The Asia-Pacific Antitrust Review **2016**

Published by Global Competition Review
in association with

Skadden, Arps, Slate, Meagher & Flom

www.globalcompetitionreview.com

© Law Business Research 2016

Overview: Merger Control

Andrew L Foster
Skadden, Arps, Slate, Meagher & Flom

Introduction

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

The list of likely filing jurisdictions in the Asia-Pacific region is only growing. In 1990, fewer than twelve jurisdictions worldwide had merger control laws.[1] Today, more than 90 countries have introduced actively engaged regimes,[2] with Asia-Pacific jurisdictions in particular seeing a dramatic rise in vigorous reviews of both global and domestic transactions. In the last eight years, new laws or important amendments in China, India and Singapore have propelled regulators in those jurisdictions onto a world stage alongside regulators in Australia, Japan, South Korea and Taiwan. At the same time, member states in the Association of Southeast Asian Nations (ASEAN)[3] have committed to introducing national competition policy and law in each member state by 2015, and new merger control regimes in Brunei, Cambodia, Laos, Myanmar, Thailand and the Philippines are expected to join those already established in Singapore, Indonesia and Vietnam.[4]

Each country has its own specific laws (many of which are covered in greater detail in the other jurisdiction-specific chapters in the *Asia-Pacific Antitrust Review 2016*), and local counsel should always be consulted in every jurisdiction in which a filing is required. This article sets forth a general overview of the various regimes in Asia and the Pacific, including whether notification is mandatory or voluntary and whether approval must be obtained prior to or following closing of the transaction. This chapter also sets forth how regulators in the major jurisdictions of the region ascertain whether a transaction qualifies for filing, procedural considerations on timing, substantive merits considerations and negotiation of remedies (if required).

Overview of current regimes

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

Table 1 – Overview of Competition Regimes

Jurisdiction	Regulator	Mandatory or Voluntary	Pre- or Post-Closing
Australia	Australian Competition and Consumer Commission (ACCC)	Voluntary	N/A
China	Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM)	Mandatory	Pre-Closing
Japan	Japan Fair Trade Commission (JFTC)	Mandatory	Pre-Closing
India	Competition Commission of India (CCI)	Mandatory	Pre-Closing
Indonesia	Commission for the Supervision of Business Competition (KPPU)	Mandatory	Post-Closing
New Zealand	Commerce Commission	Voluntary	N/A
Pakistan	Competition Commission of Pakistan	Mandatory	Pre-Closing
Singapore	Competition Commission of Singapore (CCS)	Voluntary	N/A
South Korea	Korean Fair Trade Commission (KFTC)	Mandatory	Pre-Closing/ Post-Closing[5]
Taiwan	Taiwan Fair Trade Commission (TFTC)	Mandatory	Pre-Closing
Vietnam	Vietnam Competition Authority (VCA)	Mandatory	Pre-Closing

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

Mandatory pre-closing filings

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

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

© Law Business Research 2016

by holding certain local assets separate until a pending approval is granted.

Mandatory post-closing filings

Both Indonesia and South Korea have post-closing filing obligations (although the South Korean filing can be pre-closing if one of the parties has worldwide sales or assets exceeding 2 trillion Korean won and the transaction does not involve a share acquisition on an open exchange). In Indonesia, the KPPU encourages companies to consult with it voluntarily prior to closing to provide greater certainty and minimise the risk that the KPPU would take actions to impose remedies or even unwind a transaction after implementation.[6] A pre-closing submission will diminish the intensity of a post-closing review, but will not eliminate the need for a post-closing filing. Similarly, in South Korea parties may choose voluntarily to notify a transaction to the KFTC prior to closing, although this will not extinguish the requirement to notify post-closing as well.

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

Voluntary filings

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

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

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

Filing assessment in mandatory filing jurisdictions

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

Does the proposed structure qualify as a reportable transaction?

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

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

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

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

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

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

By contrast, restructurings or transactions where one person or company already controls 50 per cent or more of the other companies involved in the transaction will ordinarily be exempt from reporting.[7]

Joint ventures themselves pose particularly complex issues with regard to reportability, particularly in the Asia-Pacific region. Unlike the European Union (and Singapore), where only the establishment of those joint ventures that perform 'all the functions of an autonomous economic entity' on a 'lasting basis' will qualify as reportable transactions, nearly every Asia-Pacific regulator considers that all joint ventures must generally be evaluated for notifiability under the merger control rules. In practice, a joint venture established to

© Law Business Research 2016

take over only one specific function of its parents (such as R&D or production), without outward, customer-facing activities, would not be notifiable in most jurisdictions around the world. Such a joint venture lacks a 'full-function character' and so would be exempted from filing in the European Union and most of its member states. In Asia and the Pacific, however, no such exemption will ordinarily apply, a practice change that can surprise even sophisticated European and US advisers.

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

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

Table 2 – Treatments of Minority Share Acquisitions

Jurisdiction	Treatment of Minority Investments
China	Reportable if the investment confers sole or joint control (ie, decisive influence) over a target's strategic decisions.
Japan	Reportable if: • the acquisition of shares represents more than 20% of the voting rights in the target, where the acquiring group is the largest shareholder in the target; or • the acquisition of shares represents more than 10% of the voting rights in the target, where the acquiring group is ranked among the top three largest shareholders in the target.
South Korea	Reportable if the acquisition represents 20% of voting rights in the target (15% for a domestic listed company).
Taiwan	Reportable if the acquisition represents more than 33% of the voting rights in the target.
India	Reportable only if the acquirer post-transaction will hold 25% or more of the total shares or voting rights of the target.
Singapore	Reportable if the investment confers sole or joint control (ie, decisive influence) over a target's strategic decisions.
Vietnam	Reportable if the buyer is at a level which, as provided for by law or by the target's bylaws, is sufficient to dominate the financial policies and operations of the target company for the purpose of obtaining economic benefits from the business operations of the target company.
Australia	Reportable if control is conferred; even if control is not conferred, a minority investment can contravene section 50 of Australia's Competition Act, and the ACCC will determine through consideration of intra-company relationships, directors' duties and other factors including the actual ownership share of the minority interest, the existence of any arrangements that may enhance the influence of the minority interest, the size, concentration, dispersion of the rights of the remaining shareholders, and the board representation and voting rights of the minority interests.[8]
New Zealand	Reportable if control is conferred, although the Commerce Commission generally considers that there is no change of control below a 20% shareholding.

How are the specific thresholds to be applied?

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

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

Table 3 – Financial Filing Thresholds for Share Acquisitions in Mandatory Pre-Closing Jurisdictions

Jurisdiction	Financial Filing Thresholds for Share Acquisitions
China	A mandatory pre-closing filing is required if: • combined worldwide turnover exceeds 10 billion yuan and each of at least two parties has China turnover exceeding 400 million yuan; or • combined China turnover exceeds 2 billion yuan and each of at least two parties has China turnover exceeding 400 million yuan.
Japan	A mandatory pre-closing filing is required if: • the aggregate amount of domestic revenue of the acquiring group exceeds ¥20 billion; and • the aggregate amount of domestic revenue of the target group exceeds ¥5 billion.
South Korea	A mandatory pre-closing filing is required if: • one party has worldwide asset value or sales above 200 billion Korean won and the other has worldwide asset value or sales above 20 billion Korean won; and • each party has sales in Korea of at least 20 billion Korean won.
Taiwan	A mandatory pre-closing filing is required if: • one party has Taiwanese turnover in excess of 15 billion new Taiwan dollars (or, if that party is a financial institution, it has Taiwanese turnover in excess of 30 billion new Taiwan dollars); and • the other party has Taiwanese turnover in excess of 2 billion new Taiwan dollars.
India	A mandatory pre-closing filing is required if either the 'Parties Test' or the 'Group Test' is met, and the 'Target Test' is met as well (does not apply to asset acquisitions). Parties Test (satisfied if the parties jointly meet): • assets in India exceeding 15 billion rupees; • turnover in India exceeding 45 billion rupees; • worldwide assets exceeding US$750 million, including assets in India exceeding 7.5 billion rupees; • worldwide turnover exceeding US$2.25 billion, including turnover in India exceeding 22.5 billion rupees. Group Test (satisfied if the post-transaction group (including target) meets: • assets in India exceeding 60 billion rupees; • turnover in India exceeding 180 billion rupees; • worldwide assets exceeding US$3 billion, including assets in India exceeding 7.5 billion rupees; or • worldwide turnover exceeding US$9 billion, including turnover in India exceeding 22.5 billion rupees. Target Test[9] (satisfied by target only – not applicable in asset acquisition): • turnover in India exceeding 7.5 billion rupees; and • asset value in India exceeding 2.5 billion rupees.

© Law Business Research 2016

Pakistan	A mandatory pre-closing filing is required if: • (i) the value of the gross assets of the acquirer is 300 million rupees or more, or the combined value of the assets of the acquirer and the target is 1 billion rupees or more; or (ii) the annual turnover of the acquirer is 500 million rupees or more, or the combined turnover of the acquirer and the target is 1 billion rupees or more; and • (i) the transaction relates to the acquisition of shares or assets with a value of 100 million rupees or more; or (ii) in case of an acquisition of shares in an undertaking, the acquirer will hold (together with shares previously held) more than 10% of the voting shares in another undertaking; or (iii) in case of an asset management company carrying out asset management services, it will hold (directly and indirectly, including through all of its other investments) more than 25% of the total voting rights in an undertaking; or (iv) the value of the total assets under management of an asset management company is 1 billion rupees or more.

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

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

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

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

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

Procedural considerations

Anticipating review timelines

In coordinating filings over multiple jurisdictions, the overall impact on the potential transaction timeline is of key importance. Correctly anticipating an accurate timeline beneficially affects financing costs, the overall risk profile and cost of the transaction, the certainty of closing, the parties' respective stock prices, negotiation over termination provisions, and more. Review timelines and anticipated timing of approvals also play a role of paramount importance in negotiating (and collecting) antitrust-related break-up fees as well – in 2014 and 2015, publicly reported termination fees in prominent deals ranged from below US$125 million (eg, *Expedia/Orbitz* (US$115 million), *Scientific Games/Bally Technologies* (US$105 million), *Infineon/International Rectifier Corp* (US$70 million)) to more than US$2 billion (eg, *Actavis/Allergan* (US$2,100 million), *Halliburton/Baker Hughes* (US$3,500 million)).

Each jurisdiction has its own idiosyncrasies in terms of review periods but, as a general rule, for a transaction without meaningful competitive issues, an initial Phase I review can be completed in around 30 to 40 calendar days. Some jurisdictions require pre-notification contacts or completeness reviews prior to filing (usually from two to eight weeks), while others permit submission of a filing without prior consultation. For transactions with significant competition issues, most jurisdictions also have a more in-depth Phase II review that will typically add an additional 90 calendar days. Some jurisdictions (notably India) do not observe a Phase I/Phase II distinction, but nevertheless endeavour to complete reviews in a timely manner (and commensurate with the level of competition issues). In addition, China makes provision for an extended Phase II period (often referred to as Phase III) that can extend its review by a further 60 calendar days with the consent of the parties. Vietnam has similar provisions, although these are more rarely utilised in practice.

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

© Law Business Research 2016

Table 4 – Indicative Timelines in Mandatory Pre-Closing Filing Jurisdictions				
Jurisdiction	**Pre-Notification**	**Phase I**	**Phase II**	**RFI Stops Clock?**
China	Completeness review required before formal acceptance (typically four to eight weeks)	30 calendar days	90 calendar days (can be extended an additional 60 calendar days)	No
India	Completeness review required before formal acceptance (variable)	No Phase I/ Phase II distinction – Statutory 210 calendar day maximum, however, most transactions cleared within about 70 calendar days	Yes	
Japan	Required (typically two to four weeks)	30 calendar days	120 calendar days from formal acceptance of the initial notification, or 90 calendar days from formal acceptance of additional requested information, whichever is later	No
Korea	Not required	30 calendar days	90 calendar days	Yes
Pakistan	Not required	30 business days	90 business days	Yes
Taiwan	Not required	30 calendar days	30 calendar days (with the Parties' consent)	Yes (resets clock to Day 1)
Vietnam	Completeness review required before formal acceptance	45 business days	30 business days (can be extended an additional 30 business days)	Yes

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

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

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

Table 5 – Average Duration of MOFCOM Review – Conditional Decisions 2012-2015		
Year	**Average Duration (Months)**	**Longest Review (Months)**
2012	8.4	11.1 (*Western Digital/Hitachi*)
2013	11.1	13.5 (*Glencore/Xstrata*)
2014	5.8	6.9 (*Microsoft/Nokia*)
2015	7.0	7.9 (*NXP/Freescale*)

The CCI's review is similarly unpredictable, but for different reasons. With no Phase I/Phase II distinction and a 210 calendar day statutory maximum review period, review in India can be quite daunting, especially for cases that do not pose significant issues. In addition, many procedural rules in India have been established through local practice rather than through established, published guidelines, reducing clarity on issues such as completeness review, evaluation of the CCI's jurisdiction to review, and calculation of the likely review period for individual transactions.

Simplified procedure v ordinary procedure

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

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

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

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

Under the simple procedure, however, transactions may be eligible for accelerated treatment, which, while not eliminating the time required for preparation of a notification or completeness review, has overwhelmingly resulted in Phase I approval. Parties must affirmatively apply to MOFCOM for such treatment (the rules

© Law Business Research 2016

will not automatically apply), and MOFCOM retains the discretion in all cases to deny entry, notwithstanding the presence of one or more of the following factors. Nevertheless, for cases meeting one or more of the following characteristics, there is now a far clearer path to approval:

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

From its introduction in May 2014 until August 2015, the procedure has proven overwhelmingly popular and effective. Out of 240 cases submitted to MOFCOM in that time, 208 have proceeded under simple review (86.7 per cent). During the first quarter of 2015, 86 per cent of cases accepted in the simple procedure were cleared in Phase I. During the second quarter of 2015, 91 per cent of cases accepted in the simple procedure were cleared in Phase I.[11] The simplified procedure is not perfect, given the untrammeled discretion permitted to MOFCOM to accept or reject an application and given the attendant public notice period that permits (and even encourages) the lodging of complaints by Chinese competitors and other stakeholders. However, as the numbers show, MOFCOM has shown an impressive early track record in using the simplified procedure to improve significantly its handling of 'no issue' cases during 2014 and 2015.

Waivers and inter-regulator cooperation

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

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

The US agencies and the EC coordinate their reviews on important cases quite tightly, and it is more and more the case that Asia-Pacific regulators will be included in that coordination. There are several examples of bilateral inter-regulator coordination in the region. For example, the JFTC and KFTC concluded a coordination agreement in July 2014,[12] while MOFCOM and the ACCC signed a memorandum of understanding (MOU) in May 2014, permitting the agencies 'to exchange information on the definition of markets and theory of harm as well as impact assessments and the design of merger remedies, subject to confidentiality and privacy requirements in each jurisdiction'.[13] However, for the purposes of overall review, the key agreements are those between the Asia-Pacific regulators and the US agencies and EC, respectively, which permit truly global, cross-border coordination. These agreements are set forth in the table below.

Table 6 – Inter-regulator Coordination Agreements

Jurisdiction	United States (DOJ and FTC)	European Commission
Australia	• US–Australia Cooperation Agreement (1982) • US–Australian Mutual Antitrust Enforcement Assistance Agreement and Annex (1999)	
China	• MOU on Antitrust and Antimonopoly Cooperation (2011) • Guidance for Case Cooperation Between the Ministry of Commerce and the DOJ and FTC on Concentration of Undertakings (Merger) Cases (2011)	• Terms of Reference of the EU–China Competition Policy Dialogue (2004) • MOU on Cooperation (2012) • Practical guidance for merger cooperation between DG COMP and MOFCOM (2015)
India	• MOU on Antitrust Cooperation (2012)	• MOU on Cooperation (2013)
Japan	• US–Japan Cooperation Agreement (1999)	• Agreement between the EC and the Government of Japan concerning cooperation on anticompetitive activities (2003)
Korea	• MOU on Antitrust Cooperation (2015)	• Agreement between the EU and the Republic of Korea concerning cooperation on anticompetitive activities (2009) • Cooperation agreement between the EC and the Government of the Federal Republic of Korea (2009)

Multi-jurisdictional merits review

Substantive review of anticompetitive concerns

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

© Law Business Research 2016

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

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

Focus on global v local effects

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

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

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

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

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

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

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

Role of economic analysis

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

In the Asia-Pacific region, many regulators are becoming increasingly educated regarding the importance of economic analysis, and it is more and more serving as a complement to traditional structural analyses. For example, in China (as in the EU), market structure continues to play an important role – sometimes even a decisive role. Nevertheless, in many recent conditional approvals, MOFCOM has shown a willingness to use economic analyses, concentration analyses based on the Herfindahl–Hirschman Index (HHI) or ratio of concentration for the top few suppliers, and even price increase forecasts to support its competitive analysis.[14] While parties' combined market shares will remain one of the key factors informing MOFCOM's initial views of a transaction, its acceptance of and reliance on sophisticated economic tools demonstrates its willingness to make use of the full range of tools at its disposal.

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

Consideration of industrial policy concerns

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

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

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

Certain jurisdictions, such as China, make clear the importance

© Law Business Research 2016

of industrial policy considerations in their review – indeed, unlike most other jurisdictions, China's Anti-Monopoly Law explicitly empowers MOFCOM to take into consideration the impact of a transaction on industrial policy and national economic development.[15] However, the role of industrial policy often comes into merger review in less obvious ways in other jurisdictions. For example, in the US, the national security implications of foreign investment review (the CFIUS review by the inter-agency Committee on Foreign Investment in the US) may take into account industrial policy concerns for the US, while the European Commission – while nominally politically independent – is often perceived as advancing particular EU interests. In Asia-Pacific regions other than China, industrial policy concerns also appear to sometimes play a role in outcomes, especially when a country's particular industries and interests are implicated by a transaction.

In China, merger control law expressly permits consideration of industrial policy, and MOFCOM routinely solicits comments and input from other ministries, as well as important Chinese customers, competitors and suppliers (often through domestic trade associations). The powerful National Development Reform Commission (NDRC) and Ministry of Industry and Information Technology (MIIT) will also be invited to comment on nearly every significant filing – the NDRC has broad administrative and planning control over the entire Chinese economy, while MIIT is the state agency responsible for, inter alia, regulation of the production of technological and industrial goods. Other ministries and state actors may also be allowed to give input, depending on the case, and MOFCOM will not unilaterally override a complaint from an important stakeholder, even if it is not grounded in traditional competitive issues.

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

Negotiation of remedies

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

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

Over the past four years, MOFCOM in particular has gained in confidence in negotiating remedy packages that diverge from those favoured in other jurisdictions, and has shown a willingness to use not only a combination of behavioural and structural remedies above and beyond what may be required elsewhere, but also its own 'hold separate' remedy unique to China.

First, despite the attendant requirements of ongoing monitoring and supervision, MOFCOM has shown itself more flexible in accepting behavioural remedies that its US and EU counterparts might reject, including obligations to:

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

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

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

Moreover in *Seagate/Samsung* (2011) and *Western Digital/Hitachi* (2012) hard-disk drive cases, MOFCOM not only adopted the same structural remedies imposed in the US and EU, but also imposed its unique 'hold separate' remedy prohibiting operational integration between the merger firms until further approval was given. Although the initial waiting periods were indicated to be one year for *Seagate/Samsung* and two years for *Western Digital/*

© Law Business Research 2016

Hitachi, MOFCOM in fact did not permit integration of either transaction until October 2015.[16] MOFCOM also imposed its hold separate remedies in other foreign-to-foreign transactions in which no other competition regulator imposed conditions, including *Marubeni/Gavilon* (2013) and *MediaTek/MStar* (2013) – by the end of 2015 neither of those hold separate prohibitions had been lifted.

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

Notes

1 Maria Coppola, US Federal Trade Commission, 'ICN Best Practice: Soft Law', *CPI Antitrust Chronicle*, July 2011(1).

2 Ibid. See also Jonathan Galloway, 'Convergence in International Merger Control', *The Competition Review*, July 2009, Volume 5, Issue 2, pp 179-192.

3 The 10 ASEAN member states include Brunei, Indonesia, Cambodia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

4 See Darren Shiau, Elsa Chen, 'ASEAN Developments in Merger Control', *Journal of European Competition Law & Practice*, 2014, Volume 5, Number 3, pp 149-157.

5 Offshore transactions trigger post-closing obligations in South Korea, unless (i) one of the parties to the transaction belongs to a business group with consolidated worldwide gross asset value or sales revenues equal to or exceeding 2 trillion Korean won, or (ii) the transaction does not involve a share acquisition transacted on an open stock exchange market.

6 See KPPU No. 3 of 2012 on Guidelines for Mergers, Consolidations and Acquisitions. See also Government Regulation No. 57 of 2010 on Mergers or Consolidations of Business Entities and Acquisitions of Shares of Other Companies.

7 See, for example, Anti-Monopoly Law of the People's Republic of China, article 22.

8 ACCC Merger Guidelines, November 2008, p 59.

9 The Target Test de minimis exemption is currently scheduled to expire on 4 March 2016.

10 See Interim Provisions on the Standards Applicable to Simple Cases in Concentrations of Undertakings (12 February 2014) and Guidelines for Notification of Concentration of Undertakings Under Simplified Merger Review Procedure (18 April 2014).

11 PaRR Statistics, MOFCOM cleared 87 per cent of simple merger cases in Phase I, 17 November 2015.

12 See Memorandum on Cooperation Between the Fair Trade Commission of Japan and the Fair Trade Commission of the Republic of Korea, available at: www.jftc.go.jp/en/pressreleases/yearly-2014/July/140725.files/140725_2.pdf.

13 Memorandum of understanding on Anti-Monopoly Cooperation between the Australian Competition and Consumer Commission and the Ministry of Commerce of the People's Republic of China, available at www.accc.gov.au/system/files/Memorandum%20of%20understanding%20in%20anti-monopoly%20cooperation%20between%20the%20Australian%20Competition%20%26%20Consumer%20Commission%20and%20the%20Ministry%20of%20Commerce%20of%20the%20People%E2%80%99s%20Republic%20of%20China%20-%20English%20version.pdf.

14 Andrew L Foster and Haixiao Gu, 'Substantive analysis in China's horizontal merger control: a six-year review and beyond', *Journal of Antitrust Enforcement*, 2015, 0, pp 1-23.

15 See Anti-Monopoly Law of the People's Republic of China, Article 27(5).

16 See Andrew L Foster, et al. 'MOFCOM Lifts Hold-Separate Remedies for the First Time' (26 October 2015), Skadden Arps, available at: https://www.skadden.com/insights/mofcom-lifts-hold-separate-remedies-first-time.

© Law Business Research 2016

Andrew Foster
Skadden, Arps, Slate, Meagher & Flom

Mr Foster has been a member of Skadden's global antitrust and competition group for over 10 years, practising in the New York, Brussels, Beijing and Hong Kong offices. He is recognised as a leading practitioner of EU, Chinese, US and other international antitrust regimes. Repeatedly selected for inclusion as a leading competition lawyer in *Chambers Global* and *Chambers Asia-Pacific*, he has published widely on international competition issues, including contributing chapters to *Competition Law in Asia-Pacific: A Practical Guide* and *EU and US Antitrust Arbitration. A Handbook for Practitioners.*

Recent notable merger control work includes: Nokia Corp (Finland) in its US$16.6 billion combination with Alcatel-Lucent in the wireless telecommunications infrastructure industry; Broadcom Corp (US) in its US$37 billion acquisition by Avago Technologies Limited in the semiconductor industry; Freescale Semiconductor Ltd (US) in its merger with NXP Semiconductors, NV in a transaction valuing the combined enterprise at just over US$40 billion; General Electric (US) in its US$14 billion acquisition of Alstom SA; Merck KGaA (Germany) in its US$17 billion acquisition of Sigma-Aldrich Corporation, a chemical company for the life science industry.

Mr Foster also has significant experience in representing multinational firms in US and EU enforcement matters, involving both cartel and monopolisation and dominance investigations. He has assisted in obtaining conditional immunity with the European Commission and other competition law agencies, and has substantial experience representing clients in articles 101 and 102 investigations, as well as US private litigation and class action matters.

Skadden

Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates

42/F, Edinburgh Tower
The Landmark
15 Queen's Road Central
Hong Kong
Tel: +852 3740 4864

Andrew Foster
Andrew.Foster@skadden.com

www.skadden.com

With 23 offices, approximately 1,700 attorneys and more than 50 practice areas, Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates serves clients in every major international financial centre, providing the specific legal advice companies need to compete most effectively in a global business environment. Our clients include approximately 50 per cent of the Fortune 250 industrial and service corporations; financial and governmental entities; and small, entrepreneurial companies and non-profits. We provide our clients with the highest-quality and most cost-effective advice in an atmosphere emphasising teamwork, creativity, responsiveness and diversity.

In the Asia-Pacific region, we have approximately 90 attorneys across seven offices, giving us the resources to handle the largest and most complex transactions. Our global network of offices strategically positions the firm to coordinate and execute the cross-border elements of these transactions.

Our International Competition practice, led out of our Brussels office, advises clients in Asia-Pacific and around the globe on a full range of competition issues, including the rapidly evolving areas of EU law, merger control, cartels and articles 101 and 102 (formerly articles 81 and 82). Our Brussels-based attorneys regularly coordinate with their US and Asian colleagues on global merger and antitrust cases.

Skadden is recognised as a top practice in the area of EU and international competition by *Chambers Europe*, *IFLR1000* and *The Legal 500*. According to *Chambers Europe 2014*, 'The firm is great for complex and sophisticated legal matters, and has the ability to provide broad coverage and bring significant resources to bear.'

© Law Business Research 2016

Strategic Research Sponsor of the
ABA Section of International Law

Law
Business
Research

THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012

THE ASIA-PACIFIC ANTITRUST REVIEW 2016 ISSN 1743-7989

© Law Business Research 2016