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ASIA-PACIFIC ANTITRUST REVIEW 2019

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ANTITRUST REVIEW 2019

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Global Competition Review is a leading source of news and insight on national and cross-border competition law and practice, with a readership that includes top international lawyers, corporate counsel, academics, economists and government agencies. GCR delivers daily news, surveys and features for its subscribers, enabling them to stay apprised of the most important developments in competition law worldwide.

GCR's coverage of Asia continues to expand, with a senior reporter now stationed in Hong Kong and more plans for growth following Law Business Research's merger with Globe Business Media Group.

Complementing our news coverage, *Asia-Pacific Antitrust Review 2019* provides an in-depth and exclusive look at the region. Preeminent practitioners have written about antitrust issues in eight jurisdictions, as well as one regional overview for merger control. The edition includes updates to 16 chapters and adds two new ones: overviews of antitrust in Malaysia and Korea. The authors are unquestionably among the experts in their field within these jurisdictions and the region.

The volume includes contributions from the chairs of the Australian Competition and Consumer Commission and Korea's Fair Trade Commission, as well as the chief executive of Hong Kong's Competition Commission. Other experts look at a range of topics, including cartels and mergers in India and Japan and abuse of dominance in India and China.

This annual review expands each year, especially as the Asia-Pacific region gains even more importance in the global antitrust landscape. It has some of the world's most developed enforcers – in Australia, Korea and Japan, for example – but it also has some of the world's newest competition regimes, including in Malaysia and Hong Kong.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com. GCR thanks all of the contributors for their time and effort.

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Overview: Merger Control

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Skadden, Arps, Slate, Meagher & Flom

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

The list of likely filing jurisdictions in the Asia-Pacific region is only growing. In 1990, fewer than 12 jurisdictions worldwide had merger control laws;[1] today, more than 90 countries have introduced actively engaged regimes,[2] with Asia-Pacific jurisdictions in particular seeing a dramatic rise in vigorous reviews of both global and domestic transactions. Over the past 10 years, new laws or important amendments in China, India and Singapore have propelled regulators in those jurisdictions onto a world stage alongside regulators in Australia, Japan, South Korea and Taiwan. At the same time, member states in the Association of Southeast Asian Nations (ASEAN)[3] have committed to introduce national competition policy and law in each member state, and new merger control regimes in Brunei, Cambodia, Laos, Malaysia, Myanmar and Thailand are joining those already established in Singapore, Indonesia, the Philippines and Vietnam.[4]

Each country has its own specific laws (many of which are covered in greater detail in the other jurisdiction-specific chapters of *The Asia-Pacific Antitrust Review 2019*), and local counsel should always be consulted in every jurisdiction in which a filing is required. This article sets forth a

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.

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. It also sets out 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). Table 1, below, 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 State Administration for Market Regulation (SAMR)*	Mandatory	Pre-closing
India	Competition Commission of India (CCI)	Mandatory	Pre-closing
Indonesia	Commission for the Supervision of Business Competition (KPPU)	Mandatory	Post-closing
Japan	Japan Fair Trade Commission (JFTC)	Mandatory	Pre-closing
New Zealand	Commerce Commission	Voluntary	N/A
Pakistan	Competition Commission of Pakistan (CCP)	Mandatory	Pre-closing
Philippines	Philippines Competition Commission (PCC)	Mandatory	Pre-closing
Singapore	Competition Commission of Singapore (CCS)	Voluntary	N/A
South Korea	Korean Fair Trade Commission (KFTC)	Mandatory	Pre-closing/ Post-closing**
Taiwan	Taiwan Fair Trade Commission (TFTC)	Mandatory	Pre-closing
Thailand	Office of the Trade Competition Commission (OTCC)	Mandatory	Pre-closing/ Post-closing
Vietnam	Vietnam Competition Authority (VCA)	Mandatory	Pre-closing

* The SAMR was established in March 2018 to consolidate responsibility for all of China's antitrust enforcement into a single regulator. Previously, the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM) had responsibility for merger control enforcement.

** 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.

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

Mandatory pre-closing filings

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

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

Mandatory post-closing filings

Both Indonesia and South Korea currently 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). It is understood that a mandatory pre-closing filing regime may be introduced in Indonesia in 2019. In addition, Thailand's OTCC has introduced a post-closing filing obligation for certain transactions that may 'materially reduce competition' in Thailand. 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.[5] 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. In Thailand, on 28 December 2018, seven notifications of OTCC supplementing the Trade Competition Act were published, clarifying the filing thresholds – if a transaction causes a significant reduction in market competition, the parties must submit a post-closing filing. A significant reduction in market competition happens when the total turnover of all the parties to be merged in a certain market is 1 billion baht or more but the transaction does not result in a monopoly or any business operator having a dominant position.

5 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.

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 of the date of closing. In Thailand, post-closing notifications must be submitted within seven calendar days after the date of closing. Failure to obtain approvals post-closing can expose the parties to fines in these jurisdictions.

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.

For example, on 26 March 2018, Grab announced that it would acquire control of Uber's Southeast Asian businesses in exchange for a minority 27.5 per cent stake in the combined firm. Although Grab did not appear to have anticipated any merger filings to be needed prior to the closing, close scrutiny by the antitrust authorities in Singapore, Vietnam, the Philippines, Indonesia and Malaysia has raised significant complications relating to deal completion. Despite being a jurisdiction with only a voluntary filing regime, Singapore imposed total fines of S$13 million and proposed a divestiture remedy. Vietnam's Ministry of Industry and Trade's Department of Competition and Consumer Protection has found indications of violations of competition law in the same acquisition, stating that the parties violated the provisions with respect to notification of an economic concentration (article 20) and prohibited economic concentrations (article 18).[6] The Philippine Competition Commission imposed a fine of 16 million pesos on Grab and Uber for violating the interim measures imposed on the parties by the authority after the merger review was initiated, and for causing undue difficulties to the authority's review process.[7] Also in the Philippines, Grab was ordered to address issues related to service quality and pricing.

6 http://moit.gov.vn/web/guest/tin-chi-tiet/-/chi-tiet/ket-qua-%C4%91ieu-tra-vu-viec-grab-mua-lai-uber-13470-22.html.

7 https://phcc.gov.ph/press-releases/pcc-fines-grab-uber-p16m-for-violating-interim-measures-order/.

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 the 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 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 the State Administration for Market Regulation (SAMR, formerly 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.[8]

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

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. Table 2, below, sets out the treatment of minority investments in the major Asia-Pacific jurisdictions.

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 per cent 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 per cent 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 per cent of voting rights in the target (15 per cent for a domestic listed company).
Taiwan	Reportable if the acquisition represents more than 33 per cent of the voting rights in the target.
India	Reportable only if the acquirer post-transaction will hold 25 per cent or more of the total shares or voting rights of the target.

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

Jurisdiction	Treatment of minority investments
Philippines	Reportable where each parent will have the right to direct and govern the policies in connection therewith with the intention to share the profits, risks and losses (joint control is the key factor).
Singapore	Reportable if the investment confers sole or joint control (ie, decisive influence) over a target's strategic decisions.
Vietnam	Reportable if the buyer is at a level that, as provided for by law or by the target's by-laws, 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.*
New Zealand	Reportable if control is conferred, although the Commerce Commission generally considers that there is no change of control below a 20 per cent shareholding.

* ACCC Merger Guidelines, November 2008, p59.

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. Table 3, below, sets out a quick look at 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 300 billion Korean won and the other has worldwide asset value or sales above 30 billion Korean won; and ▪ each party has sales in Korea of at least 30 billion Korean won.

Jurisdiction	Financial filing thresholds for share acquisitions
Taiwan	A mandatory pre-closing filing is required if: ▪ one party has Taiwanese turnover in excess of T$15 billion (or, if that party is a financial institution, it has Taiwanese turnover in excess of T$30 billion) and the other party has Taiwanese turnover in excess of T$2 billion; or ▪ the aggregate worldwide turnover of all parties to the combination exceed T$40 billion, and each of at least two parties has turnover in Taiwan of at least T$2 billion.
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). The Parties Test is satisfied if the parties jointly meet: ▪ assets in India exceeding 20 billion rupees; ▪ turnover in India exceeding 60 billion rupees; ▪ worldwide assets exceeding US$1 billion, including assets in India exceeding 10 billion rupees; or ▪ worldwide turnover exceeding US$3 billion, including turnover in India exceeding 30 billion rupees. The Group Test is satisfied if the post-transaction group (including target) meets: ▪ assets in India exceeding 80 billion rupees; ▪ turnover in India exceeding 240 billion rupees; ▪ worldwide assets exceeding US$4 billion, including assets in India exceeding 10 billion rupees; or ▪ worldwide turnover exceeding US$12 billion, including turnover in India exceeding 30 billion rupees. The Target Test* is satisfied by target only: ▪ turnover in India exceeding 10 billion rupees; and ▪ asset value in India exceeding 3.5 billion rupees.
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 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 (ii) the transaction relates to the acquisition of shares or assets with a value of 100 million rupees or more; or in the case of an acquisition of shares in an undertaking, the acquirer will hold (together with shares previously held) more than 10 per cent of the voting shares in another undertaking. In the case of an asset management company carrying out asset management services: (i) it will hold (directly and indirectly, including through all of its other investments) more than 25 per cent of the total voting rights in an undertaking; or the value of the total assets under management of an asset management company is 1 billion rupees or more; and (ii) the transaction relates to the acquisition of shares or assets with a value of 100 million rupees or more; or in case of an acquisition of shares in an undertaking, the acquirer will hold (together with shares previously held) more than 10 per cent of the voting shares in another undertaking.
Philippines	A mandatory pre-closing filing is required if: (i) the aggregate value of the assets in the Philippines that are owned by the target exceed 1 billion Philippine pesos; or (ii) the gross revenues from sales in, into or from the Philippines of the target exceeds 5 billion Philippine pesos.

* The Target Test de minimis exemption was updated on 27 March 2017.

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 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, and 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 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[9] 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.

In Thailand, a mandatory pre-closing filing will be required where the transaction will result in a dominant position; this would ordinarily require the combined firm to hold a post-transaction market share of at least 50 per cent in Thailand, with Thai revenues exceeding 1 billion baht.

9 An updated version of the Law on Competition in Vietnam will become effective on 1 July 2019, which will include a new set of filing thresholds. See Vietnam Issues New Law on Competition, available at: https://www.lexology.com/library/detail.aspx?g=e4bea7f2-e921-4517-9205-8886956b530c&l=80K65GM.

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. While Singapore only has a voluntary filing regime, it for the first time imposed a fine for failure to notify in Grab's acquisition of Uber's Southeast Asian businesses, as discussed above. So it might be better to describe the filing regime in Singapore as 'semi-voluntary'.

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; and *Infineon/International Rectifier Corp*, US$70 million) to more than US$2 billion (eg, *Actavis/Allergan*, US$2.1 billion; and *Halliburton/Baker Hughes*, US$3.5 billion).

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

The KFTC, the JFTC and the TFTC are all experienced, conservative regulators that generally follow (to a greater or lesser degree) their respective, established patterns. Certain regulators, however, including the SAMR (formerly 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 the SAMR (including formerly MOFCOM) and other Chinese state bodies have 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 the SAMR is chronically understaffed, and the SAMR's practice of consulting a multitude of stakeholders during the course of its review (including other relevant ministries, 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. Table 4, below, sets out the average time, in months, that the SAMR and 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 4: Average duration of the SAMR/MOFCOM review (conditional decisions 2012–2018)

Year	Average duration (months)	Longest review (months)
2012	7.9	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)
2016	5.4	6.0 (Abbott/St Jude)
2017	11.0	15.2 (ASE/SPIL)
2018	14.0	15.3 (Bayer/Monsanto)

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, the SAMR/MOFCOM reviews routinely extend well into Phase II and sometimes even into Phase III, inevitably leaving the SAMR/MOFCOM as the last approving jurisdiction in a 'no issues' transaction.

Under the simplified 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 the SAMR for such treatment (the rules will not automatically apply), and the SAMR retains the discretion in all cases to deny entry, notwithstanding the presence of one or more of the following factors. Nevertheless, for cases meeting one or more of the following characteristics, there is now a far clearer path to approval:
- in an overlap market, the combined market share of all parties is less than 15 per cent;
- in the case of a vertical relationship, the parties have individual market shares of less than 25 per cent in both the upstream and downstream markets;
- if there is no horizontal overlap or vertical relationship, no firm has an individual market share of 25 per cent or greater in any market relevant to the transaction;
- where parties establish a joint venture outside of China or acquire an undertaking outside of China, and that joint venture or target does not engage in economic activities within China; and
- where control over a joint venture changes character from joint control to sole control by one of its original parents.

From its introduction in May 2014, the simplified procedure has proven overwhelmingly popular and effective. The SAMR/MOFCOM accepts more than 250 cases into the procedure each year, and more than 90 per cent of these are approved within Phase I (indeed, in the third quarter of 2018, the average length of review for cases filed under the simplified procedure was only 15.5 days). The simplified procedure is not perfect, given the plenary discretion permitted to the SAMR to accept or reject an application, and given the attendant public notice period that permits the lodging of

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 (29 September 2018).

complaints by Chinese competitors and other stakeholders. However, as the numbers show, the SAMR/MOFCOM has shown an impressive early track record in using the simplified procedure to improve significantly its handling of 'no issue' cases since 2014.

Waivers and inter-regulator cooperation

Increasingly, in transactions requiring competition filings in multiple jurisdictions, regulators will seek to coordinate their reviews in terms of timing and substance. As a result of confidentiality protections in individual jurisdictions, ordinarily a waiver will be required from both parties for regulators to be able to share documents or exchange views on a particular transaction. In many cases, the reviews by 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. In Grab's acquisition of Uber's Southeast Asian businesses, the Southeast Asian regulators have had discussions and coordination during their review processes.

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,[11] 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'.[12] Also, Singapore has recently started entering into cooperation agreements

11 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.

12 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.

with Asia Pacific regulators. It signed an MoU with Indonesia's KPPU in 2018[13] and a cooperation agreement with the JFTC in 2017.[14] 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 Table 5, below.

Table 5: 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) 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

13 Please see MOU on Implementation of Competition Law between the Competition and Consumer Commission of Singapore (CCCS) of the Republic of Singapore and the Commission for the Supervision of Business Competition (KPPU) of the Republic of Indonesia (2018), available at: https://www.cccs.gov.sg/-/media/custom/ccs/files/about-ccs/ccs-international-affairs/asean/cccs-kppu-mou-signedenglish-version.pdf?la=en&hash=15EC3602A5DC2F2820347526DF875C1380393F18.

14 Please see Memorandum of Cooperation between the Competition Commission of Singapore and the Japan Fair Trade Commission (2017), available at: https://www.cccs.gov.sg/-/media/custom/ccs/files/about-ccs/ccs-international-affairs/international-fora/ccs-jftc-mou_signed.pdf?la=en&hash=1DB741102 22B4DF63CA492082FA9F4E2AB920784.

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 the SAMR, the KFTC, the JFTC and the TFTC tend to take a similar approach with regard to competitive analysis in cross-border cases.

One substantive area in which Asia-Pacific regulators have consistently shown keen interest is the assessment of transactions involving intellectual property, and in particular those touching on standard essential patents (SEPs) – that is, those patents declared indispensable for the design and manufacture of products adopting a universal standard, such as those articulated by a standard setting organisation. Issues relating to SEPs arise commonly in transactions in the technology, media and telecommunications industries, and these industries play a disproportionately large role in the national economies of Asia-Pacific countries. In addition, in 2017 and 2018, the Asia-Pacific regulators also increasingly shifted their focus to R&D and innovation 'markets', in line with reviews by European and other regulators.

As a result, the SAMR, the KFTC, the JFTC and the TFTC will pay particular attention to intellectual property, innovation and SEP issues. 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 which questions of technology, media and telecommunications are paramount.

Focus on global v local effects

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

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

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

The SAMR 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, the SAMR 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 used to be more inclined to undertake its analysis on the basis of global share data, but now appears to be more often insisting on Korean-specific market shares. 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 more educated regarding the importance of economic analysis, and it increasingly serves 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, the SAMR/MOFCOM has shown a willingness to use economic analyses, concentration analyses based on the Herfindahl-Hirschman Index or ratio of concentration for the top few suppliers, and even price increase forecasts to support its competitive analysis.[15] While parties' combined market shares will remain one of the key factors informing the SAMR'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.

15 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.

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 to ensure the continued protection of consumer welfare, both locally and worldwide. Notwithstanding this admirable worldwide goal, regulators in many jurisdictions either overtly or covertly use merger control to advance or achieve national industrial policy and economic development goals. These might include:

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

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

Certain jurisdictions, such as China, make clear the importance of industrial policy considerations in their review – indeed, unlike most other jurisdictions, China's Anti-Monopoly Law explicitly empowers the SAMR/MOFCOM to take into consideration the impact of a transaction on industrial policy and national economic development.[16] 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 the SAMR/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 Ministry of Industry and Information Technology (MIIT) will also be invited to comment on nearly every significant filing – the MIIT is the state agency responsible for, among other things, 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 the SAMR/MOFCOM will not unilaterally override a complaint from an important stakeholder, even if it is not grounded in traditional competitive issues. Amid the trade tensions with the US, the merger control regime in China could become another, less overt tool to use in pursuing its economic interests.

Although some have criticised Chinese merger control as being 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)

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

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 the SAMR/MOFCOM, rightfully perceived as the most active regulator with regard to the imposition of conditions for merger approval, has only imposed conditions in 38 transactions (and prohibited two more) out of more than 2,400 filings since 2008.

Nevertheless, regulators in Asia-Pacific regions 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 several years, the SAMR/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, the SAMR/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 on principles of fairness, rationality and non-discrimination (including not selling at 'unreasonably high' prices) (*Henkel/Tiande* (2012));
- ensure stable supply with reasonable price and quantity (*Linde/Praxair* (2018));

- ensure continued interoperability of products (*ARM/Giesecke/Gemalto NV* (2012); *Broadcom/Brocade* (2017));
- ensure licensing of SEPs at fair, reasonable and non-discriminatory terms (*Google/Motorola Mobility* (2012); *Microsoft/Nokia* (2014); *Nokia/Alcatel-Lucent* (2015));
- 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));
- ensure access and use of the digital agricultural platform of the combined entity, on fair, reasonable and non-discriminatory terms (*Bayer/Monsanto* (2018));
- no bundling or tying of certain products without justification (*Broadcom/Brocade* (2017); *Essilor/Luxottica* (2018); *United Technologies Corporation/Rockwell Collins* (2018));
- no exclusivity clause imposed on downstream companies preventing them from purchasing from the combined entity's competitors (*Dow/DuPont* (2017); *Essilor/Luxottica* (2018)); and
- no false or misleading advertising (*HP/Samsung* (2017)).

The SAMR/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). Also, in *Praxair/Linde* (2018), the SAMR required divestment of equity in four joint ventures located in China.

The SAMR/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 MOFCOM, the KFTC and the TFTC all required their own licensing-based remedies to approve the transaction.

Moreover, in *Seagate/Samsung* (2011) and *Western Digital/Hitachi* (2012) hard-disk drive cases, MOFCOM not only adopted the same structural remedies imposed in the US and EU, but also imposed its unique hold-separate remedy prohibiting operational integration between the merger firms until further approval was given. Although the initial waiting periods were indicated to be one year for *Seagate/Samsung* and two years for *Western Digital/Hitachi*, MOFCOM in fact did not permit integration of either transaction until October 2015.[17] 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), *MediaTek/MStar* (2013) and *ASE/SPIL* (2017).

In addition, it should be noted that in 2018, the SAMR has significantly enhanced its supervision of the behavioural remedies it has imposed in its recent conditional approvals, taking a much more active role and working closely with the monitoring trustees post-closing.

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

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.

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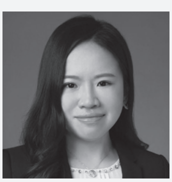

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