to assess transactions consisting in the acquisition of minority shares.

The Office can only intervene in the acquisition of non-controlling minority shares if, within the assessment of a merger notification, the Office concludes that a transaction raises competition concerns which, among other, are brought about by the fact that an acquirer has had, prior to the transaction, minority shares in competitors of an acquired undertaking or together with a majority share in one undertaking acquires minority shares in other undertakings.

In its past decision-making practice, the Office found competition concerns during the administrative proceeding on approval of a concentration in the electricity sector (case S145/2002 *ČEZ/REAS*). The company ČEZ a.s., the most important producer and wholesale supplier of electricity, intended to acquire control over five companies engaged in retail sale of electricity to end-consumers and at the same time

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<sup>6</sup> The European Commission came to a similar conclusion in case M.794 *Coca-Cola/Amalgamated Beverages GB*. However, the Office has not assessed a similar case yet.

<sup>7</sup> Pursuant to Article 15 (4) of the Competition Act, the Office may issue a written opinion stating whether a transaction constitutes a concentration of undertakings which is subject to the Office's approval. These written opinions on interpretation are not legally binding; they nevertheless contribute to increase in legal certainty of the business community.

intended to acquire minority shares in three other companies that have prerequisites for becoming in future the most important competitors of the ČEZ group in the sector of electricity retail sale. After assessing the concentration (in 2002, which was before a process of liberalization of the electricity sector started) the Office made the approval of the notified concentration conditional upon, among other, the divestiture of minority shares in each of those three companies. For the development of the competitive environment in the electricity sector it was considered to be necessary that the company ČEZ a.s. did not have any influence on business behaviour of these companies.

Similarly, in 2012 the Office cleared a merger in the sector of retail sale of industrial mineral fertilizers, agrochemicals, feeds for farm animals and seed corns to farmers and the purchase of agricultural crops from farmers (case S396/2011 *AGROFERT HOLDING/Loredana Corporation*) upon condition that a personal link between the merged undertaking and its most important competitor in affected markets was removed.

## **6. Establishment of a joint venture**

The last type of a concentration of undertakings within the meaning of the Competition Act is the establishment of an undertaking which is jointly controlled by two or more undertakings and performs all functions of an autonomous economic entity (“full-functional joint venture”).

This form of a concentration covers cases where a new undertaking is created or in cases of joint control over a so called dormant, inactive undertaking that existed at the time of a transaction but only due to the transaction (acquisition of joint control) becomes active for a particular purpose performing all functions of an autonomous economic entity on a lasting basis.

Two requirements must be fulfilled so the entity could be considered as a full-functional joint venture. Firstly, such an undertaking must be jointly controlled and at the same time it must perform all functions of an autonomous economic entity on a lasting basis.

Whether a joint venture operates on a lasting basis is assessed on case-by-case basis as no specific procedure to assess this has been established by the relevant acts. This criterion is usually met if a joint venture is created for an unlimited period of time. By contrast, transactions which are intended to last for a definite period of time (such as transactions aimed at performing a particular project) are not subject to the Office's approval.

In order to perform all functions of an autonomous economic entity, a jointly controlled undertaking must have:

- a) sufficient own resources;
- b) autonomous activities beyond specific functions of its parent companies; and
- c) sufficient degree of operational independence on its parent companies.

The Office's assessment of the full-functionality of a joint venture is in accordance with rules set out in the Consolidated Jurisdictional Notice of the European Commission.

In this respect, Article 12 (6) of the Competition Act stipulates that in the extent to which the establishment of a joint venture (which constitutes a concentration of undertakings within the meaning of Article 12 (5) of the Competition Act) has as its object or effect the coordination of competitive behaviour of undertakings controlling such joint venture who remain independent in the market, such coordination is assessed pursuant to criteria for assessing anticompetitive agreements. The assessment whether

coordination elements of a transaction consisting in the establishment of a full – functional joint venture comply with the Competition Act or not is primarily up to merging undertakings and is not part of the merger impact assessment conducted by the Office.

## **7. Changes in the legal framework**

Recently there has been no major discussion on a possible amendment to the Competition Act in the Czech Republic that would have a substantial impact on rules applicable to the merger control. Nevertheless, due to certain problems in the application of these rules, the Office has changed the criteria assessment of full – functionality of jointly acquired undertakings.

Pursuant to the Competition Act, the criterion of full – functionality of jointly acquired undertakings should be assessed only in cases where a full – functional joint venture is newly created (a concentration within the meaning of Article 12 (5) of the Competition Act), but not in cases of the acquisitions of the joint control over an already existing undertaking (a concentration within the meaning of Article 12 (3) of the Competition Act). The Office dealt with cases where it had to consider the transaction to be a merger when it consisted in the change of a shareholder of a jointly controlled undertaking that was not, prior to and even after the transaction, a full – functional undertaking and the establishment of which was not, for this reason, subject to the Office's approval. To tackle this quite an illogical situation the Office decided to change the interpretation of the Competition Act in this respect.

Going forward, the Office intends to assess the full – functionality in each of the cases where joint control over an undertaking is acquired (not only in cases of the establishment of a full – functional joint venture) with the exception of a situation where joint control over an existing undertaking (which is active in the market) by undertakings that, prior to the transaction, did not control the acquired undertaking.

After the revision the Office's assessment of the full – functionality of jointly controlled undertakings has been compliant with the European Commission's approach. The previous difference in interpretation resulted in situations in which transactions that, despite meeting the turnover thresholds of the European Commission, were not considered to be notifiable concentrations, because they did not constitute concentrations within the meaning of Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, must have been notified to the Office (if they met notification criteria laid down in the Competition Act).

The undertakings concerned might have been confused as undertakings engaged in transactions fulfilling the EU criteria may omit to check different approaches in defining concentrations in smaller jurisdictions (such as the Czech Republic) and, as a result, might omit to notify their transaction to the Office. As in the Czech Republic a concentration notifiable to the Office must not be implemented prior to the Office's approval, any measure done by the merging undertakings can be deemed as null and void and could therefore lead to significant legal complications. Also for this reason, the Office decided to make the abovementioned change in interpretation of the Competition Act.

## **8. Transactions which do not qualify as concentrations of undertakings**

In general, any transaction that constitutes a concentration of undertakings within the meaning of Article 12 of the Competition Act and fulfils one of alternative turnover criteria laid down in Article 13 of the Competition Act is subject to the Office's approval. The fact that transaction which constitutes a notifiable concentration does not raise competition concerns does not affect the obligation to notify it to the Office.

However, a short-form notification can be filed in following cases:

- a) none of the merging undertakings operates in the same relevant market, or their combined market share in the relevant market does not exceed 15 %, and at the same time none of the merging undertakings operates in the market vertically linked (upstream or downstream market) to the relevant market in which another undertaking operates, or their market share in each of these markets does not exceed 25 %, or
- b) an undertaking acquires sole control over joint venture in which it has already joint control;

Such a short-form notification is then assessed by the Office in a simplified procedure which is less burdensome. Furthermore, an approval decision is adopted within a shorter deadline in these cases.

Article 12 (8 and 9) of the Competition Act set out exceptions from a rule that a transaction leading to the acquisition of control constitutes a concentration of undertakings within the meaning of the Competition Act.

Firstly, a qualified stake held by a bank in a legal entity by virtue of payment of the issue price of shares by a set-off of the bank's receivables from such legal entity does not constitute a concentration of undertakings, if such a qualified stake is held for the duration of the rescue operation or financial restructuring of such legal entity for a maximum of one year.

Secondly, a situation where undertakings providing investment services acquire stakes in another undertaking temporarily for a period of up to one year with an intend to selling these stakes, provided they do not exercise voting rights attached to such stakes with a view to determining or influencing the competitive behaviour of the controlled undertaking, also does not qualify as a concentration of undertakings.

Thirdly, delegation of certain powers of the statutory bodies of undertakings to persons engaged in activities pursuant to special legal regulations (e.g. a liquidator or an insolvency trustee) also do not qualify as a concentration of undertakings.





## ESTONIA

In Estonia, the definition of “merger transaction” is based on the acquisition of control/material influence concept. Both acquisition of shares and assets can constitute a merger transaction, in case control is acquired.

Control is defined in the Competition Act as the opportunity for one undertaking or several undertakings jointly or for one natural person or several natural persons jointly, by purchasing shares and on the basis of a transaction or articles of association or by any other means, to exercise direct or indirect influence on another undertakings which may consist of a right to:

- 1) exercise significant influence on the composition, voting or decision-making of the management bodies of the other undertaking, or to
- 2) use or dispose of all or a significant proportion of the assets of the other undertaking.

According to Article 19 of the Competition Act, concentration is deemed to arise where:

- 1) previously independent undertakings merge or parts of undertakings are merged;
- 2) an undertaking or undertakings jointly acquire(s) control of the whole or a part of another undertaking, or of several undertakings or parts thereof;
- 3) a natural person or several natural persons already controlling at least one undertaking acquire(s) control of the whole or a part of another undertaking, or of several undertakings or parts thereof.

The joint creation of a new undertaking performing on a lasting and independent basis is also deemed to be acquisition of control.

According to the Competition Act, a part of an undertaking is the assets of the undertaking or organizationally independent part of the undertaking, including an enterprise or plant which constitutes a basis for business activities and to which turnover on the product market can be clearly attributed.

In Estonia, there is no secondary legislation or guidelines providing more detailed information on the essence of a merger transaction, only the provisions of the Competition Act described above. So, on one hand, it should be quite clear what is meant by “merger transaction”, but on the other hand, there is still enough space for interpretation and “gaming”.

In practice, in addition to the Competition Act, the Estonian Competition Authority (ECA) has been seeking guidance also from the international practice (for example, the Consolidated Jurisdictional Notice and case law).

The clearest way to acquire to control is certainly through acquisition of majority shareholding or obtaining veto rights in case of joint control. But in practice, all the transactions have not been so clear, involving acquisition of control through contracts, acquisition of assets etc.

A concentration shall be subject to control by ECA when turnover thresholds are exceeded and no exemptions are provided. So, when a transaction is a concentration in the meaning of the Competition Act and the turnover criteria are met, the concentration has to be notified even when it is unlikely to raise competitive concerns.

Acquisition of minority shareholdings is not subject to merger control in Estonia. Although in practice there have been occasions where ECA has had doubts that minority shareholdings may actually be connected to control or create a platform for coordinated behavior.

Below some examples are given of recent cases and issues where it has not been so clear for ECA whether such a transaction could be considered to be a concentration.

- Acquisition of control on a contractual basis through an international management agreement for operating two hotels in Tallinn. The acquiring company was of the opinion that the agreement for operating hotels was a service agreement, which did not bring along an acquisition of control. ECA analyzed the agreement and came to the conclusion that it could be considered as an acquisition of control on a contractual basis. The main arguments for ECA were the duration of the agreement (18 years) and the fact that the operator had the exclusive right to direct and supervise the management and operation of the hotels, the right to nominate Hotel General Managers and Financial Controllers. But despite these rights, it was not a clear case for ECA, as the hotel real estate remained a property of the previous owner, who also had the possibility to influence some other issues, i.e. to hire employees, approve budgets etc.
- Five state-owned undertakings were merged. The shares of these five undertakings belonged to the same Ministry. ECA was of the opinion that this transaction was not subject to merger control, as in this case the state was performing its business activities in one sector (road construction) through several undertakings. The main reason for deciding the transaction not being a concentration was that these undertakings were not independent enough, having several overlapping council members.
- Acquisition of assets (trash containers). For background information it can be said that in Estonia, in most areas there is a system of organized waste management, i.e. in one area only one company (that has won the bid) is dealing with waste transport. Trash containers usually, but not necessarily, belong to the company dealing with waste transport and are leased to the users. So generally the lease of trash containers can constitute a separate product market. In the case in question, Company A was acquiring the trash containers located in one district (one local area of waste transport) from Company B. Company B was leaving the market, as it did not win the right to operate in district for the next period, but also Company A was not going to operate waste transport in this district. The lease contracts concluded with the end-users were not transferred, i.e. Company B terminated the contracts, but sent new draft agreements to be concluded with Company A, though with the possibility not to sign. So it was made very convenient for the users to continue with Company A. One aspect that drew the attention of ECA was the value of the transaction – the price paid for these old trash containers was much higher than the price of new containers available. So there was a reason to believe that acquisition of assets could have been a hidden transfer of a business. But ultimately, in this case ECA left the question open, as we did not have enough evidence to prove that it actually was a concentration and it would have been even more complicated to prove it in the court. As the situation was not so clear and the customer contracts were not transferred, ECA decided in favor of the undertaking.

But as a conclusion, it can be said that it is definitely not easy to find the right balance for definition of merger transaction in order to catch all the necessary (and anticompetitive) transactions without being disproportionately burdensome both on undertakings and competition authorities. It is inevitable that transactions are becoming more complex, sometimes it is quite complicated to draw the line between acquisition of control and some other transaction and undertakings may also be searching ways to escape the scope of merger control.



## EUROPEAN UNION

### 1. Introduction

Under the EU merger control system, the concept of "concentration" plays a key role in determining whether a transaction requires notification to and approval from the European Commission prior to its implementation.

The legal basis for the concept of concentration is Article 1 of Regulation (EC) No 139/2004<sup>1</sup> ("the Merger Regulation"), which provides that the EU rules on merger control apply to transactions that satisfy two conditions. First, the proposed transaction must constitute a 'concentration' within the meaning of Article 3 of the Merger Regulation. Second, the concentration must have a 'Union dimension', meaning that the turnover thresholds set out in Article 1 of the Merger Regulation are met.

The Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004<sup>2</sup> ("the Notice") provides comprehensive guidance on the interpretation of the concept of concentration. The Notice contains many examples and references to the Commission's enforcement experience in this regard.

This note aims primarily at providing an overview of the concept of 'concentration'/acquisition of control under the Merger Regulation. Issues relating to joint ventures and the acquisition of assets are addressed in this context. The Note also briefly addresses issues relating to non-controlling minority shareholdings, a topic in relation to which DG Competition had submitted a detailed note in the context of discussions of the 2008 WP3 Roundtable on Minority Shareholdings.<sup>3</sup>

### 2. The concept of concentration

The concept of concentration under the Merger Regulation is intended to relate to operations which bring about a lasting change in the structure of the market. Indeed, in terms of Article 3(1) of the Merger Regulation, a concentration only covers operations where a change of control in the target business occurs on a lasting basis. Because the test in Article 3 is centred on the concept of control, the existence of a concentration is to a great extent determined by qualitative rather than quantitative criteria.

Article 3(1) of the Merger Regulation defines two categories of concentrations:

- those arising from a merger between previously independent undertakings;
- those arising from an acquisition of control.

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<sup>1</sup> OJ L 24 of 29 January 2003.

<sup>2</sup> OJ C 95/1 of 16 April 2008.

<sup>3</sup> See OECD document, [DAF/COMP\(2008\)30](#).

## **2.1 Mergers between previously independent undertakings**

A merger within the meaning of Article 3(1)(a) of the Merger Regulation occurs when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities. A merger may also occur, as is more often the case, when an undertaking is absorbed by another, the latter retaining its legal identity, while the former ceases to exist as a legal entity.

Finally, a merger within the meaning of Article 3(1)(a) may occur where, in the absence of a legal merger, the combining of the activities of previously independent undertakings results in the creation of a single economic unit. This may arise in particular where two or more undertakings, while retaining their individual legal personalities, establish contractually a common economic management or the structure of a dual listed company. If this leads to a *de facto* amalgamation of the undertakings concerned into a single economic unit, the operation is considered to be a merger.

## **2.2 Acquisition of control**

### **2.2.1 Concept of control**

- Person or undertaking acquiring control

Article 3 (1)(b) of the Merger Regulation provides that a concentration occurs in the case of an acquisition of control. Such control may be acquired by one undertaking acting alone, or by several undertakings acting jointly.

Control is normally acquired by persons or undertakings which are the holders of the rights or are entitled to rights conferring control under the contracts concerned (Article 3(3)(a)). Specific issues may arise in the case of acquisitions of control by investment funds. It is Commission policy to analyse structures involving investment funds on a case-by-case basis.

- Means of control

Control is defined by Article 3(2) of the Merger Regulation as the possibility of exercising decisive influence on an undertaking. It is therefore not necessary to show that the decisive influence is or will be actually exercised. However, the possibility of exercising that influence must be effective. Article 3(2) further provides that the possibility of exercising decisive influence on an undertaking can exist on the basis of rights, contracts or any other means, either separately or in combination, and having regard to the considerations of fact and law involved. A concentration therefore may occur on a legal or a *de facto* basis, may take the form of sole or joint control, and extend to the whole or parts of one or more undertakings (cf. Article 3(1)(b)).

Whether an operation gives rise to an acquisition of control therefore depends on a number of legal and/or factual elements. The most common means for the acquisition of control is the acquisition of shares, possibly combined with a shareholders' agreement in cases of joint control, or the acquisition of assets.

Control can also be acquired on a contractual basis. In order to confer control, the contract must lead to a similar control of the management and the resources of the other undertaking as in the case of acquisition of shares or assets. In addition to transferring control over the management and the resources, such contracts must be characterised by a very long duration. Only such contracts can result in a structural change in the market.

Furthermore, control can also be established by any other means. Purely economic relationships may play a decisive role for the acquisition of control. In exceptional circumstances, a situation of economic dependence may lead to control on a *de facto* basis where, for example, very important long-term supply agreements or credits provided by suppliers or customers, coupled with structural links, confer decisive influence.

Finally, there may be an acquisition of control even if it is not the declared intention of the parties or if the acquirer is only passive and the acquisition of control is triggered by action of third parties.

- Object of control

The Merger Regulation provides in Article 3(1)(b), (2) that the object of control can be one or more, or also parts of, undertakings which constitute legal entities, or the assets of such entities, or only some of these assets. The acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, i.e. a business with a market presence, to which a market turnover can be clearly attributed.

The transfer of a client base of a business can fulfil these criteria if this is sufficient to transfer a business with a market turnover. A transaction confined to intangible assets such as brands, patents or copyrights may also be considered to be a concentration if those assets such as brands, patents or copyrights may also be considered to be a concentration if those assets constitute a business with a market turnover. In any case, the transfer of licenses for brands, patents or copyrights without additional assets, can only fulfil these criteria if the licenses are exclusive at least in a certain territory and the transfer of such licenses will transfer the turnover-generating activity. For non-exclusive licenses it can be excluded that they may constitute on their own a business to which a market turnover is attached.

Specific issues arise in cases where an undertaking outsources in-house activities, such as the provision of services or the manufacturing of products, to a service provider. Cases of simple outsourcing do not involve any transfer of assets or employees to the outsourcing service suppliers. It is usually the case that any assets or employees are retained by the customer.

The situation may be different if the outsourcing service supplier, in addition to taking over a certain activity which was previously provided internally, is transferred the associated assets and/or personnel. A concentration only arises in these circumstances if the assets constitute the whole or part of an undertaking, i.e. a business with access to the market.

If the assets transferred do not allow the purchaser to at least develop a market presence, it is likely that they will be used only for providing services to the outsourcing customer. In such circumstances, the transaction will not result in a lasting change in the market structure and the outsourcing contract is again similar to a service contract. The transaction will not constitute a concentration.

- Change of control on a lasting basis

Article 3(1) of the Merger Regulation defines the concept of a concentration in such a manner as to cover operations only if they bring about a lasting change in the control of the undertakings concerned and in the structure of the market. The Merger Regulation therefore does not deal with transactions resulting only in a temporary change of control.



The question whether an operation results in a lasting change in the market structure is also relevant for the assessment of several operations occurring in succession, where the first transaction is only transitory in nature.

- Internal restructuring

A concentration within the meaning of the Merger Regulation is limited to changes in control. An internal restructuring within a group of companies does not constitute a concentration. This applies for example to increases in shareholdings not accompanied by changes of control or to restructuring operations such as a merger of a dual listed company into a single legal entity or a merger of subsidiaries. A concentration could only arise if the operation leads to a change in the quality of control of one undertaking and therefore is no longer purely internal.

### 2.2.2 *Sole control*

Sole control is acquired if one undertaking alone can exercise decisive influence on an undertaking. Two general situations in which an undertaking has sole control can be distinguished. First, the solely controlling undertaking enjoys the power to determine the strategic commercial decisions of the other undertaking. This power is typically achieved by the acquisition of a majority of voting rights in a company. Second, a situation also conferring sole control exists where only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on his own, to impose such decisions (the so-called negative sole control).

- *De jure* sole control

Sole control can be acquired on a *de jure* and/or *de facto* basis. It is normally acquired on a legal basis where an undertaking acquires a majority of the voting rights of a company. In the absence of other elements, an acquisition which does not include a majority of the voting rights does not normally confer control even if it involves the acquisition of a majority of the share capital. Where the company statutes require a supermajority for strategic decisions, the acquisition of a simple majority of the voting rights may not confer the power to determine strategic decisions, but may be sufficient to confer a blocking right on the acquirer and therefore negative control.

Even in the case of a minority shareholding, sole control may occur on a legal basis in situations where specific rights are attached to this shareholding. These may be preferential shares to which special rights are attached enabling the minority shareholder to determine the strategic commercial behaviour of the target company, such as the power to appoint more than half of the members of the supervisory board or the administrative board. Sole control can also be exercised by a minority shareholder who has the right to manage the activities of the company and to determine its business policy on the basis of the organisational structure.

- *De facto* sole control

A minority shareholder may also be deemed to have sole control on a *de facto* basis. This is in particular the case where the shareholder is highly likely to achieve a majority at the shareholders' meetings, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders' meetings in previous years. Based on the past voting pattern, the Commission will carry out a prospective analysis and take into account foreseeable changes of the shareholders' presence which might arise in future following the operation. The Commission will further analyse the position of other shareholders and assess their role. Criteria for such an assessment are in particular whether the remaining shares are widely dispersed,

whether other important shareholders have structural, economic or family links with the large minority shareholder or whether other shareholders have a strategic or a purely financial interest in the target company; these criteria will be assessed on a case-by-case basis. Where, on the basis of its shareholding, the historic voting pattern at the shareholders' meeting and the position of other shareholders, a minority shareholder is likely to have a stable majority of the votes at the shareholders' meeting, then that large minority shareholder is taken to have sole control.

Apart from the acquisition of sole control on the basis of voting rights, as indicated in section 1.2 above, sole control may also be acquired by other means, such as by way of purchase of assets or by contract.

### 2.2.3 *Joint control*

Joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Decisive influence in this sense normally means the power to block actions which determine the strategic commercial behaviour of an undertaking. Unlike sole control, which confers upon a specific shareholder the power to determine the strategic decisions in an undertaking, joint control is characterized by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions. As in the case of sole control, the acquisition of joint control can also be established on a *de jure* or *de facto* basis.

The clearest form of joint control exists where there are only two parent companies which share equally the voting rights in the joint venture. In this case, it is not necessary for a formal agreement to exist between them. However, where there is a formal agreement, it must be consistent with the principle of equality between the parent companies.

Joint control may exist even where there is no equality between the two parent companies in votes or in representation in decision-making bodies or where there are more than two parent companies. This is the case where minority shareholders have additional rights which allow them to veto decisions which are essential for the strategic commercial behaviour of the joint venture. These veto rights must be related to strategic decisions on the business policy of the joint venture. They must go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests as investors in the joint venture.

Veto rights which confer joint control typically include decisions on issues such as the budget, the business plan, major investments or the appointment of senior management. The acquisition of joint control, however, does not require that the acquirer has the power to exercise decisive influence on the day-to-day running of an undertaking. The crucial element is that the veto rights are sufficient to enable the parent companies to exercise such influence in relation to the strategic business behaviour of the joint venture. Moreover, it is not necessary to establish that an acquirer of joint control of the joint venture will actually make use of its decisive influence. The possibility of exercising such influence and, hence, the mere existence of the veto rights, is sufficient.

Even in the absence of specific veto rights, two or more undertakings acquiring minority shareholdings in another undertaking may obtain joint control. This may be the case where the minority shareholdings together provide the means for controlling the target undertaking. This means that the minority shareholders, together, will have a majority of the voting rights; and they will act together in exercising these voting rights. This can result from a legally binding agreement to this effect, or it may be established on a *de facto* basis.

The legal means to ensure the joint exercise of voting rights can be in the form of a (jointly controlled) holding company to which the minority shareholders transfer their rights, or an agreement by which they undertake to act in the same way (pooling agreement).

Very exceptionally, collective action can occur on a *de facto* basis where strong common interests exist between the minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the joint venture. In the absence of strong common interests, the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control.

### **2.3 Changes in the quality of control**

The Merger Regulation covers operations resulting in the acquisition of sole or joint control, including operations leading to changes in the quality of control. First, such a change in the quality of control, resulting in a concentration, occurs if there is a change between sole and joint control. Second, a change in the quality of control occurs between joint control scenarios before and after the transaction if there is an increase in the number or a change in the identity of controlling shareholders.

However, there is no change in the quality of control if a change from negative to positive sole control occurs. Such a change affects neither the incentives of the negatively controlling shareholder nor the nature of the control structure, as the controlling shareholder did not necessarily have to cooperate with specific shareholders at the time when it enjoyed negative control.

In any case, mere changes in the level of shareholdings of the same controlling shareholders, without changes of the powers they hold in a company and of the composition of the control structure of the company, do not constitute a change in the quality of control and therefore are not a notifiable concentration.

Two categories of changes in the quality of control can be distinguished: first, an entrance of one or more new controlling shareholders irrespective of whether or not they replace existing controlling shareholders and, second, a reduction of the number of controlling shareholders.

An entry of new controlling shareholders leading to a joint control scenario can either result from a change from sole to joint control, or from the entry of an additional shareholder or a replacement of an existing shareholder in an already jointly controlled undertaking.

A move from sole control to joint control is considered a notifiable operation as this changes the quality of control of the joint venture.

The entry of a new shareholder in a jointly controlled undertaking — either in addition to the already controlling shareholders or in replacement of one of them — also constitutes a notifiable concentration, although the undertaking is jointly controlled before and after the operation. First, also in this scenario there is a shareholder newly acquiring control of the joint venture. Second, the quality of control of the joint venture is determined by the identity of all controlling shareholders. It lies in the nature of joint control that, since each shareholder alone has a blocking right concerning strategic decisions, the jointly controlling shareholders have to take into account each other's interests and are required to cooperate for the determination of the strategic behaviour of the joint venture.

A reduction in the number of controlling shareholders constitutes a change in the quality of control and is thus to be considered as a concentration if the exit of one or more controlling shareholders results in a change from joint to sole control. Where the operation involves a reduction in the number of jointly

controlling shareholders, without leading to a change from joint to sole control, the transaction will normally not lead to a notifiable concentration.

#### **2.4 Joint ventures – the concept of full-functionality**

Article 3(1)(b) of the Merger Regulation provides that a concentration shall be deemed to arise where control is acquired by one or more undertakings of the whole or parts of another undertaking. The new acquisition of another undertaking by several jointly controlling undertakings therefore constitutes a concentration under the Merger Regulation. As in the case of the acquisition of sole control of an undertaking, such an acquisition of joint control will lead to a structural change in the market even if, according to the plans of the acquiring undertakings, the acquired undertaking would no longer be considered full-function after the transaction (e.g. because it will sell exclusively to the parent undertakings in future).

Article 3(4) of the Merger Regulation provides in addition that the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so called full-function joint ventures) shall constitute a concentration within the meaning of the Merger Regulation. The full-functionality criterion therefore delineates the application of the Merger Regulation for the creation of joint ventures by the parties, irrespective of whether such a joint venture is created as a 'greenfield operation' or whether the parties contribute assets to the joint venture which they previously owned individually. In these circumstances, the joint venture must fulfil the full-functionality criterion in order to constitute a concentration.

The fact that a joint venture may be a full-function undertaking and therefore economically autonomous from an operational viewpoint does not mean that it enjoys autonomy as regards the adoption of its strategic decisions. Otherwise, a jointly controlled undertaking could never be considered a full-function joint venture and therefore the condition laid down in Article 3(4) would never be complied with. It is therefore sufficient for the criterion of full-functionality if the joint venture is autonomous in operational respect.

The full function character essentially means that a joint venture must operate on a market, performing the functions normally carried out by undertakings operating on the same market. In order to do so the joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets (tangible and intangible) in order to conduct on a lasting basis its business activities within the area provided for in the joint-venture agreement.

A joint venture is not full-function if it only takes over one specific function within the parent companies' business activities without its own access to or presence on the market. This is the case, for example, for joint ventures limited to R&D or production. Such joint ventures are auxiliary to their parent companies' business activities. This is also the case where a joint venture is essentially limited to the distribution or sales of its parent companies' products and, therefore, acts principally as a sales agency. However, the fact that a joint venture makes use of the distribution network or outlet of one or more of its parent companies normally will not disqualify it as 'full-function' as long as the parent companies are acting as agents of the joint venture.

As long as the purpose of the joint venture is limited to the acquisition and/or holding of certain real estate for the parents and based on financial resources provided by the parents, it will not usually be considered to be full function, as it lacks resources to operate independently. This has to be distinguished from joint ventures that are actively managing a real estate portfolio and who act on their own behalf on the market, which typically indicates full-functionality.

The strong presence of the parent companies in upstream or downstream markets is a factor to be taken into consideration in assessing the full-function character of a joint venture where this presence results in substantial sales or purchases between the parent companies and the joint venture. The fact that, for an initial start-up period only, the joint venture relies almost entirely on sales to or purchases from its parent companies does not normally affect its full-function character.

Where sales from the joint venture to the parent companies are intended to be made on a lasting basis, the essential question is whether, regardless of these sales, the joint venture is geared to play an active role on the market and can be considered economically autonomous from an operational viewpoint. In this respect the relative proportion of sales made to its parents compared with the total production of the joint venture is an important factor. For this purpose, it is to be demonstrated that the joint venture will supply its goods or services to the purchaser who values them most and will pay most and that the joint venture will also deal with its parents' companies at arm's length on the basis of normal commercial conditions.

In relation to purchases made by the joint venture from its parent companies, the full-function character of the joint venture is questionable in particular where little value is added to the products or services concerned at the level of the joint venture itself. In such a situation, the joint venture may be closer to a joint sales agency. However, in contrast to this situation where a joint venture is active in a trade market and performs the normal functions of a trading company in such a market, it normally will not be an auxiliary sales agency but a full-function joint venture.

The joint venture must be intended to operate on a lasting basis. The fact that the parent companies commit to the joint venture the resources described above normally demonstrates that this is the case. By contrast, the joint venture will not be considered to operate on a lasting basis where it is established for a short finite duration. A joint venture also lacks the sufficient operations on a lasting basis at a stage where there are decisions of third parties outstanding that are of an essential core importance for starting the joint venture's business activity.

The parents may decide to enlarge the scope of the activities of the joint venture in the course of its lifetime. This will be considered as a new concentration that may trigger a notification requirement if this enlargement entails the acquisition of the whole or part of another undertaking from the parents that would, considered in isolation, qualify as a concentration.

A concentration may also arise if the parent companies transfer significant additional assets, contracts, know-how or other rights to the joint venture and these assets and rights constitute the basis or nucleus of an extension of the activities of the joint venture into other product or geographic markets which were not the object of the original joint venture, and if the joint venture performs such activities on a full-function basis.

## **2.5 Exceptions**

Article 3(5) of the Merger Regulation sets out three exceptional situations where the acquisition of a controlling interest does not constitute a concentration under the Merger Regulation.

First, the acquisition of securities by companies whose normal activities include transactions and dealing in securities for their own account or for the account of others is not deemed to constitute a concentration if such an acquisition is made in the framework of these businesses and if the securities are held on only a temporary basis (Article 3(5)(a)). In order to fall within this exception a number of requirements must be fulfilled.

Second, there is no change of control, and hence no concentration within the meaning of the Merger Regulation, where control is acquired by an office-holder according to the law of a Member State relating

to liquidation, winding-up, insolvency, cessation of payments, compositions or analogous proceedings [Article 3(5)(b)].

Third, a concentration does not arise where a financial holding company within the meaning of Article 5(3) of the Council Directive 78/660/EEC (99) acquires control.

The exceptions do not apply to typical investment fund structures. According to their objectives, these funds usually do not limit themselves in the exercise of the voting rights, but adopt decisions to appoint the members of the management and the supervisory bodies of the undertakings or to even restructure those undertakings.

### **3. Changes in the merger regime**

Although minority shareholdings may impact the substantive competitive assessment of a merger case (including the assessment of possible remedies), the acquisition of minority shareholdings may only be directly assessed under EU merger control rules to the extent that the holding confers 'control' of the target business.<sup>4</sup>

Established economic theory and the Commission's experience in reviewing acquisitions of control, as well as the experience of other jurisdictions with merger control regimes which cover acquisitions of non-controlling stakes, indicate that significant harm to competition and consumers can occur from acquisitions non-controlling minority shareholdings.

Under the Merger Regulation, the Commission has currently only the possibility to take pre-existing minority shareholdings into account if it is competent to analyse the effects of a separate acquisition of control. If, however, the acquisition of the minority stake had succeeded the acquisition of control, the Commission would have had no competence under the Merger Regulation to deal with the competition concerns arising.

Although after more than 20 years in force, the basic features of the EU merger control system are well proven, the Commission services responsible for Competition are currently reflecting on a possible review of the Merger Regulation particularly with a view to covering the acquisition of non-controlling minority shareholdings so as to give the Commission the possibility to investigate and, if necessary, intervene against anti-competitive structural links.

As far as the selection of cases involving acquisitions of minority shareholdings and the procedure is concerned, different options could be envisaged. This could be done by extending the current ex-ante notification system to acquisitions of non-controlling minority shareholdings. Alternatively, a selective system might be considered more appropriate. Under such a system, the Commission would be able to select cases of acquisitions of non-controlling minority shareholdings that are more likely to raise competition issues. Any reform to the Merger Regulation would need to strike the right balance between the need for effective competition enforcement and the need to keep regulatory burden for stakeholders at a reasonable level.

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<sup>4</sup> In this regard it is pertinent to note that the European Court of Justice has confirmed that acquisitions of minority shareholdings not conferring effective control may be analysed under Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). See in particular Case 142 and 156/84 *British American Tobacco Company Ltd and R.J. Reynolds Industries Inc. v EC of the European Communities*, [1986] ECR 1899.

#### **4. Conclusion**

The concept of 'concentration' together with the turnover thresholds established in the Merger Regulation, are the basis of the Commission's merger review jurisdiction.

The Commission's Notice seeks to achieve a high level of transparency, legal certainty and predictability as to the concept of concentration under EU merger control rules. In this context, the Notice provides important insight into the types of acquisitions of shares, acquisitions of assets, as well as the types of joint ventures which are deemed to constitute concentrations in terms of the Merger Regulation.

## GERMANY

### 1. Introduction

Defining which transactions should be subject to merger control is one of the key elements of any merger control system. Over the years Germany has gained extensive experience in striving for an adequate definition of merger control thresholds and in the application of merger control. The development from the very first implementation of the Act against Restraints of Competition (ARC) in 1958 and the early introduction of a formal merger control regime in 1973 until today has been a continued process of improving the existing definitions and closing perceived loopholes. Experience repeatedly showed that just by adequate design of the affiliation between undertakings in a way that the applicable thresholds of merger control were not reached, transactions were omitted from merger control that had the potential for the same (negative) effects on competition as a merger within the meaning of the law. Companies and lawyers were always fast and creative in adapting to legal changes and developing new designs for envisaged transactions. Offering sufficient legal certainty by clear objective thresholds for notification and at the same time providing authorities with the possibility to review all types of mergers which may have a significant and negative impact on competition has therefore been a constant challenge. In view of this Germany has refined its merger control definitions several times, aiming to find the right balance between legal certainty, practicability and the effectiveness of review. Over time, a broad set of experience and case law has been accumulated.

This contribution will present the current definitions of transactions in Germany (2.). It will provide a brief introduction on majority shareholdings and the acquisition of control or assets (3.) before focussing on non-controlling minority shareholdings (4.)<sup>1</sup> and joint ventures (5.).

### 2. Transactions subject to merger review

In Germany, Section 37 ARC defines the different types of merger transactions (concentrations) for the purposes of merger control. Today, the broad categories include the acquisition of **assets** of another undertaking (Section 37 (1) No. 1), the acquisition of **control** over another undertaking ((1) No. 2), the acquisition of **shares** in another undertaking ((1) No. 3) and the acquisition of a position that allows one undertaking to exert **material influence** (“competitively significant influence”) on another ((1) No. 4). As there are certain overlaps between these categories a merger will often fulfil more than one category.

In detail, Section 37 ACR states:

*(1) A concentration shall arise in the following cases:*

- 1. acquisition of all or of a substantial part of the assets of another undertaking;*
- 2. acquisition of direct or indirect control by one or several undertakings of the whole or parts of one or more other undertakings. Control shall be constituted by rights, contracts or any other*

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<sup>1</sup> See also the German contribution to the OECD Roundtable 2008 with case examples, available at <http://www.oecd.org/daf/competition/mergers/41774055.pdf><http://www.oecd.org/daf/competition/mergers/41774055.pdf>.



*means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking having regard to all factual and legal circumstances, in particular through:*

*a) ownership or the rights to use all or parts of the assets of the undertaking,*

*b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of the undertaking;*

*3. acquisition of shares in another undertaking if the shares, either separately or in combination with other shares already held by the undertaking, reach:*

*a) 50 percent; or*

*b) 25 percent of the capital or the voting rights of the other undertaking. The shares held by the undertaking shall also include the shares held by another for the account of this undertaking and, if the owner of the undertaking is a sole proprietor, also any other shares held by him. If several undertakings simultaneously or successively acquire shares in another undertaking to the extent mentioned above, this shall be deemed to also constitute a concentration among the undertakings concerned with respect to those markets on which the other undertaking operates;*

*4. any other structural link enabling one or several undertakings to directly or indirectly exercise a competitively significant influence on another undertaking.*

*(2) A concentration shall also arise if the undertakings concerned had already merged previously, unless the concentration does not result in a substantial strengthening of the existing affiliation between the undertakings.*

*(3) If credit institutions, financial institutions or insurance undertakings acquire shares in another undertaking for the purpose of resale, this shall not be deemed to constitute a concentration as long as they do not exercise the voting rights attached to the shares and provided the resale occurs within one year. This time limit may, upon application, be extended by the Bundeskartellamt if it is substantiated that the resale was not reasonably possible within this period.*

All transactions that are subject to German merger control must not be implemented before clearance or before the statutory waiting periods have expired (Section 41 ARC). Transactions violating this prohibition shall not be valid. For a breach of this prohibition, the Bundeskartellamt may impose fines of up to €1 million or, in the case of undertakings, 10 per cent of worldwide group turnover (Section 81 (1) ARC). This mandatory suspension period, enforceable with a fine and combined with non-validity of the implementation, is a very important and necessary tool, considering the experiences of the Bundeskartellamt with limited or no notification obligations for some merger forms in the past (see 4. below).

While Section 37 ACR only defines the different types of concentrations within the meaning of the law, a transaction only has to be notified if it also fulfils all the other requirements of the merger control rule (turnover thresholds, threshold of affected market volume, effects within the geographic scope of the ARC). Transactions fulfilling these criteria have to be assessed with regard to their potential to create or strengthen an already existing dominant position (Section 36 ARC). When the substantive criteria will be changed in the 8<sup>th</sup> ARC amendment, as it is currently envisaged, a “significant impediment to effective competition” (SIEC test) will have to be analysed.

### 3. Acquisition of a majority of share, acquisition of control, acquisition of assets

With regard to the acquisition of shares (Section 37 (1) No. 3 ARC), acquiring at least 25 % or at least 50 % of the shares or voting rights in another undertaking is considered as a transaction falling under merger control.<sup>2</sup> Each threshold met is considered a transaction on its own.

That the acquisition of at least 50 % of shares should fall under merger control seems to be common ground worldwide. There may be less consensus concerning the control of non-controlling minority interests of 25 to 50 % or even less. These concepts of German merger control will be discussed in more detail in the next section.

While the acquisition of a majority of shares or voting rights will very often also confer control, the acquisition of control as a type of transaction for the purposes of merger control was introduced in 1999 as a complement to harmonize German with European law.<sup>3</sup> Consequently, this concept has been largely influenced by European merger control. According to Section 37 (1) No. 2 ARC control can be acquired through rights, contracts or any other means that, either separately or in combination, and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on another enterprise, in particular through ownership or the right to use all or part of the assets of the enterprise; or rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of the undertaking. Due to experience made in the past, the concept of control was introduced as an additional type of transaction that should be subject to merger control, alongside established definitions, rather than a full substitute. The reasons are discussed in more detail in part 4 below.

The concept of control following the European model also leads to a slight overlap with the older German concept of the acquisition of all or of a substantial part of the assets of another undertaking (Section 37 (1) No. 1 ARC). The assets of an undertaking are all goods and rights of an undertaking with monetary value, irrespective of their type, use and potential for separate sale, provided they form the basis of an existing market position and allow the acquirer to step into the market position of the seller, thereby strengthening its own market position.<sup>4</sup>

### 4. Non-controlling minority interests

While there is wide global agreement that majority interests and the acquisition of control should be subject to merger control, there is no general consensus with regard to minority shareholdings. However, it is acknowledged that minority interests can dampen competition and consequently lead to higher prices (or lower quantities or quality). Like full mergers, minority interests can lead to unilateral or co-ordinated effects which may reduce competition. The acquiring party may have less incentive to compete aggressively because it shares in the losses and profits of the target. When both firms are competitors, the losses due to a price increase of one firm may be offset by gains of the other firm due to customers switching.<sup>5</sup> Minority shares may also facilitate collusion when they provide access to sensitive information or the ability of the acquiring company to induce the target firm to collude.

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<sup>2</sup> Until 1989, a distinction was made between shares and voting rights. Below 50 % of shares, voting rights were decisive, above 50 % shares voting rights and shares were treated equally. In the 5<sup>th</sup> amendment of the ARC, however, it was clarified that shares and voting rights were considered equal, irrespective of the percentage of shares acquired.

<sup>3</sup> See 6th amendment of the ARC (GWB).

<sup>4</sup> BGH (Federal Court of Justice), decision of 10 October 2006 - KVR 32/05 - National Geographic.

<sup>5</sup> Such effects may be measured using, for example, the Upward Pricing Pressure Test (UPP Test).

The merger control rules of the ARC allow the review of non-controlling minority interests in cases of an acquisition of shares of (more than) 25 % or a transaction resulting in material influence which is significant for competition. This establishes a two-pronged approach: there is one “clear” threshold of 25 % shares or voting rights and one targeted approach (“soft” threshold) of material influence. The concept of acquisition of minority shares is older than that of material influence, but both have been developed and amended several times, providing a large body of case law and experience. To better understand these concepts and their importance in German merger control, a brief overview of the historic development will be given, which may also provide useful information for other jurisdictions contemplating changes in their merger control regulations.

#### **4.1 Historic development**

When the ARC was first introduced in 1958 it already defined a merger control threshold of the acquisition of 25 % of shares as a form of concentration, but without the power to prohibit a merger which was introduced in 1973. The background for this definition was a rule in the German Stock Corporation Act that a majority of 75 % is required for specific decisions made by a stock company, so that a shareholder with more than 25 % of shares or voting rights will be able to block such decisions.

In 1980 experience with resourceful circumventions of the 25 % threshold by companies led to the first introduction of an additional definition of concentration, according to which already the acquisition of less than 25 % shares (or voting rights) would be considered a concentration, provided the acquirer would – through contract, statutes or decision – acquire a position that a shareholder with more than 25 % shares or voting rights has in a stock company (Section 23 (2) No. 2 sentence 4 ARC – old version). According to the courts this would not require the exact same position as a holder of shares in a stock company with a blocking minority. The acquisition of a similar position – taking all relevant circumstances into account – would fulfil the requirements.<sup>6</sup>

However, this still left too many loopholes to capture all mergers with potentially negative effects. Ten years later, another definition of concentration was introduced, adding as concentration any other form of structural link between undertakings (i.e. not falling under the established definitions), as far as the link enables one or several undertakings to exert material influence on another undertaking which would be significant for competition (Section 23 (2) No. 6 ARC – old version).<sup>7</sup> It was, however, at first exempted from the ex-ante merger control as well as notification obligations (and only subject to ex-post control including a mandatory ex-post notification). With the 6<sup>th</sup> amendment of the ARC in 1999 (and the introduction of the acquisition of control) all forms of concentrations were made subject to ex-ante control. The acquisition of a position comparable to that of a shareholder with blocking minority was abandoned, as these types of concentrations were considered by the legislator to either fall under the new definition of acquiring control (Section 37 (1) No. 2 ARC) or that of acquiring material influence (Section 37 (1) No. 4 ARC).<sup>8</sup> The latter concept remained mainly unchanged until today.

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<sup>6</sup> BGH, decision of 10 November 1987 - KVR 7/86 - “Singener Wochenblatt”.

<sup>7</sup> BGH, decision of 21 December 2004 - KVR 26/03 - “trans-o-flex”.

<sup>8</sup> The courts confirmed that, since that was the legislator’s intention, acquiring a position comparable to that which a shareholder with more than 25 % shares or voting rights has in a stock company, is one specification of material influence (see OLG Düsseldorf, decision of 12 November 2008, VI-Kart 5/08 (V) - A-TEC/Norddeutsche Affinerie).

## 4.2 Acquisition of minority shares

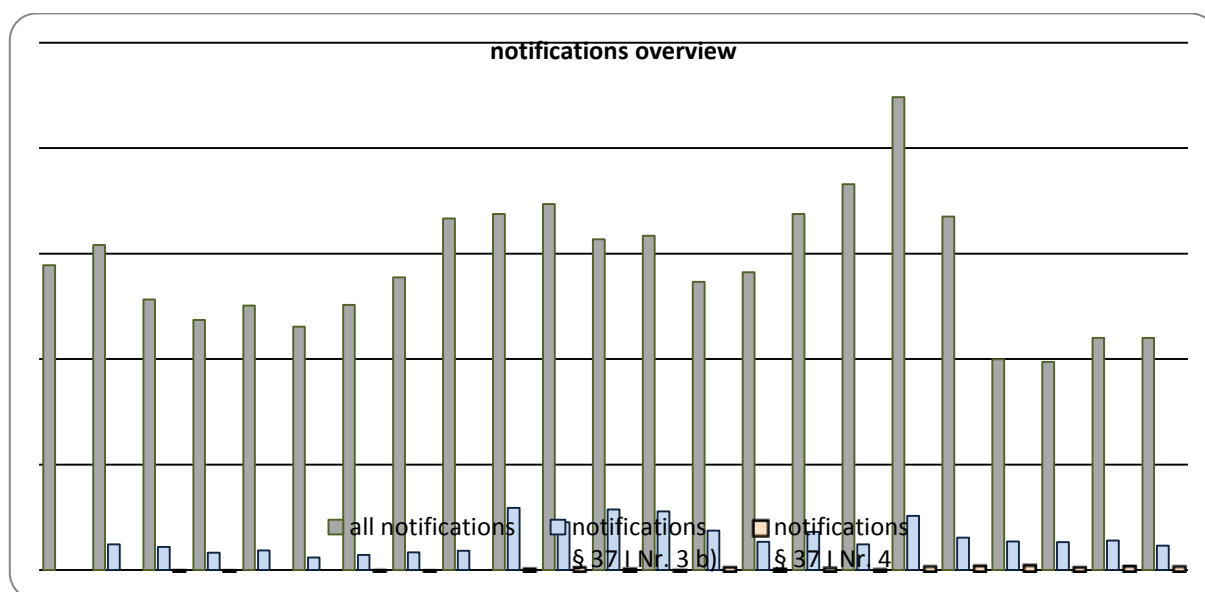
According to Section 37 (1) No. 3 in its current form an acquisition of shares in another undertaking constitutes a concentration if the shares, either separately or in combination with other shares already held by the undertaking, reach 50 % or 25 % of the capital or the voting rights of the other undertaking. Each threshold that is met constitutes a concentration on its own in the sense of the law.

The acquisition of minority shares below 50 % and above 25 % is a long established concept in German merger control. It was maintained after the introduction of the “acquisition of control” definition in 1999 to keep the possibility to assess the acquisition of minority shares below the threshold of “control” as well as the established case law. The legislator feared that otherwise a lowering of the level of protection might result, which could not be justified from a competition policy perspective.<sup>9</sup>

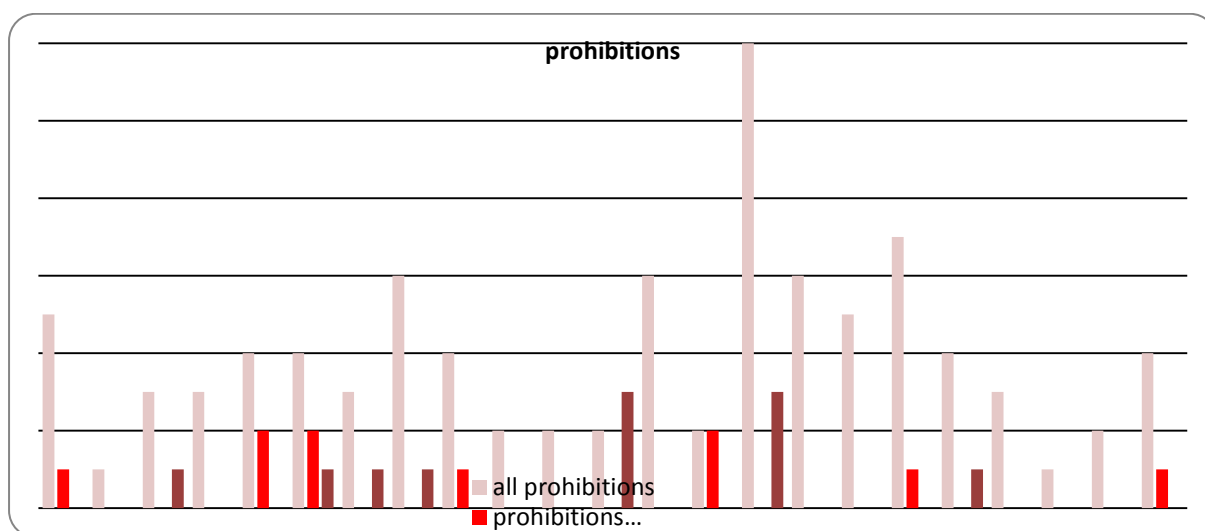
The acquisition of shares in general constitutes around 75 % of all notified merger transactions and is by far the most important type of merger transaction falling under merger control in Germany. The acquisition of minority shares plays a much smaller but nevertheless significant role.

As shown in graph 1 and 2 below, the acquisition of minority shares (Section 37 (1) No. 3b) on average constitutes around 10 % of all notifications (graph 1) and also approximately 10 % of all prohibitions in phase II merger proceedings (graph 2).

**Graph 1 – § 37 (1) all notifications, No. 3b) 25 % shares, No. 4 material influence**



<sup>9</sup> See the reasoning of the government in 1989, Reg.-Begr. 1989, p. 43.

**Graph 2 – § 37 (1) all notifications, No. 3b) 25 % shares, No. 4 material influence**

### 4.3 *Material influence*

The concept of the acquisition of a material influence (Section 37 (1) No. 4 – originally Section 23 (2) No. 6 – was introduced as a subsidiary fall-back clause to enable the review of concentrations that do not reach the established thresholds, but may nevertheless have a significant effect on competition.

Section 37 (1) No. 4 states that any other (structural) link between undertakings that is based on a share in another company and enables one undertaking to exercise a material influence on another which is significant for competition, also constitutes a concentration within the meaning of the law. In practice, only acquisitions by competitors or companies operating on an upstream or downstream level of the value chain are covered. Generally, the influence one undertaking can exert on another is deemed significant to competition when it allows the acquiring party to influence the competitive behaviour of the target in such a way that it is likely to reduce competition between the undertakings, to a degree that they will no longer act independently on the market.<sup>10</sup> It can also suffice that the target will adapt its competitive behaviour in the interests of the acquirer or that the majority shareholder will take the interests of the minority shareholder into account, even if he does so only as far as it does not conflict with his own interests.<sup>11</sup>

The assessment of a material influence which is significant for competition always has to take all relevant factors into account. Since its introduction in 1989, the concept was continuously improved and refined in the case law, giving shape to an initially less obvious threshold. Necessary conditions for a material influence which is significant for competition are a corporate link (e.g. shares, mandates, contractual rights) and a set of additional factors with significance for competition. These additional factors can be special voting or veto rights;<sup>12</sup> specific information rights;<sup>13</sup> options or pre-emption rights;<sup>14</sup>

<sup>10</sup> See the reasoning of the government in 1989, Reg.-Begr. 1989, p. 20.

<sup>11</sup> BGH, NJW-RR 2001, 762; BGH, decision of 21 December 2004 - KVR 26/03 - “trans-o-flex”.

<sup>12</sup> BKartA, decision of 3 July 2000 – B8-29/00 „Stadtwerke Neuss“; BKartA, decision of 26 August 2003 – B8-83/03 „RWE/Wuppertaler Stadtwerke“.

<sup>13</sup> BGH, decision of 21 November 2000 – KVR 16/99 – „Minderheitsbeteiligung im Zeitschriftenhandel“.

<sup>14</sup> BKartA – merger clearance decision 1998, see Activity report 1997/98, p. 111. Available at: <http://dip21.bundestag.de/dip21/btd/14/011/1401139.pdf>.

economic dependency;<sup>15</sup> or parallel interests.<sup>16</sup> Rights to nominate members of the advisory board, board of directors or management play a particularly important role.<sup>17</sup> The legislator and literature take the position of a shareholder with more than 25 % shares or voting rights in a German stock company (Section 23 (2) No. 2 sentence 4 ARC – old version) as a benchmark for the overall importance of influence and/or rights that a shareholder will have in order to meet the threshold of Section 37 (1) No. 4. In practice it will be extremely rare that shares below 10 % would be connected with a sufficient amount of rights or other plus factors that would meet the threshold of material influence.<sup>18</sup>

It is in the nature of things that a more targeted threshold conveys less legal certainty and can be more complex to apply than a clear cut objective threshold, like a certain percentage of shares. However, this is not only true for thresholds like “material influence”, but also for others like “acquisition of control” or “significant lessening of competition” and jurisdictions all over the world seem to have been able to overcome initial uncertainties with the development of sufficient case law. In Germany, the legislator explicitly decided against lowering the threshold of 25 % shares to a clear-cut 10 % of shares rule, but intended to introduce a more targeted fall-back clause. The concept of “material influence” was first introduced as ex-post control, enabling the Bundeskartellamt and the courts to gain case experience and develop a set of case law. The change to ex-ante control with the according prohibition of implementation in 1999 was made as the ex-post control proved to be less efficient and quite problematic. To provide for more legal certainty for companies the Bundeskartellamt for a brief period communicated that it would consider a material influence which is significant for competition to exist when shares of 20 % or more were acquired and that only for acquisitions below 20 % of shares would additional factors be needed.<sup>19</sup> This approach was however not followed by the courts so that the Bundeskartellamt soon made it clear that all cases would be analyzed on a case-by-case basis, taking all relevant factors into account, without being able to provide more certainty through any specific thresholds.

The particular importance of the fall-back clause of “material influence” becomes clear when looking at the case distribution. While cases concerning material influence are, on average, considerably less than 1 % of all notifications (graph 1), these cases make up around 10 % of all prohibitions in phase II merger investigations (graph 2). This might underline that companies seem to be well aware which cases might give rise to competition concerns and are trying to target their engagement right below the line where it would be a clear-cut case of a transaction.

## 5. Merger control of joint ventures

The creation of a joint venture can also be subject to merger control in Germany. The merger control provisions not only apply to full-functioning joint ventures but also to joint ventures that do not perform all the functions of an autonomous economic entity. Transactions creating joint ventures can fall under merger control not only with regard to the joint acquisition of control (Section 37 (1) No. 2), but also with regard to the acquisition of at least 25 % shares (Section 37 (1) No. 3) and even the possibility to jointly exert material influence on another undertaking (Section 37 (1) No. 4). Moreover, it might be worth noting that the ARC also treats the acquisition of at least 25 % of shares in one company by several undertakings as a

<sup>15</sup> BKartA, decision of 23 July 1992 – B5-42/90 “Gillette/Wilkinson”.

<sup>16</sup> BGH, decision of 21 November 2000 – KVR 16/99 – „Minderheitsbeteiligung im Zeitschriftenhandel“; BKartA, decision of 19 November 2002 – B8-144/02 „E.ON/Stadtwerke Straubing“.

<sup>17</sup> BGH (Federal Court of Justice), decision of 21 December 2004 - KVR 26/03 - “trans-o-flex”; OLG Düsseldorf, decision of 12 November 2008, VI-Kart 5/08 (V) - A-TEC/Norddeutsche Affinerie; BKartA, decision of 28 February 2001 – B8-279/00 “easyplus”.

<sup>18</sup> OLG Düsseldorf, decision of 6 July 2005 “Bonner Zeitungsdruckerei”.

<sup>19</sup> BKartA Activity report 1997/98, p. 122.

distinct concentration among the undertakings concerned with respect to those markets on which the joint venture operates. Applying these rules to joint ventures provides adequate possibilities to capture the risk of spill-over effects between the parent companies of a joint venture. A clear demarcation whether the creation of a joint venture should be treated under structural merger control or rather “behavioural” control of agreements, which may sometimes be difficult in other jurisdictions, is not required in Germany. Section 1 ARC (Prohibition of Agreements Restricting Competition) is applied alongside merger control, while not being bound by the same deadlines. According to the German experience, this approach has been practical and initiates the control of potentially harmful transactions at an early stage.

## **6. Concluding remarks**

When defining thresholds for merger control the legislator always has to consider the costs of “casting a wider net” for companies and competition authorities. It aims to limit the burden of notifications of merger proposals that will clearly have no impact on competition while allowing the review of all cases with potentially negative effects.

Limiting the costs of notification to a reasonable level can also be achieved by the features of the notification system itself. Information requirements for notifications to the Bundeskartellamt are very low and mergers that clearly do not cause any competition concern can be cleared very quickly without additional information. Another feature of the German system that limits the scope of the merger control regime relates to the size of the participating undertakings and the required nexus to the German jurisdiction. It ensures that only cases of a certain potential impact on competition in Germany have to be notified and assessed.

As the case statistics of the Bundeskartellamt show, the percentage of notified transactions concerning minority shares or material influence is relatively low (graph 1). While the percentage of minority share notifications equals the percentage of all prohibitions for these types of transactions, the percentage of prohibitions of cases concerning material influence exceeds the percentage of notifications by factor 10 (graph 2). The German experience shows that these cases often require deeper review because companies have a clear perception which transactions may raise significant concerns and aim to structure them in a way to avoid the thresholds. Even if a “wider net” may lead to additional costs for companies and authorities, these seem to be small compared to the costs for society if a merger transaction with significant negative impact on competition could not be assessed by the competition authority.

## HUNGARY

### 1. Definition of a merger transaction

According to the Hungarian Competition Act<sup>1</sup> a concentration of independent undertakings occurs in the following situations:

- when two or more undertakings merge,
- when one undertaking purchases another undertaking (takeover),
- when a part of an undertaking becomes a part of another undertaking,
- when sole or joint control is acquired (direct or indirect control) of another undertaking or part of an undertaking,
- when the undertakings create an undertaking that is controlled by them, which is able to perform on a long term basis all the functions of an independent undertaking.

Concerning acquisition of control the Competition Act specifies control as the following:

- the ownership of the interests or shares of another undertaking entitling them to exercise majority voting rights, or are holders of more than fifty per cent of the voting rights;
- the right to appoint, elect or recall the majority of the executive officials;
- the entitlement by contracts;
- and the ability on a factual basis to exercise decisive influence on the decisions of another undertaking.

The definition of a concentration has gradually evolved as amendments have been made to the Competition Act, and has been further refined by the practice of the Competition.

According to the practice of the Competition Council, for the existence of a merger it makes no difference whether control was acquired by one or several transactions, provided that the end result constitutes a single concentration. This also means that various transactions can result in one concentration if they are connected to each other in such a manner that none of the transactions would take place without the others. Only if one business activity, i.e. one economic entity, is involved in the acquisition by several inter-conditional legal transactions can it be considered as one merger regardless of whether the interdependent transactions are considered as acquisition of control or not, or whether the sellers belong to the same groups of undertakings.

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<sup>1</sup> The Hungarian Competition Act (Act LVII of 1996 on the prohibition of unfair and restrictive market practices):  
[http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=129&m5\\_doc=4244&m176\\_act=2](http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=129&m5_doc=4244&m176_act=2)  
 Chapter VI Control of Concentration of Undertakings (23-32 §§) and 15 § undertakings not independent of each other.



The long term nature of the control does not form part of the legal definition, the Competition Act specifies the exemption of temporary - for a one-year period at the longest - acquisitions of control by financial companies for the purpose of preparing a resale, provided that they do not exercise their controlling rights, or exercise them only to an extent which is indispensable to the attainment of these objectives.

The aim of merger control is to monitor the long term lasting changes that occur in the market structure. The GVH evaluates on a case by case basis whether the acquisition of control can be considered to be long lasting. According to the practice of the GVH, the minimum period of time above which a concentration may arise is not defined. For certain contracts a time period of 5+2 years was sufficient to establish the long-term acquisition of control.

Hungarian merger control is based on a **mandatory preliminary authorisation system**. The authorisation of the GVH is required for the merger of any undertakings with a turnover that is higher than the threshold that is contained in the Competition Act. The application for authorisation must be submitted within thirty days of the date of the publication of the invitation to tender, the conclusion of the contract or the acquisition of the controlling rights, whichever of them is the earliest. If the undertakings fail to apply to the GVH for the authorisation of their merger, the GVH may launch a proceeding ex officio.

The GVH does authorise a concrete contract in its procedure, but a concentration in terms of the Competition Act, so there are no legal obstacles to prevent the GVH from investigating the linking contracts that per se led to a merger in a procedure. According to the practice of the GVH, two or more transactions can be judged in the same procedure, if they belong to the same economic activity, the companies involved on both sides form a single economic unit and there is no significant difference between the date of the transactions. Therefore, the GVH authorises a series of transactions in one procedure if a maximum of 30 days has elapsed between the first and last step of the process.

## **2. Thresholds**

The Hungarian Competition Act that is currently in force only defines the revenue threshold. For a concentration of undertakings, the authorisation of the Hungarian Competition Authority must be sought in cases where the aggregate net turnover of all the groups of undertakings concerned exceeded 15 billion HUF (ca. 52 million EUR) in the preceding business year, and the net turnover of each of at least two of the groups of undertakings concerned was more than 500 million HUF (increment of ca. 1.7 million EUR). The current Competition Act contains no market share threshold.

### **2.1 *The two year buy-up rule – ‘gaming the system’***

The authorisation obligation exists, if the group of undertaking implemented another – not applicable – merger within two years prior to the merger of more than 500 million HUF.

With the two year buy-up rule the legislator wished to avoid a situation where the smaller transactions – which do not effect competition on the market – fall under merger control unnecessarily. However, these small steps can be harmful to competition if they become the continuing business practice of the undertaking. For this reason, the Competition Act prescribes that in assessing whether the 500 million HUF threshold is met, concentrations not subject to authorisation which took place within a two-year period preceding the concentration concerned between the same group of undertakings shall also be taken into account.

### 3. De facto control (minority interests, interlocking directorates, veto rights)

The Hungarian Competition Act contains no thresholds on acquisition of minority shareholding.

**De facto control** can be established in all cases when the owner of the minority votes - for some reason - could reasonably expect to obtain the majority of the votes in the shareholders' meeting.

There is no general rule laid down in the Competition Act on the percentage of shares or business assets which determine de facto control as it depends on the actual circumstances of the given case. The GVH investigates the acquisition of control or the establishment of de facto control on a case by case basis.

The typical situations in which de facto control is exercised through minority shares are the following:

- the largest minority shareholder's share is significantly larger than the second biggest minority shareholder's share and there is a large number of fragmented shares (in this case the Competition Council examines the actual participation on the past general meetings);
- besides the minority shareholder there is another significant shareholder that is not likely to take part in the management of the company (financial investor).

When one shareholder is able to veto the strategic decisions of an undertaking, this can result in **negative sole control**. Such negative sole control is distinguished from positive sole control in that the controlling undertaking does not have the power on his own to impose strategic decisions and can only block the decision making process. In contrast to joint control, there are no other shareholders that are able to block the adoption of strategic decisions. If one stakeholder owns 50% of the shares in an undertaking and the remaining 50% is held by several other shareholders, the general meeting of the shareholders cannot make a decision without the shareholder who possesses 50% of the shares. This means that this shareholder is able to influence the decisions of the undertaking.

Control on a de facto basis may also occur if an undertaking actually has the **majority of the representatives on the decision-making bodies** of the controlled undertaking. However, such a situation can arise at any time (for example, when an executive official resigns), so control on a de facto basis only occurs when it is likely that the situation results in lasting change.

### 4. Part of an undertaking

The definition of the part of an undertaking is based on the concept that a concentration is connected primarily to the products (services) and not to the undertakings.

The Competition Act defines "part of an undertaking" as assets or rights, including the clientele of an undertaking, the acquisition of which, solely or together with assets and rights which are at the disposal of the acquiring undertaking, is sufficient to enable market activities to be pursued (so the transaction results the change of the concentration).

According to the practice of the GVH – in contrast to the practice of the European Commission - it makes no difference whether the acquirer of a part of an undertaking is actually conducting or could conduct business activity only for the seller or for itself, it is enough that the assets or rights to be transferred alone or together with assets and rights available for the buyer are sufficient for conducting business activity.

The GVH recently investigated in several cases what criteria need to be met for taking over control of a part of an undertaking. The situations established by these cases, which were about transferring (selling or leasing) retail stores, were the following:

- the acquisition of the property of the real estate, assets and employees
- the long-term leasing of the real estate, the acquisition of assets and employees,
- the acquisition of the property of the real estate of a closed store and assets.

In a case of a leasing of an already closed mall, the Competition Council took into consideration the facts that the buyer had acquired the leasing rights of the mall right after it had closed, and the acquirer conducted the same business activity. The short term of closing and the same business activity created „goodwill” related to the real estate, which together with the assets and rights which are at the disposal of the acquiring undertaking, were sufficient for enabling market activities to be pursued.

According to the practice of the Competition Council, transferring licenses of trademarks is also considered as a merger case, because such transfers influence the market structure and concentration.

## **5. Joint ventures**

A sub-type of merger transactions is where two or more independent undertakings create a joint venture. However, only a joint venture that performs on a long term basis all of the functions of an autonomous entity (a so called full-function joint venture) shall constitute a concentration. A full-function joint venture (as in the practice of the European Commission) must have a management that is dedicated to its everyday operations and must also have access to sufficient resources, including finance, staff, and assets in order to conduct on a long term basis its business activities within the area provided for in the joint-venture agreement.

The Hungarian Competition Council has specified the criteria that must be fulfilled by full-function joint ventures. The full-function joint venture

- should be able to perform the same functions that are normally carried out by other undertakings on the same market (market presence in an operational sense)
- has to have sufficient tangible and intangible assets to produce goods and services in the relevant market, has to have a management for everyday operations, and has to have resources including finance, staff and assets, and in some cases official authorisation.

A joint venture does not constitute a full-function joint venture if its business activities are permanently and essentially limited to its parent companies. Also, if the purpose of a joint venture is limited to the acquisition of control over other companies and the maintenance of indirect joint control of parent companies, it is not considered as a full-function joint venture.

As full-function joint ventures are considered as mergers, their founders have to apply for authorisation if their net incomes fulfill the thresholds that are set out in the Competition Act.

Non-full-function joint ventures are not considered as mergers and the Competition Authority evaluates them on the basis of IV chapter of the Competition Act, the Prohibition of Agreements Restricting Economic Competition.

### 5.1 *Exercising joint control*

According to the practice of the Competition Council, an undertaking is jointly controlled when the parent companies exercise their controlling rights, which are set out in the Competition Act, jointly.

Joint control exists

- where there are only two parent companies which share equally (50:50) the voting rights in the joint venture, assuming that the operating rules of the decision-making bodies provide for equality in voting rights.
- where a company has two shareholders, and one of them has the majority of voting rights and the other one has the right to appoint members to the decision-making bodies (even in the absence of a formal agreement on control)
- where a formal agreement exists between the parent companies, for example providing for veto rights for the minority shareholder over the strategic business decisions or over a decisive element of business strategy, so that the decisions determining the business activity of the joint venture cannot be accepted without the consent of the owner of the veto rights.

Where a situation of joint control exists the parent companies have to reach an agreement on all relevant questions related to the business activity of the controlled undertaking. The existence of joint control can be established either on the basis of objective situation or on the basis of a formal agreement that has been concluded between the parent companies. Such an objective situation does not exist when the joint venture has four shareholders, which equally own 25% of the shares. In this case it is not only necessary, but also sufficient in order to reach a decision, if three shareholders reach an agreement, and this may occur in four different combinations.

### 5.2 *Reduction in number of shareholders*

Interestingly, contrary to the practice of the European Commission, in Hungary a reduction in the number of jointly controlling undertakings constitutes a notifiable concentration as an acquisition of control of the reduced number of shareholders.<sup>2</sup>

On the one hand, the GVH's practice is the result of the EC Regulation that states "a reduction in the number of controlling shareholders constitutes a change in the quality of control and is thus to be considered as a concentration (...)". Thus it cannot be excluded that a reduction in the number of shareholders will result in a change in the quality of the control and will affect economic competition.

On the other hand, Hungarian merger control is based on a **mandatory preliminary authorisation system** and failure to notify is penalised by the GVH as an infringement. So there should not remain any uncertainty about whether a specific type of transaction constitutes a concentration.

As part of the authorisation process, the GVH examines whether the reduction in the number of shareholders could result in a change to the quality of the control and in the market behaviour of the joint venture.

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<sup>2</sup> Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) para (90).

## 6. Exemptions

The Competition Act specifies two exemptions from the definition of concentration and the acquisition of control.

Temporary acquisitions of control or ownership for a maximum period of one year by financial companies for the purpose of preparing a resale are not considered **as concentrations**, if these financial companies do not exercise their controlling rights, or exercise them only to an extent which is indispensable to the attainment of these objectives. The Hungarian Competition Authority may, on request, extend the period of time where undertakings can show that it was not possible to carry out the disposal within one year.

Activities of an office-holder relating to the winding up and the dissolution of undertakings **do not qualify as** the exercise of control.

## 7. Changes in the merger regime

The following table shows the evolution of the concept of a concentration in the Hungarian legal system.

	<b>First Competition Act<sup>3</sup></b>	<b>Competition Act<sup>4</sup></b>	<b>Amendment of year 2000</b>	<b>Amendment of year 2005</b>
<b>Definition of concentration</b>	Organisational merger, Acquisition of single legal control	Organisational merger, Acquisition of single and <u>joint</u> legal control, <u>Part of an undertaking</u> , <u>Joint venture</u>	Organisational merger, Acquisition of single and joint legal and <u>de facto control</u> , Part of an undertaking, Joint venture	Organisational merger, Acquisition of single and joint legal and <u>de facto control</u> , Part of an undertaking, Joint venture, <u>Undertakings not independent of each other</u> , <u>Modification of the buy-up rule</u>
<b>Thresholds</b>	<u>Turnover</u> (aggregate net turnover of the undertakings concerned over 10 billion HUF) <u>or market share</u> (of 30%)	<u>Turnover</u> (aggregate net turnover of the undertakings concerned over 10 billion HUF, <u>aggregate turnover of min. 2 undertakings over 500 million HUF</u> )	<u>Turnover</u> (aggregate net turnover of the undertakings concerned over 10 billion HUF, aggregate turnover of min. 2 undertakings over 500 million HUF)	<u>Turnover</u> (aggregate net turnover of the undertakings concerned over <u>15 billion HUF</u> , aggregate turnover of min. 2 undertakings over 500 million HUF)

<sup>3</sup> Act LXXXVI of 1990 on the Prohibition of Unfair Market Practices

<sup>4</sup> Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices

### **7.1. Definition of a concentration**

The first Competition Act defined a concentration as either an organisational merger or the acquisition of single legal control. The current Competition Act provides definitions for an acquisition of single and joint legal control, for a part of an undertaking, and for a joint venture. Finally the amendment of year 2000 brought the acquisition of de facto control into the definition of a concentration.

The definition of “undertakings not independent of each other” which is specified in Chapter IV, Prohibition of Agreements Restricting Economic Competition also belongs to the merger regulation of the Competition Act. The definition from 2005 is basically the same as the direct and indirect participants of a concentration, except for one special case.

In case of undertakings with majority state or municipality ownership the managing relation is not a sufficient condition for the non-independence. The independence of these undertakings only can be assessed on the basis of the analysis of the actual operations. If the undertaking possesses autonomous decision-making powers in determining the market conduct, it shall be deemed to be independent of the owner. When establishing who possesses the decision-making powers for determining the market conduct, the Competition Council examines which undertaking has the right to adopt the business plan.

### **7.2. Thresholds**

The first competition law tied the authorisation application requirement to the aggregate net turnover of the undertakings (10 billion HUF, ca. 34.5 million EUR) or to a market share of 30%.

The Competition Act that is currently in force only defines the revenue threshold. For a concentration of undertakings, the authorisation of the Hungarian Competition Authority must be sought in cases where the aggregate net turnover of all the groups of undertakings concerned exceeded 15 billion HUF (ca. 52 million EUR) in the preceding business year, and the net turnover of each of at least two of the groups of undertakings concerned was more than 500 million HUF (ca. 1.7 million EUR). Before 2005, the aggregate net turnover threshold was 10 billion HUF.

Before the amendments of 2005, when assessing whether the 500 million HUF threshold was met, all concentrations which took place within a two-year period preceding the concentration concerned had to also be taken into account. This rule had a wider scope of application than the EC Regulation. According to the EC Regulation only the transactions that are not subject to authorisation - between the same groups of undertakings - should be brought together in one procedure.

The option of implementing the EC rules was raised in 2001, but it was not done, in order to keep the possibility to control the then-current cable network acquisitions. By the year of 2005, the current cable network acquisitions were accomplished, so there was no reason to maintain the regulation. In 2005 the legislator thought that it was unnecessary to maintain a regulation that results in redundant proceedings and that is also contrary to the EC regulation in order to manage the specific problems of a profession.

Since 2005, the Competition Act has stated that when assessing whether the 500 million HUF threshold is met, concentrations *not subject to authorisation* which took place within a two-year period preceding the concentration concerned *between the same groups of undertakings*, shall also be taken into account.

### **7.3. Professional regulations, professional administrative proceedings**

At present the Medicinal Products Act contains a special prohibition on buy-ups<sup>5</sup>, as a concentration shall not be authorised if

- it would give a business association or company group, or the same natural person, control over more than four pharmacies;
- it would a given business association or company group, or the same natural person, control over three or more pharmacies in a community with a population of less than twenty thousand.

In accordance with the Media Law that was adopted in 2010, the Hungarian Competition Authority shall obtain the opinion of the Media Council for the approval of a concentration of enterprises when at least two of the relevant groups of undertakings bear editorial responsibility and the primary objective of which is to distribute media content to the general public via an electronic communications network or a printed press product.<sup>6</sup> This administrative procedure is designed to ensure media pluralism, by securing the right of diverse orientation in case of merger of independent sources.

The official assessment of the Media Council shall be binding upon the Competition Authority, however, this fact does not prevent the Competition Authority from prohibiting a merger from being concluded that has already been officially approved by the Media Council, irrespective of any condition the Media Council may have imposed, or from imposing a condition or an obligation contained in the Competition Act that the Media Council has failed to impose.

### **7.4. De facto control (minority interests, interlocking directorates, veto rights)**

The acquisition of “de facto” control has been introduced into the Competition Act alongside the other three earlier defined methods of acquisition of control (the ownership of the interests or shares which entitle their owners to exercise majority voting rights, or more than fifty per cent of the voting rights, the entitlement to appoint, elect or recall the majority of the executive officials of another undertaking, and the entitlement by contracts to exercise decisive influence on the decisions of another undertaking).

### **7.5. Part of an undertaking**

The concept of a part of an undertaking was introduced into the Competition Act in 2000, as the definition of a concentration broadened with the acquisition of control over a part of an undertaking.

### **7.6. Joint ventures**

Under the legislation that was in force before November 2005, only a (so-called concentrative) joint venture constituted a merger in which founders combined their same or complementary activities. Such a transaction obviously increases the concentration of the relevant activities, despite the fact that the number of operators is not reduced but increased. A joint venture meeting the above mentioned conditions is considered as a merger, if it does not constitute an agreement restricting economic competition.

Amendments to the 2005 Competition Act clarified the scope of the joint ventures qualifying as mergers. Since the 2005 Amendment only those joint ventures that can perform all the functions of an

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<sup>5</sup> Act XCVIII of 2006 on the General Provisions Relating to the Reliable and Economically Feasible Supply of Medicinal Products and Medical Aids and on the Distribution of Medicinal Products (75. §)

<sup>6</sup> Act CLXXXV of 2010 on Media Services and on the Mass Media (171. §)

autonomous enterprise (full-function joint ventures) are considered as concentrations. The full-function joint venture has

- a management dedicated to its everyday operations;
- access to sufficient resources, including finance, staff, and assets; in order to
- conduct on a long term basis its business activities within the area provided for in the joint-venture agreement.

## **8. Alternatives**

In the practice of the GVH, the legal definition of a merger has never been extended to include anti-competitive agreements.





## INDIA\*

## 1. Acquisition of shares

The provisions of the Competition Act, 2002 (“Act”) relating to regulation of combinations (acquisitions, mergers and amalgamations) were enforced with effect from 1<sup>st</sup> June, 2011. Section 5 of the Act describes the types of transactions that constitute combination and Section 6 of the Act requires filing of pre-merger notice to the Competition Commission of India (“Commission”) in respect of a proposed combination. Towards the enforcement of the provisions relating to combinations, the Commission has also issued the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (“Regulations”), which were subsequently amended in 2012 and 2013.

In terms of Section 5 of the Act, the following transactions are combinations if the parties to such transactions meet the asset or turnover threshold mentioned therein.

- Acquisition of control, shares, voting rights or assets of an enterprise, and
- Merger or Amalgamation between enterprises.

The Act provides that the value of assets and turnover mentioned in Section 5 shall be enhanced or reduced by the Central Government, on the basis of the wholesale price index or fluctuations in the exchange rate. Pursuant to the said provision, the Central Government, at the time of enforcement of the provisions of the Act relating to combinations in 2011, enhanced the threshold values by fifty per cent. The current threshold levels are as follows:

In India	Applicable to	Assets		Turnover		
	Individual*		INR 1500 cr.		INR 4500 cr.	
	Group**		INR 6000 cr.		INR 18000 cr.	
In India and outside			Assets		Turnover	
		Total	Minimum Indian Component	Total	Minimum Indian Component	
	Individual	\$ 750 mn.	INR 750 cr.	\$ 2250 mn.	INR 2250 cr.	
	Group	\$ 3 bn.	INR 750 cr.	9 bn.	INR 2250 cr.	

Reference: Section 5 of the Act read with Central Government Notification S. O. 480 (E) dated 4<sup>th</sup> March, 2011(1 US\$ is equal to around INR 54.5 in May 2013).

\* Individual – Section 2 (h) of the Act defines *enterprise* as a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the

\* This written contribution was prepared by the Competition Commission of India.

Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

\*\* Group - Explanation (b) to Section 5 of the Act explains *group* as two or more enterprises which, directly or indirectly, are in a position to (i) exercise twenty-six per cent. or more of the voting rights in the other enterprise; or (ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise.

### ***1.1 Acquisition of non-controlling minority interest and interlocking directorates***

The Commission, through the Regulations, has given option to the parties of certain categories of combinations for not filing the notification with the Commission including an acquisition of shares or voting rights of an enterprise which does not result in the acquirer holding 25 per cent or more of the shares or voting rights in the enterprise, provided such acquisition is solely made as an investment and does not result in acquisition of control. In this regard, the Commission's endeavor is to make careful scrutiny to differentiate between the mere investor-protection rights from the rights that result in control. The Commission takes a holistic approach in arriving at any conclusion on control and the requirement of filing notice with the Commission.

The relaxation for not filing the notice has been provided to certain categories of combinations on the basis that those combinations are ordinarily not likely to cause appreciable adverse effect on competition (AAEC) in India. The relaxation provided is very general in nature and the Commission reserves the right to examine any combination that may be considered to have the likelihood of AAEC.

As regards the acquisition of interlocking directorates, neither the Act nor the Regulations issued by the Commission have any specific provision on this aspect. Filing of a pre-merger notification in respect of acquisition of interlocking directorates would be required only if such transaction constitutes a combination. In other words, in order to mandate pre-merger notification in respect of acquisition of interlocking directorates, the same should be accompanied by either acquisition of shares/voting rights or acquisition of control or assets of an enterprise including acquisition of joint control.

## **2. Acquisition of assets**

As seen above, Section 5 of the Act describes combination to include acquisition, which in turn is defined under Section 2 of the Act as *directly or indirectly, acquiring or agreeing to acquire (i) shares, voting rights or assets of any enterprise; or (ii) control over management or control over assets of any enterprise*. Thus, acquisition of assets, by definition, is included within the scope of combination and accordingly, reportable to the Commission. However, the Commission, through its regulations, has given option to the parties of not filing the notice with the Commission in respect of certain acquisition of assets, the details of which are as follows:

- (i) An acquisition of assets not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not.
- (ii) An acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business.

### 3. Joint ventures

The Act does not define the term joint ventures. The Commission has not also issued separate regulations to define or regulate joint ventures. However, going by the spirit and scheme of the Act, joint ventures are subject of the provisions regulating combinations and those proscribing anti-competitive agreements.

#### 3.1 *Joint ventures and anti-competitive agreements*

Section 3 of the Act relates to agreements having AAEC. The provision prohibits enterprises from entering into such agreement and declares the same as void. Under Section 3 of the Act, anti-competitive agreements may be classified as (i) horizontal agreements i.e. agreement between enterprises engaged in similar trade of goods or provision of services; and (ii) vertical agreements i.e. agreements between enterprises at different stages or levels of the production chain in different markets in respect of trade of goods or provision of services. Further, the said section provides that horizontal agreements mentioned therein shall be presumed to have appreciable adverse effect on competition. However, the proviso to the said provision, under Section 3 of the Act, states that “...*nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control...*” (emphasis supplied). This implies that joint ventures are subject to the provisions prohibiting anticompetitive agreements but efficiency enhancing joint ventures are exempt from the application of the rule presumption which is otherwise applicable in respect of horizontal agreements pursuant to Section 3 of the Act.

#### 3.2 *Joint ventures and combinations*

Section 5 of the Act describes acquisitions, mergers and amalgamation as combinations provided the enterprises involved in the transaction meet the asset or turnover threshold specified therein. The term acquisition has been defined under the Competition Act as directly or indirectly, acquiring or agreeing to acquire (i) shares, voting rights or assets of any enterprise; or (ii) *control* over management or *control* over assets of any enterprise. Explanation (a) to Section 5 of the Act explains control to include controlling the affairs or management by (i) one or more enterprises, either *jointly* or singly, over another enterprise or group; (ii) one or more groups, either *jointly* or singly, over another group or enterprise. These provisions of the Competition Act provide that creation of joint venture, which involves acquisition of joint control, would tantamount to a combination if the same satisfies the threshold requirements of Section 5 and the Government of India notification on exemption to target enterprise.

#### 3.3 *Structural and collusive aspects of a joint venture*

The Commission believes that assessment of AAEC pursuant to the structural issues and collusive aspects of a joint venture are mutually exclusive. Further, the approach and timelines for investigation and adjudication of structural and collusive aspects are also different. Therefore, whether a joint venture comprises a combination or is limited to a strategic cooperation between the parties would have to be decided by the Commission on case to case basis depending on the terms of agreement between the parties and other materials available on record.

As stated earlier, creation of a joint venture would be subject to the provisions regulating combinations (i.e. pre-merger notification) if the same results in acquisition of joint control as well as satisfies the threshold limits for the purpose of Section 5 of the Act. In one of its decisions, the Commission has observed that joint control over an enterprise implies control over the strategic commercial operations of the enterprise by two or more persons. In such a case, each of the persons in joint control would have the right to veto/block the strategic commercial decision(s) of the enterprise

which could result in a dead lock situation. Joint control over an enterprise may arise as a result of shareholding or through contractual arrangements between the shareholders. However, careful scrutiny would be required to differentiate between mere investor-protection rights from those rights resulting in a situation of joint control.

#### **4. Exemptions**

As already stated Section 5 of the Act describes the types of transactions that constitute combination (mergers and acquisitions) for the purposes of the Act and Section 6 of the Act requires the parties to a combination to file pre-merger notice with the Commission. However, considering the philosophy of merger control i.e. regulation of combination that are likely to cause AAEC, the Commission, through its Regulations, has provided option to the parties of certain categories of combinations of not filing notice with the Commission. Such relaxation has been provided on the basis that those categories of combinations are ordinarily not likely to cause AAEC in India. The list of combinations in respect of which pre-merger notification may not be required to be filed with the Commission are as follows:

- a) An acquisition of shares or voting rights of an enterprise which does not result in the acquirer holding 25 per cent or more of the shares or voting rights in the enterprise. However, this category would not include transactions that also results in acquisition of control.
- b) An acquisition of shares or voting rights in an enterprises, which results in acquisition less than 5 per cent of the total shares or voting rights in the enterprise in a financial year, where the acquirer already holds 25 per cent or more, but less than 50 per cent, of the shares or voting right of the enterprise.
- c) An acquisition of shares or voting rights in an enterprise where the acquirer already holds more than 50 per cent of the shares or voting rights in that enterprise. The relaxation is also available for acquisition of shares or voting rights or assets of an enterprise by another enterprise belonging to the same group.
- d) An acquisition of assets (a) that is not directly related to the business activity of the acquirer; (b) made solely as an investment; or (c) in the ordinary course of business.
- e) Revised tender offer to the shareholders of a listed company, pursuant to the applicable securities law, where pre-merger notice in respect of the initial offer has been given to the commission.
- f) An acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business.
- g) An acquisition of shares or voting rights pursuant to a bonus issue or stock splits or consolidation of face value or a rights issue of shares.
- h) A merger or amalgamation of two enterprises where one of the enterprises has more than 50% shares or voting rights of the other enterprise, and/or merger or amalgamation of enterprises in which more than 50% shares or voting rights in each of such enterprises are held by enterprise(s) within the same group.
- i) An acquisition of shares or voting rights by underwriters and stock brokers on behalf of their client.

- j) An acquisition taking place entirely outside India with insignificant local nexus and effect on markets in India.

It is pertinent to mention that the above categories would not cover combinations that also results in acquisition or change in control over any enterprise in any manner. Further, the relaxation provided is very general in nature and the Commission reserves the right to examine any such category that may have AAEC in the relevant market in India.

Based on experience over a period of two years of merger control enforcement, the Commission had also amended its Regulations twice with a view to widen the above list as well as provide clarity on the scope of the transactions covered under the list.

## **5. Objective criteria and “gaming the system”**

The Act empowers the Central Government to exempt (a) any class of enterprise in the interest of security of the State or public interest; (b) any practice or agreement pursuant to the any treaty, agreement or convention with any other country; and (c) any enterprise which performs a sovereign function on behalf of the Government. Pursuant to the said provision, the Central Government vide its notification dated 4<sup>th</sup> March, 2011 has exempted the application of Section 5 of the Act, which defines combination, in respect of a target enterprise whose assets in India is of value less than INR 250 crore or turnover in India is of value less than INR 750 crore.

As it was brought to the knowledge of the Commission by the stakeholders that transfer of the assets to a newly formed company or a shell company for the purpose of sale of such company could result in claiming exemption under the said notification as the turnover of such company would be almost negligible. Therefore, consistent with the object of the Act and the spirit of the said notification, the Commission, through its regulations, has clarified that where assets are being transferred to a company for the purpose of such company being acquired, then for the purpose of assessing the said acquisition, the value of asset and turnover of both the transferor and the transferee shall be taken together for the purpose of computing the merger thresholds.

## **6. Changes in the merger regime**

The Act was enacted on 13<sup>th</sup> January, 2003 and subsequently amended on 2007 and 2009. The provisions of the Act relating to combination were enforced with effect from 1<sup>st</sup> June, 2011. Section 5 of the Act prescribes value of assets and turnover as threshold criterion for defining/describing combination in respect of which pre-merger notification is required. The Act further provides that the said threshold levels could be enhanced or reduced by the Central Government, on the basis of wholesale price index or fluctuations in exchange rate of rupee or foreign currencies. Pursuant to the said provision, the Central Government, in 2011, at the time of enforcement of the provisions of the Act relating to combinations, enhanced the threshold value for combination by fifty per cent.

As already stated, the Government of India has exempted the application of Section 5 of the Act in respect of a target enterprise that has either assets of value less than INR 250 crore in India or turnover of value less than INR 750 crore in India. Recently, the Central Government, vide notification dated 8<sup>th</sup> January, 2013, has also exempted certain banks, that are generally regarded as failing banks by the Central Government, from the application of the provisions of the Act relating to combinations.

Besides the above, there have been no changes to the scope of transactions constituting combination for the purpose of the Act.

## **7. Alternatives**

So far, there has been no instance where the Commission had taken cognizance of a merger or acquisition, which do not qualify as combination, under the provisions of the Act. However, the Commission, being the expert body to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India, may consider taking cognizance of a merger or acquisition, that do not qualify as a notifiable combination, and may take appropriate action within the framework of the Competition Act, preferably under the provisions regulating anticompetitive agreement and abuse of dominant position.

## INDONESIA

### *Definition of Transaction in Merger Assessment<sup>1</sup>*

#### **1. Introduction**

Indonesia has already had the competition Law since 1999 following the enactment of Law No. 5 year 1999 concerning the Prohibition of Monopolistic Practice and Unfair Business Competition. However, notifications of mergers and acquisitions could not be implemented until 2010, after the issuance of Government Regulation required by such Law, namely Government Regulation No. 57 Year 2010.

#### **2. M&A transaction**

Based on the applicable competition law, the definition of M&A transaction provided for in the law includes only (i) Mergers of business entities; (ii) Consolidations of business entities; and (iii) Acquisition of shares. A merger transaction does not include several other corporate actions, such as joint venture or acquisition of assets which have also become the current trend of merger and acquisition processes worldwide.

Meanwhile, in relation to notifications of mergers and acquisitions in Indonesia, there are two main requirements stating that notifications must be submitted to the Commission for the Supervision of Business Competition (KPPU). The first requirement is that such merger must meet the required threshold, among other things, (i) total assets resulting from the merger exceeding Rp2.5 Trillion or; (ii) total turnover exceeding Rp5 Trillion. Particularly for the banking sector, the stipulated threshold of total assets is above Rp20 Trillion. The calculation of assets/turnover is conducted based on the assets/turnover of all companies controlling and controlled by the company performing the acquisition or merger, up to those of the ultimate holding business entity (*badan usaha induk tertinggi*/BUIIT).

Such arrangements are consistently set out in Government Regulations, without taking into account several factors which may potentially affect the definition of threshold limit value compared to the development of the company's assets, such as inflation, etc. The criteria established in the stipulation on the threshold value are the relative value of assets/turnover which is predicted to be able to strongly affect the development of markets in Indonesia.

The second requirement is that such merger is not a merger between affiliated companies. It is stipulated that mergers and acquisitions required to be reported to KPPU are mergers and acquisitions which are not conducted between affiliated companies. M&A between affiliated companies are deemed not to have any effects since the controlling company before and after the M&A is still the same.

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<sup>1</sup> The submission was prepared by the Merger Bureau and Foreign Cooperation Division of KPPU. For further information or clarification, please contact [international@kppu.go.id](mailto:international@kppu.go.id) or visit <http://eng.kppu.go.id/>.



### **3. Acquisition of minority interests and interlocking directorates**

In Indonesia, the definition of affiliate is broadened to a condition in which there is a change of the controlling company. There are several conditions related to the change of control, namely (i) the acquiring company controls 51% of shares; (ii) the acquiring company is the majority shareholder of the company although it is less than 51%, yet it becomes the controlling company; or (iii) the acquiring company has a relatively small number of shares, yet it becomes the controlling company according to the existing legal documents.

We can say that the focus of the commission's analysis is change of control. Based on such definition, even though the acquired assets are the minority interest (or the total number of shares held by the company conducting the acquisition is relatively lower than the total number of shares held by the other companies), and if it can be proven that they are the new controlling companies, KPPU will conduct the assessment on the impacts of the merger and acquisition since such merger and acquisition are deemed to have resulted in a change of control. However, in the event that the acquisition of minority interest does not lead to a change of control in the relevant company, KPPU will not conduct assessment on the merger or acquisition.

Meanwhile, in relation to interlocking directorates, it has been provided for in Law No 5 Year 1999 as a part of unfair business competition. In a merger assessment process in Indonesia, interlocking directorates will be a behavior considered to occur when KPPU is analyzing the potential unfair business competition. Such process may be conducted if the assessment process has reached the substance assessment stage, which means that the acquisition process has resulted in the HHI exceeding 1800 and the change in its HHI exceeding 150, indicating that the industry is relatively concentrated.

### **4. Acquisition of assets**

Acquisition of assets is not included in the definition of merger transaction in Indonesia, even though in its implementation, KPPU has noted a model of acquisition of assets as a corporate action taken by a company in order to grow organically. Therefore, due to the current arrangement, all acquisitions of assets in Indonesia are not within the jurisdiction of KPPU.

### **5. Joint ventures**

Law No 5 year 1999 does not provide for the establishment of a joint venture, therefore KPPU cannot assess a corporate action in the form of the establishment of (new) joint venture within the competition perspective. In other behaviors, for example pricing cartel, joint venture is among the excluded agreement models.

However, if a joint venture is established by acquiring shares leading to a change of control, Law No 5 year 1999 requires the delivery of notifications. For example, a company previously controlled 100% of shares, then due to the joining of partner to establish a joint venture the control of the shares becomes 50% : 50%. KPPU will carry out assessment related to the acquisition of its shares and its impacts on business competition by analyzing potential competition distortion resulting therefrom.

### **6. Exemption**

M&A becomes a part of chapter related to the abuse of dominant position in Indonesia. Along with the implementation, exemptions from laws (particularly those concerning the abuse of dominant position) are also applicable in the implementation of merger and acquisition assessment. The exemptions described in article 50 include as follows:

- a) actions and or agreements aimed at implementing the applicable laws and regulations; or
- b) agreements related to intellectual property rights, such as licenses, patents, trademarks, copyrights, industrial product designs, integrated electronic circuits, and trade secrets as well as agreements related to franchise; or
- c) agreements on the stipulation of technical standards of goods and or services which do not restrain, and or do not prevent competition; or
- d) agreements in the context of agency which do not contain conditions on resupply of goods and or services at a price lower than the agreed price; or
- e) cooperation agreements related to research for raising or improving the living standard of the society at large; or
- f) international agreements ratified by the Government of the Republic of Indonesia; or
- g) agreements and or actions for export purposes, which do not disrupting the needs and or supplies of domestic markets; or
- h) small-scale business actors; or
- i) business activities of cooperatives specifically aiming at serving their members.

All mergers and acquisitions conducted in the context of conducting the abovementioned activities are completely exempted from the obligations to deliver notifications of mergers and acquisitions.

## **7. Objective criteria and gaming system**

The number of mergers and acquisitions assessments conducted in Indonesia which have reached the substance assessment stage is very low. Therefore, there is no significant issue in its handling process. In the process in KPPU, there is no debate over merger transaction since the definition has been clearly stipulated in Law No. 5 Year 1999. Thus, the occurring process is not debate related to the definition of merger transaction, but rather the debate over how merger and acquisition fulfill the requirements so that it must be notified to KPPU.

## **8. Changes in merger system**

To this day, Indonesia has not changed the definition of merger transaction as provided for in Law No. 5 Year 1999. However, for such purposes in the future and in line with the development of arrangement of mergers and acquisitions in various Countries, KPPU recommends that joint venture and acquisition of assets are included as the part of “merger transaction”. It is because there are many processes of acquisition of assets and joint venture which factually have the potential to influence the competition.

Furthermore, the duty of KPPU is to implement the notification process of merger and acquisition as defined by Law No. 5 Year 1999. KPPU may not find alternatives in the definition of merger transaction since the definition has been clearly stipulated in such regulation.

## **9. Conclusion**

Merger transaction provided for in the law includes only (i) Mergers of business entities; (ii) Consolidations of business entities; and (iii) Acquisition of shares. Merger transaction does not include

several other corporate actions, such as joint venture or acquisition of assets. Furthermore, the definition of affiliate is broadened to a condition in which there is a change of the controlling company. There are several conditions related to the change of control, namely (i) the acquiring company controls 51% of shares; (ii) the acquiring company is the largest shareholder of the company although less than 51%, yet it is the controlling company; or (iii) the acquiring company has a relatively small amount of shares, however it becomes the controller according to the existing legal documents. The scope of interlocking directorate is also taken into account in the analysis.

Currently, there is no debate over the definition of merger transaction in Indonesia. It may be as a result of the clear definition of such transaction under the competition law. The debate taking place is not the debate related to the definition of merger transaction, but rather is the debate over how merger and acquisition fulfill the requirements so that it must be notified to KPPU.

In relation to the change of rules, so far there has been no plan for the amendment to the definition of merger transaction. However, it would be possible for the definition to be developed so as to include joint venture and acquisition of assets.

## ITALY

### 1. Introduction

Italy, in line with the EU legislation and practice, has adopted a material influence concept in the definition of a merger transaction: for the purpose of merger review the definition includes any operation where a change of control occurs on a lasting basis<sup>1</sup>. The acquisition of control is not linked to percentage thresholds or to the value of the transaction, but is determined by the qualitative criterion of acquiring a decisive influence over the strategic management of the concerned undertaking. Some features of the definition of transactions in the Italian merger review system, including acquisition of assets and assessment of joint ventures, are outlined in the following paragraphs.

The Italian Law may apply to the acquisition of minority shareholdings but only whether they confer – alone or together with other elements – joint or sole control over the acquired company. Acquisition of non-controlling minority interests are not caught by the Law. The assessment of de facto control arising from minority shareholdings has proved particularly complex in the banking, insurance and financial sectors, in view of the intricate web of financial and personal links in these sectors. Some merger cases assessed by the Italian Competition Authority (hereinafter referred also as ICA) will be reported. Finally, a paragraph will be devoted to the provisions adopted in 2012 in Italy prohibiting interlocking directorates in the banking insurance and financial services sectors, in view of the competitive concerns identified with respect to cross participation.

### 2. Acquisition of control

Art. 7 of the Italian Competition Act specifies that control may be acquired through different means, such as the specific situations set out in Article 2359 of the Italian Civil Code<sup>2</sup> or by the holding of rights, contracts or other legal relations that confer the possibility of exercising decisive influence on an undertaking. Control must be acquired “on a lasting basis” a notion not always easy to assess at the time of the notification.

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<sup>1</sup> According to Art. 5 of the Italian Competition Law n. 287/90 a concentration occurs when a stable change of control takes place in one of the following circumstances:

- a. two or more undertakings merge;
- b. one or more persons controlling at least one undertaking or one or more undertakings, acquire the direct or indirect control of the whole or parts of one or more undertakings, whether through the acquisition of shares or assets, or by contract or by any other means; and
- c. two or more undertakings create a joint venture by setting up a new company.

<sup>2</sup> Namely: i) companies in which another company has the ability to control, directly or indirectly, including through fiduciary companies, the majority of votes at the shareholders’ meeting; ii) companies in which another company has, directly or indirectly, including through fiduciary companies, sufficient voting rights to exercise a dominant influence in its shareholders’ meetings; and iii) companies that are under the dominant influence of another company by virtue of contractual links.

The most common mean for the acquisition of control is the majority shares acquisition, possibly combined with a shareholders' agreement in case of joint control.

However, also the acquisition of minority shareholdings may confer de facto control for merger review purposes under the Italian Competition Law. Over the years the Italian Authority has elaborated in its case law the criteria that determine situations where the acquisition of control occurs.

In particular, consistently with the EU Commission practice, the following circumstances conferred (de jure or de facto) sole control over an undertaking even through the acquisition of a minority interest:

- the subscription of a shareholders' agreement or other contractual or de facto mechanisms, giving the minority shareholder sufficient powers (e.g., veto rights over strategic matters, such as the approval of the budget, the business plan or the appointment of senior management) to influence the undertaking's strategic commercial decisions; or
- de facto circumstances, such as the fact that the remaining shareholding is fragmented amongst a large number of other shareholders, that make it possible for the minority shareholder to exercise a decisive influence on the strategic commercial behaviour of an undertaking.

The ICA has decided in some circumstances that control was acquired on grounds of the relevant debts of the target company, but this situation was not qualified as "economic dependence". Thus, it was the significant debt exposure together with other personal and economic links which led to de jure or de facto control.

Among the de facto circumstances that may confer to a minority shareholder a decisive influence, mention has to be made to public companies, where there is likelihood that minority shareholders may obtain the majority at the shareholder's meeting because of the wide dispersion of shares. In such situation the Italian Competition Authority generally takes into account the historical rates of attendance at meetings that have been realized in the last three years. However, other circumstances may also play a role in the case-by-case analysis carried out by the ICA.

#### **Box 1. Hopa/Olivetti<sup>3</sup>**

In the *Hopa/Olivetti* case, Bell, a company controlled by Hopa, had increased its stake in Olivetti, reaching a share of 25.9% of the ordinary shares - while the remaining shares were held by the Generali group (2.16%), Schroder (4.92%) and institutional investors and savers. The Authority ascertained that Bell held the total control over Olivetti despite its minority shareholdings, even though the participation at Olivetti's meetings was decreased in the last three years. In this specific case the ICA took into account other elements, such as: (i) the constant growth of Bell's shareholdings in Olivetti, while the shares of the other shareholders remained stable; (ii) the lack of significant shares held by other big industrial members in Olivetti.

Similarly, veto rights over strategic matters, such as the approval of the budget, the business plan or the appointment of senior management may confer a decisive influence over an undertaking. Consequently, the acquisition of a minority shareholdings combined with veto rights falls within the definition of merger under the Italian jurisdiction.

<sup>3</sup> ICA, Case C3966, *Hopa/Olivetti*, Decision No. 8384, 14th June 2000, Publ. in *Bull.* n. 24/2000.

### **Box 2. Autostrade/Autogrill<sup>4</sup>**

In the *Autostrade/Autogrill* case, a combination of undertakings, including Edizione Holding, purchased 30% of Autostrade's shares, through a special purpose vehicle undertaking called Schemaventotto Spa. The Authority stated that such acquisition led to a change in the ownership and in the control of the acquired company given to the dispersion of the remaining part of Autostrade's shares. Furthermore, the ICA took into account the decision-making mechanisms foreseen in Autostrade's statutory provisions. According to those provisions, Schemaventotto had the right to appoint 4 out of 5 members of the board of directors of Autostrade, and was therefore able to determine the strategic commercial behaviour of the company.

Moreover, the Authority considered that Edizione Holding was the only participant in the consortium which held a decisive influence over Schemaventotto. In fact, due to its 60% shareholding, Edizione Holding's favourable vote was always necessary for the adoption of the resolutions of the board of directors.

### **3. Acquisition of assets**

In the ICA's practice, acquisitions involving natural or legal persons that do not perform any economic activity and do not have control of at least one other undertaking are not deemed to be concentrations within the meaning of the Italian Competition Law. For instance, the acquisition of an undertaking whose only assets are real estate, and whose sole activity is the management of such assets, is not a concentration provided that the acquirer is not already active on the real estate market.

This exception concerning non-trading undertakings does not apply, however, to transactions between undertakings holding - directly and indirectly - licences and permits or any other title enabling to engage in business activities (i.e. intellectual property rights, trademarks, patents, know-how), even though they are not exploited at the time of the transaction.

More specifically, acquisition of assets transactions amount to a concentration if the acquired assets can be considered as "whole or a part of an undertaking", i.e., if the assets purchased can be considered a business to which turnover can be clearly attributed.

The acquisition of intangible assets, such as intellectual property rights, patents, brands, copyrights, without the transfer of other assets, may fall within the notion of acquisition of control due to their significant economic value and their limited availability. In order to be considered a concentration for merger review purposes the elements that are considered are the exclusivity of the licences, their necessity to carry out a specific activity and whether the activity generating a turnover is also transferred.

However, with regard to the acquisition of a commercial licence (i.e. a public authority's permission to offer certain services or goods), the ICA does not consider the notified acquisition as a concentration, if the acquirer permits the transferor (i.e. the previous owner) to continue in its activity.

<sup>4</sup> ICA, Case C3818, *Edizioni holding/Autostrade-concessione costruzioni autostrade*, Decision No. 8090, 2 March 2000, Publ. In *Bull* n. 9/2000.

### **Box 3. LIDL Italia/Rami d'azienda**

In the *LIDL Italia/Rami d'azienda* case<sup>5</sup>, the Council of State stated that the mere acquisition of a commercial license does not automatically constitute a “concentration” under the Italian Competition Act. In fact a transaction is deemed to be a concentration, if it gives rise to a permanent change in the control of an undertaking or parts thereof. Indeed, according to the Council of State, an acquisition of commercial licenses – without including any further economic assets and a non-competition clause – only concerns goods (i.e. licenses) which have an economic value without constituting “an undertaking or a part of an undertaking” to which market turnover can be clearly attributed<sup>6</sup>.

#### **4. Joint ventures**

In Italy joint ventures (the situation in which two or more undertakings create a new company jointly controlled by the parents) are considered merger transactions and fall under merger control review<sup>7</sup> but only if their nature is clearly “concentrative”. Pursuant to Art. 5, co. 3 of the Italian Competition Act, in fact, the joint venture must not have as its object or effect the coordination of the competitive behaviour of independent firms (i.e. there must be no coordination between the parent companies relating to prices, markets, output or innovation, in the markets where the parent companies continue to operate autonomously).

The wording of the Law does not contain a clear definition of “concentrative” and “cooperative” joint ventures. In practice, the Italian Competition Authority applies the pre-march 1998 EU law definitions and relies on the relevant 1994 European Commission Notices<sup>8</sup>. Therefore, since March 1998 there have been differences between Italian and EU law on the treatment of joint ventures.

The incorporation of a jointly controlled undertaking or the acquisition of joint control over a previously existing undertaking will give rise to a “concentrative” joint venture provided that: the joint venture is a full-function joint venture; and the joint venture’s main object or effect is not the coordination of the competitive behaviour of the parent companies.

With regard to the full-function condition the ICA takes into account the availability of sufficient resources to operate independently in a market on a stable and long lasting base, without relying predominantly from trade relations with its parent companies (in order to do so the joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets - tangible and intangible - in order to conduct on a lasting basis its business activities within the area provided for in the joint-venture agreement).

If the “cooperative” nature of a full-function joint venture prevails it is treated and appraised under the rules on agreements between undertakings (and not under the merger control rules). In general the ICA considers that the risk of coordination of the behaviour of the parent companies is high if, after the transaction, both parents will remain actual or potential competitors in the same geographical and product

<sup>5</sup> ICA, Case C8094, *Lidl Italia/Rami d'azienda*, Decision No. 16809, 10 May 2010, Publ. In *Bull.* n. 19/2007.

<sup>6</sup> Council of State Judgment, Mar. 31 2009, n. 1894, *Lidl* (quashing the first instance ruling of Lazio Regional Administrative Court Judgment, Mar. 19 2008, n. 2478 and the ICA’s initial decision).

<sup>7</sup> Article 5.1. c) Law n. 287/90.

<sup>8</sup> Commission’s notice on the distinction between concentrative and cooperative joint ventures, in O.J. 1994 O.J. (C 385) 1.

market as the joint venture, or in a market that is upstream or downstream or neighbouring with respect to the one of the joint venture, if certain conditions are met.

The assessment of the coordinating effects of joint ventures is not always clear-cut and there might be discrepancies and uncertainties in the treatment of these cases.

In a general report issued at the beginning of October 2012<sup>9</sup>, where the Italian Competition Authority (ICA) stated that efforts to promote competition needed to be supplemented by the vigorous enforcement of competition policy, it seized the opportunity to ask for legislative modifications that would strengthen its effectiveness. As for the review of joint ventures, the ICA proposed a modification of the current legal framework that would allow it, in line with the rules adopted by the European Commission and most European countries, to assess a joint venture as a merger, irrespective of its concentrative or cooperative nature.

## 5. Exemptions

Besides the case of intra-group transactions, cooperative joint ventures, transfer of non-economic activities, the only exemption foreseen in the Italian legal system is represented by the acquisitions and resale where a bank or financial institution acquires securities of an undertaking on formation or where the company is raising capital. The exemption occurs only whether the bank or the financial institution aims to resell the securities on the market no later than 24 months thereafter and does not exercise the voting rights bested in the securities. This particular kind of transaction is not excluded from the definition of merger, but it is only exempted from notification requirements and consequently the merger regime.

Lastly, no notification is required if the target is a foreign company that did not generate any turnover in Italy in the last three years and is not expected to do so as a result of the merger or acquisition.

## 6. Merger cases in the banking and insurance sectors

The assessment of mergers, and in particular the role of minority shareholdings in conferring control, has proven particularly complex in the insurance and banking sectors, characterized by **connections between competitors, especially shareholders, deriving from shareholders' agreements and the personal ties of interlocking directorates**<sup>10</sup>. The Authority has carried out thorough analysis of these elements in several merger cases assessing how cross shareholdings may negatively affect the incentives of undertakings to compete and may potentially lead to a flow of commercially and strategically sensitive information between competing undertakings.

<sup>9</sup> ICA's Proposals for pro-competitive reforms for the Annual Law on Competition, 28 September 2012, published in Bull. N. 38/2012.

<sup>10</sup> In December 2008, the Authority concluded a sector inquiry on the relationship between competition and *corporate governance* in the financial sector, focusing on the corporate governance structure of banks, insurance companies and savings management companies (both public and private) operating in Italy. The picture that emerged from this inquiry was extremely complex. In particular, the inquiry showed that, at the time, 80% of the firms analyzed were affected by interlocking directorates with competitors and that 42.3% of the firms had their competitors among their shareholders. The extent of these links appeared way above that observed in other European countries. Italian Competition Authority, IC36, The corporate governance of banks and insurance companies, 23/12/2008.



The leading case where the Authority addressed this matter is the *Sai/Fondiarria* case<sup>11</sup>, a merger involving the acquisition of 29.97% of the share capital of Fondiarria by Sai and subsequent merging of Fondiarria into Sai. The acquirer (Sai), an insurance company, notified the acquisition of sole control of Fondiarria. However, on the basis of the analysis of several elements including cross shareholdings, the ICA ascertained that Mediobanca (the main Italian investment bank, holding cross shares in all the involved undertakings), which was not initially notified as one of the parties, not only would jointly control the new entity on a de facto basis – in particular in view of debt exposure, financial links and governance links - but also controlled de facto Generali, the largest insurance company in Italy, with a minority share of 14%. The Authority justified this conclusion in the light of a historical analysis of the decisions adopted by Generali's shareholders meetings, where Mediobanca proposals relating to the management of Generali were always approved, irrespective of the extent of Mediobanca's voting right, and twice in two years a Mediobanca appointee was made chairman. Mediobanca, though not directly active in the insurance sector, would be the 'decision-making centre' of both the Sai/Fondiarria and Generali insurance groups and consequently hold a dominant position in the third-party liability insurance market. In view of these factors, in December 2002, the Authority conditioned the approval of the merger to remedies aimed at addressing its anticompetitive effects in the insurance markets descending from financial links and interlocking directorates<sup>12</sup>.

More recently, the role of Mediobanca and Generali and the concerns arising from both financial links and interlocking directorates were assessed in two cases.

In September 2007 the Authority authorised, subject to some conditions, the incorporation of Capitalia in Unicredit<sup>13</sup>. The merger was assessed taking into account the complex webs of direct and indirect cross-shareholdings between the new entity and other market players, including most notably the investment bank Mediobanca and the insurance company Generali, since both Unicredit and Capitalia had a shareholding in Mediobanca exceeding 18% in total and participated in the agreement amongst Mediobanca's main shareholders.

The Authority deemed that in a post-merger scenario Unicredit would enjoy de facto control over Mediobanca, a situation that would have a cascade effect on Generali, since Mediobanca exercised de facto control over the company. Generali was also a member, with Unicredit and Capitalia, of Mediobanca's shareholders' agreement. The Authority found that the concentration would have created or strengthened a dominant position in a number of markets, including: i) deposits; ii) households loans; iii) SMEs loans; iv) distribution of investment funds. The post-merger entity would also hold a dominant position in the investment banking sector through Unicredit-Capitalia's de facto control over Mediobanca, the leading market player. In the insurance sector, the merger would result in Unicredit's enjoying a dominant position in some markets through its indirect de facto control of Generali. The distribution of life insurance products would also be adversely affected by the merger. The Authority authorised the merger subject to compliance with a number of measures. These were designed to: maintain competitive conditions in the provincial markets for deposits and loans by divesting 150-180 branches to one or more independent third parties not holding shares in the new bank; safeguard competitive conditions in the insurance sector,

<sup>11</sup> ICA, Case C5422B, *Sai-societa` assicuratrice industriale/La Fondiarria*, decision No. 11475, 17th December 2002, Publ. in *Bull.* No. 51-52/2002.

<sup>12</sup> The decision of the Authority and in particular the assessment of the de facto control of Mediobanca was upheld by the First-Instance Administrative Court (see T.A.R. Lazio decision n. 1631 20 February 2004, *Fondiarria-Sa*). The de facto control of Mediobanca on Generali was further ascertained by the ICA in Case C7951, *Generali/Toro Assicurazioni*, Decision No. 16173 of 4 December 2006, publ. in *Bull.* No. 47/2006 and confirmed by the Court of First Instance TAR Lazio decision n. 6230 10 July 2007-AGCM/Assicurazioni Generali. .

<sup>13</sup> C8660, UNICREDITO ITALIANO/CAPITALIA, Decision n. 17283, Publ. in *Bull.* No. 33/2007.

prohibiting any production and/or distribution agreements with Generali, for as long as Unicredit/Capitalia remains a shareholder of Mediobanca, and envisaging the divestiture of the entire shareholding in Generali within a given time limit. Unicredit/Capitalia was also required to bar any of its board members holding a governance role in Mediobanca and/or Generali from taking part in the board's discussion and voting of resolutions concerning the investment banking and insurance markets in Italy; adopt internal organisational measures to ensure that no sensitive information concerning these markets is included in the information supplied to board members affected by this measure; and reduce its holding in Mediobanca by divesting 9.39% of its share capital.

By a decision made on 19 June 2012 the ICA conditionally cleared the Unipol Gruppo Finanziario (UGF) acquisition of Premafin Fondiaria (Fondiaria). The notified merger would have negatively affected several insurance markets giving or strengthening UGF dominant position. To avert such negative effects the ICA conditioned the approval of the merger on the implementation of a set of stringent structural and behavioural remedies on the merging parties and on Mediobanca. In fact, Mediobanca not only controlled de facto Generali, the next competitor of the merged entity, but it was also the main funder of the merging parties. In its assessment the ICA considered that a significant loss of competition would have arisen due to the fact that Generali, the main competitor of the merged entity, had direct and indirect link with the latter through Mediobanca and that these links would have been strengthened by the proposed merger.

Consequently the ICA conditioned the approval of the merger to a wide set of remedies. First, it imposed a number of behavioural remedies on UGF regarding its governance rules. UGF had to dissolve the termination agreement entered by Unicredit and Premafin regarding the shares of subsidiary Fondiaria Sai and refrain from entering any such agreements in future with Mediobanca and Unicredit. UGF had also to ensure that the directors of its subsidiary Fondiaria Sai appointed by Unicredit would resign and none of the members of the governance bodies of the UGF group corporate would be related, directly or indirectly, to Mediobanca, Unicredit and Generali. Finally, UGF had to reduce the debts of its subsidiaries to Mediobanca.

The structural remedies imposed by the ICA on UGF required the divestiture of the Fondiaria Sai stakes in Generali and Mediobanca to independent third parties. Mediobanca, among other things, had to divest its shares in the companies of the UGF groups and refrain in participating in the governance bodies of those companies.

## **7. The regulation on interlocking directorates**

In 2012 Italy introduced a prohibition of interlocking directorates (i.e. the prohibition to accept office or to serve in office) within competing companies or groups of undertakings operating in the banking, insurance and financial services sectors in Italy<sup>14</sup>. The prohibition responds to the ICA repeated concerns

<sup>14</sup> Art. 36 of Law Decree No. 201/2011, as converted into law by Law No. 214/2011. Section 36, "Protection of competition and interlocking directorates in the markets for banking and finance" reads as follows:

"1. No member of management boards, supervisory boards and statutory board of auditors, as well no executive officer, of companies or corporate groups which are active on the markets for banking, insurances and finance shall, at the same time, serve in "corresponding" positions in competing companies or corporate groups.

2. For the purpose of Paragraph 1, "competing companies or corporate groups" shall mean companies or corporate groups which are not in any relationship of control within the meaning of Section 7 of the Italian Antitrust Law and which are active on the same product and geographic markets.

2 bis. Where paragraph 1 is applicable, the person concerned shall have an option to choose [one of the offices] within 90 days from the appointment; where the option is not exercised, the person concerned shall be dismissed from any of such offices; the termination shall be declared by the competent corporate bodies within 30 days from the expiration of the above time-limit or from the date the infringement was

that the widespread use of personal and equity links between competitors lessens competition in these sectors.

In particular the norm provides that “no member of management boards, supervisory boards and statutory board of auditors, as well as no executive officer, of an undertaking or group of undertakings which are active on the markets for banking, insurance and finance” shall, at the same time, serve in “corresponding” positions in competing undertakings or groups of undertakings. Section 36 (2) clarifies that “competing undertakings or groups of undertakings” means undertakings which are “active on the same product and geographic markets and which have no relationship of control” (with the undertaking in which a person already serves as an executive) within the meaning of Section 7 of the Italian Antitrust Law.

The norm raised a number of issues regarding its interpretation especially with respect to individuals and undertakings to whom it should apply<sup>15</sup>. The three Surveillance Authorities (the Bank of Italy, the Insurance Regulator and the Italian Securities and Exchange Commission) in April 2012 have adopted Guidelines clarifying the implementation criteria<sup>16</sup>. The prohibition applies to members of governance bodies of undertakings exceeding a turnover threshold of 47 million euros<sup>17</sup>. The Guidelines also outline the enforcement mechanism that implies an intervention of the regulators only in the inertia of the governing bodies of the affected undertakings. An agreement for co-ordinating the role of the three regulators and the ICA in the implementation has also been signed in June 2012<sup>18</sup>.

The ICA although not directly involved in the implementation – which falls under the competence of the three regulators – can be informally or formally consulted in particular with respect to the definition of the relevant product or geographic markets and the assessment of situations of control within the definition given by the antitrust law.

It is still early to make an assessment of the implementation of these new provisions and their effects on competition in the banking, insurance and financial markets.

## 8. Conclusions

The substantive notion of transaction as envisaged in the Italian merger review system and interpreted in the ICA’s case law has allowed the Italian Authority to review a wide range of mergers, including those where minority shareholdings conferred de facto control. This notion has allowed the Italian Authority to address competitive concerns, in particular with respect to mergers in sectors characterised by the widespread recourse to cross minority shareholdings and interlocking directorates such as banking, financial and insurance markets. Remedies in these mergers have often addressed the presence of board members in governing bodies of firms competing in the same markets. Since some of these situations have come to the attention of the Authority only indirectly – i. e. in the context of the assessment of other

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acknowledged. In case of failure to act by the competent corporate body, the termination shall be declared by the Surveillance Authority of the market concerned.

2 ter. For the first application of the Decree, the 90 days time-limit is extended to 120 days as from the entry into force of the ratifying Law”.

<sup>15</sup> See V. Falce, The Italian regulation on interlocking directorates in the financial services. An antitrust dilemma, <http://www.eale.org/conference/eale2012/paper/view/49>

<sup>16</sup> The Guidelines – in Italian – can be found at this website address [http://www.astrid-online.it/Regolazione/Autorit--i/banca-d-Italia\\_Consob\\_Isvap\\_linee-guida-ex-art-36\\_20042011.pdf](http://www.astrid-online.it/Regolazione/Autorit--i/banca-d-Italia_Consob_Isvap_linee-guida-ex-art-36_20042011.pdf)

<sup>17</sup> The same threshold used in merger review for the acquired undertaking.

<sup>18</sup> See, on the ICA’s website: [http://www.agcm.it/trasp-statistiche/doc\\_download/3205-protocollo-intesa-bi-consob-isvap-agcm-art-36-dl-salva-italia.html](http://www.agcm.it/trasp-statistiche/doc_download/3205-protocollo-intesa-bi-consob-isvap-agcm-art-36-dl-salva-italia.html)

mergers - one might question whether the current norms excluding the acquisition of minority shareholdings from the notion of transaction for merger review should be amended. While no proposal of reform is envisaged at the moment, the recently adopted norms on interlocking directorates try to tackle some competitive concerns from a regulatory point of view in the sectors where, according to the legislator, they might be more relevant.



## JAPAN

### 1. Summary of merger regulations under the Antimonopoly Act and the "Definition" of merger transaction

Chapter IV of the Antimonopoly Act (hereinafter referred to as the "AMA") prohibits (1)the acquisition or possession (hereinafter referred to as "holding") of the shares of a company (including shares of partnership, the same shall apply hereinafter) (Article 10 of the AMA), (2)interlocking directorates (Article 13 of the AMA), (3)shareholding by a person other than a company (Article 14 of the AMA) or (4)a merger of companies (Article 15 of the AMA), (5)joint incorporation-type split or absorption-type split (Article 15-2 of the AMA), (6)joint share transfer (Article 15-3 of the AMA), or (7)acquisition of businesses, etc. (Article 16 of the AMA) (hereinafter referred to as a "business combination"), where it creates a business combination that may be substantially to restrain competition in any particular field of trade, or where a business combination is created through an unfair trade practice. Under the AMA, the acts described in (1) to (7) above constitute a "business combination."

The AMA prohibits any business combination that may be substantially to restrain competition in a particular field of trade. The AMA regulates business combinations because they can have an impact on competition in the market (a particular field of trade) through the forming, maintaining or strengthening of a relationship in which two or more companies operate a business in a united form, whether fully or partially by shareholding, mergers or other transactions (this relationship is hereinafter referred to as a "joint relationship"). For each business combination described in (1) to (7) above, the guidelines for business combinations (hereinafter referred to as the "Merger Guideline") clearly indicates in which cases a joint relationship is to be formed, maintained or strengthened. For the details, please see the following discussions.

In addition, under the AMA, any company that meets certain criteria is required to notify the Japan Fair Trade Commission (hereinafter referred to as the "JFTC") in advance of the formation of a business combination. The purpose of this prior notification is to ensure that the JFTC can effectively obtain information regarding the business combination which may violate the AMA. The details of the standards for prior notification differ according to the types of business combinations described in (1) to (7) above. Whether or not prior notification is required is generally determined based on the total amount of domestic sales of the company concerned, including its group companies. For example, in the case of the acquisition of shares, when the company acquiring shares (hereinafter referred to as a "shareholding company") that is part of a group of combined companies<sup>1</sup> and whose total domestic sales exceed 20 billion yen acquires the shares of the company whose shares are acquired (hereinafter referred to as the "share issuing company") whose total domestic sales, including those of its subsidiaries, exceeds 5 billion yen, and the percentage of voting rights held exceeds 20% or 50%, the company acquiring the shares is obliged to notify the JFTC of its plan.

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<sup>1</sup> A group consisting of the company, its subsidiary companies, its parent company which is not a subsidiary company of another company, and subsidiary companies of the said parent company (excluding the said company and subsidiary companies of the said company).

Regarding the minority shareholding, an interlocking directorate, or a joint venture that may become an issue for a round table, the views of the "joint relationship" based on the guidelines for business combinations and the related cases will be shown below.

## **2. Minority shareholding**

### **2.1 Merger guideline**

Whether a joint relationship is to be formed, maintained or strengthened between the shareholding company and share issuing company and is to be subject to merger review or not is basically determined considering the ratio of voting rights held (the ratio of the voting rights pertaining to shares held by the shareholding company to all the voting rights of the share issuing company, the same shall apply hereinafter) and the order of voting rights held. In addition, other factors will be considered in some cases. The detail is as follows. In the case of (2) or (3), transactions would fall under minority shareholdings.

- (1) When the ratio of the total number of voting rights pertaining to shares held by companies, etc. that belong to the group of combined companies (the group of combined companies prescribed in paragraph (2), Article 10 of the AMA, the same shall apply hereinafter) to which the shareholding company belongs to all of the voting rights of the share issuing company exceeds 50%.
- (2) When the ratio of the total number of voting rights pertaining to shares held by companies, etc. that belong to the group of combined companies to which the shareholding company belongs to all of the voting rights of the share issuing company exceeds 20% and the said ratio stands alone as the top-ranked.
- (3) Excluding the cases described above, it is considered that most of the cases do not require business combination review in general but the following items will be taken into consideration to determine whether a joint relationship is formed, maintained or strengthened. Regarding such cases, the ratio of voting rights held is 10% or less, or and the shareholding company is not ranked among the top three holders of voting rights, a joint relationship is not formed, maintained or strengthened so that in general the case does not require a business combination review.
  - (a) The extent of the ratio of voting rights held;
  - (b) The rank as a holder of voting rights, differences in and distribution of the ratios of voting rights held among the holders, and other relationships between holders;
  - (c) Cross-holding of voting rights (the share issuing company concurrently holds voting rights of the shareholding company) and other mutual relationships between the companies involved (hereinafter referred to as "parties");
  - (d) Whether officers or employees of one of the parties are officers of the other parties;
  - (e) Trading relationship between the parties (including financial relationship);
  - (f) Relationships between the parties based on business alliance, technical assistance and other agreements or agreements;
  - (g) Items (a) through (f), when including companies that already have joint relationships with the parties.

## 2.2 *The case of minority shareholdings*

### *Acquisition of shares of Fuji Heavy Industries Ltd. by Toyota Motor Corporation (Case No.4 of major business combinations in FY 2008)*

In this case, Toyota Motor Corporation (hereinafter referred to as Toyota) engaged in the manufacture and sale of automobiles plans to acquire shares of Fuji Heavy Industries Ltd. (hereinafter referred to as FHI), which is engaged in the same business. The concerned law provision is Article 10 under the AMA.

Because Toyota will increase its ratio of voting for FHI from 9.50% to 16.61% by this acquisition of shares, the JFTC made a following judgment on whether a joint relationship between Toyota and FHI was formed and the minority shareholdings would become subject to review of business combination.

“Toyota has been conventionally the single top shareholder of FHI. If this acquisition of shares is put into practice, the difference in the voting ratio between Toyota and the second shareholder will be 10% or more. In addition, FHI plans to develop small vehicles jointly with Toyota, to be entrusted with the production of such vehicles, and to have light vehicles supplied by OEM from Daihatsu Motor Co., Ltd. (hereinafter referred to as Daihatsu).

However, even after this acquisition of shares,

- (1) The parties concerned will be doing business independently based on their own management strategies and will maintain their brands and sales networks as they were before.
- (2) There is no interlocking directorates between FHI and Toyota as well as between FHI and Daihatsu or Hino Motors, Ltd., both of which are in a joint relationship with Toyota.

Considering these situations and on the basis of the explanation from the parties concerned, it is considered that FHI will continue to compete with Toyota mainly with regular passenger automobiles as its major products even after the increase of Toyota’s voting ratio for FHI to 16.61%. Therefore, the JFTC judges that this acquisition of shares would not establish a joint relationship between the parties concerned and they would not be subject to a business combination review.”

## 3. **Interlocking directorates**

In the following cases, a joint relationship is formed, maintained or strengthened between interlocking companies when an officer (a trustee, director, executive officer, managing member, auditor, company auditor or any person with an equivalent position, a manager or other employee in charge of business of the main or branch office) or an employee of a company serves concurrently as an officer of another company and that interlocking requires a review.

- (1) The officers or employees of one company comprise a majority of the total number of officers of another company.
- (2) Interlocking directorates in which the directors have the authority to represent both companies.



Excluding item 1 above, the following items will be taken into consideration to determine whether a joint relationship is formed, maintained or strengthened.

- (1) Whether an interlocking directorate is formed by full-time or representative directors.
- (2) The ratio of officers or employees of one of the interlocking companies to the total number of officers of one of the other interlocking companies.
- (3) Mutual holding of voting rights between the interlocking companies.
- (4) The trading relationships (including financial relationships), business alliance and other relationships between the interlocking companies.

#### **4. Joint Venture**

Merger Guideline defines a joint investment company (JV) as “a company jointly established or acquired by two or more companies through an agreement to pursue operations necessary to achieve mutual benefits”.

Also, Merger Guideline defines the shareholdings as “holding shares of other companies”. In the case where JV is established, direct shareholding relationship between the investing companies is not formed. However, a joint relationship is indirectly formed, maintained or strengthened through the establishment of the JV. In addition, if the business activities of the shareholding companies are integrated through the establishment of the JV, this fact itself indicates that there will be an impact on competition. In light of these facts, Merger Guideline explicitly states that establishing JV can be subject to the merger review under the framework for shareholdings regulation.

The JFTC will consider trading relationships between the parties and relationships based on business alliances and agreements when determining whether the establishing JV should be reviewed.

#### **5. Exemptions**

As described above, companies are obliged to notify the JFTC of their plan with regard to merger which would fall under certain requirements. However, merger transaction between companies which belong to the group of combined companies would be subject to the obligation of prior notification to the JFTC of their plan (proviso in paragraph (2) of Article 15, 15-2, 15-3 and 16 of the AMA).

Also, Merger Guideline states that when merger transactions such as shareholdings, interlocking directorate, merger, split and acquisition of business would be conducted within the group of combined companies, most of them would not become subject to merger review because in principle joint relationship would not be formed or strengthened.

## KOREA

### 1 Types of transactions subject to merger control review<sup>1</sup>

#### 1.1 Acquisition of shares

Korea's merger control review criteria base on assessing whether an operation establishes the power of control over an enterprise. The establishment of control, however, is extremely hard to define in any technical sense. By considering this and constraints of administrative resources, Korea, just as other countries, has adopted a quantitative threshold (percentage) targeting enterprises larger than a certain size. That is, if one of the merging parties in an amalgamation deal has assets or sales turnover of KRW 200 billion (USD 180 million) or larger and the other has assets or turnover of KRW 20 billion (USD 18 million) or more, the deal is subject to merger review. Or, to lower the threshold of controlling power recognition, if one party comes to own 20% or more of the stocks issued by the other party (15% for listed firms and the same is applied hereafter) after a merger deal, the deal is also subject to merger control review in the country.

Such devices are believed to help Korea employ a set of criteria on identifying control establishment and maintain the threshold lower enough just to reduce unnecessary costs and rule out any deal free of control establishment concerns in the first place.

Korea has had a relatively objective set of criteria on assessing control establishment. Targeted deals are those where acquired stocks are more than 20% or a party acquires additional stocks becomes the largest shareholder. In the case of shareholding of 50% or over, the deal is automatically regarded to establish control. In cases of less than 50% shareholding (that is, between 20~50%), diverse elements are considered in addition to shareholding rate such as shareholder dispersion, executive appointment, raw material procurement structure, inter-shareholder relationship, etc. to see if the deal could form any decisive influence on another enterprise effectively.

Concerning large-business group regulation, Korea regards it an affiliate of a large-business group if it holds 30% of a certain company's stocks and is the largest shareholder of the company. In such a case, control is viewed to take form automatically. In this sense, uncertainties regarding the boundary of control establishment are fewer.

##### 1.1.1 Transactions with a non-controlling minority interest

In case of transactions that present no outright right to control, additional reviews are performed for any possible control formation. Regarding this, some transactions were reviewed while others were not

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<sup>1</sup> The criteria to filter out merger deals subject to merger control review by a competition authority vary depending upon jurisdiction. In case of Korea, 5 main transaction patterns have been identified under merger control review in consideration of other advanced competition authorities' criteria and Korea's own unique situations. The patterns are stock acquisition, executive appointment, M&A, business transfer, and participation in new company set-up. Herein, we will mostly look at stock acquisition, asset acquisition, and joint venture set-up to explore such deals' substances and problems.

despite both of them involved similar stock acquisition volumes and control establishment controversies. For instance, as to the proposed deal of NPC's Korea Pallet Pool stock acquisition (Dec. 2011), the acquiring firm came to hold 33.4% of the shares, became the largest shareholder and appointed one of the co-CEOs. However, the deal was viewed to create no controlling relationship because Korea Pallet Pool CEO and his partner firms' shares accounted for 37.42%. Whereas Pointnix's UBcare stock acquisition (Apr. 2004) was regarded to confer control and received antitrust review. Although the acquiring firm came to have 35.11% of the shares after the deal, it would be the largest shareholder and other shares were widely dispersed. Hence, as to cases involving non-controlling minority interest, Korea can be said to look further into more specific elements regarding control establishment for proper assessment.

Korea's stock acquisition threshold is low (20%) enough to dispel worries that reviews are not triggered for risky deals due to loose notification threshold. The threshold is lower than the 50% mark which is deemed to start conferring control and even lower than the 30% mark that prompts the relationship of affiliation.

Korea tried to reinforce its review criteria in 2011 to respond to the problem of minority shareholding by exploiting partial acquisition in order to avoid competition, as it was recognized in the 2010 amendment of the US criteria. However, many pointed out that such a notion did not fit for Korea's review system which preemptively assesses control establishment of a deal. So responses to minority shareholding, in this situation, have yet to be introduced to the country.

If such a minority shareholding is recognized as another type of transaction and becomes possibly subject to antitrust review, review targets could grow too broad and even include deals free of anti-competition risk, expanding the burden of enterprises. This is supported by the fact that a larger part of the entire review cases is identified to have no anti-competitive aspect or controlling power establishment.

In this year of 2013, Korea, on another front, has worked to amend the review system to effectively deal with transactions including stock acquisition that are obviously without an anti-competitiveness worry but still have to be notified due to the current criteria. It would be helpful if the competition agency is allowed to exercise own discretion to review riskier cases selectively. But such an approach may bring uncertainties to notifying parties and cause additional expenses. Any planned amendment in this regard is desired to consider all these aspects comprehensively.

### *1.1.2 Interlocking directorates*

With respect to interlocking directorate, similar issues could arise to those in the minority shareholding. For this reason, Korea has mandated to notify deals involving interlocking directorates even if their stock acquisition rates do not reach the review threshold. This is to address the possibility that large firms with strong market influence in the country try to control other companies just by sending some executives without buying a share. Basically, however, the principle is to use streamlined review processes for most of the cases just to check factual relations and presume zero anti-competitiveness. Further probe is triggered only when the number of interlocking directorates is more than 1/3 of the merged company's total executive number or interlocking directorates can exercise effective influence over the company's important decisions.

### *1.2 Acquisition of assets*

Acquiring assets could also be subject to merger notification and review as it is a kind of business transfer. If a company acquires an important part or full of another company's fixed assets, the company is obliged to make notification. Intellectual property right or customer list, in particular, of the partial business transfer is subject to notification under a certain condition. That indicates cases where the

transferred asset is operable in an independent form or can cause significant fall in the original company after transfer. And targeted transfer amount is KRW 5 billion (USD 4.5 million) or larger or 10% or higher of the total asset value in the balance sheet of the original company as of the end of its previous business year.

Similar to control assessment in minority shareholding cases, it is also not an easy task to decide if any transferred asset is independently operable. For this reason, asset values are frequently used to require notification. Thus, lots of deals irrelevant of anti-competitiveness have been reported. If the absence of specific criteria continues in this regard, the scope of assets subject to review could be too much expanded, leading to excessive notifications.

### **1.3 Joint venture**

Unlike the US and EU, Korea has no separate set of guidance or rule to deal with joint ventures. The country has not differentiated structural or collusive joint ventures. Therefore merging parties do not suffer from such dual approach-caused uncertainties in the country. Joint venture is individually recognized here as an activity of participating in a new company establishment in forms of combination other than stock acquisition or asset acquisition. In case of participating in a new company set-up, the largest shareholder should make notification and the deal is assessed by looking into the combination among the participating firms. It can be said that joint ventures are subject to both Article 7 (Restriction on Combination of Enterprise) and Article 19 (Prohibition of Improper Concerted Act) of the Monopoly Regulation and Fair Trading Act (MRFTA) in Korea.

Article 7(1)5 recognizes participating in a new company set-up as a type of enterprise combination. And Article 19(1)7 regards it as a type of concerted acts to establish a company in order to jointly perform/manage a key part of business or for the purpose of such performance/management. Therefore, if a joint venture is viewed as a corporate merger, Article 7 will apply or if it is viewed as a concerted act, Article 19 will become applicable. As for a production joint venture, however, since it is not directly related to pricing activities, rule of reason should be abided by, no matter which of the two applies.

Which of the two provisions should take priority over the other may be tricky. In this case, Korea refers to the US and EU guidelines. If a joint venture continues to exist persistently, completely removes competition between the two involved participants and structurally restricts market competition, corporate merger rule should prevail, otherwise, concerted act rule is first applied.

Given the fact that concerted acts could only be reviewed ex post, merger rule is invoked first in case of a large venture with strong market impact in order to secure the competition agency's right to investigation.

## **2. Exemption from merger notification**

Korea specified exemptions from merger notification as

1. where technological innovation or business establishment is concerned<sup>2</sup>,
2. where it is obviously a simple investment activity, and
3. where the existing control does not change.

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<sup>2</sup> Applicable law already prohibits stock acquisition for the purpose of management control in this regard. Therefore, there has been almost no visible result here with no control establishment in place.

The 1 above includes investment firms or associations for smaller company establishment, which come to hold at least 20% of a business founder or a venture company’s shares, or participate in the establishment of a business founder or a venture company jointly with other firms and become the largest shareholder of it; new technology financing companies or associations which acquire a new technology developer’s shares, or participate in the establishment of a new technology developer jointly with other firms and become the largest shareholder.

The 2 gives immunity from notification to investment companies, companies designated as a private investor for social infrastructures, real estate investment companies, etc. who acquired stocks or established a company.

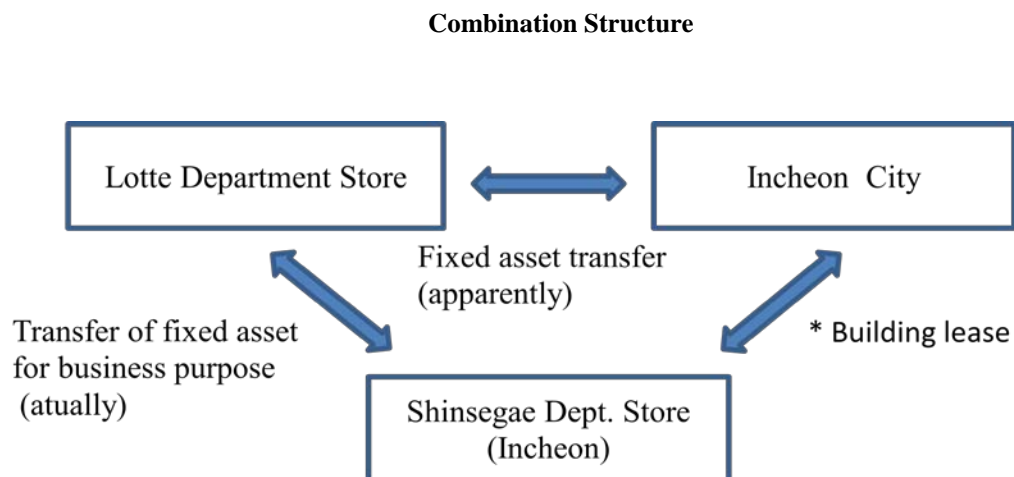
The 3 involves cases where only affiliate persons participate in stock acquisition and company establishment or are interlocking directorates of an affiliate.

The listed cases are all exempted from obligatory notification but such an exemption does not necessarily mean they are exempted from merger control review as well. All of these could still be under antitrust review.

### 3. Objective criteria and gaming the system

There is a recent case involving a department store operator and a local government who tried to exploit the clear and objective review criteria to game the review system in Korea. They restructured their transaction that would otherwise have to be notified. The competition authority made it clear that the firms should also notify the deal.

Some argued that the case, in its layout, was a simple asset trading between an enterpriser and a local government so the MRFTA was not applicable. But in its nature, the deal was actually a business transfer by a department store operator from its rival in a roundabout way. Accordingly, the deal was regarded to fall under notification obligation. Its combination structure is as follows:



If Lotte was to acquire the department store, it would have formed virtually a monopoly in the region (Incheon City). Recognizing this, the competition authority ordered the involved parties to divestiture 2 stores to 3<sup>rd</sup> parties who intended to pursue the business other than those with special interests, with a view to prevent anti-competitive market structure.

#### 4. Changes in the merger regime

In line with its economic expansion and changing market conditions,, Korea has changed the definition of transaction. For instance, concerning stock acquisition, before 2005, companies did not have to make additional notification once they notified of a deal for 20% stock acquisition regardless that they became the largest shareholder through additional acquisition thereafter. More companies tried to gain approval by notifying only 20% stock acquisition at first, then increased their shares to be the biggest shareholder later on. So a new system was introduced to make any company make further notification if it becomes the largest shareholder.

In case of new company set-up, 20% stock acquisition or more was subject to notification before. But some firms tried to separately acquire shares and then share together collectively in order to control a target company. To prevent this, Korea amended law in 2007 to mandate any largest shareholder to notify regardless of its stockholding ratio.

Since it is practically impossible to watch and review each and every merger deal, focusing resources on a few selective cases is essential. That is the purpose of the merger deal notification system. But so far, no analytical approach has been made to measure and compare the benefits from broader investigation with the expenses thereof.

#### 5. Alternatives

Just as not all of the notified merger deals are anti-competitive, not all anti-competitive deals are subject to obligatory notification. However, any competition-restricting deal, though it may not satisfy the review threshold, needs to be reviewed.

Korea's MRFTA Article 7 sets out that no one can pursue a merger deal to practically restrict competition in a certain area of business either directly or via person with special interest. This leaves some room to assess the anti-competitiveness of a deal that does not belong to the designated types for notification or falls short of some requirements.

Still, the most desired method is believed to make the notification threshold clear by law to eradicate any possible controversies. In doing so, we should take a very careful approach to avoid posing additional burden on enterprises. Competition authorities may face difficulties in following this approach since detecting such a deal is never easy. Some investigations triggered by press releases prove this as well.<sup>3</sup> It should also be noted that once a merger is completed, remedy is hard to come even if it harms competition.<sup>4</sup>

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<sup>3</sup> For instance, accounting program provider, The Zone Vision's acquisition of Kicom in 2011 was not subject to notification for its involved asset volume was smaller than the threshold. But the deal was reviewed after press releases and competitors' report.

<sup>4</sup> Or, if remedy is possible, the procedures are complicated and legal stability is compromised, as a competition authority should take a legal action to annul the merger or launch other legal procedures.



## MEXICO

### 1. Acquisition of shares

Article 16 of the Federal Law of Economic Competition (Competition Law or FLEC for its acronym in Spanish) defines a merger as:

*“(...) the fusion, acquisition of control or any other acts by which societies merge, associations, actions, social parts, trust, or assets in general among competitors, suppliers, clients or any other agents (...)”*

The article follows:

*“(...) The Commission will challenge or sanction those mergers whose object or effect are to diminish, damage or hinder competition and free market access to similar and substantially related goods or equal services.”*

According to the former, the FLEC includes among the possible merger acts the fusion, acquisition of control and other acts.

In relation to the fusion, it is recognized as the procedure by which a legal binding between different corporations occurs. It involves the transfer of assets, rights and obligations. Depending on the nature of the fusion –absorption or integration- in the former case, a company will absorb the other, in the latter, two or more companies will disappear and integrate assets, rights and obligations in a new entity.

Regarding the acquisition of control, the FLEC and its bylaw do not include any explicit definition of control. However, in practice, the Commission has taken into account that set forth in other laws, which, although they represent no legal supplement to the FLEC, feature elements from the Mexican legal system from which an interpretation of the concept of control may be drawn. In particular the Securities Market Law, in Article 2, contains a control definition from the corporate perspective that has been used by the Commission in various assessments involving mergers through shareholding:

*"III. Control is the ability of a person or group of persons to perform any of the following acts:*

*Impose, directly or indirectly, decisions at shareholder, partners or equivalent bodies general meetings, or appoint or remove a majority of the directors, managers or their equivalent, from a moral person.*

*Maintain the ownership of rights to allow, directly or indirectly, vote in respect to more than fifty percent of the capital stock of a corporation.*

*Lead, directly or indirectly, the management, strategy and major policies of an entity, through ownership of securities, by contract or otherwise."*

For its part, the judiciary has solved the possible existence of latent control situations, not necessarily by way of the shareholding but by the existence of other links (or relationships), as follows:



*"(...) The control can be real if it relates to the effective conduct of a holding company to its subsidiaries, or latent where there is a possibility of exercising control through persuasive measures which can occur among companies without a centralized and hierarchical legal bond, but real through a real power link."*<sup>1</sup>

The definition of merger contained in the FLEC also considers other acts which are deemed as mergers of societies, associations, actions, social parts, trust funds or assets in general, carried out among competitors, suppliers, clients or any other agents. This definition includes acts which not necessarily entail gaining control or which are not a result of a sale of assets or shares, but have similar effects. Among this acts the donation, inheritance, transfer of rights and leases, among others can be included.

For these other acts, the Commission has faced complications determining whether they represent a merger. In particular, the Commission has had to address the possibility that commercial contracts constitute a merger and has concluded that there are situations that transcend the legal and economic links that define mergers or acquisitions and lead to a similar behavior among companies. To determine if such unity exists, in addition to determining the existence of mechanisms of association, it is necessary to demonstrate that an agent has de facto influence on the strategies of the other and that this influence involves the loss of action liberty with effects on their behavior on the market.<sup>2</sup>

Moreover, the Commission has considered as mergers acts that do not result from a sale, but have similar effects to a merger or acquisition of shares or assets.<sup>3</sup> Similarly, the Commission assessed and sanctioned a merger, in which a society obtained radio spectrum capacity providing services through a Capacity Services Supplying Contract, which meant, in fact, obtaining, the possession of a part of the radio spectrum given under to concession to the service supplier for the society use and exploitation.<sup>4</sup>

It is worth noting that in the cases mentioned above, the Commission faced inquiries from third parties which were allegedly affected. Similar situations are often the matter of consultation by company representatives.

In relation to the obligation to notify, the law considers that merger control is a preventive mechanism, which seeks to avoid high market concentration situations. For that, article 20 of the FLEC establishes that concentrations which exceed monetary thresholds should be notified before being carried out. The law also empowers the Commission to issue an order to not execute a merger until authorized (*stop order*).

Companies intending to carry out a merger must consider certain premises to determine whether they should notify the merger to the CFC. The first is that the operation entails effects in the national territory. That is, that the act has an assigned amount in the Mexican territory or that the agents whose assets or shares of social capital are accumulated have assets or sales generated in national territory. The second is that monetary values associated to the operation surpass any of the thresholds mentioned in sections I, II and III of article 20 of the Competition law.

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<sup>1</sup> Tesis I.4o.A. J/66, *Semanario Judicial de la Federación y su Gaceta*, Novena época, tomo XXVIII, noviembre de 2008, página 1244. GRUPO DE INTERÉS ECONÓMICO. SU CONCEPTO Y ELEMENTOS QUE LO INTEGRAN EN MATERIA DE COMPETENCIA ECONÓMICA.

<sup>2</sup> File CNT-116-2008.

<sup>3</sup> File CNT-124-2007, the Commission analyze as a merger the transfer of the operation of supermarkets

<sup>4</sup> File CNT-118-2004.

In the case of international operations, agents must foresee that if the act occurs overseas, it should not have effects of fact or right in Mexico before presenting the notification and that the period in which the Commission is entitled to issue a non execution order has not expired.

The monetary thresholds that establish the obligation to notify are set by article 20 of the law:

*“The following mergers should be notified to the Commission before being carried out:*

- I. *When the act or succession of acts that give rise to mergers, regardless of the place of celebration, represent in Mexico, directly or indirectly, an amount equivalent to more than 18 million times the general minimum wage for the Federal District ;<sup>5</sup>*
- II. *When the act or succession of acts that give rise to mergers, involve the accumulation of 35 percent or more of the assets or shares of a company, whose annual assets in the Republic or annual sales originated in Mexico represent more than 18 million times the general minimum wage for the Federal District; or*
- III. *When the act or succession of acts which give rise to merger involve an accumulation of assets or capital in Mexico of more than 8.4 million times the minimum wage for the Federal District<sup>6</sup> and in which merger take part two or more economic agents whose assets and annual sale volume, jointly or separately, amount to more than 48 million times the minimum wage for the Federal District; (...)<sup>7</sup>*

The Commission assesses the monetary thresholds established in article 20 of the law one by one. It is enough for the operation to update one of the three sections in the article so that agents are obliged to notify.

Note that the thresholds are defined in minimum wage salary days, which are used frequently in different laws as an accounting unit and are updated according to the beginning of the year annual inflation.

## **2. Acquisition of minority interests and interlocking directorates**

The law makes no distinctions when treating acquisition and minority holdings. That is, if the operation surpasses any of the monetary thresholds, it should be notified, with some exceptions which will be discussed later.

For analytical effects, the Commission considers the corporate rights of the purchaser who acquires minority interest and only in few cases potential damage to competition was determined, especially in regulated markets. Therefore, in the 2011 reform to the FLEC, it was sought, to establish a simplified procedure to exempt some mergers from being notified.

In Mexico there is no explicit prohibition for interlocking directorates. The CFC assesses this effect when the merger gives the buyer the right to designate members in the Board of Directors of another company.

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<sup>5</sup> Approx. 91 million USD.

<sup>6</sup> Approx. 42 million USD.

<sup>7</sup> Approx. 244 million USD.

The Commission has expressed concern over this issue, especially when the parties that become partners are actual or potential competitors in other markets outside of the joint venture. In such cases, in markets with few competitors, the Commission has determined that the parties manifest a commitment not to exchange information related to other markets through the governing bodies of companies.

### **3. Acquisition of assets**

As in the acquisition of minority holdings, the FLEC does not treat acquisition of assets differently. The Commission does not have experience in cases in which the only asset acquired is the intellectual property rights or client lists. Such assets have been analyzed in the context of transactions which involve the acquisition of an integral business. In any case, if the situation arises, the Commission will carry out an assessment like in any other merger and the obligation to notify will be determined by monetary thresholds.

### **4. Joint ventures**

A particular case is that of collaboration agreements among competitors, which unlike regulatory frameworks that exist in other countries, in Mexico there is no legal clause allowing granting immunity from the application of the FLEC. When an agreement of this type is reported as a merger, the Commission verifies if an element considered under article 16 of the FLEC exists. That is, the act must imply some analogical aspects to those of a merger or acquisition of shares or assets, among them –and only to cite certain examples without being exhaustive- the participation of two or more economic agents, the establishment of a long term relationship that transcend the limits of a commercial relation, the possibility of interference of an economic agent in the strategic direction or appointment of directors or officers from another company and the de facto transfer of physical control of assets or the possibility to decide on its use, among other aspects.

In the event that the joint venture does not involve the transfer of assets to the new society the Commission may assess the case under that established in Article 9 of the FLEC, which refers to collusion acts. The scarcity of specific provisions for joint ventures and antitrust exemptions for certain type of collaboration agreements (air transportation companies' alliance and shared codes) may generate uncertainty among economic agents.

In relation to minority acquisitions in a joint venture, the assessment rules are the same as in other acquisitions, a merger is to be notified if it exceeds the monetary thresholds.

### **5. Exemptions**

In 2011 amendments to the FLEC various exemptions to notify mergers were included. The decision to include them was determined by the CFC's 18 years experience and by identifying certain situations in which it was determined that the merger is unlikely to pose a risk to competition. In particular, the law exempts:

- I. Corporate restructurings.
- II. Increased relative participation in a society in which the buyer has control since its incorporation or commencement of operations, or when the Commission has previously authorized the acquisition of control.
- III. Trust management, warranty or any other figures in which an economic contribution provides its assets, shares, stocks or units without the purpose or necessary consequence of transferring such assets, shares, partnership interests or units to a different society from both the settler and the trustee concerned.

- IV. Foreign operations that do not modify the direct or indirect shareholdings of companies established in Mexico.
- V. Investment funds aimed at investors.
- VI. Acquisitions in the stock market, which do not allow to accumulate more than 10 percent of the capital equity, and do not confer rights to appoint members of the board of directors or relevant officers, impose decisions at shareholders' meetings, exercise the right to vote with more than 10 percent of the capital, or influence management, operation, strategy or the main policies of the share issuing company.
- VII. Acquisitions of investment funds that do not confer influence in the operation of the acquired part and are intended to obtain financial gains.

## **6. Objective criteria and “gaming the system”**

There is the possibility that the parties involved in a merger restructure the transaction to avoid the obligation to notify. However, this is not a widespread problem since the FLEC confers faculties to the CFC to investigate and challenge mergers below monetary thresholds, as long as the investigation begins within one year of the completion of the merger.

## **7. Change in the merger regime and alternatives**

The FLEC has been amended twice, in 2006 and in 2011. In no case the definition of merger was modified, although the monetary thresholds were increased and a clarification on the national impact that operations must have was included. Moreover, as already mentioned, in 2011 various exemptions were included.

The changes have reduced significantly the number of cases examined, without the Commission noticing that its powers were affected. For its type, transactions exempted from review have little or no impact on the conditions of competition and free market access.

The reduction in the number of cases has allowed the agency to focus its resources in analyzing in greater depth cases that may be of greater impact for markets and has also enabled a more efficient service to individuals in cases of low impact to competition.

Currently, the agency is in the process of restructuring as a result of a constitutional reform that will provide it with greater autonomy and lead to the renewal of the CFC's Commissioners. In addition, the faculties to control mergers in the telecommunication sector will now be responsibility of a sector regulator. Finally, the reform establishes the need to enact a new law, which will surely represent an opportunity to clarify the procedures to notify mergers.



## POLAND

### 1. Acquisitions of shares

Under the Polish law the notification obligation is based on two set of criteria. First, the type of transaction. Second, the turnover generated by the parties to the concentration and their capital groups. Both set of criteria must be fulfilled in order to establish an obligation to notify the transition to the President of UOKiK (Polish competition authority).

The Polish antimonopoly law does not introduce the definition of concentration, but indicates what kinds of transactions are considered as concentrations. Pursuant to Article 13(2) of the antimonopoly act, notifiable concentrations covered by the antimonopoly act are as follows:

1. merger of two or more independent undertakings;
2. takeover – by way of acquisition or entering into a possession of stocks, other securities, shares or in any other way taking direct or indirect control over one or more undertakings by one or more undertakings;
3. creation by undertakings of one joint undertaking;
4. acquisition by the undertaking, of a part of another undertaking's property (the entirety or part of the undertaking), if the turnover achieved by the property in any of the two financial years preceding the notification exceeded in the territory of the Republic of Poland, the equivalent of EUR 10,000,000.

The concept of “taking over the control” is defined in Article 4(4) of the antimonopoly act. According to this provision “taking over control” means any form of direct or indirect acquisition of powers by an undertaking, allowing the undertaking, to exert, individually or jointly, taking into account all legal or factual circumstances, a decisive influence upon another undertaking or other undertakings. Such powers follow in particular from:

- a) holding directly or indirectly a majority of votes in the meeting of company members or general shareholders' meeting, also in the capacity of a pledgee or user, or in the management board of another undertaking (dependent undertaking), including based on agreements with other persons,
- b) the right to appoint or recall a majority of members of the management board or supervisory board of another undertaking (dependent undertaking), including based on agreements with other persons,
- c) members of the undertaking's management board or supervisory board constituting more than half of the members of another undertaking's (dependent undertaking's) management board,
- d) holding directly or indirectly a majority of votes in a dependent partnership or in the general meeting of a dependent cooperative, including based on agreements with other persons,

- e) holding a title to the entire or a part of the property of another undertaking (dependent undertaking),
- f) contract which envisages managing another undertaking (dependent undertaking) or such undertaking transferring its profits.

The analyzed notion of “control” is quite broad in order to include any form of decisive influence over another undertaking based on *de iure* or *de facto* actions. This concept has never raised any serious doubts as to its vagueness or subjectivity.

The Polish system of merger control is based on compulsory notification of all transactions meeting the notification criteria. The criteria are objective in nature and are based on the turnover of enterprises engaged in concentration. Pursuant to Article 13(1) of the antimonopoly law, the concentration is subject to notification if:

1. the combined worldwide turnover of undertakings participating in the concentration in the financial year preceding the year of the notification exceeds the equivalent of EUR 1,000,000,000, or
2. the combined turnover of undertakings participating in the concentration in the territory of the Republic of Poland in the financial year preceding the year of the notification exceeds the equivalent of EUR 50,000,000.

Both criteria are independent of each other and the transaction may fulfill just one of them. It is worth underlining that, it is not required for the transaction to take place in Poland in order to be notified, unless the worldwide turnover criterion is met.

### ***1.1 Acquisition of minority interests and interlocking directorates***

The control of minority shareholding and interlocking directorates was first introduced in the Polish antimonopoly act of 1990. However, at first such activities were treated under the antitrust rules as a form of anticompetitive coordination. The situation has changed in 2000 when the following antimonopoly act was passed. The Act of 2000 listed circumstances when notification is necessary i.e. in cases of mergers, acquisitions and joint – ventures. Moreover, notification was compulsory also in situations of quasi-concentrations as follows:

- a) taking over or acquisition of stocks or shares of another undertaking resulting in achieving at least 25% of votes at a general assembly or assembly of partners;
- b) assuming by the same person the function of a member of the managing or controlling body of the competing undertakings.

Those types of concentrations presented 10% -15% of all merger cases notified to the antimonopoly authority in the give period of 2000 - 2007. There have never been any case regarding those types of mergers that required antimonopoly intervention.

In 2007 together with introduction of the new antimonopoly act minority shareholding and interlocking directorates were exempted from the notification obligation. They are no longer regarded as forms of concentrations. The change was made in order to reduce the number of merger notifications and to reduce transaction costs of undertakings. Obligation to notify acquisition of minority shares were perceived as unnecessary burden on undertakings. Several undertakings were fined for failure to notify those types of transactions. Furthermore, the previous experience of the antimonopoly authority with controlling of minority shareholdings proved that those transactions were unproblematic. Therefore, the

Polish parliament decided to exempt those transactions from the notification obligation in 2007. They are no longer treated as mergers since they fall outside the list of merger notifiable transactions. The list of notifiable merger transactions is of jurisdictional nature and the President of UOKiK may not investigate, under the merger control rules, transactions that are not listed.

Under the current regime minority shareholding and interlocking directorates may be only reviewed under the antitrust rules. So far there was no case of this type settled by the Polish competition authority.

## **2. Acquisition of assets**

As indicated earlier Article 13(2)(4) of the antimonopoly act treats as a notifiable merger acquisition by the undertaking, of a part of another undertaking's property (the entirety or part of the undertaking), if the turnover achieved by the property in any of the two financial years preceding the notification exceeded in the territory of the Republic of Poland, the equivalent of EUR 10,000,000. Under this provision acquisition of assets may notifiable unless turnover criteria are met.

For the purposes of provisions on merger control, the assets should be understood as the whole or part of the enterprise of other undertaking. Pursuant to art. 55(1) of Civil Code, the enterprise is an organised group of intangible and tangible components intended for pursuing the economic activity, including in particular:

- designation individualising the enterprise or its separate parts (name of the enterprise),
- ownership of immovable or movable property, including equipment, materials, goods and products and any other material rights to immovable property or movable property,
- rights resulting from lease and rent agreements for immovable or movable property and the right to use immovable or movable property resulting from other legal relations,
- claims, rights in securities and cash,
- concessions, licenses and permits,
- patents and other industrial property rights,
- copyrights and related property rights,
- trade secrets,
- books and documents relating to the economic activity.

The intention of concentration consisting in the acquisition of the assets of other undertaking is subject to the notification to the President of UOKiK only in a situation when the purchased assets generate the turnover indicated in Article 13(2)(4) of the antimonopoly act. This turnover, in the territory of the Poland, must exceed the threshold of EUR 10 million in at least one of the two financial years preceding the notification of the intention of concentration. When calculating the turnover of the acquired part of the assets for the purposes of the possible notification of the intention of concentration, it is necessary to consider the entire process associated with that part of the assets taking into account the specific nature of the purchased part of the assets (e.g., production line, production plant or product brand) and the market environment and industry, with which this part of the assets is associated and not just the individual components. Sometimes it may be difficult to calculate the turnover generated by acquired assets. To calculate attributable turnover one must prove that the particular asset is indispensable to generate the income. This assessment may be subjective and depend on the type acquired assets or the type of business



activity they are connected to. For example, in case of concentration consisting in purchasing the press title, it is not possible to separate this title from the economic activity related to sale of press under this title. Therefore, when calculating the value of the purchased assets, it is necessary to include the turnover derived from sale of this press title in the period laid down in the act. In practice this type of merger transaction cover acquisition of organized parts of other undertaking like factories, warehouses or outlets that do not possess legal personality. It may cover intellectual property rights or lease agreements, as well.

It should also be stressed that, if the assets belong to separate undertakings belonging to the same capital group and if they are purchased under the same transaction or interrelated transactions, in fact we deal with the same concentration. In this situation, when calculating the turnover, it is necessary to include the turnover achieved by the whole of the acquired assets.

### **3. Joint ventures**

Creation of joint venture is one of statutory examples of notifiable merger transaction.

It is one of the most common, apart from the acquisition of control, forms of concentration reviewed by the President of UOKiK. Establishment of the joint undertaking usually takes place through establishment of commercial companies (limited liability company, joint stock company, general partnership, limited partnership and limited joint-stock partnership) and cooperatives. However, it is not required to notify to the President of UOKiK of establishing a civil partnership by undertakings. This company is not regarded as the undertaking within the meaning of the antimonopoly act. Partners of such the company are regarded as undertakings. Transformation of the civil partnership into the general partnership will be subject to the notification to the President of UOKiK. Such transformation is regarded as establishing of the joint undertaking by undertakings (existing partners of the civil partnership).

It should be stressed that the obligation to notify the intention of concentration consisting in establishment of the joint undertaking by undertakings arises only in case when more than one undertaking participates in establishing the joint undertaking. Thus, such the obligation does not arise in the situation of establishing of the joint undertaking only by one undertaking or in case of establishing the joint undertaking by one undertaking and entity or entities not being undertakings. In order that such concentration is subject to the notification to the President of UOKiK, the process of establishing the joint undertaking should therefore involve at least two undertakings.

Under the Polish law all kinds of joint venture are notifiable irrespective of their concentrative or cooperative character. Furthermore, the Polish antimonopoly law does not distinguish between joint ventures aimed at long lasting performance of commercial activity and joints ventures created on temporal basis.

However, the notification obligation may be established only if the independent undertaking is created. If the joint venture consists purely of exchange of knowledge or commercial activities without establishing a separate undertaking structure it is not regarded as a merger. The obligation to notify the intention of concentration consisting in establishment of the joint undertaking refers both to the situation where participants in concentration (founding undertakings) establish, for this purpose, a new joint undertaking and to the situation where, for example, in order to establish the joint undertaking one of participants will establish a new company and then other participants will purchase or take up its shares/stocks. To establish the joint undertaking, participants in concentration may also use the existing undertaking (the joint undertaking is established, e.g. on a basis of a company functioning within the capital group of one of founders).

The antimonopoly act does not provide for specific requirements in relation to the joint undertaking (otherwise than, for example, regulation 139/04 where it is required from the joint undertaking to perform the functions of an autonomous economic entity on a permanent basis). Establishment of the joint undertaking that will not perform all functions of an autonomous undertaking on a permanent basis (e.g. products manufactured by the joint undertaking will be supplied exclusively or primarily to founding undertakings or capital groups to which founders belong), should also be notified to the President of UOKiK.

Concentration consisting in establishment of the joint undertaking is subject to the notification to the President of UOKiK regardless of the number of votes it will be ultimately granted to founders in the joint undertaking. Such concentration, therefore, should be notified even if one of founders holds shares/stocks in a quantity giving it the right of control over the joint undertaking and other founders hold minority shares.

The definition of joint venture under the Polish antimonopoly act is a very broad one. This has an adverse effect on the quality of merger control since the Polish competition authority is obliged to review joint ventures not leading to any changes in market structures due to their temporal character.

#### **4. Exemptions**

Notification criteria are based on formal premises and derived from substantive factors. Therefore there is a need to relax these formal premises by introducing exemptions. Those exemptions aim at eliminating from the scrutiny transactions which are insignificant or by their nature it is unlikely that may cause any competitive problems. Article 14 of the antimonopoly act indicates that the obligation to notify the intention of concentration does not apply where:

1. the turnover of the undertaking over which the control is to be taken in accordance with Article 13(2)(2) did not exceed in the territory of the Republic of Poland in any of the two financial years preceding the notification, the equivalent of EUR 10 000 000;
2. the financial institution, the normal activities of which include investing in stocks and shares of other undertakings, for its own account or for the account of others, acquires or takes over, on a temporary basis, stocks and shares with a view to reselling them provided that such resale takes place within one year from the date of the acquisition or taking over, and that:
  - a) this institution does not exercise the rights arising from these stocks or shares, except for the right to dividend, or
  - b) exercises these rights solely in order to prepare the resale of the entirety or part of the undertaking, its assets, or these stocks and shares;
3. the undertaking acquires or takes over, on a temporary basis, stocks and shares with a view to securing debts, provided that such undertaking does not exercise the rights arising from these stocks or shares, except for the right to sell;
4. the concentration arises as an effect of insolvency proceedings, excluding the cases where the control is to be taken over by a competitor or a participant of the capital group to which the competitors of the to-be-taken undertaking belong;
5. the concentration applies to undertakings participating in the same capital group.

All exceptions are of absolute character. If a transaction fulfils any of premises set out in Article 14, it is exempted from the scrutiny of the antimonopoly authority even if it is or may be anticompetitive. The most important is the first exemption. Together with special rules on calculating the turnover, it constitutes the most frequent situation when undertakings are exempted from the obligation to notify the merger. When interpreting the fourth exemptions, it should be remembered that it applies only to insolvency proceedings taking place in Poland and conducted according to Polish provisions. Furthermore, it is limited solely to one form of concentration i.e. takeover

## **5. Objective criteria and “gaming the system”**

Generally Polish competition authority does not have any signals that undertakings shape transactions in order to avoid competition scrutiny. However, there were two cases when the President of UOKiK has fined the undertakings for trying to escape the antimonopoly supervision by dividing the transaction and order structural remedies (dissolution of concentrations).

The first case regarded two local newspaper companies A (Polish local company) and B (part of Verlagsgruppe Passau GmbH). The transaction consisted of transfer of printing, editorial and distribution related assets of company A to company B and conclusion of non-compete agreement between the two undertakings for the duration of five years. As a consequence of the transfer of assets the company A remained the owner of two local newspaper titles but with no backoffice nor any assets to continue the commercial activity. As a result of this and to follow the non-compete agreement the company A decided to cease to publish the two newspapers.

The second case regarded two local newspaper companies C (Polish local company) and B (part of Verlagsgruppe Passau GmbH). The company B acquired 24,5% shares of company C. In the following transactions between the two companies several assets i.e. printing and editorial assets were transferred from company C to company B. One of the transaction regarded the transfer of advertisement sell office of company C to company B which gave the company B exclusive rights to sell advertisements in newspapers owned by companies B and C.

Unfortunately, the courts reviewing these two decisions of the President of UOKiK took a very formalistic view on what constitute the merger transaction as defined by the Polish antimonopoly act. The courts were unable to see that both transactions led to actual change of market structure either by driving out of business of one undertaking or by depriving any form of independence the other company. As a consequence, both decision of President of UOKiK were set aside and transactions remained unchanged.

## **6. Changes in the merger regime**

During the last 10 years turnover thresholds were significantly increased. The increase of turnover thresholds served to reduce business transaction costs by limiting the obligation of notification.

However, a problem can be noticed that by increasing the turnover thresholds and adapting them to transnational transactions, they have become too high for certain transactions of a purely local nature. The result is that it may be reasonable to reinstate the notification criteria based on subjective indicators, such as the market share to capture mergers of a local character.

Furthermore, in 2007 minority shareholding transactions and interlocking directorates are no longer notifiable. The reason was the same as in the first case i.e. reduction of number of notifiable transactions and reduce transaction costs.

## **7. Alternatives**

The provisions on notification obligation are of jurisdictional nature and preclude the President of UOKiK to investigate concentration transactions falling outside on the basis of merger control rules. In principle, it is possible to investigate them on the basis of antitrust rules. However, such control may be only undertaken ex post and standard competition rules apply. There are no specific rules designed for companies with substantial market power except for general prohibition of abusing dominant position by undertakings.



## ROMANIA

### 1. Definition of transaction for the purpose of merger control review

Romanian merger control is regulated by Law No. 21/1996 with further modifications and completions (the Competition Law). The merger control rules contained in the Competition Law are given detail and expanded upon through secondary legislation.

A concentration is defined by the Competition Law as arising where a change of control on a lasting basis results from:

- the merger of two or more previously independent undertakings or parts of undertakings; or
- the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings. Accordingly, the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration.

A transaction that constitutes a concentration within the meaning of the Competition law is subject to merger control and has to be notified if the combined and individual turnovers of the participating undertakings exceed certain thresholds. The worldwide consolidated turnover of all participating undertakings has to exceed €10 million. Additionally, at least two participating undertakings must have a domestic turnover in Romania of more than €4 million.

Control is defined for national merger control purposes in Article 10(5) of Competition Law as in European Commission Merger Regulation (ECMR) as the ability to exercise "decisive influence" over an undertaking, in particular, through the ownership or right to use all or part of its assets or the existence of rights or contracts conferring decisive influence on the composition, voting or other commercial decisions of the undertaking.

As noted, the creation of a full function joint venture constitutes a concentration for the purposes of the national merger control. A joint venture will generally be full function where:

- it has sufficient resources to operate independently on a market, performing all the functions normally carried out by undertakings operating in the same market, with its own management and access to resources such as staff, assets and finance; and
- there is a lasting change in the structure of the undertakings concerned.

To the extent that the creation of a joint venture constituting a concentration has as its object or effect the co-ordination of the competitive behaviour of undertakings that remain independent, such coordination will also be subject to the criteria laid down in Article 5 (1) and (3) of the national Competition law and Articles 101 (1) and (3) of the Treaty on the Functioning of the European Union (TFEU) with a view to establishing whether or not the operation is compatible with a normal competitive environment.

In making this appraisal, the RCC shall take into account in particular whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighboring market closely related to this market, whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

## **2. Minority shareholdings and current merger control regime**

The basis for applicability of the Romanian Merger Regulation to minority shareholdings lies in the concept of control whereby control, according to art. 10(5) of Competition Law is considered to be conferred when an undertaking exercises directly or indirectly “decisive influence” over another undertaking. So, the key issue for the analysis of minority shareholders’ participation in the companies’ capital is that the mere possibility to exercise decisive influence triggers the applicability of Romanian Merger Regulation.

Therefore, the acquisition of a minority shareholding that ensures legal or de facto control over an undertaking triggers the requirement for a notification to the Romanian Competition Council (hereinafter referred as RCC). In such cases, the turnover thresholds laid down in the Competition Law have to be also met.

The RCC’s practice is in line with the Romanian Regulation on economic concentrations and ECMR which makes a clear distinction between minority shareholdings for passive financial investment and minority shareholdings that allow some form of control. The latter type of minority shareholdings that triggers the notification obligation under the Romanian merger control regime was presented above.

As regards the passive financial investment, it is not deemed to be considered a concentration if the minority package of shares was acquired with a view to be resold, provided that the minority shareholder does not exercise voting rights in respect of those shares with a view to determining the competitive behaviour of the respective undertaking or provided that the minority shareholder exercises such voting rights only with a view to preparing the disposal of all or part of those shares and that any such disposal takes place within one year of the date of the shares’ acquisition. That period may be extended by the Romanian competition authority on request where the minority shareholder can show that the disposal was not reasonably possible within the period set.

The Romanian legislation in the area of competition does not contain specific provisions regarding the interlocking directorates.

## **3. Enforcement of current legal tools to ensure and monitor that minority capital participations of the undertakings and interlocking directorates in competing companies are not conducive to competition concerns**

### ***3.1 Ex-ante intervention of RCC, in virtue of its national merger control legislation***

A current legal tool in the hand of RCC in order to ensure and monitor that minority capital participations of the undertakings involved in a concentration and interlocking directorates in competing companies are not conducive to competition concerns consists in the fact that they are included in the overall assessment of the economic concentrations.

In this regard, it has to be said that a clear sign in this direction has been given by the Romanian Merger Regulation in its Notification Form, which fully complies with the consolidated version of the Regulation 802/2004 implementing the EC Merger Regulation amended by Commission Regulation (EC) No 1033/2008(Section IV of Form CO).

Thus, section 4 of the Romanian Notification Form states that “for each of the parties to the concentration provide a list of all undertakings belonging to the same group. This list must include: [...] a list of all other undertakings which are active in affected markets in which the undertakings, or persons, of the group hold individually or collectively 10% or more of the voting rights, issued share capital or other securities; a list [...] of the members [...] of management who are also members of the boards of management or of the supervisory boards of any other undertaking which is active in affected market”.

This requirement means that on one side, minority participations below 10% of the capital are considered by RCC of pure financial interest and, on the other side, that all the other participations might constitute aggravating circumstances in the assessment of the anti-competitive effect of the concentration.

Yet, divestiture of minority shareholdings in competitors outside the transaction itself have been offered as remedies and accepted by the RCC only in a merger case involving the acquisition a sole control that took place on the oil market. This commitment served to remove structural links which could have led to the coordination of the commercial behavior of the merging company and its rival post-merger. Therefore, orders of divestiture can extend to a pre-existing minority shareholding in the target company only if it is considered as a part of the concentration under scrutiny.

### **3.2 *Ex-post intervention of RCC through the enforcement of the rules regarding anticompetitive practices***

There are particular circumstances when even without conferring control rights over a company (the power to exercise decisive influence according to the Romanian Merger Control Regulation), minority share acquisitions could still have an effect on competition. This is particularly so in oligopolistic markets, where the anti-competitive effect of various forms of structural links may be particularly visible.

Yet, only in one bid-rigging case related to privatization of a state owned company active in the field of marketing of both industrial products and food products, the fact that one of the parties to the cartel had minority shares in a competitor and presence of other structural and even personal links between the parties to the agreement was regarded as a facilitating factor in infringing the Competition Law.

That means that RCC acknowledges that, in particular situations, operations involving minority shareholdings, have the potential to lessen competition and even can facilitate a horizontal anticompetitive agreement.

## **4. RCC’s position on possible remedies in current legal framework and in a future regulation to better counteract harm to competition occurring in particular circumstances from acquisitions of non-controlling minority shareholdings**

On the basis of the little experience gained by RCC with respect to the application of antitrust rules to minority share acquisitions, the instructive OECD Competition Committee’s Secretariat outputs issued on the occasion the 2008 WP3 Roundtable on Minority Shareholdings and the established economic theory on this issue, RCC is of the opinion that the application of an ex-post control would require the evaluation of the potential anti-competitive effects stemming from minority share ownership in an investigation procedure, either concerning an alleged abuse of dominant position case or an alleged anticompetitive agreement or concerted practice. In such a scenario, apart from the difficulties inherent to the management of any antitrust case, the burden of the competition authority would be greater. This is due to the fact that the competition authority would have to prove on the one hand, the existence of the causality relationship between the minority shareholding and the respective practice and its effects, on the other hand.



To make such a minority shareholding acquisition subject to ex-ante intervention of the competition authority (treating it like a merger), throughout the EU, there are at least two options under a legal perspective argued in the doctrine as proper tools for addressing such an issue. The first option looks thoughtfully at a shift from the decisive influence concept framing the current merger control regime at national and community level to the material influence concept used in UK merger control regime, system featuring voluntary notifications of transactions. The second option contemplates to the introduction of an additional well-reasoned threshold above which minority shareholding acquisitions would become subject to a prior notification obligation, as it happens in German or Austrian law.

To ensure a balance between the concern of a competition authority to assess at large cases of impact over the market and the need to create tools for addressing the particular circumstances under which the acquisition of non-controlling minority shareholdings give rise to negative market effects, RCC is of the opinion that a capital share-based threshold above which the notification obligation would arise, for instance, of 25% might be considered more appropriate. Extending the current ex-ante notification system to acquisitions of non-controlling minority shareholdings would offer a competition authority the possibility of monitoring the particular situations triggered by the presence of a natural person or legal entity in the shareholding of rival undertakings.

At the same time, this option features the advantage of ensuring on the one hand, legal certainty for the business environment and of preventing increased administrative burden on the RCC, on the other hand as far as the notification of mergers exceeding certain thresholds is mandatory at national and community level.

RCC contemplates also to the possibility of limiting certain special rights that the minority shareholders acting in rival undertakings are benefiting from. However, such a measure could only be adopted after a careful analysis of its market impact. This could be done by introducing a ban either on the acquisition of minority shares in rival undertakings or on interlocking directorates (prohibition to acquire functions or to serve in corresponding positions in the competitors' boards).

In this way, the chance of shareholders to have access to information regarding the competitive behaviour of the undertakings where they hold minority shares would be diminished. In such a case, the respective shareholders would have to opt for a leadership function only in one of the companies involved. Such solutions would require among other things a correlation between certain similar terms but which have different meaning in various laws (for instance, the term of *significant shareholder*, that of *control* or *group*), as well as the definition of the term *competitor*.

## RUSSIAN FEDERATION

### 1. General provisions

Chapter 7 of the Russian federal law of 26.07.2006 No. 135-FZ "On Protection of Competition" (hereinafter referred as the Law on Protection of Competition) is devoted to issues of state control over economic concentration.

According to this chapter, specific stock (share) transactions, commercial and financial organizations' property transactions, creation and reorganization of economic entities that are carried out both upon a pre-merger or post-merger notification to the antimonopoly authority are subject to state control.

The following transactions are subject to state control<sup>1</sup>:

- 1) acquisition by a person (a group of persons) of more than 25, 50, 75% of voting shares of a Russian joint-stock company;
- 2) acquisition by a person (a group of persons) of more than 1/3, 50%, 2/3 shares of a Russian limited liability company;
- 3) acquisition of more than 20% of the fixed production assets and intangible assets of a management company;
- 4) acquisition of other rights of control in relation to the Russian economic entity (for example, establishment of indirect control, receiving functions of the management company);
- 5) acquisition of more than 50% of stocks (shares) of a foreign legal entity that carries out deliveries of goods to the Russian market.

Thus, the transactions listed above will require a pre-merger or post-merger notification to the antimonopoly authority only if a planned transaction corresponds to one of the established criteria of "fineness" transactions, namely:

- a) the total sum of assets of the group of the purchaser and the group of the acquired society exceeds seven billion rubles (233,3 mln. US\$) [thus the cost of a group of the acquired society should exceed two hundred fifty million rubles (8,3 mln. US\$)];
- b) the total proceeds of the specified persons from realization of goods exceed ten billion rubles (333,3 mln. US\$) [thus the cost of the acquired group should also exceed two hundred fifty million rubles (8,3 mln. US\$)];
- c) one of the persons stated above is included in the register of the economic entities having a share in the market of certain goods in a size of more than 35% (further - the register).

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<sup>1</sup> Article 28 of the Law on Protection of Competition.

If the cost of assets of participants of transactions doesn't exceed the specified sizes, transactions can be made without pre-notification but a post-merger notification to antimonopoly authority is required.

Besides, in some cases when conditions of "finessness" of actions made is ensured (for example, seven billion rubles for the cost of assets (233,3 mln. US\$)) reorganization of the commercial organizations (merge, accession, and also creation) is subject to the state control<sup>2</sup>.

## **2. Acquisition of shares**

Acquisition by a person (a group of persons) of more than 25, 50, 75 percent of voting shares of a Russian joint stock company (more than 1/3, 50 percent, 2/3 shares respectively– for a limited liability company) is performed both upon a pre-merger notification or a post-merger notification (in the presence of terms established).

The acquisition of shares (stocks) of economic entities means acquisition of the right of ownership as well as the right to manage shares (stocks) of Russian economic entities on other grounds, such as on the basis of a property trust management contract, contract of agency etc.).

For example, a pre-merger notification is required for concluding a share pledge agreement, if as a result of its conclusion the pledgee receives the right to manage voting shares of this entity (by means of exercising of the voting right at the general shareholder meeting).

It is worth noting that if the person does not acquire the right to manage shares at its own discretion (to manage differently than strictly according to instructions of shareholders), such entity is not an acquirer of shares within the meaning of the antimonopoly legislation and its transactions do not require a pre-merger notification.

## **3. Acquisition of a minority shares**

As it was said above, acquisition of more than 25 % shares (stocks) of an entity is subject to a pre-merger notification to the antimonopoly authority. Acquisition by an entity of 25 and less percent of shares does not require a pre-merger notification.

Thus, it is necessary to keep in mind that the Law on Protection of Competition extends on cases of acquisition of shares by a group of persons which is considered in the antimonopoly law as the single economic entity<sup>3</sup>.

In connection with this, acquisition of the minority shares may require a pre-merger notification to the antimonopoly authority if other members of a group have participation shares in the target company and such a group receives the right to manage the respective quantity of voting shares of the company acquired (more than 25, 50, 75 % of shares).

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<sup>2</sup> Article 27 of the Law on Protection of Competition.

<sup>3</sup> A group of persons is the aggregate of individuals and (or) legal entities that are united by a specific relations of dependency. Features of reckoning persons among one group of persons is specified by Art. 9 of the law on protection of Competition. For example, a group of person is an economic entity and an individual or legal entity if such a person has respectively the right to manage more than 50% of shares(stocks) of such an economic entity or carries out functions of an executive body of such an economic entity.

#### **4. Acquisition of assets**

Receiving by an economic entity (a group of entities) of the rights of ownership, use or possession of more than 20 percent of fixed production assets or intangible assets of another economic entity is performed both with a pre-merger notification or with a post-merger notification to the antimonopoly authority (in the presence of terms established).

Acquisition of fixed production assets and exclusive rights to the results of intellectual property, provided the volume of transferred property is over 20 percent of the balance value of fixed production assets and non-material assets of a transferring person, requires a prior consent.

Thus, only acquisition of assets located within the territory of the Russian Federation is subject to a pre-merger notification. The exception is specified for acquisition of fixed assets in the form of the land plots, objects of incomplete construction and non-industrial purpose.

#### **5. Joint ventures**

The Law on Protection of Competition does not have a special norms regulating creation of joint ventures.

At the same time, creation of a new commercial organization or acquisition of a specific participation share in the existing enterprises requires a pre-merger notification to the antimonopoly authority (in the presence of terms established).

When establishing a commercial organization (Art. 27 of the Law on Protection of Competition) a pre-merger notification is required if the cost of assets of participants exceeds 7 billion rubles (233,3 mln. US\$) (or their total proceeds from realization of goods exceed ten billion rubles (333,3 mln. US\$), authorized capital stock of a created organization is paid with shares (stocks), property of another commercial organization and in relation to such a property a created organization acquire the rights specified by Art. 28 of the Law on Protection of Competition (acquisition of more than 25, 50, 75 % of shares; acquisition of more than 20 % of the fixed production assets and intangible assets. In case an authorized capital of the created organization is paid by cash assets, a pre-merger notification is not required.

In relation to transactions on acquisition of participation shares in the existing enterprises, common provisions on acquisitions of shares (stocks) of commercial organizations is applied.

As it was mentioned above (see items 1, 2), acquisition of more than 25, 50, 75 % of voting shares of the Russian joint-stock company is subject to a premerger notification to the antimonopoly authority or more than 1/3, 50 %, 2/3 shares in the authorized capital of the public limited company (in case there are specified conditions on cost of assets, inclusion in register of participants of transactions).

#### **6. Exemptions**

The Law on Protection of Competition specifies a number of exemptions of approval by the antimonopoly authority of transactions that are subject to state control.

The following transactions are excluded from the list of pre-merger notification:

- 1) persons entering into one group of persons on the basis of possession of more than 50 actions (shares) in dependent entities;

- 2) in order provided by the Law on protection of competition for carrying out of "intra group" transactions (Article 31);
- 3) on the basis of acts of the President of the Russian Federation or acts of the Government of the Russian Federation.

The first basis specifies an exception for cases of carrying out of "intra group" transactions between parent and subsidiaries companies or companies which are under control of one person.

So, disposal, transfer of shares of societies within one group of persons won't require a pre-merger notification if such transactions are made between holding and subsidiaries companies, and also between persons of more than 50 % shares of which the supervising person (the participant of group) has the right to dispose directly or indirectly. A notification on carrying out of such transactions has to be submitted to the antimonopoly authority.

The second basis for "release" of transactions from a pre-merger notification is their carrying out according to the order for "intra group" transactions provided by the Law on Protection of Competition.

In case no less than one month prior to execution of transactions the list of the persons entering into one group has been presented to the antimonopoly authority, and as of the moment of transactions such a list has not been changed, execution of these transactions by participants of a group can be made without a pre-merger notification but a post-merger notification to the competition authority is required.

Besides, as it was mentioned, a pre-merger notification isn't required if transactions are made on the basis of acts of the President of the Russian Federation or acts of the Government of the Russian Federation.

## **7. Changes to a merger regime**

Amendments introduced into the Federal Law «On Protection of Competition» by the so-called «Third Antimonopoly Package» came into force in January 2012.

These amendments involve, inter alia, the sphere of control over economic concentration.

In accordance with the amendments introduced, the requirement specifies a pre-merger notification of the antimonopoly authority if an acquisition makes more than 50% of stocks (shares) of the foreign legal entities carrying out deliveries of goods to the Russian market in volumes that can influence on competition, namely the foreign organizations which carries out deliveries of goods to the territory of the Russian Federation in the sum of more than one billion rubles (within a year preceding the date of the planned transaction).

Moreover, the law bill on exception of the necessity to submit to the antimonopoly authority post-notifications on transactions (actions) of economic concentration (acquisition of shares, property, merger, joining of the commercial organizations) is being considered in the State Duma of the Russian Federation (the lower chamber of the Russian Parliament).

The bill has been developed for the purposes of improvement of the antimonopoly regulation and reduction of administrative burdens on participants of business activity.

Adoption of the aforementioned law will considerably reduce the administrative burdens on medium-sized business and allow the competition authority focusing on major transactions (actions) that can significantly affect competition which will encourage rising of antimonopoly effectiveness in Russia.

## SLOVAK REPUBLIC

### 1. Introduction

Although the concept of "merger transaction" is relatively stable and consistently interpreted in the Slovak competition law, there are cases, where new questions arise and it is necessary to find new solutions.

Currently, the Office is dealing with increased number of cases, where the concept of control does not fully reflect the factual reality of the undertaking. This may lead to situations where the transaction is not subject to control by the Office, or the Office assesses the transaction, but it does not catch the real economic power of parties to the concentration.

### 2. Legal framework

Merger control, as well as other areas of competition law, is substantially governed by Act No. 136/2001 on Protection of Economic Competition (the Act). The relevant authority for merger control (and competition law in general) is the Antimonopoly Office of the Slovak Republic. The legislation is to a great extent in line with the European law.

#### 2.1 *Definition of concentration*

Pursuant to the Act concentration means the process of economic combining of undertakings through:

- a merger or amalgamation of two or more separate undertakings (including mergers and amalgamations pursuant to special legislation, as well as 'economic mergers', i.e., situations whereby the undertakings concerned become economically combined, while retaining their legal independence, especially in the case of joint economic management); or
- the acquisition of direct or indirect control by an undertaking of several undertakings over another undertaking or part of another undertaking or undertakings, or
- the creation of a joint venture controlled by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity (full-function joint venture).

According to the Act, 'control' is the ability to exercise a controlling influence on the activities of an undertaking, especially by means of:

- ownership rights or other rights to the undertaking or part thereof; and
- rights, contracts or other facts allowing the exercising of a controlling influence on the composition, voting or decisions taken by bodies belonging to the undertaking.

## **2.2 Acquisition of shares and acquisition of assets**

The Act does not establish any „objective criteria“ such as percentage thresholds or value of transaction for the definition of certain transactions as mergers.

In line with the concept of control established by the Act non-controlling minority interests shareholding is caught by our merger control regime only if it causes control on *de iure* or *de facto* basis (together with other relevant facts).

Also with regard to the Interlocking directorates issue the Office can use this fact only as one of the criteria for establishment of control on *de facto* basis, but has not used it as a sole fact on which the existence of concentration could be based.

Regarding acquisition of assets which do not represent an entire business the Act states the basic rule upon which such transaction is considered as a concentration. The target of the transaction must be the assets based on which turnover is attained.

## **2.3 Joint ventures**

The Act contains special provisions with respect to joint ventures. Concentration also means the establishment of a joint venture jointly controlled by two or more undertakings if the respective joint venture performs all functions of an independent economic entity on a lasting basis, i.e. a full-function joint venture. Within the proceedings regarding this kind of concentration which is aimed at or may lead to coordination of competitive behaviour of undertakings, the Office shall assess such concentration according to Articles 4 and 6 (conditions for assessment of agreements restricting competition and possible exemption, i.e. national equivalents of Art. 101 TFEU). In such a case the Office issues a decision approving a concentration if the concentration does not significantly distort effective competition on the relevant market, mainly due to the creation or strengthening of dominant position and at the same time the coordination of competitive behaviour is not prohibited as agreement restricting competition.

The abovementioned procedure is followed by the Office in case of full-function joint ventures. It means that to qualify any creation of a joint venture as a concentration, the Office firstly needs to deal with its full functionality. In case of not full-function joint ventures, these are not reviewed under the control of concentration but according to the rules relating to agreements restricting competition.

## **2.4 Exemptions**

Under the Act there are some transactions excluded from the definition of a “merger transaction“. A concentration does not arise if banks, branches of foreign banks, other financial institutions or insurance companies, the normal activities of which include trading in securities on their own accounts or on the accounts of others, temporarily acquire securities with a view to reselling them. This exemption only applies if they do not exercise voting and other rights with a view of influencing the competitive behaviour of that undertaking or if they exercise these voting rights only with a view of preparing for the sale of the entire undertaking or part thereof or the sale of securities, provided that this sale is effected within one year of the date of acquisition of the securities. If the disposal is not reasonably possible within this period of time, it may – upon request - be extended by the Office. Further exemptions exist under special laws, for example, regarding the acquisition of control over an undertaking by liquidation trustees under the Commercial Code or by the bankruptcy trustee under the Bankruptcy Act.

The Office is preparing within the amendment of the Act also the amendment of the current provision. It seems necessary to specify also in the legal text that the sale of securities made within one year period must entail real loss of the control on the permanent basis. The current application of this provision is in

line with this explanation. On the other hand some financial institution may try to avoid the control of concentration by buying securities and selling them within the one year period but with repeated acquiring of the same securities in some days after a purely formal selling. It could happen that such financial institution then obtains and keeps the control over these securities (and over certain undertakings) for a substantially longer period than it is legally exempted.

### **3. Office's case law**

On the following model cases, we would like to illustrate some situations we have encountered in our practice.

#### **3.1 Case A**

The Office assessed a merger case of competitors A and B - acquisition of sole control of undertaking A over the undertaking B. Before the concentration undertaking A had a minority shareholding in B. This minority shareholding was acquired by several transactions. We were not able to identify the existence of control of undertaking A over B based on the minority shares. Although the Office suspected that A influenced the conduct of an undertaking B based solely on the existence of minority shares, we did not prove it.

It was difficult to prove negative effects of concentration in the proceedings as certain changes in the market have occurred probably already in connection with the minority share of A in B before the merger, but we could not prove a direct link between these changes and the minority shareholders entry. Given that data were not available on territorial activities of those undertakings in SR from the period before obtaining a minority share of the undertaking A in B, it was not possible in the present case to take into account the effect of minority shareholder's entry. Also, the existence of minority interests of undertaking A in B could contribute to market cartelisation, which is generally prone to such behaviour, and it is difficult to assess the impact of concentration on such a market - mainly to prove the negative impact of the merger. Despite the above mentioned, we were able to prove the negative impact of this concentration in this case.

#### **3.2 Case B**

Recently, the Office has dealt with the concentration upon which one company A has gained control over several companies. As the acquirer – company A was relatively newly established company, the Office tried to determine who carries out the control over the acquirer for the precise determination of concentration, finding out what is the real economic power and economic group of the acquirer and for the precise assessment of concentration. There were several minority shareholders in this company (some of which different forms of investment companies established abroad in which real ownership structure is not possible to find out). Based on the minority shareholding and the voting rights rules established within company and only weak evidence with regard to personal connection among parent companies it was not possible to conclude that there is exclusive or joint control over the acquirer. As the acquirer has been a newly established company it was not possible to deduce the existence of de facto exclusive or joint control based on the existence of strong common economic interests, for example there were only few sessions of statutory and management bodies and the Office could not deduce the existence of long period common voting of certain parent companies.

Although we had indication that the real acquirer is one or several of parent companies, we were not able to prove it purely on the base of minority shareholding in connection with other facts of the case. From the matter of fact point of view the Office had a declaration in the name of the acquirer that the



business of its parent companies is not even similar to that obtained in the concentration. From the competition point of view we could conclude the case with the approval.

### **3.3 Case C**

The concentration was notified to the Office as an acquisition of indirect joint control of two individuals through company A controlled jointly by them. During the proceedings they changed corporate documents of the company A and this company became solely controlled by one individual. As a result, the Office has closed the proceedings as turnover criteria were not fulfilled. We had indication, that this change was associated with proceedings, that the concentration was not assessed by the Office but according to our law we had to close this proceedings.

## **4. Conclusion**

The abovementioned examples have shown us, that wider definition of concentration would help in certain cases. Although from the above cases the problem from the competition perspective has not been identified, it could serve as an example that sometimes criteria upon which the existence of control is judged are insufficient.

If we can ground the existence of control/or the existence of concentration purely on certain minority shareholding, the Office could avoid or at least lessen time consuming investigation about the existence of de facto control. However, it is necessary to consider the additional costs and uncertainty associated with such a solution.

Despite the abovementioned examples, however, we are not yet at a stage when we would propose any changes to the wording of the Act, especially with regard to the minority shareholding issue. In particular, the experience of other competition authorities may be beneficial for us to find potential solutions in cases, but also considering possible legislative changes.

## SOUTH AFRICA

### 1. Background

Section 12 of the Competition Act, No. 89 of 1998 (“the Act”) as amended, provides that “a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.” The Act empowers three bodies to scrutinise mergers:

- (i) The Competition Commission (“the Commission”) is the investigation and enforcement agency. All mergers must be notified to the Commission. The Commission must be notified of all mergers and acquisitions if the value of the proposed merger equals or exceeds R560 million (calculated by either combining the annual turnover of both firms or their assets), and the annual turnover or asset value of the transferred/target firm is at least R80 million. These mergers are classified as intermediate and the Commission is empowered to decide whether or not to approve such transactions. If the combined annual turnover or assets of both the acquiring and transferred/target firms are valued at or above R6.6 billion, and the annual turnover or asset value of the transferred/target firm is at least R190 million, the merger must be notified to the Commission as a Large merger.<sup>1</sup> For transactions that are classified as Large, the Commission conducts the merger investigation and submits a Recommendation to the Competition Tribunal (“the Tribunal”) for decision making;
- (ii) The Tribunal adjudicates Large transactions and reviews decisions of the Commission in intermediate mergers;<sup>2</sup>
- (iii) The Competition Appeals Court (“the CAC”) adjudicates the decisions of the Tribunal upon a review application being brought.

The ensuing sections provide an insight into the South African approach and perspective for each of the areas as per the brief.

### 2. Definition of transactions for the purpose of the merger control review

The Act provides two jurisdictional prerequisites that render a merger transaction subject to a mandatory scrutiny of the competition authorities. Once a transaction meets the definition of a merger it should be notified if it meets the financial thresholds. If does not meet the financial thresholds it should be notified only if the Commission requires the merging parties to do so.

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<sup>1</sup> Section 11(5) a to c of the Competition Act set out the classification of mergers and acquisitions (Small, Intermediate or Large) in terms of the General Notice 216 of 2009.

<sup>2</sup> See section 16 of the Act.

The Act does not expressly and exhaustively<sup>3</sup> define control because it is said to be “*too elastic a notion to confine to a closed list*”<sup>4</sup>. The concept of control is more fully canvassed in our competition law jurisprudence. These include, as stated in section 12 (2) of the Act, where a person-

- (a) beneficially owns more than one half of the issued share capital of the firm;
- (b) is entitled to vote a majority of votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;
- (c) is able to appoint or to veto the appointment of a majority of the directors of the firm;
- (d) is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No.6 1 of 1973);
- (e) in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
- (f) in the case of a close corporation, owns the majority of members’ interest or controls directly or has the right to control the majority of members’ votes in the close corporation; or
- (g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

The issue of control is thus significant in merger regulation in South Africa because it is an essential determinant of whether or not a merger that should be notified to the Commission has occurred. The Act envisages a merger to occur either by the acquisition of direct or indirect control. It therefore follows that section 12 of the Act engenders a broad interpretation of what amounts to control in order to, *inter alia*, ensure that the competition authorities examine the widest possible range of potential merger transactions.<sup>5</sup> This may mean that what *prima facie* appears to be a transaction that may not warrant notification for merger regulation purposes may, upon further analysis, amount to a change in control that would warrant merger notification. Hence, a more detailed assessment of a proposed transaction may be required in certain instances in order to establish whether a mandatory notification would be required.

## **2.1 Acquisition of minority interest**

The CAC has held that it is necessary that control in terms of the Act be interpreted but this will require a case-by-case analysis, in terms of merger transactions. Section 12(2)(g) recognises that it is possible for a firm which does not have *de jure* control for example as a result of its majority shareholding in a firm to have the ability to control the firm as if it were a *de jure* controller. The jurisprudence has interpreted this provision to mean that it is possible for a firm to be subject to multiple forms of control at the same time. Therefore, although a shareholders’ agreement may be drafted so as to reflect that, *de jure*,

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<sup>3</sup> *Bulmer SA (Pty) Ltd & Seagram Africa (Pty) Ltd v Distillers Corporation (SA), Stellenbosch Farmers Winery Group (Pty) Ltd & the Competition Commission* (April 2001) Case No. 94/FN/Nov00.

<sup>4</sup> *Ethos Private Equity Fund IV and The Tsebo Outsourcing Group (Pty) Ltd* Case No. 30/LM/Jun03 at page 8, paragraph 31.

<sup>5</sup> *Distillers Corporation (South Africa) Limited & Stellenbosch Farmers’ Winery Group Limited v. Bulmer (SA) (Proprietary) Limited & Seagram Africa (Proprietary) Limited* Case No.: 08/CAC/MAY01 at page 24.

there is no single controlling mind, an incisive analysis of the *de facto* position may lead to an opposite conclusion. Therefore, before concluding that minority shareholding does not confer control, an extensive analysis is required. The Commission in a recent merger demonstrated that a 7.6% shareholding confers control after an in-depth evaluation of the available information. It studied the information pertaining to various agreements, the voting pool arrangements, board minutes, and strategic documents detailing how decisions are taken.

### 3. Acquisition of assets

In terms of Section 12 (1) of the Act, a merger may occur in any manner including: (i) purchase or lease of the shares, interest or assets of the other *firm* in question; or (ii) amalgamation or other combination with the other *firm* in question. Consequently, a transaction involving the acquisition of assets such as a mining license, debtors' book/customer list, and property, would be required to be notified to the Commission should they meet the notification thresholds. In the case of assets, that asset must form part of the business of the target firm or should be an asset, the acquisition of which would contribute to the productive capacity of the acquiring firm.<sup>6</sup> In the case of the property transaction, notification of an acquisition is required in South Africa irrespective of whether the acquiring firm is replacing the business activities of the target business. Therefore, in instances where an acquiring firm is purchasing a business operation from one party and the land/property on which that business is operating from is owned by another party may constitute two separate notifications.

### 4. Joint ventures

The application of merger control provisions to joint venture transactions is not a straightforward matter. Furthermore, the growing complexity of these transactions makes it difficult for the competition authorities to exempt them from the application of the Act. It is for these reasons that the Commission has issued a Practice Note in 2009<sup>7</sup> that outlines the Commission's approach to joint ventures.

The Act does not expressly mention joint ventures and it would not be appropriate or fair to business to interpret the definition of merger to include transactions that, in their view, the legislature did not intend to include in the Act. The Act applies to all economic activity within, or having an effect within, the Republic. Therefore, all joint ventures, in whatever form, which take place within the Republic or outside the Republic but having an effect within the Republic, clearly fall within the ambit of the Act. The question would therefore be whether such joint ventures constitute mergers in a manner contemplated in the Act.

As stated earlier, a merger, in terms of section 12 of the Act, occurs when *one or more* firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm. A firm is defined in section 1(ix) of the Act and includes a person, partnership or a trust. The words "*one or more*" firms in the definition clearly indicate that a merger may involve the acquisition of either *sole or joint control*.

The merger control provisions should be understood to be applicable to joint venture transactions. However, not all joint venture transactions will constitute a merger and this will depend on how such transactions are structured.

Since the merger provisions of the Act are concerned with a change of control, only those joint ventures that result in such a change of control would be notified. However, those that do not result in a

<sup>6</sup> The Competition Commission v. Edgars Consolidated Stores Limited and Retail Apparel (Proprietary) Limited Case No.: 95/FN/DEC02 at page 7.

<sup>7</sup> <http://www.compcom.co.za/practice-notes/favicon.ico>.

change of control *may fall within the ambit of Chapter 2 of the Act* that deals with restrictive practices. We use the following examples to illustrate the concept of joint ventures:

Where two or more firms jointly create a separate entity in which they jointly exercise control while remaining independent, the creation of such an entity on its own would not amount to a merger, as none of the parties would be acquiring control over the other's businesses. There would be no change of control over any of the firms or businesses, as the creation of the joint venture would not affect their independence with respect to the control structure.

However, the situation would be different if the parties to the joint venture transfer assets or interests into the newly created entity. In some instances, a SPV is created, which then acquires certain divisions or businesses of parties to the joint venture. The parties to the joint venture therefore cease to operate their independent businesses in respect of the transferred divisions and operate them through the newly created entity. This technically and factually results in the parties to the joint venture merging their divisions or businesses into one operation. On the basis of the transfer of interests, assets or business into the joint venture, the transaction in question would constitute a merger contemplated in terms of section 12 of the Act. The joint venture company will be regarded as the acquiring firm while the specific assets or businesses being acquired would be the target firms.

The competition authorities in South Africa recognise that it may be necessary and beneficial for companies or corporate institutions, to enter into strategic alliances or form strategic co-operatives or joint ventures. It is therefore important that the competition authorities are vigilant in order to ensure that parties do not structure transactions in a manner that will evade the provisions of the Act.

## **5. Exemptions**

### **5.1 Risk mitigation**

In the ordinary course of business, banks mitigate the inherent risk involved in money lending by taking security from their borrowers. A security interest in an asset is granted to the financier, who acquires the asset in the event of default by the borrower. As risk mitigation, financial transactions result in the acquisition of an interest in the assets or the business of another company at the time of sale and/or upon default by such firm. These transactions would technically fall within the ambit of the merger control provisions. The acquiring party will as a result of the said transaction acquire control over the business or part of the business or business assets wherein no control was exercised previously. Where the threshold requirements are met, notification of these transactions would be required.

The definition of a merger in the Act does not distinguish between short and long term acquisitions of assets or controlling interests. In its current form, the definition of a merger covers all transactions irrespective of their temporary nature. It is, however, unlikely that it was the intention of the legislature to include transactions, within the ambit of the merger provisions that occur in the ordinary course of the business of banks. The Commission's approach towards mergers that involves banks for purposes of risk mitigation is contained in a Practice note issued in 2004<sup>8</sup> which reads as follows:

*"...where a bank acquires an asset or controlling interest in a firm in the ordinary course of its business in providing finance based on security or collateral, the Commission would not require notification of the transaction at this point. Similarly, if upon default by the firm the bank takes control of the asset or controlling interest in that firm with the intention to safeguard its investment or on-sell to another firm or person to recover its finance, a notification would not be required*

<sup>8</sup> Competition Commission of South Africa | Practice notes.

*(Par 3). However, if the bank fails to dispose of the assets or the controlling interest within a period of twelve (12) months, notification would be required upon the expiry of the twelve-month period. This twelve-month period commences only when the bank assumes control over the security interest. The expiry of this period in itself will trigger notification of that acquisition if the thresholds are met” (par4).*

The competition authorities in South Africa recognise that there are transactions that are purely financial in nature and occur in the ordinary course of the business of financial institutions registered in terms of the South African Banks Act No. 94 of 1990 (“the Banks Act”)<sup>9</sup> and are not entered into with the objective of controlling and/or operating a business. Further, in the case of sale and leaseback transactions, rental in terms of the lease agreement constitute repayment of the finance provided by the bank. The acquisition of the property is generally maintained until the repayments cover the finance outlay of the bank through the initial sale agreement.

Therefore, the acquisition of control over the assets of the firm in the circumstances to mitigate against financial risk and which is maintained on a temporary basis, with the intention to dispose of the acquisition to recoup the initial capital outlay are not treated as merger transactions as under the Act.

## 5.2 **Restructuring**

Transactions occur between wholly-owned subsidiaries such that although there is a direct change of control from one wholly-owned subsidiary to another, indirect control such as that held by the parent or holding company does not change. The Tribunal has recognised that these types of transactions may not trigger the type of change of control as envisaged under section 12 (1) of the Act. The CAC has, however, on appeal of the Distillers matter ruled that: “...*To the contrary, section 12(1) makes no express provision for the exclusion of transactions between a company and its wholly-owned subsidiary, from the definition of merger*<sup>10</sup>.” This suggests that even a transaction between a company and its wholly-owned subsidiary, or entities within a single economic entity, may give rise to an acquisition of control within the meaning of section 12(1)(a) of the Act, and is therefore **not exempt** from notification.

The approach adopted by the Commission and Tribunal as a result of this judgement is to treat all internal restructuring transactions that are notified to the Commission as mergers.

## 5.3 **Asset securitisation schemes**

Securitisation schemes involving the sale of the bank’s assets to a Special Purpose Vehicle (“SPV”) (as a going concern) appears to be a sale of income generating assets, and therefore a sale of part of the business of the seller. This sale may therefore constitute a merger as contemplated in section 12 of the Act. The SPV will, as a result of the sale of the concerned assets, acquire control over a part of the business of the seller, which it did not have prior to the transaction. Where the threshold requirements are met, notification of these transactions would be required. The indication that the SPV has no assets except those acquired as a result of the transaction will be considered in the calculation of the annual turnover or asset values of the firms to the transaction for the purpose of determining whether the financial thresholds are met.

Generally, in securitisation schemes, the bank, acting as an originator, would pool assets from its own portfolio. However, it may securitise assets that have previously been purchased from a third party. In the

<sup>9</sup> [http://www2.resbank.co.za/internet/Publication.nsf/LADV/0B2DBBD25565FE0242256D8D00341E9D/\\$File/Banks+Act+1990.pdf](http://www2.resbank.co.za/internet/Publication.nsf/LADV/0B2DBBD25565FE0242256D8D00341E9D/$File/Banks+Act+1990.pdf)

<sup>10</sup> Supra fn 7 at page 25.

latter instance, merger notification may be triggered twice in respect of the same pool of assets, provided the thresholds are met: first, when the bank acquires the pool of assets from the third party and second, when the bank then initiates a securitisation scheme in respect of the same pool of assets.

The definition of a merger under the Act does not allow for the consideration of the rationale or intention behind the transactions nor are these considerations relevant for notification purposes. However, it might not have been the intention of the legislature to include risk mitigation transactions, which are regularly entered into by banks.

Thus, in the application of the Act, consideration ought to be given to transactions that are purely financial in nature and that occur only to mitigate the inherent risks of the ordinary course of the business of financial institutions registered in terms of the Banks Act.

Given the accelerating frequency with which these transactions are occurring, the Commission is likely to be burdened with numerous notifications in instances where there are no real competition and/or public interest concerns. The approach adopted considers the nature and increasing volume of these transactions, the current global economic environment, as well as the approach adopted in other jurisdictions.

Furthermore, cognizance ought to be given to the fact that the SPV is established solely for purposes of executing a transfer of risk. In terms of the South African Reserve Bank Securitisation Notice<sup>11</sup> (“Securitisation Notice”), the SPV may not hold other assets. The limitations imposed on the SPV ensure that it does not enjoy a competitive position. Thus, it is unlikely that the execution of these schemes would have any impact on competition, particularly since the SPV is not intended to be a regular and lasting business entity.

Thus, in respect of securitisation schemes outlined above, the Commission might not require the notification of a transaction where a bank sells or facilitates or sponsors the sale of a portfolio of assets to an SPV, provided that the scheme is executed in compliance with the stipulated conditions in the Securitisation Notice. Therefore, this approach would not apply to any further disposal of the same portfolio of assets. Given that the Securitisation Notice legally defines an SPV, any possible misuse of the Commission’s adopted approach is mitigated by the fact that the SPV may not be used for any other business purposes.

## **6. Changes in the merger regime**

In 2008, the competition authorities recommended an increase in the notification financial thresholds. The recommendation was accepted by the Minister of Trade and Industry and has been in effect since 1 April 2009. The changes were necessitated by the significant economic growth experienced by the economy in the prior years and the recognition by the competition authorities that the vast majority of cases reviewed raised neither competition nor public interests concerns. In addition, the structure of the Commission had remained relatively unchanged whereas merger notifications had increased approximately three-fold from 2001 to 2008.

The new thresholds substantially reduced the number of transactions that had to be notified to the Commission. Small mergers do not require mandatory notification (except where the Commission requires the parties to notify). However, in order to ensure that small mergers that may raise competition concerns did not escape competition scrutiny, the Commission issued a guideline advising the business community of the circumstances when the Commission would require that it be informed and notified of small

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<sup>11</sup> South Africa in Government Notice 1375 published in Government Gazette 22948 on 13 December 2001.

mergers. In brief, the Commission requested parties to inform it of small mergers involving firms that are subject to Chapter 2 investigations and/or that are respondents before the Tribunal in terms of Chapter 2 of the Act. The Commission has informed firms that upon being informed of the transaction, it would request parties to notify the transaction only in circumstances where this was warranted. The Commission believed that by issuing the small merger guidelines, it would mainly review those mergers that are more likely to raise substantial prevention and lessening of competition and/or public interest concerns.





## CHINESE TAIPEI

This report will illustrate the types of transaction for a merger control review, defined in by the Fair Trade Act. A case example is also provided to demonstrate the challenges faced by the Fair Trade Commission in merger definition.

### 1. Merger control regime in Chinese Taipei

The term “merger” is defined under Paragraph 1, Article 6 of the Fair Trade Act (FTA) which sets forth as follows: 1) an enterprise and another enterprise are merged into one; 2) an enterprise holds or acquires the shares or capital contributions of another enterprise to an extent of more than one-third of the total voting shares or total capital of such other enterprise; 3) an enterprise is assigned by or leases from another enterprise the whole or the major part of the business or properties of such other enterprise; 4) an enterprise operates jointly with another enterprise on a regular basis or is entrusted by another enterprise to operate the latter’s business; or 5) an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise.

When a transaction falls within one of the merger types and the scales of parties involved in the transaction meet the threshold, the merger parties are required to file notification to the Fair Trade Commission (FTC). The thresholds of merger notifications are prescribed in Paragraph 1, Article 11 of the FTA: 1) as a result of the merger the enterprise(s) will have one third of the market share; 2) one of the enterprises in the merger has one fourth of the market share; or 3) sales for the preceding fiscal year of the enterprises in the merger exceeds the threshold amount publicly announced by the central competent authority. As for the factors of merger assessment, Paragraph 1, Article 12 of the FTA provides that the central competent authority may not prohibit any of the mergers if the overall economic benefit of the merger outweighs the disadvantages resulted from competition restraint.

To reduce the legal uncertainty in business investment and compliance cost, the FTC plans to base the thresholds solely on the annual turnover. In the latest draft amendment to the FTA, revised Paragraph 1, Article 11 provides that when the sales for the preceding fiscal year of the enterprises in the merger exceeds the threshold amount publicly announced by the central competent authority, a merger notification shall be filed to the central competent authority. This draft amendment is to be reviewed by the Legislative Yuan (Congress).

### 2. Types of transaction subject to merger review

The purpose of pre-merger control under FTA is to secure competitive market structure by means of reviewing potential anti-competitive effects of mergers ex ante. The type of “an enterprise and another enterprise are merged into one” is defined in Subparagraph 1 of Paragraph 1, Article 6 of the FTA because the merged party, an independent entity would be absorbed in terms of economic and legal aspects after merging, and this would lead to a reduction in the number of firms in the market and an increase in market concentration. For those types of mergers described in Subparagraphs 2 to 5 of Article 6, the merger parties would still remain as independent legal entities but one party could exercise influence on the other party through acquisition of shares, assets or other measures that might change the extent of competition. Thus, these transactions shall also be reviewed under merger control regime.

## **2.1 Acquisition of shares**

The Paragraph 1, Article 369-2 of the Company Act provides that a company which holds a majority of the total number of the outstanding voting shares or the total amount of the capital stock of another company is considered the controlling company, while the said another company is considered the subordinate company. However, merger control in the competition law is to prevent the over-extension of enterprises' market power. It is different from the legislative purpose of the Company Act regarding regulations on affiliated companies. In other words, merger parties subject to merger review are not restricted to affiliated companies defined in the Company Act. Share acquisition would trigger merger review if the shares either separately or in combination with shares held by the acquirer reach one-third of the voting shares or total capital of the acquired company.

Pursuant to Paragraph 2, Article 6 of the FTA, shares of the acquirer shall be calculated by adding the share of those companies which are controlled by, controlling or affiliated with the acquirer. In the following circumstances, the relation of being "controlled by, controlling or affiliated with the acquirer" would be established: 1) a company holds more than 50% of the total outstanding voting shares or total capital contributions of another company; 2) a company directly or indirectly controls the personnel, financial or business management of another company; 3) more than half of the executive shareholders, or members of the board of directors are the same between companies; 4) more than 50% of the total outstanding voting shares or capital contributions of the acquiring company and another company are held by the same shareholders or investors; 5) a company that controls another company in accordance with subparagraph 3 and 4 of Paragraph 1, Article 6 of the FTA.

## **2.2 Acquisition of assets**

Asset acquisition defined as one of merger types in subparagraph 3, Paragraph 1, Article 6 of the FTA, which stipulates where an enterprise is assigned by or leases from another enterprise the whole or the major part of the business or properties of such other enterprise. The term "assigned" means that one party, through contractual relation, gains ownership of property rights by another party. The term "lease" refers to a contract whereby the parties agree that one of them one party shall let the other party pay it for using an asset or benefit.

In the case of asset acquisition, "the whole or the major part of the business or properties" is a criterion for assessing whether such acquisition is a merger. When determining if the acquired asset constitutes the major party of business or properties for the target firm, the following factors are generally considered:

1. The proportion of the property or business being assigned to the total value of the assignor's property and business volume would be taken into account.
2. The portion of the property or business being assigned could be separated from the assignor to be viewed as an independent business unit. For example, sales outlets, individual departments of the enterprise, trademarks, copyright, patents and so on.
3. The property or business being assigned is considerably important for production, sales, distribution.
4. The part of the property or business being assigned will increase the economic power of the assignee and enhance its current market position.

### 2.3 *Joint ventures*

As stipulated in Subparagraph 4, Paragraph 1, Article 6 of the FTA, an enterprise which operates jointly with another enterprise on a regular basis or is entrusted by another enterprise to operate the latter's business is also qualified as a merger transaction. The so-called "joint operation on a regular basis" means that enterprises enter into a contract on a lasting basis under which they share all profits and losses in the form of a single entity under the control of a unified management. Profits and losses may be distributed in a ratio of the investment of each party concerned.

With regard to the term "entrusted operation," it denotes that an enterprise (hereinafter referred as the "consignor") entrusts its business entirely to another enterprise, but the business is still operated in the name of the cosigner and its profit and loss would belong to the consigner. In this regard, the consignor has decision-making power to supervise the business operation of the entrusted enterprise, and has to pay it remuneration in return.

The aforesaid joint operation may include joint venture created in a formation of new entity or by jointly controlling an existing entity. The criteria of a joint venture are as follows: 1) the existence of a joint venture contract, 2) the existence of common interests, 3) sharing of profits and losses, 4) rights to operating business jointly, and 5) interdependence between the shareholders operating the joint venture based on the principle of good faith.

At early stage of FTC's establishment, the joint venture created by incorporation of a new entity was not subject to merger review in consideration of law enforcement cost. In 2002, the FTC made an explanation for joint ventures. It clarified no matter when an enterprise invested in an existing or a new entity, the potential restrictive competition effect in the relevant market would be the same. Therefore, the term "another enterprise" used in Paragraph 1, Article 6 of the FTA, would cover not only an existing entity at the time of merging, but also a new entity set up through joint venture. The subparagraph 4 paragraph 1, Article 6 of the FTA has been applied by the FTC in a number of joint ventures recent years<sup>1</sup>.

### 2.4 *Interlocking directorates*

Interlocking directorates may constitute the merger type specified in Subparagraph 5, Paragraph 1, Article 6 of the FTA: "where an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise." The prima facie evidence applied in such a case is whether more than half members of the board in the target will be appointed by the acquirer. The FTC found that the competition might be lessened significantly, particularly for horizontal mergers as a result of interlocking directorates.

The cases of interlocking directorates are not rare in the FTC's law enforcement experience. For instance, the FTC in 2010 launched investigation into an alleged unlawful merger between Cashbox Partyworld Co., Ltd. and Holiday Entertainment Co., Ltd. It found that the Cashbox appointed more than half members of board and supervisors of the Holiday. The FTC concluded that the Cashbox could exercise control over the Holiday by sharing common members of their boards. The phenomenon of

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<sup>1</sup> For example, Chinese Petroleum Corporation and 7 other petrochemical companies set up a joint venture called Kuo Kuang Petrochemical Technology Corporation; Lien Hwa Industrial Corp. set up Blue Sea Industrial Gases Co. with Air Products San Fu Co., Ltd.; Far Eastone Telecommunications Co., Ltd. and 8 other businesses set up an on-line digital music service company; and 5 domestic telecommunication companies and EasyCard Corporation jointly set up a new business to operate a trust service management platform.

interlocking directorates between competitors was viewed as a transaction under merger review in Chinese Taipei.

***Case example: Uni-President Enterprise Corporation and Weilih Food Industrial co., ltd.***

Uni-President Enterprise Corporation (hereinafter referred to as Uni-President) and Weilih Food Industrial Co., Ltd. (hereinafter referred to as Weilih) respectively accounted for 47.7% and 21.2% of the instant noodle market. Uni-President filed a merger notification with the FTC in Apr. 2008 regarding its intention to indirectly acquire through its subsidiary one third of the shares of Weilih. In Sep. 2008, the FTC decided prohibiting the merger.

On Oct. 7 the same year, however, a newspaper reported that Uni-President had obtained 3 seats on the board of directors and 1 seat of the board of supervisors of Weilih in the director and supervisor reelection held on Oct. 6, and the general manager of Uni-President had taken office as the chairperson of the board of directors of Weilih after restructuring. The FTC initiated an investigation and discovered that Uni-President had indeed obtained over half of the seats on the board of directors and board of supervisors and also appointed the chairperson.

The FTC's found that, the Weilih's board of directors indeed had the authority to control business management and the appointment and discharge of important personnel. After obtaining half of the seats on the board of directors of Weilih, Uni-President apparently played an important role in the operation of the said board of directors as well as the appointment and discharge of Weilih's personnel. Uni-President also stated that it had appointed its own personnel to be on the board of directors of Weilih in order to ensure that Weilih would not make investments in other fields and could concentrate on the instant noodle business. This proved that Uni-President was indeed able to affect Weilih's business management decisions by obtaining half of the seats on the board of directors and appointing the chairperson of Weilih. It was impossible that both companies would continue to compete in the instant noodle market. Therefore, Uni-President's de facto control of Weilih had weakened the incentive for either side to compete in the market.

The FTC decided that Uni-President's acquisition of half of the seats on the board of directors and board of supervisors and appointment of the chairperson of Weilih had already complied with the merger type described in Subparagraph 5, Paragraph 1, Article 6 of the FTA. In addition, as the merging enterprises in this case met the merger notification filing threshold, Uni-President should file a merger notification with the FTC in advance as set forth in Subparagraph 3, Paragraph 1, Article 11 of the FTA and Paragraph 1, Article 7 of the Enforcement Rules to the FTA. However, Uni-President failed to do so and therefore violated Paragraph 1, Article 11 of the FTA. As a consequence, the FTC in 2009 ordered Uni-President to remove the personnel concurrently holding positions in Weilih to relinquish the de facto control, and also imposed on Uni-President an administrative fine of NT\$500,000.

Uni-President filed an appeal and administrative litigation but both were initially overruled. However, the Supreme Administrative Court supported Uni-President's request, discarded the original ruling, and remanded the case to the Taipei High Administrative Court for retrial. The original decision was revoked. The main reasons for the ruling stated in the Taipei High Administrative Court's decision as follows: 1) The provision of "an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise" set forth in Subparagraph 5, Paragraph 1, Article 6 of the FTA shall apply only when the influence of the controlling enterprise on the operation or personnel appointment and discharge of another enterprise achieves a level where market competition is (likely to be) endangered. 2) The FTC was not able to prove that Uni-President did control the business operation and personnel appointment and discharge of Weilih. Although the FTC filed an appeal on the grounds that the court had confused Article 6 (merger definition), Article 11 (harm of competition restrictions), and Article

12 (disadvantages of competition restrictions outweighing overall economic benefits) of the FTA, the Supreme Administrative Court dismissed the appeal. The FTC filed for retrial, but the Supreme Administrative Court dismissed retrial request on Mar. 28, 2013.

### **3. Exemption**

Pursuant to Article 11-1 of the FTA, there are four exemptions from filing requirement in the following circumstances: 1) where any of the enterprises participating in a merger already holds no less than 50% of the voting shares or capital contribution of another enterprise in the merger and merges such other enterprise; 2) where enterprises of which 50% or more of the voting shares or capital contribution are held by the same enterprise merge; 3) where an enterprise assigns all or a principal part of its business or assets, or all or part of any part of its business that could be separately operated, to another enterprise newly established by the former enterprise solely; 4) where an enterprise, pursuant to the proviso of Paragraph 1, Article 167 of the Company Law or Article 28-2 of the Securities and Exchange Law, redeems its shares held by shareholders so that its original shareholders' shareholding falls within the circumstances provided for in Subparagraph 2, Paragraph 1, Article 6 herein.

The reasoning behind the aforesaid article is that if a merger involves only the internal adjustment of an economic entity and will not necessarily lead to an expansion of economies of scale or lessening of competition in the relevant market or is a result of mandatory compliance with the Company Act or Securities and Exchange Act because of an enterprise's holding the shares of another enterprise, such a merger is not covered by merger control and, therefore, the concerned parties are given exemption and need not file a merger notification with the FTC.

The FTC added one more exemption in the latest draft amendment of the FTA: when an enterprise makes a reinvestment to set up a subsidiary and holds 100% of the shares or has put up 100% of the capital contributions or makes other types of investment, which have been publicly announced by the competent authority as not requiring filing of merger notifications, it shall be given exemption and need not file a merger notification.



## TURKEY

In Turkey mergers and acquisitions are regulated according to the Act No 4054 on the Protection of Competition (Competition Act) and of Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of Competition Board (Communiqué 2010/4).

Merger control regime aims at regulating the changes in the market structure. However, it may also slow down transaction procedure, resulting in uncertainties and increasing the work load of the competition authorities. Thus, expected benefits from the merger control regime may fall behind of costs associated with it. As a result, the criteria that determine which transactions should be notified plays an important role in reaching an effective merger control regime. In order to bring about an effective merger control regime, notification criteria both securing the notification of concentrations which may result in anti-competitive effects and avoiding uncertainties for undertakings are needed.

### 1. Acquisition of shares

In order to grasp expected benefits from merger control regime and minimize costs of merger notification process for the undertakings and competition authorities, it is necessary to design a notification system that covers mergers and acquisitions resulting in competitive concerns as much as possible. That is, in determining which transactions will be subject to notification, transactions which are likely to cause changes in conduct of the undertaking in the market should be taken into account. In doing so, “acquisition of control” and “decisive influence” concepts should be employed.

According to Article 5 (1) of the Communiqué 2010/4, a concentration is deemed to arise where a change of control in the undertakings concerned occurs on a lasting basis<sup>1</sup>. The Communiqué 2010/4 provides in Article 5 (2) that control occurs through instruments which allow exercise of decisive influence over an undertaking<sup>2</sup>.

Control can be acquired through rights, contracts or other instruments and in assessing whether a transaction causes acquisition of control may require a comprehensive analysis of the transaction which may not always be based on objective criteria. As a result, employing “acquisition of control” concept in determining whether notification is required, may cause -to some extent- legal uncertainty. On the other hand, using objective criteria like percentage thresholds or value of transaction, may cause notification of too many transactions which are unlikely to raise any competitive concerns.

In order to provide legal certainty, control and decisive influence concepts should be clearly defined. Competition authorities’ are expected to guide undertakings about these concepts through their regulations

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<sup>1</sup> In *Babil* (30.10.2008; 08-61/998-390), TCA considered leasing of a ready-mixed concrete plant for five years to constitute a merger transaction as five years was evaluated to be a sufficient time period to exercise decisive influence in ready-mixed concrete market.

<sup>2</sup> In one case (20.02.2013; 13-11/163-85), a joint bidding agreement which did not include any transfer of shares was considered to constitute a merger transaction by TCA as the parties agreed that both parties would have veto rights about joint venture’s annual development plan, adaptation of the budget, decisions concerning the development of products and pricing.



and decisions. Being aware of that fact, Turkish Competition Board is on the verge of publishing Guidelines on Cases Considered as a Merger or an Acquisition and Concept of Control which explains concept of control, person or undertaking acquiring control, means of control, object of control and change of control on lasting basis.

Turkish example provides some insights about the role of acquisition of control concept on creating uncertainty in the notification process. In 2010, while 7 % of all transactions notified to the Turkish Competition Authority (TCA) were out of the scope of merger control legislation, the ratio decreased to 6 % in the following year. That is, statistics of 2010 and 2011 indicate that acquisition of control concept does not cause too much uncertainty in determining whether a transaction has to be notified to the TCA.

According to the Communiqué 2010/4, acquisition of minority shares that do not confer an outright right to control the undertaking cannot be regarded as an acquisition which has to be notified. On the other hand, acquisitions of minority shareholdings falling short of ensuring a change in control can be examined under Articles 4 and 5 of the Competition Act prohibiting anti-competitive agreements, concerted practices and decisions, and providing exemption conditions for anti-competitive conduct respectively. As a result, not considering acquisition of minority shares' as an acquisition does not lead to a problem in Turkish merger control regime. And thus, TCA does not have any plans to deal with this issue. On the other hand, expanding the definition of a merger transaction to cover minority shareholdings may cause too many notifications which do not raise any competitive concerns and transaction costs for firms and misallocation of competition authority resources without any enforcement benefits.

Before the amendment of the Communiqué 2010/4 on February 1, 2013, notification was not required for transactions without any affected market<sup>3</sup> except for joint ventures, even if they exceeded the notification thresholds. Affected market test aimed to eliminate notification requirement for transactions which did not raise any competitive concerns. However, affected market test required undertakings to define relevant market(s) and make comprehensive analysis of the transaction in order to decide whether the transaction resulted in an affected market and caused uncertainty in determining whether a transaction had to be notified. For example, some undertakings preferred to notify transactions without any affected market<sup>4</sup>. As "affected market" test did not provide the expected benefits, it was abandoned in 2013. After the amendment, all merger transactions which exceed notification thresholds have to be notified without considering whether they raise competitive concerns or not.

Apart from previous discussions, it should be noted that according to the Communiqué 2010/4, establishment of interlocking directorates that do not confer an outright right to control the undertaking is not considered as a merger transaction. Interlocking directorates may be reviewed under rules on anti-competitive agreements.

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<sup>3</sup> See paragraphs 28 and 29 of the Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions which provides that "*Affected market indicates horizontal and vertical relations between relevant product markets. Within this framework, the fact that there is a relevant product market where the activities of the parties overlap horizontally or vertically fulfills the condition of the existence of an affected market provided that at least one party operates in Turkey ... Horizontal relationship indicates the overlap in the same level where at least two of the parties are commercially active in the same product market while vertical relationship indicates the cases where at least one of the parties is commercially active in the downstream or upstream market of any product market in which another party operates.*"

<sup>4</sup> In 2011, TCA received 13 such notifications.

## 2. Acquisition of assets

According to Article 5 (1) of Communiqué 2010/4, the acquisition of direct or indirect control over all or part of one or more undertakings is considered as a merger or acquisition. In this regard, the object of control can be some of the assets of undertakings. The acquisition of control over assets is considered under rules of on mergers and acquisitions if the transaction involves assets to which a market turnover can be attributed. The transfer of customer lists and intellectual property rights are also considered as covered transaction if those assets constitute a business with a market turnover.

For example, in *Mudurnu*<sup>5</sup>, TCA assessed whether acquisition of a trademark constitutes a merger transaction. In its decision, TCA concluded that the trademark formed the basis of marketing activities of the undertaking and played an essential role in sales and acquisition of the trademark constituted a merger transaction. In another case<sup>6</sup>, acquisition of customer list and employees of an undertaking operating in freight forwarder was considered to constitute a merger transaction by TCA.

Moreover, in *Migros*<sup>7</sup>, acquisition of rental contract of three retail stores was considered to constitute a merger transaction by TCA as in organized retail market store space is crucial to operate in the market.

## 3. Joint ventures

Article 5 (3) of Communiqué 2010/4 provides that formation of a joint venture which would permanently fulfill all of the functions of an independent economic entity shall constitute a merger transaction. Therefore, two conditions must be fulfilled in this regard: (a) an acquisition of joint control by two or more undertakings and (b) full-functionality.

A joint venture will be fully functional if it performs the functions normally carried out by an undertaking operating on the same market in which the joint venture operates. Also a joint venture must be formed for a long enough duration to bring about a lasting change in the structure of the undertaking concerned, in order to constitute a merger transaction.

In one case<sup>8</sup>, two undertakings<sup>9</sup> operating in manufacture and distribution of vehicle tires agreed to create a joint venture which would also manufacture and distribute vehicle tires. The Competition Board examined whether the joint venture fulfilled the full-functionality criterion. Following the transaction both parent companies would continue to operate in vehicle tires market, the joint venture would supply its goods in Turkey only to original equipment manufacturers, the price of the products produced by the joint venture would be determined by the parent companies according to a formula, products produced by the joint venture would be distributed in Turkey by one of the parent companies. The Competition Board concluded that the joint venture would not be autonomous in operational respect and therefore could not be dealt under rules on mergers and acquisitions. The Competition Board decided that the notified transaction was a cooperation agreement within the scope of Article 4 and Article 5 of the Competition Act.

A joint venture which has the aims or effect of restricting competition between the parent companies also constitutes a merger transaction and it can be examined under rules on anti-competitive agreements. Article 13 (3) of the Communiqué 2010/4 provides that formation of a joint venture which constitutes a

<sup>5</sup> 06.05.2009; 09-21/439-10.

<sup>6</sup> 27.09.2012; 12-46/1395-468.

<sup>7</sup> 14.08.2008; 08-50/721-281.

<sup>8</sup> AKO-SRI (06.02.2013; 13-09/119-65).

<sup>9</sup> Abdulkadir Özcan Otomotiv Lastik San. ve Tic. A.Ş. (AKO) and Sumitomo Rubber Industries, Ltd. (SRI).

merger transaction can also be assessed within the framework of the Communiqué 2010/4 if it has the goal or effect of limiting competition among undertakings. Although in some cases<sup>10</sup> TCA examined whether the joint venture would cause restriction of competition between the parent companies, the Board has never decided that a joint venture which defined as a merger transaction infringes Article 4 of the Competition Act.

Before the Communiqué 2010/4 came into force, joint ventures which would restrict competition between parent companies were reviewed under Article 4 and Article 5 of the Competition Act without strict time limits and joint ventures which were cleared by the Board would also be reviewed under Article 4 and Article 5 of the Competition Act and this caused uncertainty<sup>11</sup>. Article 13 (3) of the Communiqué 2010/4 provides legal certainty and time limits about assessment procedure of joint ventures which may restrict competition between parent companies.

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<sup>10</sup> Doganlar-Kelebek (28.08.2012; 12-42/1312-428), General Atlantic-Yemek Sepeti (17.10.2012; 12-51/1447-494), Unmaş-Europastray (27.11.2012;12-60/1598-582).

<sup>11</sup> *Akdeniz Çimento* (03.10.2006 06-69/930-267).

## UKRAINE

### 1. Acquisition of shares

Ukrainian legislation for protection of economic competition provides clear criteria for the definition of merger transactions. In other words, this concept is clear.

Thus, in accordance with Article 22 of the Law of Ukraine "On Protection of Economic Competition" for the purpose of preventing monopolization of product markets, abuse of monopoly (dominant) position, restriction of competition, bodies of the Antimonopoly Committee of Ukraine shall exercise state control over the concentration of undertakings.

Under the Law the following is deemed to be concentration:

- 1) a merger of undertakings or an affiliation of one undertaking to another one;
- 2) direct or indirect (through third persons) acquisition of control by one or several undertakings over one or several undertakings or parts of undertakings, particularly, by means of:
  - a) direct or indirect (through third persons) acquisition or other form of coming into ownership of assets that constitute an integral property complex or structural subdivision of an economic entity, obtaining for management, rent, lease, concession or otherwise the right to use assets in the form of an integral property complex or structural subdivision of an economic entity, including acquisition of the assets from an economic entity under liquidation;
  - b) appointment or election to the position of the head, deputy head of the Supervisory Board, the Executive Board, other supervisory or executive body of an economic entity of natural person who has already occupied one or more mentioned positions for the other , or creation of a situation in which more than half of positions of the members of the Supervisory Board, the Executive Board, other supervisory or executive bodies of two or more economic entities are occupied by the same persons;
- 3) establishing by two or more economic entities of an economic entity which will for a long period of time independently perform economic activities, but at the same time such creation does not lead to coordination of the competitive behaviour between the economic entities that have created this economic entity , or between them and the newly created economic entity;
- 4) direct or indirect (through other entity) acquisition, or other form of acquiring into ownership of or obtaining for management shares (stocks) that allow to achieve or exceed 25 or 50 % of votes in the supreme management body of the economic entity.

The article 24 of the Law of Ukraine "On Protection of Economic Competition" defines cases requiring prior authorization of the Antimonopoly Committee of Ukraine bodies for concentration of undertakings:

- 1) in cases, provided for by Article 22(2) of this Law and other regulations, when aggregate value of assets or aggregate sales turnover of the concentration participants, with control relations being taken into account, in the last financial year, including those abroad, exceeds the amount equivalent to 12 million Euros, determined in accordance with the exchange rate established by the National Bank of Ukraine and effective on the last day of the financial year while:
  - the value (aggregate value) or the sales turnover (aggregate sales turnover) of goods, including those abroad, of at least two participants of the concentration, with control relations being taken into account, exceeds the amount equivalent to 1,000,000 euros determined in accordance with the exchange rate established by the National Bank of Ukraine and effective for each on the last day of the financial year, and
  - the value (aggregate value) of assets or the sales turnover (aggregate sales turnover) of goods in Ukraine of at least one participant of the concentration, with control relations being taken into account, exceeds the amount equivalent to 1,000,000 euros determined in accordance with the exchange rate established by the National Bank of Ukraine and effective on the last day of the financial year;
- 2) in cases, provided for by Article 22(2) of this Law and other regulations, irrespective of aggregate value of assets or aggregate sales turnover of goods of participants of concentration, when:
  - a share on a certain commodity market of any participant of concentration or an aggregate share of participants of concentration, with control relations being taken into account, exceeds 35 percent, and a concentration is performed on this or allied product market.
  - At present, the draft Law of Ukraine "On Amending the Law of Ukraine" On Protection of Competition ", which would increase the thresholds of merger participants, given the current economic situation, is under consideration by the Verkhovna Rada of Ukraine.

## **2. Acquisition of minority stake and joint management**

Pursuant with part 2 of Article 22 of the Law of Ukraine "On Protection of Economic Competition" concentration means in particular the following:

- direct or indirect (through third persons) acquisition of control by one or several undertakings over one or several undertakings or parts of undertakings;
- establishing by two or more economic entities of an economic entity which will for a long period of time independently perform economic activities, but at the same time such creation does not lead to coordination of the competitive behaviour between the economic entities that have created this economic entity , or between them and the newly created economic entity;
- direct or indirect (through other entity) acquisition, or other form of acquiring into ownership of or obtaining for management shares (stocks) that allow to achieve or exceed 25 or 50 % of votes in the supreme management body of the economic entity.

However, an accurate method for determining the critical impact of one or several undertakings over one or several undertakings according to the size of the share in the share capital or other general method of testing the presence of the decisive impact the entity does not exist. Each case is considered individually, taking into account legal and / or factual evidences of decisive influence of one entity for strategic decisions of another entity. Where not talking about acquiring of controlling stake based on legal

fact it must be considered also other rights that are derived from the right of ownership of shares or those arising out of separate agreements between the shareholders, in particular concerning representative authorities in Management Bodies or other rights related to decision-making on economic activities.

In case of acquiring by economic entity of corporate rights, less than a controlling interest, the particular circumstances of the transaction parties are usually analyzed, assessing the voting rights in Management Bodies of the entity and other similar factors that could be important to determine the decisive impact on the entity. For example, ownership of a minority stake may be related to the decisive influence when the rest of the shares dispersed among small shareholders, or if a minority share gives its owner the exclusive, special voting rights or the right to veto strategic decisions of the economic entity. These strategic decisions include the appointment of the governing bodies, the definition of the budget, approval of business plans and investment activities.

### **3. Examples**

The Antimonopoly Committee of Ukraine considered the application for permission to concentration as acquiring by companies A, B and C together with D control over company E, through the distribution of shares of company E in the following ratio: company D will own 25 percent of shares in the company; A - 26, 43 percent; company B - 21,9 percent; company C - 20,72 percent.

According to the contract on exchanging and purchasing of shares, the Company D shall acquire 636.441 shares of the company E, which is now owned by companies A, B and C (treasury shares), that cumulatively account for 25 per cent of the voting shares of the company E.

In addition, after completion of the transaction its parties have to sign a contract of shareholders, which will determine the specifics and management of the company E. In particular, pursuant to paragraphs 7.1 (a) and 7.2 (a) shareholders' agreement, decisions on key issues of the company E should be taken by the shareholders, who together own at least 90 percent of the authorized capital of the company E.

These issues include following:

- amendments to the statute of the company E, or changes to the statute documents of companies that make up the Group of Companies (except in cases envisaged by the agreement of shareholders);
- significant changes in the nature or scope of business of the company E or any of its subsidiaries;
- any proposal concerning the elimination of the company E or any of its subsidiaries or other procedures involving the elimination of such enterprises,
- enter administration of the company (both through court and out of court) or its reorganization;
- any changes of the rights of shareholders or holders of other securities (any class) in the share capital of the company E or in the share capital any of its subsidiaries.

In this way, company D, together with Companies A, B, C, owning in the aggregate approximately 94 per cent of the share capital of the company E, will take certain rights of veto over key areas of the company E. Furthermore, in accordance with paragraph 4.3 of the agreement of shareholders, the Board of Directors (hereinafter - BD ) of the company E shall composed of 13 members who will have 16 votes. BD members should be appointed as follows:

Shareholder	Number of Directors (categories A, B and C) <sup>1</sup>	Number of votes
Company B	2 Directors of the category A	2
Company D	3 Directors of the category A and 1 Director of the category B	5
Company A	2 Directors of the category A, 1 Director of the category B and 1 Director of the category C	5
Company C	2 Directors of the category A	2

While paragraph 7.3 of the shareholders agreement provided a list of questions that referred to the exclusive competence of the BD and that should be made only with the approval of at least by 13 votes of the BD members, in particular the issue of borrowing, capital investment, acquisition or sale of the company E, change of the financial year of the company E, hiring high managers of the company E, approval or budget changes of the company E and its business plan, resize its share capital, the conclusion or termination of significant contracts and driving significant litigations.

Therefore the above agreements on the voting procedure in the BD and on decision making by shareholders of the company E will enable companies A, B, C, D to exercise joint control over the company E.

#### 4. Acquisition of assets

Pursuant with the part 2 of Article 22 of the Law of Ukraine "On Protection of Economic Competition" concentration means in particular the following:

- direct or indirect (through third persons) acquisition or other form of coming into ownership of assets that constitute an integral property complex or structural subdivision of an economic entity, obtaining for management, rent, lease, concession or otherwise the right to use assets in the form of an integral property complex or structural subdivision of an economic entity, including acquisition of the assets from an economic entity under liquidation.

According to Article 4 of the Law of Ukraine "On Lease of State Property" integral property complex is the economic object with complete production cycle of products (works, services) together with the land on which it is based, stand-alone utilities, electricity supply system. This object could be (according to the same article) separate entities, as well as their structural subdivisions.

That is, the Ukrainian legislation on protection of economic competition does not qualify the acquisition of intellectual property rights or customer lists as a "merger". The law clearly states that it should be the entire business or its part thereof, providing complete cycle of production or providing of services.

<sup>1</sup> At the same time each Director of the category A will have 1 vote, each Director of the category B will have 2 votes and each Director of the category C will have 1 vote.

If the definition of "merger" would be broadened, a risk of increasing the number of applications exists, including those that have no effect on competition. To avoid such risk in the legislation should be defined clear criteria for the qualification of such agreements. At the same time, if the AMC will receive an application for concentration in the form of buying or otherwise acquiring rights to use assets that do not represent the entire business of economic entity or its part with complete production cycle, the Committee provides a permission.

## **5. Exemptions**

According to the paragraph 2 of the part 3 of the article 22 of the Law of Ukraine "On Protection of Economic Competition":

- procurement of shares of an undertaking by a person whose major type of activities is the performance of financial operations or operations associated with securities, if the procurement is made for the purpose of their subsequent resale, provided that the said person takes no part during voting in the superior body or other management bodies of the undertaking. In this case the subsequent resale shall be made within one year from the day of procurement of the shares. Bodies of the Antimonopoly Committee of Ukraine, proceeding from a request which is to be submitted by the mentioned persons and which shall substantiate the impossibility of further resale, may take a decision to extend the term.

To monitor this issue the Antimonopoly Committee of Ukraine exercises daily analysis of incoming correspondence (including e-mail) relating to the purchase of shares of an entity by a person whose main activity is to conduct financial transactions. In particular, in 2012 the Committee received and analyzed 34 documents.

## **6. Alternatives**

Besides the control over concentration Ukrainian competition law includes also the control over concerted actions.

Pursuant with the paragraph 2 of the part 2 of the Article 7 of the Law of Ukraine "On The Antimonopoly Committee of Ukraine " the Committee have, in particular, the following powers in the field of control over concerted actions, concentrations:

- to make orders and decisions envisaged by the legislation on economic competition protection in respect of applications and cases of granting an authorization for concerted actions, concentration, and to give opinions and make preliminary conclusion concerning concerted actions, concentration, as well as conclusions concerning classification of actions according to the legislation on economic competition protection;

According to the article 5 of the Law of Ukraine "On Protection of Economic Competition":

- "Concerted actions" shall mean conclusion of agreements in any form by undertakings, making decisions in any form by associations, as well as any other concerted competitive behaviour (activity, inactivity) of undertakings.
- Concerted actions shall also mean the establishment of an undertaking, an association the purpose or consequence of the establishment of which is the coordination of competitive behaviour between the undertakings, which established the mentioned undertaking, association, or between them and the newly-established undertaking, or joining such an undertaking.



In cases defined by the article 10 of the Law it shall be prohibited to take concerted actions, provided for in this article, until authorization has been granted by bodies of the Antimonopoly Committee of Ukraine or the Cabinet of Ministers of Ukraine.

Obtaining of the Committee's preliminary permit for concerted actions should be done in the order defined by the Procedure of Submitting Applications to the Antimonopoly Committee of Ukraine for Obtaining Preliminary Permit for Concerted actions of Economic Entities, approved by the Resolution of the Antimonopoly Committee of Ukraine on February 12, 2002, №26-r, registered in the Ministry of Justice of Ukraine on March 07, 2002 under the No 284/6572.

For example the Antimonopoly Committee of Ukraine considered the application of the authorized representative of the Companies A and B for permission them concerted action in the form of creation of a joint company.

Concerted action was to create by Companies A and B a joint company C, which for a long period will independently perform economic activities, but this will lead to coordination of competitive behavior between companies A and B.

At the same time, there are some exemptions, which permits an entity to be exempted from obtaining prior permission of the Antimonopoly Committee of Ukraine, including:

*Standard requirements for concerted actions of the subjects of management with the purpose of overall exemption from preliminary obtaining of authorization from the bodies of the Antimonopoly Committee of Ukraine for concerted actions, approved by the Resolution of the Antimonopoly Committee of Ukraine on 12.02.2002 № 27-r, registered in the Ministry of Justice of Ukraine on 07.03.2002 № 239/6527 ;*

*Standard requirements for establishment of economic association and receiving an overall exemption from preliminary obtaining of association establishment authorization from the bodies of the Antimonopoly Committee of Ukraine, approved by the Resolution of the Antimonopoly Committee of Ukraine on 30.11.2006 № 511-r, registered in the Ministry of Justice of Ukraine on 26.01.2007 № 61/13328.*

## **7. Definition of geographical markets**

During consideration of applications and cases of concentration of undertakings the position in relevant product markets of participants involved in concentration is examined. Therefore product and geographical boundaries of these markets are determined.

According to paragraph 6.1 of the Guidelines on definition of monopoly (dominant) position of undertakings on the market adopted by the Resolution of the Antimonopoly Committee of Ukraine on March 5, 2002 № 49-p, registered by the Ministry of Justice of Ukraine on April 1, 2002, № 37/6605 (hereinafter – the Guidelines):

- territorial (geographical) boundaries of the market of certain products (product group) are determined by setting the minimum area, beyond which from the point of view of consumer purchase of goods (product group) belonging to the group of substitute goods (product group) is impossible or inappropriate.

The correctness of the territorial (geographical) boundaries of a product market can be tested through research of degree of market opening (DMO) in interregional and / or international trade.

According to the paragraph 8 of point 6.3. of the Guidelines, if the indicator DMO > 40% for a national market it is a sign of the openness of the national market.

Recently, the Committee faced concentrations which territorial boundaries of relevant markets go far beyond the territorial boundaries of Ukraine.

Depending on the national characteristics of merged companies, there are two types of mergers: the national mergers – mergers of companies located within the same state, transnational mergers - mergers of companies, located in different countries (transnational mergers), acquisitions of companies in other countries (cross-border acquisition).

## **8. Transnational mergers**

The Antimonopoly Committee of Ukraine considered an application for concentration in the form of acquisition by company A of assets of company B, which provides the possibility of the business activity on production and sale of hard drives.

During consideration of the application, it was found that after the concentration the total share of companies A and B on the hard disks market in Ukraine will exceed 35 percent.

However:

- Companies A and B sells hard drives directly in Ukraine (such products are present in the Ukrainian market through its import by economic entities that are non-residents of Ukraine - independent distributors);
- there are no producers, direct consumer of hard drives, and there are no suppliers for the purposes of the production and sale of hard drives in Ukraine;
- there is no domestic production of hard drives in Ukraine;
- market of hard drives is open to international trade;
- there are no barriers (customs or administrative) to import hard drives to Ukraine by potential competitors on a common basis.

In connection with the above, the Committee has defined the geographical boundaries of the market as the world market.

Given the above and the fact that:

- consumers of hard drives are free to choose suppliers anywhere in the world;
- participants of concentration will not be able to influence prices, terms of trade in the Ukrainian market due to the lack of barriers to enter of new suppliers in the Ukrainian market;
- a competitive effect of other producers of hard drives exists;
- there are potential innovative substitutes for hard drives,

The Antimonopoly Committee of Ukraine has granted permission to the concentration.

## **9. Acquisition of companies in other countries**

The Antimonopoly Committee of Ukraine considered application for concentration in the form of acquisition by company A of assets of companies B and C enabling the economic activities of production and sales of toluoldiizotsianat.

During consideration of the application, it was found that after the concentration the combined share of the concentration participants in the market of toluoldiizotsianat in Ukraine will exceed 35 percent.

However, given that:

- Ukraine does not have its own production of toluoldiizotsianat;
- consumers of toluoldiizotsianat are free to choose suppliers anywhere in the world;
- transportation costs are only a small part of the cost of toluoldiizotsianat;
- there are no administrative constraints on imports of toluoldiizotsianat in Ukraine;
- geographic boundaries of the market is a global market;
- combined share of the concentration participants in the market of toluoldiizotsianat in relevant territorial boundaries in 2010, 2011 and 2012 did not reach 35 percent;
- concentration of members will not be able to influence prices, terms of trade and so on in the Ukrainian market due to the lack of barriers to enter the Ukrainian market of new suppliers;
- concentration participants experiencing significant competition;
- the concentration does not lead to monopolization and restriction of competition in product markets of Ukraine,

Antimonopoly Committee of Ukraine has granted permission to the concentration.

## UNITED KINGDOM

### 1. Introduction

This submission discusses jurisdictional issues in cases that could be considered ‘borderline’ in that they require greater analysis and a careful consideration of the facts in determining whether they fall within the parameters of the United Kingdom (UK) merger review provisions, in particular cases involving the acquisition of shares or assets and those mergers that are undertaken through a joint venture, and the UK regime’s approach to the challenges raised by such cases.

In order to fully appreciate the UK approach, a brief outline of the merger review provisions in the UK is provided below.

### 2. The UK regime - overview

In the UK, merger provisions are contained in the Enterprise Act 2002 (the Act) and reviews are conducted by the Phase I Authority, the Office of Fair Trading (OFT), and, where the OFT’s duty to refer is triggered<sup>1</sup>, the Phase II Authority, the Competition Commission (CC).<sup>2</sup>

In assessing whether a particular transaction falls for review under the Act, both Authorities must consider whether a ‘relevant merger situation’ has been created or, for anticipated mergers, will be created.

In order to constitute a ‘relevant merger situation’ a merger must meet three criteria for the purposes of the Act<sup>3</sup>:

- (i) Two or more enterprises must cease to be distinct or there must be arrangements in progress or in contemplation which, if carried into effect, will lead to enterprises ceasing to be distinct;
- (ii) Either: the UK turnover associated with the enterprise which is being acquired exceeds £70 million (*turnover test*) or the enterprises which cease to be distinct supply or acquire goods or services of any description and after the merger, together supply or acquire at least 25 per cent of all those particular goods or services in the UK or a substantial part of the UK (*share of supply test*); and

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<sup>1</sup> In considering whether the OFT’s duty to refer is met, the OFT must form a realistic belief, objectively justifiable by facts, as to whether or not it is or may be the case that the merger has resulted or may be expected to result, in a substantial lessening of competition – section 22 and 33 of the Act.

<sup>2</sup> Guidance on the application of the jurisdictional test under the UK merger regime can be found in the OFT publication - OFT 527, Mergers Jurisdictional and Procedure Guidance, dated June 2009 and the joint publication of the CC and OFT, OFT1254/CC2(revised) – Merger Assessment Guidelines, dated September 2010.

<sup>3</sup> Section 23 of the Act.

- (iii) Either the merger must not yet have taken place or must have taken place not more than four months before a reference to the CC is made.

Effectively, the definition of a ‘transaction’ for the purposes of UK merger control is aligned to the definition of a ‘relevant merger situation’. In assessing whether a relevant merger situation has, or is likely to be created, the OFT and CC (the UK authorities) must consider in the first instance whether enterprises have ceased, or are likely to cease to be distinct. This involves an assessment of (i) whether the entities involved in the transaction are ‘enterprises’ for the purposes of the Act and (ii) whether these enterprises have been brought under common ownership or control.

The assessment of these questions is not always clear cut and some of the issues presented to date are discussed below.

### 3. Acquisition of assets

In dealing with the acquisition of assets the term ‘enterprise’ is of particular importance in considering whether a particular transaction constitutes a relevant merger situation. Under section 129 of the Act the term ‘enterprise’ is defined as the activities, or part of the activities, of a business. This does not mean that the enterprise in question need be a separate legal entity but simply means that the activities in question should be carried on for gain or reward or otherwise than free of charge.

The UK authorities’ guidance outlines the approach adopted in defining and ‘enterprise’ under the Act. It states<sup>4</sup>:

*‘An ‘enterprise’ may comprise any number of components, most commonly including the employees working in the business and the assets and records needed to carry on the business, together with the benefit of existing contracts and/or goodwill. In some cases, the transfer of physical assets alone may be sufficient to constitute an enterprise: for example, where the facilities or site transferred enables a particular business activity to be continued. Intangible assets such as intellectual property rights are unlikely, on their own, to constitute an ‘enterprise’ unless it is possible to identify turnover directly related to the transferred intangible assets that will also transfer to the buyer.’*

In interpreting these principles, the Authorities will have regard to the following specific considerations<sup>5</sup>:

- The transfer of ‘customer records’ is likely to be important in assessing whether an enterprise has been transferred.
- The application of the TUPE regulations<sup>6</sup> would be regarded as a strong factor in favour of a finding that the business transferred constitutes an enterprise.
- The OFT would normally (although not inevitably) expect a transfer of an enterprise to be accompanied by some payment for the goodwill obtained by the purchaser. The presence of a price premium being paid over the value of the land and assets being transferred would be indicative of goodwill being transferred.’

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<sup>4</sup> Merger Assessment Guidelines – joint publication of the CC and OFT, paragraph 3.2.4.

<sup>5</sup> OFT – Jurisdictional and Procedural Guidance, OFT527, paragraph 3.10.

<sup>6</sup> The Transfer of Undertakings (Protection of Employment) Regulations 2006.

Whilst the Act states that the activity in question is carried on for gain or reward or otherwise than free of charge, the OFT does not require that the transferred activity generates a profit or dividend for shareholders. Indeed the activity could well be making a loss or even conducted on a 'not-for-profit' basis. In *Imperial Cancer Research Fund/Cancer Research Campaign*<sup>7</sup> a merger between two charities operating on a not-for-profit basis the OFT found that both charities carried on certain activities for gain or reward, particularly their respective retailing activities.

In the *Age Concern*<sup>8</sup> case involving a number of charities there was evidence that personal pendant alarm systems offered to the elderly by SeniorLink Eldercare and Aid Call, were both (generally) operated in a commercial manner for gain and reward. While Help the Aged provided a certain proportion of pendant alarms to SeniorLink Eldercare customers in England free of charge (in terms of initial outlay), and Help the Aged chose to 'gift' its share of the profits from its shareholding in Seniorlink Eldercare to the charity, customers still needed to pay a quarterly monitoring service charge. The OFT concluded that the parties' activities in relation to the supply of personal pendant alarms constituted part of a business and therefore were enterprises for the purposes of section 129 of the Act.

An 'enterprise' may comprise several components, most commonly including employees working in the business and the assets and records needed to carry on the business. The OFT's approach to a transaction involving the transfer of a business or part of a business is to have regard to the substance of the arrangement and not just its legal form. For example, in the case of *CineWorld Group plc/Hollywood Green Leisure Park Cinema (Wood Green)*<sup>9</sup> the fact that there was no direct sale agreement between the two cinemas did not mean that an 'enterprise' did not cease to be distinct.

In some cases the transfer of physical assets alone could be sufficient to constitute enterprises ceasing to be distinct where they enable a particular business activity to be continued. In *Eurotunnel/SeaFrance*<sup>10</sup> the OFT considered that the purchase of three ferry vessels (accounting for approximately 95 per cent of the purchase price) constituted an 'enterprise' on the basis that the vessels enabled the acquirer to operate a sea ferry business, despite the vessels not being in operation for a period of time.

The transfer of intangible assets such as intellectual property rights (IPR) is unlikely, on its own, to constitute an 'enterprise' unless it is possible to identify turnover directly related to the transferred intangible asset(s). In *Project Canvas*<sup>11</sup> one of the key questions for the OFT was whether the joint venture partners would be transferring any 'enterprises' to the Canvas joint venture. One such contribution was the IPR from the BBC<sup>12</sup>, specifically software, designs, specifications and know-how at various stages of development. The OFT found that the technology and R&D transferred to the Canvas joint venture was substantially incomplete and therefore no direct turnover could be attributed to the IPR which still required

<sup>7</sup> ME/1074/02: Although this case was decided under the Fair Trade Act 1973, the result would not have differed under the Act.

<sup>8</sup> ME/4034/09 - Completed merger of Seniorlink Eldercare and Aid Call resulting from the completed merger between Help The Aged and Age Concern England – July 2009.

<sup>9</sup> ME/3390/07: Anticipated acquisition by CineWorld Group plc, through its subsidiary Cine\_UK Limited, of the cinema business operating at the Hollywood Green Leisure Park, Wood Green.

<sup>10</sup> Completed acquisition by Groupe Eurotunnel S.A. of certain assets of former Sea France S.A – October 2012.

<sup>11</sup> Anticipated joint venture between The British Broadcasting Corporation, ITV Broadcasting Limited, Channel 4 Television Corporation, Channel 5 Broadcasting Limited, British Telecommunications plc, Talk Talk Telecoms Limited and Arqiva Limited – Project Canvas – May 2010.

<sup>12</sup> The other joint venture partners' contributions were mainly financial.

further development. On this basis the OFT did not find the transfer of the IPR to constitute an ‘enterprise’ for the purposes of the Act.

Similarly in the case of *GuestLogix/Panasonic*<sup>13</sup> the OFT considered whether the integration of onboard retail point of sale software and IPR by GuestLogix into Panasonic’s in-flight entertainment screens would constitute enterprises ceasing to be distinct. The OFT found that any revenue stream arising from the use of the software on the Panasonic in-flight entertainment screens belonged to GuestLogix rather than Panasonic. Moreover the agreement did not transfer the software and IPR on a permanent basis but the arrangement was akin to a supplier agreement for the non-exclusive supply of the software and IPR.

As can be seen from the above examples of the OFT’s decisional practice, a transaction that comprises the transfer of assets alone may fall within the UK’s merger control jurisdiction provided the other criteria in the assessment of jurisdiction are met.

#### **4. Acquisition of shares**

Once the UK authorities have established that the transaction involves ‘enterprises’ they must consider whether they are brought under common ownership or control.

Section 26 of the Act distinguishes three levels of interest referred to as ‘control’. The level of ‘control’ recognised by the Act can be listed in the following ascending order:

- The acquirer may acquire the ability materially to influence the policy of the target company (*material influence*);
- The acquirer may acquire the ability to control the policy of the target company (*de facto control*); and
- The acquirer may acquire a controlling interest in the target company (*legal control*).

The UK does not have any thresholds in terms of shareholding levels or transaction value when considering a change in the level of control. In routine cases where for example, one enterprise proposes to purchase, or has purchased, the entire share capital of another and thus has full control, the question of whether two enterprises have ceased to be distinct is relatively straightforward to determine.

In other cases, where outright voting control is not acquired, the question of whether two enterprises have ceased to be distinct is not as straightforward. Legal control generally means a shareholding giving more than 50 per cent of the voting rights in the target company. De facto control is obtained when an entity controls the target enterprise despite not holding the majority of voting rights. This could arise where the acquirer would have, in practice, more than 50 per cent of votes cast at shareholder meetings because of shareholder turnout. This is somewhat akin to the concept of ‘decisive influence’ under the EU Merger Regulation.

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<sup>13</sup> Completed supplier agreement between by Guestlogix Inc and Panasonic Avionics in respect of a commercial arrangement to provide services in the development of onboard point of sale payment facility integrated into in-flight entertainment systems, decision dated 21 December 2012.

The ability to exercise material influence is the lowest level of control that may give rise to a relevant merger situation. In assessing material influence in the context of the Act, the OFT focuses on the acquirer's ability to influence policy relevant to the behaviour of the target in the marketplace. The Act provides that the OFT may treat material influence and de facto control as equivalent to control.<sup>14</sup>

This submission will concentrate on some of the issues surrounding the assessment of 'material influence' experienced by the UK authorities to date. There are a number of factors that the UK authorities may take into account when assessing material influence including: the level of shareholding and the existence and exercise of voting rights; board representation; agreements between businesses that one will cease production and source from the other; and, financial arrangements where one party is very dependent on the other such that it may exert influence on commercial policy.<sup>15</sup> For the purposes of this submission, we focus on the main factors considered to date, namely: shareholding and board representation.

#### 4.1 Shareholding

In the UK a shareholding conferring more than 25 per cent of voting rights generally enables the holder to block special resolutions.<sup>16</sup> Consequently, a share of voting rights of over 25 per cent is likely to be seen by the OFT as presumptively conferring the ability to materially influence policy. For example, in *Ryanair/Aer Lingus*, the OFT found that Ryanair's ability to block special resolutions to disapply pre-emption rights (which it had applied in the past) restricted Aer Lingus' access to capital, which was a factor in finding that Ryanair had or may have material influence over Aer Lingus<sup>17</sup>.

This presumption applied by the OFT provides businesses with some level of certainty as to the approach of the OFT in assessing transactions involving the acquisition of 25 per cent of voting rights.

The OFT's jurisdictional and procedural guidance states that an acquisition of between 15 and 25 per cent, whilst not attracting a presumption of conferring material influence, may be examined.<sup>18</sup>

In the *Completed acquisition by British Sky Broadcasting Group plc of a 17.9 per cent stake in ITV plc*<sup>19</sup> the principal grounds for the OFT's belief that BSKyB had material influence over ITV was the evidence of attending and voting at ITV shareholders' meetings. This evidence indicated to the OFT that BSKyB was likely to represent more than 25 per cent of votes cast at ITV shareholders' meetings (based on shareholder turnout figures) and as a result BSKyB may have the ability to block special resolutions at such meetings. The OFT considered that in such circumstances BSKyB may be presumed to have material influence in relation to ITV.

<sup>14</sup> Section 26(3) of the Act.

<sup>15</sup> See MMC Report – Stora Kopparbergs Bergslags AB/Swedish Match NV, and Stora Kopparbergs Bergslags AB/The Gillette Company: A report on the merger situation CM 1473 March 1991.

<sup>16</sup> In order for a Special Resolution to be passed by a company's members (or class of members) it needs a majority of not less than 75 per cent of votes cast. A Special Resolution ensures that certain scenarios which affect the company on a fundamental level cannot happen without a large majority of the members agreeing. Effectively this protects a member/shareholder's rights and position within the company. Some examples of matters requiring a Special Resolution include: altering the Articles of Association of a company, re-registering a private limited company to a public company and vice versa and application of pre-emption rights.

<sup>17</sup> Completed acquisition by Ryanair Holdings plc of a minority interest in Aer Lingus Group plc, ME/4694/10, 15 June 2012, paragraphs 35-37.

<sup>18</sup> OFT527 – supra, paragraph 3.20.

<sup>19</sup> ME/2811/06.



The CC, in its phase II investigation, considered a number of factors that might give BSKyB the ability to influence the policy of ITV<sup>20</sup>:

- (i) the absolute and relative size of BSKyB's shareholding and the consequent, likely ability of BSKyB to block special resolutions; and
- (ii) the industry knowledge and standing of BSKyB which, combined with the absolute and relative size of its shareholding, might give it the ability to influence the strategy of the ITV board.

The CC concluded that BSKyB's ability to block a special resolution would limit some of ITV's strategic options, for example, its ability to raise funds, and therefore, when considered with all the evidence, conferred on BSKyB the ability to materially influence ITV.<sup>21</sup>

The OFT has found material influence where the shareholding was 15 per cent. In *First Milk/Wiseman*<sup>22</sup> the OFT decided there was material influence on the basis that First Milk had a Director on the board with considerable industry experience where it was expected that particular weight would be attached to his views.

In the *Anticipated acquisition by Tramlink Nottingham Consortium of Net Phase Two Concession*<sup>23</sup> the parties submitted that the acquirer would not acquire control over the target, because its small interest in Tramlink Nottingham (12.5 per cent) would not give it the ability materially to influence or otherwise control Tramlink Nottingham's policy. Whilst the OFT accepted this view that one particular member of the consortium with 12.5 per cent of shares would not gain any degree of control on its own, members of the Tramlink consortium (six enterprises) could be regarded as associated persons under section 127 of the Act. This would enable them to act together to secure control of the target through the award of a concession. Effectively, the OFT considered the consortium members as one person for the purpose of deciding whether two enterprises will be brought under common control.

The *Tramlink Nottingham Consortium case* shows that in situations where there are a number of persons acquiring an enterprise, the Act requires the OFT to consider whether in fact the *associated persons* are acting together. The Act does not require that each of the acquiring parties should themselves individually have control of the target for them to be regarded as associated persons and therefore be viewed as acting together.

#### **4.2 Board representation**

In addition to the ability to materially influence through the voting of shares, the UK regime may also consider, where appropriate, whether the acquirer is able to materially influence the commercial policy and strategy of the target through board representation (*'interlocking directorates'*). In some circumstances it is possible that board representation alone may confer material influence.

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<sup>20</sup> Completed acquisition by British Sky Broadcasting Group plc of a 17.9 per cent stake in ITV plc, Report to the Secretary of State for Trade and Industry dated 27 April 2007, paragraph 3.34.

<sup>21</sup> The CC's conclusions were upheld on appeal to the Competition Appeals Tribunal and the Court of Appeal: *BSkyB plc –v- the CC and the Secretary of State* [2008] CAT 25; and *BSkyB –v the CC and the Secretary of State* [2010] EWCA Civ2.

<sup>22</sup> Completed acquisition by First Milk Limited of a 15 per cent stake in Robert Wiseman Dairies plc, 7 April 2005.

<sup>23</sup> ME/5094/11.

The vast majority of board appointments, in particular non-executive appointments, will not raise any issues. However, in some cases the OFT may well be interested where interlocking directorates between competing businesses where such representation raises the possibility that one party could, in fact, have material influence over a competitor and thereby raise the prospect that the OFT's duty to refer could be met.

In the case of *JC Decaux/Concourse*<sup>24</sup> the agreement between the parties allowed for the appointment by the acquirer of two senior directors to the target's board, where there were only three board members in total. Each JC Decaux board director was also allowed a vote. This fact was one of the main considerations why the OFT considered there to be material influence in this case. The majority voting rights on the board provided JC Decaux with the ability to materially influence the commercial behaviour of Concourse.

Whilst the use of the concept of 'material influence' may raise concerns as to clarity and certainty, the OFT has sought to address any possible concerns with a presumption of material influence for shareholdings of 25 per cent or more and publication of detailed guidance on its approach to minority shareholdings in cases where there is no presumption made.

## 5. Acquiring control by stages

In cases where there is an incremental move in the level of control exerted by the acquirer, such as moving from material influence to de facto or legal control or from de facto control to full legal control, the UK regime provides discretion for this to be treated as enterprises ceasing to be distinct giving rise to a merger.<sup>25</sup>

In the case of *Travis Perkins/Toolstation*<sup>26</sup> the acquirer, Travis Perkins, had already acquired a lower level of control in 2008, in that it had material influence with around 30 per cent of voting rights in Toolstation. At that time, Travis Perkins also acquired a number of other control rights that included amongst others, Toolstation agreeing the business plan with Travis Perkins and Toolstation only raising further capital through a specific Travis Perkins fund. The OFT therefore considered that Travis Perkins already had de facto control over Toolstation and the proposed transaction in 2012, in which it acquired the remaining shares in Toolstation, involved Travis Perkins moving up a level of control to gain legal control.

As a result, the OFT was able to treat the two parties as ceasing to be distinct and assert jurisdiction to investigate the transaction. However, the OFT chose not to exercise its discretion under section 26(4) of the Act to review the transaction for a combination of reasons.

The main reasons were that there was little overlap between the parties' respective products and that the parties had already been working closely together with Toolstation's growth only possible as a result of Travis Perkins' intimate involvement and funding in Toolstation. Also from a customer's or competitor's perspective, the 2012 acquisition made no obvious practical difference.

In an earlier case of *Cavendish/Keepmoat/Apollo*<sup>27</sup> the OFT exercised its discretion to review the transaction on the basis that it had not previously had the opportunity to review the previous acquisition

<sup>24</sup> ME/5303/11 – Completed acquisition by JC Decaux UK Limited of rights in Concourse Initiative Limited and Media Initiatives Limited – March 2012.

<sup>25</sup> Section 26(4) of the Act.

<sup>26</sup> ME/5365/12 – Completed acquisition by Travis Perkins plc of a controlling interest in Toolstation Limited – March 2012.

<sup>27</sup> Anticipated acquisition by Cavendish Square Partners (General Partner) Limited of a controlling interest in each of Lakeside 1 Limited (Keepmoat) and Apollo Group Holdings Limited (Apollo) – November 2011.

which provided Cavendish with a minority shareholding<sup>28</sup> and that the further transaction changed the organisational structure of the two companies.

The Act also provides that a series of transactions between the merging parties that occur within a period of two years may be treated as having occurred simultaneously on the date of the last transaction.<sup>29</sup>

## 6. Joint ventures

The UK regime does not contain ‘special rules’ as to when joint ventures are considered a ‘relevant merger situation’. Rather joint ventures are considered within the applicable rules and the general approach taken by the OFT in relation to the assessment of a relevant merger situation.

This approach was demonstrated recently in the case of *Vodafone/Telefonica*<sup>30</sup> where the proposed joint venture involved the transfer of each party’s site management business (including certain ‘passive assets’ such as sites and infrastructure) to the newly formed joint venture company. The OFT considered this transfer of assets as constituting enterprises ceasing to be distinct.

The transaction also involved the transfer of ‘active assets’ which were confirmed by the parties to include the radio access network (RAN). The parties argued that the transfer of the parties’ respective RAN system did not constitute enterprises ceasing to be distinct because there would be no change of control in the equipment. The parties compared the RAN transfers to reciprocal outsourcing arrangements which the OFT recognised are only likely to lead to enterprises ceasing to be distinct where they involve the permanent (or long term) transfer of assets, rights and/or employees to the outsourcing service supplier.

The OFT considered that the parties did not provide the RAN assets to third parties, they were not considered as revenue generating and therefore there were no customer records or goodwill associated with the RAN assets. The OFT did not, therefore, consider the RAN assets to constitute an enterprise or form part of a business ceasing to be distinct.

Joint ventures involving minority shareholdings are subject to the same rules as all transactions involving a minority shareholding. This was demonstrated by the OFT’s consideration of *Tramlink Nottingham Consortium* case (as discussed above) which involved a joint venture containing members of a consortium whom, individually would have minority shares in the joint venture. However the OFT considered that the consortium, as associated persons, would act together to secure control of the joint venture.

From a wider policy perspective, the UK regime differentiates between ‘structural’ and ‘collusive’ aspects of a joint venture. Any evidence of collusion or restrictive agreements may be considered separately under enforcement tools such as the Competition Act 1998. The case of *Sports Direct/JJB*,<sup>31</sup> although not a joint venture case, demonstrated this approach to structural versus collusive aspects<sup>32</sup>.

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<sup>28</sup> The OFT did not need to conclude on the level of control Cavendish had prior to the transaction in question.

<sup>29</sup> Section 29 of the Act.

<sup>30</sup> Anticipated joint venture between Vodafone Limited and Telefonica UK Limited – September 2012.

<sup>31</sup> ME/3986/08 – Completed acquisition by Sports Direct International plc of a number of stores from JJB Sports plc – May 2009.

<sup>32</sup> <http://www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98/closure/sports-goods/>.

Mergers and ancillary restrictions to the merger are generally excluded from the prohibitions of the Competition Act 1998.

## **7. Exceptions**

The UK merger review regime also provides for two main exceptions for mergers that technically meet its jurisdictional definition. It is for the merging parties to raise arguments for such exceptions after notification. The exceptions are to the OFT's duty to refer and may allow a relevant merger situation not to be referred to the UK phase II authority, the CC, in the event that a significant lessening of competition is found by the OFT.

The main exceptions are contained in section 22 (2) of the Act for completed mergers and section 33 (2) of the Act for anticipated mergers. The main exceptions are the same and are categorised as:

- The market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference to the CC (*de minimis test*).
- Any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned (*customer benefits test*).
- In relation to anticipated mergers only, where the arrangements concerned are not sufficiently far advanced or are not sufficiently likely to proceed, to justify the making of a reference to the CC.

Given that the UK regime's exceptions are not applied for jurisdictional purposes, this submission does not propose to deal further with the individual exceptions.

However, it is important to point out that these exceptions to the duty to refer are discretionary in nature and therefore it is in the OFT's discretion as to whether it would be appropriate to apply them in considering its duty to refer a merger to the CC.

## **8. Gaming the system**

The UK regime has not had recent experience of a concrete attempt at gaming the system to make transactions fall outside the merger review provisions. One reason for this is that the UK regime's approach is to consider the economic effect rather than the legal form of what constitutes a relevant merger situation, such as, what is an 'enterprise'.

The share of supply test also allows the UK competition authorities significant flexibility in bringing transactions within the merger review provisions and does not rely on a fixed definition of when a transaction would qualify, as would be the case in the turnover test. Collectively this may make it comparatively more difficult to game the UK system.

## **9. Changes in the merger regime**

There have not been any recent changes to the UK mergers regime relevant to the issues discussed. The Enterprise and Regulatory Reform Act 2013 (ERRA) has introduced certain reforms to the UK merger regime that will take effect from 1 April 2014, on which date the Competition and Markets Authority (CMA) will replace the OFT and the CC. However, there are no substantive changes made by the ERRA to the statutory provisions on jurisdiction.

**10. Conclusion**

The jurisdictional thresholds set out in the UK regime provide the competition authorities with substantial flexibility. However, this is moderated to a great extent through the publication of detailed guidance and reasoned decisional practice by the competition authorities.

## UNITED STATES

### 1. Introduction

The Hart-Scott-Rodino (“HSR”) Act, 15 U.S.C. §18a, requires that parties to certain mergers or acquisitions notify the Federal Trade Commission and the Department of Justice (collectively, “the Agencies”) before consummating the proposed acquisition. In general, the HSR Act requires premerger notification for acquisitions of “voting securities” or “assets” that meet a certain size of transaction threshold – that is, if, as a result of the acquisition, the acquiring person will hold in excess of \$50 million (as adjusted<sup>1</sup>) in assets or voting securities of the acquired person.<sup>2</sup> In addition, if the acquisition is valued between \$50 million (as adjusted) and \$200 million (as adjusted), a “size of person” test must also be met under which one party has sales or assets of \$100 million (as adjusted) or more and another party has sales or assets of \$10 million (as adjusted) or more.<sup>3</sup> Thus, coverage of a transaction under the U.S. premerger notification system does not depend on whether control or material influence is obtained.

Although the U.S. premerger notification system subjects most mergers of significant size to premerger competitive review, a transaction does not have to be subject to such review for the Agencies to be able to challenge it under the antitrust laws. Under Section 7 of the Clayton Act,<sup>4</sup> the Agencies can challenge almost any acquisition of stock or assets, without regard to whether the acquisition requires premerger notification under the HSR Act, and such challenges can be brought either before or after a transaction is consummated. Indeed, the Agencies have investigated and challenged a number of transactions that were not reportable under the HSR Act.<sup>5</sup>

### 2. Responses to suggested issues and questions for consideration

#### 2.1 Acquisitions of shares

As noted above, for acquisitions of voting securities, premerger reporting requirements do not hinge on whether “control” or “material influence” of the issuer is obtained. Acquisitions of minority interests may be reportable if they result in an acquiring person holding greater than \$50 million (as adjusted) in

<sup>1</sup> Since 2005, the jurisdictional thresholds are adjusted annually to reflect changes in gross national product. The current thresholds (<http://ftc.gov/os/2013/01/130110claytonact7afrn.pdf>) are approximately 42 percent above the 2005 thresholds. For example, the size of transaction threshold that had been \$50 million in the baseline year is now \$70.9 million.

<sup>2</sup> 15 U.S.C. §18a(a)(2)(B)(i).

<sup>3</sup> 15 U.S.C. §18a(a)(2)(B)(ii).

<sup>4</sup> 15 U.S.C. §18.

<sup>5</sup> There have been a number of recent examples. *See, e.g., FTC and State of Idaho v. St. Luke’s Health Sys., Ltd.*, 1:12-cv-00560-BLW-REB (D. Id. filed March 13, 2013), [www.ftc.gov/opa/2013/03/stluke.shtm](http://www.ftc.gov/opa/2013/03/stluke.shtm); *U.S. v. Bazaarvoice, Inc.*, C13-0133 (N.D. Cal., filed Jan. 10, 2013), [www.justice.gov/atr/public/press\\_releases/2013/291185.htm](http://www.justice.gov/atr/public/press_releases/2013/291185.htm); *U.S. and State of New York v. Twin America LLC*, 12 CV 8989 (S.D.N.Y., filed Dec. 11, 2012), [www.justice.gov/atr/public/press\\_releases/2012/290136.htm](http://www.justice.gov/atr/public/press_releases/2012/290136.htm).

voting securities of an issuer. The HSR Act and Rules do, however, exempt acquisitions that result in holding 10 percent or less of an issuer's voting securities if made solely for the purpose of investment.<sup>6</sup> Under the authority that the HSR Act grants the Agencies to promulgate rules, including to define terms used in the statute, the HSR Rules provide that “[v]oting securities are held or acquired ‘solely for the purpose of investment’ if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.”<sup>7</sup>

Suggestions have from time to time been made to the Agencies that this “investment only” exemption as defined and applied by the Agencies is too narrow, subjecting too many acquisitions of ten percent or less of an issuer's voting securities that are not likely to raise competitive issues to premerger reporting. As described below in response to question 4, the Agencies have the authority to exempt from premerger reporting classes of transactions that are not likely to violate the antitrust laws, and have, through rulemaking, created such exemptions for various classes of transactions.

Interlocking directorates are not acquisitions of voting securities or assets under the HSR Act and do not trigger any reporting requirements. Section 8 of the Clayton Act, as amended by the Antitrust Amendments Act of 1990, however, prohibits certain director and officer interlocks between competing business corporations.

## 2.2 *Acquisitions of assets*

In addition to acquisitions of securities, the HSR Act explicitly covers acquisitions of assets. The acquired assets may include an entire business unit, tangible assets that do not comprise an entire business unit and/or intangible assets such as patents or licenses.

Questions sometimes arise as to whether certain types of business arrangements involving assets (such as leases, management contracts, and exclusive licenses of intellectual property), constitute acquisitions of assets. Such questions are often resolved through informal interpretations rendered by the Premerger Notification Office of the FTC,<sup>8</sup> and in some instances through rulemaking.<sup>9</sup>

Exemptions from premerger reporting, as described in response to question 4 below, have proved to be an important way of assuring that premerger reporting is not required for categories of asset acquisitions that are unlikely to raise significant antitrust issues. The HSR Act, for example, exempts acquisitions of goods or realty transferred in the ordinary course of business.<sup>10</sup> And the Agencies have used their authority to exempt other classes of transactions unlikely to violate the antitrust laws, including acquisitions of unproductive real property, office buildings and residential property, hotels and motels, and agricultural property.<sup>11</sup>

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<sup>6</sup> 15 U.S.C. §18a(c)(9) and 16 CFR §802.9.

<sup>7</sup> 16 C.F.R. §801.1(i)(1).

<sup>8</sup> The Premerger Notification Office (PNO) answers thousands of inquiries each year and is prepared to provide prompt informal advice concerning the potential reportability of a transaction. See <http://ftc.gov/bc/hsr/staffphone.shtm>. Many of the PNO's informal interpretations are available on its website at <http://ftc.gov/bc/hsr/informal/index.shtm>.

<sup>9</sup> An example of a recent rulemaking can be found at [www.ftc.gov/opa/2012/08/hsr.shtm](http://www.ftc.gov/opa/2012/08/hsr.shtm).

<sup>10</sup> 15 U.S.C. §18a(c)(1).

<sup>11</sup> See 16 C.F.R. §802.2.

### 2.3 *Joint ventures*

Premerger reporting may be required for the formation of certain types of joint ventures. Section 801.40 of the HSR Rules provides specific rules regarding the formation of corporate joint ventures, treating such formations as acquisitions of voting securities of the venture by the venturers.<sup>12</sup>

Section 801.50 provides specific rules regarding formations of non-corporate joint ventures, such as partnerships and limited liability companies (LLCs).<sup>13</sup> Premerger reporting of the formation of non-corporate joint ventures is required only when one of the venturers will “control” the new entity – in which case, it is deemed to be acquiring the assets of the joint venture that it did not previously hold. Although change of control of an entity is generally not a prerequisite for reportability of a voting securities or asset transaction, it is a key factor in determining when an acquisition of an interest in an unincorporated entity must be reported. “Control” is defined in Section 801.1(b) of the HSR rules.<sup>14</sup> In the case of an entity that has no voting securities (*e.g.*, a partnership or LLC), control means having the right to 50 percent or more of the profits of an entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity.<sup>15</sup>

The rules regarding acquisitions of interests in existing corporate and non-corporate joint ventures build on the concepts involved in determining reportability of joint venture formations in that the acquisition of an interest in a partnership or LLC is unreportable if it does not convey control of the entity.

Although there is some difference in the treatment of joint venture formations and acquisitions of joint venture interests depending on whether the venture is corporate or non-corporate in nature, those differences flow from the HSR Act’s coverage of acquisitions of “voting securities” and “assets,” and the Agencies have not deemed interests in partnerships or LLCs to be either voting securities or assets within the meaning of the HSR Act. The Agencies treat joint ventures – whether corporate or non-corporate – as consistently as possible, as reflected by the 2005 rulemaking involving noncorporate entities described in the answer to question 6 below.

### 2.4 *Exemptions*

Exemptions from HSR play an important role in refining the parameters of the United States premerger notification program. Some of these exemptions are mandated by the HSR Act.<sup>16</sup> These statutory exemptions are based on either of two broad rationales: the transactions are of a category unlikely

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<sup>12</sup> 16 C.F.R. §801.40.

<sup>13</sup> 16 C.F.R. §801.50.

<sup>14</sup> 16 C.F.R. §801.1(b).

<sup>15</sup> For corporate entities, control is defined as either holding 50 percent or more of the outstanding voting securities of an issuer or having the contractual power presently to designate 50 percent or more of the directors of a corporation. The concept of control, while generally not relevant to the question of whether a transaction is reportable under HSR, is relevant, in addition to reportability of non-corporate joint venture formations, to determining what entities are included in the acquiring and acquired persons when calculating whether the statutory size-of-person test is met. It also is relevant to determine whether the Section 802.30 exemption for intraperson transactions applies. (The “intraperson” exemption exempts acquisitions in which the acquiring person and at least one of the acquired persons are the same by reason of control. 16 C.F.R. §802.30. Examples of exempted transactions include an acquiring person who already holds 50 percent or more of the voting securities of an issuer acquiring the remaining shares, and the merger of, or the transfer of assets between, two subsidiaries controlled by the same parent.)

<sup>16</sup> See 15 U.S.C. §18a(c).



to raise significant antitrust issues (*e.g.*, acquisitions of goods or realty in the ordinary course of business); or the transactions are subject to premerger competitive review by another federal agency (*e.g.*, bank mergers, which are reviewed by one of the bank regulatory agencies).

In addition to creating statutory exemptions from premerger reporting, Congress built additional flexibility into the premerger notification system for determining which transactions must be notified by granting the Agencies the rulemaking authority to exempt from premerger notification classes of transactions “which are not likely to violate the antitrust laws.”<sup>17</sup> The Agencies, with input from the public, have used this authority in several important areas.<sup>18</sup> For example, exemptions have been created through agency rulemaking for acquisitions of foreign voting securities or foreign assets that lack a sufficient nexus with U.S. commerce,<sup>19</sup> certain types of real property such as office and residential property, agricultural property and hotels,<sup>20</sup> and acquisitions of voting securities of issuers holding assets the acquisition of which would be exempt.<sup>21</sup>

## 2.5 *Objective criteria and “gaming the system”*

The U.S. premerger notification program is based on clear and objective criteria and thresholds, enabling parties to determine whether the transaction they are planning requires premerger notification.

“Gaming the system” by structuring transactions to avoid premerger reporting has not been a systemic or widespread problem in the United States. Parties recognize that even if their transaction does not require premerger reporting, it can still be subject to substantive antitrust challenge by the Agencies, and the Agencies recognize that transactions are often structured primarily for tax or other business reasons rather than to avoid premerger reporting. The HSR Rules address potential instances of gaming the system by providing that “[a]ny transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirement of the act shall be disregarded, and the obligation to comply shall be determined by applying the act and [the] rules to the substance of the transaction.”<sup>22</sup> The Agencies can seek civil penalties for failures to make premerger filings, and a handful of such cases brought over the 35 years that the HSR system has been in place have been based on this avoidance rule and have resulted in substantial civil penalties.<sup>23</sup>

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<sup>17</sup> 15 U.S.C. §18a(d)(2)(B).

<sup>18</sup> See generally 16 CFR Part 802.

<sup>19</sup> For the acquisition of foreign assets to be reportable, the assets must have generated sales of more than \$50 million (as adjusted) into the United States in the most recent fiscal year. For an acquisition of voting securities of a foreign issuer to be reportable, the issuer must have either \$50 million (as adjusted) in assets located in the United States or \$50 million (as adjusted) in sales in or into the United States in the most recent fiscal year; an additional requirement, if the acquiring person is foreign, is that a controlling interest must be acquired in the issuer. See 16 CFR §§802.50-51.

<sup>20</sup> See 16 CFR §802.2.

<sup>21</sup> See 16 CFR §802.4.

<sup>22</sup> 16 CFR 801.90.

<sup>23</sup> See, *e.g.*, *U.S. v. Sara Lee Corp.*, 1996-1 Trade Cas. (CCH) ¶ 71,301 (D.D.C. 1996); *U.S. v. Honickman*, 1992-2 Trade Cas. (CCH) ¶ 70,018 (D.D.C. 1992).

## 2.6 *Changes in the merger regime*

What constitutes a transaction requiring premerger reporting is largely dictated by the HSR statute – “assets” and “voting securities” are statutory terms, and a number of HSR exemptions are contained in the statute. Although Congress has not changed these basic underpinnings regarding the type of transactions that may require premerger reporting, it has changed the *thresholds* for premerger reporting. The centerpiece of those amendments, which took effect in February 2001, was an increase in the “size of transaction threshold” to \$50 million, from \$15 million.<sup>24</sup> The legislation also created an annual automatic adjustment mechanism, which took effect in 2005, whereby the thresholds are adjusted annually to reflect the percentage change in gross national product.

As described in response to question 4 above, the Agencies have created a number of premerger reporting exemptions that play an important part in determining the types of transactions requiring premerger reporting.

In addition, the Agencies have on occasion promulgated rules, after notice to and comment from the public, that affect the types of transactions for which premerger reporting may be required.

For example, in 2004-2005, the Agencies solicited comments and adopted a series of rules aimed at addressing, to the extent possible under the statute, the disparate treatment of corporate and non-corporate entities, such as partnerships or limited liability companies, particularly in the areas of formation of these entities, acquisitions of interests in them, and the application of certain exemptions.<sup>25</sup> The central thrust of these rules changes, as discussed in response to question 3 above, is that meaningful antitrust review should occur at the point at which control of an unincorporated entity changes. In adopting these rules, the Agencies agreed to track their impact on premerger notifications received and, over the next two years, found that the changes worked very well.<sup>26</sup> The Agencies’ experience since the adoption of these rules in 2005 is that although they do not capture every formation of an LLC or partnership that may raise antitrust issues, they have done a better job at doing so than had the previous rules and interpretations.

The rulemaking process that is required for creating exemptions or adopting other types of rules involves a notice and public comment period, after which the Agencies must address points raised in the comments. The rulemaking must also include an analysis of the impact of the rulemaking under various other statutes, such as the Paperwork Reduction Act, which requires that information collected from the public minimizes burden and maximizes public utility. Thus, the Agencies implicitly engage in a cost/benefit analysis in every rulemaking.

## 2.7 *Alternatives*

As is highlighted in the Introduction above, an important feature of the United States system is the Agencies’ ability under section 7 of the Clayton Act to reach transactions that are not reported under the premerger reporting program. In addition, the Agencies can challenge transactions as agreements in restraint of trade under Section 1 of the Sherman Act.

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<sup>24</sup> 15 U.S.C. 18a(a)(2).

<sup>25</sup> 69 FR 18686 (April 8, 2004) (proposed rules); 70 FR 11502 (March 8, 2005) (final rules).

<sup>26</sup> See HSR Annual Reports, Fiscal Year 2006, p.9 ([www.ftc.gov/os/2007/07/P110014hsrreport.pdf](http://www.ftc.gov/os/2007/07/P110014hsrreport.pdf)) and Fiscal Year 2007, pp.8-9 ([www.ftc.gov/os/2007/07/P110014hsrreport.pdf](http://www.ftc.gov/os/2007/07/P110014hsrreport.pdf)).



## BIAC

### 1. Executive summary

The Business and Industry Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments for the Roundtable Discussion on the definition of transaction for the purpose of merger control.

Legislators, competition agencies and courts have a great variety of views on the definition of relevant transactions for the purpose of merger control. BIAC submits that merger control jurisdiction, including but not limited to where mandatory notification is required, should be established in line with the 2005 OECD Recommendation on Merger Review – particularly through the use of “clear and objective criteria” for determining when a merger should be notified or qualify for review.<sup>1</sup> More specifically, merger control should apply to structural changes in the market and not to transactions whose impacts are not structural, but rather depend on subsequent behaviour. The latter should be dealt with under antitrust rules on coordination and conduct. The variety (and sometimes inconsistency) of approaches may be observed in four topical areas, namely: (1) acquisitions of shares (including acquisitions of minority interests and interlocking directorates); (2) acquisitions of assets; (3) joint ventures; and (4) exemptions (including the *de minimis* rule).

Acquisitions of shares (including acquisitions of minority interests and interlocking directorates) – It is appropriate in some instances that competition authorities may investigate and regulate potential anti-competitive effects of minority shareholdings and interlocking directorates. However, BIAC’s concerns in this respect are that (i) notification processes and agencies’ investigations should be limited to those circumstances where legitimate concerns about impacts on competition are *likely to occur* as a result of such transactions, (ii) the applicable rules should be sufficiently clear to provide maximum legal certainty and (iii) the rules should be reasonably consistent across jurisdictions. This is an area where agencies need to work towards convergence of their criteria, with a view to clearly defining notions such as “control”, and where guidelines, designed in a coordinated fashion between agencies, are a welcome supporting tool. BIAC submits that any such convergence should be aimed at reducing the regulatory burden of international merger controls and, at all costs, avoid regulatory creep increasing the burden on business.

Acquisitions of assets – Asset deals generally fall within the category of a merger transaction in all jurisdictions, so long as the acquired assets have “sufficient economic significance” to warrant merger

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<sup>1</sup> 2005 OECD Recommendation on Merger Review, available online at: <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=195&InstrumentPID=191&Lang=en&Book=False>. See also International Competition Network, “Defining ‘Merger’ Transactions for Purposes of Merger Review” (Presented to the Merger Working Group at the International Competition Network’s Sixth Annual Conference on 31 May 2007), online at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc327.pdf> at 7: “In all events, the definition of qualifying “merger” transactions should provide clear and easily understandable standards that will enable merging parties to readily ascertain their notification obligations.”

review.<sup>2</sup> BIAC recommends that asset acquisitions should only be treated as a merger if they result in changes to market structure (i.e., if they involve an acquisition of a full business with goodwill). BIAC notes that this structural change standard is not reflected in the merger review laws in many jurisdictions, which creates significant ambiguity and uncertainty as to whether an asset deal would fall within the ambit of merger control. This uncertainty exists, in particular, with respect to acquisitions of intangible assets. To the extent that merger control laws in various jurisdictions are not based on a structural change standard, they should be revised accordingly.

Joint ventures – Joint ventures are flexible business instruments which have no absolute legal definition. Depending on their form, joint ventures may have a structural influence on the market and therefore, depending on whether that is the case in particular deals, joint ventures may be properly subject to merger control. Again, agencies and courts have taken a great variety of approaches, the most advanced likely being the “full-function joint venture” concept of the European Union, which refers to the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity. The variety of approaches towards joint ventures makes planning for regulatory approvals very complex, especially for multi-jurisdictional transactions, and undermines legal certainty with respect to the strategic and operational decisions made in connection with joint ventures. BIAC would encourage agencies to work towards further convergence of their policies in this area, perhaps taking the above-mentioned criterion of “full-function joint venture” as a basis for such harmonization.

Exemptions (including the *de minimis* rule) – Finally, most jurisdictions recognize various exemptions, whether “quantitative” (based on thresholds relating to the magnitude of the transaction or the size of the acquired stake in the target company – i.e., *de minimis* exemptions) or “qualitative” (attempting to capture various categories of transactions that are unlikely to have any competitive significance). BIAC believes that more initiatives should be pursued to bring these frameworks into further alignment, and to enlarge the scope of certain exemptions (either in terms of thresholds or categories of exempted transactions) with a view to increasing predictability for businesses and stimulating investment.

As in many areas of competition law and policy, BIAC supports convergence to increase efficiency, but, in this area, it is important that such convergence occur without increasing the regulatory and administrative costs associated with merger control rules that capture an ever expanding set of transactions. A clear and appropriate set of rules is required to ensure that merger control regimes encompass only those transactions that lead to meaningful structural changes in the market.

## **2. Acquisitions of shares (including acquisitions of minority interests and interlocking directorates)**

BIAC recognizes that minority shareholdings can have an influence on the policy of companies. This applies first, naturally, where the minority holding provides access to the corporate governance bodies, such as seats on the Board of Directors or contractual veto rights (a variety of situations which are covered here for convenience under the term “interlocking directorates”). It also extends to so-called “passive” shareholdings where no such rights are provided. Passive minority shareholders being in a position to exercise influence is probably an increasing trend, both as a result of the growing share of the financial funds’ investments in the economy and because of the recent evolution of general corporate governance practices towards a stronger “shareholders’ engagement” by these and other investors.

<sup>2</sup> International Competition Network, “Defining ‘Merger’ Transactions for Purposes of Merger Review” (Presented to the Merger Working Group at the International Competition Network’s Sixth Annual Conference on 31 May 2007), online: <http://www.internationalcompetitionnetwork.org/uploads/library/doc327.pdf> at 4.

Such positions of influence by minority shareholders can affect the market behaviour of companies in some circumstances. Indeed, it is not uncommon that a company holds a minority share in another with which it has market relations, whether horizontal or vertical (in certain cases these shareholdings are reciprocal), nor that a third party (e.g. an investment fund) owns minority shareholdings in several undertakings having between themselves horizontal competitive or vertical relationships. There are usually perfectly valid reasons for these situations, and they can even be recognized as having pro-competitive effects.<sup>3</sup> It is however not in dispute that in certain circumstances a minority shareholder can have an influence that is not restricted to the protection of its investment, but rather extends to the determination of the company's market policy. Even if the investment remains passive – i.e., not supported by interlocking directorship (reciprocal or not) or veto rights – this can affect incentives to compete and information flows.

Therefore, it is appropriate in some instances that competition authorities investigate and regulate potential anti-competitive effects of minority shareholding and interlocking directorates and, accordingly, that these situations are included in the definition of “transaction” for the purpose of merger control. However, BIAC's concerns in this respect are that (i) notification processes and agencies' investigations should be limited to those circumstances where legitimate concerns about impacts on competition are *likely to occur* as a result of such transactions, (ii) the applicable rules should be sufficiently clear to provide maximum legal certainty and (iii) the rules should be reasonably consistent across jurisdictions. There remains scope for improving the clarity and consistency of approaches across jurisdictions in this respect, notwithstanding that most antitrust regimes provide some safeguards against unnecessary notifications.

As expressed in BIAC's contribution to this Committee's Working Party No. 3 roundtable of February 19, 2008, the improvements would imply “(1) clear guidance on the *de minimis* thresholds of investment that will not result in agency scrutiny or concern; (2) an explanation of the circumstances under which the agency will deem cross-ownership interests to constitute a threat to competition; (3) an indication of the circumstances under which the agency will challenge cross-directorships between corporations, including subsidiaries and affiliates; and (4) an indication of the potentially acceptable remedies considered if it is found that the minority shareholding can indeed have anti-competitive effects”.<sup>4</sup>

The United States has a legal treatment of minority shareholdings and interlocking directorates which is relatively clear: the *Hart–Scott–Rodino Antitrust Improvements Act of 1976* (the “HSR Act”) provides a safe harbor if the transaction is “made solely for the purpose of investment” (i.e. passive investments in which the purchaser has no intention of influencing the business decisions of the issuer)<sup>5</sup> and if, as a result of the acquisition, the acquiring person would hold 10% or less of the outstanding voting securities of the issuer (15% or less for institutional investors).<sup>6</sup> Furthermore, Section 8 of the *Clayton Act* prohibits in principle interlocking directorates between competing companies, subject only to precise *de minimis*

<sup>3</sup> See for instance the European Commission's decision 98/663/EC- *Blokker/Toys'R'Us* of 26 June 1997, OJ L 316 of 25 November 1998 P. 0001 – 0019.

<sup>4</sup> Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates, [DAF/COMP\(2008\)30](http://www.oecd.org/daf/competition/mergers/41774055.pdf) available at <http://www.oecd.org/daf/competition/mergers/41774055.pdf>.

<sup>5</sup> Such a conclusion does not automatically result from the fact that the acquirer is an investment fund: see for instance the *Kinder Morgan/ Carlyle and Riverstone Holdings LLC* case (In the Matter of TC Group LLC et al., FTC File No. 061-0197, Mar. 16, 2007, available at <http://www.ftc.gov/os/caselist/0610197/index.htm>), or *U. S. v. Value Act Capital Partners LLC*, Case 1: 07-cv-02267 (January 11, 2008), available at <http://www.justice.gov/atr/cases/valueact.htm>.

<sup>6</sup> 16 C.F.R. §§ 802.9 and 802.64.

exemptions.<sup>7</sup> Industry's main concern here is that the *de minimis* thresholds are exceedingly low, implying that a large number of situations are subject to scrutiny while circumstances where legitimate concerns about impacts on competition are *likely to occur* are rather rare.

Like the U.S. system, Canada has a bifurcated merger control system whereby a sub-set of merger transactions (i.e., those that meet certain thresholds) are subject to pre-merger notification and review, while all mergers, regardless of whether they are notifiable, are subject to substantive review and possible remedies.<sup>8</sup> A "merger" is defined to include "the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares . . . , of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person."<sup>9</sup> As explained in the Canadian *Merger Enforcement Guidelines*, "a 'significant interest' in the whole or a part of a business is held qualitatively when the person acquiring or establishing the interest obtains the ability to materially influence the economic behaviour of the target business, including but not limited to decisions relating to pricing, purchasing, distribution, marketing, investment, financing and the licensing of intellectual property rights."<sup>10</sup> A number of factors are relevant in determining whether a minority interest confers material influence in the context of a share transaction, including, for example, voting rights attached to the shares being acquired, the status of the acquirer (e.g. general or limited partner), holders and distribution of remaining shares, board composition (and interlocking directorates)<sup>11</sup>, special voting/veto rights, terms of any shareholder/voting agreement, etc.<sup>12</sup>

<sup>7</sup> Section 8 of the *Clayton Act* generally prohibits a person from serving as a director or officer of two or more corporations that are competitors: *Clayton Act* § 8, 15 U.S.C. § 19. However, Section 8 does not apply to parent corporations and their wholly-owned subsidiaries.

<sup>8</sup> Indeed, among the most recent contested merger cases in Canada is *Canada (Commissioner of Competition) v. CCS Corp.*, which involved a merger that was not subject to pre-merger notification. Among other things, the case also raised questions regarding the scope of the term "business" for the purposes of section 91, discussed *infra*. In particular, the Tribunal's decision raises the possibility that, in order to be subject to merger review, a transaction must involve the acquisition of a business that "must have the potential to impact competition in the markets at issue". The concurring opinion of Crampton C.J. dissented on this point, arguing that the determination of whether a merger involves a "business" should not require any competitive effects assessment. See Brian Facey and Cassandra Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations* (LexisNexis Canada, 2013), at 38-39.

<sup>9</sup> *Competition Act*, s. 91. Emphasis added.

<sup>10</sup> Competition Bureau, *Merger Enforcement Guidelines* (6 October 2011), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html>> at para 1.5. Emphasis added.

<sup>11</sup> Unlike the United States, Canada does not have an equivalent to section 8 of the *Clayton Act* which prohibits (subject to certain exceptions) interlocking directorates between competing companies. This may suggest the Canadian Parliament has not sought to place emphasis on addressing such issues through the competition laws. Also, as a much smaller country, interlocking directorships are far more common in Canada. See National Competition Law Section, Canadian Bar Association, *Submission on Merger Enforcement Guidelines Consultation*, December 2010, available online at: <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Comments-TheCanadianBarAssociation-MEGs-Dec-2010.pdf/\\$FILE/Comments-TheCanadianBarAssociation-MEGs-Dec-2010.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Comments-TheCanadianBarAssociation-MEGs-Dec-2010.pdf/$FILE/Comments-TheCanadianBarAssociation-MEGs-Dec-2010.pdf)> at 7-8.

<sup>12</sup> *Ibid.* at paras 1.6, 10.1. As set out in the Guidelines, "[i]n the absence of other relationships, direct or indirect ownership of less than 10 percent of the voting interests in a business does not generally constitute ownership of a significant interest. While inferences about situations that result in a direct or indirect holding of between 10 percent and 50 percent of voting interests are more difficult to draw, a larger voting interest is ordinarily required to materially influence a private company than a widely held public company." Note also that, separate and apart from encompassing acquisitions of shares, the merger

The European Union has also clearly established that minority ownership transactions which give to a party “decisive influence” over another fall within the definition of “concentration” for the purpose of merger control. This is the so-called “Philip Morris doctrine”<sup>13</sup>, later largely incorporated in the Merger Regulation. Other transactions which fall below the threshold of “concentration” may, depending on the circumstances, be subject to substantive review in the context of article 101 and 102 of the Treaty of Rome, which pursue different purposes. Although it is felt that “if there is a gap” in EU merger control, it would appear to cover very few cases”,<sup>14</sup> critics point out that some transactions having an effect on competition do escape the Commission’s review, and that it is hard to draw from the trends of case law or the Consolidated Jurisdictional Notice a clear view of the criteria (such as the level of the shareholding or the nature of contractual rights) used to determine the “influence” which will trigger the application of the Regulation.

Within their respective jurisdictions, European national laws and the practice of national agencies have different approaches. For instance, while Austria has a simple threshold in terms of equity percentage (25%), Germany uses a double criterion (25% and “the acquisition of a competitively significant influence”) and in both cases filing is compulsory.<sup>15</sup> In contrast, the United Kingdom looks for the ability to “materially influence” the target company’s policy (with the acquisition of more than 25% of the voting rights in a target company giving rise to a rebuttable presumption of material influence) and relies on voluntary filing.<sup>16</sup> French law addresses “decisive influence” (*influence déterminante*) whether or not substantiated by shareholding.<sup>17</sup>

The diversity of approaches is even wider in the rest of the world, ranging from the requirement of a filing for the acquisition of “any level of minority shareholding (e.g. in Ecuador, Egypt, El Salvador or Jordan and many other countries), to a variety of thresholds in terms of percentage of voting rights (e.g. 10% in Pakistan, 20% in Armenia, 25% in Kazakhstan or Ukraine, one third in Chinese Taipei, 35% in Mexico or Uzbekistan) or more complex combinations of thresholds like in Japan or South Korea where the ranking of the share of the acquirer in the target company comes into play. In some cases the filing requirements depend on the configuration of the market, e.g. a dominant position (Moldova) or are specific to certain sectors (e.g. bank and insurance in Guatemala, telecommunications in Thailand) or certain types of companies (public companies in Nigeria). Yet in other countries the filing remains voluntary, and

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provisions under the *Competition Act* also encompass mergers that are “amalgamations”, a concept which refers to two or more corporations continuing as one corporation pursuant to a statutory procedure.

<sup>13</sup> Issued from *British American Tobacco Company Ltd and R. J. Reynolds Industries, Inc. v Commission of the European Communities*, joined cases 142 and 156/84 of 17 November 1987.

<sup>14</sup> Annette Schild, “*When is a Merger a Merger?*” (Presented at the ABA 71st Annual Antitrust Law Spring Meeting, 12 April 2013) at 16.

<sup>15</sup> An acquisition of a minority shareholding below 25% is notifiable if the acquiring party obtains “competitively significant influence”: see Section 37(1)(4) of the *Act Against Restraints of Competition*, for instance, in the case of the PSA (Peugeot)/General Motors alliance, the Bundeskartellamt considered that the contractual rights contemplated in the transaction gave to GM “significant influence” over PSA while its stake was only 7% of shares and 5.58% of voting rights (decision No B9-32/12).

<sup>16</sup> In regard to shareholdings between 15 and 25% the UK’s Office of Fair Trading (“OFT”) will consider the commercial reality and results of the transaction when assessing whether the purchaser has acquired the ability to materially influence (i.e. the focus is on substance not legal form). Below 15%, the OFT will intervene only exceptionally. The lowest level found likely to create material influence in the past was *NTL/Newcastle United*, where a 6.3% shareholding was referred to the (then) MMC on the basis, inter alia, that it may have created material influence. In *BSkyB/ITV*, where the minority interest which conferred material influence was 17.9%, the order was to reduce to below 7.5% to fall below the material influence level.

<sup>17</sup> Article L. 430-1.III of the Commercial Code.



necessary if the acquisition creates a situation where anticompetitive practices might occur (New Zealand, Venezuela, Zambia).

To a certain extent, this diversity in approaches simply reflects the complexity of the matter. It is hard to recommend a happy medium between the legal certainty provided by the application of rigid equity (or voting rights) thresholds, and the flexibility necessary to accommodate the reality of the markets in order to exercise control over only those transactions which merit attention from a competition perspective. Inevitably, the sheer diversity of approaches makes multi-jurisdictional transactions more complex and costly, which can only hamper investment. This is clearly an area where the agencies need to work towards convergence in their criteria, with a view to clearly defining notions such as “control” and “influence”, and where guidelines, designed in a coordinated fashion between agencies, are a welcome supporting tool.

### 3. Acquisitions of assets

An acquisition of assets generally falls into the category of a merger transaction in all jurisdictions, so long as the acquired assets have “sufficient economic significance” to warrant merger review.<sup>18</sup> BIAC recognizes that there has been substantial harmonization and convergence across jurisdictions on this issue. However, BIAC recommends that asset acquisitions should only be treated as a merger if they result in changes to market structure (i.e., if they involve a full business with goodwill). BIAC notes that this structural change standard is not captured by the merger review laws in many jurisdictions.

In the United States, for instance, the HSR Act applies to every transaction involving an acquisition of tangible or intangible assets. The FTC and DOJ have taken the position that the term “assets” should be given a broad interpretation to include intellectual property.<sup>19</sup> As such, an asset for HSR purposes includes tangible assets as well as intangible assets, including IP, goodwill and exclusive licenses. However, non-exclusive intellectual property licenses or exclusive licenses for marketing and distribution rights are not assets for HSR purposes.<sup>20</sup> Note also that proposed amendments to the HSR act would extend the notification requirement to certain acquisitions of exclusive pharmaceutical patent licenses that historically have not been reportable because the licensor retained manufacturing rights under the patent.<sup>21</sup>

In the EU, the concept of “concentration” under Merger Regulation 139/2004 (the “ECMR”) includes the acquisition of direct or indirect control, whether by purchase of securities or assets, of the whole or parts of one or more other undertakings.<sup>22</sup> A concentration can consist of the acquisition of intangible

<sup>18</sup> International Competition Network, “Defining ‘Merger’ Transactions for Purposes of Merger Review” (Presented to the Merger Working Group at the International Competition Network’s Sixth Annual Conference on 31 May 2007), online: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc327.pdf>> at 4.

<sup>19</sup> Transcript, “HSR: Back to Basics Workshop” (FTC Conference Center on 4 March 2009), online: <<http://www.ftc.gov/bc/workshops/hsr/081023transcript.pdf>> at 3.

<sup>20</sup> FTC and DOJ, *Antitrust Guidelines for the Licensing of Intellectual Property* (6 April 1995), online: <<http://www.justice.gov/atr/public/guidelines/0558.htm>> at para 4.1.2; Mary K. Marks, “Pharmaceutical Patent Transfers Subject to the HSR Act: Increased Review Raises Importance of Valuation” (12 December 2012), online: martindale.com <[http://www.martindale.com/intellectual-property-law/article\\_Greenberg-Traurig-LLP\\_1641328.htm](http://www.martindale.com/intellectual-property-law/article_Greenberg-Traurig-LLP_1641328.htm)>, citing ABA Premerger Notification Practice Manual, 4<sup>th</sup> Ed. at 27.

<sup>21</sup> Mary K. Marks, “Pharmaceutical Patent Transfers Subject to the HSR Act: Increased Review Raises Importance of Valuation” (12 December 2012), online: martindale.com <[http://www.martindale.com/intellectual-property-law/article\\_Greenberg-Traurig-LLP\\_1641328.htm](http://www.martindale.com/intellectual-property-law/article_Greenberg-Traurig-LLP_1641328.htm)>.

<sup>22</sup> Slaughter and May, “The EU Merger Regulation: An overview of the European merger control rules” (March 2012), online: <<http://www.slaughterandmay.com/media/64572/the-eu-merger-regulation.pdf>> at para 2.1.

assets if those assets form the basis for a business to which market turnover is attached.<sup>23</sup> As in the U.S. context, a concentration under the ECMR excludes the acquisition of non-exclusive licenses.

In the UK, a reviewable merger under the *Enterprise Act* consists of two enterprises (defined as the whole or part of a business) being brought under common ownership or control.<sup>24</sup> This process may include the transfer or pooling of assets: indeed, the Office of Fair Trading has provided guidance stating that the transfer of physical assets alone may be sufficient to constitute an enterprise in some cases, such as where a transfer consists of facilities or sites that allow a particular business activity to be continued.<sup>25</sup> However, intangible assets such as IP rights “are unlikely, on their own, to constitute an ‘enterprise’ unless it is possible to identify turnover directly related to the transferred intangible assets that will also transfer to the buyer”.<sup>26</sup> In 2012, the OFT issued a decision suggesting that UK merger control may apply even if the acquired assets are not operating as part of a business and have in fact been inoperative for a period.<sup>27</sup> This suggestion is consistent with the position put forward in the OFT’s interpretation guidelines.<sup>28</sup>

In Canada, the merger provisions in the *Competition Act* define a merger as an acquisition of a direct or indirect interest in a business by any means, including by “purchase or lease of shares or assets...”<sup>29</sup> The *Merger Enforcement Guidelines* state that “asset transactions...that generally fall within the scope of section 91 include the purchase or lease of an unincorporated division, plant, distribution facilities, retail outlet, brand name or intellectual property rights from the target company”.<sup>30</sup> According to the *Merger Enforcement Guidelines*, “[t]he Bureau treats the acquisition of any of these essential assets, in whole or in part, as the acquisition or establishment of a significant interest in that business. Further, acquiring a subset of the assets of a business that is capable of being used to carry on a separate business is also considered to be the acquisition or establishment of a significant interest in the business.”<sup>31</sup> The notification provisions of the *Competition Act* provide additional guidance on this issue: they state that pre-merger notification is necessary in respect of a proposed acquisition of any of the assets in Canada of an operating business if certain thresholds are met.<sup>32</sup> Note, however, that some uncertainty exists with regard to the meaning of an “operating business”: the term is defined broadly under the *Competition Act* as “a business undertaking in Canada to which employees employed in connection with the undertaking

<sup>23</sup> Information from European Union Institutions and Bodies Commission, *Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings* (2008/C 95/01), online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF>> at 1.3.

<sup>24</sup> Annette Schild, *loc. cit.* at 11.

<sup>25</sup> Office of Fair Trading, “Mergers: Jurisdictional and procedural guidance” (June 2002), online: <[http://www.offt.gov.uk/shared\\_offt/mergers\\_ea02/oft527.pdf](http://www.offt.gov.uk/shared_offt/mergers_ea02/oft527.pdf)> at paras 3.1, 3.10.

<sup>26</sup> Office of Fair Trading, “Mergers: Jurisdictional and procedural guidance” (June 2002), online: [http://www.offt.gov.uk/shared\\_offt/mergers\\_ea02/oft527.pdf](http://www.offt.gov.uk/shared_offt/mergers_ea02/oft527.pdf) at para 3.10.

<sup>27</sup> “Acquisition of assets in liquidation referred to the CC” (November – December 2012), online: Ashurst Competition Newsletter, <[http://www.ashurst.com/publication-item.aspx?id\\_Content=8528](http://www.ashurst.com/publication-item.aspx?id_Content=8528)>; OFT Case Number ME/5570/12, online: <[http://www.offt.gov.uk/shared\\_offt/mergers\\_ea02/2012/Eurotunnel.pdf](http://www.offt.gov.uk/shared_offt/mergers_ea02/2012/Eurotunnel.pdf)>.

<sup>28</sup> Competition Commission and Office of Fair Trading, *Merger Assessment Guidelines* (September 2010), online: <[http://www.offt.gov.uk/shared\\_offt/mergers/642749/OFT1254.pdf](http://www.offt.gov.uk/shared_offt/mergers/642749/OFT1254.pdf)> at para 3.2.4.

<sup>29</sup> *Competition Act*, s.91. Emphasis added.

<sup>30</sup> Competition Bureau, *Merger Enforcement Guidelines* (6 October 2011) at para 1.13, online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html>>.

<sup>31</sup> *Ibid.* at para 1.13. Emphasis added.

<sup>32</sup> *Competition Act*, s. 110 (2).

ordinarily report for work”, rather than more traditionally in terms of revenue capacity and/or expectation of profit.<sup>33</sup>

As indicated above, the approach taken in major jurisdictions creates significant ambiguity and uncertainty as to whether an acquisition deal would fall within the ambit of merger control. BIAC encourages enforcement agencies to clarify such areas of ambiguity in order to help foster greater certainty for businesses contemplating asset transactions. Most importantly, BIAC recommends that asset acquisitions should only be treated as a merger if they result in changes to market structure. To the extent that merger review laws in various jurisdictions – such as the UK’s definition of an enterprise as including “part of a business” – fails to define such structural change, they should be revised accordingly. Asset transactions whose impact depends on subsequent behaviour should be addressed through antitrust rules on coordination and conduct, rather than through merger control.

#### 4. Joint ventures

There is no universally accepted definition of joint ventures, whether in competition law or other areas of the law, and most academics have recognized that attempting to provide a legal definition is futile.<sup>34</sup> Yet the term is widely used in the business world and businesspeople are fully aware that the transactions that they call joint ventures, irrespective of their broad variety of forms, can have anticompetitive effects. These can result from contractual or unwritten commitments to restraints of competition between the parents or between one or several of the parents and the joint venture, or from spill-over effects. However, only those joint ventures whose formations constitute a structural change should fall within the ambit of merger control. However, again, in practice, a great variety of approaches can still be observed in this respect.

The United States has a pragmatic approach to joint ventures. Like in most competition law systems, “joint ventures” are not identified as such, and the Antitrust Guidelines for Collaborations between Competitors make clear that the formation of a joint venture, irrespective of its form and in particular whether or not a separate entity is created, may be dealt with as a “relevant agreement” for the purposes of Section 7 of the *Clayton Act*. The HSR Act further requires a complex legal analysis to determine whether the transaction requires a notification.

The European Union, having introduced in 1997 the new criterion of “full-function joint venture”, has an entirely different approach. The concept of “full-function joint venture” is satisfactory inasmuch as it fits the economic purposes pursued by antitrust law, i.e. to capture transactions which have an effect on the market. Notwithstanding the benefits of the “full-function joint venture” standard, this standard nevertheless requires a close review of contractual documentation and can result in an increasingly burdensome notification process (including with respect to the negotiation of remedies).

The approaches of European national agencies’ differ, resulting in control of joint ventures that would not qualify as “notifiable full-function” in EU law, and triggering a variety of forms of control, sometimes *ex-ante* (as in Germany) and sometimes *ex-post* (as in the U.K.). Admittedly, these differences do not necessarily result in major distortions as to the substance of the decisions, as the national legislations are

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<sup>33</sup> *Competition Act*, s. 108; Competition Bureau, “Pre-Merger Notification Interpretation Guideline Number 1: Definition of ‘operating business’”, online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03358.html>>.

<sup>34</sup> See for instance comments in Bellamy & Child, *European Community Law of Competition*, Oxford University Press, 6th ed. 2007, p. 540.

progressively adjusted to get closer to the European model.<sup>35</sup> However, they make the planning of transactions extremely complex for companies endeavouring to design an international strategy.

Other approaches can be found in other countries. In Canada, the definition of a merger transaction is broad enough that it could include strategic alliances and joint ventures, where there is an acquisition of control over or a significant interest in the whole or a part of a business; however, joint ventures or strategic alliances also may be examined under section 90.1 of the *Competition Act*, which permits the Competition Tribunal to issue a prohibition order in respect of an existing or proposed collaboration that prevents or lessens, or is likely to prevent or lessen competition substantially in a market. In China, joint venture transactions, which have played a key role in the country's international development, are subject to the recent antitrust law regime if one of the parties acquires "decisive influence".<sup>36</sup> In Brazil, the new law captures "association agreements, consortium agreements and joint ventures" but the definition of these transactions is still less than clear.

This shows that, while it is undisputable that certain joint ventures may have a structural influence on their markets and therefore deserve to be subject to merger control, the variety of approaches taken by antitrust agencies makes the planning of the regulatory approvals very complex, especially for multi-jurisdictional transactions, and undermines the legal certainty of the strategic and operational decisions made in their respect. BIAC would encourage agencies to work towards a further convergence of their policies in this area, perhaps taking the above-mentioned criterion of "full-function joint venture" as a basis for such harmonization.

## 5. Exemptions (including *de minimis* rule)

BIAC believes that governments in all jurisdictions, in consultation with the business community, should use objectively quantifiable criteria to identify an appropriate threshold for the target's turnover, below which small mergers are unlikely to have a significant adverse economic effect in light of the characteristics of the local economy, and create clear exemptions for transactions falling below that threshold.<sup>37</sup> More generally, BIAC believes in the value of continuing harmonization and convergence across jurisdictions with respect to exemptions. BIAC urges that certain exemptions be expanded to promote investment and reflect current economic and institutional conditions. These points are discussed below with reference to the laws of specific jurisdictions.

In the United States, the HSR Act and accompanying rules exempt from notification various categories of asset acquisitions that are unlikely to have competitive significance, such as acquisitions of assets in the ordinary course of business, acquisitions of non-voting securities, acquisitions by securities underwriters,<sup>38</sup> creditors,<sup>39</sup> insurers and institutional investors, acquisitions of less than 50% of an

<sup>35</sup> As was the case for instance in the French *Loi des Nouvelles Régulations Economiques* of May 15, 2001, and more recently Lithuania since May 1, 2012.

<sup>36</sup> MOFCOM, the responsible regulatory authority, usually considers not only rights related to the decision-making for strategic business policy but also other ways to exercise influence over the target ('plus factors') that are not examined in other jurisdictions such as the EU, e.g. the right to appoint middle level key personnel, such as a finance manager, and/or key members in charge of sales, production, site-management and marketing.

<sup>37</sup> BIAC Summary of Discussion Points: Discussion on *de minimis* Rules in Merger Control (28 June 2011), online: [http://www.biac.org/members/comp/mtg/2011-06-com-mtgs/Final\\_June\\_2011\\_BIAC\\_Note\\_on\\_de\\_Minimis\\_Rules\\_OECD\\_CLP\\_WP3.pdf](http://www.biac.org/members/comp/mtg/2011-06-com-mtgs/Final_June_2011_BIAC_Note_on_de_Minimis_Rules_OECD_CLP_WP3.pdf) at 3.

<sup>38</sup> So long as such acquisitions are made in the ordinary course of the security underwriters' business: 16 C.F.R. § 802.60.

unincorporated entity (i.e. partnerships or limited liability companies),<sup>40</sup> certain financing transactions, acquisitions of real property assets and acquisitions of voting securities “solely for the purpose of investment” if, post-investment, the acquiring person would hold 10% or less of the outstanding voting securities of the issuer.<sup>41</sup> This last exemption essentially creates a safe harbour for partial equity investors.<sup>42</sup> As mentioned in Section I above, BIAC is of the view that the current threshold of 10% – which was established decades ago without the benefit of economic learning on the subject – is far too low to reflect current economic and institutional thinking.<sup>43</sup>

In the EU, Article 3 of the ECMR provides that a “concentration” shall not be deemed to arise in cases of (a) acquisitions of securities by financial institutions or insurance companies in the ordinary course of business with a view to reselling within one year, and (b) transfers to liquidators in connection with liquidation proceedings, winding up, insolvency, cessation of payments and so forth.<sup>44</sup> Further, under current EC merger rules, a transaction qualifies for simplified notification and review if the parties' own a combined share below 15% in each market where there is an overlap, and a combined share below 25% in each market that is upstream or downstream of a market where the other party is active. Further, in March 2013, the European Commission opened a consultation on proposed regulatory amendments that would increase the above thresholds to 20% and 30% respectively. BIAC applauds this potential increase to market share ceilings, which the Commission estimates will result in approximately 10% more mergers benefiting from the simplified procedure. However, the EC's proposed regulatory amendments would also heighten the Commission's powers to conduct full-scale review of transactions that would otherwise qualify for simplified procedure.<sup>45</sup> BIAC believes that this shift would reduce predictability and increase the burden on businesses.

The *Enterprise Act* in the UK imposes no requirement for merger notification, even where the OFT would otherwise possess jurisdiction to review a merger. As such, merger notification is conducted on a solely voluntary basis. Note, however, that the OFT is empowered by legislation to investigate both anticipated and completed mergers (and to refer such mergers for possible remedial action), even where a

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<sup>39</sup> So long as such acquisitions are made in the ordinary course of the creditors' business in connection with a bona fide debt workout: 16 C.F.R. § 802.63.

<sup>40</sup> 16 C.F.R. § 801.1(f)(1). Moreover, acquisitions of 50% or more of an unincorporated entity are exempt, regardless of value, if the acquisition is for the purpose of financing and the purchaser will hold less than 50 percent of the unincorporated entity after it realizes the return on its investment: 16 C.F.R. § 802.65.

<sup>41</sup> International Competition Network, “Defining ‘Merger’ Transactions for Purposes of Merger Review” (Presented to the Merger Working Group at the International Competition Network's Sixth Annual Conference on 31 May 2007), online: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc327.pdf>> at 4-5; Code of Federal Regulations & Federal Register, *Part 802 – Exemption Rules* (15 U.S.C. 18a(d)), online: <<http://federal.eregulations.us/cfr/title/title16/chapter1/part802?selectdate=11/1/2011>>; FTC, “What is the Premerger Notification Program?” (March 2009), online: <<http://www.ftc.gov/bc/hsr/introguides/guide1.pdf>>.

<sup>42</sup> BIAC, “Antitrust Issues Involving Minority Shareholding and Interlocking Directorates” (19 February 2008) at para 13.

<sup>43</sup> *Ibid.* at para 14.

<sup>44</sup> European Commission, *EU Competition Law Rules Applicable to Merger Control* (1 April 2010), online: [http://ec.europa.eu/competition/mergers/legislation/merger\\_compilation.pdf](http://ec.europa.eu/competition/mergers/legislation/merger_compilation.pdf) at Article 3(5).

<sup>45</sup> Van Bael Bellis, “European Union: European Commission Proposes Simplification of Merger Control Filings” (17 May 2013), online: Mondaq <http://www.mondaq.com/x/239740/Trade+Regulation+Practices/European+Commission+Proposes+Simplification+Of+Merger+Control+Filings>.

merger is a relatively small transaction.<sup>46</sup> In this regard, BIAC believes that the current system in the UK would benefit from increased certainty and predictability.

Among the implications of the voluntary nature of the UK's notification regime is that parties may choose not to notify a temporary transaction, such as a break-up bid where one or more entities purchase an enterprise pursuant to an agreement that the acquired business be divided up shortly thereafter. The question therefore arises whether the OFT will consider the first transaction as a separate relevant merger, or whether it will examine only the ultimate acquisitions in the second step, after the target is split up. The OFT's jurisdictional and procedural guidelines for mergers provide that "the OFT will generally be unlikely to seek to examine a relevant merger situation where it is clear that it will be merely an interim step in the context of a wider transaction and that the subsequent steps will occur within the four month time period within which the OFT has the ability to refer the initial acquisition."<sup>47</sup> Similarly, in France, the question of transactions which involve an acquisition of control on an interim basis (e.g. with a firm commitment to resell in whole or in part within a short period), by parties other than financial institutions or insurance companies, was considered in *Autorité de la Concurrence, Décision No 12-DCC-48*, April 6, 2012 *Sofides/ITM Entreprises*, which found that, depending on the circumstances, transactions that do not result in any lasting change in corporate control are not subject to merger control rules. In BIAC's view, such exemptions from the application of merger control rules are worthwhile, in that they rightly exempt transactions that will not result in any lasting structural change in the market.

Canada's Competition Act exempts transactions from notification that, given their nature, are not expected to give rise to anticompetitive effects in any market in Canada, including, for example, acquisitions of real property or goods in the ordinary course of business, transactions among affiliates, acquisitions of insolvent businesses by creditors, certain non-corporate joint ventures<sup>48</sup>, as well as acquisitions of shares/certain other interests made for the purpose of underwriting securities, acquisitions resulting from gifts or inheritances and acquisitions of non-voting shares.<sup>49</sup>

While the legal frameworks reviewed above have undergone some harmonization, more initiatives should be pursued to bring these frameworks into further alignment, with a view to increasing predictability for businesses and stimulating investment. Moreover, certain exemptions, including the exemption for partial equity investors in the U.S., should be expanded in order to reflect economic reality. Finally, BIAC submits that the creation of clear exemptions from notification and intervention in all jurisdictions for de minimis mergers will benefit growth and competitiveness, provided that the de minimis threshold is established using objectively quantifiable criteria, in consultation with the business community.<sup>50</sup>

<sup>46</sup> See OFT, "Mergers: Jurisdictional and procedural guidance" (June 2002) online: <[http://www.oft.gov.uk/shared\\_of/mergers\\_ea02/oft527.pdf](http://www.oft.gov.uk/shared_of/mergers_ea02/oft527.pdf)> at paras 4.1-4.2, 4.22.

<sup>47</sup> *Ibid*, paras 3.38-3.40.

<sup>48</sup> In order for a joint venture to be exempt from notification, certain requirements must be met, including, *inter alia*, (i) there is no change in control over any party to the joint venture; (ii) the range of activities of the joint venture are restricted by the joint venture agreement; and (iii) the joint venture agreement contains provisions that would allow for its orderly termination. See s. 112 of the *Competition Act*.

<sup>49</sup> Brian Facey and Cassandra Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations* (LexisNexis Canada, 2013), at 43-47.

<sup>50</sup> BIAC Summary of Discussion Points: Discussion on de minimis Rules in Merger Control (28 June 2011), online: [http://www.biac.org/members/comp/mtg/2011-06-com-mtgs/Final\\_June\\_2011\\_BIAC\\_Note\\_on\\_de\\_Minimis\\_Rules\\_OECD\\_CLP\\_WP3.pdf](http://www.biac.org/members/comp/mtg/2011-06-com-mtgs/Final_June_2011_BIAC_Note_on_de_Minimis_Rules_OECD_CLP_WP3.pdf) at 2-3.

## **6. Conclusions**

The wide variety of approaches taken by legislators, competition agencies and courts to defining relevant transactions for the purpose of merger control – in particular, including transactions other than plain mergers – leads to the unnecessary expenditure of time and resources, especially now that it is quite common that multi-jurisdictional transactions require multiple filings.

As in many areas of competition law and policy, BIAC supports convergence with respect to the definition of transaction for the purpose of merger control. However, given the risks (in terms of time and expense) associated with an ever expanding scope of transactions subject to merger control, it is important that such convergence occur without expanding the types of transactions that are subject to merger control.

BIAC appreciates the opportunity to submit these comments for the Roundtable Discussion on the definition of transaction for the purpose of merger review and would encourage agencies to consider ways to increase clarity and certainty as to which transactions should be subject to merger control, including the specific recommendations made in this paper with respect to (1) acquisitions of shares, (2) acquisitions of assets, (3) joint ventures and (4) exemptions.

## SUMMARY OF DISCUSSION

*By the Secretariat*

Mr. Frederic Jenny, the Chair of Working Party No. 3 (WP3), opened the roundtable on the definition of a merger transaction for purposes of merger review and welcomed all participants. He explained that the roundtable would focus on the definition of a merger transaction in four scenarios: (i) the acquisition of the shares, in particular of minority interests; (ii) the creation of interlocking directorates; (iii) the acquisition of assets; and (iv) the formation of joint ventures. The Chair emphasized that the topics chosen for this roundtable are the areas with real problems and divergent approaches, as identified in the Secretariat's Background Note. As the Background Note explains, for the majority of the "classical" mergers there is a lot of agreement on what a "merger transaction" is.

### **1. The acquisition of minority shareholdings**

The Chair first turned to Germany. He explained that Germany uses a test of competitively significant influence to reach cases of minority shareholdings, which sets Germany slightly apart from many other jurisdictions. He asked Germany to address in particular two issues raised by its contribution: First, for those transactions that were notified as a merger under the competitively significant influence standard, the percentage of prohibition decisions was much higher than for other types of merger transactions. Does this imply that jurisdictions that do not have this standard should worry about failing to review a significant number of anti-competitive transactions? Second, does the relatively soft standard raise concerns in practice because it does not provide legal certainty?

The delegate from Germany first pointed out that Germany's ability to review the acquisitions of certain non-controlling minority interests under merger review laws was certainly no longer unique in the international arena. Many economists acknowledge non-controlling minority interests might harm competition; a very interesting study on minority shareholdings has been commissioned by the OFT; they are discussed in the U.S. horizontal merger guidelines; the European Commission is expected to open consultations on an extension of European merger control to the acquisition of minority interests; and the UK already uses a material influence standard which is very similar to that standard used in Germany.

The delegate next turned to the Chair's observation that transactions that fall under the competitively significant influence standard appear to represent a disproportionately high share of problematic transactions. During the last 20 years, the Bundeskartellamt has reviewed approximately 30,000 notified mergers. Of those, approximately 220 were notified under the competitively significant influence standard, which represents less than 1% of all cases. Among those, approximately one dozen transactions were prohibited and a few more were cleared with commitments. This is a very small number in absolute terms, but it is true that the share of prohibitions of these cases is ten times higher than in all other cases. What could explain that result? From the outset the competitively significant influence standard – or material influence standard, to use the UK term - was designed to target cases with an effect on competition. This type of transactions is particularly relevant in markets where a firm already has a dominant position, so that the parties can expect a close review by the Bundeskartellamt. This is all the more the case when there have already been critical decisions in the same markets, in particular if these decisions had been confirmed by the Supreme Court, like in the case of newspapers and electricity markets. If the parties conclude that a concentration will very likely raise competitive concerns, they may try to redesign the



transaction in such a way that it is not notifiable anymore. One should not assume that these cases are specific to certain industries or to German markets. Rather, they are typical for markets with clearly defined relevant markets and with few players involved; they may also be more typical for markets with a higher past intervention rate. Of course certain industries may fit these criteria better, but the two most recent cases in which the Bundeskartellamt intervened against non-controlling minority stakes concerned the healthcare sector and banking. One case concerned the acquisition of a 10.1% stake by one private hospital chain in another hospital chain. The merger would have led to a strengthening of a dominant position in only one local market, so in the end the case could be cleared with the condition that the acquiring hospital would sell its own hospitals in that local market. Another case concerned a transaction involving two banks.

On the practical application of the competitively significant influence standard, the delegate explained that the Bundeskartellamt receives approximately 20 to 30 notifications per year involving this type of transaction. This was not a lot, considering the more than thousand merger notifications each year. Frequently the parties would try to persuade the Bundeskartellamt that their transaction would not fulfill the notification criteria and would often be prepared to challenge the final decision in court. The Bundeskartellamt is always open to discussions. It is of course always difficult to cope with such a soft threshold. Sometimes the parties will continue to change their plans in order to arrive just below the line. But this can be equally true for the application of the “acquisition of control” standard. In the end, some of the difficult cases have helped to get clarifications from the court so that there the line is sufficiently clear.

The Chair turned next to Poland. Its submission explains that acquisitions of minority interests initially could be reviewed under merger review law, but since a change in the law in 2007 they are no longer considered “merger transactions.” The Polish contribution suggests that there is no regret about the change as there had been no evidence that these transactions raised competitive problems. Given’s Germany intervention, it would be interesting to hear about the experience of Poland. Why was the situation there different from Germany’s experience?

The delegate from Poland confirmed that Poland’s experience had been different from Germany’s. Acquisitions of minority interests as well as interlocking directorates did fall under merger review law between 1990 and 2007. Those cases represented approximately 10 to 15% of all notifications every year. A review of these cases revealed that none created any serious competition concerns. Thus, in 2007 it was decided to abolish the obligation to notify such transactions because it was considered an unnecessary burden for undertakings. The delegate from Poland explained that the relevant provision covered acquisitions of at least 25% of votes of shares of the target that did not result in the acquisition of control. This was therefore a more formalistic approach than the more flexible German approach. When the obligation to notify this type of transaction was eliminated, the source of most infringement procedures for failure to notify a merger was eliminated as well. This also demonstrated that those transactions were not perceived as problematic transactions by the stakeholders. In principle such transactions could now be reviewed under antitrust rules but so far there has been no case.

The Chair pointed out that Slovakia has a slightly different experience than the first two jurisdictions. It currently considers including the acquisition of non-controlling minority interests in the definition of merger transaction, but is uncertain about the benefits and the costs of such a move. He asked Slovakia to explain what type of information it would like to have before taking a position.

The delegate from the Slovak Republic replied that there have been cases where a minority shareholding may have had negative effects on competition. Acquisitions of non-controlling minority interests may result in a competitive problem because shareholders may be able to influence the conduct of the acquired undertaking, even if they could not exercise *de facto* control in the more traditional sense. During the review of one particular merger, the competition authority found out that the acquirer already

had a minority shareholding in the target company, which had been acquired by several transactions that did not fall under a merger review regime. The competition authority suspected that the shareholder influenced the conduct of the target in light of the minority interest and that therefore the past transactions already had some effect on competition. In this particular case, the competition authority established that the merger would have harmful effects and prohibited this merger. Cases like this one suggest that it would be beneficial to include non-controlling minority interests in a definition of a merger. On the other hand, bringing the acquisition of minority shareholdings under the merger review regime would create problems as well, as it would impose costs on companies and increase the number of notified mergers that do not raise competitive concerns. Thresholds as well as other criteria should be consistent in all EU member states in order to minimize burdens and uncertainty for undertakings and avoid situations where certain transactions fall under merger control in one jurisdiction but are not considered merger transactions in another jurisdiction.

The Chair referred to Korea as an example of a country that considered adopting a provision that would allow it to review the acquisition of minority shareholdings under its merger review law, but in the end decided against it. He asked Korea to explain the reasons for this decision.

The delegate from Korea explained that the extension of the definition of a merger transaction to capture the acquisition of certain non-controlling interests was due to a practical necessity. The 20% threshold in the law was set because there is always a grey area when determining whether a firm has the ability to exercise control over a firm in which it has a minority stake; “control” cannot be defined merely by numbers and figures. Even if the interest is low, there could be other means to exercise influence over the target and that could amount to practical, *de facto* control. On the other hand, no matter what stake a company has in another company, even if the target is a competitor, concerns may not arise. This situation is reflected in the KFTC decisions. In some cases of minority shareholdings the KFTC found control, while in others with a similar shareholding ratio it did not find control. For that reason Korean merger review law has set a fixed threshold for minority shareholdings that is relatively low.

The Chair next asked Italy to report about its practical experiences in the Unicredit case. Is the current legal framework sufficient to control acquisitions of minority interest or is Italy considering changes in the law to better capture transactions that result in the creation of minority interests?

The delegate from Italy explained first that the acquisition of minority shareholdings as such does not constitute a merger transaction. The relevant question is whether minority shareholdings confer *de facto* control. The relevant criteria have been developed over the years and are in line with the practice of the European Commission. Minority shareholdings play a particular role in the bank and insurance sectors, which are characterized by a pervasive presence of cross shareholdings and interlocking directorates. The Italian competition authority has analysed several mergers in this sector and in several cases found that minority shareholdings conferred *de facto* control. The leading case in this respect is *Sai/Fondiaria* which involved a minority share of only 14%, but where the history of the decisions that were taken by Mediobanca was used to establish *de facto* control. This was a case in the insurance sector where the merging firms Sai and Fondiaria had notified a merger. The competition authority established that Mediobanca, which is the main investment bank in Italy, not only controlled the Sai/Fondiaria entity in view of the debt exposure and governance links, but controlled also - and this was the innovative and more interesting part of the case - Generali, the main insurance company in Italy. Control was found in light of the way decisions adopted by Generali had been influenced by Mediobanca: Mediobanca’s management decisions were always approved by Generali irrespective of the extent of Mediobanca voting rights; and with respect to the appointments of Generali directors, Mediobanca had been able to have its candidates appointed on several occasions. As to the Chair’s question, it could be said that the competition authority’s decisions in the insurance and banking sectors, which were upheld by courts, in a way filled the enforcement gap that might exist in the law. No change in the law was envisaged at the moment, but as

other countries Italy is awaiting with some interest the discussion that will take place at the European level on this issue.

The Chair observed that the position explained by Italy is not much different from the position of the Slovak Republic: there are no plans of immediate action, but if there is some European move in that direction you might be interested in following. Before asking the European Union for its thinking about the topic, the Chair turned to Romania which in its submission provided a detailed discussion of the pros and cons and of the different possibilities to better catch the acquisition of non-controlling minority shareholdings.

The delegate from Romania pointed out that the Romanian competition council to date had in fact very little experience with respect to the application of antitrust rules to minority share acquisitions. In a first step, it would be necessary to evaluate how effectively the potential anti-competitive effects of minority share ownerships could be investigated in an antitrust procedure. Such a case would be difficult to manage, due to the fact that the competition authority would have to prove the causal relationship between the minority shareholding and the respective practice as well as its harmful effect. Ex-ante intervention under merger review laws could rely on at least two options: One would be the UK model that would require moving from a decisive influence standard to a material influence standard. But the United Kingdom has a voluntary notification system, unlike the merger review regimes at the EU level and in Romania. The second option would be the introduction of a percentage threshold above which the minority share acquisition will become subject to a mandatory prior notification, similar to the situation in Germany and Austria. This solution would enable the competition authority to examine cases that could have an impact on the market while ensuring legal certainty for business and preventing increased administrative burden for the Romanian competition council. The Romanian competition council also contemplates the possibility of restricting minority shareholders when they involve rival undertakings. This could include a ban on the acquisition of minority shares in rival undertakings or on interlocking directorates that involve positions in a competitor's board. In this way, the ability of shareholders to have access to information regarding the competitive behaviour of a rival undertaking would be limited. The delegate confirmed that Romania was also following with great interest the evolution of the discussion at the EU level.

The Chair commented that several jurisdictions has already indicated their interest in the European discussions and asked the European Union to explain its position and its plans.

The delegate from the European Union remarked that this debate could not be more timely because the European Commission would launch later this week a public consultation on different possible improvements to make merger control more effective. One of the core elements of this consultation is whether the current merger control rules should be expanded to cover also non-controlling minority shareholdings. The Commission considers that the current situation is not satisfactory. As some delegates already explained, merger control from a European perspective applies to the acquisition of control. Sometimes the acquisition of minority shareholdings can lead to the acquisition of control and therefore falls under the EUMR, but in other cases it does not lead to control and therefore it is outside the current merger regulation.

The European Commission has some experience with the problems arising from minority shareholdings in connection with cases where one of the parties to a notified merger already holds a minority interest in a third party. If a company merges with a competitor of the company in which it has a minority shareholding, the European Commission must assess the competitive effects of the minority shareholding. The European Commission has identified situations where these pre-existing minority shareholdings lead to competition problems, either under unilateral effects theories or under a coordinated effects theory. In certain cases the Commission has even identified a possible vertical impact and foreclose

risks. In all these cases the Commission was able to impose remedies, normally the divestiture of the minority shareholdings. But the European Commission cannot assess the initial acquisition of minority shareholdings.

In some circumstances Article 101 concerning anti-competitive agreements, could be used to deal with minority shareholdings, but there are situations where Article 101 would not apply, such as the acquisition of minority shareholdings via the stock change. Article 102 on the abuse of dominant position could be applied to the acquisition of minority shareholdings when the company that is acquiring the minority shareholdings is already in a dominant position. Thus, there is a patchwork of rules that allows the Commission to look at problems related to minority shareholdings in some circumstances but not on a systematic manner. There is therefore a gap here that needs to be filled.

The public consultation will be mostly about how to deal with this gap. It will present different views and ways in which rules could be developed to allow the Commission to deal with minority shareholdings. One possibility is to establish the same procedural rules that we have for “normal” mergers and introduce a mandatory notification, accompanied by the full set of rules that apply to merger notifications. This proposal was already examined by the Commission in 2001, and rejected. This solution brings a lot of information to the competition authority, a lot of legal certainty. But it also imposes significant burdens on companies and public authorities, taking into account that acquisitions of minority shareholdings are quite widespread and only a relatively limited number of cases lead to anti-competitive effects.

That is why the consultation also presents alternatives that would be more selective and would allow the Commission to intervene only if it identifies potential harm. Such a system could be based on a pure self-assessment system by companies like the one that exists already under Articles 101 and 102. Or one could envisage an intermediate system with an obligation on the companies to inform the Commission of a transaction but without providing all the information that is required under today’s notification system. The Commission could decide on the basis of this information or maybe based complaints or other market information whether it wants to intervene. This is a complex matter. It would also be necessary to decide other parameters, for instance whether there should be a percentage threshold above which notifications are required. The public consultation will last for three months and the Commission hopes to come to a conclusion in the autumn on whether there is a need to move forward or not.

The Chair turned to the United States which has an entirely different system. According to its contribution, the US uses a very wide definition of what is a merger but has a relatively narrow and precise set of thresholds to determine when a notification is required. Is it in fact always so clear to companies whether they have to notify and are the criteria entirely predictable? How would cases be handled where a minority shareholding may create an incentive for the firm to compete less vigorously with the firm in which it has a small shareholding because it would not be in its interest to increase competition there?

The delegate from the United States began his intervention with a couple of overview points to put the U.S. system in context. The Clayton Act, which is the law prohibiting anti-competitive mergers, exists since 1914, but the system of pre-merger reporting has been introduced only in 1976 under the Hart-Scott-Rodino Act. As the Chair suggested, coverage under the law is very broad, notably it applies to all mergers regardless of form and size. But the implementation of the law and the implementing rules on notification requirements are informed by experience, in particular by the fact that a very large majority of mergers including reported mergers do not present competitive problems. For example, in the most recent fiscal year the agencies granted early termination - that is clearance without having to wait for the 30 days period to expire - in some 60% of notified transactions and second phase proceedings were initiated in only around 3% of notified transactions.

Another important feature of the law is that the agencies can challenge anti-competitive transactions whether or not they are subject to notification requirements and even after consummation of reported transactions. Thus, although the definition of a merger transaction and the pre-merger notification system are very helpful to the ability to enforce the Clayton Act, it is not necessary for the pre-merger notification rules to catch every potentially harmful transaction.

The Secretariat's paper properly notes the trade-off between bright line objective definitional rules and the benefit of being able to consider a variety of qualitative factors that can influence whether a transaction causes a change in competitive conditions. The agencies have tried to make the rules regarding pre-merger notification as clear and objective as possible. In order to do that, they have come back many times over the years to fine-tune the relevant rules. But of course there are always grey areas so it is not always perfectly clear whether a transaction meets the definition and is notifiable. In fact, the agencies get many questions from parties regarding the interpretation of the rules, for example with respect to the investment-only exception, which is an important exception to the coverage of pre-merger notification rules. A lot of questions are about when shareholders have an active influence under these rules. The agencies have a very open line of communication for those kinds of enquiries and much of the advice is posted on the web site so everybody can benefit from it.

As to the Chair's question about the potential anti-competitive effects of passive minority shareholdings, it was important to note that the agencies can come back and challenge transactions that they later consider anti-competitive but had not been aware of earlier. The delegate could not recall a case where such a transaction had been challenged, but emphasized this is the kind of thing the agencies would keep an eye out for.

The Chair next turned to BIAC, highlighting BIAC's plea for convergence on this issue, although with the proviso that convergence should not expand the scope of transactions that are caught by merger control. How should BIAC's position be understood in light of the concerns expressed by some countries that some problematic mergers were not caught if merger review laws did not extend to the acquisition of a minority interest? Adopting a provision to catch minority shareholdings would enlarge the scope of merger control but if these transactions did raise competition issues, maybe it is not such a bad thing? Could BIAC explain how it views the potential for convergence and what principles would be important?

The BIAC representative replied that there may be situations where diversity has advantages. But diversity is not a good thing in the regulation of international transactions because it increases transaction costs especially in multi-jurisdictional transactions. This amplifies the legal uncertainty and makes strategic decision more difficult, which could ultimately have a chilling effect on the economy. BIAC therefore once again supports convergence, as it has done in other areas. In fact, the issues related to the definition of transactions for merger control purposes are perfect examples of the necessity to work towards convergence, including the acquisition of minority interests, the acquisition of assets, and joint ventures.

There is no doubt that the acquisition of the minority shares in a company can have in certain circumstances harmful effects and should be controlled. Such effects can be the result of interlocking directorates, the right to appoint members of board of directors of the targeted companies, or veto rights. Harmful effects could even exist in the absence of such rights, although it is more difficult to identify situations where the mere presence of a significant shareholder will influence the attitude of the target's management.

The BIAC contribution provided a brief review of the extremely rich variety of approaches that are taken by the legislations on the definition on the minority acquisitions. They rely generally either on a mechanical threshold based on the percentage of the acquired company's capital of voting rights, which

can range from zero in certain jurisdictions - meaning that every acquisition of minority shareholding is eligible for control - to 35% in other countries, or they rely on the attempt to capture the circumstances where the acquirer has a decisive influence. In this respect there is again a rich variety in the wording to describe the situations where the requisite influence exists. In multi-jurisdictional transactions this requires a very complex analysis before one can determine which are the required merger filings.

BIAC recognizes that it is a tricky issue and would recommend that efforts be made towards convergence, based on the objective of capturing those transactions that do have an impact on competition or where an impact on competition is likely to occur, coupled with a *de minimis* threshold. Common or converging guidelines should provide interpretation of regulatory definitions.

The Chair opened to floor for comments and discussions on this issue of minority interests by other delegations.

The delegate from Sweden intervened and remarked that after listening to the contributions he did not find anybody really explaining why it was necessary to capture minority shareholdings. He explained that he had always been quite sceptic concerning the logic behind the need to extend merger control to the acquisition of minority shareholdings. The idea behind merger control is simply that a company can control another company and that it can direct the target company's behaviour in the market, and if it is a competitor then it can certainly ensure that the target competes less vigorously. With respect to minority shareholdings, the argument goes that the shareholder will compete less vigorously because it has a stake in the target. For example, if a company holds 25% of the target's shares, it gets 25% of the target's profits. But if the same company wins the entire contract, it will get 100% of the profits. One could therefore be sceptical about the logic that a company would forego 75% of the profit by allowing the target firm to win a contract.

Another argument that is often voiced is that minority shareholdings or interlocking directorates are a means of dampening competition by facilitating collusion. But he was not aware of good examples showing that collusion was actually happening. Competition authorities catch cartelists all the time and they are perfectly able to collude without owning pieces of each other or without getting on each other's boards. It just seems to be a very complicated means of achieving a cartel. He asked whether there was more empirical evidence suggesting that competition authorities should be worried if they are currently not reviewing acquisitions of minority shareholdings.

The Chair thanked Sweden for the provocative question of whether there is any reason at all to want to control a minority shareholding, given that there are other ways to collude. He asked Germany for a first answer.

The delegate from Germany replied that in general economists seem to agree that non-controlling minority interests can dampen competition between competitors. Cases involving a competitively relevant influence that are investigated in depth by the Bundeskartellamt are very often cases between close competitors on a clearly defined market. A typical case was the newspaper of Cologne buying a minority share in the newspaper of Bonn. The two towns are only 30 km apart, and therefore one would find overlapping areas of activity. In the Bundeskartellamt's view the minority shareholding combined with other structural and contractual links would have led to competition between the parties. In any event the legal requirements for a competitively significant influence go beyond corporate links and include additional factors significant for competition, like contractual rights, special voting or veto rights, specific information rights, options or pre-emption rights, economic dependency or parallel interests. The approach used by Germany's highest court for transactions with competitively significant influence is that it is important to consider that the target will respect the interests of the acquiring party in its future decisions on economic activity. A company might be able to achieve the same results by other means. But

in the Bundeskartellamt's experience the acquisition of a minority share appears to be the most attractive way to achieve these results because it establishes a legal framework between the two parties.

A second delegate added that although there may not always be much empirical evidence for the amount of competitive harm, there were some relevant examples of negative impact in the experience of the Bundeskartellamt. Some years ago Germany had four very powerful major energy suppliers, REW, E.On, Vattenfall, and EnBW. Back then, the four companies held minority shareholdings in the municipality suppliers, their customers. During approximately 10 years those minority shareholdings went up from something like 10 or 15 holdings nationwide to more than 100 or 120. For the Bundeskartellamt that was a very clear signal that the four major companies were buying interests in these municipality suppliers in order to secure their supply chain. The Bundeskartellamt started to forbid these mergers on the ground that they foreclosed the market as there was no other explanation for that strategy. While there was no empirical evidence in the sense that the effects of the acquisitions were evaluated, one could observe over that time a clear strategy.

The delegate from the United Kingdom pointed out that competition issues can arise in a variety of ways, not solely a matter of collusion. Minority shareholdings can amount to a dampening of competition; whether or not that amounts to an SLC is another thing. Recent experiences have shown that these effects can come about in hostile situations, in relationships involving competitors. One case reviewed by the two UK agencies and then actually reviewed by two courts in the UK as well was ITV and BSkyB, which involved a 17.5% shareholding. This may not seem very high but when you look at what was *de facto* happening in the meetings then you saw the power behind that shareholding. The particular concern in that case was looking at the target company's ability to raise finance effectively, as BSkyB was seen to be able to have quite an effect on passing special resolutions.

The delegate from Austria took the floor to share the experience of the Austrian competition authority with the relevant provisions concerning minority shareholdings. In Austria, acquisitions of non-controlling minority shareholdings of at least 25% of the shares have to be notified, although there is no provision like in Germany that refers to the acquisition of a competitively significant influence. The minority interest provision is important. For example, in 2011 mergers that concerned minority shareholdings represented 12% of all notifications, but 33% of all the mergers going into phase 2. This suggests that mergers involving the acquisition of minority shareholdings appear to be more problematic than others. The cases which went into phase 2 concern the media industry in Austria, which is already very highly concentrated. This is therefore a market where non-controlling minority shareholdings can pose problems. During the recent revision of the Cartel Act there was an intensive discussion whether the law should go one step further and introduce also a provision like in Germany, but it was finally decided not to introduce such a provision.

The delegate from the United States also replied to the question raised by the delegate from Sweden. There was not much empirical evidence on this point. But there was anecdotal evidence to suggest that in fact minority shareholdings can be a problem. The problem is, like the UK suggested, about the dampening of competitive incentives or finding more of a mutuality of interests. The Department of Justice challenged earlier this year A-B InBev's acquisition of Modelo. The complaint lays out how AnheuserBusch, which at that time owned a very substantial interest, a non-controlling but substantial interest in Modelo, despite all sort of safeguards against influence was actually working very hard to get Modelo in the United States to follow the pricing of the leaders in the market place. So there is some evidence to suggest that there is an increased risk there and that is a risk that is serious enough that it makes a lot of sense for enforcers to find some way to examine that risk and inform them about whether action is warranted.

The delegate from Italy supported the intervention by the United States. He pointed out that in response to the Green Paper of the European Commission, the Italian authority in 2002 suggested

introducing a control of minority shareholding acquisitions. Two ideas were behind that suggestion: one possibility is the fact that the two equal competitors have equal shares, one in the capital of the other and of course this may create a reduction of competition because of coordinated effect. The second point was brought up by a paper by David Gilo, who is now the Chair of the Israeli competition authority. He wrote a paper suggesting that when a maverick owns some important shares in a dominant player, then its incentives to compete are reduced.

The delegate from the European Union added that in his initial presentation he briefly mentioned the possible anti-competitive effects of minority shareholdings. The Commission's consultation will be accompanied by two annexes, one that includes a comprehensive survey of economic literature on the possible negative impacts of minority shareholdings and another one with a long list of concrete examples of cases where the European Commission and other authorities have identified actual harm. Last year in the review of the *Glencore/Xstrata* merger, for example, the Commission identified a problem in the market of zinc supplies in Europe, based on the combined existence of minority shareholdings and a long term supply agreement. To remedy this situation it required the divestment of the minority shareholding.

And to follow up on Germany's intervention, the European Commission examined energy markets in Germany in parallel to the RWE case that was examined by the German competition authority. The European Commission examined the *Veba/VIAG* merger and required the divestiture of a number of minority shareholdings that could have led to coordination in certain energy markets in Germany. Another example concerns the gas market in Germany. In *Exxon/Mobil*, the Commission imposed a number of remedies to divest minority shareholdings that were leading to risk of coordination in regional gas market in Germany. The experience shows that in actual cases minority shareholdings have led to problems.

The Chair remarked that the Swedish delegation received an answer to its question coming from many different directions. The high level of scepticism expressed by the Swedish delegation was not really shared by those countries that took the floor.

## **2. Interlocking directorates**

The Chair suggested moving on to the second part of the roundtable discussion focusing on interlocking directorates. He explained that this was another area where there is a diversity of views. In some jurisdictions interlocking directorates are outside the scope of merger control, in other jurisdictions they are within the scope of merger control but only to the extent that they lead to one firm having a control of the other firm or both of them having control on the other one, and finally in a few jurisdictions they are explicitly mentioned in the merger control laws. He suggested that it would be useful to start with Japan which probably has the most elaborate provision on interlocking directorates in its merger review law.

The delegate from Japan took the floor to explain how merger review applies to interlocking directorates in Japan. According to Article 13 of the Antimonopoly Act, interlocking directorates are prohibited when they may substantially restrain competition in any particular field of trade. In addition, the JFTC may order the person implicated by this provision to resign from his or her position as the director of the company. It is also worth noting that there is no explicit requirement to notify interlocking directorates.

The JFTC's merger guidelines explain in greater detail when interlocking directorates require review. The first case is when directors or employees of one company comprise a majority of the total number of directors of the other company; the second case is when an interlocking directorate has the authority to represent both those companies. In other cases, the need to review depends on the situation. Usually there are four elements considered: Whether an interlocking directorate is formed by full-time or representative directors; the ratio of directors or employees of one of the interlocking companies to the total number of



directors of one of the other interlocking companies; mutual holding of voting rights between the interlocking companies; and the trade relationship or business alliance of those companies. When the interlocking companies belong to the same group of companies, there is in general no need of a review. In practice, prior notification is not required when interlocking directorates are created. The JFTC can collect information about interlocking directorates through the notification of other types of mergers where parties are required to submit information about interlocking directorates.

The Chair next turned to Chinese Taipei, which also appears to be interested in controlling interlocking directorates. It appears that interlocking directorates fall within merger review only if they result in control of another firm. The contribution refers to a case that went all the way to the Supreme Court. It would be interesting to hear about the law and also the kind of cases that are reviewed.

The delegate from Chinese Taipei explained that interlocking directorates between competitors are viewed as merger transactions in Chinese Taipei. According to Article 6(1)(5) of the Fair Trade Act, when an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise, the *prima facie* evidence applied in such a case is whether more than half members of the board of the target will be appointed by the acquirer. Cases of interlocking directorate are not rare. The FTC has actually some enforcement experience. The FTC found that the competition might be lessened significantly particularly for horizontal mergers as a result of interlocking directorates.

### **3. Acquisitions of assets**

The Chair noted that the roundtable had heard from two examples of jurisdictions that have a specific provision for interlocking directorates. But generally, the topic appears to be of a lesser priority in many jurisdictions. He then proposed to discuss the next issue, the application of merger review laws to asset acquisitions: When is an asset acquisition material enough to fall under the definition of a merger transaction? How much control over the asset must the acquirer have to come within the ambit of the merger control law? Is acquiring control through a contract or acquiring a piece of intellectual property enough to constitute a merger? The Chair observed that the contributions demonstrate that there are a lot of difficulties for competition authorities to define when exactly the acquisition of an asset is a merger. He asked the Czech Republic to start the discussion and to report about a case concerning whether the transfer of the domain name could fit the definition of a merger.

The delegate from the Czech Republic first confirmed that the case in the Czech submission was a hypothetical case. The competition authority was approached by two e-shop providers who were thinking about transforming the domain name of one of them and they asked whether hypothetically such transaction could constitute a merger. The competition authority answered that under some circumstances that could be the case. The parties abandoned the transaction so there was no opportunity to deal with this issue. In the view of the competition authority, the transfer of a patent or a trademark could be considered a merger transaction if a sufficient number of customers is drawn with the contract as well. This can happen when a domain name is transferred because a typical customer identifies the name of the domain and not the one actually providing the services. The domain name is an asset that attracts customers. The competition authority is currently revising the guidelines on the concept of a merger transaction and considers including a statement in the guidelines on the point that under some circumstances the transfer of trademark, of patent and even of a domain name can constitute a merger.

The Chair then turned to the UK contribution to stay with the topic of intellectual property. The contribution presented two cases involving the transfer of intellectual property rights. Although in both cases the transfers were eventually not found to constitute a merger, it would be interesting to hear about these cases, and more generally about what criteria should be used to determine when IP transfers can be considered a merger transaction.

The delegate from the United Kingdom first followed up on the earlier discussion on passive minority shareholdings and clarified that unlike shareholdings for strategic purposes such as in the *BSkyB/ITV* case, passive shareholdings purely for investment purposes are not considered merger transactions under UK merger control law.

Concerning the Chair's question, the delegate explained that the test in the UK is whether two or more enterprises cease or will cease to be distinct. The term "enterprise" is defined in the legislation as the activities or part of the activities of a business. There is no need for a separate legal entity whose shares are being acquired; "activities" can be just assets or there can be a joint venture of partnership of one form or another. What is clear from the legislation is that it has to be activities for gain or reward. It is also clear that assets can include intangible assets such as intellectual property rights. The main question in relation to intellectual property rights is whether it is possible to identify a turnover that is specifically relevant to the transferred intangible asset that will be transferred to the buyer. As a hypothetical case, one can think of some of the transactions in the consumer goods field. If there is simply a transfer of a brand and no manufacturing facilities and no consumer contracts, but there was a clear turnover that was allocated or could be allocated to that brand, the transaction could be regarded as potentially being subject to investigation under the merger rules in the UK.

The contribution mentioned two cases where this issue came up. One is referred to as Project Canvas, which was a joint venture partnership between the major national broadcaster, the BBC, the major commercial broadcasters, i.e., the major independent channels 1,2,3,4 and 5 but excluding BskyB, two telecom companies, British telecom and Talk Talk, and a transmission company, Arqiva. The Project was a partnership to offer digital terrestrial channels and internet-delivered TV services via a particular set-top box that was connected to viewers' TV sets. There was a single-branded user interface, which has become known as Your View. Most of the parties made a contribution of a financial nature to this joint venture, but the BBC contributed some software, some designs, some specifications and some know-how that was still in the course of development. The question was whether the transfer of that technology to the partnership could mean that part of the activities of a business was being transferred from the BBC to the partnership. The OFT came to the conclusion that the technology was itself substantially incomplete and there was no evidence at all at that point that any turnover could be attributed to it because it had not been commercialized. So in that case the conclusion was that it was not a merger.

In the second case the OFT was notified of a situation where a company, GuestLogix, had integrated its retail point of sales of software and its intellectual property into the in-flight entertainment system of Panasonic Avionics. The question was whether there was a revenue stream attributable to the integration of that point of sale software so that this was essentially the transfer of IPRs to Panasonic. The OFT concluded that it was not because the IPR was not being transferred on a permanent basis and essentially the arrangement seemed to be no more than a non-exclusive licensing of the software and the IPR to Panasonic. It did not amount to a permanent divestment of the IPR.

The Chair observed that the United Kingdom's focus on whether there is a transfer of revenue from one party to the other appears to be pretty close to a case on a transfer of a trademark presented in the Turkish contribution. Turkish law also appears to require the Turkish competition authority to identify that there is a revenue transfer together with the asset. He asked Turkey how it was able to identify in this case that revenue went along with the transfer of a trademark and whether it will always be the case that if there is a transfer of trademark there is necessarily a transfer of revenue.

The delegate from Turkey first mentioned that in this specific case the target was not active on the market, as it had gone into bankruptcy and its production had stopped. No specific turnover could therefore be identified during the merger review. The transaction concerned the poultry market in Turkey and the target had been one the biggest player in the market, although it gone into bankruptcy. The competition

board concluded that the trademark formed the basis of market-based activities of the undertaking as it played an essential role in sales activities. The acquisition of the trademark therefore constituted a merger transaction.

The Chair returned to the United Kingdom and asked how the UK would evaluate a situation where the trademark of a company in bankruptcy is transferred, and therefore the trademark is inactive or at least does not generate sales. Would the UK look at potential revenue if you could not find any recent actual revenue associated with the trademark?

The delegate from the United Kingdom replied that such a situation has not arisen in practice. Presumably, if the company itself was bankrupt but if there was value in the trademark, one would look at the latest revenue attributable to that trademark when it had been in use in the market. Anyone can speculate about the turnover that might be realizable from the use of that trademark in different people hands. One would have to look and see whether it was actually active in the market. The delegate recalled one case in the past where essentially a trademark that had not been used for some years was transferred as part of a package of assets; but that transaction qualified for other reasons as a merger transaction. In most cases involving businesses that are bankrupt there is a point of time at which both the value of the asset being transferred and the turnover attributable to them should be identified. A recent example in relation to retail sector involved a particular clothing retailer that went out of business. The delegate recalled that in this case the assets included the trademark. It seemed to be the logical conclusion in that case to look at the turnover that had been realized from those trademarks in the preceding 12 months.

The Chair next turned to Australia to discuss a case involving asset transfers. He observed that in Australia there seems to be a bit of a controversy over whether the transfer of a greenfield site to a large retailer is a transfer that qualifies as a merger transaction. Apparently the ACCC is inclined to consider that it is indeed a merger, but the parties are resisting fiercely this interpretation.

The delegate from Australia first mentioned a couple of features of the supermarket sector and the Australian merger regime. The supermarket sector in Australia is very concentrated, with two major supermarket chains (so-called MSCs), and an independent sector, which is supplied by a single wholesaler. Then there is Aldi which entered approximately 15 years ago and has recently been expanding quite rapidly. Australian merger laws are quite broad in that they cover all acquisitions of assets and shares that substantially lessen competition. A greenfield site, that is a site on which supermarket is to be built, is such an asset and is covered by the law. The government has indicated that if that interpretation of the law is successfully challenged it would amend the law to make it clear that greenfield sites are covered. So far it has not been challenged but that may be about to change.

The ACCC has looked at quite a few of these greenfield acquisitions in the supermarket sector and in terms of their potential impact on local supermarket retail markets. Australia does not have any compulsory pre-merger notification scheme, but a voluntary notification system which has evolved over many years on an informal basis and has actually become quite formal. Many of these site acquisitions are unlikely to substantially lessen competition because they are not actually removing a competitor from the market; so most of the transactions reviewed by the ACCC were not taken to a market review and they were quickly disposed of.

The ACCC has looked at one or two transactions very closely been concerned about the removal of potential competition as a result of the acquisition of a greenfield site. In one case the acquisition was abandoned after the ACCC issued a statement of issues. Another case is currently pending. In fact the ACCC reached the decision a couple of weeks ago to oppose the acquisition of a greenfield site by one of the MSCs in outer Western Sydney. This particular site has some features that suggested that the acquisition would substantially lessen competition by preventing the entry of a rival supermarket. The site

was on the edge of Sydney where both the closest competitor and the next closest competitor were owned by the acquiring supermarket chain. Aldi is planning to enter in that local market in 2014. The next closest competition is 9km away, separated by a motorway. Any other new entry was extremely unlikely. The ACCC reached the conclusion that absent the acquisition, entry by an alternative supermarket at that site was likely and that would increase competition and provide greater choice to consumers in the local market. The ACCC has announced the decision to oppose and is now waiting to see. Under the Australian enforcement regime the parties are free to proceed and the ACCC would then have to go to court and seek an injunction.

The Chair called on Hungary to continue the earlier discussion on how revenues can be attributed to the transferred assets. He explained that Hungary's case was reminiscent of Turkey's trademark case, although it involved a retail mall that was closed at the time when it was transferred. How did Hungary conclude that there was a merger transaction? Was it necessary to prove that there was a possibility of attributing revenue? Or did Hungary follow Australia's approach, focusing on whether there would be more competition if someone else bought this retail mall?

The delegate from Hungary explained that the Hungarian Competition Act defines as merger transactions those asset acquisitions that are probably substantial enough to bring about structural changes on the market. The assets and rights of an undertaking together with the assets and rights at the disposal of the acquiring undertaking must be sufficient to enable market activities to be pursued. The Competition Council decides on a case by case basis whether the transfer of assets fulfils this definition of the Competition Act, taking into account the totality of relevant circumstances.

In the retail merger case the Competition Council found that the leasing of closed stores was a merger transaction because of the goodwill attached to the relevant location. The case involved a merger of two DIY chains, Obi and Bricostore. Both parties operated national chains of DIY products and home improvement products. Bricostore closed its stores at the end of 2012 but kept the properties. In the middle of January, OBI and Bricostore signed a lease agreement for 12 years so that OBI could operate stores on those properties. The Competition Council found that a 20 year duration and the other conditions of the lease agreement transferred control over the properties to OBI; the Competition Council also took the effects of the transaction into consideration. First, the lessee and the lessor were involved in the same business activities so their stores were competing with each other; the competition council pointed out that the DIY stores were in particular locations that carried some elements of goodwill as consumers have some expectations that in these places such activities are carried out and DIY products can be bought. Second, the Competition Council evaluated the length of the interruption of the business activity. The stores had closed at the end of December and the lease agreement was signed in the middle of January; the acquirer had access to all the necessary employment, know-how, rights, assets, and business partners to start the business just right after the rebranding. The Competition Council concluded that a month of closing was not likely to change consumers' expectations and therefore the goodwill attached to these locations continued to exist.

The Chair next pointed out that Estonia's contribution described a case that was reminiscent of Hungary's, even though it was a different case with a different outcome. He explained that the Estonian case involved a transfer of trash containers with some goodwill, but the competition authority did not consider that it was a merger. He asked Estonia why the competition authority did not consider that there was a merger transaction.

The delegate from Estonia confirmed that the case involved the acquisition of assets in the waste management sector. In waste management, most districts in Estonia have a system of organized waste management, in which only the company that has won the tender is active. Trash containers belong usually, but not necessarily, to the company dealing with waste transport and can be leased to users. So

generally the lease of trash containers can constitute a separate product market. In the case in question, Company A was acquiring the trash containers located in one district from Company B. Company B was leaving the market, as it did not win the right to operate in this district for the next period. But also Company A, the acquiring company, was not going to be active in waste transport in this district. B's lease contracts concluded with the end-users were not transferred. Company B terminated the contracts, but sent its customers new draft agreements to be concluded with company A, though with the possibility not to sign it. So it was made very convenient for the users to continue with Company A. One aspect that drew the attention of the competition authority was the value of the transaction because the price paid for these old trash containers was much higher than the price of new containers. So there was a reason to believe that acquisition of assets could have been a hidden transfer of a business. But ultimately the competition authority left this question open as there was not enough evidence to prove that it actually was a concentration. It would have been complicated to prove in the court that there was a merger as the situation was not so clear and the customer contracts were not transferred.

The Chair called on Colombia to discuss its case involving asset transfers.

The delegate from Colombia explained first that Colombia followed the acquisition of control standard in order to determine whether certain transactions constitute a merger. The acquisition of assets is considered a merger when it grants the acquiring company the possibility to exploit a line of business that absent the transaction would not be under its control. The *Haceb* case involved the acquisition of an intangible asset, a trademark, together with a lease contract. Haceb, which is a well-known company for producing refrigerators, bought the trademark of Icasa, which was another well-known trademark for refrigerators, together with a lease contract for machinery. The parties did not notify the merger, but the Superintendence considered that it was indeed a merger because the main asset in that transaction was a well-known trademark. The well-known aspect of the asset was very important and it was determined that the purchase of intangible assets between competing companies may result in a merger whenever it enables the acquirer to produce a line of business and acquire the goodwill that a competitor had, thereby increasing the acquirer's share in the market.

The delegate from South Africa also reported about a relevant case. Like in Australia, there had been a lot of property deals during the last year; over 25% of all notified transactions are related to property deals. Many concern greenfield acquisition that involve not only people who are involved in the retail sector, but also people who are involved either in the business of trading in real estate or in other types of businesses that involve acquisition of land. Some of them can change the use of the land, according to the type of business they are involved in, for example hotels. One challenging question in this type of transaction has been that parties come in and notify the proposed greenfield acquisition but do not disclose what they are going to do with the land. Because South Africa has a mandatory notification system, mergers must be reviewed as notified. So, for example, someone who is involved in hotels is buying a land that is designated as an agricultural land; the buyer is not in the agriculture business and does not intend to do agriculture so there is no overlap. But then the parties explain that they do not know what they are going to do with the land. The Competition Tribunal accepted the parties' arguments.

The Chair followed up with a question for Australia and asked what would have happened if the buyer of the land said that it did not know whether it was going to exploit it or turn it into something completely different from the line of business that we are in? Would the ACCC have to look at all the possibilities of usage and then decide that there was at least one possible usage with anti-competitive effects in order to block the transaction?

The delegate from Australia replied that it would have been necessary to establish a factual-counterfactual scenario that there was a real chance of a substantial lessening of competition as interpreted by the courts. There has been a bit of a debate in one particular case that went to the full court about

whether you split up the counterfactual, whether the counterfactual was a separate test to the SLC test or whether it was a uniform test. Taking everything into account one would have to look at the likelihood of use under the factual-counterfactual and whether there was a real chance of substantial lessening of competition comparing the two.

The Chair concluded this part of the discussion, observing that the discussion indicated that the range of asset transactions that can be considered to be merger transactions is wide. The criteria used to decide that there are merger transactions are themselves quite different from one country to the other, including the possibility of generating revenue or the possibility of being used complementing other assets, or the likely use of those assets coming into place.

#### **4. Joint ventures**

He then turned to the fourth category of complex cases which are joint ventures. Joint ventures raise complicated definitional issues to decide whether they come under the merger control law or whether they should be considered to be anti-competitive agreements. There are several issues, one of which is whether there is a specific provision regarding joint ventures in the merger law. A second issue is under what circumstances joint ventures are sufficiently merger-like to qualify as mergers, and the third questions when there can be two sets of controls on the same joint venture because it has a structural aspect and it has a behavioural dimension. The Chair turned to Canada, explaining that Canada's description of the joint venture treatment created a quite complex picture. The contribution appeared to suggest that there are probably some joint ventures that are not reviewable, but that the Bureau would like to review. He asked Canada to explain why this is the case and what kind of joint ventures would escape merger control.

The delegate from Canada explained that under Canadian competition law, a joint venture will be considered a merger and thus falls under the Bureau's scope of review if it results in the acquisition or establishment of control over, or of a significant interest in, the whole or part of a business. The Competition Tribunal can issue remedial orders in respect of a joint venture that constitutes a merger subject to a limited exemption. The joint venture exemption is restricted to the formation of combinations that are non-corporate joint ventures such as through a partnership or trust. For the exemption to apply there is a long list of criteria that must be met, as laid out in the Canadian submission.

Where a merger meets certain financial thresholds, it will typically be subject to pre-merger notification; however there is an exemption from pre-merger notification that is specific to joint ventures. This exemption applies only to the formation of a combination, and has a set of broader criteria than the joint venture exemption on merger review. Again, the contribution describes these criteria in more detail.

The joint venture exemptions are generally intended to apply to research and development joint ventures as well as specific project joint ventures that are potentially beneficial to the Canadian economy and are not likely to raise competition concerns. It is possible that parties through a proposed combination may structure their deal to fit within the exemption to avoid pre-merger notification. The Bureau is aware of instances where transactions that raised potential competition concerns have benefited from the exemption. Adding to the concern is the fact that the Bureau has a limited time period within which the Commissioner can challenge a completed transaction. For the joint venture exemption, that period used to be three years from the date of the completion of a merger, but that period has been shortened to one year in March 2009. In other words, in case of a non-notifiable transaction the Bureau has only one year after completion of that transaction to detect it and to conduct an investigation.

A joint venture was the subject of the 2011 case of *The Commissioner of Competition v. Air Canada, United Continental Holdings, Inc., United Airlines, Inc. and Continental Airlines, Inc.* In that case the Commissioner challenged a proposed joint venture and certain alliance agreements

between Air Canada, United Airlines and Continental Airlines. The Commissioner sought merger remedies in respect of the proposed joint venture between the airlines that would, in effect, have merged all their respective operations on flights between Canada and the United States. In addition, the Commissioner sought also remedies under section 90.1 of the Act in respect of three alliance agreements between the airlines that preceded the proposed trans-border joint venture. Section 90.1 of the Act provides for the civil review of agreements or arrangements between competitors and potential competitors that are likely to prevent or lessen competition substantially. Ultimately the Commissioner and the respondents concluded the matter through a consent agreement that prohibits Air Canada and United Continental from coordinating on key aspects of competition including joint pricing and revenue sharing on 14 trans-border routes.

The Chair thanked Canada for a clear explanation of a rather complicated situation. He noted that situations may be even more complicated elsewhere. The Mexican contribution, for example, acknowledges the fact that there is a complete lack of clear rules governing the characterization of joint ventures, which creates uncertainty for the parties. He asked Mexico to explain why this is the case and what happens if the parties do not notify a joint venture because they think that they are outside the scope of the merger review.

The delegate from Mexico confirmed that Mexico had no specific provisions governing joint ventures when it comes to merger review. However, the definition of what constitutes a merger is quite wide and so most joint ventures must be notified, provided they meet the monetary thresholds specified in the competition law. That situation has costs and benefits. Obviously the cost is that some joint ventures must be notified in Mexico even though they are not notifiable in other jurisdictions. But in majority of cases, JVs that do not pose a clear risk to competition are subject to a simplified merger notification procedure that takes a very short period of time. There are no changes anticipated in this respect.

The Chair then asked the United States and the European Union briefly explain whether the treatment of joint ventures in their respective jurisdictions avoids some of the problems that have been identified elsewhere. Is there a sufficiently clear rule on the definition of concentrated joint ventures as opposed to cooperative joint ventures or are parties also confronted with some of the uncertainty that has been revealed by the Mexican and the Canadian presentations?

The delegate from the European Union replied that the well-known main criteria in the EU to know if a joint venture needs to be notified under the EUMR is whether the JV is full-function or not. This distinction depends on whether this entity would operate on a standalone basis on the market and has the different elements that will enable it to offer services or products on the market on a standalone basis. This is a criterion that may be simple to define, but that is difficult to apply on a case-by-case basis. Over the years the Commission has generated sufficient case practice. All decisions are published, typically with some paragraphs on why this merger is notifiable or not, unless a simplified procedure applies. The Commission has also provided additional guidance on identifying what is the full-function joint venture and what is a joint venture that requires to be assessed under Article 101. But certainly this is not one of the easy areas of the law.

Mr. Reindl posed a follow-up question to the European Union, in connection with the previous discussion of minority shareholdings. If the EU considered extending the scope of the merger regulation to certain minority shareholdings, is there not the risk that this will interfere with the current rules on joint ventures? There may be joint ventures where somebody acquires a minority shareholding that does not amount to control and therefore the joint venture is not considered a merger. But if the merger regulation is revised to reach non-controlling minority shareholdings, this could interfere with the goal of keeping joint venture jurisdictional analysis as pure as described before.

The delegate from the European Union confirmed that this was one of the difficult areas in the debate. Certainly this is not an area for which there is a clear solution. There are different alternatives that could be used, maybe one alternative would be to continue to maintain the current criteria of full-function joint venture and take into account minority shareholdings into full-function joint ventures as a concentration, whereas everything that remained outside that would continue to be assessed under Article 101. More reflection on this point is, however, required.

The delegate from the United States explained that he was not aware of a major concern with the application of notification rules to joint ventures. There are some rules specific to the definition of joint ventures for reporting purposes, and for a large number of transactions it is clear under the rules when joint ventures is treated as a merger under Section 7 of the Clayton Act. For other transactions that go under the broad rubric of joint venture, it is rather clear that if there is not a sufficient integration they would be analysed under section 1 of our Sherman Act as a collaborative arrangement. Inevitably there are grey areas and this is why the parties are welcome to consult with the agencies' pre merger notification offices to obtain advice.

The Chair asked participants what they saw as the result of the roundtable. Should the Committee be satisfied that there is quite a diversity of approaches? Or is there a need for more consistency among the approaches, as BIAC suggested? Should the Committee try to think about more systematic approaches, for example in the case of assets transactions or on the joint venture front?

The delegate from the United States replied that the differences among jurisdictions are real but do not appear to dramatically affect the cost associated with filings. If one would have to prioritize issues of merger notifications, differences in the definition of a merger transaction would not be at the top of the list. At the end of the day, it does not appear that the differences here have a huge impact.

The Chair observed that no other delegate appeared to object to the idea expressed by the United States that maybe one has to live with those differences. It may be that there are not so many cases where the different interpretations create real difficulties.

The delegate from Ireland added that it may be helpful to contrast the discussion on joint ventures with the discussion on the minority shareholdings. With joint ventures, there are some different approaches, and yet in general people think that the different approaches work and there is not a huge problem. In the case of minority shareholdings, there is a greater sense that some learning has occurred and that maybe there is more reason for concern than people once thought that the system is not addressing properly. So minority share holdings could be an area where people are thinking about making changes whereas people do not see really a problem in the joint venture context.

The Chair concurred that in the case of minority shareholdings there are more substantive differences, as evidenced by the exchange of views between Sweden and other Committee members. So there may be a need to learn more about minority shareholdings and how they impact on competition. For other areas, the discussion suggested that different approaches do not create a major problem. But there should be awareness of the differences and an exchange of views in particular among countries that have developed a clear framework for merger transactions and those with less satisfactory solutions.

The Chair thanked the delegates for their active participation in the discussion and drew the roundtable to a close.





## SYNTHÈSE

### LA NOTION D'OPÉRATION DE FUSION

*Par le Secrétariat\**

Plusieurs points essentiels se dégagent du document de référence du Secrétariat, des débats ayant eu lieu au cours de la table ronde, ainsi que des communications écrites présentées par les délégués :

- (1) *La définition des opérations de fusion contribue de manière importante au bon fonctionnement des régimes de contrôle des fusions axés sur des objectifs d'efficacité, d'efficience et de transparence. Des seuils de notification sont utilisés pour cerner les opérations ayant un élément de rattachement suffisamment substantiel avec une juridiction donnée, tandis que la définition des opérations de fusion doit permettre de déterminer quelles sont les opérations pour lesquelles il est « opportun » de procéder à un contrôle des fusions, à savoir les opérations qui se traduisent par une combinaison plus durable d'actifs qui étaient précédemment indépendants et dont on peut raisonnablement considérer que les résultats seront probablement contraires aux objectifs du droit de la concurrence.*

L'application de seuils de compétence appropriés contribue de manière cruciale au bon fonctionnement des régimes de contrôle des fusions axés sur des objectifs d'efficacité, d'efficience et de transparence. Deux seuils de compétence sont communément utilisés pour déterminer si une opération donnée doit faire l'objet d'une procédure de contrôle des fusions et/ou si elle entre dans le champ d'application des obligations de notification : (1) les seuils de notification, qui se rapportent la plupart du temps à l'ampleur de l'opération ou à la taille des parties et visent à exclure les transactions qui n'auront très probablement aucun impact substantiel dans une juridiction donnée ; et (2) la définition des opérations de fusion, qui doit permettre de déterminer quelles sont les opérations pour lesquelles il est « opportun » de procéder à un contrôle des fusions. Cette notion d'« opportunité » est liée au fait que le contrôle des fusions est une procédure d'examen ponctuelle destinée à déterminer si une combinaison plus durable d'actifs qui étaient précédemment indépendants est susceptible de modifier sensiblement les incitations qui influent sur l'utilisation de ces actifs dans le cadre du processus concurrentiel, modification qui pourrait elle-même déboucher sur des résultats contraires aux objectifs du droit de la concurrence.

Lors de la fixation des seuils de compétence, les autorités doivent trouver un juste équilibre entre le désir d'examiner la plupart des opérations qui sont suffisamment importantes et pourraient porter atteinte à la concurrence du fait de modifications plus durables du marché, d'une part, et la nécessité de veiller à ce que le processus de contrôle reste gérable et prévisible, et son coût raisonnable pour toutes les parties concernées, d'autre part. La nécessité de concilier ces deux objectifs, potentiellement antagoniques, dans un cadre d'analyse coûts-avantages est couramment prise en compte pour la définition et l'ajustement des seuils de notification. Les débats ayant eu

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\* Cette synthèse ne reflète pas nécessairement un consensus entre les membres du Comité de la concurrence. En revanche, il récapitule les points essentiels des débats ayant eu lieu au cours de la table ronde, des communications écrites présentées par les délégués, ainsi que du document de référence du Secrétariat.

lieu lors de la table ronde ont cependant confirmé qu'une telle approche d'analyse coûts-avantages était également utile pour la définition des opérations de fusion. Plusieurs participants à la table ronde ont expliqué qu'ils prenaient en considération aussi bien les avantages que les coûts qui résulteraient des modifications apportées à leur définition des opérations de fusion lorsqu'ils envisageaient de restreindre ou d'élargir le champ de la définition applicable.

Une analyse coûts-avantages dépend non seulement des seuils de notification et de la définition des opérations de fusion applicables, mais aussi d'un certain nombre d'autres facteurs qui varient suivant les juridictions, notamment concernant le caractère obligatoire de la notification, les critères utilisés pour déterminer les obligations de notification, les obligations initiales en matière d'information, la rapidité de la procédure de contrôle, les hypothèses relatives aux atteintes potentielles à la concurrence pouvant découler de certains types d'opérations, et l'efficacité de différents instruments du droit de la concurrence pouvant être utilisés pour examiner les opérations potentiellement anticoncurrentielles qui n'entrent pas dans le périmètre de la définition des opérations de fusion.

L'interdépendance de ces facteurs explique pourquoi il n'existe pas de solution unique pour parvenir à un équilibre optimal entre les objectifs d'efficacité, d'efficience et de transparence d'un régime de contrôle des fusions et pourquoi, malgré l'élaboration de meilleures pratiques internationalement reconnues pour le contrôle des fusions, les définitions des opérations de fusion diffèrent sensiblement d'une juridiction à l'autre.

- (2) *Les définitions des « opérations de fusion » peuvent être fondées soit sur des critères numériques « objectifs », soit sur des critères plus « économiques » utilisés en vue de faire correspondre plus étroitement la définition des opérations de fusion avec les modifications de la relation entre les parties concernées qui pourraient poser problème sous l'angle de la concurrence. Chacune de ces approches présente ses propres avantages et inconvénients. Toutes deux sont couramment utilisées dans le cadre des régimes de contrôle des fusions, et certains d'entre eux conjuguent ces deux approches.*

Une approche objective de la définition des « opérations de fusion » repose généralement sur des seuils de prise de participation fixés en pourcentage, comme l'acquisition d'une part de 50 % ou de 25 % du capital de l'entreprise ciblée. Des critères objectifs rendent le système plus prévisible et transparent. Toutefois, ainsi que l'ont confirmé des participants à la table ronde, ils peuvent inciter les parties à structurer leurs transactions « aux alentours » des seuils pour se soustraire aux obligations de notification et aux procédures de contrôle. Cela dit, en fixant un seuil objectif trop bas, pour rendre plus difficiles ces stratégies de contournement, les autorités risquent d'imposer des coûts inutiles à tous les acteurs concernés, dans la mesure où cela peut déboucher sur un nombre excessif de procédures de contrôle des fusions portant sur des opérations très peu susceptibles d'avoir le moindre effet préjudiciable sur la concurrence.

Les critères « économiques » correspondent plus directement au mécanisme suivant lequel une opération de fusion risque de porter atteinte à la concurrence, dans la mesure où ils visent à déterminer si ladite opération permettra à une entreprise d'acquérir la capacité d'exercer une forme ou une autre d'influence sur une entreprise précédemment indépendante. Les différents systèmes juridiques définissent différents degrés d'influence, tels qu'une « influence déterminante », une « influence notable », une « influence substantielle », ou une « influence notable du point de vue de la concurrence ». Ces définitions permettent de prendre en compte les raisons des éventuels problèmes de concurrence plus directement que des critères objectifs, et donc de « cibler » plus efficacement les interventions sur les opérations de fusion susceptibles de poser problème. Elles rendent par ailleurs plus difficiles les tentatives de contournement du

système. Cela dit, elles exigent un travail plus poussé d'interprétation au cas par cas. Elles peuvent donc être une source d'incertitude et réduire la transparence du processus. Des lignes directrices formulées par les autorités de la concurrence, des orientations informelles et une prise de décisions cohérente peuvent remédier dans une certaine mesure aux problèmes pouvant se poser à cet égard.

Dans certaines juridictions sont conjugués des critères objectifs et économiques. Au cours de la table ronde ont été évoquées des juridictions où sont utilisées des définitions des opérations de fusion fondées sur un seuil plus bas (mesuré en pourcentage), associées à des critères économiques révélateurs d'une relation plus étroite entre les deux parties à l'opération. Certains pays emploient en parallèle des critères objectifs et économiques, si bien que, par exemple, l'acquisition d'une participation de 25 % ou de 50 % du capital d'une autre entreprise, la prise de « contrôle » d'une autre entreprise, l'acquisition d'une influence notable du point de vue de la concurrence sur une autre entreprise, ou encore l'acquisition de la totalité ou d'une part substantielle des actifs d'une autre entreprise sont autant de cas de figure considérés comme des fusions. Chacun de ces critères peut être appliqué indépendamment des autres pour déterminer si une opération constitue une fusion.

- (3) *Le fait que les participations minoritaires, même totalement passives, peuvent avoir des effets anticoncurrentiels dans certaines circonstances fait l'objet d'une prise de conscience grandissante. Celle-ci a déclenché dans plusieurs juridictions un débat sur la question de savoir si le champ d'application des régimes de contrôle des fusions devait être élargi aux participations minoritaires ne conférant pas un contrôle absolu sur l'entreprise cible. Pour de nombreuses juridictions, la question essentielle est de savoir s'il est possible de tracer une frontière suffisamment nette entre les cas où il est très probable que les participations minoritaires aient des effets préjudiciables sur la concurrence, et ceux où il est très probable qu'elles n'en aient pas, et devraient donc rester en dehors du périmètre de la définition des opérations de fusion afin que soient évités des coûts inutiles.*

Il apparaît clairement aujourd'hui que dans certaines conditions, les participations minoritaires peuvent avoir des effets anticoncurrentiels. Le détenteur d'une participation minoritaire peut être à même d'influer sur le comportement concurrentiel de la cible de manière à le rendre moins agressif, ou bien il peut décider d'adopter lui-même un comportement concurrentiel moins agressif afin de ne pas nuire à ses intérêts financiers dans l'entreprise cible. Même en cas de participation financière totalement passive, le détenteur pourrait être incité de manière unilatérale à adopter un comportement concurrentiel moins agressif, dans la mesure où il bénéficie grâce à sa participation minoritaire de la réduction des pressions concurrentielles exercées sur la cible. En outre, il a été souligné au cours de la table ronde que dans certains cas, une participation minoritaire pouvait rendre la cible moins attractive pour d'autres investisseurs, réduisant du même coup sensiblement la possibilité que ladite cible puisse devenir un concurrent plus puissant. Ces problèmes soulèvent des questions importantes pour le contrôle des fusions, notamment celle de savoir si la définition des opérations de fusion devrait être élargie aux participations minoritaires qui ne confèrent pas un contrôle absolu sur l'entreprise cible, voire aux participations minoritaires totalement passives.

Ce problème a été abordé de manières très différentes suivant les juridictions. Une approche relativement commune parmi certains pays membres consiste à utiliser des seuils définis par des pourcentages fixes pour déterminer si l'acquisition d'une participation minoritaire doit être considérée comme une fusion. Une autre approche vise à déterminer si le détenteur d'une participation minoritaire peut exercer une influence notable du point de vue de la concurrence sur la cible.

La table ronde a montré que les questions relatives aux participations minoritaires suscitaient les plus vifs débats dans le cadre des régimes de contrôle des fusions où la définition de ces opérations était fondée exclusivement sur la notion de « prise de contrôle », qui suppose qu'une partie acquière une « influence déterminante » sur la cible. Les participations minoritaires qui ne confèrent pas une influence déterminante restent en dehors du champ d'application du régime de contrôle des fusions. Au cours de la table ronde, les représentants de certaines juridictions ont fait part de leurs préoccupations concernant cette « lacune » à leurs yeux, et évoqué les débats en cours sur la façon d'élargir le périmètre de leur définition des opérations de fusion afin que certaines participations minoritaires entrent dans le champ d'application de leur législation relative au contrôle des fusions.

De nombreux participants s'accordaient sur l'idée que les lois relatives au contrôle des fusions devaient pouvoir s'appliquer à certaines participations minoritaires ne conférant pas un contrôle absolu, mais la table ronde a également confirmé l'absence de consensus sur cette question. Certains participants ont émis des doutes quant à la solidité des éléments indiquant qu'il existait une probabilité suffisante que des participations minoritaires puissent avoir des effets préjudiciables. La table ronde a également permis de confirmer que pour l'heure, très peu de juridictions étaient dotées de lois sur le contrôle des fusions s'appliquant aux participations minoritaires totalement passives ou aux participations prises aux fins de placement. Il n'existe par conséquent aucun élément empirique solide permettant de déterminer si ce type d'opération soulève régulièrement des problèmes de concurrence.

- (4) *Les acquisitions d'actifs d'une entreprise cible constituent une façon plus « directe » que les prises de participation de provoquer des modifications structurelles durables du marché. Ces opérations peuvent influencer sur la façon dont ces actifs sont utilisés dans le processus concurrentiel, et sont donc généralement considérées comme des opérations de fusion. Des questions complexes peuvent se poser lorsque les actifs acquis ne constituent qu'une partie des actifs de l'entreprise concernée ou d'une gamme d'activités. Dans ces cas-là, de nombreux régimes de contrôle des fusions imposent de déterminer si les actifs acquis revêtent une importance suffisante pour avoir d'éventuels effets préjudiciables sur la concurrence, afin d'établir si l'acquisition en question doit être considérée comme une opération de fusion.*

Les débats ayant eu lieu au cours de la table ronde ont confirmé que la plupart des juridictions appliquaient une approche souple pour déterminer si les acquisitions d'actifs limités constituaient une opération de fusion, et qu'elles procédaient à un examen plus poussé de l'ensemble des circonstances pertinentes pour déterminer si les actifs acquis étaient suffisamment importants pour entraîner des modifications structurelles du marché.

Dans plusieurs juridictions, la législation prévoit que les actifs acquis doivent représenter au moins « une partie d'une entreprise », ce qui signifie qu'il doit y avoir un transfert du contrôle d'une activité se traduisant par une présence sur le marché et générant un chiffre d'affaires qui lui est attribuable sans ambiguïté. Des simples transferts de listes de clients ne seraient probablement pas considérés comme une opération de fusion suivant cette approche.

D'autres juridictions adoptent une approche plus globale et considèrent que l'acquisition de tout actif qui joue un rôle essentiel dans les activités commerciales, attire les clients, ou a un impact sur le processus concurrentiel pourrait être considérée comme une opération de fusion. Dans le même ordre d'idées, les participants à la table ronde ont évoqué des exemples où l'acquisition d'une seule marque, d'un magasin qui n'était pas ouvert au moment de l'opération, d'un site vierge pour la construction d'un supermarché, ou d'un nom de domaine pouvait être considérée comme une opération de fusion. Dans tous ces cas, toute la question est de savoir si l'actif acquis aura

probablement un impact sur la position de l'acquéreur sur le marché. Cet examen des effets du transfert d'actif sur la position concurrentielle de l'acquéreur peut rapprocher le règlement de cette question de compétence d'une évaluation sur le fond de l'impact de l'opération sur la concurrence, même si un tel examen sera toujours beaucoup moins détaillé.

Une acquisition d'actifs n'est considérée comme une « opération de fusion » que si elle se traduit par des modifications structurelles d'une certaine durée. Ainsi, la concession de licences non exclusives de droits de propriété intellectuelle ne serait pas considérée comme une opération de fusion. Il apparaît que dans la plupart des juridictions, il faudrait au minimum une licence exclusive de droits de propriété intellectuelle concédée à long terme pour que l'opération en question soit considérée comme une fusion.

- (5) *Dans de nombreuses juridictions sont utilisées les règles d'application générale relatives aux acquisitions de participations et d'actifs pour déterminer si une coentreprise constitue une « opération de fusion », et il n'existe pas de règles de compétence spécifiques aux coentreprises. Celles-ci tendent à soulever des problèmes de compétence plus complexes dans les juridictions où la définition des opérations de fusion repose sur les critères de prise de contrôle/d'influence déterminante. Dans ces cas-là, il faut déterminer si les sociétés mères peuvent exercer le niveau requis de « contrôle » et, dans la plupart des cas, si la coentreprise constitue un acteur suffisamment indépendant sur le marché.*

Dans de nombreux régimes de contrôle des fusions, il n'est pas jugé nécessaire de réserver un traitement spécifique à la création de coentreprises. Les mêmes critères de compétence sont appliqués à toutes les opérations. La création d'une coentreprise par intégration d'actifs passe généralement par l'acquisition de participations ou d'actifs, ou bien des actifs qui étaient détenus de manière indépendante peuvent être utilisés pour créer une nouvelle « entreprise » sur laquelle certaines ou l'ensemble des sociétés mères peuvent exercer leur contrôle ou une influence substantielle. Cela suffirait pour que cette opération soit considérée comme une fusion, selon la définition généralement applicable. Dans ces juridictions, il n'est fait aucune différence dans la définition des opérations de fusion entre la création d'une coentreprise et l'acquisition d'une participation minoritaire. Comme l'ont confirmé les débats ayant eu lieu au cours de la table ronde, cette approche se traduit par un champ d'application relativement large, dans lequel peuvent entrer un grand nombre de coentreprises, mais des procédures simplifiées de notification et/ou de contrôle peuvent être utilisées pour éviter des coûts inutiles.

Dans d'autres juridictions, la définition des opérations de fusion comporte des dispositions spécifiques aux coentreprises. Ainsi, dans les juridictions qui appliquent le modèle européen de « contrôle/influence déterminante », il est jugé nécessaire de déterminer précisément dans quelle mesure les coentreprises correspondent à la définition des opérations de fusion. Il faut en général qu'au moins deux sociétés mères acquièrent une « influence déterminante » sur la coentreprise, et que cette dernière soit « de plein exercice », c'est-à-dire qu'elle agisse sur le marché comme une entité économique autonome. Par conséquent, une coentreprise peut aller de pair avec l'acquisition de participations ou d'actifs se traduisant par une modification structurelle durable du marché, mais en l'absence d'« influence déterminante » exercée par ses sociétés mères, ou en l'absence d'entité autonome agissant sur le marché, la qualification d'opération de fusion ne peut être retenue. L'application de ces deux critères à des situations diverses en matière de coentreprises peut soulever des problèmes complexes. Les débats ayant eu lieu au cours de la table ronde ont confirmé que des lignes directrices ainsi qu'une prise de décisions cohérente et transparente contribuaient de manière importante à assurer la prévisibilité des décisions rendues en matière de compétence pour les parties, même si cette approche ne permet pas d'éliminer toutes les difficultés que peuvent soulever les dossiers au cas par cas.

- (6) *S'il est généralement admis que les seuils de compétence appliqués aux fins du contrôle des fusions devraient reposer sur des règles précises et des critères objectifs, cette idée semble avoir davantage de poids en matière de seuils de notification. En ce qui concerne la définition des opérations de fusion, la volonté que les types d'opération théoriquement problématiques soient tous, ou quasiment tous, couverts semblent peser davantage dans la balance que la détermination à appliquer des règles précises. Grâce à des lignes directrices, des orientations informelles et une prise de décisions cohérente et transparente, la définition des opérations de fusions peut demeurer prévisible en pratique.*

La question de l'équilibre à trouver entre l'utilisation de critères objectifs et transparents, d'une part, et l'emploi de normes plus ouvertes à interprétation qui soient applicables aux opérations potentiellement préjudiciables, d'autre part, est souvent réglée par le recours à des critères plus souples conjugués à des enquêtes factuelles. Ainsi, les participants à la table ronde ont évoqué l'utilisation de critères plus souples d'« influence substantielle/notable » pour déterminer si l'acquisition d'une participation minoritaire ou la création d'une coentreprise constitue une « opération de fusion », et la réalisation d'enquêtes pour établir si l'acquisition d'un actif pouvait affecter la position concurrentielle de l'acheteur, en vue de déterminer si cette acquisition d'actif constituait une opération de fusion. Ces critères plus souples semblent permettre à une autorité de la concurrence de procéder à une évaluation très préliminaire des effets concurrentiels probables d'une opération pour déterminer si celle-ci constitue une fusion, ou devrait être considérée comme telle.

Tout au long de la table ronde, les participants ont confirmé que ces critères plus souples permettaient de mieux cibler les opérations potentiellement problématiques, mais qu'ils soulevaient également des questions complexes dans certains cas. Il peut exister un certain flou dès lors que des décisions doivent être prises au cas par cas pour déterminer si une opération constitue une fusion. Néanmoins, les participants ont aussi souligné que des lignes directrices, des orientations informelles ainsi qu'une prise de décisions cohérente et transparente contribuaient de manière importante à atténuer la crainte que des critères souples et des évaluations au cas par cas ne puissent aller à l'encontre d'un renforcement de la transparence et de la prévisibilité des procédures.

**NOTE DE RÉFÉRENCE**  
**LA NOTION D'OPÉRATION DE FUSION**

*Par le Secrétariat\**

Le présent document examine l'approche adoptée par différents pays pour définir les opérations relevant de leur législation sur le contrôle des fusions (les « opérations de fusion »)<sup>1</sup> et par conséquent susceptibles de faire l'objet d'un contrôle. Décider qu'une action constitue une opération de fusion peut avoir plusieurs implications en fonction des régimes de contrôle des fusions, selon que les notifications des opérations de fusion sont obligatoires ou spontanées, et selon que, dans les régimes de contrôle des fusions dotés de systèmes de notification obligatoire, la compétence du contrôle et l'obligation de notification sont deux notions distinctes (de sorte que certaines opérations de fusion contrôlables ne sont pas soumises à une notification obligatoire et à des délais d'attente) ou sont identiques. Néanmoins, quelle que soit la manière dont les régimes de fusion organisent le processus de contrôle, tous doivent définir dans un premier temps les types d'opérations de fusion réputés « se prêter » à un contrôle.

L'analyse des seuils de compétence, qui implique de définir ce qu'est une opération de fusion, est une question éminemment technique, mais néanmoins importante, car des seuils de compétence appropriés sont essentiels au bon fonctionnement d'un régime de contrôle des fusions visant l'efficacité, l'efficience et la transparence<sup>2</sup>. Il est incontestable qu'une bonne définition de ce qui constitue une opération de fusion doit, au vu de ces objectifs, (i) cibler les types « adéquats » d'opérations, c'est-à-dire celles qui débouchent sur des changements structurels, plus durables, sur le marché et pourraient à terme compromettre les objectifs fondamentaux d'un régime de droit de la concurrence, (ii) éviter de couvrir un trop grand nombre d'opérations qui généralement ne présentent pas de risque du point de vue du droit de la concurrence ou qui seront mieux contrôlées par d'autres outils dont disposent les autorités de concurrence, et (iii) appliquer autant que possible des règles précises reposant sur des critères objectifs, clairs et transparents pour déterminer si une opération doit être soumise à un contrôle.

Toutefois, ces deux objectifs ne sont pas aisément conciliables, et aucune solution unique ne permet de parvenir à un équilibre optimal. Cela s'explique notamment par le fait que des facteurs supplémentaires, spécifiques à chaque régime de contrôle des fusions, ont une incidence sur ce que pourrait être la meilleure solution. Ces facteurs sont notamment les seuils de notification, les obligations d'information initiale, la

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\* Cette note a été rédigée pour le Secrétariat par Andreas Reindl (consultant à l'OCDE).

<sup>1</sup> Le présent document utilisera le terme d'« opération de fusion » de manière neutre pour décrire les opérations relevant de la législation applicable en matière de contrôle des fusions, et reconnaît que chaque législation peut utiliser sa propre terminologie, et parler de « phénomène de fusion », de « concentration » ou de « fusion ».

<sup>2</sup> OCDE, Recommandation du Conseil sur le contrôle des fusions, [C\(2005\)34](#), article I(A)(1)(2) ; RIC, Procédures de notification des opérations de concentration, RP VI.A. Commentaire 1 (« Efficacité, efficience, transparence et prévisibilité sont des attributs fondamentaux d'un régime de contrôle des concentrations bien conçu »). Sur le thème de la définition d'une opération de fusion, voir également RIC, *Defining "Merger" Transactions for Purposes of Merger Review (2007)*.



rapidité du contrôle, les hypothèses relatives aux effets potentiellement préjudiciables pour la concurrence de certains types d'opérations et l'efficacité d'autres instruments d'application du droit de la concurrence. Malgré l'élaboration de bonnes pratiques, reconnues à l'échelle internationale, applicables au processus de contrôle des fusions, il n'est donc pas surprenant que plusieurs pays continuent de recourir à des approches différentes et que les définitions de ce qu'est une opération de fusion divergent sensiblement. Les modifications apportées à la définition de la notion « d'opération de fusion », bien que moins fréquentes que les modifications des seuils de notification, ne sont pas rares, ce qui met en évidence l'importance, mais aussi la complexité, du sujet.

Toutes ces différences et les arbitrages effectués entre les principes énoncés plus haut n'importent guère pour les opérations qui sont au cœur de la législation sur le contrôle des fusions. Par exemple, l'acquisition pure et simple de toutes les actions d'une société-cible précédemment indépendante sera inmanquablement considérée comme une opération de fusion. La situation serait à peu près identique si l'entreprise repreneuse acquérait 80 % et non 100 % de la société-cible, ou encore la quasi-totalité des actifs de la société-cible nécessaires pour poursuivre les activités que celle-ci menait. La législation sur le contrôle des fusions s'applique en règle générale aussi lorsque deux entreprises fusionnent des branches d'activité précédemment autonomes au sein d'une nouvelle entité, créée et contrôlée conjointement, qui devient un nouvel acteur du marché.

Mais plus l'on s'éloigne de ces cas de figure, qui sont au cœur même de la législation, pour s'intéresser de plus près aux opérations qui se trouvent « à la marge », plus frappantes sont les différences entre les différents pays. Par exemple, lorsqu'une entreprise acquiert uniquement une petite participation dans la société-cible ou des éléments d'actifs plus limités qui, en soi, ne constituent pas une entreprise en activité, ou lorsque deux entreprises fusionnent plusieurs pans de leurs activités au sein d'une forme d'entité conjointe plus souple, les régimes de contrôle des fusions adoptent des approches différentes pour déterminer si ces opérations constituent ou non des fusions.

Dans le présent document, on examinera la notion d'opération de fusion en étudiant principalement la manière dont les différents régimes de contrôle des fusions appliquent cette notion aux opérations « à la marge ». Dans ce contexte, il s'agit, pour les pays, de déterminer quels types d'opérations ils souhaitent contrôler dans le cadre du régime de contrôle des fusions qui est le leur, et de quelle manière ils peuvent cibler efficacement ces opérations sans compromettre les objectifs d'efficacité et de transparence de leur dispositif. Cet examen s'articule autour des principaux types d'opérations généralement concernés par le contrôle des fusions : les prises de participation, les acquisitions d'actifs et les coentreprises. Chacune de ces trois catégories soulève une série de questions distinctes, mais ont ceci en commun que le souci de pouvoir couvrir la totalité ou la quasi-totalité de ces opérations susceptibles, en théorie, d'être problématiques semble avoir l'influence la plus déterminante sur la définition de ce qu'est une opération de fusion. L'idée que les seuils de compétence devraient se fonder sur des critères très précis et être ciblés avec soin pour éviter de prendre en compte un trop grand nombre d'opérations sans incidence sur la concurrence semble être moins déterminante. Les seuils de notification semblent être l'outil le plus couramment utilisé et le plus efficace pour offrir une plus grande objectivité et mieux calibrer la portée de la législation relative au contrôle des fusions.

## **1. Définition de la notion d'opération de fusion – une approche fonctionnelle**

La définition de ce qui constitue une opération de fusion et les seuils de notification sont les deux outils couramment utilisés pour déterminer si une opération donnée doit déclencher un contrôle et/ou à une obligation de notification. Les seuils de notification, qui dépendent le plus souvent de la taille de l'opération ou des parties concernées, ont pour but d'éliminer les opérations qui n'auront

vraisemblablement aucune incidence notable dans un pays donné<sup>3</sup>. La définition d'une opération de fusion a une fonction différente, car elle vise à identifier les opérations « se prêtant » à un contrôle, cette nécessité étant liée au fait que le contrôle des fusions est un processus ponctuel visant à déterminer si un regroupement durable d'actifs précédemment autonomes est susceptible de faire évoluer significativement les incitations à utiliser de telle ou telle manière les actifs dans le processus concurrentiel, ce qui pourrait entraîner des résultats contraires aux objectifs visés par un régime de droit de la concurrence. Pour déterminer si les opérations de fusion se prêtent ou non à un contrôle, on doit donc essentiellement se demander si elles seront à l'origine de changements structurels et si l'on peut raisonnablement estimer qu'elles risquent d'entraver la concurrence sur le marché. En particulier, les opérations qui se traduisent par des changements structurels mineurs, dont il est très peu probable qu'elles aient des effets anticoncurrentiels, et pour lesquelles les coûts induits par un contrôle ne seraient par conséquent pas justifiés, paraissent de ce fait moins se prêter à un contrôle. Il en va de même des accords plus transitoires pourtant susceptibles d'avoir une plus forte incidence sur la concurrence mais dans le cadre desquels les décisions que les parties pourront être amenées à prendre dans le futur ne sont pas raisonnablement prévisibles au moment du contrôle<sup>4</sup>.

Les critères de seuils de compétence doivent respecter un juste équilibre entre le désir de connaître la plupart des opérations susceptibles de porter atteinte à la concurrence par des changements plus durables sur le marché d'une part, et la nécessité de s'assurer que le processus reste gérable et le coût raisonnable pour toutes les parties concernées d'autre part. On pourrait envisager de fixer ou d'ajuster les seuils de compétence en fonction des courbes coûts /avantages marginaux. La portée un régime de contrôle des fusions ne devrait être étendue que pour autant que les coûts liés au contrôle d'opérations supplémentaires ne dépassent pas les avantages découlant de l'interdiction des (rares) opérations supplémentaires susceptibles de nuire à la concurrence ou des mesures correctives prises à leur encontre. À l'inverse, il conviendrait de restreindre la portée du dispositif de contrôle des fusions dès lors que les économies (avantages) tirées du contrôle d'un nombre moins élevé d'opérations ayant été notifiées sont supérieures aux coûts supplémentaires découlant, pour la collectivité, d'une fusion anticoncurrentielle qui passerait entre les mailles du filet<sup>5</sup>.

Par analogie avec les principes qui régissent l'élaboration de normes destinées à mener une analyse sous l'angle du droit matériel de la concurrence, on peut également décrire cet arbitrage comme une

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<sup>3</sup> Pour une analyse plus approfondie des seuils de notification, et notamment de la question de l'existence d'un lien suffisant, voir par exemple les pratiques recommandées du RIC, *Recommandation II ; RIC, Setting Notification Thresholds for Merger Review (2008) ("ICN Notification Threshold Report")*. Pour une description générale de l'incidence des seuils de notification sur les régimes nationaux de contrôle des fusions, voir par exemple OCDE, *Report on Experiences of Member Countries under the 2005 OECD Recommendation on Merger Review (OECD Merger Recommendation Report)* (à paraître en 2013) ; Maria Coppola & Cynthia Lagdameo, *Taking Stock and Taking Root: A Closer Look at Implementation of the ICN Recommended Practices for Merger Notification & Review Procedures*, dans *The International Competition Network at Ten 297* (Paul Lugard ed. 2011).

<sup>4</sup> Les restructurations intra-groupe peuvent également être exclues du dispositif de contrôle des fusions car elles ne modifient pas les incitations à utiliser des éléments d'actif dans le processus concurrentiel.

<sup>5</sup> Voir pour une analyse plus détaillée RIC, *Notification Threshold Report*, supra note 3, point 4, notamment les références à Konkurrensverket, *Tröskelvärden för koncentrationsprövningar – Bättre omsättningsgränser för anmälan av företagskoncentrationer 31-33 (2006)*, disponible à l'adresse suivante : [http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/rap\\_2006-3.pdf](http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/rap_2006-3.pdf) ; résumé en anglais disponible à l'adresse [http://www.kkv.se/upload/Filer/ENG/Publications/rap\\_2006-3\\_summary.pdf](http://www.kkv.se/upload/Filer/ENG/Publications/rap_2006-3_summary.pdf). Des situations pratiques récentes dans lesquelles une approche similaire a été utilisée sont présentées, à titre d'exemple, dans OCDE, *Merger Recommendation Report*, supra note 3, point 11 (exemples de réformes menées en Allemagne, au Brésil et en Italie).

volonté d'axer les efforts sur une réduction maximale des coûts. Dès lors, les seuils de compétence devrait avoir pour objet de minimiser la somme des coûts résultant des erreurs de type I (contrôle d'opérations notifiées qui ne posent pas de problèmes d'ordre concurrentiel), les erreurs de type II (contrôle d'opérations problématiques qui échappent au contrôle des fusions) et des efforts de conformité et d'application de la loi (susceptibles d'augmenter lorsque des critères incertains ou subjectifs sont utilisés)<sup>6</sup>.

Ce calcul n'est bien entendu pas une science exacte, en raison de l'absence de données de qualité sur les avantages ou les coûts. En outre, les seuils de notification et la définition de la notion d'opération de fusion auront des effets interdépendants : un pays peut opter pour une définition très large mais retenir des seuils de notification très élevés et ainsi limiter le nombre des opérations concernées ; l'application de seuils de notification élevés pourrait également réduire les coûts de conformité et d'application dans la mesure où, un grand nombre d'opérations ne pouvant avec certitude être qualifiées de fusions, les parties n'en sont pas affectées puisque les opérations en question sont en deçà ces seuils de notification. L'analyse coûts/avantages dépendra également de facteurs supplémentaires, notamment le caractère obligatoire ou non de la notification<sup>7</sup>, les obligations d'information initiale et la rapidité du contrôle. Les coûts peuvent aussi dépendre de l'efficacité d'autres moyens d'action prévus par le droit de la concurrence en matière de contrôle des opérations potentiellement anticoncurrentielles qui sont pas définies comme étant des fusions. Si, par exemple, le contrôle d'accords anticoncurrentiels est un moyen efficace de dissiper la crainte que certaines opérations puissent déboucher sur une meilleure coordination des parties en favorisant les échanges d'informations entre elles, le coût induit par une définition de ce fait plus restrictive de ce qui constitue une opération de fusion sera moindre et, les arguments en faveur d'un élargissement de cette définition s'en trouveront affaiblis.

Les différents facteurs coûts/avantages étant très variables, on ne saurait prétendre trouver une définition « optimale » ou « correcte » de ce qu'est une opération de fusion qui serait valable dans tous les pays. De fait, la définition de la notion d'opération de fusion n'est qu'un critère parmi d'autres qui déterminent les coûts et avantages de telle ou telle solution. Néanmoins, l'approche coûts/avantages fait ressortir les objectifs qui doivent être pris en compte pour déterminer si les seuils de compétence d'un régime de contrôle des fusions fonctionnent correctement ou s'ils doivent être revus. Plus précisément, cette approche met en évidence le fait qu'un régime de contrôle des fusions efficace n'a pas pour objet de traquer toutes les sources d'atteintes potentielles à la concurrence, mais uniquement celles pour lesquelles les avantages induits par une intensification de l'action publique sont susceptibles de l'emporter sur les coûts supplémentaires qui en découlent. Elle montre également que les décisions d'élargissement du champ de compétence ne doivent pas reposer sur des affaires particulières très médiatisées qui suscitent rapidement des préoccupations relatives à « une application lacunaire de la loi », mais sur une série d'observations étayant plus solidement les hypothèses avancées en matière de coûts et d'avantages

<sup>6</sup> *ICN Notification Threshold Report*, supra note 3, point 4.

<sup>7</sup> Dans les régimes de contrôle des fusions sans exigences de notification obligatoire, la fonction de la définition de la notion d'opération de fusion est essentielle pour limiter le pouvoir d'appréciation dont dispose l'autorité de concurrence pour déterminer quelles opérations doivent faire l'objet d'un contrôle. Dans certains pays qui mettent en œuvre cette approche, tels que l'Australie ou la Nouvelle-Zélande, cette définition est tellement large (elle couvre en principe toutes les prises de participation et acquisitions d'actifs) qu'elle ne limite pas significativement la capacité de l'autorité de la concurrence à s'intéresser à ce type d'opérations dans leur ensemble, quelle que soit leur ampleur et leur nature ; des limites plus pertinentes existent, par exemple, dans le régime des fusions britannique. Cela étant, cette large définition a peu d'effet sur le calcul coûts/avantages auquel le régime doit se livrer étant donné que la grande majorité des opérations qui peuvent être définies comme des fusions ne seront jamais contrôlées. En ce sens, l'importance de la définition de ce qui constitue une opération de fusion dans un régime dépourvu de système de notification obligatoire diffère légèrement de ce qu'elle est dans les régimes où cette notification est obligatoire.

potentiels<sup>8</sup>. Enfin, elle montre qu'une approche de la définition de la notion d'opération de fusion qui fonctionne dans un pays n'est pas nécessairement exportable, sous l'angle du rapport coûts/avantages, avec le même succès.

Cette approche explique également comment de nouvelles connaissances et une meilleure compréhension des risques importants associés à certains types d'opérations peuvent inciter à modifier la définition de ce qu'est une opération de fusion. Si, de l'avis général, certaines opérations sont de nature à être plus préjudiciables que ce que l'on supposait auparavant, on peut s'attendre à ce que les coûts induits par le fait que ces opérations échappent au processus de contrôle des fusions augmentent. Il sera alors temps de s'interroger sur la nécessité, réelle ou supposée, de mettre fin à une « application lacunaire de la loi », en élargissant la portée du régime de contrôle des fusions. Le document de référence de la précédente table ronde du Groupe de travail n°3 sur les prises de participation minoritaire a souligné, à juste titre, ce lien entre les préoccupations de fond et la réponse que peut y apporter le régime de contrôle des fusions<sup>9</sup>.

## 2. Différents critères utilisés dans la définition de la notion d'opération de fusion

Deux types de critères sont principalement utilisés dans les différents pays pour définir ce qui constitue une « opération de fusion » : d'une part des critères « objectifs » et chiffrés, et, d'autre part, des critères plus « économiques » visant à mieux aligner cette définition sur l'évolution de la relation entre des parties, susceptible de conduire à des problèmes de concurrence. Différentes combinaisons de ces deux types de critères peuvent également être utilisées. Par ailleurs, certains pays ont recours à une définition large, selon laquelle la notion d'opération de fusion recouvre en principe toute prise de participation ou acquisition d'actifs et qui n'est pas restreinte par un objectif ou des critères économiques supplémentaires.

Les seuils de pourcentage applicables aux prises de participation sont un exemple d'approche « objective ». À titre d'exemple, plusieurs pays se fondent sur l'acquisition d'une participation de 5 %, 10 %, 20 %, 25 %, 35 % ou 50 %<sup>10</sup> dans la société-cible. Cette énumération montre que les seuils jugés pertinents par les différents régimes de contrôle des fusions sont très variables. Toutefois, les seuils objectifs ne doivent pas être choisis de manière arbitraire, car ils doivent permettre de mesurer les effets potentiels que telle ou telle opération peut avoir sur la relation entre l'acquéreur et la société-cible. Ainsi, lorsque le repreneur acquiert une participation de 50 %, cela lui donne incontestablement le contrôle de la société-cible, tandis qu'une prise de participation de 25 % peut donner à penser que les actionnaires minoritaires seront en mesure d'exercer les droits importants que leur confère la loi, qui peuvent leur permettre d'influer sur le comportement commercial de la société-cible. Les seuils inférieurs correspondent généralement à une prise de participation minoritaire dans la société-cible, se situant à un niveau donnant à penser, selon toute vraisemblance, que l'acquéreur dispose sans doute de moyens différents, mais suffisants, lui permettant d'influer sur le comportement commercial de la société-cible.

Lorsque les seuils en pourcentage sont en particulier fixés à l'extrémité basse de la fourchette, il peut être préférable de les combiner à d'autres critères faisant apparaître que les liens entre les deux parties à l'opération sont en fait plus étroits. Le régime japonais de contrôle des fusions est un bon exemple de cette

<sup>8</sup> Généralement, il peut être plus aisé de restreindre le champ de compétence si l'on peut mettre en évidence que certaines catégories d'opérations ne posent presque jamais de problèmes de concurrence et/ou au contraire que certaines catégories d'opérations ne sont tout simplement pas contrôlées comme il le faudrait. Il peut être en effet plus difficile de trouver des éléments empiriques justifiant un élargissement du champ couvert par un régime de contrôle des fusions.

<sup>9</sup> OCDE, Problèmes de lutte contre les monopoles en cas de participation minoritaire et de cumul des mandats d'administrateur, DAF/COMP(2008).

<sup>10</sup> Ces exemples sont tirés des régimes de contrôle des fusions de l'Allemagne, du Brésil, du Canada et du Japon. Tous sont examinés ci-après.

approche. Outre un seuil de prise de participation de 50 % dans la société-cible, il prévoit deux seuils plus bas de 10 % ou 20 %. Cela étant, à chaque fois, l'opération ne sera contrôlée que si d'autres indicateurs donnent à penser que l'acquéreur peut exercer une certaine influence sur la société-cible : lorsqu'il s'agit d'une prise de participation de 20 %, l'acquéreur doit ainsi devenir le principal actionnaire de la société-cible ; dans le cas d'une participation de 10 %, il doit être devenu l'un des trois plus importants détenteurs de droits de vote de la société-cible et plusieurs autres critères, laissant supposer qu'il peut, dans une certaine mesure, exercer une influence sur la cible, doivent également être pris en compte<sup>11</sup>.

Les critères « économiques » utilisés pour définir ce qu'est une opération de fusion sont plus directement fonction du mécanisme par lequel une opération pourrait nuire à la concurrence. En l'occurrence, il s'agit principalement de se demander si l'opération permettra à une entreprise d'acquérir la capacité d'exercer une quelconque forme de contrôle sur une autre entreprise, jusque-là indépendante. Les différents systèmes juridiques établissent une gradation entre les différents niveaux d'intensité du contrôle : « influence déterminante », « influence significative », « influence substantielle », ou « influence significative sur le plan de la concurrence », même si l'on peut se demander si ces nuances sont vraiment déterminantes du point de vue économique. Ces gradations rendent compte plus directement que les seuils en pourcentage des éventuels motifs de préoccupation concernant la concurrence. Peut-être reflètent-elles également la crainte que les seuils en pourcentage fixés puissent inciter les parties à contourner le système. Dans le même temps, cependant, elles nécessitent davantage d'interprétation et de conseil concernant les facteurs qui seront pris en compte et peuvent par conséquent être source d'incertitude. Citons à titre d'exemple le régime de contrôle des fusions de l'UE qui applique un critère de « contrôle/influence déterminante »<sup>12</sup>, également retenu par de nombreux autres régimes en Europe et dans d'autres pays, notamment en Chine<sup>13</sup>. Font également partie de cette catégorie les régimes britannique<sup>14</sup>, allemand<sup>15</sup> et canadien<sup>16</sup> qui font appel (en plus d'autres définitions de la notion d'opération de fusion) aux critères moins exigeants que sont « l'influence substantielle », « l'influence significative sur le plan de la concurrence » ou « l'influence significative ».

Les lignes directrices publiées dans certains pays et expliquant la notion d'opération de fusion peuvent contribuer à rendre plus prévisibles les critères en vigueur, mais peuvent aussi illustrer les risques potentiels d'un recours à des critères « d'influence » plus ouverts. Ainsi, les lignes directrices canadiennes et britanniques établissent une assez longue liste de facteurs pertinents différents pouvant être pris en compte pour déterminer l'existence ou non de l'« influence » requise, soulignant le fait qu'au final le contexte général sera plus déterminant que la présence ou l'absence de tel ou tel facteur isolé<sup>17</sup>. Si une telle

<sup>11</sup> Commission de la concurrence japonaise (JFTC, Japan Fair Trade Commission), *Guidelines to the Application of the Antimonopoly Act Concerning Review of Business Combinations*, (version révisée, 2010), parties I(1)(A) et I(1)(B).

<sup>12</sup> Règlement (CE) n° 139/2004 du Conseil relatif au contrôle des concentrations entre entreprises, J.O. L 2004/1 (2004) (règlement UE sur les concentrations), articles 3 (1) et (2).

<sup>13</sup> Loi antimonopole de la République populaire de Chine, article 203).

<sup>14</sup> Enterprise Act 2002, article 26(3). Il convient de noter que l'Enterprise Act prévoit trois niveaux de contrôle. Outre l'« influence substantielle », un contrôle peut également être exercé *de jure* (participation de contrôle) ou *de facto* (capacité de contrôle). La présente note s'intéressera plus particulièrement au critère d'influence substantielle qui est le plus utile pour les besoins de la comparaison.

<sup>15</sup> Gesetz gegen Wettbewerbsbeschränkungen (GWB) [Loi contre les restrictions de concurrence].

<sup>16</sup> Loi sur la concurrence, article 91.

<sup>17</sup> Bureau de la concurrence, Fusions - Lignes directrices pour l'application de la loi (2011), Section 1.6 ; Office of Fair Trading and Competition Commission, *Merger Assessment Guidelines (2010)*, sections 3.2.8 à 3.2.12, et, de manière plus détaillée, OFT, *Mergers, Jurisdictional and Procedural Guidance (2009)*, sections 3.15 à 3.28. Le Royaume-Uni étant doté d'un régime de contrôle des fusions sans notification

situation est à l'évidence compréhensible du point de vue de l'autorité de la concurrence chargée de faire respecter le droit, l'important pouvoir d'appréciation dont elle dispose pour décider au cas par cas si elle est (ou veut être) compétente pour évaluer une opération peut engendrer des problèmes du point de vue des parties cherchant à obtenir plus de clarté et de prévisibilité.

**Box 1. Recours à des lignes directrices en vue d'améliorer la prévisibilité découlant de définitions de la notion d'opération de fusion reposant sur le concept d'« influence » -  
L'exemple du Canada**

Facteurs retenus par le Bureau de la concurrence canadien pour déterminer si une participation minoritaire précise, une association d'intérêts, une entente ou tout autre lien ou intérêt confère une influence importante<sup>18</sup> :

- les droits de vote liés aux actions ou aux titres de participation dans une association d'intérêts détenus par l'acquéreur;
- le statut de l'acquéreur qui participe dans une société de personnes (c.-à-d. commandité ou commanditaire) ainsi que la nature des droits et des pouvoirs liés à cette participation;
- les détenteurs du reste des actions ou des intérêts et leur répartition (si la participation de l'entreprise acquise est partagée ou restreinte et si l'acquéreur est l'actionnaire le plus important);
- la composition du conseil d'administration<sup>4</sup> et le quorum aux réunions du conseil d'administration, la participation et les habitudes de vote antérieures (si l'acquéreur est en mesure d'obtenir un niveau de représentation suffisant pour influencer la décision ou d'empêcher l'adoption de résolutions par son vote dans une réunion ordinaire);
- l'existence de droits de vote ou de veto spéciaux liés aux actions ou aux intérêts de l'acquéreur (c.-à-d. l'étendue des droits d'approbation de l'actionnaire en ce qui a trait aux transactions qui ne surviennent pas dans le cours normal des affaires);
- les conditions des conventions d'actionnaires ou des ententes de vote;
- l'action bénéficiaire ou la participation aux bénéfices de l'intérêt minoritaire en comparaison avec la participation financière de l'acquéreur;
- l'étendue, le cas échéant, de l'influence de l'acquéreur sur le choix des cadres ou des membres siégeant aux principaux comités;
- le statut et l'expertise de l'acquéreur par rapport à ceux des autres actionnaires;
- les services (à titre de cadre, de conseiller ou autre) que l'acquéreur fournit à l'entreprise, le cas échéant;
- les options de vente et d'achat ou autres droits de liquidité, le cas échéant, que l'acquéreur détient et dont il peut se servir pour influencer d'autres actionnaires ou cadres;
- l'accès dont dispose l'acquéreur, s'il y a lieu, aux renseignements confidentiels sur l'entreprise;
- la mesure dans laquelle l'acquéreur peut par ailleurs faire pression sur les processus décisionnels de l'entreprise.

C'est en règle générale la combinaison de facteurs, et non la présence ou l'absence d'un seul facteur, que le Bureau juge déterminante dans son évaluation de l'influence concrète.

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obligatoire, les risques pour les parties découlant de l'utilisation de critères d'« influence » moins bien définis sont considérablement moindres que dans un régime où la notification est obligatoire.

<sup>18</sup>

Bureau de la concurrence, Lignes directrices, supra note 17, Section 1.6.

Certains pays utilisent des définitions différentes pour décrire les opérations qui constituent des fusions. Le droit allemand sur le contrôle des fusions en est un bon exemple. D'après l'article 37 du GWB, il y a opération de fusion lorsqu'une entreprise acquiert une participation de 25 % ou de 50 % dans une autre entreprise, le « contrôle » d'une autre entreprise, une influence significative sur une autre entreprise sur le plan de la concurrence ou la totalité ou une part substantielle des actifs d'une autre entreprise. Chacun de ces cas décrit un scénario d'opération de fusion différent. Cette approche repose sur deux notions générales, celle de « contrôle » (qui est identique à la notion de contrôle/d'influence déterminante du règlement UE sur les concentrations) et celle d'« influence significative sur le plan de la concurrence » (moins exigeante), mais ajoute quelques seuils spécifiques qui devraient apporter une plus grande clarté, et permettre de couvrir les manières très différentes dont les opérations peuvent avoir une incidence sur la propension à livrer concurrence. Ces définitions étant multiples, une opération donnée peut être considérée comme une opération de fusion en vertu de plusieurs d'entre elles. Dans la pratique, la qualification retenue ne porte pas à conséquence car elle est sans effet sur le processus de contrôle de la fusion ou l'analyse de l'opération sur le fond.

Le Canada pourrait être considéré comme un autre pays ayant adopté une telle approche. Il se fonde principalement sur deux définitions légales et générales de la notion d'« opération de fusion », à savoir l'acquisition d'un contrôle (*de jure*) ou d'une « influence significative ». Toutefois, le Bureau explique également qu'il part du principe que les opérations notifiables, en vertu du chapitre IX de la Loi sur la concurrence, conduisent également à l'acquisition d'une participation importante dans une société-cible : en matière d'acquisition d'actions, une prise de participation de 20 % (dans une entreprise cotée) ou de 35 % (dans une entreprise non cotée) déclenche une obligation de notification (en supposant que les seuils de notification sont atteints) et, par conséquent, est censée avoir pour effet l'exercice d'une influence significative<sup>19</sup>.

Le régime américain de contrôle des fusions adopte quant à lui une approche toute différente<sup>20</sup>. Il repose sur ce qui est sans doute l'une des définitions les plus larges de la notion d'opération de fusion. Le libellé de l'article 7 du *Clayton Act* – « *no person...shall acquire... the whole or any part of the stock or assets of another entity...* » (nul [...] ne doit acquérir [...] tout ou partie des actions ou des éléments d'actif d'une autre entité [...]) – peut s'appliquer à pratiquement toute prise de participation ou acquisition d'éléments d'actif<sup>21</sup> et n'est en principe limité que par une exemption légale applicable à certaines prises de participation réalisées à des fins d'investissement<sup>22</sup>. Le calcul du rapport coûts/avantages décrit précédemment fait ici appel à d'autres paramètres : le régime américain des fusions repose principalement sur un ensemble de seuils chiffrés « objectifs » qui permettent de limiter considérablement les catégories d'opérations de fusion notifiables, c'est à dire soumises à une obligation de notification au titre du *Hart Scott Rodino Act* (« HSR Act »)<sup>23</sup>. S'agissant du fonctionnement du régime de contrôle des fusions, les

<sup>19</sup> *Id.*, Section 1.7.

<sup>20</sup> D'autres pays suivent un modèle similaire et utilisent, pour définir ce qu'est une fusion, une notion très large couvrant les prises de participation et les acquisitions d'actifs. L'Australie et la Nouvelle-Zélande, deux pays dotés d'un système de contrôle volontaire, en font partie. Comme indiqué ci-après, l'Inde adopte une approche similaire.

<sup>21</sup> 15 U.S.C. §18.

<sup>22</sup> Exemption analysée plus loin (en même temps que les exemptions aux exigences de notification), Section 3.1.

<sup>23</sup> Hart Scott Rodino Antitrust Improvements Act (HSR Act), 15 USC § 18a. D'autres rares exigences d'information initiale restreignent encore le coût du régime de contrôle des fusions, malgré le caractère général de la définition élémentaire donnée dans cette loi à la notion d'opération de fusion. Le fait que les autorités peuvent contrôler et contester une opération anticoncurrentielle définie comme étant une opération de fusion, sans qu'une obligation de notification ne s'applique – ce qui limite les coûts potentiels

seuils de notification prévus par le HSR Act revêtent une importance bien plus grande, ce qui explique pourquoi ils bénéficient généralement d'une attention bien plus grande que la définition juridique (plus large) de la notion d'opération de fusion.

### 3. Scénarios de fusions et exemples de « domaines problématiques »

#### 3.1 Prises de participation majoritaire et minoritaire

Comme on l'a vu, l'acquisition pure et simple d'une société-cible par une prise de participation ne soulève guère de questions en ce qui concerne les seuils de compétence. Quelle que soit la définition utilisée, tous les pays considéreront l'acquisition de la totalité ou d'un pourcentage élevé des actions d'une entreprise comme une « opération de fusion », que ce soit parce qu'elle confère à l'acquéreur le contrôle de la société-cible, que la participation acquise dépasse un certain seuil chiffré, ou que ce type d'opération est considéré de manière générale comme une opération de fusion.

L'application de la législation sur le contrôle des fusions aux prises de participation minoritaire qui ne confèrent pas le même type de contrôle incontestable de la société-cible a récemment bénéficié d'un regain d'intérêt. Bien entendu, de nombreux régimes de concurrence dans le monde reconnaissent depuis quelques temps déjà les effets que peut avoir ce type d'opérations sur la concurrence et les soumettent à un processus de contrôle des fusions. Cela étant, dans le monde entier, les spécialistes de la concurrence se sont de nouveau intéressés à cette question, principalement en raison d'une nouvelle compréhension des risques qui peuvent accompagner ce type d'opérations du point de vue du droit de la concurrence, si on les examine sur le fond. Les lignes directrices américaines de 2010 sur les fusions se sont enrichies d'une section consacrée à l'évaluation des prises de participation partielles<sup>24</sup>. La même année, l'OFT a publié un nouveau rapport sur les prises de participation minoritaire<sup>25</sup>. Cela étant, les questions de compétence, dans le domaine du contrôle des fusions, ont également suscité un regain d'intérêt. Le Groupe de travail n°3 s'est intéressé à ces deux aspects il y a seulement quelques années de cela<sup>26</sup>.

La saga européenne *Ryanair/Air Lingus* a également suscité un vif débat public sur le sujet.

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induits par les erreurs de type II que peuvent engendrer des seuils de notification élevés – a également une incidence sur le calcul coûts/avantages.

<sup>24</sup> U.S. Department of Justice et U.S. Federal Trade Commission, *Horizontal Merger Guidelines (2010)*, Section 13.

<sup>25</sup> OFT, *Minority Interests in Competitors, A Research Report prepared by DotEcon Ltd (2010)*.

<sup>26</sup> OCDE, Problèmes de lutte contre les monopoles en cas de participation minoritaire et de cumul de mandats d'administrateur, [DAF/COMP\(2008\)30](#) (OCDE, participation minoritaire).



**Box 2. Ryanair/Aer Lingus – Compétence limitée contre compétence étendue concernant le contrôle d'une prise de participation minoritaire dans une entreprise concurrente**

Ryanair et Aer Lingus sont deux compagnies aériennes irlandaises. Aer Lingus est la compagnie nationale ; si elle n'affiche plus une santé aussi insolente qu'autrefois, elle reste un acteur viable sur le marché des transports aériens. Ryanair est le plus grand transporteur à bas coût en Europe, et s'est imposé comme l'une des plus importantes compagnies aériennes sur l'ensemble du marché européen. Ces deux compagnies se livrent une concurrence frontale sur de nombreuses liaisons.

Fin 2006, Ryanair a pris une participation dans Aer Lingus et lancé une offre publique d'achat sur l'intégralité des actions d'Aer Lingus, opération à laquelle cette dernière s'est opposée. La Commission européenne a interdit l'offre publique d'achat en juin 2007<sup>27</sup>. Aer Lingus a demandé à la Commission de contraindre Ryanair à se défaire de sa participation minoritaire. La Commission a refusé d'accéder à cette requête, se déclarant incompétente : Ryanair n'a jamais réussi à acquérir une participation « de contrôle » dans Aer Lingus et par conséquent la Commission n'avait pas compétence pour la contraindre à se défaire de toutes les actions acquises dans le cadre d'une opération qui aurait de fait été une fusion, si elle n'avait été interdite en vertu du règlement UE sur les concentrations ; l'acquisition d'une participation minoritaire aurait dû être considérée comme une opération indépendante et dans la mesure où elle n'a conféré à l'acquéreur aucune « influence déterminante », elle ne relève pas de la compétence du règlement UE sur les concentrations<sup>28</sup>. Les deux parties ont fait appel. En juillet 2010, le Tribunal de l'UE a confirmé les deux volets de la décision. Il a confirmé que la Commission européenne n'a pas compétence pour examiner ou exiger la cession d'une participation minoritaire<sup>29</sup>.

L'offre renouvelée (la troisième) de Ryanair portant sur la participation restante dans Aer Lingus a été interdite par la Commission européenne en février 2013. La Commission a estimé que la fusion créerait d'importants problèmes de concurrence sur de nombreuses liaisons sur lesquelles les deux compagnies étaient les seuls concurrents, ou du moins les concurrents les plus proches, et a rejeté la mesure corrective proposée au motif qu'elle était inefficace<sup>30</sup>. Ryanair a introduit un recours auprès du Tribunal de l'UE contre cette décision.

Au Royaume-Uni, l'OFT a ouvert, en octobre 2010, sa propre enquête sur la prise de participation minoritaire de Ryanair dans Aer Lingus. Les autorités britanniques sont compétentes pour contrôler l'acquisition d'une participation minoritaire de Ryanair dans Aer Lingus en vertu du critère de l'« influence substantielle » prévu par l'Enterprise Act de 2002. Les recours juridiques formés par Ryanair pour contester la compétence de l'OFT ont au final été rejetés par la Cour d'appel en 2012 et la même année l'OFT a saisi la Commission de la concurrence pour un complément d'enquête<sup>31</sup>.

Le 30 mai 2013, la Commission de la concurrence a provisoirement décidé que la participation de 29.8 % de Ryanair était susceptible de réduire la concurrence sur les liaisons entre la Grande-Bretagne et la République d'Irlande et que Ryanair pourrait devoir diminuer sa participation dans Aer Lingus. Ses conclusions provisoires laissent entendre que la participation de Ryanair bloque la capacité d'Aer Lingus à fusionner avec ou à s'allier à une autre compagnie aérienne pour se développer et à dégager les synergies nécessaires pour rester compétitive, que Ryanair peut contrarier ses programmes d'émissions d'actions ou d'augmentation de capital, et qu'elle pourrait empêcher Aer Lingus de vendre des créneaux horaires avantageux à Heathrow.

Bien qu'il n'y ait eu aucune « application lacunaire de la loi » en l'espèce, on peut se demander s'il existe par ailleurs d'autres opérations similaires créant des problèmes de concurrence (assez évidents) mais pour lesquelles la Commission européenne n'est pas compétente et dans lesquelles, peut-être, contrairement à l'affaire *Ryanair*, aucun État membre de l'UE n'a la possibilité d'intervenir non plus.

<sup>27</sup> Affaire COMP/M.4439, Ryanair/Aer Lingus, décision du 27 juin 2006.

<sup>28</sup> Affaire COMP/M.4439, Ryanair/Aer Lingus, note rejetant la demande d'Aer Lingus, 11 octobre 2007.

<sup>29</sup> Affaire T-342/07, Ryanair/Commission, Rec. 2010, p. II-3457.

<sup>30</sup> Affaire COMP/M.6663, Ryanair/Aer Lingus, décision du 27 février 2013.

<sup>31</sup> Office of Fair Trading, *OFT refers Ryanair's minority stake in Aer Lingus to Competition Commission*, communiqué de presse, 15 juin 2012.

### 3.1.1 Problèmes de concurrence

Il est désormais admis que, dans certaines conditions, les prises de participation minoritaire peuvent avoir des effets anticoncurrentiels<sup>32</sup>. Selon le contexte, elles peuvent donner lieu à des effets unilatéraux car elles sont susceptibles d'inciter davantage les entreprises concernées à réduire leur production/augmenter leurs prix. Le détenteur de la participation minoritaire peut avoir la capacité d'influencer la société-cible pour qu'elle adopte un positionnement moins concurrentiel. Cela étant, même dans le cas d'une participation financière purement passive, le détenteur peut avoir un intérêt unilatéral à se montrer moins concurrentiel puisqu'il bénéficie, par le biais de sa participation minoritaire, du fait que la société-cible est confrontée à une concurrence moins âpre. En outre, dans certains cas, on pourrait craindre que la prise de participation minoritaire n'atténue l'attrait de la société-cible aux yeux d'autres investisseurs, diminuant ainsi nettement la possibilité pour elle de devenir un concurrent plus sérieux<sup>33</sup>. Une telle situation déboucherait en outre, pour l'essentiel, sur des effets unilatéraux. Cela étant, les prises de participation minoritaire peuvent aussi donner lieu à des effets coordonnés car elles sont de nature à faciliter la coordination entre les concurrents<sup>34</sup>. Les effets préjudiciables sont plus probables lorsque les prises de participation minoritaire ont lieu entre sociétés concurrentes, mais peuvent aussi en principe se produire lorsque l'acquéreur prend une participation minoritaire dans une entreprise qui lui est verticalement liée<sup>35</sup>.

Selon les circonstances, les prises de participation minoritaire peuvent établir différentes relations entre les deux entreprises concernées. D'un point de vue économique, une distinction peut être faite entre les prises de participation minoritaire « actives » qui permettent à l'actionnaire de peser sur le processus décisionnel et la conduite commerciale de la société-cible, et les prises de participation minoritaire « passives » dans le cadre desquelles l'actionnaire détient un intérêt purement financier dans la société-cible et n'exerce aucune influence sur le comportement concurrentiel de celle-ci. Les systèmes juridiques peuvent prévoir une différenciation encore plus marquée entre les degrés de participation minoritaire active, en s'efforçant de faire une distinction entre celles qui débouchent sur un contrôle incontestable, analogue à celui que confère une participation majoritaire, et celles qui confèrent un degré d'influence moindre, mais néanmoins significatif sur le plan concurrentiel.

### 3.1.2 Seuils de compétence

Étant donné que les prises de participation minoritaire peuvent porter atteinte à la concurrence, la question importante qui se pose pour un régime de contrôle des fusions est de savoir s'il devrait adopter une définition qui soit suffisamment large de la notion d'opération de fusion pour couvrir les prises de participation minoritaire qui ne confèrent pas un contrôle incontestable de la société-cible, voire qui puisse

<sup>32</sup> Il est également admis que les prises de participation minoritaire sont généralement moins efficaces que les prises de participation à 100 %, même si elles peuvent parfois générer certains gains d'efficacité. Il est également admis que des justifications commerciales mineures peuvent plaider en faveur d'une prise de participation non majoritaire dans une société concurrente.

<sup>33</sup> *BSkyB v the Competition Commission et al*, [2008] CAT 25, *conf'd*, BSKyB, [2010] EWCA Civ 2 (High Court) ; une justification similaire apparaît dans les conclusions préliminaires de la Commission de la concurrence dans l'affaire *Ryanair*, Competition Commission, *Ryanair may have to reduce its stake in Aer Lingus*, communiqué de presse, 30 mai 2013.

<sup>34</sup> Ce point est parfaitement illustré dans OCDE, *Participations minoritaires*, supra note 26, 20-38, et dans OFT, *Minority Interests in Competitors*, supra note 25.

<sup>35</sup> Bien que les publications récentes sur ce sujet soient plus rares, les problèmes verticaux liés à des prises de participation minoritaire (préexistantes) ont fait l'objet d'un certain nombre de décisions en vertu du règlement de l'UE sur les concentrations. Voir, par exemple, affaire M.3653, Siemens/VA Tech (13 juillet 2005) ; affaire M.5406, IPIC/Man Ferrostaal (13 mars 2009).

s'appliquer à celles qui sont totalement passives. De manière générale, les régimes de contrôle des fusions s'intéressent principalement aux situations dans lesquelles les prises de participation minoritaire confèrent une influence sur la société-cible, peu d'entre eux ayant recours aux définitions applicables aux opérations de cette nature véritablement passives.

Les prises de participation minoritaire en tous genres n'étant pas rares, la difficulté consiste notamment à savoir si une ligne de démarcation suffisamment claire peut et doit être fixée entre celles de ces opérations qui sont les plus susceptibles d'entraîner des effets préjudiciables et celles qui, selon toute probabilité, n'en entraîneront pas, et devraient donc être maintenues hors du champ de la définition de ce qu'est une opération de fusion. Les approches utilisées pour venir à bout de cette difficulté sont très variables selon les pays.

#### *Régimes utilisant des seuils fixes exprimés en pourcentage*

Certains pays recourent à des seuils fixes pour définir les niveaux de prise de participation minoritaire qui constituent une opération de fusion. Parmi les exemples déjà mentionnés figurent l'Allemagne qui prévoit un seuil de 25 % et le Japon, qui applique des seuils de 20 % et 10 %, même si chacun de ces seuils n'est déclenché que lorsque des facteurs spécifiques supplémentaires laissent penser que la participation minoritaire confèrera également à son acquéreur la capacité d'influencer le comportement de la société-cible<sup>36</sup>. Ces seuils en pourcentage présentent des avantages évidents car ils reposent sur des critères de compétence objectifs et prévisibles. L'exemple de l'Allemagne illustre également les risques inhérents à l'utilisation de seuils fixes, du fait que des parties ont pu donner, semble-t-il, l'impression qu'elles avaient structuré leurs opérations « en fonction » du seuil de 25 % pour échapper au contrôle, ce qui a conduit l'Allemagne à introduire le critère d'« influence significative sur le plan de la concurrence » en complément de la notion d'opération de fusion.

La portée de la législation sur le contrôle des fusions applicable aux prises de participation minoritaire est bien plus large au Brésil, à la suite des réformes de la loi de 2012 sur la concurrence<sup>37</sup>. Conformément à l'article 90 de la nouvelle Loi sur la concurrence, les prises de participation minoritaire d'au moins 5 % constituent une opération de fusion lorsque l'actionnaire et la société-cible sont liés par une relation horizontale ou verticale. En Dans le cas contraire, le seuil applicable est porté à 20 %. Aucun autre critère ne semble s'appliquer pour déterminer si la prise de participation minoritaire confère à l'acquéreur une quelconque influence, comme c'est le cas au Japon, par exemple. Ainsi, le Brésil semble être l'un des rares pays où les prises de participation purement passives, supérieures à un seuil *de minimis* très faible, sont considérées comme des opérations de fusion.

La mise en œuvre de la nouvelle loi étant encore récente, il est trop tôt pour en évaluer les dispositions. Toutefois, celles-ci ont pour avantage de définir des seuils précis (même si des désaccords peuvent survenir sur l'existence ou non d'une relation verticale ou horizontale entre les parties) et d'être pratiquement impossibles à contourner, tout en élargissant considérablement le champ des possibilités de contrôle. L'expérience dira, à la lumière des fusions notifiées, si le nombre d'opérations de prise de participation de faible ampleur entraînant des problèmes de concurrence significatifs est suffisant pour justifier le recours à cette définition large – et potentiellement coûteuse – de la notion d'opération de fusion.

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<sup>36</sup> Voir supra, Section 2.

<sup>37</sup> Loi de 2011 sur la concurrence (entrée en vigueur le 29 mai 2012).

*Prises de participation minoritaire dans les régimes appliquant des critères de « contrôle/influence déterminante »*

Les prises de participation minoritaire soulèvent davantage de questions dans les régimes de contrôle des fusions reposant exclusivement sur la notion d'« acquisition d'un contrôle », autrement dit l'acquisition d'une influence déterminante sur la société-cible, pour définir ce qu'est une opération de fusion. Il n'est néanmoins pas surprenant que le sujet ait suscité une forte attention en Europe, où le droit de la concurrence de l'UE et de ses nombreux États membres suit la même approche. Les prises de participation minoritaire peuvent bien entendu répondre au critère de l'« influence déterminante » – même si tel est rarement le cas – en fonction notamment de droits supplémentaires et des pactes d'actionnaires dont elles peuvent s'accompagner, mais également de l'éparpillement des autres actionnaires.

Lors de la dernière révision de ce qui s'appelait à l'époque le règlement CE sur les concentrations, la Commission européenne s'était déjà demandé si la notion d'opération de fusion devait être modifiée pour être étendue à un plus grand nombre de prises de participation minoritaire<sup>38</sup>, avant de finir par rejeter la nécessité d'une telle réforme. Elle a estimé que d'autres mécanismes d'application de la loi étaient suffisamment efficaces pour combler de manière adéquate les « lacunes » et qu'une extension du champ d'application du contrôle des fusions serait trop coûteuse. Toutefois, ce débat a ressurgi et la Commission se demande désormais sérieusement si elle doit modifier son régime de contrôle des fusions, s'interrogeant sur l'ampleur, réelle ou supposée, des « lacunes en matière d'application de la loi », et sur la manière dont des réformes efficaces par rapport aux coûts qui en découleraient pourraient être mises en place. Il est difficile, du moins à partir des informations dont on dispose, de savoir si, mis à part *Ryanair*<sup>39</sup>, un nombre tellement important d'autres affaires laisserait supposer que les lacunes existantes seraient si graves qu'elles justifieraient une réforme, étant également entendu que l'extension du champ de compétence du règlement UE sur les concentrations aurait aussi un coût<sup>40</sup>.

*Couvrir les prises de participation minoritaire en appliquant des critères d'« influence substantielle/significative »*

D'autres pays, dont plusieurs pays européens, ont étendu le champ d'action et prennent en compte à tout le moins certaines prises de participation minoritaire conférant à l'acquéreur un moindre degré de contrôle. En Allemagne, les prises de participation minoritaire peuvent être définies comme des opérations de fusion dans plusieurs cas. Même si une telle opération confère à l'acquéreur un type de « contrôle » sur la société-cible différent de celui prévu par le règlement UE sur les concentrations (article 37(1)(3) du GWB) et est inférieure au seuil des 25 % (article 37(1)(2) du GWB), il s'agit bien d'une opération de

<sup>38</sup> Commission européenne, Livre vert sur la révision du Règlement (CEE) n° 4064/89 du Conseil, COMP(2001)745 (11 décembre 2001).

<sup>39</sup> Et même dans l'affaire *Ryanair*, on pourrait dire qu'il n'y a pas eu application lacunaire de la loi puisqu'un État membre a pu contrôler l'opération. Plus généralement, plus important est le nombre d'affaires liées à des prises de participation minoritaire qui échappent à l'application du règlement de l'UE sur les concentrations mais qui font l'objet d'un contrôle dans certains États membres, moins l'application de la loi est « lacunaire ».

<sup>40</sup> Il semble que l'essentiel des éléments dont on dispose concerne des fusions ayant fait l'objet d'un contrôle dans le cadre desquelles l'une des parties détenait une participation minoritaire préexistante dans un entreprise tiers. Or les fusions (contrôlées) en question créaient une relation de concurrence entre l'entreprise tiers et l'autre partie à la fusion, ce qui au final a suscité certaines préoccupations. Dans la mesure où, dans ces affaires, les prises de participation minoritaire préexistantes n'ont posé aucun problème de concurrence, il n'y aurait eu aucun avantage à étendre la compétence pour procéder au contrôle de ces opérations.

fusion dès lors qu'elle permet à l'acquéreur d'exercer une « influence significative sur le plan de la concurrence » (article 37(1)(4) du GWB).

Cette disposition de l'article 37(1)(4) du GWB a été introduite en 1989 en raison de l'impression qui prévalait alors que certaines parties contournaient le système en structurant leurs opérations potentiellement préjudiciables de manière à les faire échapper au dispositif allemand de contrôle des fusions, notamment en acquérant des participations inférieures à 25 % et en s'abstenant d'acquérir des droits de contrôle formels équivalents à ceux que conférerait une participation de 25 %<sup>41</sup>.

La loi ne prévoit aucune disposition particulière relative au moment où une opération a un effet significatif sur la concurrence, et ses contours exacts ne sont pas très clairs. D'après les publications disponibles, l'utilité de la disposition lors de son introduction initiale était inversement proportionnelle à la complexité des questions d'interprétation qu'elle soulevait<sup>42</sup>. Depuis, toutefois, cette disposition a joué un rôle bien plus important, notamment dans les secteurs des médias et de l'énergie. Par ailleurs, la pratique décisionnelle a fait ressortir plusieurs facteurs pertinents, tels que la nomination des membres de la direction, les droits d'information et de contrôle, les pactes d'actionnaires, ou encore les liens économiques entre les parties. Au final, l'enquête doit principalement avoir pour objet de déterminer si les décisions de la société-cible concernant des actions ayant une incidence sur la concurrence ne sont plus prises de manière autonome mais peuvent être influencées par suite d'une prise de participation minoritaire. Cependant, les simples relations contractuelles à long terme qui créent une certaine dépendance économique sans droits supplémentaires ne semblent pas être considérées comme des opérations de fusion<sup>43</sup>.

La limite inférieure des prises de participation minoritaire couvertes n'est que de 10 %, même si dans au moins une décision, le *Bundeskartellamt* a considéré que l'acquisition d'une participation de 9 % constituait bien une opération de fusion. Cette décision a été infirmée en appel, même si le tribunal n'a pas, sur le principe, rejeté l'idée qu'une prise de participation de 9 %, si elle s'accompagne de mesures « accessoires » suffisantes, puisse conférer le niveau requis d'« influence »<sup>44</sup>. Cette disposition s'applique également aux relations verticales. De fait, elle a joué un rôle particulièrement important dans le secteur de l'énergie. Le *Bundeskartellamt* l'a ainsi invoquée pour empêcher les principaux acteurs du marché allemand de l'énergie de prendre des participations minoritaires dans des entreprises détenues par des municipalités.

La Loi britannique sur le contrôle des fusions est très différente de la situation qui prévaut en Allemagne, car elle repose sur un système de notification spontanée, tout en étant similaire dans la mesure où elle couvre les prises de participation minoritaire qui confèrent un niveau d'influence inférieur à celui d'un contrôle total. Conformément à l'article 26 de l'Enterprise Act 2002 (loi sur l'entreprise de 2002), il y a « situation de fusion » lorsque deux entreprises cessent d'être distinctes, ce qui se produit lorsqu'elles sont réunies sous une propriété ou un contrôle commun. La notion de contrôle s'étend aux situations dans lesquelles l'actionnaire acquiert une « influence substantielle » sur la société-cible<sup>45</sup>.

<sup>41</sup> Veelken, in Immenga/Mestmäcker, Wettbewerbsrecht: GWB, ¶86 (4<sup>e</sup> édition. 2007).

<sup>42</sup> Richter, in Wiedemann, Handbuch des Kartellrechts ¶116 (2<sup>e</sup> éd. 2008).

<sup>43</sup> BGH, KVR16/99, décision du 21 novembre 2000, WuW/E DE-R 607, 612, Minderheitsbeteiligung im Zeitschriftenhandel; Richter in Wiedemann, supra note 42, ¶121.

<sup>44</sup> *Bundeskartellamt*, B6-27/04, Bonner Zeitungsdruckerei (8 septembre 2004), WuW/E DEV 968, *rev'd*, OLG Düsseldorf (Ct. Appeals), VI-Kart 26/04 (V) (7 juillet 2005), WuW DE-R 1581.

<sup>45</sup> Voir également supra, note 14.

Cette loi ne précise pas dans quelles circonstances il y a influence substantielle. En pratique, de nombreux paramètres entrent en ligne de compte, notamment la taille des participations et l'éparpillement des autres actionnaires, l'identité des actionnaires, les droits de vote spéciaux, les représentations au conseil d'administration et les restrictions des droits de vote. En définitive, l'autorité de la concurrence cherchera à déterminer si l'acquéreur peut influencer de manière substantielle les mesures prises par la société-cible sur le marché<sup>46</sup>.

**Box 3. BSKyB/ITV – Couvrir les prises de participation minoritaire en vertu du critère d'« influence substantielle »**

En 2006, BSKyB, premier opérateur de télévision à péage du Royaume-Uni, a acquis une participation d'environ 18 % dans ITV, le plus gros radiodiffuseur commercial britannique. Certains éléments ont donné à suspecter que l'opération avait été motivée par le désir d'empêcher des tiers de prendre le contrôle d'ITV. Le gouvernement est intervenu, et l'OFT a ouvert une enquête. Il a jugé que l'opération était une opération de fusion et soulevait des problèmes de concurrence. L'affaire a été transmise à la Commission de la concurrence en 2007 pour examen complémentaire.

La Commission a jugé que cette prise de participation minoritaire conférait une « influence substantielle » à BSKyB, car, elle serait *de facto* en mesure de bloquer certaines résolutions particulières prises par ITV et pourrait donc limiter les options stratégiques de celle-ci telles que sa capacité à lever des fonds. Le statut d'acteur majeur de son secteur caractérisant BSKyB renforcerait encore son influence.

Dans son analyse sur le fond, la Commission de la concurrence a exprimé d'autres craintes, notamment le fait que BSKyB pourrait influencer la stratégie de production de contenus d'ITV et ses investissements dans la technologie TVHD. Elle a conclu qu'il en résulterait probablement un affaiblissement substantiel de la concurrence du fait de la moindre rivalité entre ITV et BSKyB sur le marché de la télévision. Elle a conclu qu'un désengagement de BSKyB, qui ramènerait sa participation sous le seuil des 7.5 %, constituerait une mesure corrective efficace<sup>47</sup>.

Le Tribunal d'appel de la concurrence a confirmé, en 2008, les conclusions de la Commission de la concurrence tant sur la compétence que sur le fond, jugeant notamment appropriée la mesure corrective imposée (qui a également été approuvée par le ministre concerné). Le Tribunal a estimé, sur la question de la capacité de BSKyB à bloquer les décisions spécifiques, notamment celles visant à lever des fonds, que les conclusions de la Commission se justifiaient tant concernant le critère de compétence que du point de vue de l'évaluation d'impact sur la concurrence. Cet aspect a été un élément essentiel pour juger que BSKyB exerçait une influence substantielle et pour conclure à un risque d'atteinte à la position concurrentielle d'ITV<sup>48</sup>.

En 2010, la Haute Cour a rejeté l'appel de BSKyB formé contre la décision du Tribunal d'appel de la concurrence, confirmant toutes les décisions précédentes relatives à la compétence et à l'évaluation menée en vertu du droit matériel de la concurrence<sup>49</sup>.

En pratique, une prise de participation de 25 % est réputée conférer une influence substantielle compte tenu des droits accordés aux actionnaires minoritaires par la Loi sur les sociétés applicable. Une participation de 15 % constitue une limite inférieure pertinente, même si on ne peut exclure, en deçà de ce seuil, qu'une influence substantielle peut malgré tout être exercée<sup>50</sup>.

<sup>46</sup> OFT, *Jurisdictional and Procedural Guidance*, supra note 17, ¶ 3.15.

<sup>47</sup> Commission de la concurrence, *Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc (2008)* (le ministre concerné a rendu une décision formelle dans cette affaire).

<sup>48</sup> British Sky Broadcasting Group Plc c. The Competition Commission, [2008] CAT 25.

<sup>49</sup> British Sky Broadcasting Group Plc c. The Competition Commission, [2010] EWCA Civ 2.

<sup>50</sup> OFT, *Jurisdictional and Procedural Guidance*, supra note 17, ¶ 3.20.

Ainsi, les deux pays européens évoqués ici disposent de capacités assez importantes pour couvrir les prises de participation minoritaire, même si, pour y parvenir, ils ont dû s'appuyer sur un instrument législatif qui ne définit pas clairement de frontière entre les opérations relevant ou non du contrôle des fusions, et sur une pratique décisionnelle ayant, dans chaque pays, permis d'élaborer un catalogue de critères qui peut, dans ces deux pays, être appliqué avec une certaine souplesse. Ni l'un ni l'autre n'est en mesure d'intervenir lorsqu'il s'agit de prises de participation minoritaire passives ne conférant à l'acquéreur qu'un simple intérêt financier dans la société-cible.

#### *Élargissement du champ d'action en appliquant quelques exemptions*

Le traitement des prises de participation minoritaire passives aux fins de la définition de ce qu'est une opération de fusion est appréhendé différemment dans la législation américaine relative au contrôle des fusions. Il semblerait qu'aux États-Unis un plus large éventail de prises de participation minoritaire puisse être considéré comme des opérations de fusion qu'au Royaume-Uni et en Allemagne par exemple. Conformément à l'article 7 du Clayton Act, une opération de fusion est une acquisition de « *tout ou partie des actions ou du capital social* » d'une autre entreprise et une telle acquisition peut être interdite lorsqu'elle peut avoir « *pour effet de réduire substantiellement la concurrence* »<sup>51</sup>. Par conséquent, toutes les acquisitions de titres de participation dans une société-cible peuvent être considérées comme des opérations de fusion<sup>52</sup>. Cette définition très large est nuancée par l'article 7(3) qui dispose que « *[c]et article ne s'applique pas aux personnes qui achètent ces actions à seule fin d'investissement et ne les utilisent pas pour provoquer ou pour tenter de provoquer, en votant ou en prenant toute autre mesure, un affaiblissement substantiel de la concurrence.* ».

L'exemption applicable « aux investissements » prévue à l'article 7(3), qui n'impose aucun plafond au pourcentage d'actions pouvant être détenues « passivement », peut éliminer certains types de prises de participation minoritaire du champ d'application de la législation américaine sur le contrôle des fusions. Cette exemption, largement inspirée par l'exemption de même nature prévue par les règles de déclaration contenues dans le HSR Act, a cependant une portée très limitée dans la pratique<sup>53</sup>. Une opération ne sera réputée être effectuée « à seule fin d'investissement » que si l'acquéreur n'exerce pas d'influence sur les actions et la conduite commerciale de la société-cible et n'utilise aucun des mécanismes à sa disposition pour provoquer, ou tenter de provoquer, un affaiblissement substantiel de la concurrence. Sont exclues de l'article 7(3) les situations dans lesquelles l'actionnaire acquiert le contrôle actif de la société-cible, la capacité d'influencer les actions de la société-cible par d'autres moyens que le contrôle, ou peut accéder à des informations commercialement sensibles. Ces paramètres donnent à penser que le critère de

<sup>51</sup> Tout au long de la présente note, il importe de garder à l'esprit la différence entre les opérations qui sont considérées comme des opérations de fusion en vertu de l'article 7 du Clayton Act et celles qui sont notifiables en vertu du HSR Act et de ses modalités d'application, 16 CFR §§801-803.

<sup>52</sup> U.S. c. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957).

<sup>53</sup> Le HSR Act prévoit un plafond, exemptant les prises de participation de 10 % maximum réalisées à des fins d'investissement (HSR Act, article (a)(C)(9)). Le plus célèbre contrevenant à l'obligation de déclaration prévue par le HSR Act, ayant invoqué l'« exemption pour investissement », est probablement Bill Gates, qui a accepté de payer une amende civile de 800 000 USD pour non-notification de l'acquisition d'une petite prise de participation dans une autre société ; étant par ailleurs l'un des administrateurs de la société en question, il n'a pas pu bénéficier de cette exemption. U.S. Department of Justice, *Bill Gates to Pay \$ 800,000 Civil Penalty for Violating Antitrust Premerger Notification Requirements*, communiqué de presse, 3 mai 2004. Cette sanction, et d'autres plus récentes, montrent que les autorités surveillent de près que l'exemption ne peut être utilisée abusivement par des personnes acquérant davantage qu'une participation minoritaire strictement passive.

compétence permettant considérer qu'une opération constitue une fusion n'est pas très différent de l'analyse sur le fond des éventuels effets anticoncurrentiels<sup>54</sup>.

On peut se demander si l'exemption prévue en cas de prise de participation réalisée « à seule fin d'investissement » peut s'appliquer en cas d'acquisition de droits minoritaires dans un concurrent direct<sup>55</sup>, même si les autorités ont parfois, dans le cadre d'une action corrective, approuvé des prises de participation purement passives, bien en deçà du seuil des 10 %, dans une société concurrente<sup>56</sup>. Les mesures correctives ayant été conçues pour s'assurer que les opérations en cause n'étaient plus susceptibles d'avoir pour effet de réduire significativement la concurrence, les prises de participation passives réalisées dans le même esprit et d'un niveau comparable peuvent en principe bénéficier de l'exemption prévue à l'article 7(3) du Clayton Act.

Une approche similaire des prises de participation minoritaire peut être observée en Inde où le régime de contrôle des fusions récemment mis en place semble suivre dans une large mesure le modèle américain en ce qui concerne la définition de ce qu'est une opération de fusion. De toute évidence, l'adoption d'une approche analogue n'y a en l'occurrence pas été le fruit de nombreuses années de pratique décisionnelle, d'où une grande incertitude et des craintes importantes relatives à la disproportion et au manque de précision des seuils de compétence<sup>57</sup>. La Loi sur la concurrence définit comme une opération de fusion toute acquisition du contrôle, d'actions, de droits de vote *ou* d'actifs d'une autre entreprise<sup>58</sup>, ce qui laisse penser que toute prise de participation mineure dans une autre société peut, en principe, être considérée comme une opération de fusion. Cette définition large est limitée par des exemptions qui excluent certaines prises de participation minoritaire. En vertu d'un règlement adopté par la Commission de la concurrence indienne, les prises de participation jusqu'à 25 % ne sont exemptées que si elles sont réalisées à seule fin

<sup>54</sup> Voir, par exemple, *U.S. c. Tracinda Inv. Corp.*, 477 F.Supp. 1039 (C.D. Cal. 1979) (le critère de l'exemption, applicable lorsque la prise de participation est effectuée « à seule fin d'investissement », ne diffère pas fondamentalement de la proscription prévue par l'article 7 en tant que tel).

<sup>55</sup> Areeda & Hovenkamp, *Antitrust Law*, ¶ 1204(b) (l'exception pour investissement doit bénéficier uniquement aux investisseurs, notamment aux investisseurs institutionnels) ; Paul C. Cuomo et al, *Partial Acquisitions: Recent MOFCOM Action Suggests Possible Divergence with U.S. Standards*, *CPI Antitrust Chronicle*, janvier 2012, point 3, note de bas de page 5 (les prises de participation partielle dans des sociétés concurrentes ne sauraient bénéficier de l'exemption prévue à l'article 7(3) du Clayton Act).

<sup>56</sup> Voir, par exemple, U.S. Federal Trade Commission, *FTC Requires Restructuring Of Time Warner/Turner Deal: Settlement Resolves Charges That Deal Would Reduce Cable Industry Competition*, communiqué de presse, 12 septembre 1996 (autorisation d'une participation de 9.2 % non assortie de droits de vote) ; U.S. Department of Justice, *American Airlines Cleared to Acquire Stock in Argentine Airline*, communiqué de presse, 8 juillet 1998 (autorisation d'une prise de participation de 8.5 %) ; U.S. Department of Justice, *Department Announces Tentative Settlement in the Northwest-Continental Lawsuit*, communiqué de presse, 6 novembre 2000 (autorisation d'une prise de participation de 7 %).

<sup>57</sup> Pour un bilan des évolutions survenues et des préoccupations suscitées, voir, par exemple, Tony Reeves & Dan Anderson, *India's New Merger Control Regime: When Do You Need to File*, 26 *Antitrust* 94 (2011).

<sup>58</sup> Loi de 2002 sur la concurrence, n°12 de 2003, modifiée par la Loi de 2007 (Modification) sur la concurrence, article 5.



d'investissement et ne confèrent pas à l'acheteur le contrôle de la société-cible<sup>59</sup>. Cette exemption n'est pas applicable aux prises de participation minoritaire dans une société concurrente<sup>60</sup>.

### 3.1.3 Conclusions

Le cas des prises de participation, et plus particulièrement celles qui ne confèrent pas à l'acheteur un niveau de contrôle *de jure*, illustre clairement la volonté de nombreux régimes de contrôle des fusions de faire porter leur action sur toutes sortes d'opérations qui permettent à l'acquéreur d'exercer une influence sur la conduite de la société-cible. Néanmoins, pratiquement aucun régime de contrôle des fusions ne semble se satisfaire des seuils de participation simples et objectifs, exprimés en pourcentage, peut-être parce qu'ils sont susceptibles d'être trop facilement contournés ou parce qu'il faudrait les fixer à un niveau si bas que l'autorité de la concurrence aurait alors à faire face à un trop grand nombre d'affaires sans intérêt. Dès lors, la portée plus large des lois sur le contrôle des fusions s'accompagne souvent de définitions ouvertes et d'un ensemble de facteurs potentiellement pertinents qui doivent être appliqués au cas par cas.

Le fait de mettre l'accent sur la capacité à influencer le comportement commercial de la société-cible signifie par ailleurs également que les prises de participation passives (lorsque les intérêts sont purement financiers) sont rarement couvertes par les définitions de la notion d'« opérations de fusion », malgré les effets préjudiciables qu'elles peuvent avoir. Le Brésil semble faire exception à règle. Chaque prise de participation au-delà d'un seuil de 5 % est couverte, sauf si les parties n'entretiennent pas le moindre lien entre elles. Seule l'expérience montrera si cette approche est excessivement prudente ou globalement avantageuse.

## 3.2 Acquisitions d'actifs, notamment d'actifs limités

Dans pratiquement tous les principaux régimes de contrôle des fusions, l'acquisition d'une société-cible par l'achat d'actifs entre dans la définition de ce qu'est une opération de fusion. Ces opérations utilisent un moyen plus « direct » que les prises de participation pour provoquer des changements structurels durables sur le marché, qui peuvent affecter la manière dont les actifs en question sont utilisés dans le processus concurrentiel, et doivent par conséquent être traitées comme les prises de participation. Il en est de même lorsque les actifs acquis formaient une branche d'activité à part entière du vendeur, et/ou lorsque l'acquisition n'implique pas le transfert pur et simple de l'intégralité des droits de propriété mais consiste en un arrangement contractuel similaire qui confère à l'acheteur des droits à long terme, et peut-être irrévocables, de gestion des actifs, comme c'est le cas des contrats de location qui induisent un transfert du contrôle des actifs, des droits de gestion et des risques commerciaux.

Cependant, comme pour les prises de participation, des questions plus complexes peuvent surgir lorsque la situation évolue après la simple acquisition des droits de propriété de la totalité des actifs d'une entreprise ou d'une activité. Ces questions peuvent notamment concerner la taille/la valeur/l'importance que doivent avoir les actifs pour avoir une incidence telle sur la concurrence que l'opération doive faire l'objet d'un contrôle. La plupart des pays étendent la portée de leur législation sur le contrôle des fusions au-delà de l'acquisition de la totalité des actifs d'une entreprise, mais il existe des différences quant au niveau de détail prévu par chaque législation. Certaines exigent que les actifs acquis forment une unité

<sup>59</sup> Règlement de 2011 de la Commission indienne de la concurrence (*Procedure in regard to the transaction of business relating to combinations*), modifié au 4 avril 2013, annexe I. Une deuxième exemption, ajoutée en 2013, concerne les prises de participation jusqu'à 5 % dans la société-cible, lorsque l'acheteur détient déjà au moins 25 % de celle-ci, mais pas plus de 50 % et uniquement si les prises de participation complémentaires ne confèrent pas à l'acheteur le contrôle de la société-cible.

<sup>60</sup> Reeves & Anderson, *India's New Merger Control Regime*, supra note 57, point 97.

suffisante pour que l'acheteur puisse transférer ou poursuivre une activité commerciale particulière ou que les actifs en question représentent une source de revenus distincte. Dans d'autres pays, chaque transfert d'actifs suffisamment significatif pour modifier la position concurrentielle de l'acquéreur est par principe considéré comme une opération de fusion.

### 3.2.1 Opérations nécessitant l'acquisition d'actifs plus substantiels

Comparé à celui d'autres grands pays ou territoires, le droit de la concurrence de l'UE applique une notion plus restrictive concernant le moment où les acquisitions d'actifs peuvent être considérées comme des opérations de fusion. Conformément aux dispositions du règlement UE sur les concentrations portant sur les acquisitions d'actifs<sup>61</sup>, il y a changement requis du contrôle d'une « entreprise » si l'acheteur acquiert la possibilité d'exercer une influence déterminante par des droits de propriété ou de jouissance sur tout ou partie des biens d'une autre entreprise<sup>62</sup>. Bien que l'expression « droit [...] de jouissance [de toute] partie des biens d'une autre entreprise [...] » puisse être interprétée de manière très large, en pratique, les actifs acquis doivent représenter au moins une « partie d'une entreprise », ce qui signifie qu'il doit y avoir un transfert du contrôle d'une activité ayant une présence sur le marché et générant un chiffre d'affaires qui lui est attribuable sans ambiguïté<sup>63</sup>.

Le critère d'attribution du chiffre d'affaires donnera lieu à des cas limites qui nécessiteront une analyse spécifique du contexte en général. Par exemple, il a été jugé que le transfert de certains actifs, par exemple des centrales électriques, répondait à cette exigence. Pour autant, dans d'autres circonstances, le simple transfert d'actifs peut être insuffisant pour constituer une « opération de fusion », et il peut être alors nécessaire qu'il y ait transfert de savoir-faire ou de structures de commercialisation, en plus du transfert d'actifs, pour que l'acheteur soit en mesure de se livrer à des activités générant un chiffre d'affaires lié à des tiers. De même, un accord de cession de toutes les relations clients existantes, même s'il ne porte que sur une certaine catégorie de clients, a été considéré comme une « opération de fusion ». Cela étant, en raison du critère d'« attribution du chiffre d'affaires », il est moins probable que des transferts exclusivement limités à des listes de clients ou que la cession d'un droit de propriété intellectuelle particulier soient considérés comme des opérations de fusion<sup>64</sup>.

Le Royaume-Uni applique une notion légale différente, mais sa position vis-à-vis des acquisitions d'actifs ne semble pas si différente de celle établie dans le règlement UE sur les concentrations. Conformément à l'Enterprise Act (Loi sur l'entreprise) de 2002, toutes les acquisitions des activités ou de parties d'activités d'une entreprise peuvent en principe être considérées comme des opérations de fusion. Pour déterminer si les actifs cédés sont suffisamment importants, une évaluation au cas par cas est indispensable et devra, conformément aux lignes directrices du Royaume-Uni sur les fusions, prendre en compte tous les éléments pertinents<sup>65</sup>. Les actifs cédés doivent permettre de poursuivre une activité commerciale et le chiffre d'affaires qui leur est directement lié doit pouvoir être identifié. Un prix d'achat incorporant le paiement de la cession du fonds de commerce indiquerait ainsi fortement qu'il y a eu cession d'une entreprise commerciale, donnant à penser que l'acheteur acquiert non seulement des actifs « nus »,

<sup>61</sup> Commission européenne, Communication juridictionnelle codifiée de la Commission concernant le règlement (CE) n° 139/2004 du Conseil relatif au contrôle des opérations de concentration entre entreprises, J.O. C /1 (2008) (CJC).

<sup>62</sup> Règlement de l'UE sur les concentrations, Article 3(2)(a).

<sup>63</sup> CJC, supra note 61, ¶24.

<sup>64</sup> Cela étant, il n'est en principe pas exclu que les critères nécessaires pour avoir qualité d'« actif » puissent être remplis. CJC, supra note 61, ¶24.

<sup>65</sup> OFT, *Jurisdictional and Procedural Guidance*, supra note 17, article 3.12.

mais également la capacité à les utiliser dans le cadre d'une activité commerciale<sup>66</sup>. En revanche, la cession de certains droits (droits de propriété intellectuelle, par exemple) ne serait pas considérée, en tant que telle, comme une opération de fusion. Par ailleurs, si la cession de listes de clients peut être un facteur important pour déterminer s'il y a eu ou non transfert d'une activité, elle ne saurait en soi être considérée comme une opération de fusion.

Le Japon semble s'être doté d'une législation un peu plus restrictive en ce qui concerne les acquisitions d'actifs. Selon les lignes directrices sur les concentrations relatives à la Loi antimonopole sur le contrôle des sociétés commerciales, les acquisitions d'actifs doivent concerner une « part substantielle » d'une activité, décrite par ailleurs comme une partie de l'activité capable de fonctionner comme une seule entreprise à part entière et ayant une valeur distincte de l'entreprise vendeuse. En outre, ces lignes directrices ont recours à des seuils chiffrés pour définir le « caractère substantiel » de la part acquise, et se fondent sur le chiffre d'affaires relatif (à savoir rapporté au chiffre d'affaires total du vendeur) et absolu généré par les actifs cédés, pour identifier une opération de fusion<sup>67</sup>.

### 3.2.2 Étendre le champ de compétence aux acquisitions d'actifs plus limités

Dans d'autres pays, la législation sur le contrôle des fusions s'étend à un plus large éventail d'acquisitions d'actifs. Les États-Unis en sont un bon exemple. Conformément à l'article 7 du Clayton Act, « [...] aucune société soumise à la compétence de la *Federal Trade Commission* ne doit acquérir tout ou partie des actifs d'une autre société [...] »<sup>68</sup>. Les tribunaux ont confirmé qu'il s'agit d'une définition large de la notion d'opération de fusion car la loi utilise des « termes génériques, imprécis, qui couvrent un large éventail d'opérations », et que « [t]el qu'utilisé dans cette loi, et en fonction du contexte factuel, le terme d'« actifs » peut désigner tout élément de valeur ».

Le texte a été jugé suffisamment vague pour inclure la propriété ou les droits de propriété, immobiliers ou mobiliers, matériels ou immatériels, qui sont susceptibles d'être cédés et qui ont été utilisés par le vendeur et pourraient être utilisés par l'acheteur pour livrer concurrence. Les listes de clients, les itinéraires de vente et les volumes de vente, les licences exclusives, les franchises, ainsi que les marques déposées et les brevets ont été considérés comme des actifs relevant de l'article 7. Le seul critère limitatif – et peu exigeant – pour distinguer les acquisitions d'actifs qui constituent des opérations de fusion de celles qui n'en sont pas est le fait que l'actif cédé doit pouvoir avoir une forme ou une autre d'utilité concurrentielle dès lors qu'il passe sous le contrôle de l'acheteur<sup>69</sup>.

Dans le même esprit, toutes sortes d'acquisitions d'actifs seraient considérées comme des opérations de fusion en vertu de l'article 37 du GWB allemand. La disposition applicable fait référence de manière générale aux droits de propriété ou de jouissance de tout ou partie des actifs d'une entreprise. La pratique

<sup>66</sup> *Id.*, article 3.10.

<sup>67</sup> JFTC, *Guidelines Concerning Review of Business Combinations*, supra note 11, article 4(3).

<sup>68</sup> Le texte sur les acquisitions d'actifs a été introduit à l'article 7 par le Celler-Kefauver Act de 1950 lorsqu'il a été constaté qu'une interdiction des prises de participation anticoncurrentielles pouvait aisément être contournée par un accord de cession de la totalité des actifs d'une entreprise. La référence aux sociétés soumises à la compétence de la *Federal Trade Commission* semble restreindre le champ de compétence par rapport à celui qui est applicable aux prises de participation, mais la jurisprudence a pratiquement rendu caduque cette restriction.

<sup>69</sup> La portée de la notion juridique d'« opération de fusion » est atténuée par d'importantes exceptions à l'obligation de notification qui excluent, par exemple, certaines opérations immobilières et acquisitions d'actifs réalisées dans le cadre normal de l'activité, sauf lorsqu'elles représentent « la totalité ou l'essentiel des actifs d'une unité opérationnelle ». Voir 16 CFR §802.

en matière d'application de la législation vise essentiellement à savoir si les actifs concernés par une opération (i) sont importants pour la position du vendeur (en tenant compte d'un ensemble modulable de critères qualitatifs et quantitatifs) ; et (ii) peuvent avoir une incidence sur la position de l'acheteur sur le marché<sup>70</sup>. Par conséquent, si l'on applique ce critère de compétence, une certaine évaluation des circonstances entourant la cession d'actifs semble nécessaire.

En vertu de cette interprétation, on considère que la cession d'un seul magasin (sur plusieurs centaines de points de vente appartenant à une seule grande chaîne), de listes de clients ou d'une marque déposée utilisée pour une activité peut être considérée une opération de fusion<sup>71</sup>.

### 3.2.3 *Quelles opérations constituent des « acquisitions » d'actifs ?*

Une approche souple des critères de compétence peut également être observée s'agissant de la forme sous laquelle l'acheteur acquiert le contrôle des actifs. Une interprétation restrictive du terme « acquisition » peut laisser croire que seuls les transferts de propriété formels sont concernés, où presque tous les grands pays ont systématiquement recours à une définition plus large pour faire correspondre leurs seuils de compétence avec la réalité du contexte concurrentiel. Par conséquent, de nombreuses autres modalités par lesquelles l'acquéreur obtient le droit de contrôler la manière dont il utilisera les actifs de l'autre partie seront considérées comme des « acquisitions »<sup>72</sup>.

Ainsi, nous avons déjà indiqué que l'acquisition de droits de propriété intellectuelle peut constituer une acquisition d'actifs se prêtant à un contrôle<sup>73</sup>. Cela ne vaut pas seulement pour les cessions de la totalité de droits de propriété, mais également pour les cessions de licences exclusives à long terme, de préférence irrévocables, qui provoque un changement durable sur le marché<sup>74</sup>. En revanche, les licences non exclusives de droits de propriété intellectuelle ne sont généralement pas considérées comme des « acquisitions »<sup>75</sup>. Cette simple distinction peut se révéler rapidement caduque et une évaluation plus détaillée des circonstances spécifiques au cas d'espèce peut être rendue nécessaire, les accords de licence étant des instruments souples qui permettent d'attribuer les droits en fonction des besoins commerciaux des

<sup>70</sup> BGH, KVR 14/91, arrêt du 7 juillet 1992, Warenzeichenerwerb ; BGH, KVR32/05, arrêt du 10 octobre 2006, National Geographic I ; Richter in Wiedemann, supra note 42, point. 81.

<sup>71</sup> United States c. Columbia Pictures Corp., 189 F.Supp. 153 (SDNY 1960). Dans le même esprit, la loi canadienne sur le contrôle des fusions semble considérer toute acquisition d'un actif « essentiel » comme une « opération de fusion ». Peuvent faire partie des actifs essentiels des structures de distribution, un point de vente au détail, un nom de marque ou des droits de propriété intellectuelle. Bureau de la concurrence, Lignes directrices, supra note 17, Section 1.13.

<sup>72</sup> Dans l'affaire United States c. Columbia Pictures Corp., 189 F.Supp. 153, 182, le tribunal a justifié son interprétation large du terme « acquisition » de la manière suivante : « La loi n'impose aucune méthode spécifique d'acquisition. Elle s'intéresse avant tout au résultat final de la cession d'une partie suffisamment importante de l'ensemble des privilèges et des droits légaux du cédant à l'acquéreur pour conférer à la cession un poids économique et l'« effet » préjudiciable proscrit. ».

<sup>73</sup> Voir supra, sections 3.2.1 et 3.2.2. Comme on l'a vu, il peut y avoir des différences entre les pays quant aux circonstances dans lesquelles le transfert d'un droit de propriété intellectuelle peut être considéré comme une « acquisition ».

<sup>74</sup> Dans l'affaire United States c. Columbia Pictures Corp., 189 F.Supp. 153, par exemple, un contrat de licence exclusive de 14 ans qui donnait au titulaire le droit d'exploiter une importante filmothèque par voie de télédiffusion a été considéré comme une « acquisition ».

<sup>75</sup> Commission européenne, Communication juridictionnelle codifiée de la Commission concernant le règlement (CE) n° 139/2004 du Conseil relatif au contrôle des opérations de concentration entre entreprises, J.O. C 95/1 (2008) (CJC), ¶24.

parties. Ainsi, le cédant peut octroyer une licence exclusive, tout en conservant certains droits d'exploitation limités du droit de propriété intellectuelle concédé sous licence. À tout le moins en ce qui concerne le régime américain de contrôle des fusions, cela ne semble pas affecter la qualification d'« opération de fusion »<sup>76</sup> d'une telle opération. Toutefois, dans ce type de situations, il semble plus probable que l'appréciation diffèrera selon le régime de contrôle des fusions.

À l'évidence, des questions similaires se posent s'agissant d'autres droits de propriété. Dans ce cas aussi, le transfert formel de propriété ne serait pas requis et les opérations dont les effets pourraient être substantiellement similaires seront également considérées comme des « acquisitions ». Ce qui importe, c'est le droit relativement durable d'utiliser certains actifs<sup>77</sup>. Ce transfert peut se faire, par exemple, au travers d'un contrat de location qui donne au preneur le contrôle de la gestion et des ressources de la société-cible. Ces éléments sont pour l'essentiel parfaitement décrits dans la CJC de la Commission européenne<sup>78</sup>, mais semblent s'appliquer dans le même esprit ailleurs.

Les situations « marginales » qui suscitent les questions les plus complexes semblent se produire lorsque, suite à l'instauration d'une relation purement économique, une partie dispose des moyens d'influer sur les décisions commerciales de l'autre partie, malgré l'absence de liens structurels ou de contrats conférant à l'acquéreur le droit de contrôler ou d'influencer les décisions de gestion de la société-cible. On peut en l'occurrence se demander si, et dans quelles circonstances, la création de cette situation de dépendance économique peut être considérée comme une « acquisition ». Une interprétation large de la notion d'« acquisition » qui pourrait couvrir des relations en principe purement contractuelles ressort, par exemple, de l'analyse qu'a faite la Commission européenne des différents modes de prise de contrôle d'une autre entreprise. D'après la Commission, une situation de dépendance économique peut conduire au niveau requis de contrôle lorsque des contrats ou crédits à long terme confèrent une influence déterminante, pour autant qu'ils s'accompagnent de liens structurels<sup>79</sup>. L'analyse de la Commission ainsi que la jurisprudence citée à l'appui de son point de vue donnent à penser que certains liens structurels, tels qu'une participation, le droit de nommer la direction, ou au moins une option qui peut être convertie en droits de propriété, seront généralement nécessaires et examinés en conjonction avec les « autres » liens économiques afin d'établir le « contrôle/l'influence déterminante ». Cela peut vouloir dire qu'en pratique, il existe rarement des relations purement économiques si « intenses » qu'elles confèrent à une partie la capacité d'influer de manière substantielle sur l'autre partie, si ces relations ne sont pas accompagnées d'une autre action de nature « juridique » (structurelle ou contractuelle) renforçant l'influence. Il est également possible que de telles relations purement contractuelles créant une dépendance économique puissent exister, mais il pourrait être inapproprié de les faire entrer dans le champ d'application des lois sur le contrôle des fusions, compte tenu de la difficulté à définir des frontières claires et prévisibles.

L'analyse de la portée de l'article 37(1)(4) du GWB, déjà évoquée, et du recours qui y est fait au critère de l'« influence significative sur le plan de la concurrence » pour définir ce qu'est une opération de fusion, est également instructive à cet égard. En principe, le libellé de la disposition pourrait sembler suffisamment vague pour couvrir les opérations dans le cadre desquelles les liens purement économiques

<sup>76</sup> Une proposition d'amendement des règles de notification préalable à la fusion prévues par le HSR Act, visant à préciser qu'un transfert de droits de brevet exclusifs dans le secteur pharmaceutique donne lieu à une acquisition d'actifs potentiellement notifiable en vertu de le HSR Act, semble à cet égard particulièrement intéressante. Voir U.S. Federal Trade Commission, *FTC Seeks Public Comments on Proposed Amendments to the Premerger Notification Rules Related to the Transfer of Exclusive Patent Rights in the Pharmaceutical Industry* (13 août 2012).

<sup>77</sup> Voir, par exemple, le règlement de l'UE sur les concentrations, article 3(2)(a).

<sup>78</sup> CJC, supra note 75, ¶18.

<sup>79</sup> CJC, supra note 75, ¶20.

aboutissent à un tel degré de dépendance économique que le niveau d'influence requis sur une autre société ou un autre groupe d'actifs est atteint. Or, le commentaire relatif à cette disposition fait ressortir qu'une telle interprétation soulèverait des problèmes de sécurité juridique, en particulier dans un régime de contrôle des fusions prévoyant une notification obligatoire et des sanctions dans les cas où il n'y a pas eu notification d'une opération notifiable et où la partie concernée a omis de demander l'autorisation requise de l'opération. Dès lors, pour établir la réalité d'une « influence significative sur le plan de la concurrence », il peut être nécessaire que l'opération s'accompagne d'une action de nature « juridique », ayant un effet plus permanent (quitte à mener par ailleurs une analyse des mécanismes ayant généré cette influence économique), telle qu'une prise de participation dans la société-cible<sup>80</sup>.

### 3.2.4 Conclusions

De manière peut-être plus systématique encore que dans le cas des prises de participation, certains pays semblent à l'évidence vouloir engager un examen approfondi de l'ensemble des paramètres permettant de déterminer si une acquisition d'actifs constitue une opération de fusion. La notion d'acquisition est interprétée avec une certaine souplesse. Plus particulièrement, la nécessité d'étudier les effets de la cession d'actifs sur la position concurrentielle de l'acheteur peut rapprocher cette question de compétence d'une évaluation sur le fond de l'impact de l'opération sur la concurrence, même si une telle étude sera toujours beaucoup moins détaillée. Souvent, bien sûr, les exigences de notification atténueront les effets d'une telle définition large de l'opération de fusion, mais l'impression demeure que les autorités de la concurrence disposent d'une marge d'appréciation notable pour décider si des acquisitions d'actifs relèvent ou non du dispositif de contrôle des fusions.

### 3.3 Coentreprises

Le recours à la notion d'opération « centrale/marginale » qui explique les similitudes et les différences entre les principaux régimes de contrôle des fusions vaut également pour ce qui est des coentreprises. Lorsqu'au moins deux parties forment et contrôlent une coentreprise qui implique une véritable intégration d'actifs relativement permanente et met fin à la concurrence entre les sociétés mères dans son secteur d'activité, la création de cette coentreprise sera presque invariablement considérée comme une opération de fusion<sup>81</sup>. Toutefois, la notion de coentreprise étant souple, de nombreux types de coopération relèvent de cette catégorie. En outre, plus la coentreprise met en avant la collaboration et occulte l'intégration d'actifs, moins le rôle « autonome » qu'elle joue sur le marché est clair, et plus les différences entre les pays sont marquées<sup>82</sup>.

<sup>80</sup> Veelken, in Immenga/Mestmäcker, supra note 41, ¶¶ 93-94.

<sup>81</sup> À condition, comme on le verra ci-après, qu'au moins l'une des sociétés mères ait une influence déterminante sur les activités de la coentreprise ce qui, dans de nombreux régimes de contrôle des fusions européens, constitue un élément supplémentaire important.

<sup>82</sup> Les différences de qualification d'une coentreprise peuvent affecter considérablement les parties : si la coentreprise est une « opération de fusion », des obligations de notification et des délais d'attente peuvent être imposés, mais une décision finale sur la légalité de l'entreprise et donc la sécurité juridique peuvent généralement être obtenues bien plus rapidement que si la coentreprise est soumise à un contrôle pour suspicion d'accord restrictif. Différents critères de contrôle s'appliqueraient également, bien qu'il semble y avoir un consensus entre la plupart des principaux pays selon lequel certains aspects collaboratifs d'une coentreprise (ou la totalité de la coentreprise si elle ne peut être qualifiée de fusion en tant que telle) feraient l'objet d'un contrôle visant à détecter un éventuel accord restrictif, même si la formation de la coentreprise est considérée comme une opération de fusion. Enfin, on pourrait s'attendre à ce que des questions analytiques similaires sur les effets concurrentiels d'une coentreprise soient soulevées, quels que soient sa qualification et le cadre de procédure applicable. Différentes mesures correctives peuvent

De manière très générale, deux approches prédominent quant à la question de savoir comment la définition de la notion d'opération de fusion s'applique aux coentreprises. De nombreux régimes de contrôle des fusions ne voient pas la nécessité de traiter de manière distincte la formation des coentreprises ; ainsi les coentreprises créées par une intégration d'actifs passent généralement par une étape d'acquisition d'actions ou d'actifs ; autre possibilité, certains actifs précédemment détenus de manière indépendante peuvent être utilisés pour former une nouvelle « entreprise », contrôlée par les sociétés mères, ce qui suffirait à faire de cette opération une opération de fusion, selon la définition généralement applicable. D'autres pays ont adopté des dispositions spécifiques aux coentreprises dans leurs définitions. Les pays qui appliquent le modèle « contrôle/influence déterminante » du règlement UE sur les concentrations peuvent en particulier considérer plus indispensable d'examiner spécifiquement la manière dont les coentreprises sont conformes à la définition ; ces pays ont tendance à restreindre l'éventail des coentreprises relevant de leur définition. Ces différences donnent lieu au phénomène bien connu selon lequel une coentreprise internationale peut être considérée comme une opération de fusion, soumise à une obligation de notification dans certains pays, tandis que dans d'autres elle sera considérée comme un accord restrictif non notifiable<sup>83</sup>.

Ainsi, en vertu de la Loi américaine sur le contrôle des fusions, l'acquisition d'actifs ou de titres assortis de droits de vote dans le contexte de la formation d'une coentreprise serait considérée comme une opération de fusion, selon les règles généralement applicables de l'article 7 du Clayton Act, même si une obligation de notification dépendrait encore une fois des règles définies dans le HSR Act. Une acquisition d'actifs peut intervenir lorsque les sociétés mères de la coentreprise ont suffisamment de droits pour acquérir le « contrôle » des actifs apportés à la coentreprise<sup>84</sup>. Comme précédemment, ces règles couvrent un large éventail de coentreprises susceptibles d'être considérées comme une opération de fusion. La qualification d'opération de fusion, en vertu de cette définition large, et les éventuelles obligations de notification prévues par le HSR Act ne déterminent pas nécessairement les critères d'évaluation sur le fond. Dans certains cas, une coentreprise notifiable peut être considérée comme une collaboration entre des concurrents qui ne relève pas des lignes directrices sur les concentrations horizontales<sup>85</sup>.

Cette définition générale de la notion d'opération de fusion s'appliquerait également au Royaume-Uni. La formation d'une coentreprise y est considérée comme une opération de fusion lorsqu'au moins deux entreprises cessent d'être distinctes et qu'au moins deux sociétés mères exercent le niveau de contrôle requis sur l'entreprise. Les niveaux de « contrôle » pourraient varier d'une société mère à l'autre, par exemple si l'une détient une participation de contrôle et que l'autre exerce une « influence substantielle ».

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également être imposées, même si, encore une fois, les différences pratiques peuvent ne pas être importantes.

<sup>83</sup> La formation de Covisint, une plateforme de fourniture en ligne créée par les trois principaux constructeurs automobiles de Détroit, GM, Ford et Chrysler (à l'époque indépendant), est un exemple de coentreprise de ce type. La formation de Covisint a été contrôlée en tant qu'opération de fusion, notamment aux États-Unis et en Allemagne, mais pas en vertu du règlement CE sur les concentrations (car aucune société mère n'exerçait une « influence déterminante » sur la coentreprise) ; la Commission européenne a vérifié s'il ne s'agissait pas d'un accord restrictif en vertu de l'article 101. Voir U.S. Federal Trade Commission, *FTC Terminates HSR Waiting Period for Covisint B2B Venture*, communiqué de presse, 11 septembre 2000 ; Federal Cartel Office, Decision B 5 - 34100 - U 40/00, Covisint (25 septembre 2000) ; Commission européenne, La Commission autorise la création de Covisint, une bourse de commerce automobile sur Internet, communiqué de presse IP/01/1155 (31 juillet 2001). La coentreprise a été contrôlée en tant que fusion également au Brésil, bien que la décision d'autorisation ait été délivrée après un processus de contrôle si long que les sociétés mères l'avaient déjà revendu.

<sup>84</sup> Voir, par exemple, *Addamax Corp. c. Open Software Foundation, Inc.*, 888 F.Supp. 274 (D. Mass. 1995).

<sup>85</sup> En fonction du degré d'intégration, des effets sur la concurrence entre les sociétés mères et de la durée de leur collaboration, certaines coentreprises ont pu être analysées.

En Allemagne, l'approche qui prévaut en ce qui concerne les coentreprises est analogue. Une opération de fusion serait avérée si, à la suite de la formation d'une coentreprise, aux moins deux sociétés mères détiennent une participation d'au moins 25 %, dans la coentreprise ou exerce une influence concurrentielle significative sur ses activités.

Étant donné que ces pays appliquent le même critère de compétence pour toutes les opérations, il n'existe pas non plus de différence entre la qualification d'opération de fusion appliquée à la création d'une coentreprise et à une prise d'une participation minoritaire. Certains cas de prises de participation minoritaire nécessiteront une analyse sur le fond différente de celle effectuée pour les coentreprises, sans que cela ait de conséquence sur leur qualité éventuelle d'opération de fusion.

L'étendue de la compétence conférée par le règlement UE sur les concentrations est plus limitée s'agissant des coentreprises. Cela s'explique par le fait qu'une opération de fusion est réputée exister uniquement si au moins deux sociétés mères acquièrent une « influence déterminante » sur la coentreprise, et que cette dernière doit être « de plein exercice », c'est-à-dire qu'elle doit agir sur le marché comme une entité économique autonome. Ainsi, une coentreprise peut induire un changement structurel durable sur le marché, mais en l'absence d'« influence déterminante » par ses sociétés mères, ou en l'absence d'entité autonome agissant sur le marché, la qualification d'opération de fusion ne peut être retenue.

Ces deux exigences peuvent susciter des questions sur les seuils de compétence, dans les situations de coentreprise, qui pourraient ne pas se poser dans d'autres régimes de contrôle des fusions. Un bref exposé sur diverses formes de coentreprises permet d'illustrer ce phénomène : si un acheteur unique acquiert le contrôle d'actifs qui représentent une entreprise<sup>86</sup>, l'opération constituerait une « opération de fusion », que l'entreprise acquise soit ou non considérée comme « de plein exercice »<sup>87</sup>. Mais lorsque plusieurs parties sont concernées, la situation peut se compliquer quelque peu. Le fait est que si deux parties forment une coentreprise en acquérant conjointement une entreprise auprès d'un tiers, il n'est pas utile d'évaluer son caractère de « plein exercice » ; l'acquisition qui a donné naissance à une coentreprise sera toujours considérée comme une opération de fusion. Si en revanche les deux parties forment une nouvelle entreprise en apportant leurs propres actifs (y compris des actifs représentant une « entreprise »), l'opération de fusion ne sera avérée que si la coentreprise résultante est « de plein exercice »<sup>88</sup>. Les choses semblent moins évidentes lorsqu'un acheteur devient un associé de la coentreprise alors que l'entreprise était précédemment détenue individuellement par l'autre associé ; le critère de « plein exercice » de l'entreprise détenue conjointement peut être requis, mais le contraire semble également plausible<sup>89</sup>.

Ainsi, des opérations qui semblent provoquer des changements structurels très similaires sur le marché pourraient relever de règles de compétence différentes. La notion d'opération de fusion peut avoir une portée légèrement plus restreinte lorsqu'au moins deux parties forment une coentreprise par un apport d'actifs, plutôt que lorsqu'un acheteur unique acquiert une entreprise<sup>90</sup>. Il est fort possible que dans la pratique, ces questions complexes ne posent aucun problème majeur aux parties, notamment parce que dans ce type d'opération, elles seront incitées à faire contrôler leur coentreprise en application de la législation sur le contrôle des fusions et que l'autorité de la concurrence sera normalement peu désireuse de ne pas accéder à leur demande. Toutefois, cela montre qu'introduire la nécessité du critère de « plein

<sup>86</sup> Voir supra, Section 2.

<sup>87</sup> CJC, supra note 75, ¶24.

<sup>88</sup> CJC, supra note 75, ¶92.

<sup>89</sup> CJC, supra note 75, ¶86.

<sup>90</sup> L'essentiel de cette discussion fait suite aux travaux de Lars-Peter Rudolf et Bettina Leupold, *Joint Ventures – The Relevance of the Full Functionality Criterion under the EU Merger Regulation*, 3 J. Europ. Comp. L. & Practice 439 (2012).



exercice » pour déterminer le seuil de compétence peut soulever des questions complexes qui peuvent être évitées dans d'autres régimes de contrôle des fusions. La Chine a résolu de se soustraire à ces difficultés, en décidant, après réflexion, de supprimer l'exigence de plein exercice des règles de compétence régissant les coentreprises<sup>91</sup>.

L'élément de « contrôle/influence déterminante » peut également susciter des questions intéressantes, par exemple celle de savoir si l'Union européenne devrait envisager d'étendre la notion d'opération de fusion à certains types au moins de prises de participation minoritaire qui échappent actuellement au contrôle des fusions<sup>92</sup>. À l'heure actuelle, la prise d'une de participation minoritaire dans une coentreprise n'est considérée comme une opération de fusion que si le critère d'« influence déterminante » est rempli. La création d'une coentreprise par trois sociétés disposant de parts égales mais d'aucuns droits ni instruments de contrôle particuliers ne serait pas actuellement considérée comme une opération de fusion. Les trois sociétés mères seraient considérées comme des actionnaires minoritaires sans « contrôle/influence déterminante »<sup>93</sup>. Si le champ d'application du règlement UE sur les concentrations devait être étendu aux prises de participation minoritaire qui ne confèrent pas de « contrôle/influence déterminante », les répercussions sur l'exercice d'une compétence à l'égard des coentreprises « non contrôlées » seraient multiples. Un champ de compétence plus large qui couvrirait les prises de participation minoritaire ne conférant aucun contrôle engloberait également les coentreprises dans lesquelles les sociétés mères ont des participations sans contrôle, ce qui pourrait élargir de manière substantielle le champ d'application du contrôle des fusions en vertu du règlement de l'UE sur les concentrations. Une telle situation pourrait également nécessiter le recours à des règles de compétence spécifiques aux prises de participation minoritaire pour tenter de faire la distinction entre les « prises de participation minoritaire normales » et les « prises de participation minoritaire dans des coentreprises ».

#### 4. Conclusions

Malgré les importantes disparités qui subsistent dans l'approche adoptée par les différents régimes de contrôle des fusions pour définir ce qui constitue une « opération de fusion », la brève analyse comparative de certaines questions plus épineuses fait resurgir plusieurs thèmes communs. Principalement, de nombreux pays ont choisi d'élargir le champ d'application de leur législation sur le contrôle des fusions, qui s'étend bien au-delà des opérations « centrales » pour couvrir des opérations comme l'acquisition d'un contrôle *de jure* de la société-cible ou l'acquisition d'actifs ayant une portée similaire<sup>94</sup>.

<sup>91</sup> Comme on l'a vu, la Chine a largement suivi le modèle du règlement UE sur les concentrations lors de la conception de son régime des fusions. Sa Loi Antimonopole ne précise pas quand les coentreprises sont considérées comme des « opérations de fusion », et il a été laissé au MOFCOM – ministère chinois du Commerce extérieur qui est l'autorité de concurrence chargée du contrôle des fusions – le soin de publier des règles d'application afin de clarifier les questions restées ouvertes, y compris les questions de compétence. Le projet de dispositions transitoires comprenait un critère de plein exercice pour les coentreprises, excluant ainsi du champ d'application les coentreprises ne revêtant pas cette spécificité. Cela étant, le règlement final du MOFCOM relatif à la notification des concentrations entre entreprises, publié en 2009, ne retient pas le critère de plein exercice, élargissant ainsi le champ des coentreprises soumises au contrôle des fusions.

<sup>92</sup> Voir supra, Section 3.1.2.

<sup>93</sup> Voir l'exemple supra, note 83.

<sup>94</sup> Les acquisitions « insidieuses » et les opérations interdépendantes démontrent également la nécessité d'élargir le champ de compétence des régimes de contrôle des fusions par des règles parfois plus souples, applicables dans des circonstances spécifiques ; si aucune de ces opérations n'atteignait à elle seule les seuils de compétence, considérées ensemble, ces opérations relèveraient toutes d'une même compétence. La préoccupation en l'occurrence est qu'une application étroite, au cas par cas, des seuils de compétence

Premièrement, cela peut témoigner d'une faible confiance dans la capacité d'autres instruments d'exécution à couvrir efficacement des opérations quelque peu « à la marge » du régime de contrôle des fusions et à prendre périodiquement des mesures à l'encontre des opérations susceptibles d'avoir des effets anticoncurrentiels. Des problèmes de détection peuvent se poser, de même que la question de savoir si les normes d'exécution et les exigences en matière de preuve relevant de dispositions interdisant les accords anticoncurrentiels et les comportements unilatéraux anticoncurrentiels rendent inefficace un contrôle *ex-post* de ces opérations. Assurément, l'application du dispositif de contrôle des fusions aux opérations « à la marge » présente des avantages pour les autorités de la concurrence dans la mesure où les parties doivent porter les accords qu'ils concluent à leur connaissance et où le mécanisme de contrôle *ex-ante* renforce l'action de l'autorité de contrôle. En outre, à l'évidence, les autres instruments d'exécution ne sont tout simplement d'aucune aide pour certaines opérations, par exemple pour les prises de participation minoritaire non consensuelles.

Comme on l'a vu au début de la présente note, le débat international sur les procédures de contrôle des fusions est fortement orienté vers une « objectivation » des seuils de compétence. Entre les deux composantes essentielles des seuils de compétence que sont les seuils de notification et la définition de la notion d'opération de fusion, ce débat a porté bien plus sur la première de ces deux composantes que sur la deuxième. S'agissant des seuils de notification, l'utilisation des parts de marchés comme seuils de notification n'est pas déraisonnable sur le principe, si elle vise à exclure les opérations peu susceptibles de nuire à la concurrence. Pour autant, une telle utilisation a néanmoins été découragée car ce critère n'est pas infaillible, est source d'incertitude et peut impliquer d'évaluer les circonstances propres à chaque cas d'espèce pour déterminer la compétence<sup>95</sup>.

S'agissant de la définition de la notion d'« opération de fusion », le même type d'évaluation spécifique d'un large éventail de critères, qui confère à l'autorité de la concurrence un certain pouvoir d'appréciation, semble beaucoup moins contestable. La tension entre l'utilisation de critères objectifs et transparents et le ciblage des opérations potentiellement préjudiciables par l'application de critères plus ouverts est souvent résolue par le recours à des critères plus souples conjugués à des enquêtes factuelles. De fait, il semble que des critères d'influence « substantielle/significative » plus souples, ou des enquêtes

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permettrait aux parties de créer des montages afin d'échapper au contrôle des fusions pour ce qui constitue en réalité, sur le plan commercial, une seule et même opération (susceptibles de s'accompagner d'effets anticoncurrentiels).

Plusieurs pays ont élaboré des règles d'agrégation afin que leurs seuils de compétence reflètent la réalité du contexte concurrentiel. En vertu des règles de notification prévues par le HSR Act, par exemple, toutes les acquisitions distinctes d'actions, d'actifs ou de participations dans des entités non constituées en société au cours d'une période de six mois sont regroupées pour déterminer si les seuils de notification sont atteints. 16 CFR §801.13. Le règlement UE sur les concentrations prévoit une règle d'agrégation pour les opérations réalisées au cours d'une période de deux années entre les mêmes parties. Règlement de l'UE sur les concentrations, article 5(2)(2). En outre, les opérations étroitement liées peuvent dans certaines circonstances être traitées comme une seule opération. Règlement UE sur les concentrations, considérant 20. Cela peut signifier, par exemple, que tous les prises de participation successives dans une société-cible sont traités comme une seule et même opération contrôlable une fois que la dernière opération déterminante a eu lieu, et non pas uniquement la dernière opération conférant le « contrôle » requis de la cible ; bien entendu, si cette dernière opération n'est pas mise en œuvre, toutes les opérations précédentes restent en dehors du champ d'application du règlement UE sur les concentrations. Cette règle d'agrégation s'applique également à une série d'opérations distinctes mais liées économiquement, dans le cadre de laquelle aucune opération ne pourrait avoir lieu sans une autre. Dans cette dernière situation en particulier, la règle de compétence dépend de l'évaluation au cas par cas de toutes les circonstances permettant d'apprécier le but économique poursuivi par les parties, une étape parfois nécessaire pour garantir l'efficacité du système.

<sup>95</sup>

ICN Notification Threshold Report, supra note 3, point 4.

visant à vérifier si l'actif acquis est susceptible d'avoir une incidence sur la position concurrentielle de l'acheteur, peuvent permettre à une autorité de la concurrence de se servir d'une évaluation très en amont des effets concurrentiels probables d'une opération pour déterminer si cette dernière constitue une opération de fusion (ou devrait être considérée comme telle). Une certaine marge d'appréciation lors de la prise de décision est peut-être nécessaire pour assurer l'efficacité d'un régime de contrôle des fusions et pour cibler les opérations dont on peut raisonnablement estimer qu'elles sont susceptibles de poser des problèmes.

En tout état de cause, une telle approche n'a pas fait l'objet d'une « fronde » organisée, même si son fonctionnement implique certains coûts sur le plan de la sécurité juridique et de la prévisibilité. De fait, les pays ont réussi à atténuer les craintes suscitées par les coûts inutiles qui résultent de définitions larges et peu claires de ce qu'est une opération de fusion en recourant à des seuils de notification plus élevés et/ou à des procédures moins coûteuses pour ne pas risquer d'avoir à contrôler de nombreuses opérations ne posant de toute évidence aucun problème, limitant ainsi le nombre d'affaires situées « à la marge » pour lesquelles il importe vraiment d'adopter des définitions moins précises. En outre, de nombreuses autorités de la concurrence semblent être parvenues à mettre à profit des lignes directrices, des recommandations informelles et une pratique décisionnelle cohérente pour rendre ce processus raisonnablement prévisible. Toutefois, en l'absence de tels mécanismes de « maîtrise des coûts », il est à craindre, de manière plus légitime, que l'extension du champ d'application d'un régime de contrôle des fusions aux opérations plus « à la marge » puisse aboutir à une trop grande incertitude et entraîner des coûts supérieurs aux avantages qu'une telle évolution serait susceptible d'apporter.

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## COMPTE RENDU DE LA DISCUSSION

*Par le Secrétariat*

M. Frédéric Jenny, le Président du Groupe de travail n° 3, ouvre la table ronde sur la définition des opérations de fusion aux fins de leur contrôle et souhaite la bienvenue à l'ensemble des participants. Il explique que la table ronde sera axée sur la définition des opérations de fusions dans quatre scénarios : (i) la prise de participations, en particulier de participations minoritaires ; (ii) le cumul de mandats d'administrateur ; (iii) l'acquisition d'actifs et (iv) la création de coentreprises. Le Président souligne que les thèmes retenus pour cette table ronde sont les domaines caractérisés par de véritables problèmes et des approches divergentes, mis en évidence dans la note de référence du Secrétariat. Comme l'explique celle-ci, pour la majorité des fusions « classiques », un large consensus prévaut quant à la notion d'« opération de fusion ».

### **1. L'acquisition de participations minoritaires**

Le Président se tourne d'abord vers l'Allemagne. Il explique que ce pays applique un critère d'influence notable du point de vue de la concurrence, qui permet d'inclure dans le champ d'application du régime de contrôle des fusions des cas de participations minoritaires, ce qui place l'Allemagne dans une situation un peu à part au regard de nombreuses autres juridictions. Il demande à l'Allemagne de répondre en particulier à deux questions soulevées par sa contribution. Premièrement, pour les opérations notifiées en tant que fusions sur la base du critère de l'influence notable du point de vue de la concurrence, le pourcentage de décisions d'interdiction est nettement plus élevé que pour les autres types d'opérations de fusion. Cela signifie-t-il que les juridictions qui n'appliquent pas ce critère devraient craindre qu'un nombre important d'opérations anticoncurrentielles n'y fasse l'objet d'aucune procédure de contrôle des fusions ? Deuxièmement, le caractère relativement subjectif de cette règle est-il problématique en pratique, parce qu'il n'offre pas de sécurité juridique ?

Le délégué de l'Allemagne souligne tout d'abord que la capacité des autorités allemandes d'examiner certaines prises de participations minoritaires non contrôlantes en vertu de la législation sur le contrôle des fusions n'est certainement plus une exception sur la scène internationale. De nombreux économistes admettent que des participations minoritaires non contrôlantes peuvent porter atteinte à la concurrence ; une étude très intéressante sur les participations minoritaires a été commandée par le Bureau de la concurrence (OFT, *Office of Fair Trading*) du Royaume-Uni ; elles sont examinées dans les lignes directrices sur les fusions horizontales des États-Unis ; la Commission européenne devrait ouvrir des consultations sur la possibilité d'élargir le régime européen de contrôle des opérations de concentration à l'acquisition de participations minoritaires ; et le Royaume-Uni applique déjà un critère d'influence substantielle qui est très similaire à celui employé en Allemagne.

Le délégué revient ensuite sur l'observation du Président selon laquelle les opérations considérées comme des fusions sur la base du critère de l'influence notable du point de vue de la concurrence semblent représenter une part disproportionnée des opérations problématiques. Au cours des 20 dernières années, l'Office fédéral des ententes (*Bundeskartellamt*) a examiné environ 30 000 fusions notifiées. Sur ce total, approximativement 220 ont été notifiées en vertu du critère de l'influence notable du point de vue de la concurrence, ce qui représente moins de 1 % de l'ensemble des dossiers. Parmi ces 220 opérations, une douzaine ont été interdites et quelques autres ont fait l'objet d'une décision d'autorisation assortie de mesures correctives. Il s'agit là d'un nombre très limité en termes absolus, mais il est vrai que la proportion d'interdictions dans ce type d'affaires est dix fois plus élevée que pour l'ensemble des autres dossiers. Qu'est-ce qui pourrait expliquer ce résultat ? Dès le départ, le critère de l'influence notable du point de vue de la concurrence – ou de l'influence substantielle, pour utiliser le terme britannique – a été conçu pour cibler les affaires ayant un effet sur la concurrence. Ce type d'opérations est particulièrement important sur les marchés où une entreprise occupe déjà une position dominante, de sorte que les parties peuvent s'attendre à faire l'objet d'un examen approfondi de la part du *Bundeskartellamt*. Et ce d'autant plus que des décisions cruciales ont été rendues concernant ces mêmes marchés, en particulier si ces décisions ont été confirmés par la Cour fédérale de justice (*Bundesgerichtshof*), comme pour les marchés des journaux et de l'électricité. Si les parties concluent qu'une opération de concentration soulèvera très probablement des problèmes de concurrence, elles peuvent tenter de restructurer l'opération afin qu'elle ne soit plus soumise à notification. Supposer que ces affaires sont spécifiques à certains secteurs ou aux marchés allemands serait une erreur. Elles sont en réalité caractéristiques des situations dans lesquelles le marché en cause est clairement défini et le nombre d'acteurs concernés limité ; elles peuvent également être plus fréquentes pour les marchés caractérisés par un taux antérieur d'intervention élevé. Il va de soi que certains secteurs peuvent correspondre davantage que d'autres à ces critères, mais les deux affaires les plus récentes dans lesquelles le *Bundeskartellamt* s'est opposé à l'acquisition de participations minoritaires non contrôlantes concernaient le secteur des soins de santé et les banques. Une affaire portait sur l'acquisition d'une participation de 10.1 % par une chaîne d'hôpitaux privés dans une autre chaîne d'hôpitaux. Cette fusion aurait eu pour conséquence un renforcement de position dominante sur un marché local uniquement, de sorte qu'au bout du compte, l'opération a été autorisée à la condition que la chaîne d'hôpitaux acquéreuse vende ses propres hôpitaux sur ce marché local. L'autre affaire concernait une opération impliquant deux banques.

S'agissant de l'application pratique du critère de l'influence notable du point de vue de la concurrence, le délégué explique que le *Bundeskartellamt* reçoit environ 20 à 30 notifications par an portant sur ce type d'opération. C'est peu, sachant que plus d'un millier de fusions lui sont notifiées chaque année. Les parties s'efforcent fréquemment de convaincre le *Bundeskartellamt* que leur opération n'est pas soumise à notification, et sont souvent prêtes à contester en justice sa décision finale. Le *Bundeskartellamt* est toujours ouvert au débat. Il est naturellement toujours difficile de manier un seuil aussi subjectif. Parfois, les parties continuent de modifier leur projet afin de rester juste en deçà de ce seuil. Cela peut néanmoins valoir également pour l'application du critère de la « prise de contrôle ». En définitive, certaines des affaires complexes ont permis d'obtenir des éclaircissements de la part de la Cour, qui ont permis de préciser les choses de manière suffisamment claire à cet égard.

Le Président se tourne ensuite vers la Pologne. Il est indiqué dans sa communication que les acquisitions de participations minoritaires pouvaient initialement être examinées en vertu de la législation sur le contrôle des fusions, mais que depuis une modification apportée en 2007, elles ne sont plus considérées comme des « opérations de fusion ». La contribution de la Pologne laisse à penser que cette modification ne suscite aucun regret, dans la mesure où rien n'indiquait que ces opérations soulevaient des problèmes de concurrence. Compte tenu de l'intervention de l'Allemagne, il serait intéressant que soit évoquée l'expérience de la Pologne. En quoi la situation de ce pays différerait-elle de celle de l'Allemagne ?

Le délégué de la Pologne confirme que l'expérience de son pays était différente de celle de l'Allemagne. Les prises de participations minoritaires ainsi que le cumul de mandats d'administrateur entraient effectivement dans le champ d'application de la législation sur le contrôle des fusions entre 1990 et 2007. Ces affaires représentaient environ 10 % à 15 % de l'ensemble des notifications chaque année. Un réexamen de ces affaires a révélé qu'aucune n'avait soulevé de sérieux problème de concurrence. Par conséquent, il a été décidé en 2007 de supprimer l'obligation de notifier ces transactions, car on a considéré qu'elle constituait une charge inutile pour les entreprises. Le délégué de la Pologne explique que les dispositions applicables couvraient les prises de participations débouchant sur l'acquisition d'au moins 25 % des droits de vote dans la cible sans pour autant se traduire par une prise de contrôle. Il s'agissait donc d'une approche plus formaliste que la méthode relativement souple appliquée en Allemagne. Lorsque l'obligation de notifier ce type d'opération a été supprimée, la source de la plupart des procédures d'infraction ouvertes pour défaut de notification d'une fusion a également été éliminée. Cela a aussi montré que ces opérations n'étaient pas considérées comme problématiques par les parties prenantes. En principe, ces opérations pourraient maintenant être examinées en vertu du droit des pratiques anticoncurrentielles, mais aucune ne l'a été jusqu'à présent.

Le Président souligne que la Slovaquie a une expérience légèrement différente de celle des deux premières juridictions. Elle envisage actuellement d'inclure l'acquisition de participations minoritaires non contrôlantes dans le périmètre de la définition des opérations de fusion, mais une certaine incertitude prévaut quant aux coûts et avantages d'une telle initiative. Il demande à la Slovaquie d'indiquer quel type d'informations elle souhaiterait avoir avant de prendre position.

Le délégué de la République slovaque répond que dans certains cas, il est possible que des participations minoritaires aient eu des effets négatifs sur la concurrence. L'acquisition de participations minoritaires non contrôlantes peut se traduire par un problème de concurrence, parce que les actionnaires peuvent être en mesure d'influer sur le comportement de l'entreprise acquise, même s'ils ne peuvent exercer un contrôle de fait au sens plus classique. Au cours de l'examen d'une fusion, l'autorité de la concurrence a établi que l'acquéreur détenait déjà une participation minoritaire dans l'entreprise cible, qu'il avait acquise par le biais de plusieurs opérations n'entrant pas dans le champ d'application du régime de contrôle des fusions. L'autorité de la concurrence présumait que l'actionnaire en question avait influé sur le comportement de la cible compte tenu de cette participation minoritaire et, par conséquent, que les opérations antérieures avaient déjà eu un impact sur la concurrence. Dans ce cas précis, l'autorité de la concurrence a établi que la fusion aurait des effets préjudiciables et l'a interdite. Des affaires comme celle-là laissent à penser qu'il serait opportun d'intégrer les participations minoritaires non contrôlantes dans le périmètre de la définition des fusions. Cela dit, inclure l'acquisition de participations minoritaires dans le champ d'application du régime de contrôle des fusions soulèverait également des problèmes, dans la mesure où cela serait une source de coûts pour les entreprises et entraînerait une augmentation du nombre de fusions notifiées ne soulevant aucun problème de concurrence. Il faudrait que les seuils et autres critères appliqués dans tous les États membres de l'Union européenne (UE) soient cohérents, afin de réduire au minimum les charges et l'incertitude pesant sur les entreprises, et d'éviter que certaines opérations soient soumises au contrôle des fusions dans une juridiction alors qu'elles ne sont pas considérées comme des opérations de fusion dans une autre.

Le Président cite la Corée en exemple, en indiquant que ce pays avait envisagé d'adopter des dispositions qui lui auraient permis d'appliquer sa législation sur le contrôle des fusions aux prises de participations minoritaires, mais y a finalement renoncé. Il demande à la Corée d'exposer les raisons de cette décision.



Le délégué de la Corée explique que l'inclusion dans le périmètre de la définition des opérations de fusion de l'acquisition de certaines participations non contrôlantes était motivée par des impératifs pratiques. Le seuil de compétence a été fixé à 20 % dans la loi parce qu'il existe toujours un certain flou dès lors qu'il faut déterminer si une entreprise est en mesure d'exercer un contrôle sur une autre entreprise dans laquelle elle détient une participation minoritaire ; la notion de « contrôle » ne peut être uniquement définie par des chiffres. Même si la participation détenue par une entreprise est modeste, elle peut disposer d'autres moyens d'exercer une influence sur sa cible, qui pourraient être assimilables à un contrôle de fait. Cela dit, quelle que soit son ampleur, une participation détenue par une entreprise dans une autre, même si la cible est un concurrent, peut ne pas soulever de problème de concurrence. Les décisions de la Commission coréenne de la concurrence (KFTC, *Korea Fair Trade Commission*) en témoignent. Dans certains cas de participations minoritaires, la KFTC est parvenue à la conclusion qu'un contrôle était exercé, tandis que dans d'autres dossiers concernant des participations de même ampleur, elle a conclu à l'absence de contrôle. C'est pour cette raison que le seuil concernant les participations minoritaires prévu par la législation coréenne sur le contrôle des fusions a été fixé à un niveau relativement bas.

Le Président demande ensuite à l'Italie de faire part de son expérience concrète dans l'affaire Unicredit. Le cadre juridique actuel est-il suffisant pour contrôler les prises de participations minoritaires, ou bien l'Italie envisage-t-elle de modifier sa législation afin de mieux prendre en compte les opérations débouchant sur la création de participations minoritaires ?

Le délégué de l'Italie explique tout d'abord que l'acquisition de participations minoritaires ne constitue pas en soi une opération de fusion. Toute la question est de savoir si une participation minoritaire confère un contrôle de fait. Les critères à appliquer ont été mis au point au fil des ans et sont conformes à la pratique de la Commission européenne. Les participations minoritaires jouent un rôle particulier dans les secteurs de la banque et de l'assurance, qui se caractérisent par une multitude de situations de participations croisées et de cumul de mandats d'administrateur. L'autorité italienne de la concurrence a analysé différentes fusions dans ce secteur et dans plusieurs cas, elle est parvenue à la conclusion que des participations minoritaires conféraient un contrôle de fait. Le dossier le plus emblématique à cet égard est l'affaire *Sai/Fondiaria*, qui portait sur une participation minoritaire de 14 % seulement, mais dans laquelle l'historique des décisions prises par Mediobanca a été utilisé pour établir l'existence d'un contrôle de fait. Dans cette affaire relative au secteur des assurances, les entreprises Sai et Fondiaria avaient notifié leur projet de fusion. L'autorité de la concurrence a établi que Mediobanca, la principale banque d'investissement d'Italie, contrôlerait non seulement l'entité Sai/Fondiaria compte tenu de ses dettes et des liens existant en matière de gouvernement d'entreprise, mais qu'elle contrôlerait également – et cela constituait la composante nouvelle et la plus intéressante de ce dossier – Generali, la principale société d'assurance d'Italie. L'autorité a conclu qu'un contrôle était exercé compte tenu de l'influence qui avait été exercée par Mediobanca sur des décisions adoptées par l'assemblée générale des actionnaires de Generali : les propositions soumises par Mediobanca concernant la gestion de Generali étaient toujours approuvées, indépendamment des droits de vote détenus par Mediobanca ; en outre, cette dernière avait réussi à faire nommer ses candidats au conseil d'administration de Generali à plusieurs reprises. Pour revenir à la question du Président, on pourrait dire que les décisions rendues par l'autorité de la concurrence dans les secteurs de l'assurance et de la banque, qui ont été confirmées par les tribunaux, ont d'une certaine manière comblé les lacunes pouvant exister dans le système d'application des lois. Aucune modification de la législation n'est envisagée pour le moment, mais comme d'autres pays, l'Italie attend avec intérêt les débats sur cette question qui auront lieu au niveau européen.

Le Président fait observer que la position exposée par l'Italie n'est pas très différente de celle de la République slovaque : aucune mesure immédiate n'est prévue, mais si une avancée dans cette direction intervient au niveau européen, elle pourrait être encline à suivre le mouvement. Avant de demander à l'Union européenne de donner son point de vue sur cette question, le Président se tourne vers la Roumanie, dont la contribution contenait une présentation détaillée des différentes possibilités envisageables pour

mieux prendre en compte l'acquisition de prises de participations minoritaires non contrôlantes, ainsi que des avantages et inconvénients connexes.

Le délégué de la Roumanie souligne qu'à ce jour, le Conseil de la concurrence roumain n'a eu en fait qu'une expérience très limitée de l'application des règles de concurrence aux prises de participations minoritaires. Dans un premier temps, il serait nécessaire d'évaluer l'efficacité avec laquelle pourraient être analysés les effets anticoncurrentiels potentiels de participations minoritaires en vertu du droit des pratiques anticoncurrentielles. Une telle procédure serait difficile à gérer, étant donné que l'autorité de la concurrence devrait prouver l'existence d'une relation de causalité entre la participation minoritaire et la pratique considérée, ainsi que ses effets préjudiciables. Une intervention *ex ante* fondée sur le droit relatif au contrôle des fusions pourrait prendre au moins deux formes : la première correspondrait au modèle britannique, qui exigerait de passer du critère de l'influence déterminante à celui de l'influence substantielle. Le système de notification appliqué au Royaume-Uni revêt cependant un caractère facultatif, ce qui n'est pas le cas dans les régimes de contrôle des fusions en place au niveau de l'UE et en Roumanie. La seconde option consisterait à fixer un seuil défini en pourcentage au-delà duquel une prise de participation minoritaire serait soumise à une obligation de notification préalable, suivant un mécanisme similaire à ceux qui existent en Allemagne et en Autriche. Cette solution permettrait à l'autorité de la concurrence d'examiner les affaires pouvant avoir un impact sur le marché, tout en garantissant aux entreprises une certaine sécurité juridique et en évitant une augmentation de la charge administrative du Conseil de la concurrence roumain. Celui-ci envisage par ailleurs de limiter les prises de participations minoritaires lorsqu'elles concernent des entreprises rivales. Cela pourrait notamment se traduire par une interdiction de l'acquisition de participations minoritaires dans des entreprises rivales ou du cumul de mandats d'administrateur dans des entreprises concurrentes. Ainsi, la capacité des actionnaires d'accéder à des informations concernant le comportement concurrentiel d'une entreprise rivale serait limitée. Le délégué confirme que la Roumanie suit également avec grand intérêt l'évolution des débats au niveau de l'UE.

Le Président fait remarquer que plusieurs juridictions ont déjà fait part de leur intérêt pour les débats en cours au niveau européen, et demande à l'Union européenne d'exposer sa position et ses projets.

Le délégué de l'Union européenne fait observer que ce débat intervient à un moment où on ne peut plus opportun, puisque la Commission européenne va lancer cette semaine une consultation publique sur différentes améliorations pouvant être apportées au contrôle des concentrations pour le rendre plus efficace. Un des principaux points de cette consultation est de savoir si le champ d'application des règles actuelles de contrôle des concentrations devrait être élargi aux prises de participations minoritaires non contrôlantes. La Commission estime que la situation actuelle n'est pas satisfaisante. Comme l'ont déjà expliqué certains délégués, d'un point de vue européen, le contrôle des concentrations s'applique aux prises de contrôle. Parfois, l'acquisition de participations minoritaires peut déboucher sur une prise de contrôle et tombe donc sous le coup du règlement de l'UE sur les concentrations, mais dans d'autres cas, elle ne se traduit pas par une prise de contrôle et n'entre donc pas dans le champ d'application du règlement actuel sur les concentrations.

La Commission européenne dispose d'une certaine expérience des problèmes découlant de participations minoritaires liés à des affaires dans lesquelles une des parties à une opération de concentration notifiée détient déjà une participation minoritaire dans une tierce partie. Si une entreprise fusionne avec un concurrent de l'entreprise dans laquelle elle possède une participation minoritaire, la Commission européenne doit évaluer les effets concurrentiels de cette participation minoritaire. La Commission européenne a identifié des situations dans lesquelles ces participations minoritaires préexistantes soulèvent des problèmes de concurrence, liés soit à des effets unilatéraux, soit à des effets coordonnés. Dans certains cas, la Commission a même identifié des risques de restriction verticale et de verrouillage du marché. Dans toutes ces affaires, la Commission a pu imposer des mesures correctives,

prenant généralement la forme d'une cession des participations minoritaires. Elle ne peut cependant examiner l'acquisition initiale de participations minoritaires.

Dans certaines circonstances, les dispositions de l'article 101 relatives aux accords anticoncurrentiels pourraient être utilisées pour traiter les cas de participations minoritaires, mais il existe des situations dans lesquelles l'article 101 ne serait pas applicable, telles que l'acquisition de participations minoritaires sur le marché boursier. L'article 102 sur l'abus de position dominante pourrait être appliqué aux prises de participations minoritaires lorsque l'entreprise acquéreuse occupe déjà une position dominante. Par conséquent, il existe une multiplicité de règles qui permettent à la Commission d'examiner les problèmes relatifs aux participations minoritaires dans certaines circonstances, mais pas de manière systématique. Nous sommes donc en présence d'une lacune qu'il est nécessaire de combler.

Les consultations publiques porteront essentiellement sur la façon de remédier à cette lacune. Elles offriront la possibilité de présenter différents points de vue et modalités suivant lesquelles pourraient être élaborées des règles permettant à la Commission de traiter les questions de participations minoritaires. Une solution consisterait à établir les mêmes règles de procédure que celles qui s'appliquent aux opérations de concentration « normales » et à instaurer une obligation de notification, accompagnée de toute la panoplie des règles relatives à la notification des opérations de concentration. Cette proposition avait déjà été examinée par la Commission en 2001, et rejetée. Cette solution se traduit par l'apport d'un volume considérable d'informations à l'autorité de la concurrence, et par une grande sécurité juridique. Néanmoins, elle impose également des charges importantes aux entreprises et aux autorités publiques, étant donné que les prises de participations minoritaires sont très fréquentes et que seul un nombre relativement limité d'entre elles a des effets anticoncurrentiels.

C'est pourquoi sont également présentées dans le cadre de la consultation d'autres solutions, qui seraient plus sélectives et permettraient à la Commission d'intervenir uniquement si elle identifie une atteinte potentielle à la concurrence. Un tel système pourrait être fondé sur un mécanisme d'auto-évaluation pure des entreprises tel que celui qui existe déjà en vertu des articles 101 et 102. Ou bien on pourrait envisager un système intermédiaire, dans lequel les entreprises seraient tenues d'informer la Commission des opérations mais sans devoir fournir toutes les informations requises dans le cadre de la procédure actuelle de notification. La Commission pourrait décider sur la base de ces informations, ou peut-être de plaintes ou d'autres informations relatives au marché, si elle souhaite intervenir. C'est un sujet complexe. Il faudrait également décider si d'autres paramètres doivent être appliqués, tels qu'un seuil défini en pourcentage au-delà duquel les opérations doivent être notifiées. La consultation publique durera trois mois et la Commission espère parvenir à une conclusion à l'automne sur la nécessité éventuelle d'aller de l'avant.

Le Président se tourne vers les États-Unis, dont le système est totalement différent. D'après leur contribution, les États-Unis utilisent une définition très large des opérations de fusion, mais appliquent un ensemble relativement restreint et précis de seuils pour déterminer dans quel cas une notification s'impose. Dans les faits, les entreprises savent-elles toujours aussi clairement si elles doivent notifier une opération, et les critères appliqués sont-ils totalement prévisibles ? Comment pourraient être traités les dossiers dans lesquels une participation minoritaire risque d'inciter l'entreprise acquéreuse à adopter un comportement concurrentiel moins agressif vis-à-vis de l'entreprise dont elle détient une faible part du capital, parce qu'il ne serait pas dans son intérêt de renforcer la concurrence dans ce contexte ?

Le délégué des États-Unis commence son intervention par quelques généralités pour replacer le système américain dans son contexte. La loi Clayton, qui interdit les fusions anticoncurrentielles, existe depuis 1914, mais le système de notification préalable des fusions n'a été mis en place qu'en 1976, en vertu de la loi Hart-Scott-Rodino. Comme l'a indiqué le Président, le champ d'application de ces dispositions législatives est très vaste, puisqu'il englobe notamment toutes les fusions indépendamment de leur forme et de leur ampleur. Néanmoins, la mise en œuvre de la législation et les règles d'application relatives aux

obligations de notification reflètent l'expérience acquise au fil du temps, notamment le fait qu'une très large majorité des fusions, y compris des fusions notifiées, ne posent pas de problème de concurrence. Ainsi, au cours du dernier exercice budgétaire, les autorités de la concurrence ont opté pour une clôture anticipée – c'est-à-dire autorisé l'opération considérée avant l'expiration du délai d'attente de 30 jours prévu – pour environ 60 % des opérations notifiées, et la seconde phase de la procédure d'examen n'a été lancée que pour 3 % des opérations notifiées approximativement.

Une autre caractéristique importante de cette loi est que les autorités de la concurrence peuvent s'opposer à des opérations anticoncurrentielles qu'elles soient ou non soumises à obligation de notification, et même après que les opérations notifiées aient eu lieu. Par conséquent, bien que la définition des opérations de fusion et le système de notification préalable des fusions contribuent clairement à la mise en application de la loi Clayton, il n'est pas nécessaire que les règles de notification préalable des fusions couvrent toutes les opérations potentiellement préjudiciables à la concurrence.

Dans son document, le Secrétariat souligne à juste titre la nécessité de trouver un équilibre entre des règles précises fondées sur une définition objective et la capacité précieuse de prendre en compte divers facteurs qualitatifs pouvant influencer sur l'éventuel impact concurrentiel d'une opération. Les autorités de la concurrence se sont efforcées de définir des règles aussi claires et objectives que possible en matière de notification préalable des fusions. Pour ce faire, elles sont revenues à maintes reprises sur les dispositions applicables afin de les ajuster au fil des ans. Toutefois, il subsiste naturellement toujours des zones de flou, de sorte qu'on ne peut pas toujours déterminer de manière parfaitement claire si une opération correspond à la définition des fusions et doit être notifiée ou non. En fait, les autorités de la concurrence reçoivent de nombreuses questions de parties concernant l'interprétation des règles, par exemple s'agissant de la dérogation relative aux participations détenues aux seules fins de placement, qui constitue une exemption importante des règles de notification préalable des fusions. De nombreuses questions portent sur la question de savoir comment déterminer si des actionnaires exercent une influence active selon ces règles. Les autorités de la concurrence ont une politique de communication très ouverte concernant ce type de demande de renseignements, et une grande partie des conseils formulés sont mis en ligne sur leur site Internet, afin que tout un chacun puisse en bénéficier.

S'agissant de la question du Président sur les effets anticoncurrentiels potentiels des participations minoritaires passives, il importe de noter que les autorités de la concurrence peuvent revenir sur une opération qui leur avait échappé précédemment, et s'y opposer si elles la jugent préjudiciable à la concurrence. Le délégué n'a pas souvenir d'un tel cas de figure, mais il souligne que c'est le type de choses pour lesquelles les autorités de la concurrence restent vigilantes.

Le Président se tourne ensuite vers le Comité consultatif économique et industriel auprès de l'OCDE (BIAC), en mettant en avant son plaidoyer en faveur d'une convergence dans ce domaine, sous réserve toutefois qu'elle ne se traduise pas par une extension du champ d'application des procédures de contrôle des fusions. Comment faut-il comprendre la position du BIAC compte tenu des préoccupations exprimées par certains pays, selon lesquels certaines fusions problématiques échappent au contrôle des fusions si son champ d'application ne couvre pas les prises de participations minoritaires ? L'adoption de dispositions couvrant les prises de participations minoritaires élargirait le champ d'application du contrôle des fusions, mais si ces opérations soulèvent effectivement des problèmes de concurrence, ce ne serait peut-être pas une si mauvaise chose. Le BIAC pourrait-il exposer son point de vue sur les possibilités de convergence, et indiquer quels principes seraient importants à cet égard ?

Le représentant du BIAC répond qu'il peut exister des situations dans lesquelles la diversité présente des avantages. Néanmoins, la diversité n'est pas une bonne chose en matière de réglementation des opérations internationales, car elle alourdit les coûts de transaction, en particulier en cas d'opération impliquant plusieurs juridictions. Cela accentue l'insécurité juridique et rend les décisions stratégiques plus

difficiles, ce qui pourrait à terme avoir un effet dissuasif sur l'activité économique. Le BIAC plaide donc de nouveau en faveur d'une convergence, comme elle l'a fait dans d'autres domaines. En fait, les questions relatives à la définition des opérations de fusion aux fins de leur contrôle illustrent on ne peut mieux la nécessité d'œuvrer en faveur d'une convergence des règles, y compris en matière de prises de participations minoritaires, d'acquisition d'actifs et de coentreprises.

Il est évident que l'acquisition de participations minoritaires dans une entreprise peut avoir dans certaines circonstances des effets préjudiciables sur la concurrence, et qu'elle doit faire l'objet d'un contrôle. Ces effets peuvent résulter du cumul de mandats d'administrateur, du droit de nommer des membres du conseil d'administration des entreprises cibles, ou de droits de veto. Des effets préjudiciables peuvent même exister en l'absence de tels droits, mais il est plus difficile d'identifier les situations dans lesquelles la simple présence d'un actionnaire important influera sur le comportement de la direction de l'entreprise cible.

La contribution du BIAC contenait un bref passage en revue de la palette extrêmement riche d'approches adoptées dans le cadre des législations concernant la définition des prises de participations minoritaires. Elles consistent en général soit à appliquer mécaniquement un seuil défini en pourcentage du capital ou des droits de vote acquis dans l'entreprise cible, qui peut aller de zéro dans certaines juridictions – ce qui signifie que toute prise de participation minoritaire peut faire l'objet d'un contrôle – à 35 % dans d'autres, soit à tenter de cerner les circonstances dans lesquelles l'acquéreur exerce une influence déterminante. À cet égard, on observe également une grande diversité de formulations utilisées pour décrire les situations dans lesquelles existe l'influence requise. En cas d'opération relevant de plusieurs juridictions, un travail d'analyse très complexe est nécessaire pour déterminer quelles sont les obligations de notification applicables en matière de fusion.

Le BIAC reconnaît qu'il s'agit d'une question délicate et recommande que des efforts soient accomplis en vue d'une convergence, l'objectif étant d'appliquer une procédure qui permette de contrôler les opérations qui ont effectivement un impact sur la concurrence, ou qui sont susceptibles d'en avoir un, associée à un seuil *de minimis*. Des lignes directrices communes ou convergentes devraient fournir une interprétation des définitions figurant dans les textes juridiques.

Le Président donne la parole aux participants pour que les autres délégations puissent formuler des observations et débattre de cette question.

Le délégué de la Suède intervient et fait observer qu'après avoir pris connaissance des contributions, il estime que personne n'a vraiment expliqué pourquoi il était nécessaire de prendre en compte les participations minoritaires. Il explique qu'il a toujours été sceptique quant aux arguments avancés pour justifier la nécessité d'élargir le champ d'application du contrôle des fusions aux prises de participations minoritaires. L'idée qui sous-tend le contrôle des fusions est simplement qu'une entreprise peut en contrôler une autre et qu'elle peut orienter le comportement de cette entreprise cible sur le marché, et s'il s'agit d'un concurrent, elle peut assurément faire en sorte que la cible adopte un comportement concurrentiel moins agressif. S'agissant des prises de participations minoritaires, l'argument mis en avant est que l'entreprise acquéreuse livrera une concurrence moins agressive à l'entreprise cible puisqu'elle détient une part de son capital. Ainsi, si une entreprise détient 25 % du capital de la cible, elle obtient 25 % de ses bénéfices. Toutefois, si la même entreprise emporte l'intégralité du contrat considéré, elle engrangera 100 % des bénéfices. On peut donc être dubitatif quant à l'idée qu'une entreprise renoncerait à 75 % des bénéfices qu'elle pourrait obtenir en laissant l'entreprise cible emporter un contrat.

Un autre argument fréquemment avancé est que les prises de participations minoritaires ou le cumul de mandats d'administrateur constituent un moyen d'atténuer la concurrence, dans la mesure où ils facilitent les comportements collusoires. Or, le délégué ne connaît aucun bon exemple montrant l'existence

effective de comportements collusoires. Les autorités de la concurrence mettent sans cesse au jour des ententes, et les entreprises impliquées sont tout à fait capables d'agir en collusion sans qu'il existe entre elles de liens prenant la forme d'une participation capitalistique ou d'une présence au conseil d'administration. La création de tels liens semble constituer un moyen très compliqué de mettre en place une entente. Il demande s'il existe d'autres éléments empiriques laissant à penser que les autorités de la concurrence qui n'examinent pas pour le moment les prises de participations minoritaires devraient s'en préoccuper.

Le Président remercie la Suède d'avoir posé cette question stimulante : y a-t-il la moindre raison de vouloir contrôler les prises de participations minoritaires, compte tenu des autres formes de collusion existantes ? Il invite l'Allemagne à y apporter une première réponse.

Le délégué de l'Allemagne répond qu'en général, les économistes semblent convenir du fait que des participations minoritaires non contrôlantes peuvent atténuer la concurrence entre entreprises rivales. Les affaires d'influence notable du point de vue de la concurrence qui sont examinées de manière approfondie par le *Bundeskartellamt* concernent souvent des concurrents proches présents sur un marché clairement définis. L'acquisition par le journal de Cologne d'une participation minoritaire dans celui de Bonn constitue à cet égard un excellent exemple. Trente kilomètres seulement séparent ces deux villes, de sorte que l'on observe des chevauchements d'activités. Du point de vue du *Bundeskartellamt*, cette prise de participation minoritaire, conjuguée à d'autres liens structurels et contractuels, aurait entraîné une diminution de la concurrence entre les parties. En tout état de cause, les conditions devant être réunies au regard de la loi pour qu'une influence notable du point de vue de la concurrence soit exercée ne se limitent pas aux liens entre les entreprises, et recouvrent également des facteurs importants pour la concurrence tels que les droits contractuels, les droits de vote spéciaux ou de veto, les droits spécifiques en matière d'information, les options ou droits de préemption, la dépendance économique ou les intérêts parallèles. Suivant l'approche adoptée par la plus haute juridiction allemande à l'égard des opérations ayant une influence notable du point de vue de la concurrence, il est important de considérer que la cible respectera les intérêts de la partie acquéreuse dans le cadre de ses futures décisions en matière d'activité économique. Une entreprise peut être en mesure d'obtenir les mêmes résultats par d'autres moyens. Néanmoins, au vu de l'expérience acquise par le *Bundeskartellamt*, l'acquisition d'une participation minoritaire semble constituer le moyen le plus attrayant d'obtenir ces résultats, car elle met en place un cadre juridique entre les deux parties.

Un autre délégué ajoute que même si l'on ne dispose pas toujours d'éléments empiriques conséquents concernant l'ampleur des atteintes à la concurrence, les dossiers traités par le *Bundeskartellamt* offrent des exemples éloquentes d'impact négatif. Il y a quelques années de cela, l'Allemagne comptait quatre grands fournisseurs d'énergie très puissants : REW, E.On, Vattenfall et EnBW. À l'époque, ces quatre entreprises détenaient des participations minoritaires dans les fournisseurs des communes, leurs clients. En l'espace de 10 ans environ, le nombre de ces participations minoritaires est passé de 10-15 à l'échelle nationale à plus de 100-120. Pour le *Bundeskartellamt*, cela indiquait très clairement que les quatre grandes entreprises susmentionnées achetaient des participations dans les fournisseurs des communes pour sécuriser leur chaîne d'approvisionnement. Le *Bundeskartellamt* a commencé à interdire ces fusions au motif qu'elles verrouillaient le marché, dans la mesure où rien d'autre ne pouvait expliquer cette stratégie. On ne disposait d'aucun élément empirique découlant d'une évaluation des effets de ces acquisitions, mais on pouvait observer au fil du temps la mise en œuvre d'une stratégie claire.

Le délégué du Royaume-Uni souligne que des problèmes de concurrence peuvent se poser de manières très diverses, et non uniquement sous la forme de comportements collusoires. Les participations minoritaires peuvent équivaloir à une atténuation de la concurrence ; quant à savoir si cela constitue ou non une diminution substantielle de la concurrence, c'est une autre question. Des événements récents ont montré que ces effets pouvaient se produire dans des situations d'hostilité, dans le cadre de relations avec des concurrents. Une affaire examinée par les deux autorités de la concurrence au Royaume-Uni, puis par

deux tribunaux britanniques également, concernait ITV et BSkyB, sachant que la seconde entreprise détenait 17.5 % du capital de la première. Une telle participation peut paraître assez modeste, mais lorsqu'on examinait le déroulement concret des assemblées générales d'actionnaires, le pouvoir effectif conféré par cette participation devenait manifeste. Le problème spécifique dans cette affaire concernait la capacité de l'entreprise cible à lever efficacement des fonds, dans la mesure où il a été estimé que BSkyB était en mesure d'exercer une influence non négligeable sur l'adoption de résolutions spéciales.

Le délégué de l'Autriche prend la parole pour faire part de l'expérience de l'autorité autrichienne de la concurrence concernant la mise en œuvre des dispositions applicables aux participations minoritaires. En Autriche, les prises de participations minoritaires non contrôlantes portant sur au moins 25 % du capital doivent être notifiées, mais il n'existe pas de dispositions similaires à celles en vigueur en Allemagne faisant référence à l'acquisition d'une influence notable du point de vue de la concurrence. Les dispositions relatives aux participations minoritaires sont importantes. Ainsi, en 2011, les fusions concernant des participations minoritaires ont représenté 12 % de l'ensemble des opérations notifiées, mais 33 % de la totalité des fusions pour lesquelles a été enclenchée la seconde phase de la procédure de contrôle. Cela laisse à penser que les fusions passant par l'acquisition d'une participation minoritaire sont plus problématiques que les autres. Les affaires ayant fait l'objet d'un examen de phase 2 concernent le secteur des médias, qui est déjà très concentré en Autriche. Il s'agit donc d'un marché sur lequel les participations minoritaires non contrôlantes peuvent poser problème. Au cours de la récente révision de la loi sur les ententes, la question de savoir s'il fallait renforcer la législation en adoptant des dispositions similaires à celles existant en Allemagne a été vivement débattue, mais il a été finalement décidé de ne pas le faire.

Le délégué des États-Unis répond également à la question posée par le délégué de la Suède. Les éléments empiriques disponibles sont des plus limités dans ce domaine. Néanmoins, des observations ponctuelles laissent à penser que dans les faits, les participations minoritaires peuvent poser problème. Celui-ci tient, comme l'a indiqué le Royaume-Uni, à une atténuation des incitations concurrentielles ou à l'émergence d'une certaine communauté d'intérêts. Le ministère de la Justice s'est opposé cette année à l'acquisition de Modelo par Anheuser-Busch InBev (A-B InBev). Le recours formé montre comment Anheuser-Busch, qui détenait à l'époque une participation très importante, non contrôlante mais substantielle, dans Modelo, malgré toutes sortes de garde-fous destinés à l'empêcher d'exercer son influence, s'employait en fait avec énergie à faire en sorte que Modelo s'aligne aux États-Unis sur les prix pratiqués par les entreprises leaders du marché. Certains éléments indiquent donc bien qu'il existe un risque accru en l'occurrence, et que ce risque est suffisamment sérieux pour qu'il soit tout à fait légitime que les responsables de l'application des lois cherchent à examiner ce risque et à déterminer si des mesures s'imposent.

Le délégué de l'Italie se rallie à l'intervention des États-Unis. Il souligne qu'à la suite du Livre vert de la Commission européenne, les autorités italiennes avaient proposé en 2002 de mettre en place un contrôle des prises de participations minoritaires. Cette proposition reposait sur deux idées. La première est que si deux concurrents égaux détiennent des participations croisées égales dans leur capital, cela peut naturellement entraîner une réduction de la concurrence en raison d'effets coordonnés. La seconde avait été mise en avant dans un document de David Gildo, qui préside aujourd'hui l'autorité israélienne de la concurrence. Selon lui, lorsqu'un « franc-tireur » détient une participation importante dans un acteur dominant, il est moins incité à adopter un comportement concurrentiel agressif.

Le délégué de l'Union européenne ajoute que dans sa communication initiale, il a brièvement évoqué les éventuels effets anticoncurrentiels des participations minoritaires. Le document de consultation de la Commission sera accompagné de deux annexes, l'une présentant un examen approfondi des publications économiques sur les éventuels effets négatifs des participations minoritaires, et l'autre contenant une longue liste d'exemples concrets d'affaires dans lesquelles la Commission européenne et d'autres autorités ont mis en évidence des atteintes effectives à la concurrence. L'année dernière, lors de l'examen de la

fusion *Glencore/Xstrata*, par exemple, la Commission a identifié un problème sur le marché du zinc en Europe, compte tenu de l'existence d'une participation minoritaire conjuguée à un accord de fourniture à long terme. Pour remédier à cette situation, elle a demandé la cession de cette participation minoritaire.

Par ailleurs, dans le prolongement de l'intervention de l'Allemagne, la Commission européenne s'est penchée sur les marchés de l'énergie dans ce pays parallèlement à l'examen par l'autorité allemande de la concurrence de l'affaire RWE. La Commission européenne a examiné la fusion *Veba/VIAG* et demandé la cession d'un certain nombre de participations minoritaires qui auraient pu déboucher sur des comportements coordonnés sur certains marchés de l'énergie en Allemagne. Dans l'affaire *Exxon/Mobil*, la Commission a imposé un certain nombre de mesures correctives afin que soient cédées des participations minoritaires se traduisant par un risque de comportement coordonné sur les marchés régionaux du gaz en Allemagne. L'expérience montre donc que des participations minoritaires créent des problèmes concrets dans certains cas.

Le Président fait observer que la question de la délégation suédoise a reçu des réponses multiples. Le fort scepticisme exprimé par la délégation suédoise n'est pas vraiment partagé par les pays qui ont pris la parole.

## **2. Le cumul de mandats d'administrateur**

Le Président propose de passer à la deuxième partie de la table ronde, consacrée au cumul de mandats d'administrateur. Il explique qu'il s'agit d'un autre domaine dans lequel les points de vue sont divers. Dans certaines juridictions, le cumul de mandats d'administrateur n'entre pas dans le champ d'application du contrôle des fusions, tandis que c'est le cas dans d'autres pour autant que ce cumul débouche sur le contrôle d'une entreprise par l'autre ou sur une relation de contrôle réciproque entre les deux entreprises, et enfin, dans quelques juridictions, cette pratique est explicitement mentionnée dans la législation sur le contrôle des fusions. Il indique qu'il serait judicieux de commencer par le Japon, dont le droit relatif au contrôle des fusions contient sans doute les dispositions les plus précises concernant le cumul de mandats d'administrateur.

Le délégué du Japon prend la parole pour exposer les modalités d'application du contrôle des fusions au cumul de mandats d'administrateur dans son pays. Selon l'article 13 de la loi antimonopoles, le cumul de mandats d'administrateur est interdit lorsqu'il peut restreindre sensiblement la concurrence dans un domaine d'activité donné. En outre, la Commission de la concurrence japonaise (JFTC, *Japan Fair Trade Commission*) peut enjoindre à une personne visée par ces dispositions de démissionner de son poste d'administrateur de l'entreprise considérée. Il convient également de noter qu'il n'existe pas d'obligation explicite de notification concernant le cumul de mandats d'administrateur.

Les lignes directrices relatives aux fusions de la JFTC indiquent de manière plus précise dans quelles circonstances le cumul de mandats d'administrateur doit faire l'objet d'une procédure de contrôle. Le premier cas de figure correspond à la situation dans laquelle les administrateurs ou les salariés d'une entreprise comprennent une majorité de l'ensemble des administrateurs d'une autre entreprise ; le second correspond à la situation dans laquelle les personnes cumulant des mandats d'administrateur dans deux entreprises détiennent des droits de représentation de ces deux entreprises. Dans les autres cas de figure, la nécessité d'un examen dépend de la situation. Généralement, quatre éléments sont pris en considération : le fait que les personnes qui cumulent des mandats d'administrateur soient des administrateurs à temps plein ou des administrateurs délégués ; le ratio entre les administrateurs ou les salariés d'une des entreprises ayant des administrateurs communs et le nombre total d'administrateurs d'une des autres entreprises concernées ; la détention réciproque de droits de vote par les entreprises ayant des administrateurs communs ; et les relations commerciales ou alliances entre ces entreprises. Lorsque les entreprises ayant des administrateurs communs appartiennent au même groupe, il n'est en général pas nécessaire d'ouvrir une



procédure de contrôle. En pratique, aucune notification préalable n'est requise en cas de cumul de mandats d'administrateurs. La JFTC peut recueillir des informations sur les phénomènes de cumul de mandats d'administrateur *via* la notification d'autres formes de fusions, dans le cadre de laquelle les parties sont tenues de fournir des renseignements sur ce point.

Le Président se tourne ensuite vers le Taipei chinois, qui s'intéresse aussi manifestement aux situations de cumul de mandats d'administrateur dans le cadre du contrôle des fusions. Il apparaît que ce type de pratiques existe uniquement dans son champ d'application s'il débouche sur le contrôle d'une autre entreprise. La contribution fait référence à une affaire qui est remontée jusqu'à la Cour suprême. Il serait intéressant d'en savoir plus sur la législation, ainsi que sur le type d'affaires qui est examiné.

Le délégué du Taipei chinois explique que le cumul de mandats d'administrateur entre entreprises concurrentes est considéré comme une opération de fusion au Taipei chinois. Selon l'article 6, alinéa (1)(5), de la loi sur la concurrence (*Fair Trade Act*), lorsqu'une entreprise contrôle directement ou indirectement les activités commerciales ou la nomination ou le renvoi de membres du personnel d'une autre entreprise, on considère qu'il existe une présomption suffisante dès lors que plus de la moitié des membres du conseil d'administration de la cible seront nommés par l'acquéreur. Les affaires de cumul de mandats d'administrateur ne sont pas rares. Concrètement, la Commission de la concurrence (FTC, *Fair Trade Commission*) a acquis une certaine expérience en termes d'application des lois dans ce type d'affaires. Elle est parvenue à la conclusion que le cumul de mandats d'administrateur pouvait réduire sensiblement la concurrence, en particulier en cas de fusion horizontale.

### **3. L'acquisition d'actifs**

Le Président note que les participants à la table ronde ont pris connaissance de deux exemples de juridictions dotées de dispositions spécifiques sur le cumul de mandats d'administrateur. Reste que de manière générale, cette question semble jugée moins prioritaire dans de nombreuses juridictions. Il propose ensuite d'aborder la question suivante, à savoir l'application du droit du contrôle des fusions à l'acquisition d'actifs : quand une acquisition d'actifs est-elle suffisamment importante pour entrer dans le périmètre de la définition des opérations de fusion ? L'acquisition d'un contrôle par le biais d'un contrat ou l'acquisition d'un élément de propriété intellectuelle est-elle suffisante pour constituer une fusion ? Le Président fait observer que les contributions montrent que les autorités de la concurrence ont beaucoup de difficultés à définir les circonstances exactes dans lesquelles l'acquisition d'un actif est assimilable à une fusion. Il demande à la République tchèque d'ouvrir le débat et d'évoquer une affaire dans laquelle il s'agissait de déterminer si le transfert d'un nom de domaine correspondait ou non à la définition des opérations de fusion.

Le délégué de la République tchèque souligne tout d'abord que le dossier évoqué dans la communication de son pays était hypothétique. L'autorité de la concurrence a été contactée par deux entreprises de commerce électronique qui envisageaient de transformer le nom de domaine de l'une d'elles, et qui lui ont demandé, dans l'hypothèse où une telle opération aurait lieu, si elle pourrait constituer une fusion. L'autorité de la concurrence a répondu que tel pourrait être le cas dans certaines circonstances. Les parties ont renoncé à concrétiser cette transaction, de sorte que l'autorité n'a pas eu l'occasion de se prononcer concrètement sur ce problème. Du point de vue de l'autorité de la concurrence, le transfert d'un brevet ou d'une marque pourrait être considéré comme une fusion si ce contrat s'accompagne du transfert d'un nombre suffisant de clients. Cela peut se produire lorsqu'un nom de domaine est transféré, car c'est généralement celui-ci qui est identifié par les clients, et non l'entreprise qui fournit effectivement les services considérés. Le nom de domaine est un actif qui attire les clients. L'autorité de la concurrence est en train de réviser les lignes directrices relatives à la notion d'opération de fusion, et envisage d'y inclure des dispositions indiquant que dans certaines circonstances, le transfert d'une marque ou d'un brevet, voire d'un nom de domaine, peut constituer une fusion.

Le Président aborde ensuite la contribution du Royaume-Uni pour rester sur le thème de la propriété intellectuelle. Elle fait référence à deux affaires ayant trait au transfert de droits de propriété intellectuelle. Bien que dans les deux cas, il ait été conclu finalement que ces transferts ne constituaient pas des fusions, il serait intéressant d'en savoir davantage sur ces dossiers, et de manière plus générale sur les critères à appliquer pour déterminer si des transferts de propriété intellectuelle peuvent être considérés comme une opération de fusion.

Le délégué du Royaume-Uni revient tout d'abord sur le débat précédent concernant les participations minoritaires passives et souligne qu'à la différence des participations détenues à des fins stratégiques, comme dans l'affaire *BSkyB/ITV*, les participations passives détenues uniquement aux fins de placement ne sont pas considérées comme des opérations de fusion en vertu de la législation britannique sur le contrôle des fusions.

Concernant la question du Président, le délégué explique que le critère appliqué au Royaume-Uni est de savoir si deux entreprises ou plus cessent ou cesseront d'être distinctes. Le terme « entreprise » est défini dans la législation comme les activités d'une société ou une partie de ces activités. Il n'est pas nécessaire qu'existe une entité juridique distincte dont sont acquises des parts du capital ; les « activités » considérées peuvent être simplement des actifs, ou il peut exister une coentreprise ou un partenariat sous une forme ou une autre. Ce qu'indique clairement la législation, c'est qu'il doit s'agir d'activités axées sur l'obtention d'un avantage ou d'un gain. Il est également clair que les actifs considérés peuvent être des actifs incorporels tels que des droits de propriété intellectuelle. La principale question relative aux droits de propriété intellectuelle est de savoir s'il est possible d'identifier un chiffre d'affaires qui soit spécifiquement lié à l'actif incorporel qui sera transféré à l'acheteur. À titre d'exemple hypothétique, on peut songer à certaines opérations dans le domaine des biens de consommation. S'il y a simplement un transfert de marque sans cession d'installations de production ni de contrats conclus avec des consommateurs, mais si un chiffre d'affaires clairement identifié était imputable ou pourrait être imputé à cette marque, on pourrait considérer que l'opération en question est susceptible d'être examinée en vertu des règles sur les fusions en vigueur au Royaume-Uni.

La contribution mentionnait deux affaires dans lesquelles cette question s'était posée. L'une est désignée sous le nom de Project Canvas, qui était un partenariat noué sous forme de coentreprise entre la principale entreprise nationale de diffusion audiovisuelle, la BBC, les principaux diffuseurs audiovisuels commerciaux, c'est-à-dire les grandes chaînes indépendantes Channel 1,2,3,4 et 5 mais sans BSkyB, deux sociétés de télécommunications, British Telecom et Talk Talk, ainsi qu'une société de transmission, Arqiva. Ce Project Canvas était un partenariat destiné à offrir des chaînes numériques terrestres et des services de télévision *via* Internet par le biais d'un boîtier adaptateur spécifique connecté au poste de télévision des usagers. Il allait de pair avec une interface utilisateur associée à une marque unique, désignée sous le nom de Your View. La plupart des parties ont apporté une contribution de nature financière à cette coentreprise, mais l'apport de la BBC a pris la forme de logiciels, de dessins et modèles, de spécifications ainsi que de savoir-faire qui étaient en cours d'élaboration. La question était de savoir si le transfert de cette technologie au partenariat pouvait signifier qu'une partie des activités d'une entreprise était transférée de la BBC à ce partenariat. L'OFT est parvenu à la conclusion que cette technologie était en elle-même substantiellement incomplète, et qu'absolument rien n'indiquait à ce stade que le moindre chiffre d'affaires pût lui être imputé, puisqu'elle n'avait pas été commercialisée. Par conséquent, il a été jugé en l'occurrence qu'il ne s'agissait pas d'une fusion.

Dans la deuxième affaire, l'OFT s'est vu notifier une situation dans laquelle une entreprise, GuestLogix, avait intégré son logiciel de vente au détail et ses droits de propriété intellectuelle dans le système de divertissement à bord de Panasonic Avionics. La question était de savoir si un flux de recettes pouvait être attribué à l'intégration de ce logiciel de vente au détail, donc de savoir s'il représentait au fond un transfert de droits de propriété intellectuelle à Panasonic. L'OFT est parvenu à la conclusion que ce

n'était pas le cas, parce que ces droits de propriété intellectuelle n'étaient pas transférés de manière définitive et, sur le fond, cet accord semblait être une simple concession de licence non exclusive concernant le logiciel et les droits de propriété intellectuelle considérés à Panasonic. Il n'était pas équivalent à une cession définitive de ces éléments de propriété intellectuelle.

Le Président fait observer que la focalisation du Royaume-Uni sur l'éventuel transfert de recettes entre parties semble très proche de la démarche adoptée dans une affaire de transfert de marque présentée dans la contribution de la Turquie. Il apparaît que le droit de ce pays fait également obligation à l'autorité turque de la concurrence d'établir que le transfert d'actif s'accompagne d'un transfert de recettes. Il demande à la Turquie comment il a été possible dans cette affaire de déterminer que le transfert d'une marque allait de pair avec un transfert de recettes, et s'il est toujours considéré qu'un transfert de marque a nécessairement pour corollaire un transfert de recettes.

Le délégué de la Turquie commence par indiquer que dans ce cas précis, la cible n'était pas active sur le marché, étant donné qu'elle avait fait faillite et que sa production avait été arrêtée. Il a donc été impossible d'identifier un chiffre d'affaires spécifique au cours de la procédure de contrôle. Cette opération concernait le marché de la volaille en Turquie, et la cible avait été un des principaux acteurs du marché, avant de faire faillite. Le Conseil de la concurrence est parvenu à la conclusion que la marque constituait le fondement d'activités marchandes de l'entreprise, dans la mesure où elle jouait un rôle essentiel dans ses activités commerciales. L'acquisition de cette marque constituait par conséquent une opération de fusion.

Le Président se tourne de nouveau vers le Royaume-Uni et lui demande comment il évaluerait une situation dans laquelle est transférée la marque d'une entreprise en faillite, ce qui implique que la marque en question est inactive ou, à tout le moins, qu'elle ne génère aucun chiffre d'affaires. Les autorités britanniques examineraient-elles le chiffre d'affaires potentiel si elles étaient dans l'impossibilité de trouver le moindre chiffre d'affaires concret et récent qui soit associé à la marque considérée ?

Le délégué du Royaume-Uni répond qu'une telle situation ne s'est jamais présentée concrètement. Selon toute vraisemblance, si l'entreprise elle-même était en faillite mais si la marque avait de la valeur, on examinerait les dernières recettes imputables à cette marque lorsqu'elle était utilisée sur le marché. On peut toujours conjecturer sur le chiffre d'affaires qui pourrait être réalisé par différentes personnes si elles détenaient cette marque. Il faudrait déterminer si la marque était effectivement active sur le marché considéré. Le délégué se remémore une affaire dans laquelle, en substance, une marque n'ayant pas été utilisée depuis quelques années était transférée dans le cadre d'un ensemble d'actifs ; mais cette opération avait été considérée comme une fusion pour d'autres raisons. Dans la plupart des cas concernant des entreprises en faillite, il y a un stade auquel il convient de déterminer la valeur des actifs transférés et le chiffre d'affaires qui leur est attribuable. Le secteur de la distribution offre un récent exemple concernant un détaillant de vêtements qui avait cessé ces activités. Le délégué se souvient que dans ce dossier, les actifs comprenaient la marque. Il avait alors semblé logique d'examiner le chiffre d'affaires qui avait été réalisé grâce à cette marque au cours des 12 mois précédents.

Le Président se tourne ensuite vers l'Australie pour évoquer une affaire de transferts d'actifs. Il fait observer qu'en Australie, la question de savoir si le transfert d'un site vierge à un grand détaillant est assimilable à une opération de fusion est quelque peu controversée. Apparemment, la Commission australienne de la concurrence et de la consommation (ACCC, *Australian Competition & Consumer Commission*) est encline à considérer qu'il s'agit effectivement d'une fusion, mais les parties s'opposent vigoureusement à cette interprétation.

Le délégué de l'Australie évoque d'abord certaines caractéristiques du secteur de la grande distribution et du régime australien de contrôle des fusions. La grande distribution est très concentrée en Australie, puisqu'elle regroupe deux grandes chaînes de supermarchés et un secteur indépendant, qui est

approvisionné par un seul grossiste. Il faut y ajouter Aldi, qui est arrivé il y a de cela 15 ans environ et s'est récemment développé assez rapidement. La législation australienne sur les fusions est d'une portée assez vaste, puisqu'elle couvre toutes les acquisitions d'actifs et de participations qui se traduisent par une diminution substantielle de la concurrence. Un site vierge, c'est-à-dire un site sur lequel est construit un supermarché, constitue un tel actif et entre dans le champ d'application de la loi. Le gouvernement a indiqué que si cette interprétation de la loi était contestée en justice et qu'il était fait droit à ce recours, il modifierait la législation pour que les dispositions en vigueur indiquent clairement que les sites vierges sont couverts. Cette interprétation n'a pas été remise en question jusqu'ici, mais les choses sont peut-être sur le point de changer.

L'ACCC a examiné un nombre conséquent de ces acquisitions de sites vierges dans le secteur de la grande distribution, en s'intéressant à leur impact potentiel sur les marchés locaux de la grande distribution. Il n'existe aucune obligation de notification préalable en Australie, mais le pays est doté d'un système de notification facultative qui a évolué au fil des ans, de sorte que le mécanisme informel mis en place à l'origine a cédé la place à un dispositif en fait assez formel. Nombre de ces acquisitions de sites vierges sont peu susceptibles d'entraîner une diminution substantielle de la concurrence, dans la mesure où elles ne se traduisent en fait pas par le retrait d'un concurrent du marché. Par conséquent, la plupart des opérations ayant retenu l'attention de l'ACCC n'ont pas fait l'objet d'une analyse de marché, et les dossiers ont été rapidement clos.

L'ACCC a examiné une ou deux opérations de manière approfondie, craignant que l'acquisition d'un site vierge ne puisse se traduire par une perte de concurrence. Dans un cas, le projet d'acquisition a été abandonné après que l'ACCC eut publié un exposé des questions en litige. Une autre affaire en est cours d'examen. En fait, l'ACCC a décidé voilà quelques semaines de s'opposer à l'acquisition d'un site vierge par une des grandes chaînes de supermarchés dans la banlieue ouest de Sidney. Le site en question présente des caractéristiques laissant à penser que cette acquisition entraînerait une diminution substantielle de la concurrence, en empêchant l'entrée d'un supermarché rival. Ce site se trouve à la périphérie de Sidney, dans une zone où les deux concurrents les plus proches sont détenus par la chaîne de supermarché acquéreuse. Aldi prévoit d'entrer sur le marché local en 2014. Le deuxième concurrent le plus proche est éloigné de 9 kilomètres, et séparé de l'endroit considéré par une autoroute. Toute autre nouvelle entrée était extrêmement improbable. L'ACCC est parvenue à la conclusion qu'en l'absence de cette acquisition, il était probable qu'un autre supermarché s'installe sur ce site, et que cela renforcerait la concurrence et élargirait l'éventail de choix offert aux consommateurs sur le marché local. L'ACCC a annoncé sa décision de s'opposer à l'opération et attend maintenant la suite des événements. Dans le cadre du système juridique australien, les parties sont en effet libres de procéder malgré tout à l'opération envisagée, auquel cas l'ACCC devrait aller en justice et demander une injonction.

Le Président demande à la Hongrie de poursuivre les précédents échanges sur les modalités selon lesquelles des recettes peuvent être attribuées à des actifs transférés. Il explique que le dossier évoqué par la Hongrie rappelle l'affaire de marque de la Turquie, même s'il concernait une galerie marchande qui était fermée au moment de son transfert. Comment la Hongrie est-elle parvenue à la conclusion qu'il s'agissait d'une opération de fusion ? A-t-il été nécessaire de démontrer qu'il était possible d'attribuer des recettes aux actifs considérés ? Ou bien la Hongrie a-t-elle suivi l'approche de l'Australie, en s'attachant à déterminer si la concurrence serait plus forte en cas d'achat de cette galerie marchande par un autre acteur ?

Le délégué de la Hongrie explique qu'aux termes de la Loi sur la concurrence en vigueur dans son pays, constituent des opérations de fusions les acquisitions d'actifs qui sont probablement suffisamment importantes pour entraîner des modifications structurelles du marché considéré. Les actifs et droits de l'entreprise achetés conjugués aux actifs et droits dont dispose l'entreprise acquéreuse doivent être suffisants pour permettre la poursuite d'activités marchandes. Le Conseil de la concurrence détermine au

cas par cas si le transfert d'actifs correspond à cette définition figurant dans la Loi sur la concurrence, en tenant compte de l'ensemble des circonstances pertinentes.

Dans l'affaire de fusion concernant le secteur du commerce de détail, le Conseil de la concurrence a jugé que la location de magasins fermés constituait une opération de fusion compte tenu du fonds commercial associé au site considéré. L'affaire portait sur la fusion de deux chaînes nationales de magasins de bricolage, Obi and Bricostore. Le seconde entreprise a fermé ses magasins à la fin de 2012 mais conservé ses biens immobiliers. À la mi-janvier, Obi et Bricostore ont signé un contrat de location pour une période de 12 ans, durant laquelle Obi pouvait utiliser ces biens immobiliers pour un usage commercial. Le Conseil de la concurrence a estimé que compte tenu de sa durée et de ses autres conditions, ce contrat de location transférait le contrôle des biens immobiliers concernés à Obi ; il a également pris en compte les effets de cette opération. Premièrement, le locataire et le bailleur exerçaient leurs activités dans le même domaine, de sorte que leurs magasins étaient en concurrence ; le Conseil de la concurrence a souligné que les magasins de bricolage concernés se trouvaient dans des endroits spécifiques comportant des éléments de fonds commercial, étant donné que les consommateurs tablaient sur la présence de ces activités commerciales et sur la possibilité d'acheter des produits de bricolage à ces endroits. Deuxièmement, le Conseil de la concurrence a évalué la durée de l'interruption des activités commerciales considérées. Les magasins avaient été fermés à la fin de décembre et le contrat de location avait été signé à la mi-janvier ; l'acquéreur avait accès à toutes les ressources nécessaires en termes de personnel, de savoir-faire, de droits, d'actifs et de partenaires commerciaux pour pouvoir relancer l'activité juste après le changement de marque. Le Conseil de la concurrence en a conclu qu'il était peu probable qu'une période de fermeture d'un mois modifie les attentes des consommateurs et que le fonds commercial associé à ses sites existait donc toujours.

Le Président souligne que la contribution de l'Estonie fait référence à une affaire qui rappelle celle évoquée par la Hongrie, même s'il s'agit d'un dossier différent dont l'issue a été différente. Il explique que l'affaire estonienne portait sur le transfert de poubelles présentant des éléments de fonds commercial, mais l'autorité de la concurrence n'a finalement pas estimé qu'il s'agissait d'une opération de fusion. Il demande à l'Estonie pourquoi.

Le délégué de l'Estonie confirme que l'affaire concernait l'acquisition d'actifs dans le secteur de la gestion des déchets. Dans ce domaine, la plupart des districts estoniens ont un système de gestion des déchets structuré de telle sorte qu'il est confié à une seule entreprise, sélectionnée sur appel d'offres. Les poubelles appartiennent généralement, mais pas nécessairement, à l'entreprise qui se charge du transport des déchets, et elles peuvent être louées aux utilisateurs. Par conséquent, la location de ces poubelles peut constituer en règle générale un marché de produits distinct. Dans l'affaire en question, l'entreprise A rachetait des poubelles se trouvant dans un district donné à l'entreprise B. Cette dernière quittait le marché, dans la mesure où elle n'avait pas remporté l'appel d'offres organisé pour attribuer la gestion des déchets dans ce district sur la période suivante. Par ailleurs, l'entreprise A, l'acquéreur, n'allait pas se charger du transport des déchets dans ce district. Les contrats de location conclus entre B et les utilisateurs finaux n'étaient pas transférés. L'entreprise B a résilié ces contrats, mais adressé de nouveaux projets de contrat à conclure avec l'entreprise A à ses clients, qui conservaient tout de même la possibilité de ne pas les signer. Il était donc très pratique pour les utilisateurs d'entrer dans une relation contractuelle avec l'entreprise A. Un des aspects qui a attiré l'attention de l'autorité de la concurrence résidait dans la valeur de la transaction, dans la mesure où le prix payé pour ces vieilles poubelles était nettement supérieur à celui de poubelles neuves. Il y avait donc matière à penser que cette acquisition d'actifs pouvait constituer un transfert d'activité dissimulé. Néanmoins, au bout du compte, l'autorité de la concurrence a laissé cette question en suspens, car elle ne disposait pas d'éléments suffisants pour prouver qu'il s'agissait effectivement d'une opération de concentration. Il aurait été compliqué de démontrer en justice que l'on était en présence d'une fusion, étant donné que la situation n'était pas claire et que les contrats avec les consommateurs n'étaient pas transférés.

Le Président invite la Colombie à évoquer l'affaire la concernant dans laquelle il était question de transferts d'actifs.

Le délégué de la Colombie explique tout d'abord que son pays applique le critère de la prise de contrôle pour déterminer si certaines opérations constituent des fusions. L'acquisition d'actifs est considérée comme une fusion lorsqu'elle donne à l'entreprise acquéreuse la possibilité d'exploiter une gamme d'activités qui, en l'absence de cette opération, ne serait pas sous son contrôle. L'affaire *Haceb* portait sur l'acquisition d'un actif incorporel, une marque, et un contrat de location. Haceb, qui est un fabricant de réfrigérateur renommé, a acheté Icasa, une autre marque bien connue de réfrigérateurs, tout en concluant un contrat de location de machines. Les parties n'ont pas notifié cette opération, mais la Direction générale de l'industrie et du commerce (SIC, *Superintendencia de Industria y Comercio*) a estimé qu'il s'agissait effectivement d'une fusion, dans la mesure où le principal actif concerné par cette transaction était une marque renommée. La notoriété de l'actif considéré revêtait une grande importance, et il a été déterminé que l'acquisition d'actifs incorporels entre entreprises concurrentes pouvait se traduire par une fusion dès lors qu'elle permettait à l'acquéreur de réaliser une gamme d'activités et d'obtenir le fonds commercial qu'avait un concurrent, et d'accroître du même coup sa part de marché.

Le délégué d'Afrique du Sud évoque à son tour une affaire ayant valeur d'exemple. Comme en Australie, de nombreuses transactions immobilières ont eu lieu au cours de l'année dernière ; plus de 25 % de toutes les opérations notifiées concernaient des biens immobiliers. Il s'agissait dans de nombreux cas d'acquisitions de sites vierges faisant intervenir non seulement des acteurs du commerce de détail, mais aussi des intervenants spécialisés dans le négoce immobilier ou dans d'autres types d'activités impliquant l'acquisition de terrains. Certains acheteurs peuvent modifier l'utilisation des terrains concernés, en fonction de leur type d'activité, comme les entreprises hôtelières. Un problème épineux soulevé par ce type d'opération tient au fait que les parties se manifestent pour notifier l'acquisition de site vierge envisagée, mais sans révéler ce qu'elles comptent faire des terrains. Dans la mesure où l'Afrique du Sud applique un système de notification obligatoire, les opérations de fusion doivent être examinées telles qu'elles sont notifiées. Ainsi, un acteur du secteur de l'hôtellerie a acheté un terrain destiné à un usage agricole ; l'acheteur n'exerçait pas ses activités dans le secteur agricole et n'avait pas l'intention d'y entrer, donc il n'y avait pas de chevauchement. Cela dit, les parties ont expliqué qu'elles ne savaient pas ce qu'elles allaient faire du terrain. Le Tribunal de la concurrence a accepté les arguments des parties.

Le Président pose ensuite une question à l'Australie et demande ce qui se serait passé si l'acheteur du terrain avait déclaré qu'il ne savait pas s'il allait l'exploiter dans son domaine d'activités ou le transformer pour l'affecter à un usage totalement différent ? L'ACCC aurait-elle dû examiner toutes les possibilités d'utilisation envisageables, et établir ensuite qu'il existait au moins une affectation éventuelle ayant des effets anticoncurrentiels pour pouvoir s'opposer à l'opération considérée ?

Le délégué de l'Australie répond qu'il aurait été nécessaire d'établir par une analyse contrefactuelle qu'il existait un véritable risque de diminution substantielle de la concurrence, suivant l'interprétation de cette notion par les tribunaux. Dans une affaire qui a été examinée par la Cour fédérale en formation plénière, les questions suivantes ont suscité un débat assez vif : d'une part, l'analyse contrefactuelle doit-elle être scindée en divers scénarios correspondant à l'absence de fusion ; d'autre part, l'analyse contrefactuelle est-elle distincte de l'analyse fondée sur le critère de la diminution substantielle de la concurrence (SLC, *Substantial Lessening of Competition*), ou bien s'agit-il d'une analyse uniforme ? En tenant compte de tous les éléments, il faudrait examiner la probabilité d'utilisation des terrains considérés dans le cadre de l'analyse contrefactuelle, et déterminer s'il existe un véritable risque de diminution substantielle de la concurrence en comparant les deux scénarios.

Le Président conclut cette partie des débats, en soulignant que ces échanges de vues ont montré l'ampleur de l'éventail des acquisitions d'actifs qui pouvaient être considérées comme des opérations de

fusion. Les critères employés pour déterminer si ces transactions constituent ou non des fusions sont eux-mêmes assez différents d'un pays à l'autre, et peuvent notamment porter sur la possibilité de générer un chiffre d'affaires, la possibilité qu'ils soient utilisés en complément d'autres actifs, ou l'utilisation probable de ces actifs à terme.

#### **4. Les coentreprises**

Il passe ensuite à la quatrième catégorie d'affaires complexes, relative aux coentreprises. Celles-ci soulèvent des questions complexes de définition, lorsqu'il s'agit de déterminer si elles relèvent du droit relatif au contrôle des fusions, ou s'il faut les considérer comme des accords anticoncurrentiels. La première question qui se pose est de savoir s'il existe des dispositions spécifiquement consacrées aux coentreprises dans la législation relative aux fusions. La deuxième est de déterminer dans quelles circonstances les coentreprises sont suffisamment similaires à des fusions pour être considérées comme telles. Enfin, la troisième est de savoir quand une même coentreprise peut faire l'objet de deux procédures de contrôle, parce qu'elle présente à la fois une dimension structurelle et une dimension comportementale. Le Président se tourne vers le Canada, en expliquant que sa description du traitement réservé aux coentreprises offre un tableau assez complexe. Dans sa contribution, le Canada semblait indiquer qu'il existait probablement des coentreprises qu'il n'était pas possible de contrôler, mais que le Bureau de la concurrence souhaiterait pouvoir examiner. Il demande au Canada d'expliquer pourquoi, et quels types de coentreprises échapperaient au contrôle des fusions.

Le délégué du Canada explique qu'en vertu du droit canadien de la concurrence, une coentreprise est considérée comme une fusion, et entre donc dans le champ de compétence du Bureau de la concurrence, si elle se traduit par l'acquisition ou l'établissement d'un contrôle sur la totalité ou une partie d'une entreprise, ou encore d'un intérêt relativement important dans la totalité ou une partie d'une entreprise. Le Tribunal de la concurrence peut rendre des ordonnances correctives concernant les coentreprises qui constituent des fusions, sous réserve d'une dérogation limitée. Cette exemption vaut uniquement pour les associations d'intérêts formées autrement que par l'intermédiaire d'une personne morale, comme des sociétés de personnes ou des fiducies. Une longue liste de critères doit être satisfaite pour que cette exemption s'applique, comme indiqué dans la contribution du Canada.

Lorsqu'une fusion remplit certaines conditions en termes de seuils financiers, elle donne généralement lieu à un avis de fusion préalable ; néanmoins, il existe une exemption de cette obligation d'avis préalable spécifique aux coentreprises. Cette dérogation ne s'applique qu'à la formation d'associations d'intérêts, et l'éventail des critères qui lui sont attachés est plus large que celui des critères d'exemption du contrôle des fusions concernant les coentreprises. Ces critères sont également décrits de manière plus détaillée dans la contribution du Canada.

Les exemptions relatives aux coentreprises sont généralement destinées à s'appliquer aux coentreprises de recherche et de développement, ainsi qu'à celles qui correspondent à des projets spécifiques qui peuvent bénéficier à l'économie canadienne et sont peu susceptibles de soulever des problèmes de concurrence. Il est possible que les parties, par le biais d'un projet d'association d'intérêts, parviennent à structurer leur transaction pour qu'elle satisfasse les critères d'exemption, de manière à se soustraire à l'obligation de soumettre un avis de fusion préalable. Le Bureau de la concurrence a connaissance de dossiers dans lesquels des opérations qui soulevaient des problèmes de concurrence potentiels ont bénéficié de cette exemption. À cela vient s'ajouter le fait que le Bureau dispose d'une période limitée pendant laquelle le Commissaire de la concurrence peut contester une transaction terminée. S'agissant de l'exemption relative aux coentreprises, cette période était autrefois de trois ans à compter de la date de réalisation d'une fusion, mais cette durée a été raccourcie à un an en mars 2009. En d'autres termes, en cas de transaction ne devant pas faire l'objet d'un avis, le Bureau de la concurrence dispose d'un

délai d'une année seulement à compter de la réalisation de cette transaction pour déceler son caractère problématique et mener une enquête.

Une coentreprise était précisément au cœur de l'affaire de 2011 Le Commissaire de la concurrence c. Air Canada, United Continental Holdings Inc., United Airlines Inc., et Continental Airlines Inc. . Dans ce dossier, le Commissaire remettait en question un projet de coentreprise et certains accords d'alliance entre Air Canada, United Airlines et Continental Airlines. Le Commissaire a demandé que soient prises des mesures correctives concernant le projet de coentreprise entre ces compagnies aériennes, qui se serait traduit de fait par une fusion de toutes leurs activités de transport aérien entre le Canada et les États-Unis. En outre, le Commissaire a demandé que soient également prises des mesures correctives en vertu de l'article 90.1 de la Loi sur la concurrence concernant les trois accords d'alliance entre ces compagnies aériennes qui avaient été conclus avant l'accord de coentreprise transfrontalière projeté. Les dispositions de l'article 90.1 de la Loi sur la concurrence permettent l'ouverture d'une procédure civile contre tout accord ou arrangement entre des concurrents effectifs ou potentiels qui aura vraisemblablement pour effet d'empêcher qui est susceptible d'empêcher ou de diminuer sensiblement la concurrence. Au bout du compte, le Commissaire et les défenderesses ont conclu la procédure par un consentement interdisant à Air Canada et United Continental de coordonner leurs activités dans des domaines essentiels du point de vue de la concurrence, interdisant notamment toute tarification commune et toute mise en commun des revenus sur 14 liaisons transfrontalières.

Le Président remercie le Canada d'avoir décrit clairement une situation relativement complexe. Il note que l'état des lieux peut être encore plus complexe dans d'autres pays. Ainsi, le Mexique reconnaît dans sa contribution l'absence totale de règles claires concernant la qualification des coentreprises, ce qui est une source d'incertitude pour les parties. Il demande au Mexique d'expliquer pourquoi il en est ainsi, et ce qui se passe si les parties ne notifient pas une coentreprise parce qu'elles pensent que celle-ci n'entre pas dans le champ d'application du contrôle des fusions.

Le délégué du Mexique confirme qu'il n'existe dans son pays aucunes dispositions spécifiques aux coentreprises en matière de contrôle des fusions. Néanmoins, la définition des opérations de fusion est assez large, de sorte que la plupart des coentreprises doivent être notifiées, sous réserve qu'elles remplissent les critères de seuils monétaires prévus par le droit de la concurrence. Cette situation présente des avantages et des inconvénients. Le problème évident qu'elle pose est que certaines coentreprises doivent être notifiées au Mexique alors qu'elles ne sont pas soumises à notification dans d'autres juridictions. Toutefois, dans la majorité des cas, les coentreprises qui ne représentent pas un risque manifeste pour la concurrence font l'objet d'une procédure simplifiée de notification des fusions qui prend très peu de temps. Aucune modification n'est prévue à cet égard.

Le Président demande ensuite aux États-Unis et à l'Union européenne d'expliquer brièvement si le traitement des coentreprises (qualifiées d'« entreprises communes » dans le droit européen) dans leurs juridictions respectives permet d'éviter certains des problèmes qui ont été cernés ailleurs. Existe-t-il des règles suffisamment claires concernant la définition des coentreprises concentratives, par opposition aux coentreprises coopératives, ou bien les parties sont-elles confrontées dans une certaine mesure à l'incertitude mise en évidence par les communications du Mexique et du Canada ?

Le délégué de l'Union européenne répond que le principal critère, bien connu, appliqué par l'UE pour déterminer si une entreprise commune doit être notifiée en vertu du règlement sur les concentrations consiste à déterminer si cette entreprise commune est ou non « de plein exercice ». Pour ce faire, il faut établir si l'entité considérée serait capable d'opérer sur le marché de manière autonome, et si elle dispose des différents éléments nécessaires pour fournir des biens ou des services sur le marché de manière autonome. Ce critère est certes simple à définir, mais il est difficile à appliquer au cas par cas. Au fil des ans, la Commission a produit une jurisprudence suffisante. Toutes ses décisions sont publiées, et



contiennent généralement des paragraphes expliquant pourquoi la fusion concernée est soumise ou non à notification, à moins qu'une procédure simplifiée ne s'applique. La Commission a également fourni des orientations complémentaires permettant d'identifier les entreprises communes de plein exercice, et de déterminer quelles sont celles qui doivent être examinées au regard de l'article 101. Néanmoins, il ne s'agit assurément pas d'un domaine simple du droit de la concurrence.

M. Reindl pose une question complémentaire à l'Union européenne, concernant les précédents échanges sur les participations minoritaires. Si l'Union européenne envisageait d'élargir le champ d'application du règlement sur les concentrations à certaines participations minoritaires, cela ne risquerait-il pas d'aller à l'encontre des règles en vigueur sur les entreprises communes ? Il peut en effet y avoir des entreprises communes caractérisées par l'acquisition d'une participation minoritaire ne constituant pas une prise de contrôle, de sorte que lesdites entreprises communes ne sont pas considérées comme des fusions. Or, si l'on révisé le règlement sur les concentrations pour élargir son champ d'application aux participations minoritaires non contrôlantes, cela pourrait aller à l'encontre de l'objectif consistant à veiller à ce que l'analyse juridictionnelle des entreprises communes demeure aussi pure que cela a été évoqué plus haut.

Le délégué de l'Union européenne confirme que c'est un des points difficiles du débat. Il est indéniable qu'il n'existe pas de solution évidente en la matière. Différentes possibilités sont envisageables, sachant que l'une d'elles pourrait consister à conserver le critère actuel des entreprises communes de plein exercice, et à considérer les participations minoritaires s'inscrivant dans le cadre d'entreprises communes de plein exercice comme des opérations de concentration, tandis que tous les autres cas de figure resteraient appréciés au regard de l'article 101. Il faudra cependant approfondir la réflexion sur ce point.

Le délégué des États-Unis explique qu'à sa connaissance, aucun problème majeur n'est posé par l'application des règles de notification aux coentreprises. Il existe des règles spécifiques de notification se rapportant à la définition des coentreprises, et pour un grand nombre de transactions, les règles en vigueur permettent clairement de déterminer quelles coentreprises sont considérées comme des fusions en vertu de l'article 7 de la Loi Clayton. Pour ce qui est des autres transactions entrant dans la catégorie générale des coentreprises, il est assez clair qu'en cas d'intégration insuffisante, elles seront analysées au regard de l'article 1 de la loi Sherman en tant que dispositifs de collaboration. Il est inévitable que des zones de floue persistent, et c'est pourquoi les parties sont invitées à consulter les services des autorités de la concurrence chargés des notifications préalables des fusions pour leur demander conseil.

Le Président demande aux participants quel est leur point de vue sur le résultat de la table ronde. Le Comité devrait-il simplement prendre acte de la diversité manifeste des approches utilisées ? Ou bien serait-il nécessaire d'instaurer une plus grande cohérence entre ces approches, comme l'a suggéré le BIAC ? Le Comité devrait-il orienter sa réflexion vers des approches plus systématiques, par exemple s'agissant des acquisitions d'actifs ou des coentreprises ?

Le délégué des États-Unis répond que les différences entre juridictions sont bien réelles, mais qu'elles ne semblent pas avoir d'impact considérable sur les coûts liés aux notifications. S'il fallait hiérarchiser les problèmes en matière de notification des fusions, les différences de définition des opérations de fusion n'arriveraient pas en tête de liste. Au bout du compte, il ne semble pas que ces différences aient un énorme impact à cet égard.

Le Président note qu'aucun autre délégué ne semble en désaccord avec l'opinion exprimée par le représentant des États-Unis, selon lequel il faut sans doute s'accommoder de ces disparités. Peut-être n'y a-t-il pas tant d'affaires dans lesquelles des différences d'interprétation créent de véritables difficultés.

Le délégué de l'Irlande ajoute qu'il pourrait être utile d'établir un parallèle entre le débat sur les coentreprises et celui consacré aux participations minoritaires. S'agissant des coentreprises, il existe des approches différentes, mais en général, on considère qu'elles fonctionnent et que cette diversité ne pose pas d'énorme problème. Dans le cas des participations minoritaires, le sentiment prévaut davantage que des enseignements ont été tirés, et qu'il est peut-être plus à craindre qu'on ne le pensait que certains problèmes ne soient pas traités correctement dans le cadre des systèmes en place. Par conséquent, les participations minoritaires peuvent constituer un domaine dans lequel on envisage d'apporter des modifications, alors qu'on considère que la question des coentreprises ne pose pas vraiment de problème.

Le Président se rallie à l'idée que dans le cas des participations minoritaires, il existe des différences plus fondamentales, ainsi que l'ont montré les échanges de vues entre la Suède et les autres membres du Comité. Il serait donc peut-être nécessaire d'en savoir plus sur les participations minoritaires et sur leur impact en matière de concurrence. Dans les autres domaines, les débats laissent à penser que les différences d'approche constatées ne posent pas de problème majeur. Il convient cependant d'être conscient de ces disparités, et un échange de vues serait souhaitable en particulier entre les pays ayant élaboré un cadre clair relatif aux opérations de fusion et ceux dont les dispositifs sont moins satisfaisants.

Le Président remercie les délégués de leur participation active aux débats et met fin à la table ronde.



**OTHER TITLES****SERIES ROUNDTABLES ON COMPETITION POLICY**

1	Competition Policy and Environment	OCDE/GD(96)22
2	Failing Firm Defence	OCDE/GD(96)23
3	Competition Policy and Film Distribution	OCDE/GD(96)60
4	Efficiency Claims in Mergers and Other Horizontal Agreements	OCDE/GD(96)65
5	The Essential Facilities Concept	OCDE/GD(96)113
6	Competition in Telecommunications	OCDE/GD(96)114
7	The Reform of International Satellite Organisations	OCDE/GD(96)123
8	Abuse of Dominance and Monopolisation	OCDE/GD(96)131
9	Application of Competition Policy to High Tech Markets	OCDE/GD(97)44
10	General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises	OCDE/GD(97)53
11	Competition Issues related to Sports	OCDE/GD(97)128
12	Application of Competition Policy to the Electricity Sector	OCDE/GD(97)132
13	Judicial Enforcement of Competition Law	OCDE/GD(97)200
14	Resale Price Maintenance	OCDE/GD(97)229
15	Railways: Structure, Regulation and Competition Policy	DAFFE/CLP(98)1
16	Competition Policy and International Airport Services	DAFFE/CLP(98)3
17	Enhancing the Role of Competition in the Regulation of Banks	DAFFE/CLP(98)16
18	Competition Policy and Intellectual Property Rights	DAFFE/CLP(98)18
19	Competition and Related Regulation Issues in the Insurance Industry	DAFFE/CLP(98)20
20	Competition Policy and Procurement Markets	DAFFE/CLP(99)3
21	Competition and Regulation in Broadcasting in the Light of Convergence	DAFFE/CLP(99)1
22	Relations between Regulators and Competition Authorities	DAFFE/CLP(99)8
23	Buying Power of Multiproduct Retailers	DAFFE/CLP(99)21
24	Promoting Competition in Postal Services	DAFFE/CLP(99)22
25	Oligopoly	DAFFE/CLP(99)25
26	Airline Mergers and Alliances	DAFFE/CLP(2000)1

27	Competition in Professional Services	DAFFE/CLP(2000)2
28	Competition in Local Services: Solid Waste Management	DAFFE/CLP(2000)13
29	Mergers in Financial Services	DAFFE/CLP(2000)17
30	Promoting Competition in the Natural Gas Industry	DAFFE/CLP(2000)18
31	Competition Issues in Electronic Commerce	DAFFE/CLP(2000)32
32	Competition in the Pharmaceutical Industry	DAFFE/CLP(2000)29
33	Competition Issues in Joint Ventures	DAFFE/CLP(2000)33
34	Competition Issues in Road Transport	DAFFE/CLP(2001)10
35	Price Transparency	DAFFE/CLP(2001)22
36	Competition Policy in Subsidies and State Aid	DAFFE/CLP(2001)24
37	Portfolio Effects in Conglomerate Mergers	DAFFE/COMP(2002)5
38	Competition and Regulation Issues in Telecommunications	DAFFE/COMP(2002)6
39	Merger Review in Emerging High Innovation Markets	DAFFE/COMP(2002)20
40	Loyalty and Fidelity Discounts and Rebates	DAFFE/COMP(2002)21
41	Communication by Competition Authorities	DAFFE/COMP(2003)4
42	Substantive Criteria Used for the Assessment of Mergers	DAFFE/COMP(2003)5
43	Competition Issues in the Electricity Sector	DAFFE/COMP(2003)14
44	Media Mergers	DAFFE/COMP(2003)16
45	Universal Service Obligations	DAF/COMP(2010)13
46	Competition and Regulation in the Water Sector	DAFFE/COMP(2004)20
47	Regulating Market Activities by Public Sector	DAF/COMP(2004)36
48	Merger Remedies	DAF/COMP(2004)21
49	Cartels: Sanctions Against Individuals	DAF/COMP(2004)39
50	Intellectual Property Rights	DAF/COMP(2004)24
51	Predatory Foreclosure	DAF/COMP(2005)14
52	Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling	DAF/COMP(2005)44
53	Enhancing Beneficial Competition in the Health Professions	DAF/COMP(2005)45
54	Evaluation of the Actions and Resources of Competition Authorities	DAF/COMP(2005)30
55	Structural Reform in the Rail Industry	DAF/COMP(2005)46
56	Competition on the Merits	DAF/COMP(2005)27
57	Resale Below Cost Laws and Regulations	DAF/COMP(2005)43
58	Barriers to Entry	DAF/COMP(2005)42
59	Prosecuting Cartels Without Direct Evidence of Agreement	DAF/COMP/GF(2006)7
60	The Impact of Substitute Services on Regulation	DAF/COMP(2006)18

61	Competition in the Provision of Hospital Services	DAF/COMP(2006)20
62	Access to Key Transport Facilities	DAF/COMP(2006)29
63	Environmental Regulation and Competition	DAF/COMP(2006)30
64	Concessions	DAF/COMP/GF(2006)6
65	Remedies and Sanctions in Abuse of Dominance Cases	DAF/COMP(2006)19
66	Competition in Bidding Markets	DAF/COMP(2006)31
67	Competition and Efficient Usage of Payment Cards	DAF/COMP(2006)32
68	Vertical Mergers	DAF/COMP(2007)21
69	Competition and Regulation in Retail Banking	DAF/COMP(2006)33
70	Improving Competition in Real Estate Transactions	DAF/COMP(2007)36
71	Public Procurement - The Role of Competition Authorities in Promoting Competition	DAF/COMP(2007)34
72	Competition, Patents and Innovation	DAF/COMP(2007)40
73	Private Remedies	DAF/COMP(2006)34
74	Energy Security and Competition Policy	DAF/COMP(2007)35
75	Plea Bargaining/Settlement of Cartel Cases	DAF/COMP(2007)38
76	Competitive Restrictions in Legal Professions	DAF/COMP(2007)39
77	Dynamic Efficiencies in Merger Analysis	DAF/COMP(2007)41
78	Guidance to Business on Monopolisation and Abuse of Dominance	DAF/COMP(2007)43
79	The Interface between Competition and Consumer Policies	DAF/COMP/GF(2008)10
80	Facilitating Practices in Oligopolies	DAF/COMP(2008)24
81	Taxi Services Regulation and Competition	DAF/COMP(2007)42
82	Techniques and Evidentiary Issues in Proving Dominance/Monopoly Power	DAF/COMP(2006)35
83	Managing Complex Mergers	DAF/COMP(2007)44
84	Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations	DAF/COMP(2007)45
85	Market Studies	DAF/COMP(2008)34
86	Land Use Restrictions as Barriers to Entry	DAF/COMP(2008)25
87	Construction Industry	DAF/COMP(2008)36
88	Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates	DAF/COMP(2008)30
89	Fidelity and Bundled Rebates and Discounts	DAF/COMP(2008)29
90	Presenting Complex Economic Theories to Judges	DAF/COMP(2008)31
91	Competition Policy for Vertical Relations in Gasoline Retailing	DAF/COMP(2008)35
92	Competition and Financial Markets	DAF/COMP(2009)11

93	Refusals to Deal	DAF/COMP(2007)46
94	Resale Price Maintenance	DAF/COMP(2008)37
95	Experience with Direct Settlements in Cartel Cases	DAF/COMP(2008)32
96	Competition Policy, Industrial Policy and National Champions	DAF/COMP/GF(2009)9
97	Two-Sided Markets	DAF/COMP(2009)20
98	Monopsony and Buyer Power	DAF/COMP(2008)38
99	Competition and Regulation in Auditing and Related Professions	DAF/COMP(2009)19
100	Competition Policy and the Informal Economy	DAF/COMP/GF(2009)10
101	Competition, Patents and Innovation II	DAF/COMP(2009)22
102	Standard for Merger Review	DAF/COMP(2009)21
103	Failing Firm Defence	DAF/COMP(2009)38
104	Competition, Concentration and Stability in the Banking Sector	DAF/COMP(2010)9
105	Margin Squeeze	DAF/COMP(2009)36
106	State-Owned Enterprises and the Principle of Competitive Neutrality	DAF/COMP(2009)37
107	Generic Pharmaceuticals	DAF/COMP(2009)39
108	Collusion and Corruption in Public Procurement	DAF/COMP/GF(2010)6
109	Electricity: Renewables and Smart Grids	DAF/COMP(2010)10
110	Exit Strategies	DAF/COMP(2010)32
111	Standard Setting	DAF/COMP(2010)33
112	Competition, State Aids and Subsidies	DAF/COMP/GF(2010)5
113	Emission Permits and Competition	DAF/COMP(2010)35
114	Pro-active Policies for Green Growth and the Market Economy	DAF/COMP(2010)34
115	Information Exchanges between Competitors under Competition Law	DAF/COMP(2010)37
116	The Regulated Conduct Defence	DAF/COMP(2011)3
117	Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings	DAF/COMP(2010)11
118	Competition in Ports and Port Services	DAF/COMP(2011)14
119	Crisis Cartels	DAF/COMP/GF(2011)11
120	Horizontal Agreements in the Environmental Context	DAF/COMP(2010)39
121	Excessive Prices	DAF/COMP(2011)18
122	Cross-border Merger Control: Challenges for Developing and Emerging Economies	DAF/COMP/GF(2011)13
123	Competition in Hospital Services	DAF/COMP(2012)9
124	Procedural Fairness: Competition Authorities, Courts and Recent Developments	DAF/COMP(2011)122

125	Remedies in Merger Cases	DAF/COMP(2011)13
126	Economic Evidence in Merger Analysis	DAF/COMP(2011)23
127	Unilateral Disclosure of Information with Anticompetitive Effects	DAF/COMP(2012)17
128	Promoting Compliance with Competition Law	DAF/COMP(2011)20
129	Impact Evaluation of Merger Decisions	DAF/COMP(2011)24
130	Market Definition	DAF/COMP(2012)19
131	Competition and Commodity Price Volatility	DAF/COMP/GF(2012)11
132	Quantification of Harm to Competition by National Courts and Competition Agencies	DAF/COMP(2011)25
133	Improving International Co-operation in Cartel Investigations	DAF/COMP/GF(2012)16
134	Leniency for Subsequent Applicants	DAF/COMP(2012)25
135	The Role of the Efficiency Claims in Antitrust Proceedings	DAF/COMP(2012)23
136	Competition and Payment Systems	DAF/COMP(2012)24
137	Methods for Allocating Contracts for the Provision of Regional and Local Transportation Services	DAF/COMP(2013)12
138	Vertical Restraints for On-line Sales	DAF/COMP(2013)13
139	Competition and Poverty Reduction	DAF/COMP/GF(2013)12
140	Competition Issues in Television and Broadcasting	DAF/COMP/GF(2013)13
141	The Role and Measurement of Quality in Competition Analysis	DAF/COMP(2013)17
142	Competition in Road Fuel	DAF/COMP(2013)18
143	Recent Developments in Rail Transportation Services	DAF/COMP(2013)24