MERGER CONTROL

European Union

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SECTION 1: OVERVIEW

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1.1 Please provide a brief overview of your jurisdiction's merger control legislative and regulatory framework.

The EU merger control regime is governed by Regulation (EC) 139/2004 of January 20, 2004 on the control of concentrations between undertakings (the EU Merger Regulation). The EU Merger Regulation applies to the European Economic Area (EEA), ie the 28 EU Member States and Norway, Iceland and Liechtenstein.

The European Commission has issued a number of notices and guidelines that assist in the interpretation of procedural and substantive aspects of the EU Merger Regulation. These notices and guidelines include, for example: the Consolidated Jurisdictional Notice; the Notice on the Simplified Procedure; the Notice on Case Referrals; the Notice on Acceptable Remedies; the Notice on Market Definition; and the substantive Guidelines on Horizontal and Non-horizontal Mergers. The Commission also published a series of Best Practices documents, including Best Practices on merger proceedings, Best Practice Guidelines on divestiture commitments, and Best Practices on the submission of economic evidence. All documents are available on the website of the Commission at *http://ec.europa.eu/competition/mergers/legislation/legislation.html*

The EU Merger Regulation is enforced by the Directorate General for Competition of the European Commission (DG Competition) in Brussels.

1.2 What have been the key recent trends and developments in merger control?

The Commission has continued its active merger enforcement policy

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in 2017. It has been pursuing more aggressive theories of harm including in relation to non-horizontal, vertical or conglomerate mergers (e.g., *Qualcomm/NXP Semiconductors*, *Luxottica/Essilor*, and *Bayer/Monsanto*) and innovation, where in its decision on the *Dow/DuPont* merger it pursued a theory of harm involving research and development efforts. The Commission has also shown an increased focus on the effectiveness of merger remedies, and has continued to aggressively enforce procedural violations, including gun-jumping and the provision of misleading information in the context of merger proceedings.

1.3 Briefly, what is your outlook for merger control over the next 12 months, including any foreseeable legislative reform/revisions?

The EU Commission has launched a public consultation that sought feedback on the effectiveness of purely turnover-based thresholds in the EU Merger Regulation, the treatment of cases that typically do not raise competition concerns, and the referral mechanisms involving member states and is presently considering stakeholder responses on these issues but has not yet taken a position.

SECTION 2: JURISDICTION

2.1 What types of transactions are caught by the rules? What constitutes a merger and how is the concept of control defined?

The EU Merger Regulation applies to a 'concentration,' which is deemed to arise where a change of control on a lasting basis results from: (i) the merger of two or more previously independent undertakings: (ii) the acquisition of direct or indirect control of the whole or parts of one or more other undertakings; or (iii) the creation of a joint venture (JV) performing on a lasting basis all the functions of an autonomous economic entity (full function JV).

The concept of control is broadly defined and can be based on rights, contracts or any other means which, either separately or in combination, *de facto* or by law, confer the possibility of exercising decisive influence on an undertaking's strategic commercial decisions. To that end, the acquisition of a minority shareholding in another undertaking may give rise to the acquisition of control if the rights attached to the minority shareholding confers the ability to block strategic commercial decisions of the undertaking. These decisions typically include the adoption of the annual budget or business plan, the appointment or removal of senior management and decisions relating to non-extraordinary investments.

'Sole control' refers to a situation in which one undertaking alone exercises decisive influence over another undertaking; 'joint

control' means a situation in which two or more undertakings exercise such influence jointly.

A concentration also arises where there is a lasting change in the quality or nature of control of an undertaking, for example, a change from joint control to sole control in an undertaking.

2.2 What are the jurisdictional thresholds for notification? Can the authorities investigate a merger falling below these thresholds?

The EU Merger Regulation applies to all concentrations with a community dimension. There are two alternative notification thresholds under the EU Merger Regulation.

A concentration has a community dimension where: (i) the combined aggregate worldwide turnover of all the undertakings concerned is more than €5 billion (around $6.2 billion); and (ii) the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same member state.

A concentration that does not meet the above thresholds has a community dimension where: (i) the combined aggregate worldwide turnover of all the undertakings concerned is more than €2.5 billion; (ii) in each of at least three EU member states, the combined aggregate turnover of all the undertakings concerned is more than €100 million; (iii) in each of at least three EU member states included for the purpose of point (ii), the aggregate turnover of each of at least two of the undertakings concerned is more than €25 million; and (iv) the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate community-wide turnover within one and the same member state.

The EU Merger Regulation provides for a one-stop-shop system, which means that concentrations with a community dimension must be notified to the Commission which has exclusive jurisdiction pre-empting jurisdiction of the EU member states and, based on the European Economic Area (EEA) Agreement, also the three additional EEA member states Norway, Iceland and Liechtenstein. Conversely, if a transaction does not qualify as a concentration with an EU dimension, the EEA Member States are competent to investigate the transaction subject to their respective national laws.

The allocation of jurisdiction in the EU according to the above principles is complemented by the possibility of pre- or post-notification case referrals from the Commission to the member states or vice versa. Details on case referrals are provided for in the Notice on Case Referrals.

2.3 Are foreign-to-foreign transactions caught by the rules? Is a local effect required to give the authority jurisdiction to review it?

The EU Merger Regulation applies to all concentrations that have a community dimension.

SECTION 3: Notification

3.1 When the jurisdictional thresholds are met, is a filing mandatory or voluntary? What are the risks/sanctions for failing to notify a transaction and closing prior to clearance?

A pre-closing notification to the Commission is mandatory if the transaction qualifies as a concentration with a Community dimension.

The concentration cannot be implemented before its notification or until it has been declared compatible with the common market under the EU Merger Regulation, except for the following situations: in a public bid or a series of transaction in securities listed on a stock exchange provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission; or where the Commission has granted a derogation on the basis of a reasoned request from the parties. Such derogations, however, are very rare in practice.

Violations of the standstill obligation are aggressively enforced by the Commission and are subject to a statutory maximum fine of up to 10% of the aggregate turnover of the undertaking concerned. On October 26 2017, the General Court upheld a €20 million fine imposed by the Commission for implementing a transaction before obtaining clearance (*Marine Harvest v Commission*).

3.2 Who is responsible for filing? Do filing fees apply?

Responsible for making the filing are for mergers, the merging parties; for acquisitions of sole or joint control, the respective acquirer(s) of control; and for the creation of a full-function JV, the undertakings that will have joint control over the JV.

There are no filing fees under the EU Merger Regulation.

3.3 Is there a deadline for filing? What are the filing requirements and how onerous are they?

There is no filing deadline under the EU Merger Regulation. Concentrations with a Community dimension can be notified to the Commission following the conclusion of the transaction agreement, the announcement of the public bid, or the acquisition of a controlling interest. The notification can also be made earlier where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a community dimension.

The notification is made to DG Competition using a standard form notification: a Form CO. In the Form CO, the parties are required to provide detailed information on the competitive effects of the transaction, including descriptions of the undertakings concerned, their respective

activities, the definition of relevant product and geographic markets, a competitive analysis of the effect of the transaction with respect to affected markets, including market shares, and information on competitors and customers, efficiencies arising from the transaction, and copies of internal strategic documents. In complex cases, the completion of a Form CO may require the provision of a significant amount of information and documents, including of economic evidence.

Transactions that qualify for the simplified procedure according to the criteria set out in the Notice on the Simplified Procedure can be notified using a Short Form CO, which requires less detailed information.

3.4 Are pre-notification contacts available, encouraged or required? How long does this process take and what steps does it involve?

Pre-notification discussions with the Commission are a standard procedure under the EU Merger Regulation, including for cases that qualify for assessment under the simplified procedure. Parties should anticipate a pre-notification process of at least two weeks in straightforward cases. In complex cases, pre-notification can be considerably longer and extend to several months. There are no strictly defined steps for pre-notification but the parties typically start pre-notification by submitting a draft of the Form CO to the case team once the case team has been set up on the basis of a case team allocation request to be submitted by the parties.

SECTION 4: Review process and timetables

4.1 What is the standard statutory timetable for clearance and is there a fast-track procedure? Can the authority extend or delay this process? What are the different steps and phases of the review process?

The review period in phase I is 25 working days from the receipt of a complete notification. This period is extended to 35 working days if commitments are offered by the parties, or a member state makes a referral request.

Where the Commission finds that the concentration raises serious doubts as to its compatibility with the common market, it shall decide to initiate phase II proceedings. If the Commission opens a phase II investigation, the review period is extended by an additional 90 working days from the day that follows the decision to initiate phase II proceedings. The phase II review is extended to 105 working days if the parties offer commitments unless these commitments are offered less than 55 working days after the initiation of proceedings. The phase II review period can be extended further if the parties request a one-off extension, which has to be made no later than 15 working days after the opening of phase II, or if the Commission decides to extend the phase II proceedings in agreement with the notifying parties. The cumulative extension cannot exceed 20 working days, i.e. the maximum phase II review period is 125 working days. However, the review period may be suspended if, for circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has to issue a formal decision requesting information or ordering an inspection (stop-the-clock).

There is no formal fast-track procedure available.

4.2 What is the substantive test for clearance? What are the theories of harm the authorities will investigate? To what extent does the authority consider efficiencies arguments?

Under the EU Merger Regulation, a concentration which would significantly impede effective competition, in the EEA or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market. In its assessment, the Commission must take into account substantiated claims of efficiencies brought about by the transaction. With respect to full-function JVs, the Commission will in addition assess whether the creation of the JV has as its object or effect the coordination of the competitive behaviour of the parent companies of the JVs.

In its assessment, the Commission will assess whether the concentration results in non-coordinated (or unilateral) or coordinated anti-competitive effects in accordance with the Commission's detailed Guidelines on Horizontal and Non-Horizontal Mergers.

4.3 Are remedies available to address competition concerns? What are the conditions and timing issues applicable to remedies.

Remedies are available to address competition concerns in phase I and phase II. The basic condition for a remedy is that the commitments must be capable of rendering the concentration compatible with the common market so that they will prevent a significant impediment of effective competition. Remedies can take the form of structural commitments, including divestitures, and/or behavioural commitments. The Commission has a preference for structural commitments but behavioural commitments may be suitable and have been accepted by the Commission in certain circumstances, for example, to remedy vertical or conglomerate concerns. According to the Commission, for remedies to be accepted in phase I, they need to be clear-cut so that it is not necessary to enter into an in-depth investigation and that the commitments are sufficient to clearly rule out serious doubts as to the concentration's compatibility with the common market.

If the Commission clear the transaction subject to commitments, in phase I or phase II, the parties commit that, within a specified time-period following the Commission's decision, they will implement the commitment, for example, sell the divestment business to a purchaser. This standard remedy procedure allows the parties to implement the transaction immediately upon receipt of the clearance decision. However, in the event that the Commission requires an up-front buyer, the parties cannot implement the concentration unless and until the parties have entered into a binding agreement with a suitable purchaser, both of which must be approved by the Commission before closing of the transaction can occur.

The Commission's decision to clear a transaction subject to commitments typically involves the appointment of a Monitoring Trustee by the parties to monitor compliance with the commitments and, in case of divestiture commitments, a divestiture trustee to divest the divestment package, at no minimum price, if the parties are unable to find a suitable purchaser within the specified time period.

SECTION 5: Judicial review

5.1 Please describe the parties' ability to appeal merger control decisions and the time-limits applicable. What is the typical time-frame for appeals.

The Commission's decision under the EU Merger Regulation can be appealed to the EU's General Court within two months of the notification of the decision. Appeals can be brought by the parties as well as third parties to the extent they are directly and individually concerned by the Commission's decision. The filing of an appeal does not suspend the effects of the Commission's decision but the parties may apply to the General Court for the decision to be suspended and other interim measures.

The judgments of the General Court may, within two months, be subject to an appeal before the Court of Justice, limited to points of law.

The average time for appeal proceedings before the General Court is two to three years but can be longer in individual cases. If the General Court assesses the appeal under the expedited procedure, the duration of the appeal proceedings can be less than one year (in one case, the General Court rendered its judgment after seven months) but generally the time-frame is between one and two years. Appeal proceedings before the Court of Justice generally take more than two years.