GCR INSIGHT

ASIA-PACIFIC
ANTITRUST REVIEW 2021

# ASIA-PACIFIC
ANTITRUST REVIEW 2021

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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.

Complementing our news coverage, the *Asia-Pacific Antitrust Review 2021* provides an in-depth and exclusive look at the region. Pre-eminent practitioners have written about antitrust issues in eight jurisdictions, including a new chapter on China, expanded coverage of Japan in antitrust litigation and settlements, and two new chapters on South Korea. In addition, we have expanded the scope of the regional overviews to encompass cartels and abuse, and pharmaceuticals. The authors are, unquestionably, among the experts in their field within these jurisdictions and the region.

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 South 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.

**Global Arbitration Review**
London
*March 2021*



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# Overview: Merger Control

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

**In summary**

Every transaction of significant size triggers cross-border merger control reviews across the Asia-Pacific region. Coordinating such reviews across varying regimes can significantly impact deal timing, certainty and value. This includes not only jurisdictional questions of where to file, but also ongoing management of a multi-jurisdictional review, including filing preparation, review timelines, merits review and even remedies negotiations.

**Discussion points**

- Merger control filing assessment;
- reportable transactions for merger control;
- coordination of merger control substantive review;
- coordination of merger control review time lines; and
- negotiation of merger remedies.

**Referenced in this article**

- Australian Competition and Consumer Commission (ACCC);
- Anti-Monopoly Bureau of the State Administration for Market Regulation (SAMR);
- Competition Commission of India (CCI);
- Commission for the Supervision of Business Competition (KPPU);
- Japan Fair Trade Commission (JFTC);
- Commerce Commission (NZCC);
- Philippines Competition Commission (PCC);
- Competition and Consumer Commission of Singapore (CCS);
- Korean Fair Trade Commission (KFTC); and
- Taiwan Fair Trade Commission (TFTC).



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

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*, www.iflr.com/Article/3440049/Trends-in-merger-control-2015.html.

3 The 10 ASEAN Member States include Brunei, Indonesia, Cambodia, Laos, Malaysia, Myanmar, the 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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**Table 1: Overview of competition regimes**

| Jurisdiction | Regulator | Mandatory or voluntary | Pre- or post-closing |
|---|---|---|---|
| Australia | ACCC | Voluntary | N/A |
| China | SAMR* | Mandatory | Pre-closing |
| India | CCI | Mandatory | Pre-closing |
| Indonesia | KPPU | Mandatory | Post-closing** |
| Japan | JFTC | Mandatory | Pre-closing |
| New Zealand | NZCC | Voluntary | N/A |
| Pakistan | Competition Commission of Pakistan | Mandatory | Pre-closing |
| Philippines | PCC | Mandatory | Pre-closing |
| Singapore | CCS | Voluntary¶ | N/A |
| South Korea | KFTC | Mandatory | Pre-closing/ post-closing¶¶ |
| Taiwan | TFTC | Mandatory | Pre-closing |
| Thailand | Office of the Trade Competition Commission | Mandatory | Pre-closing/ post-closing |
| Vietnam | Vietnam Competition Authority | Mandatory | Pre-closing |

* 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.

** 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.

¶ 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.

¶¶ 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 won or the transaction does not involve a share acquisition transacted on an open stock exchange market.

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.

Merger notifications to the ACCC, NZCC and the CCCS 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



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divestiture of already-acquired shares and assets or fines for giving effect to a merger that lessens competition, or a combination of these. As a result, the decision on whether to file should not be taken lightly and an attempt to shorten a transaction's closing timeline by deciding not to file may backfire if a regulator opens an investigation and subsequently takes action against the parties.

## Filing assessment in mandatory filing jurisdictions

Other merger control chapters in this Review provide detailed information on individual filing requirements for their specific jurisdictions. This chapter will not duplicate that expert advice. 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.

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. However, many Asia-Pacific regulators prefer instead to rely purely on whether a transaction results in the acquisition of above a certain shareholding threshold of a target's voting rights. Thus, depending on the jurisdiction, transactions may qualify as reportable not only if they involve mergers or straightforward acquisitions of control, but also if they involve acquisitions of minority interests or joint ventures. 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.[5]

Table 2 sets out the treatment of minority investments (including joint ventures) in the major Asia-Pacific jurisdictions.

5 See, for example, the 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.* |
| Japan | Reportable if:<br>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<br>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 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. |
| Vietnam | Reportable if the acquisition is sufficient to control or influence the acquired enterprise, or all or one of the business lines of the acquired enterprise. |
| 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. |

* On 2 January 2020, SAMR 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'.

** 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. 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.



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Certain jurisdictions also look to market thresholds to determine whether filings are necessary. Of the mandatory, pre-closing filing jurisdictions in the Asia-Pacific, only Taiwan and Thailand[6] 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.

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, for the first time it imposed a fine for failure to notify in Grab's acquisition of Uber's Southeast Asian businesses. 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.

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

6 Vietnam used to have market share thresholds as well. However, please refer to footnote ** of Table 2 on the pending implementation of Vietnam's new Competition Law.



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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.

## Simplified procedure versus ordinary procedure

China, South Korea, and India have introduced forms of a simplified procedure which can accelerate review timing. In China, for cases meeting one or more of the following characteristics, more than 90 per cent 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):

- in an overlap market, the combined market shares are less than 15 per cent;
- in a vertical relationship, the parties' individual market shares are less than 25 per cent in upstream and downstream markets;
- if there is no overlap or vertical relationship, no firm has an individual market share of 25 per cent or greater in any relevant market;
- where parties establish a joint venture outside China or acquire an undertaking outside 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.

In South Korea, if the parties voluntarily notify a transaction before the statutory triggering event and the KFTC determines that the transaction does not raise anticompetitive concerns,[7] 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. The Guidelines do not supersede the law and thus the KFTC still has the discretion to use the full review period.

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

7 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 Securitisation 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 won); and
- offshore joint ventures that are not expected to have any effect on the South Korean market.



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implementing their transactions. The Green Channel Notification Procedure only applies to transactions that do not involve any form of 'overlaps' (vertical, horizontal or complementary) between the activities of the parties.

### Waivers and inter-regulator cooperation

Increasingly, regulators will seek to coordinate their reviews in timing and substance. 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 US agencies and the European Commission signal key areas of interest, allowing other regulators to focus their own reviews. Granting waivers can increase the efficiency of a cross-border review, as the detailed analyses 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, and can 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 lead to exposure of confidential information outside of the review process.

## 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. Partly as a result of global coordination and increasing substantive convergence, regulators in 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 show keen interest is issues 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. 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; however, it is crucial for parties with important intellectual property portfolios (and especially SEPs) to carefully consider the potential competitive effects that the transaction could create when seen through the eyes of regulators for which questions of technology, media and telecommunications are paramount.



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## 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 US Department of Justice, the US Free Trade Commission and the European Commission (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, South Korea, Japan and Singapore all exist on a continuum between lesser and greater acceptance of a worldwide analysis.

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. Similarly, the TFTC will ordinarily request Taiwan-specific market data to review. Beginning in 2019, the TFTC has started to 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 South Korea-specific market shares, in addition to global shares. The KFTC thus carefully considers the concerns of South 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), 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, 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 where it serves as a complement to traditional structural analyses. For example, in China, market structure continues to play the paramount role. Nevertheless, in many recent conditional



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approvals, SAMR 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.[8] 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, South 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' conclusions. Also, starting in 2019, the TFTC began 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 analysis even in non-issue cases.

## 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 48 transactions (and prohibited two more) out of more than 3,000 filings since 2008.

Nevertheless, Asia-Pacific regulators do sometimes require remedies that would be unacceptable to, or considered unnecessary by, regulators in other jurisdictions. If 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, in terms of both timing and substance, 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. SAMR has shown itself more flexible in accepting behavioural remedies that its US and EU counterparts might reject, including most importantly:

- obligations to ensure stable supply and sufficient product choice on fair, reasonable and non-discriminatory terms to Chinese customers (see, eg, *KLA/Orbotech* (2019), *II-VI/Finisar* (2019), *NVIDIA/Mellanox* (2020), *Infineon/Cypress* (2020), *ZF/WABCO* (2020) and *Cisco/Acacia* (2021));

8 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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- ensuring continued interoperability of products (*ARM/Giesecke/Gemalto NV* (2012), *Broadcom/Brocade* (2017), *NVIDIA/Mellanox* (2020) and *Infineon/Cypress* (2020)); and
- ensuring no bundling or tying of certain products without justification (*Broadcom/Brocade* (2017), *UTC/Rockwell Collins* (2018), *KLA/Orbotech* (2019), *NVIDIA/Mellanox* (2020), *Infineon/Cypress* (2020) and *Cisco/Acacia* (2021)).

SAMR and other Asia-Pacific regulators have, in the past, imposed stringent remedies where the EC has concluded that remedies were not required. For example, 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 difficult 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 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.[9] 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).

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.

9 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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