GCR INSIGHT

ASIA-PACIFIC
ANTITRUST REVIEW 2020

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ANTITRUST REVIEW 2020

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Preface

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 2020 provides an in-depth and exclusive look at the region. Preeminent practitioners have written about antitrust issues in nine jurisdictions, as well as one regional overview for merger control. The edition includes updates to 16 chapters and adds three new ones: two chapters on merger control in India and Vietnam, and another on leniency in India. 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 executives of Hong Kong's Competition Commission and Singapore's Competition and Consumer Commission. Other experts look at a range of subjects, including abuse of dominance and vertical agreements in China and e-commerce in Japan.

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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London
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Overview: Merger Control

Andrew L Foster and Kexin Li
Skadden, Arps, Slate, Meagher & Flom LLP

Nearly every global transaction of significant size will be subject to merger control reviews in multiple jurisdictions across the Asia-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 impacts not only jurisdictional questions of where to file, but also the ongoing management of a multi-jurisdictional review, including filing preparation, anticipation of review timelines, merits review and even remedies negotiations.

The list of likely filing jurisdictions in the Asia-Pacific continues to grow. In 1990, fewer than 12 jurisdictions worldwide had merger control laws;[1] today, more than 120 jurisdictions have introduced merger control 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 continued to introduce new competition law in each member state, with new merger control regimes in Brunei, Cambodia, Laos, Malaysia, and Myanmar joining those already established in Singapore, Indonesia, the Philippines, Thailand 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 this *Asia-Pacific Antitrust Review*) and local counsel should be consulted in each jurisdiction in which a filing is required. This chapter sets forth a general

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

2 Trends In Merger Control 2015, International Financial Law Review, https://www.iflr.com/Article/3440049/Trends-in-merger-control-2015.html.

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.

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overview of the various regimes in the Asia-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 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[5]
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[6]	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

5 While the amendment to the Competition Law has not been effective yet, it is expected that upon the enactment of the amendment, Indonesia will adopt a mandatory pre-closing filing regime.

6 Although formally a voluntary regime, Singapore does show some of the characteristics of a mandatory regime, as failures to apply for pre-closing approval can in some cases lead to fines and other penalties.

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Jurisdiction	Regulator	Mandatory or voluntary	Pre- or post-closing
Vietnam	Vietnam Competition Authority (VCA)	Mandatory	Pre-closing[7]

* 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 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 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 South Korea 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 the near future. In addition, Thailand's OTCC has introduced a post-closing filing obligation for

7 Vietnam adopted a New Competition Law on 12 June 2018. The New Competition Law entered into effect on 1 July 2019, replacing the Competition Law of 2004. However, the implementation decrees have not yet all been released. Until the new Competition Authority is established and the implementation decrees are promulgated under the New Law, the New Law's provisions are not applicable and the new merger control regime is not in effect.

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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 of the KPPU taking actions to impose remedies or even unwind a transaction after implementation.[8] 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 the 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.

While jurisdictions with post-closing obligations will not impact a transaction's 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 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

8 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.

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the closing, close scrutiny by the antitrust authorities in Singapore, Vietnam, the Philippines, Indonesia and Malaysia 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).[9] The Philippine Competition Commission (PCC) 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.[10] Also in the Philippines, Grab was ordered to address issues related to service quality and pricing. On 18 December 2019, the PCC imposed a fine of 16.15 million pesos on Grab Philippines for violating its price and service quality commitments during the fourth quarter of the initial undertaking, 'marking the completion of PCC's first year of monitoring Grab on its voluntary commitments'.[11]

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 that expert advice, but does provide a high-level overview to assess filings 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, one must first determine whether the deal structure constitutes a reportable transaction within 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 confer control upon an acquiring company or result in an acquisition of voting rights above a particular threshold level.

Control itself, in the antitrust context, 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.

9 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.

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

11 Please see: https://phcc.gov.ph/press-releases/pcc-grab-fine-16-15m-eod-sdf-q4/.

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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), 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.

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.[12]

Joint ventures can pose complex issues with regard to reportability, particularly in the Asia-Pacific region. In most jurisdictions around the world (Including Singapore), joint ventures will only trigger a filing requirement where the venture is expected to be of a 'full-function' character – that is, performing 'all the functions of an autonomous economic entity' on a 'lasting basis'. Thus, a joint venture established solely 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. In many Asian jurisdictions, however, no such exemption applies, a practice change that can surprise even sophisticated European and US advisers.

While acquisition of 50 per cent or more of a target's voting rights will ordinarily 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 sets out the treatment of minority investments in the major Asia-Pacific jurisdictions.

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

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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.[13]
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 if the acquirer post-transaction will acquire control or even material influence[14] over the target.
Philippines	Reportable where the acquirer will have the ability to substantially influence or direct the actions or decisions of the target, whether by contract, agency or otherwise.
Singapore	Reportable if the investment confers sole or joint control (ie, decisive influence) over a target's strategic decisions.

13 China's SAMR on 2 January 2020 released draft amendments to the Anti-Monopoly Law for public comments. The draft amendments define 'control' as the 'right or actual status that an undertaking directly or indirectly, solely or jointly, has or may have to impose decisive influence on the production and operation activities or other major decisions of other undertakings'.

14 Please note that the CCI Interprets 'control' very broadly. The CCI ruled that control is 'the ability to exercise decisive influence over the management or affairs whether such influence is exercised by way of majority shareholding, veto rights or contractual covenants.' CCI ruling in the Independent Media Trust case, reported by CMS Cameron McKenna, International Law Office Newsletter (31/3/2014). The CCI has also considered cases of negative control given to minority shareholders as a result of veto rights over strategic commercial decisions (such as approval of business plans, budgets and operating plans; setting up new offices in other cities or expanding to new cities; appointing key managerial positions, including the terms of their employment and compensation; and starting of new lines of business or discontinuing a line of business). Although there is the minority acquisition exemption on acquisition of less than 25 per cent of the total shares or voting rights of the target, the CCI has interpreted these rules very narrowly, finding ways to reach acquisitions of shares below 25 per cent on the ground that they were not realised solely in the ordinary course of business or for investment purposes only.

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Jurisdiction	Treatment of minority investments
Vietnam	Reportable if the buyer has more than 36 per cent of the charter capital (this includes voting and non-voting shares) of the target or ownership at a level sufficient to make decisions on important matters of financial policies, appointments or dismissal of management and operations of the target, or has the right to make such decisions under a pre-acquisition contractual arrangement between the parties.[15]
Australia	Reportable if control is conferred, and 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, p 59.

How are the specific thresholds to be applied?

If a transaction is reportable, the parties must then 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 its 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 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.

15 Please refer to footnote 7 on the pending implementation of Vietnam's new Competition Law.

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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: ▪ 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 ▪ 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: ▪ 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 ▪ 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.

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Jurisdiction	Financial filing thresholds for share acquisitions
Philippines	A mandatory pre-closing filing is required if both 'Size of the Party' threshold and 'Size of the Transaction' threshold are met. The size of the Party threshold is met if the following exceed 5.6 billion Philippine pesos: ▪ the aggregate annual gross revenues in, into or from the Philippines of at least one of the acquiring or acquired entities (and its group at the ultimate parent level); or ▪ the aggregate gross value of the assets in the Philippines of at least one of the acquiring or acquired entities (and its group at the ultimate parent level). The size of the transaction threshold is met if the value of the transaction exceeds 2.2 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 local counsel is essential. In calculating revenues, these generally include the consolidated net sales to third-party customers made in the most recently completed financial year, allocated according to the location of the customer.

Similarly, each jurisdiction tends to take its own approach on how to determine 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 added complexities, 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, only Taiwan and Thailand[16] 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,

16 Vietnam used to have market share thresholds as well. However, please refer to footnote 7 on the pending implementation of Vietnam's new Competition Law.

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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.

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 thresholds vary by jurisdiction. In Australia, a filing is 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 across multiple jurisdictions, the overall impact on the potential transaction timeline is of key importance. Accurately anticipating a review 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.

The anticipated timing of approvals also plays 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 and 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.

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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 statutory timelines. Certain regulators, however, including SAMR (formerly MOFCOM) and the CCI, can be far less predictable.

For example, reviews in China ordinarily take significantly longer than comparable reviews in other jurisdictions, although SAMR (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 or to the end of Phase II. The Anti-Monopoly Bureau of SAMR is chronically understaffed and SAMR's practice of consulting a multitude of stakeholders during the course of an ordinary procedure review adds time and complexity to every review. For cases with serious competition or industrial policy concerns, reviews can last over a year. Table 4 sets out the average time, in months, that SAMR/MOFCOM required to conditionally approve transactions under review in the past four years (from the date of initial submission to the date of approval).

Table 4: Average duration of SAMR/MOFCOM review (conditional decisions 2012–2019)

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*)
2019	12.9	18.1 (*Zhejiang Garden Bio-chemical High Tech/Royal DSM JV*)

The CCI's review is similarly unpredictable, albeit for different reasons. With no Phase I and 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.

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Simplified procedure versus 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. However, in 2014, China introduced a new simplified procedure[17] 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, SAMR/MOFCOM reviews routinely extend well into Phase II and sometimes even into Phase III, inevitably leaving 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 SAMR for such treatment (the rules will not automatically apply) and 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.

17 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).

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From its introduction in May 2014, the simplified procedure has proven overwhelmingly popular and effective. SAMR/MOFCOM accepts more than 250 cases into the simplified procedure each year, and more than 90 per cent of these are approved within Phase I (indeed, in the third quarter of 2019, the average length of review for cases filed under the simplified procedure was only 18.5 days). The simplified procedure is not perfect, given the plenary discretion permitted to SAMR to accept or reject an application, and given the attendant public notice period that permits the lodging of complaints by Chinese competitors and other stakeholders. However, as the numbers show, SAMR/MOFCOM have shown an impressive early track record in using the simplified procedure to improve significantly its handling of 'no issue' cases since 2014.

In South Korea, based on the amendments on 30 June 2015 to the Merger Review Guidelines, if the parties voluntarily notify a transaction before the statutory triggering event and the KFTC determines that the transaction does not raise anticompetitive concerns,[18] the KFTC will review the transaction when it is formally notified (after the statutory triggering event) under a simplified review process in 15 calendar days. In this simplified review, the KFTC only verifies the accuracy of the information provided in the filing without engaging in an in-depth competitive assessment. The Guidelines do not supersede the law and thus the KFTC still has the discretion to use the full review period (30 calendar days with a possible extension of up to 90 additional calendar days).

In India, the Amendments to the Combinations Regulations effective 15 August 2019 introduced a Green Channel Notification Procedure pursuant to which qualifying transactions are automatically approved upon receipt by the parties of an acknowledgment of receipt of the filing issued by the CCI. In these cases, the parties do not have to wait for CCI approval before implementing their transactions. The Green Channel Notification Procedure applies only to transactions that do not involve any form of 'overlaps' (vertical, horizontal or complementary) between the activities of the parties. Parties have to conduct a self-assessment to determine whether they meet the strict test set forth in the Amendments to the Combinations Regulations to conclude that the transaction is truly a 'no overlap' transaction.

18 The following transactions are presumed not to be anticompetitive and can be reviewed under the simplified procedure:

- conglomerate mergers where no product or service substitutability exists between the parties due to the particular nature of the relevant market;
- business combinations between affiliates;
- transactions in which a controlling relationship is not established between parties;
- participation in the incorporation of a private equity fund pursuant to the Indirect Investments Act;
- business combination of a securitisation specialty company pursuant to the Asset Securitization Act;
- participation in the incorporation of a ship investment company pursuant to the Ship Investment Companies Act;
- conglomerate mergers by small or medium-sized enterprises (ie, companies that do not belong to a business group whose consolidated total assets or turnover exceeds 2 trillion Korean won); and
- offshore joint ventures that are not expected to have any effect on the Korean market.

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Waivers and inter-regulator cooperation

Increasingly, in transactions requiring competition filings in multiple jurisdictions, regulators will seek to coordinate their reviews in 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 important signposts from which other jurisdictions can navigate their individual reviews. Granting waivers to permit coordination can increase 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,[19] 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'.[20] On 23 May 2019, 27 May 2019 and 20 November 2019, SAMR signed a memorandum of understanding with the KFTC,[21] the JFTC[22] and the PCC[23] respectively to enhance cooperation on antitrust enforcement. Singapore has also recently started entering into cooperation agreements with Asia-Pacific regulators. The CCS signed an MOU with Indonesia's KPPU in

19 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.

20 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.

21 See: http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=8181.

22 See: https://www.jftc.go.jp/en/pressreleases/yearly-2019/May/190527.pdf.

23 See: https://phcc.gov.ph/press-releases/pcc-samr-mou/.

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2018[24] and a cooperation agreement with the JFTC in 2017.[25] Thus, in Grab's acquisition of Uber's Southeast Asian businesses, the Southeast Asian regulators all discussed and coordinated extensively during their respective review processes.

The most critical agreements remain those between the Asia-Pacific regulators and the US agencies and EC, respectively. These agreements are set forth in Table 5.

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

24 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.

25 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.

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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 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 2019, the Asia-Pacific regulators continued to increasingly shift their focus to R&D and innovation 'markets', in line with reviews by European and other regulators.

As a result, SAMR, the KFTC, the JFTC and the TFTC all 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 versus 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 the US or the EU, or both, in addition to requiring filings in the Asia-Pacific. 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 the Asia-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.

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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, 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. Beginning in 2019, the TFTC has started to take increase its scrutiny of foreign-to-foreign transactions, even where the target may have a very limited presence in Taiwan.

The KFTC also increasingly insists on the provision of Korea-specific market shares, in addition to global shares. The KFTC thus carefully considers the concerns of Korean customers and suppliers 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 recognise 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, 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.[26] While parties' combined market shares will remain one of the key factors informing 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 and India 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'

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26 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.

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conclusions. Also, starting in 2019, the TFTC has begun to focus on its own economic analysis and frequently request profit margin data from filing parties to conduct its own Gross Upward Pricing Pressure Index (GUPPI) analysis even in non-issue cases.

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 SAMR/MOFCOM to take into consideration the impact of a transaction on industrial policy and national economic development.[27] 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 (CFIUS) in the US) may take into account industrial policy concerns for the US, while the European Commission – though 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 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 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.

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

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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) 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 for 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 SAMR, Asia's most active regulator with regard to the imposition of conditions for merger approval, has only imposed conditions in 44 transactions (and prohibited two more) out of more than 2,900 filings since 2008.

Nevertheless, Asia-Pacific regulators 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, SAMR 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, 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));

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- ensure supply to downstream customers on principles of fairness, rationality and non-discrimination (including not selling at 'unreasonably high' prices) (*Henkel/Tiande* (2012); *KLA/Orbotech* (2019); *II-VI/Finisar* (2019));
- 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));
- ensure no bundling or tying of certain products without justification (*Broadcom/Brocade* (2017); *Essilor/Luxottica* (2018); *United Technologies Corporation/Rockwell Collins* (2018); *KLA/Orbotech* (2019));
- ensure no exclusivity clause imposed on downstream companies preventing them from purchasing from the combined entity's competitors (*Dow/DuPont* (2017); *Essilor/Luxottica* (2018));
- ensure no false or misleading advertising (*HP/Samsung* (2017));
- keep a non-full-function joint venture's operations separate and independent from its parents (*Zhejiang Garden Bio-chemical High-Tech/Royal DSM JV* (2019)); and
- ensure no supply of an intermediary product to other competitors in the relevant market (*Novelis/Aleris* (2019)).

SAMR 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), SAMR required divestment of equity in four joint ventures located in China.

SAMR 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. In 2019, SAMR even imposed remedies on a non-full function joint venture between Zhejiang Garden Bio-chemical High-Tech and Royal DSM – which was particularly noteworthy because without a full-function character, the joint venture was not truly customer-facing, making it hard to understand the potential harm to consumers.

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

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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.[28] 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), *ASE/SPIL* (2017), *TTS/Cargotec* (2019) and *II-VI/Finisar* (2019).

In addition, starting from 2018, 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.

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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28 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.

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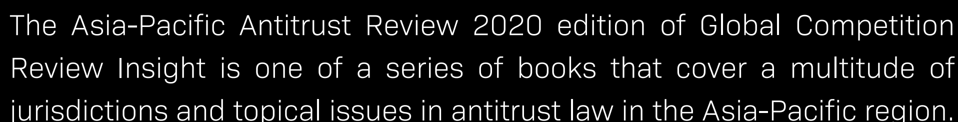

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