

Navigating Icebergs: A Brief Survey of Non-Reportable Transaction Enforcement Around the World

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While antitrust investigations of transactions falling below the thresholds set for mandatory merger control filings (“non-reportable” transactions) is a well-known and entrenched part of U.S. antitrust oversight, a number of other jurisdictions around the globe also have antitrust authority over non-reportable transactions. As mergers and acquisitions are increasingly global, this poses a challenge to companies and their respective antitrust counsel at the outset of any transaction. Today, there are more than 150 merger control regimes around the world, nearly double the number of merger regimes in existence a little over ten years ago.¹ Many jurisdictions outside the United States now allow for, and even seek out, investigations of acquisitions that are not subject to mandatory filings. For example, while the European Commission does not have jurisdiction to investigate and challenge non-reportable transactions, individual Member States within the European Union do, and there are many other jurisdictions with similar authority.² As a result, merging parties’ risk assessment should account for the possibility that, even where a transaction falls below filing thresholds, antitrust regulators may investigate a proposed or consummated transaction.

It is common practice for parties to evaluate merger control filing obligations at the outset of a transaction by evaluating the revenues, assets, and (if required) market shares of the parties. However, this assessment does not necessarily identify jurisdictions where notification is not required. Instead, such an assessment can detect where there may still be antitrust risk and the possibility of a non-reportable merger investigation under local law.

The decision to investigate a non-reportable transaction is generally not informed by predetermined thresholds but hinges more on fact intensive elements that are akin to market share thresholds.³ As described in more detail below, the following factors may indicate the degree of

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¹ Peter Alexiadis et al., *Merger Control: “Around the World in 80 Days: Management of the Merger Review Process of Global Deals,”* 19 Bus. L. INT’L 201, 202 (2018). In 2008, approximately 80 countries had merger control regimes. *Id.* The authors thank the following individuals for providing valuable insight into non-reportable transaction enforcement in specific jurisdictions: Joyce Midori Honda and Thales de Melo e Lemos of Cescon Barriou (Brazil), Jason Gudofsky of McCarthy Tétrault LLP (Canada), Luis Marín Tobar of LEXVALOR Abogados (Ecuador), Henri Capin-Gally, Roman Gonzalez Melo, and German Macias Salas of White & Case LLP (Mexico), Tamara Dini and Marion Lautar of Bowmans (COMESA), Philip Andrews and Ciarán Donohue of McCann FitzGerald (Ireland), Marius Juonys and Linas Petronaitis of Ellex Valiunas (Lithuania), Aksel Joachim Hageler and Lennart Garnes of SANDS (Norway), Zhan Hao, Song Ying, and Zhan Yang of Anjie Law Firm (China), Toshio Dokei, Takako Onoki, and Hideo Nakajima of White & Case LLP (Japan), Taekyu Kang, Juhyun Park, and Ji-Yeun Hong of Kim & Chang (South Korea).

² Organisation for Economic Co-operation and Development, *Investigations of Consummated and Non-Notifiable Mergers*, Submission of the European Union to the OECD Working Party No. 3 on Co-operation and Enforcement 3 (Feb. 12, 2014), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD\(2014\)19&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2014)19&docLanguage=En).

³ Some have argued that market share thresholds are impractical as a default notification threshold without adequate antitrust agency guidance. Hugh Hollman & Benjamin Geisel, *Six Easy Steps to Better Merger Control Reviews: Recommendations for Competition Agencies Across the Globe* 4, ANTITRUST SOURCE (Dec. 2019), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2018-2019/atsource-december2019/dec19_full_source.pdf (“Market share tests are burdensome because they require the parties to expend con-

likely antitrust scrutiny of a non-reportable transaction: (1) high market shares, (2) a unique local nexus, (3) customer opposition, (4) the nature of the product, (5) nascent competition, (6) high barriers to entry, (7) national champions, and/or (8) the elimination of a close or disruptive competitor.

The following is a brief survey of a selection of geographically diverse jurisdictions that have the authority to investigate and initiate enforcement actions into non-reportable transactions. Included are jurisdictions from the Americas, Europe, Africa, and Asia that have a track record in initiating such investigations.

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The Americas

United States. Nearly 45 years ago, the United States enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), which created a premerger notification framework for transactions. But the U.S. antitrust agencies, the Department of Justice and Federal Trade Commission, are empowered to challenge transactions before or after consummation where “the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.”⁴

Under Section 7 of the Clayton Act, transactions can be challenged by the U.S. antitrust agencies, individual state attorneys general, and private plaintiffs.⁵ In addition, the FTC can challenge mergers that lead to unfair methods of competition in violation of Section 5 of the FTC Act.⁶ There are no minimum requirements for deal value or limitations on enforcement based on how long the deal has been closed.⁷ For example, U.S. antitrust agencies challenged a non-reportable transaction valued at \$3.1 million,⁸ as well as a transaction where eight years had passed between closing and enforcement.⁹ Not all investigations ultimately result in enforcement actions but even the investigations alone into non-reportable transactions can be costly and time-consuming.

In recent years, the U.S. antitrust agencies have shown an increased willingness to investigate and challenge non-reportable transactions.¹⁰ Between 2009 and 2013, the DOJ investigated 73 non-reportable transactions, which represented 20 percent of all DOJ merger investigations during that same period.¹¹ Since December 2008, the DOJ and FTC have challenged more than 30

siderable effort to define relevant markets (often absent any clear market definition precedent) and assess the parties' presence in such markets prior to even knowing whether a transaction is notifiable or not.”).

⁴ 15 U.S.C. § 18.

⁵ *Id.*

⁶ 15 U.S.C. § 45.

⁷ Organisation for Economic Co-operation and Development, Investigations of Consummated and Non-Notifiable Mergers, Submission of the United States to the OECD Working Party No. 3 on Co-operation and Enforcement 8 (Feb. 25, 2014), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD\(2014\)23&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2014)23&docLanguage=En) (“In 1957, the Supreme Court upheld a 1949 DOJ suit challenging stock acquisitions that occurred in 1917-19, although Clayton Act challenges so many years after a transaction are exceptional.”).

⁸ Complaint, United States v. George's Foods, LLC, No. 5:11-cv-00043-GEC (W.D. Va. May 10, 2011), ECF No. 1.

⁹ Complaint at 4, Graco Inc., FTC No. 1010215 (Apr. 17, 2013).

¹⁰ D. Bruce Hoffman, *Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms*, Responses for the S. Comm. on the Judiciary Subcomm. on Antitrust, Competition Policy, and Consumer Rights (Oct. 8, 2019), <https://www.judiciary.senate.gov/imo/media/doc/Hoffman%20Responses%20to%20QFRs1.pdf> (“We have many sources to learn about non-reportable transactions. Our staff are experts in their industries, and they routinely monitor trade press to learn of non-reportable transactions, for instance by setting up news alerts. In other instances, we are contacted directly by customers, competitors, suppliers, or other market participants to alert us of pending deals. During our pending investigations, we hear about other deals during our contacts with industry members. We receive emails and phone calls from the public with tips.”).

¹¹ Leslie C. Overton, Non-reportable Transactions and Antitrust Enforcement, Remarks at the 14th Annual Loyola Antitrust Colloquium, Institute for Consumer Antitrust Studies (Apr. 25, 2014), <https://www.justice.gov/atr/file/517791/download>.

non-reportable transactions.¹² The COVID-19 pandemic has not hampered the antitrust agencies' enforcement efforts, as both agencies are remotely reviewing and investigating transactions.¹³ Instead of cutting back, the U.S. antitrust agencies are exercising increased vigilance in an effort to detect transactions that parties may try to “slip through” during the ongoing COVID-19 pandemic.¹⁴

Transactions that fall below the HSR Act's thresholds have been of particular interest in certain industries, including those more likely to involve nascent or potential competitors. In February, the FTC announced a broad probe for information related to non-reportable transactions entered into since 2010 by five major U.S. technology companies.¹⁵ Using its authority under Section 6(b) of the FTC Act, the FTC indicated that it intends to collect this information “to examine trends in acquisitions and the structure of deals, including whether acquisitions not subject to HSR notification might have raised competitive concerns, and the nature and extent of other agreements that may restrict competition.”¹⁶ The FTC's probe is twofold: it is examining consummated non-reportable transactions that “might raise antitrust concerns worthy of antitrust investigations,” while also deepening its “understanding of acquisition activity in important technology markets” to make future FTC “enforcement efforts more effective.”¹⁷ Some FTC commissioners have recommended conducting additional studies of non-reportable transactions across other industries.¹⁸

The following examples of recent U.S. antitrust enforcement actions taken against non-reportable transactions show that: (1) small transactions are not immune from antitrust scrutiny; (2) high market shares, even in narrowly drawn markets, are particularly relevant; (3) internal documents can be harmful from an antitrust perspective, even where there is no agency review; and (4) divestment or unwinding are likely remedies.

- In January 2020, the FTC challenged Axon Enterprise's consummated \$13 million acquisition of VieVu, which the FTC alleges is Axon's closest competitor for the sale of body-worn

¹² Ronan Harty & Mary Marks, *Merger Control—USA*, GETTING THE DEAL THROUGH (May 2020).

¹³ Press Release, Dep't of Justice, Justice Department Announces Antitrust Civil Process Changes for Pendency of COVID-19 Event (Mar. 17, 2020), <https://www.justice.gov/opa/pr/justice-department-announces-antitrust-civil-process-changes-pendency-covid-19-event>; Ian Conner, *Changes in Bureau Procedure During COVID-19 Coronavirus Pandemic*, COMPETITION MATTERS (Mar. 16, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/changes-bureau-procedure-during-covid-19-coronavirus>.

¹⁴ Ian Conner, *supra* note 13 (“The protection of competition, and the welfare of American consumers, is as important now as ever.”); Ian Conner, *Resuming Early Termination of HSR Reviews*, COMPETITION MATTERS (Mar. 27, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/resuming-early-termination-hsr-reviews> (“[S]crutiny of anticompetitive transactions and practices will not be relaxed, notwithstanding the difficult circumstances caused by the coronavirus pandemic.”); Rohit Chopra (@chopraftc), TWITTER (Mar. 18, 2020, 7:19 PM), <https://twitter.com/chopraftc/status/1240417656941023234> (“Corporations shouldn't be able to slip big mergers through during national emergencies.”).

¹⁵ Press Release, Fed. Trade Comm'n, FTC to Examine Past Acquisitions by Large Technology Companies (Feb. 11, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies>.

¹⁶ *Id.*

¹⁷ Fed. Trade Comm'n, FAQs: Technology Platform 6(b) Study 1–2, FTC File No. P201201 (Feb. 11, 2020), https://www.ftc.gov/system/files/attachments/press-releases/ftc-examine-past-acquisitions-large-technology-companies/tech_platform_6b_draft_faqs_02-11-2020.pdf.

¹⁸ Statement of Commissioner Christine S. Wilson, Joined by Commissioner Rohit Chopra, Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders, FTC File No. P201201 (Feb. 11, 2020), https://www.ftc.gov/system/files/documents/reports/6b-orders-file-special-reports-technology-platform-companies/statement_by_commissioners_wilson_and_chopra_re_hsr_6b_0.pdf (encouraging FTC to consider similar 6(b) studies across other industries, such as the dialysis industry, to provide “a more complete understanding about the competitive effects of non-reportable mergers writ large”).

An 80 percent post-transaction market share will obviously pique the interest of U.S. antitrust agencies . . .

camera systems to large metropolitan police departments.¹⁹ Axon estimated that by June, its legal fees would already have reached \$8 million, or 60 percent of the overall transaction value.

- In December 2017, the FTC challenged Otto Bock's consummated September 2017 acquisition of Freedom Innovations, although the acquisition was non-reportable under the HSR Act.²⁰ The FTC alleged that Otto Bock, "the leading manufacturer and supplier of microprocessor prosthetic knees," was acquiring its "closest [and] most significant and disruptive competitor" in the market for microprocessor prosthetic knees. In November 2019, the FTC issued a final order upholding an Administrative Law Judge's finding that Otto Bock's post-merger 80 percent market share in the microprocessor prosthetic knees market would result in "higher prices and less innovation for amputee patients and prosthetic clinic customers."²¹ The FTC's Final Order required that Otto Bock divest the entire Freedom Innovation business.²² An 80 percent post-transaction market share will obviously pique the interest of U.S. antitrust agencies, which begs the question: were the parties aware that such a market definition would carry an 80 percent market share? If so, did the parties properly account for the risk of potential antitrust regulatory intervention?
- In December 2017, the DOJ challenged TransDigm's \$90 million acquisition of SCHROTH Safety Products.²³ TransDigm acquired SCHROTH Safety Products for \$90 million but the deal structure made it non-reportable under the HSR Act.²⁴ The merging parties developed, manufactured, and sold restraint systems used on commercial airplanes and airbags. The complaint alleged that TransDigm's acquisition of SCHROTH would eliminate its most significant competitor and lead to increased prices.²⁵ TransDigm and the DOJ settled the challenge through a divestiture of the entire SCHROTH business.²⁶
- In January 2013, the DOJ challenged Bazaarvoice's June 2012 acquisition of its competitor, PowerReviews, for \$168 million (only \$31 million in cash).²⁷ Both companies operated online product ratings and review platforms. The DOJ investigated and later sued in the U.S. District Court for the Northern District of California to unwind the transaction. The district court held

¹⁹ Press Release, Fed. Trade Comm'n, FTC Challenges Consummated Merger of Companies that Market Body-Worn Camera Systems to Large Metropolitan Police Departments (Jan. 3, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-challenges-consummated-merger-companies-market-body-worn>; Matthew Perlman, *Body Cam Maker Slams FTC with Constitutional Challenge*, LAW360 (Jan. 3, 2020).

²⁰ Complaint, Otto Bock HealthCare N. Am., Inc., FTC Docket No. 9378 (Dec. 20, 2017).

²¹ Commission Opinion at 2, Otto Bock HealthCare N. Am., Inc., FTC Docket No. 9378 (Dec. 20, 2017).

²² Final Order, Otto Bock HealthCare N. Am., Inc., FTC Docket No. 9378 (Dec. 20, 2017); Press Release, Fed. Trade Comm'n, FTC Commissioners Unanimously Find that Consummated Merger of Microprocessor Prosthetic Knee Companies Was Anticompetitive; Assets Must Be Unwound (Nov. 6, 2019), <https://www.ftc.gov/news-events/press-releases/2019/11/ftc-commissioners-unanimously-find-consummated-merger> ("The acquisition was not reportable under the Hart-Scott-Rodino Act. The Commission's order requires Otto Bock to divest the Freedom Innovations assets to an FTC-approved buyer.")

²³ Press Release, Dep't of Justice, Justice Department Requires TransDigm Group to Divest Airplane Restraint Businesses Acquired from Takata (Dec. 21, 2017), <https://www.justice.gov/opa/pr/justice-department-requires-transdigm-group-divest-airplane-restraint-businesses-acquired>.

²⁴ *Id.*

²⁵ Complaint, United States v. Transdigm Group Inc., No. 1:17-cv-02735 (D.D.C. Dec. 21, 2017), ECF No. 1.

²⁶ Proposed Final Judgment, United States v. Transdigm Group Inc., No. 1:17-cv-02735 (D.D.C. Dec. 21, 2017), ECF No. 2-1.

²⁷ Anthony Ha, *After Antitrust Suit, Bazaarvoice Sells PowerReviews to Review Site Viewpoints for \$30 Million*, TECHCRUNCH (June 4, 2014), <https://techcrunch.com/2014/06/04/bazaarvoice-sells-powerreviews/>.

that Bazaarvoice's 56–68 percent market share of the ratings and reviews platform market, as opposed to the merging parties' proposed market that also included blogs, forums, and social networks, established a prima facie violation of Section 7 of the Clayton Act.²⁸ The court relied heavily on the parties' own documents, which showed that they viewed themselves as each other's closest competitor and that they operated in a "duopoly."²⁹ Accordingly, the transaction "would eliminate Bazaarvoice's only meaningful commercial competitor."³⁰ In June 2014, Bazaarvoice announced its sale of PowerReviews for \$30 million in cash.³¹

Brazil. The Administrative Council for Economic Defense (CADE) in Brazil has authority to open investigations into transactions that fall below the mandatory notification thresholds pursuant to Article 88, Paragraph 7 of Law n° 12.529/2011. Law n° 12.529/2011 limits CADE's ability to require notification of non-reportable transactions to one year post closing and provides that CADE may analyze any kind of non-reportable transactions. CADE has also established a specific procedure for the notification of non-reportable transactions.³² CADE uses the Administrative Procedure to Investigate a Merger Filing to initiate notification of a non-reportable transaction by requiring the merging or merged parties to notify a transaction, even if it did not meet the statutory threshold. Since the institution of Law n° 12.529/2011 in May 2012, CADE has used its power to investigate or require notification of non-reportable transactions a few times and often acts after receiving complaints.

In February 2020, CADE's Tribunal required notification of the acquisition of control of Sacel—Serviços de Vigilância e Transporte de Valores—Eireli by Prosegur Brasil Transportadora de Valores e Segurança S.A., two companies that operate in the market of transportation and custody of valuables.³³ CADE learned about this transaction from a third party, which provided a timeline of mergers in the sector. According to CADE, the transaction may have resulted in a market share greater than 90 percent in a geographic market within Brazil. In addition, there were successive acquisitions of regional competitors by national competitors and complaints regarding lack of rivalry and coordination. A final decision on the merits is still pending.

In August 2018, CADE required notification of a non-reportable transaction in the pharmaceutical supplies industry between SM Empreendimentos Farmacêuticos and All Chemistry do Brasil, both of which supply pharmaceutical raw materials to compounding pharmacies.³⁴ In light of industry complaints of market abuse, CADE required notification because SM Empreendimentos had made successive acquisitions to significantly increase its market share.³⁵ According to CADE, the proposed transaction would have reduced competition and increased prices. In October 2018, CADE approved the merger, conditioning its approval on SM Empreendimentos' agreement

²⁸ See *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO, 2014 U.S. Dist. LEXIS 3284, at *118–131, *233–240 (N.D. Cal. Jan. 8, 2014).

²⁹ *Id.* at *9.

³⁰ *Id.* at *10.

³¹ *Ha*, *supra* note 27.

³² CADE Resolution n° 24/2019.

³³ Press Release, CADE, Prosegur deverá notificar aquisição de ativos da empresa Sacel ao Cade [Prosegur Must Notify the Acquisition of Assets of Sacel to Cade] (Feb. 5, 2020), <http://www.cade.gov.br/noticias/prosegur-devera-notificar-aquisicao-da-empresa-sacel-ao-cade>.

³⁴ All Chemistry do Brasil/SM Empreendimentos Farmacêutico, APAC n° 08700.006335/2017-83 (2018); Ambrogio Visconti, *Fagron's Acquisition of All Chemistry do Brasil Ltda*, GLOBAL LEGAL CHRON. (Nov. 27, 2017), <http://www.globallegalchronicle.com/fagrons-acquisition-of-all-chemistry-do-brasil-ltda/>.

³⁵ Press Release, CADE, Aquisição da All Chemistry do Brasil pela SM Empreendimentos Farmacêuticos terá que ser notificada ao Cade [Acquisition of All Chemistry do Brasil by SM Empreendimentos Farmaceuticos Will Have to Be Notified to CADE] (May 9, 2018), <http://www.cade.gov.br/noticias/aquisicao-da-all-chemistry-do-brasil-pela-sm-empreendimentos-farmaceuticos-tera-que-ser-notifi-cada-ao-cade> ("The joint action of these companies can result, among other effects, in decreasing competition and increasing prices. Thus,

not to engage in a transaction with any other distributor of pharmaceutical supplies and to submit any transaction for CADE approval for two years.

CADE also investigated a 2015 non-reportable transaction between Guerbet Produtos Radiologicos and Mallinckrodt do Brasil after receiving a complaint that the proposed transaction would have resulted in anticompetitive market concentration. Upon further investigation, CADE determined that a post-merger market share of at least 66 percent required a detailed analysis of the transaction. The parties notified the transaction in August 2016, and CADE unconditionally approved the transaction in June 2017.³⁶

Finally, the merger between Greca Distribuidora de Asfaltos, Betunel Indústria e Comércio, and Centro Oeste Asfaltos was notified by the parties, even though it did not meet the legal thresholds for mandatory notification. The parties preemptively notified CADE as the parties' revenues were close to the applicable turnover thresholds and they had relatively high market shares in the asphalt industry. Based on article 88, paragraph 7 of Law n° 12.529/2011, CADE's General-Superintendence decided to investigate the merger and ultimately approved it without restrictions in October 2014.³⁷

Canada. Section 92 of Canada's Competition Act gives the Commissioner of Competition authority to investigate and challenge mergers, including non-reportable mergers.³⁸ Pursuant to Section 97 of the Competition Act, this authority extends for one year after closing.³⁹ In May 2019, Canada unveiled its revamped Merger Intelligence and Notification Unit (MINU), which now has an expanded mandate to detect potentially anticompetitive non-reportable transactions,⁴⁰ as part of its "continued shift . . . towards greater scrutiny of non-notifiable mergers."⁴¹ The MINU has "a broader focus on active intelligence gathering on non-notifiable merger transactions that may raise competitive concerns."⁴² After less than two months of activity under its broader mandate, the MINU had already identified two "potentially problematic transactions."⁴³

the uncertain impact resulting from the operation justifies a more detailed analysis of its effects on the market, requiring the identification and possible control of possible damage to the competitive environment.").

³⁶ Despachos Do Superintendente-Geral, n° 08700.005959/2016-21 (June 5, 2017), <https://www.jusbrasil.com.br/diarios/149098593/dou-secao-1-06-06-2017-pg-48>.

³⁷ Merger Filing No. 08700.006497/2014-06.

³⁸ Competition Act (Canada) § 92, R.S.C. 1985, c. C-34 (where "the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially" the tribunal may take action, such as dissolving an already completed merger or blocking a proposed merger); Press Release, Canada Competition Bureau, Competition Bureau Enhances Information-Gathering Efforts on Non-Notifiable Mergers (Sept. 17, 2019), <https://www.canada.ca/en/competition-bureau/news/2019/09/competition-bureau-enhances-information-gathering-efforts-on-non-notifiable-mergers.html> ("Mergers of all sizes and in all sectors of the economy are subject to review by the Bureau to determine whether they are likely to raise significant competition concerns.").

³⁹ Competition Act (Canada) § 97, R.S.C. 1985, c. C-34.

⁴⁰ Matthew Boswell, No River Too Wide, No Mountain Too High: Enforcing and Promoting Competition in the Digital Age, Remarks at the Canadian Bar Ass'n Competition Law Spring Conference 2019 (May 7, 2019), <https://www.canada.ca/en/competition-bureau/news/2019/05/no-river-too-wide-no-mountain-too-high-enforcing-and-promoting-competition-in-the-digital-age.html> ("Also in mergers, we have expanded the role of the Merger Intelligence and Notification Unit to include a broader focus on intelligence gathering. This will assist in fulfilling our mandate to detect, investigate and challenge mergers that could breach the Act.").

⁴¹ Jessica Rutledge, *Competition Bureau Emphasizes Its Expanded Intelligence Gathering Role for Non-Notifiable Mergers*, STIKEMAN ELLIOTT (Sept. 20, 2019), <https://www.stikeman.com/en-ca/kh/competitor/Competition-Bureau-Emphasizes-its-Expanded-Intelligence-Gathering-Role-for-NonNotifiable-Mergers>.

⁴² Press Release, Canada Competition Bureau, Competition Bureau Enhances Information-Gathering Efforts on Non-Notifiable Mergers (Sept. 17, 2019), <https://www.canada.ca/en/competition-bureau/news/2019/09/competition-bureau-enhances-information-gathering-efforts-on-non-notifiable-mergers.html>.

⁴³ Boswell, *supra* note 40.

In May 2019, Canada unveiled its revamped Merger Intelligence and Notification Unit (MINU), which now has an expanded mandate to detect potentially anticompetitive non-reportable transactions, as part of its "continued shift . . . towards greater scrutiny of non-notifiable mergers."

There is evidence that Canada's Competition Bureau is actively investigating and pursuing non-reportable transactions that carry a risk of anticompetitive effects. In November 2018, Evonik Industries AG, a specialty chemical manufacturer, reached an agreement to acquire PeroxyChem Holding Company LLC, a manufacturer of hydrogen peroxide, peracetic acid, and persulfates, for \$625 million.⁴⁴ Closing, which was originally expected in mid-2019, was postponed because of an August 2019 FTC challenge in the United States (ultimately rejected by a U.S. district court in January 2020).⁴⁵

While the FTC's challenge was ongoing in the United States, the Competition Bureau was working closely with the FTC to conduct its own investigation into the proposed transaction, which was non-reportable in Canada.⁴⁶ A complainant in the pulp and paper industry had notified Canada's MINU of the proposed transaction.⁴⁷ The complainant's tip spurred a ten-month investigation, which included "extensive consultations" with industry stakeholders, such as customers and competitors in the "pulp and paper, mining, and oil and gas sectors."⁴⁸ On January 28, 2020, the Canada Competition Bureau announced that it had reached a deal, whereby the parties would divest PeroxyChem's British Columbia hydrogen peroxide facility to alleviate the post-transaction lack of "any viable alternatives for [standard grade] hydrogen peroxide."⁴⁹

The Competition Bureau recently announced that it would terminate its investigation of Canadian National Railway Company's acquisition of H&R Transport Limited.⁵⁰ In connection with clearing the transaction, the Competition Bureau issued a position statement where it explained that the non-reportable transaction raised serious competition concerns for the supply of full truckload refrigerated intermodal services in eight origin-destination rail terminal pairs.⁵¹ Following an exhaustive investigation that spanned approximately seven months during which the parties entered into a timing agreement with the Commissioner to prevent closing prior to the end of the investigation, the Commissioner ultimately decided not to challenge the transaction. The Commissioner based his decision on grounds that the efficiencies resulting from the transaction were greater than, and offset, the resulting anticompetitive effects. The Commissioner also concluded that those efficiencies would have been lost had the Competition Tribunal issued an order to prohibit closing. This satisfied the requirements of the statutory efficiencies defense under Section 96 of Canada's Competition Act.⁵²

The Competition Bureau often relies on customer complaints to spur its non-reportable transaction investigative efforts. In 2014, after receiving several customer complaints, the Competition Bureau found that Bell Aliant's non-reportable acquisition of Ontera was likely to "substantially lessen and/or prevent competition in the sale of wireline telecommunications services in up to 16

⁴⁴ Press Release, Canada Competition Bureau, Competition Bureau Statement Regarding Evonik's Proposed Merger with PeroxyChem (Jan. 28, 2020), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04519.html> [hereinafter Evonik Press Release].

⁴⁵ Press Release, Evonik, Evonik Acquisition of PeroxyChem Delayed by FTC Lawsuit (Aug. 2, 2019), <https://corporate.evonik.com/en/investor-relations/pages/article.aspx?articleId=115876>; FTC v. Rag-Stiftung, No. 19-2337, 2020 U.S. Dist. LEXIS 18346 (D.D.C. Jan. 24, 2020).

⁴⁶ Evonik Press Release, *supra* note 44.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Press Release, Canada Competition Bureau, Competition Bureau Statement Regarding Canadian National Railway Company's Proposed Acquisition of H&R Transport Limited (Apr. 22, 2020), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04527.html>.

⁵¹ *Id.*

⁵² *Id.*

Northern Ontario communities.”⁵³ To address the Competition Bureau’s concerns, Bell Aliant agreed to a much lengthier behavioral remedy than typically imposed, providing a 20-year right of use for Ontera fiber strands to a competitor.⁵⁴ This case is a reminder that parties should assess the customer landscape and cannot view customer outreach as a practice reserved solely for the latter stages of an inquiry or investigation.

Relatively insignificant transaction values do not deter the Competition Bureau’s enforcement efforts. In 2014, following several customer complaints, Canada’s Competition Tribunal found that a \$6 million merger between two companies that operated landfills in Northeastern British Columbia was likely to “prevent competition substantially in the relevant market.” The Competition Bureau observed high barriers to entry and lack of acceptable substitutes.⁵⁵ The Supreme Court of Canada eventually cleared the merger on the basis of the efficiencies defense in Canada’s Competition Act.⁵⁶

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Finally, it is worth noting that non-reportable, non-traditional corporate arrangements, such as joint ventures, are not immune from antitrust scrutiny in Canada. This was demonstrated by the Competition Bureau’s 2011 challenge of a joint venture between Air Canada and United Continental. The Bureau alleged that the joint venture would “monopolize ten important Canada/United States routes, and substantially reduce competition on nine additional routes, leading to increased prices and reduced consumer choice on key transborder routes.”⁵⁷

Ecuador. Under the Organic Law for Regulation and Control of Market Power, the Superintendency of Market Power Control (Authority) in Ecuador may open an investigation or request notification for non-reportable transactions.⁵⁸ While it remains unclear precisely what triggers an investigation by the Authority or a request to notify a non-reportable transaction, the Authority has broad powers to act where there is a risk of “substantial lessening of competition.”

The Authority is not bound to act within a certain amount of time and can request notification or investigate whenever it uncovers a risk of transaction-related antitrust harm. For example, in 2016, the Authority requested information from two global pharmaceutical companies after the authority learned of a multibillion dollar acquisition in the vaccines market. The Authority believed that the parties’ market definition and threshold analysis may have been flawed and required notification. However, once the Authority received information from the parties, it verified the relevant market and market share analysis and closed the investigation. Nevertheless, the Authority demonstrated a willingness to review a large, international transaction that affected many different geographic markets.

More recently, the Authority also opened ex officio investigations into non-reportable transactions in the cement and concrete market. In March 2019, the Authority issued fines of approximately \$130,000 against Union Cementera Nacional UCEM S.A. for failing to report its acquisition

⁵³ Press Release, Canada Competition Bureau, Competition Bureau Statement Regarding the Proposed Acquisition of Ontera by Bell Aliant (Oct. 1, 2014), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03823.html>.

⁵⁴ *Id.*

⁵⁵ *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, ¶ 81.

⁵⁶ *Id.*

⁵⁷ Press Release, Canada Competition Bureau, Competition Bureau Seeks to Block Joint Venture Between Air Canada and United Continental (June 27, 2011), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng%20/03386.html>.

⁵⁸ Organic Law for the Regulation and Control of Market Power, Art. 16, Para. 3.

of EQUIHOMIGONERA and opened investigations in the same market for other consummated transactions that came to its attention during the course of the referred investigation.⁵⁹

Mexico. Pursuant to Article 62 of Federal Economic Competition Law (LFCE), the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (IFT) have the power to investigate non-reportable mergers that may “hinder, lessen, injure or hamper” competition, “generate barriers to entry,” or “substantially facilitate the parties to the transaction to engage in illegal conducts under the LFCE.”⁶⁰ This power extends for one year following the execution of a merger agreement.

COFECE has recently challenged several non-reportable transactions. In March 2018, COFECE investigated a potentially unlawful transaction concerning incoming shareholders of UNEGAS, retailers in the diesel/gasoline market, who were also active in the diesel/gasoline market. However, in October 2019, COFECE closed the investigation because the transaction occurred outside the one-year statute of limitations. Similarly, in August 2016, the IFT initiated an investigation into Radiorama’s non-reportable acquisition of 16 local radio stations. IFT decided the case in March 2020 but has not published the final resolution.

Europe and Africa

Common Market for Eastern and Southern Africa (COMESA). Pursuant to Article 23(6) of the COMESA Regulations of 2004, the COMESA Competition Commission (CCC) may require parties to notify a transaction that does not meet the notification thresholds and/or requirements if the transaction is “likely to substantially prevent or lessen competition” or “likely to be contrary to public interest.” The CCC may act at any time, before or after consummation but it has not yet exercised its power to require notification of a non-reportable merger.

Ireland. The Irish Competition and Consumer Protection Commission (CCPC) has the power to investigate non-reportable transactions pursuant to Section 10(1)(c) of the Competition and Consumer Protection Act 2014, which provides for investigation of a suspected breach of the Competition Act 2002 (Competition Act) or Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU). Sections 4 and 5 of the Competition Act mirror Articles 101 and 102 of the TFEU, which prohibit anticompetitive agreements, decisions, and concerted practices, as well as abuse of a dominant market position. Section 14A of the Competition Act provides that the CCPC shall have a right of action against an undertaking that has breached Sections 4 or 5 of the Competition Act or Articles 101 or 102 of the TFEU. There is no specific time limit or procedure applicable to the enforcement of a non-reportable merger.

According to a CCPC notice regarding non-reportable transactions, the CCPC “may carry out a preliminary inquiry to ascertain whether the opening of an investigation . . . is warranted, followed, where appropriate, by an investigation” and “may issue proceedings seeking an injunction to restrain implementation of the merger.”⁶¹ The CCPC may also request that the parties notify a non-reportable transaction. Where the parties refuse to notify a transaction and do not reach a settlement with the CCPC, the CCPC can institute proceedings in the High Court. If the CCPC attempts

⁵⁹ Superintendencia de Control Del Poder De Mercado—Comision de Resolucion De Primera Instancia, SCPM-CRPI-007-2019 (Mar. 21, 2019), <https://www.scpm.gob.ec/sitio/wp-content/uploads/2019/03/res-007-2019.pdf>.

⁶⁰ Ley Federal de Competencia Económica [Federal Economic Competition Law], Arts. 62, 65.

⁶¹ Competition and Consumer Protection Comm’n, Notice in Respect of the Review of Non-Notifiable Mergers and Acquisitions 3 (2014), <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/CCPC-Mergers-Non-Notifiable-Mergers-1.pdf>.

to unwind an already consummated merger, it must seek an injunction ordering the parties to reverse the transaction from the High Court. The CCPC has warned companies that non-reportable mergers are not free of antitrust scrutiny in Ireland:

It is important for companies and their advisors to take note that even where turnovers fall below the required financial thresholds for mandatory notification, they still have a duty to ensure that any mergers or acquisitions they propose or undertake do not substantially lessen competition in their relevant market. The CCPC will use its powers to ensure that mergers that do not meet the required financial thresholds for mandatory notification, but that are likely to result in a substantial lessening of competition, do not go unchecked.⁶²

The CCPC has warned companies that non-reportable mergers are not free of antitrust scrutiny in Ireland . . .

The CCPC has not yet blocked any non-reportable transactions, and the CCPC generally does not make public statements about investigations into non-notifiable transactions. However, the CCPC's predecessor, the Competition Authority, successfully blocked non-reportable transactions. For example, in 2012, the Competition Authority investigated a non-reportable proposed transaction between Eason and Son Limited and Argosy Libraries Limited, the only two Irish-based wholesalers of new books. Because of its narrow market definition (Irish wholesalers of new books), the Competition Authority considered the transaction to be "two-to-one."⁶³ The Competition Authority conducted an extensive investigation into the proposed transaction and concluded that the proposed transaction would infringe Section 4 of the Competition Act by increasing the price and reducing the choice of new books. After the CCPC instituted court proceedings, the parties abandoned the transaction and agreed to notify the Competition Authority of any similar arrangements.⁶⁴

Lithuania. The Competition Council of the Republic of Lithuania (CC) has the authority, pursuant to Article 13 of the Law on Competition of the Republic of Lithuania (Law on Competition), to require that parties apply for clearance when a non-reportable proposed transaction will "likely result" in the strengthening or creation of a dominant market position or a substantial restriction of competition.⁶⁵ The "likely result" standard is currently being challenged in a case where the CC initiated its investigation with a very simple analysis showing high market shares and potential dominance, only to eventually find that the transaction did not raise any competitive issues. The CC only has one year post-closing to take action against non-reportable transactions.⁶⁶ The CC has imposed an obligation on parties to notify a non-reportable transaction on at least three occasions.

Where the CC has ordered notification of a non-reportable transaction, parties have generally avoided serious antitrust enforcement actions but are still burdened with notifying the transaction.

⁶² Press Release, Competition and Consumer Protection Comm'n, CCPC Obtains Commitments from Kantar Media to Secure Approval for Proposed Acquisition of Newsaccess (July 12, 2017), <https://www.ccpic.ie/business/ccpc-obtains-commitments-kantar-media-secure-approval-proposed-acquisition-newsaccess/>.

⁶³ Competition Authority, *Annual Report* 30–31 (2012), <https://www.ccpic.ie/consumers/wp-content/uploads/sites/2/2017/03/Annual-Report-2012-FINAL.pdf>.

⁶⁴ *Id.*

⁶⁵ The Law on Competition, No. VIII-1099, Article 13, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/49e68d00103711e5b0d3e1beb7dd5516?jfwid=q8i88mf0v> [English Translation] ("The Competition Council may impose an obligation on undertakings to submit a notification on concentration and *mutatis mutandis* apply the concentration control procedure provided for in this Section even though the aggregate income indicators established in Article 8(1) of this Law are not exceeded where it is likely that concentration will result in the creation or strengthening of a dominant position or a substantial restriction of competition in a relevant market.").

⁶⁶ *Id.* ("The Competition Council may adopt a separate resolution to apply the concentration control procedure only in cases where no more than 12 months have passed from the implementation of the concentration in question.").

In May 2017, the CC initiated merger control proceedings against Estonian-based Baltic Ticket Holdings over its acquisition of Nacionalinis Bilietu Platintojas. The parties provided ticket distribution services in Lithuania, Latvia, Estonia, and Belarus.⁶⁷ Although the transaction was non-reportable under Lithuanian turnover-based thresholds, the CC alleged that the transaction would likely cause the “creation or strengthening of a dominant position or a substantial restriction of competition in the ticket distribution market” and ordered the parties to notify the merger within two months.⁶⁸ Baltic appealed the CC’s order all the way to the Supreme Administrative Court of Lithuania, asking for the suspension of merger procedure, pending litigation on validity of the decision, but the Supreme Administrative Court did not approve the request.⁶⁹ Baltic notified the transaction in January 2018 and received clearance in July 2018.⁷⁰ Similarly, in August 2013, the CC ordered notification of an acquisition of a company that provided administrative services for buildings in Vilnius by a company that provided similar services.⁷¹ The transaction was notified in June 2014 and cleared by the CC in October 2014.⁷²

The CC has also successfully challenged non-reportable transactions. For example, in July 2015, the CC successfully challenged a consummated transaction involving Eesti Meedia’s acquisition of AllePAL, a competing operator of classified advertising portals for real estate and vehicles. The CC suspected that the non-reportable transaction “created or strengthened a dominant position or restricted competition” in the classified ads for real estate and vehicles market.⁷³ Consequently, in July 2015, the CC ordered Eesti Meedia to make the necessary filings with the CC. After Eesti Meedia’s January 2016 notification, in May 2016, the CC found that the transaction restricted competition in Lithuania and ordered that AS divest part of the business that had been acquired.⁷⁴

Norway. The Norwegian Competition Authority (NCA) has the power to investigate non-reportable mergers pursuant to the Norwegian Competition Act Section 18, Parts 3 and 5. Under the Act, the NCA may undertake an investigation when a merger “significantly impede[]s effective competition . . . in particular as a result of the creation or strengthening of a dominant posi-

⁶⁷ Press Release, Competition Council, BILIJŲ PLATINTOJŲ KONCENTRACIJA NEAPRIBOJO KONKURENCIJOS [Concentration of Ticket Distributors Does Not Limit Competition] (July 7, 2018), <http://kt.gov.lt/lt/naujienos/bilietu-platintoju-koncentracija-neapribojo-konkurencijos>.

⁶⁸ Press Release, Competition Council, Ticket Distributors Failed to Suspend Merger Control Procedure (Oct. 19, 2017), <http://kt.gov.lt/en/news/ticket-distributors-failed-to-suspend-merger-control-procedure>.

⁶⁹ The case on validity of decision is still pending in the Supreme Administrative Court of Lithuania. *Id.*

⁷⁰ Competition Council, NUTARIMAS DĖL LEIDIMO VYKDYTI KONCENTRACIJĄ AS BALTIC TICKET HOLDINGS [SIGIJUS 100 PROC. UAB „NACIONALINIS BILIJŲ PLATINTOJAS“ AKCIJŲ] [Ruling on the Authorization of a Concentration After the Acquisition of UAB Nacionalinis Bilietu Platintojas by Baltic Ticket Holdings], No. 1S-100 (2018), http://kt.gov.lt/uploads/docs/docs/3522_5644b611468781e4c9af495906d581c5.pdf; Press Release, Competition Council, BILIJŲ PLATINTOJŲ KONCENTRACIJA NEAPRIBOJO KONKURENCIJOS [Concentration of Ticket Distributors Does Not Limit Competition] (July 7, 2018), <http://kt.gov.lt/lt/naujienos/bilietu-platintoju-koncentracija-neapribojo-konkurencijos>.

⁷¹ Competition Council, DĖL LEIDIMO VYKDYTI KONCENTRACIJĄ UAB „NEMUNO BŪSTO PRIEŽIŪRA“ [SIGIJUS 100 PROC. UAB „ŽIRMŪNŲ BŪSTAS“ AKCIJŲ] [Ruling on the Authorization to Implement the Concentration after the Acquisition], No. 1S-165 (2014), http://kt.gov.lt/uploads/docs/docs/13695_imp_b4f7e32548d41bde477d9a3a04258ca6.pdf.

⁷² *Id.*

⁷³ Press Release, Competition Council, Competition Council Obligated AS Eesti Meedia to Submit Merger Notification (July 23, 2015), <https://kt.gov.lt/en/news/competition-council-obliged-as-eesti-meedia-to-submit-merger-notification>.

⁷⁴ Press Release, Competition Council, Merger Between Classified Ads Websites Restricted Competition (May 6, 2016), <http://kt.gov.lt/en/news/competition-council-merger-between-classified-ads-websites-restricted-competition>.

tion.”⁷⁵ The NCA may only order notification of mergers that do not meet the notification thresholds and/or requirements when there are reasonable grounds to believe that competition may be affected, or where extraordinary circumstances may warrant examination. There is also a short clock on enforcement. The NCA may not order notification of a non-reportable transaction more than three months after a final agreement is reached or control is obtained, whichever is first. Additionally, the NEC can prospectively order notification in concentrated markets or product markets with a history of anticompetitive conduct (for example, energy and supermarkets). Since 2014, the NCA has ordered notification of non-reportable transactions on several occasions.

While the NCA has a record of requiring notification but not following up with a subsequent investigation,⁷⁶ there are examples of enforcement. Most recently, in August 2018, the NCA intervened in two related non-reportable transactions and reached a remedy agreement with the parties. The NCA ordered notification when Sector Alarms acquired both a 49.99 percent interest in Nokas, along with Nokas’s small system security alarm portfolio. According to the NCA, the acquisitions were likely to “lead to a significant impediment to effective competition in the market for security systems for homes and small businesses.”⁷⁷ The NCA took action because it viewed Nokas, the third-largest player to Sector Alarms and another competitor, as somewhat of a nascent competitor in the Norwegian home security systems market who, although substantially smaller than the other competitors, “exert[ed] an important competitive constraint.”⁷⁸ Even though both transactions fell below the filing threshold, the NCA forced Sector Alarms to reduce its interest to 25 percent of Nokas and to drop its acquisition of the small security alarm portfolio.

There are no time limits on when SAMR must act for non-reportable transactions. SAMR has not exercised this power often, at least not publicly.

Asia

China. Pursuant to Article 4 of the Rules on Thresholds of Concentration of Undertakings, China’s State Administration for Market (SAMR) can investigate a non-reportable transaction where the transaction may eliminate or restrict competition in the Chinese market. There are no time limits on when SAMR must act for non-reportable transactions. SAMR has not exercised this power often, at least not publicly. However, SAMR is currently investigating a \$35 billion non-reportable transaction between Uber China and Didi Chuxing Technology Co., a transaction announced in August 2016 and closed in November 2016.⁷⁹ Didi’s high market share made the transaction an obvious target for regulatory attention. According to Didi, which claimed an 87 percent market share, it was not required to seek regulatory approval as the companies lacked sufficient profits to meet the relevant thresholds.⁸⁰ China’s Ministry of Commerce (MOFCOM), SAMR’s predeces-

⁷⁵ Council Regulation No 139/2004, 2004 O.J. (L 24) Article 2, § 2.

⁷⁶ In 2014 the NRC required notification in Cappelen Holding’s acquisition of control in Kongsberg Esco, and in 2016 it required notification in AT Skog’s acquisition of 34 percent of SB Skog. Norwegian Competition Auth., V2014-4—Cappelen Holding AS—Kongsberg Esco AS—konkurranseloven § 18 tredje ledd—pålegg om meldeplikt [V2014-4—Cappelen Holding AS—Kongsberg Esco AS—§ 18, Third paragraph of the Competition Act—Order to Notify] <https://konkurransetilsynet.no/decisions/1245-v2014-4/>; Norwegian Competition Auth., AT Skog SA—SB Skog SA—Viken Skog SA, <https://konkurransetilsynet.no/fusjoner/at-skog-sa-sb-skog-sa-viden-skog-sa/>.

⁷⁷ Press Release, Norwegian Competition Auth., Sector Alarm—Nokas Cleared with Remedies (Mar. 28, 2019), <https://konkurransetilsynet.no/sector-alarm-nokas-cleared-with-remedies/?lang=en>.

⁷⁸ *Id.*

⁷⁹ Press Release, State Admin. for Market Reg., Didi-Uber Merger Under Antitrust Investigation (Nov. 17, 2018), <http://en.people.cn/n3/2018/1117/c90000-9519372.html>; Jose Vilches, *Uber China Completes Merger with Didi Chuxing*, TECHSPOT (Nov. 28, 2016), <https://www.techspot.com/news/67193-uber-china-completes-merger-didi-chuxing.html>.

⁸⁰ Jake Spring et al., *China Regulator Says Didi, Uber Deal Will Need MOFCOM Approval*, REUTERS (Aug. 2, 2016), <https://www.reuters.com/article/us-uberchina-m-a-didi/china-regulator-says-didi-uber-deal-will-need-mofcom-approval-idUSKCN10D0J8>.

sor, disagreed with Didi's position, and in September 2016, SAMR announced that it is investigating the merger in accordance with its "crack down [] on monopolistic activity that damage[] consumer rights."⁸¹ The investigation is ongoing.

Japan. Under Japan's Anti-Monopoly Act (AMA), any business combination that would "substantially restrain competition in any particular field of trade" is prohibited.⁸² Chapter IV of the AMA⁸³ explicitly prohibits business combinations, including share acquisitions, mergers, and business/asset transfers that substantially restrain competition.⁸⁴ Under the AMA, the JFTC has authority to investigate a proposed transaction, including a non-reportable transaction, whenever it could violate the AMA.⁸⁵ Nothing limits the JFTC's authority to investigate a proposed or consummated transaction to a certain time period.

On December 17, 2019, the JFTC amended the Guidelines to Application of the Anti-Monopoly Act concerning Review of Business Combination (Guidelines)⁸⁶ and the Policies concerning Procedures of Review of Business Combination (Policies)⁸⁷ to better address developments in the digital market. In the amended Policies, the JFTC provided factors that could lead to the review of a non-reportable transaction even if a target's turnover is small and would not meet the target threshold. These include when the transaction value is large (i.e., more than approximately \$370 million) and is expected to affect domestic consumers, subject to the acquirer's threshold being met.⁸⁸ Further, the amended Policies recommend that parties consult with the JFTC voluntarily when the transaction value exceeds approximately \$370 million, and when one or more of the following factors exists: (1) an acquired company has an office in Japan and/or conducts R&D in Japan, (2) an acquired company conducts sales activities targeting domestic consumers, such as providing its website and/or pamphlet in the Japanese language, or (3) the total domestic sales of an acquired company exceed approximately \$920,000.

Last year, the JFTC secured a significant victory when it challenged a non-reportable transaction affecting multiple countries. In April 2019, M3, Inc., which manages drug information platforms, acquired Nihon Ultmarc Inc., a provider of medical information databases.⁸⁹ These Japan-

⁸¹ Press Release, State Admin. for Market Reg., Didi-Uber Merger Under Antitrust Investigation (Nov. 17, 2018), <http://en.people.cn/n3/2018/1117/c90000-9519372.html>.

⁸² The Antimonopoly Act, Act No. 54 of Apr. 14, 1947, https://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.html (English translation) [hereinafter *AMA*].

⁸³ *AMA* Chapter IV.

⁸⁴ *AMA* ¶ 1, Art. 10; *AMA* ¶ 1, Art. 15.

⁸⁵ *AMA* Art. 40 ("The Fair Trade Commission may, if necessary for the performance of its duties, order public offices, juridical persons formed by special laws and regulations, enterprises or organizations of enterprises, or their personnel to appear before the Fair Trade Commission, or require them to submit necessary reports, information or materials."); *AMA* Art. 45 ("When the Fair Trade Commission receives a report as provided in the preceding paragraph, it must make the necessary investigations into the case. . . . Whenever the Fair Trade Commission believes there to be a fact in violation of the provisions of this Act or a fact falling under the purview of a monopolistic situation, the Fair Trade Commission may take appropriate measures on its own authority."); *AMA* Art. 47 (outlining actions that JFTC may take, such as ordering interrogations, reports, expert opinions, and document production).

⁸⁶ Japan Fair Trade Comm'n, Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (2004), https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217GL.pdf.

⁸⁷ Japan Fair Trade Comm'n, Policies Concerning Procedures of Review of Business Combination (2019), https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217policy.pdf.

⁸⁸ The total Japanese turnover of an acquirer and its group companies exceeds JPY20 billion (approximately USD 184 million).

⁸⁹ Japan Fair Trade Comm'n, Results of Review on the Acquisition by M3, Inc. of the Shares in Nihon Ultmarc Inc. (Oct. 24, 2019), <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191024r.pdf>.

In 2014, Microsoft consummated its \$7 billion acquisition of Nokia's handset business after receiving antitrust approval in the United States and the European Union, but the KFTC launched an investigation into the transaction (which was not reportable to the KFTC) and pressed for post-transaction remedies.

ese companies, while highly active in Japan, also had a presence in the United States, United Kingdom, France, China, Korea, and India.⁹⁰ Although the proposed transaction did not meet the AMA's filing thresholds, the JFTC raised concerns regarding the "restraint of competition by the acquisition" and initiated an investigation.⁹¹ Consequently, the JFTC interviewed competitors and other relevant parties,⁹² finding that the transaction "would substantially restrain competition in the Drug Information Providing Platform Operation Business of which users are the pharmaceutical companies/doctors."⁹³ To remedy this finding, the parties agreed that they would not refuse to provide database access to competitors, would not tie their products, and would report compliance to the JFTC on a regular basis for five years.⁹⁴

South Korea. The Monopoly Regulation and Fair Trade Law (FTL) in South Korea broadly prohibits business combinations that "actually restrict competition in a certain area of trade," regardless of whether a transaction meets the merger filing thresholds.⁹⁵ If the Korean Fair Trade Commission (KFTC) believes that a non-reportable transaction restricts competition, it may open an investigation pursuant to Article 49(1) of the FTL, which authorizes the KFTC to investigate a suspected violation of the FTL on its own. The KFTC may also open an investigation based on the filing of a complaint (e.g., by a competitor), under Article 49(2) of the FTL. Under Article 49(4) of the FTL, the KFTC has seven years after closing to intervene, and once the KFTC initiates an investigation, it has five years to complete its investigation.

While the KFTC does not often investigate non-reportable transactions, it has investigated transactions that it believed posed a risk of restricting competition. In 2014, Microsoft consummated its \$7 billion acquisition of Nokia's handset business after receiving antitrust approval in the United States and the European Union, but the KFTC launched an investigation into the transaction (which was not reportable to the KFTC) and pressed for post-transaction remedies.⁹⁶ The KFTC's 21-month investigation may have been driven by concerns that the transaction would provide Microsoft an unfair advantage over South Korea national champions Samsung and LG.⁹⁷ In August 2015, the KFTC reached an agreement with Microsoft that imposed behavioral remedies, using its consent decree process for the first time to remedy an anticompetitive merger.⁹⁸ The consent decree, specific to South Korean companies, required Microsoft to license standard essential patents on fair, reasonable, and nondiscriminatory terms, refrain from demanding cross-licens-

⁹⁰ Notice of Acquisition of Consolidation of Nihon Ultmarc Inc., M3, Inc. (Feb. 28, 2019), https://corporate.m3.com/en/ir/20190125_06/U%E7%A4%BE%E9%81%A9%E6%99%82%E9%96%8B%E7%A4%BA_E.Fin.pdf.

⁹¹ Japan Fair Trade Comm'n, Results of Review on the Acquisition by M3, Inc. of the Shares in Nihon Ultmarc Inc. (Oct. 24, 2019), <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191024r.pdf>.

⁹² *Id.* at 1–2.

⁹³ *Id.* at 14.

⁹⁴ *Id.* at 15–16.

⁹⁵ Art. 7(1).

⁹⁶ Cecil Saehoon Chung et al., *Early Signs of Protectionist Merger Control in Korea? Probably No, At Least Not Yet*, COMPETITION POL'Y INT'L 1 (Oct. 29, 2014).

⁹⁷ Cho Mu-hyun, *South Korea Regulators Finally OK Microsoft's Nokia Deal*, CNET (Aug. 24, 2015), <https://www.cnet.com/news/south-korea-regulators-finally-ok-microsoft-nokia-deal/>.

⁹⁸ Pallavi Guniganti, *Microsoft/Nokia Marks Korea's First Proposed Merger Consent Order*, GLOBAL COMPETITION REV. (May 19, 2015); Organisation for Economic Co-operation and Development, Roundtable on the Extraterritorial Reach of Competition Remedies, Note by Korea to the OECD Working Party No. 3 on Co-operation and Enforcement 4 (Nov. 23, 2017), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2017\)37/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2017)37/en/pdf).

ing as a condition for licensing, and not seek injunctions to prevent the sale of devices using certain patents without a license. In another matter, in 2004, the KFTC investigated a transaction in the electronic medical record (EMR) industry, which involved MD House's hostile acquisition of UB Care. In response to the hostile takeover, the target company, UB Care, submitted a complaint to the KFTC regarding the transaction. After conducting an investigation, the KFTC found the acquisition to be anticompetitive and required a divestiture of the acquired EMR business and all relevant IP within six months.⁹⁹

Practical Tips

Where a proposed transaction raises potential anticompetitive concerns, parties should assume that antitrust agencies will take notice even if a merger does not require notification. To better understand the likelihood that a particular transaction may face such scrutiny, there are steps parties can take to assess and reduce the risk. For example:

- Understand that antitrust scrutiny may still occur even where few, if any, antitrust filings are required.
- Evaluate the effect of a proposed transaction early on, even for narrow plausible markets, especially those where there are high market shares or a history of regulatory review.
- Identify nuanced market characteristics or local conditions that may pique the interest of antitrust regulators. This includes considering whether a target is a nascent or potential competitor, or if a jurisdiction has a history of favoring and protecting domestic companies from foreign competition.
- Work with local counsel to confirm whether an antitrust agency has the power to investigate and/or challenge a non-reportable transaction, and whether there is an interest or history of enforcement in the particular industry.
- Undertake a substantive analysis of regional or country-specific markets, especially in jurisdictions where antitrust authorities have shown a propensity to scrutinize non-reportable transactions.
- Recognize that consummation of a transaction does not mean that antitrust scrutiny is eliminated. In many countries, antitrust agencies have the power to take action for a certain number of years after consummation, or even indefinitely.
- Consider how to manage the risk of enforcement after closing by minimizing the likelihood of customer complaints, disruptions to product availability, and actions such as price increases that could stir complaints.

While the notion of non-reportable challenges was once limited to a select group of jurisdictions, those numbers have grown steadily over time. This can prove to be especially challenging for parties involved in global deals since any number of jurisdictions may choose to investigate a potential transaction even when mandatory pre-notification is not triggered. By taking a proactive approach, parties can identify areas of potential scrutiny and prepare before an investigation is commenced. ●

⁹⁹ Korean Fair Trade Comm'n, Decision No. 2004-079 (Apr. 6, 2004).