Merger Control

Jurisdictional comparisons **Second edition 2014**

General Editors:
Jean-François Bellis & Porter Elliott,
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General Editors
Jean-François Bellis & Porter Elliott,
Van Bael & Bellis

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Foreword

Jean-François Bellis & Porter Elliott, Van Bael & Bellis

There was a time not so long ago when very few countries in the world had merger control laws. In most jurisdictions, there was no need to notify a merger for prior approval before closing. How different the situation is today. It is estimated that upwards of 100 countries now have merger control laws, and in most of these countries, qualifying mergers, acquisitions and – in some cases – joint ventures must be notified and cleared by the local regulators before they can be implemented. Today, the need to obtain merger control approvals is often the number one factor delaying the closing of deals around the world.

Unfortunately, while more countries have merger control than ever before, there remains relatively little harmonisation, with each jurisdiction having its own rules on what types of transactions must be notified, what thresholds apply, what the procedure is and how long it takes. Even the substantive test for determining whether a notified transaction will be approved is not the same in every jurisdiction. With merger control authorities becoming tougher in their enforcement practices, the challenges facing merging companies have never been more daunting. This book aims to help.

With contributions from leading law firms covering 49 of the most important jurisdictions worldwide, this second edition of *Merger Control* endeavours to address the most common and critical questions of merging companies and their lawyers, including some which are less often addressed in other books of its kind, such as whether pre-notification consultations are customary in a given jurisdiction, whether 'carve-out' arrangements may be implemented to allow for closing to take place in jurisdictions where approval is still pending, whether the jurisdiction at issue has a track record of fining foreign companies for failure to file and whether it has ever issued penalties for 'gun-jumping' offences.

Adopting the reader-friendly Q&A format that has been used successfully in other volumes of *The European Lawyer Reference Series*, including the first edition of *Merger Control* (2011), this book sets out to answer for each jurisdiction the key questions those on the front line are most likely to have, including:

- Whether notification is mandatory (as in most jurisdictions where the thresholds are met) or voluntary (as, for example, in Australia, New Zealand, Singapore and the UK). If mandatory, is the requirement to file based purely on the parties' turnover (as in the EU and many other jurisdictions worldwide), or are there other factors that need to be considered, such as market share (eg, in Portugal, Spain and the UK), asset value (eg, in Russia and Ukraine) or the size of the transaction (eg, in the US)?
- Is there a filing deadline and/or a requirement to suspend implementation pending receipt of an approval decision? In most jurisdictions, there is no filing deadline so long as the deal is not closed until it has been approved, but there are exceptions.

- How onerous is the filing? Most jurisdictions have detailed notification forms that must be completed (Germany being a notable exception), although some forms take far more time to complete than others. For example, although certainly not always the case, it is not unusual for notifications to the European Commission to exceed 100 pages (not counting annexes) and to include very detailed legal and economic analysis. By comparison, the US Hart-Scott-Rodino form is short and straightforward, and it can usually be completed in a matter of days (although a second request in the US can be extremely burdensome).
- What factors are likely to be considered by the relevant authorities in assessing the legality of the transaction? While it must be assumed that every authority will focus first and foremost on whether the transaction would raise competition concerns in its territory, some authorities are more likely than others to consider theories of competitive harm that go beyond traditional concerns related to high combined market shares, such as the risks of vertical foreclosure. Similarly, non-competition issues, such as industrial policy or labour policy, may be more likely to be considered in some jurisdictions than others.

Although by no means a substitute to seeking the advice of local counsel, this book aims to address these and other critical questions in a concise and practical way, and therefore to serve as a valuable resource to companies and counsel navigating their way through the twists and turns of obtaining the required merger control approvals worldwide.

Compiling the second edition of *Merger Control* has truly been a group effort. With this in mind, we would like to thank all the authors for their contributions, as well as the team of *The European Lawyer* for their diligence in bringing this book to fruition. We also wish to express our gratitude to our colleagues at Van Bael & Bellis who assisted us on this project, in particular Reign Lee for her editorial support, and Els Lagasse and Veerle Roelens for their secretarial assistance.

Brussels, March 2014

Foreword

Bernd Langeheine, Deputy Director-General, DG Competition, European Commission

Nowadays, an ever larger number of mergers need to obtain regulatory approval in several jurisdictions. The popularity of merger control is due to a general recognition that it is desirable to maintain a market structure which is conducive to effective competition and, therefore, crucial for a robust, innovative economic landscape. This is in the interest of consumers and market players at different levels alike.

As a consequence of globalisation, free trade and open markets merger control has become a key element of almost all competition law regimes around the world. Apart from problems related to costs and delays for closing the deal, multiple filings create a risk of inconsistent or even contradictory decisions. This is why all major competition authorities should cooperate closely on cases which require notification in several countries.

During 2011 and 2012, the European Commission, for example, worked together with other antitrust enforcers in about half of all cases for which an in-depth investigation was opened. The most notable example was the wide-ranging cooperation (ie with the US, Chinese, Japanese, Korean and Australian competition authorities) in the 'Hard-disk-drive cases' in 2011. Parties to a merger and their counsel generally have a keen interest in facilitating such cooperation in order to avoid conflicting decisions. This, in turn, requires knowledge about jurisdictional thresholds and other filing requirements as well as about the timelines of proceedings. This book provides a wealth of information on these and other relevant points for all important merger control systems around the world.

Competition rules and their enforcement will continue to be fragmented for lack of an international authority that would have jurisdiction over mergers and could take decisions for more than one country. There are, however, tendencies to avoid multiple filings at least at the regional level. In Europe, the situation is alleviated by the fact that, since 1990, there has been a merger control regime at the EU level under which mergers of a certain size that concern the competitive situation in several Member States are normally vetted by the European Commission. This is complemented by national rules on merger control which apply to all other relevant transactions, ie mainly those which are of a lesser size and which only concern one Member State.

In the EU, there are clear and explicit rules that lay down which (EU or national) authority has original jurisdiction over a merger. But there is also a mature system of referral mechanisms which mitigates the rigidity of the rules for case allocations and ensures that the best-placed authority deals with a particular merger. These referral provisions apply, in particular, where an operation needs to be notified in several Member States or where markets are wider than the national level and trade between Member States is affected.

The transfer of such cases from national authorities to the Commission will reduce the administrative burden for companies to the largest possible extent and avoid multiple filings. But the rules on referrals also foresee the transfer of merger cases from the EU level to a national authority in certain justified cases. A referral can take place upon the request of the parties, before an operation is notified or after notification at the request of a national competition authority. The application of these mechanisms has produced encouraging results over recent years. Between 2004 and the end of 2013, there were almost 280 referrals from national competition authorities to the EU Commission and approximately 130 in the other direction, ie to the national authority of a Member State. Nevertheless, one-stop shopping does not always work and there are still a large number of cases every year which are scrutinised by competition authorities in two or more EU countries (eg, 240 cases in 2007).

At the international level, the picture remains diverse. Intensive merger scrutiny in traditionally strong antitrust jurisdictions has been matched by new merger control regimes springing up in all parts of the world, most notably Asia and Latin America. Today, there are more than 100 merger control systems in force around the world which vary greatly not only with regard to notification requirements, but also with regard to other key elements such as timelines and filing fees.

Notifying parties and their lawyers continue to struggle with the proliferation of merger regimes and the ensuing divergences regarding procedures and substantive criteria or benchmarks. This situation is time-consuming and costly, in particular in cases where the actual impact of an operation in a given country is rather unimportant, but where low national jurisdiction thresholds nevertheless require a notification.

There are various discussion and coordination fora at the international level, such as the International Competition Network (ICN) or the Competition Committee of the Organisation for Economic Cooperation and Development which endeavour to produce more convergence of national merger control systems. Some progress has been achieved in the context of the ICN with the adoption of recommended practices on matters such as jurisdiction, procedure and even substantive assessment. Given the wide variety of underlying national circumstances (nature of the authority, administrative culture, enforcement powers) and the sensitivities often connected to issues of merger control, this remains, however, an undertaking which requires a lot of patience and which will only be crowned by success in the long term. In the meantime, the coexistence and parallel application of a large number of national merger control systems will continue.

Managing multiple filings with a variety of national competition authorities requires important skills in terms of legal knowledge, organisation and coordination. This book provides valuable insights and guidance with regard to these complicated processes and it will be of great assistance to corporations and their counsel.

Brussels, March 2014

Latvia

Raidla Lejins & Norcous
Dace Silava-Tomsone, Ugis Zeltins & Sandija Novicka

LEGISLATION AND JURISDICTION

1. What is the relevant merger control legislation? Is there any pending legislation that would affect or amend the current merger control rules described below?

The merger control provisions are included in the Competition Law, effective as of 1 January 2002 and the Cabinet of Ministers Regulation No. 800 of 29 September 2008 'Procedure of filing and examination of full-form and short-form notification of a concentration between market participants'.

In September 2013, the Ministry of Economics filed with the Cabinet of Ministers a proposal for the amendments to the Competition Law. *Inter alia*, it is planned to change significantly the current merger control rules. It is proposed to introduce the following jurisdictional merger control criteria:

(i) the combined turnover of all undertakings concerned is at least EUR 30 million; and
(ii) the turnover of at least two merging parties exceeds EUR 1.5 million; or
(iii) in the health-care sector, the turnover of at least two merging parties exceeds EUR 300,000.

The market-share criterion would be removed by the amendments. However, the Competition Council would have a discretion to request filing of notification in respect of a merger which does not hit the thresholds if the merger concerns a relevant market in which the merging parties' combined market share exceeds 40 per cent or there are reasonable grounds to expect that the merger would create or strengthen dominant position or would substantially lessen competition in the relevant market.

By the amendments, the scope of transactions qualifying for a short-form notification will be expanded.

It is also planned to introduce a state fee for filing the merger notification and to introduce rights of the Competition Council to extend the deadline for taking the decision for 15 business days in cases when remedies need to be assessed. The proposed filing fees range from EUR 4,000 to EUR 8,000 depending on the combined turnover of the merging parties.

Also, the system of penalties would be reformed. According to the amendments, the amount of the penalty for an unnotified merger or merger in breach of the decision adopted by the Competition Council would be up to 5 per cent of the combined turnover of the merging parties in the previous financial year.

It is yet to be seen whether and in what reading the proposed

amendments will be adopted by Parliament. However, it is likely that the amendments will be adopted already in 2014. In such case, it is likely that the new rules will become applicable as of 2015.

2. What are the relevant enforcement authorities, and what are their contact details?

The Competition Council is an authority charged with monitoring compliance with the merger control rules, including examination of the concentration notifications submitted, granting regulatory approvals and imposition of penalties for failure to notify.

The Competition Council contact details are as follows:

Konkurences padome (Competition Council)
Brivibas iela 55, 2 korp. Riga, LV 1010
T: +371 6728 2865
F: +371 6724 2141
E: konkurence@kp.gov.lv
W: *www.kp.gov.lv* (the website is available in Latvian and, to some extent, in English)

3. What types of transactions are potentially caught by the relevant legislation?

Under the Competition Law a concentration is deemed to arise where:

- two or more previously independent market participants merge;
- one market participant is merged into another market participant;
- one or more individuals already controlling at least one market participant, or one or more market participants either: (i) acquire all or part of the assets or rights to use those assets; or (ii) acquire direct or indirect decisive influence over one or more other market participants;
- one individual or two or more individuals jointly either: (i) acquire all or part of the assets of two or more market participants or rights to use those assets; or (ii) acquire direct or indirect decisive influence over two or more other market participants.

As follows from the above, under the Competition Law both asset and share deals are covered. The concept of decisive influence is broadly similar to that of the concept of control under the EC Merger Regulation. In the Competition Law the decisive influence is defined as the ability, directly or indirectly, to:

- control (permanently or on a case-by-case basis) decision-making in the management institutions of the market participant through shareholding or otherwise;
- appoint sufficient number of members of the supervisory or management institutions of the market participant to gain the majority vote in that institution.

4. Are joint ventures caught, and if so, in what circumstances?

Merger control rules apply to joint ventures as well. The Competition

Council in its decisions has explained that joint ventures are subject to merger control only if they are 'full-function' joint ventures within the meaning of the EC Merger Regulation. The jurisdictional thresholds are the same as in other cases of concentrations. The turnover of the joint venture itself (and, if applicable, its group) and that of the jointly controlling parties (and, if applicable, their groups) is taken into account.

5. What are the jurisdictional thresholds?

Jurisdictional merger control criteria are as follows:

- the combined turnover of all undertakings concerned is at least Ls 25 million (EUR 35,572,000); or
- the combined market share of all undertakings concerned exceeds 40 per cent; and
- there are three or more merging parties, or
- there are two merging parties and the turnover of each exceeds Ls 1.5 million (EUR 2,134,000).

The thresholds are defined by reference to turnover in Latvia and it includes revenues in all product markets. The turnover of the previous financial year is considered.

Only the turnover of the purchaser and the target, but not the seller, is taken into account. However, if the purchaser belongs to a corporate group, the net turnover of the whole group is taken into account. Group is defined by reference to the decisive influence.

The turnover threshold can be satisfied by only one party – the purchaser or the target – if there are three or more parties to the merger. The Competition Council has interpreted the law to mean that even the acquisition of a dormant Latvian company (ie, a company without turnover) is necessarily a concentration.

The market share threshold can be satisfied even if the parties do not have overlapping activities and there is no distinction drawn between the target or the acquirer satisfying the threshold. Again, if there are two parties to the merger and the turnover of one does not exceed Ls 1.5 million (EUR 2,134,000), merger control provisions do not apply even if the combined market share exceeds 40 per cent.

The combined turnover in Latvia is calculated by adding the net turnover of the purchaser (and, if applicable, its group) and the net turnover of the target. Discounts and turnover taxes are excluded. Turnover within a group is also excluded. When assets are acquired, only the turnover that can be attributed to them is included. The turnover of companies subject to joint control is attributed to the controlling entity in proportion to the shareholding.

The Competition Law does not deal with how turnover should be allocated to Latvia, but according to the implementing Cabinet of Ministers Regulation only sales of goods and services in and to Latvia must be included, ie, sales from Latvia to another jurisdiction are not taken into account.

Entities which are not present in Latvia are not considered to be parties

to a concentration which may be controlled under the Competition Law. However, this approach is based on a non-evident interpretation, and the Competition Council might reconsider if a large local undertaking intended to merge with obvious potential market entrants.

The market-share threshold is applied by reference to the whole of the relevant market, which is not necessarily geographically limited to Latvia.

Presence is defined by reference to residence, incorporation or turnover. Therefore, direct sales into Latvia are sufficient to constitute 'local presence'.

When calculating turnover, exchange rates of the Latvian Central Bank are used. They are available at *www.bank.lv/eng/main/all*.

6. Are these thresholds subject to regular adjustment?

The turnover thresholds are set in absolute, rather than relative terms, therefore any changes may be achieved only by means of legislation.

7. Are there any sector-specific thresholds?

Jurisdictional thresholds are the same for all sectors. Rules of turnover calculation are different in the banking and insurance sector.

8. In the event the relevant thresholds are met, is a filing mandatory or voluntary?

The filing is compulsory.

9. Can a notification be avoided even where the thresholds are met, based on a 'lack of effects' argument?

No, once a transaction qualifies for merger control, there are no exceptions from the general requirement to file. In 2008, the Competition Council imposed a fine of Ls 11,760 (EUR 16,800) on Latvian company that acquired 100 per cent shares in a dormant limited liability company that had no turnover or assets, except for the land lease agreement giving rights to construct on the land plot a trade centre. The Competition Council was not ready to accept any 'lack of effects' arguments.

10. Are there special rules by which a notification of a 'foreign-to-foreign' transaction can be avoided even where the thresholds are met?

No, once a transaction qualifies for merger control, there are no exceptions from the general regime. In 2008, the Competition Council imposed a fine of Ls 2,600 (EUR 3,700) on a company registered in Estonia which, as a result of amendments to the shareholders agreement concluded with a company registered in Luxembourg, acquired sole decisive influence (previously joint control) over an Estonian company and indirect sole decisive influence over a Latvian company.

11. Does the relevant authority have jurisdiction to initiate a review of transactions which do not meet the thresholds for a notification?

No, the Competition Council has no jurisdiction to initiate a review of a

transaction for merger control purposes if the transaction does not meet the thresholds for a notification.

NOTIFICATION REQUIREMENTS, TIMING AND POTENTIAL PENALTIES

12. Is there a specified deadline by which a notification must be made?

Notification must be submitted 'before concentration', ie before the transfer of control becomes effective. The obligation is considered to have been fulfilled only when the full-form notification or, if permissible, short-form notification has been duly filed. Fines up to Ls 1,000 (EUR 1,400) per day may be imposed for failure to notify and for late notification. The starting date of the period subject to the fine is the effective date of the merger, ie closing.

13. Can a notification be made prior to signing a definitive agreement?

Filing can be made as soon as the parties are able to provide information describing the intended structure of the transaction in sufficient detail for merger control assessment to take place. In practice where filing takes place prior to a binding agreement being entered, the intended structure of the transaction normally would be reflected in some kind of document executed by the merging parties (ie, letter of intent or heads of terms) rather than simply outlined. The respective document or documents must be enclosed with the notification.

14. Who is responsible for notifying?

The filing obligation rests on: (i) the person acquiring sole or joint control over an undertaking or assets, regardless of whether the target is a legal person and whether it will cease to exist; or (ii) all the parties that are to merge into a new legal entity. It is possible but not customary to notify jointly.

15. What are the filing fees, if any?

There is no filing fee.

16. Where a notification is necessary, is approval needed before the transaction is closed/implemented (is there a waiting period or a suspension requirement)?

Closing is possible after notification but before clearance, yet at the parties' own risk. An eventual prohibition or conditional clearance would retroactively render the closing illegal and trigger a fine. Therefore, if the transaction is completed before the clearance is received, there is a risk that the market participants will be obliged to carry out de-merger and will be subject to a fine for a merger in violation of the decision of the Competition Council.

17. If there is a suspension requirement, is it possible to apply for a derogation in order to close before approval is granted? If so, under what circumstances?

There is a prohibition on closing before submission of notification but not before clearance. Since there is no formal standstill obligation after filing, there are no express provisions allowing an application for derogation.

Consequently, closing prior to clearance is subject only to self-assessment by the parties.

18. Are any other exceptions (carve-outs etc) available to allow parties to close/implement prior to approval?

As indicated under questions 16 and 17, there is a prohibition on closing before submission of notification but not before clearance. Closing prior to clearance is subject only to self-assessment of the parties.

There are no exceptions from the general regime for public bids.

From a strictly legal point of view, carve-out of the Latvian part of the transaction from the global transaction is not possible.

19. What are the possible sanctions for failing to notify a transaction?

A fine of up to Ls 1,000 (EUR 1,400) per day may be imposed for failure to notify and for late notification. The starting date of the period subject to the fine is the effective date of the merger, ie closing. Only the party which was bound to submit notification is liable for the fine.

So far the fines imposed by the Competition Council have ranged from Ls 10 (EUR 14) to Ls 250 (EUR 350) per day. So far the highest fine of Ls 250 per day was applied in a case where a market participant demonstrated manifest disregard of the merger control regime by failing to notify even after the Competition Council opened an investigation on the implemented merger, and up until the date the Competition Council took decision to allow the merger. In practice, the amounts of fines calculated on the basis of determined rate per day are often reduced by the Competition Council under the considerations of reasonableness.

The Competition Council may order de-merger, divestment or other remedies as it sees fit. Due to reduced budget and staff, the ability of the Competition Council to monitor transactions subject to notification is limited and largely dependent on the activities of competitors and information disclosed in the mass media.

20. What are the possible sanctions for implementing a transaction prior to receiving approval (so-called 'gun-jumping')?

The Competition Law does not provide for an obligatory suspension of completion before clearance. Under the Competition Law, a daily fine of Ls 1,000 (EUR 1,400) can be imposed on market participants that have merged in violation of the negative or conditional clearance decision of the Competition Council. Therefore, if the transaction is completed before the clearance is received, there is a risk that the market participants will be obliged to carry out a de-merger and will be subject to a fine for merger in

violation of the decision of the Competition Council.

In the case of 'gun-jumping', the new market participant or the acquirer of the control can be fined.

Due to reduced budget and staff, the ability of the Competition Council to monitor cases of the 'gun-jumping' is limited.

21. What are the possible sanctions for implementing a transaction despite a prohibition decision or in breach of a condition/obligation imposed by a conditional clearance decision?

Under the Competition Law, a daily fine of EUR 1,400 can be imposed on market participants that have merged in violation of the negative or conditional clearance decision of the Competition Council.

In addition, the Latvian Administrative Offences Code provides for a fine of up to EUR 700 for natural persons and up to EUR 14,000 for legal persons if they refuse to comply with a decision of the Competition Council.

Criminal law provides for imprisonment of up to two years, forced labour, fine and prohibition on doing business for a refusal to comply with the requests of the Competition Council if this offence has been committed repeatedly within one year or has caused significant damage to the interests of the state or consumers. Until now no case has been prosecuted under this provision.

So far there has been only one case in which the Competition Council has applied a fine for failure to comply with its decision in a merger case. At the beginning of 2009, the Competition Council conditionally cleared the merger of two companies owning several pharmacies in Latvia imposing a prohibition on acquiring companies operating pharmacies in specific territories in Latvia. In breach of the prohibition, one of the merger participants acquired a company owning pharmacies in the restricted territory. A fine of Ls 75 (EUR 100) per day was imposed.

Under the Competition Law, the fine for the violation of the decision of the Competition Council can be imposed on the newly formed market participant or the acquirer of the control.

22. What are the different phases of a review? Is there any way to speed up the review process?

There may be two phases of merger filing review. The maximum duration of a Phase I investigation is one month from filing. If Phase I is completed by a decision to commence Phase II, the latter must be completed within (i) four months from the date of submission of the full-form application, or (ii) three months from the date of submission of the short-form application.

It is important to note that the commencement of a Phase II investigation does not necessarily indicate a potentially problematic transaction. Often, a Phase II investigation is commenced only due to shortage of resources at the authority to advance the review or due to delay in collection of information or obtaining of feedback from third parties.

The review timetable cannot be extended or frozen. If within a term of 45 days from the date of the notification, the notifying party has not

received a decision from the Competition Council to clear or prohibit the merger or open a Phase II investigation, the merger shall be considered cleared. Failure by the Competition Council to issue a decision within the Phase II deadlines results in an automatic unconditional clearance. If the notification contains incomplete, incorrect or misleading information, the Competition Council may consider that it has not been submitted, thus resetting the timetable.

General administrative law permits a petition asking the Competition Council to review the case within a shortened timetable. The request and the Competition Council's response must be reasoned. The response can be appealed to a court, however, in practical terms a decision of the court is unlikely to be obtained prior to the expiry of review deadlines.

Generally speaking, the Competition Council lets the parties know that it considers the merger to be a 'problematic merger' quite late in the proceedings, usually at the very end of the Phase II investigation. Upon such notification, at the initiative of the notifying party a meeting with the representatives of the authority may be held during which the Competition Council explains its position and requests the notifying party's suggestions for a remedy.

23. Is there a possibility for a 'simplified' procedure or shorter notification form and, if so, under what conditions would this apply?

Short-form notification can be submitted if the parties to a merger: (i) are not active on the same relevant market or on upstream or downstream markets related to one another; or (ii) their combined market share in the relevant market does not exceed 15 per cent. The maximum duration of a Phase II investigation is three months (instead of four months) from the date of submission of the short-form application.

24. What types of data and what level of detail is required for a notification?

'Cabinet of Ministers Regulation No. 200 of 29 September 2008 on the procedure for filing and examination of full-form and short-form notification of concentration between market participants' contains a list of information that shall be included in the notification. In general, the notification shall contain the information broadly similar to Form CO of the EC Merger Regulation. Besides the information on the participants to the merger, the information on the size of the markets, on competitors, customers, suppliers and entry barriers must also be provided. Also the legal, financial and economic aspects of the transaction and its impact on the competition must be described.

25. In which language(s) may notifications be submitted?

The notification must be in Latvian.

26. Which documents must be submitted along with a notification?

The notification must be accompanied by:

(i) power(s) of attorney specifically authorising a person to represent one or all parties to the merger for the purposes of submitting the notification and participating in the investigation;
(ii) articles of association of each party to the merger;
(iii) copies of financial statements for each party's most recent financial year;
(iv) attestation of truthfulness covering all submitted material; and
(v) document(s) demonstrating the parties' mutual intent to negotiate or conclude an agreement which would qualify as a concentration subject to merger control.

Market-related documents may be enclosed at the parties' discretion.

Public documents, eg notarised powers of attorney, must be legalised.

All foreign language documents must be translated into Latvian, and the translations must be attested by a sworn translator. In practice, translations of the relevant extracts of extensive documents such as transaction documentation might suffice. Likewise, in certain cases the Competition Council might accept, eg market studies in English. Such exceptions, however, should be agreed in each individual case.

27. What are the possible sanctions for providing incorrect, misleading or incomplete information in a notification?

If incomplete information is provided in the notification, it is deemed not to have been submitted.

If incomplete or misleading information is submitted in response to the Competition Council's questions, inter alia, during investigation, or if misleading information has been included in the notification, the Latvian Administrative Offences Code provides for a fine of up to Ls 500 (EUR 700) for natural persons and up to Ls 10,000 (EUR 14,000) for legal persons.

There is no publicly available information regarding fines applied for submission of incomplete or misleading information in merger cases.

28. To what extent is the relevant authority available for pre-notification discussions? Are pre-notification consultations customary?

Normally, the officials of the Competition Council are always ready to meet with the market participants to discuss competition law issues relevant to them. Pre-notification consultations are customary in cases when there are doubts whether the transaction meets the jurisdictional thresholds.

29. Where pre-notification consultations are possible, what measures does the relevant authority take to ensure that such discussions are treated confidentially?

According to the Competition Law, the officials of the Competition Council are not allowed to disclose information obtained when performing their official duties, unless it is authorised by the Chairperson of the Competition Council. Confidential information can be disclosed only in cases specifically listed in the law. Normally, the fact of the pre-notification consultations is not disclosed to the public by the Competition Council. However, the

market participants are advised to explicitly state to the Competition Council that the fact of the pre-notification consultations and the information shared during the meeting is confidential.

30. At what point and in what forum does the relevant authority make public the fact that a notification has been made?

The fact and date of notification, as well as the identities of the parties are disclosed on the Competition Council's website (*www.kp.gov.lv*) within three days from receipt of the notification.

31. Once the authority has issued its decision, what information about the transaction and the decision is made publicly available?

The final decision is made public by means of publication in an official journal and posting on the authority's website. The parties to the notification must indicate which information is confidential. Confidential information is omitted from the publication.

There are no clear guidelines for publication of press releases. Normally, press releases on most important decisions of the Competition Council appear on the website of the authority and are distributed to the mass media.

SUBSTANTIVE ASSESSMENT OF THE MERGER, ROLE OF THIRD PARTIES AND REMEDIES

32. What is the substantive test for assessing the legality of a notified transaction?

The substantive test is either: (i) creation or strengthening of dominant position; or (ii) substantial lessening of competition. A positive finding under any of the two tests may result in prohibition.

33. What theories of harm are considered by the authority in assessing the transaction? How concerned are the authorities with non-horizontal (eg, vertical or conglomerate) effects, and are any other theories of harm analysed (eg, coordination in the case of joint ventures)?

In general, non-horizontal mergers are considered less likely to harm competition. The Competition Council in SIA Latvijas Mobilais Telefons decision of 5 April 2006 (case No. 1767/05/10/8) stated that vertical merger can pose a risk to competition only if at least one of the merger participants holds a dominant position in the relevant market or the merger can cause or facilitate foreclosure on any relevant market. Mergers resulting in joint ventures are assessed under the standard substantive test. Creation of a joint venture will be subject to a more detailed assessment if any of the parent companies is active in related upstream or downstream markets.

34. Are non-competition issues, such as industrial policy or labour policy, commonly taken into account in the assessment of the transaction?

Non-competition factors are not relevant, although the implementing Cabinet of Ministers Regulation does contain so far unapplied and uninterpreted words saying that 'social gain' may be taken into account in the substantive assessment. Decisions of the Competition Council do not seem to reveal any particular pattern of implicit reliance on non-competition factors.

35. Are economic efficiencies considered as a mitigating factor in the substantive assessment?

Although economic efficiencies achieved as a result of the merger (especially if consumers benefit from it) are accepted by the Competition Council as one of the factors that can counterbalance lessening of competition, so far, complex economic analysis or economic expert witness opinions are usually not part of the proceedings.

36. Does the relevant authority typically cooperate/share information with authorities in other jurisdictions?

The Competition Council regularly cooperates at an international level with other competition authorities. According to the Competition Law, upon request from the competition authorities of other Member States, the Competition Council is entitled to carry out investigative activities in relation to Latvian market participants.

The Competition Council participates in the European Competition Network (ECN), which is a formal cooperation forum for European competition authorities and the European Commission. In addition to the ECN, the Competition Council occasionally informally contacts neighbouring competition authorities in Lithuania and Estonia to coordinate their approach.

37. To what extent are third parties involved in the review process?

Third parties' views are always invited if a Phase II investigation is commenced. Given that the fact of notification must be disclosed publicly, third parties' observations may already be received during Phase I. An invitation to submit observations is published on the Competition Council's website, but it may also proactively approach customers, competitors, trade associations and consumer organisations in order to solicit their views.

The Competition Council's decisions in merger cases can be appealed to a court, except for the decision to begin an investigation and to commence a Phase II investigation, within one month after the notification of the decision. An appeal can be brought not only by the parties to the merger, but also by any third party whose rights or legitimate interests are infringed by the decision.

In case third parties fail to reply to formal requests for information by the Competition Council they may be fined under the Latvian Administrative Offences Code which provides for a fine of up to EUR 700 for natural persons and up to EUR 14,000 for legal persons.

38. Is it possible for the parties to propose remedies for potential competition issues?

There are no statutory or regulatory rules on the remedy procedure, nor has the Competition Council published any guidance.

The parties are free to suggest possible remedies. However, the Competition Council is not bound by the suggestion, and the parties are not obliged to offer any remedies. The remedies imposed by the Competition Council are part of the decision by which the merger is cleared and, thus, are binding on the parties.

In principle, remedies can be proposed at any stage of the procedure.

Remedies will be accepted if the Competition Council can be persuaded that the suggested remedies are relevant, adequate and sufficient to eliminate the competition concerns of the merger identified by the Competition Council.

39. What types of remedies are likely to be accepted by the authority (eg, divestment remedies, other structural remedies, behavioural remedies etc)?

The Competition Council may accept both behavioural and structural remedies, but, in practice, it is more welcoming towards behavioural remedies.

40. What power does the relevant authority have to enforce a prohibition decision?

Under the Competition Law a daily fine of EUR 1,400 can be imposed on market participants that have merged in violation of the decision of the Competition Council.

In addition, the Latvian Administrative Offences Code provides for a fine of up to Ls 500 (EUR 700) for natural persons and up to Ls 10,000 (EUR 14,000) for legal persons if they refuse to comply with a decision of the Competition Council.

Criminal law provides for imprisonment of up to two years, forced labour, fine and prohibition on doing business for a refusal to comply with the requests of the Competition Council if this offence has been committed repeatedly within one year or has caused significant damage to the interests of the state or consumers.

JUDICIAL REVIEW

41. Is it possible to challenge decisions approving or prohibiting transactions? If so, before which court or tribunal?

The Competition Council's decisions in merger cases can be appealed to a court, except for the decision to begin an investigation and to commence a Phase II investigation, within one month after the notification of the decision.

Appeals are heard in the first instance by the Regional Administrative Court. Decisions of the Regional Administrative Court can be appealed on points of law to the Administrative Departments of the Senate of the Supreme Court.

42. What is the typical duration of a review on appeal?
Litigation in the first instance might take up to one year. In total, the litigation might last two to three years.

43. Have there been any successful appeals?
According to publicly available information, there has been one case in which the Competition Council decision under which the transaction was prohibited has been revoked by the court. The first-instance court ruled that the decision of the Competition Council contained contradictory evidence and conclusions regarding the impact of the transaction on competition in the relevant market. Furthermore, the court ruled that the Competition Council had failed to analyse and demonstrate why the merger could not be cleared subject to remedies. The arguments of the first-instance court were also upheld by the appellate court.

STATISTICS

44. Approximately how many notifications does the authority receive per year?
Before the economic crisis, the Competition Council received between 30 and 80 notifications per year. After the crisis the number of notified transactions dramatically decreased. Between 2009 and 2012, there were 10 notifications per year on average. In 2013, the number of notified mergers started to grow slowly with 15 mergers notified.

45. Has the authority ever prohibited a transaction? How many prohibition decisions has the authority issued in the past five years?
During the last five years, the Competition Council has issued three prohibition decisions (one in 2007 and two in 2008).

46. Over the past five years, in what percentage of cases have binding commitments been required in order to obtain clearance for a transaction?
So far remedies have been ordered in only about 20 cases. On average, it represents roughly 10–15 per cent of all merger cases. However, the most recent practice of the Competition Council demonstrates that it is increasingly inclined to impose remedies. Thus, in 2013, remedies were ordered in three out of 15 notified transactions.

47. How frequently has the authority imposed fines in the past five years?
During the past five years, the Competition Council has applied fines in seven cases (in 2009 – one case; in 2010 – one case, in 2011 – two cases; in 2012 – one case; and in 2013 – two cases). In all seven cases, the fine was applied for failure to notify the merger before it took place.

Contact details

GENERAL EDITORS

Jean-François Bellis & Porter Elliott
Van Bael & Bellis
Avenue Louise 165
B-1050 Brussels
Belgium
T: +32 (0)2 647 73 50
F +32 (0)2 640 64 99
E: jfbellis@vbb.com
pelliott@vbb.com
W: www.vbb.com

AUSTRALIA

Luke Woodward, Elizabeth Avery & Morelle Bull
Gilbert + Tobin Lawyers
Level 37
2 Park Street
Sydney 2000
NSW
Australia
T: +61 2 9263 4000
F: +61 2 9263 4111
E: lwoodward@gtlaw.com.au
eavery@gtlaw.com.au
mbull@gtlaw.com.au
W: www.gtlaw.com.au

AUSTRIA

Dr Johannes P. Willheim
Willheim Müller Rechtsanwälte
Rockhgasse 6, A 1010 Wien
Austria
T: +43 (1) 535 8008
F: +43 (1) 535 8008 50
E: j.willheim@wmlaw.at
W: www.wmlaw.at

BELGIUM

Martin Favart
Van Bael & Bellis
Avenue Louise 165
B-1050 Brussels, Belgium
T: +32 (0)2 647 73 50
F +32 (0)2 640 64 99
E: mfavart@vbb.com
W: www.vbb.com

BRAZIL

Onofre Carlos de Arruda Sampaio & André Cutait de Arruda Sampaio
O.C. Arruda Sampaio – Sociedade de Advogados
Al. Ministro Rocha Azevedo, 882 – 8º andar.
01410-002,
São Paulo
Brazil
T: +55 11 3060-4300
F: +55 11 3082-2272
E: onofre@arruda-sampaio.com
andre@arruda-sampaio.com
W: www.arruda-sampaio.com

BULGARIA

Peter Petrov & Meglena Konstantinova
Boyanov & Co
82, Patriarch Evtimii Blvd
Sofia 1463
Bulgaria
T: +359 2 8 055 055
F: +359 2 8 055 000
E: p.petrov@boyanov.com
W: www.boyanov.com

CANADA

Susan M. Hutton & Megan MacDonald
Stikeman Elliott LLP
Suite 1600
50 O'Connor Street
Ottawa, ON
Canada K1P 6L2
T: +1 613 234-4555
E: shutton@stikeman.com
E: mmacdonald@stikeman.com
W: www.stikeman.com

CHINA

Janet Yung Yung Hui &
Stanley Xing Wan
Jun He
20/F, China Resources Building
8 Jianguomenbei Avenue
Beijing 100005, P.R. China
T: +8610 8519 1300
F: +8610 8519 1350
E: xurr@junhe.com
wanxing@junhe.com
W: www.junhe.com

CROATIA

Boris Babić, Boris Andrejaš &
Stanislav Babić
Babić & Partners Law Firm Ltd
Nova cesta 60, 1st floor
10000 Zagreb, Croatia
T: +385 (0) 1 3821 124
F: +385 (0) 1 3820 451
E: boris.babic@babic-partners.hr
boris.andrejas@babic-partners.hr
stanislav.babic@babic-partners.hr
W: www.babic-partners.hr

CYPRUS

Elias Neocleous & Ramona Livera
Andreas Neocleous & Co LLC
Neocleous House
195 Makarios III Avenue
PO Box 50613, CY-3608
Limassol, Cyprus
T: +357 25 110 000
F: +357 25 110 001
E: info@neocleous.com
W: www.neocleous.com

CZECH REPUBLIC

Robert Neruda
Havel, Holásek & Partners s.r.o.
Attorneys at Law
Hilleho 1843/6, 602 00 Brno
T: +420 724 929 134
F: +420 545 423 421
E: robert.neruda@havelholasek.cz
W: www.havelholasek.cz

Roman Barinka
Havel, Holásek & Partners s.r.o.
Attorneys at Law
Na Florenci 2116/15
110 00 Praha 1
T: +420 255 000 883
F: +420 255 000 110
E: roman.barinka@havelholasek.cz
W: www.havelholasek.cz

DENMARK

Gitte Holtsø, Thomas Herping
Nielsen & Daniel Barry
Plesner
Amerika Plads 37
DK-2100 Copenhagen
Denmark
T: +45 33 12 11 33
F: +45 33 12 00 14
E: gho@plesner.com
thn@plesner.com
dba@plesner.com
W: www.plesner.com

ESTONIA

Tanel Kalaus & Martin Mäesalu
Raidla Lejins & Norcous
Roosikrantsi 2
Tallinn 10119
Estonia
T: +372 640 7170
F: +372 6407 171
E: rln@rln.ee
W: www.rln.ee

EUROPEAN UNION

Porter Elliott & Johan Van Acker
Van Bael & Bellis
Avenue Louise 165
B-1050 Brussels
Belgium
T: +32 (0)2 647 73 50
F: +32 (0)2 640 64 99
E: pelliott@vbb.com
jvanacker@vbb.com
W: www.vbb.com

FINLAND

Katri Joenpolvi & Leena Lindberg
Krogerus Attorneys Ltd
Unioninkatu 22
FI-00130 Helsinki, Finland
T: +358 (0)29 000 6200
F: +358 (0)29 000 6201
E: katri.joenpolvi@krogerus.com
leena.lindberg@krogerus.com
W: www.krogerus.com

FRANCE

Thomas Picot
Jeantet Associés
87 avenue Kléber
75116 Paris, France
T: +33 01 45 05 80 30
F: +33 01 45 05 81 01
E: tpicot@jeantet.fr
W: www.jeantet.fr

GERMANY

Dr Andreas Rosenfeld, Dr Sebastian Steinbarth & Caroline Hemler
Redeker Sellner Dahs Rechtsanwälte
Willy-Brandt-Allee 11
53113 Bonn
Germany
T: +49 228 726 25 0
F: +49 228 726 25 99

172, Avenue de Cortenbergh
1000 Brussels
Belgium
T: +32 2 740 03 20
F: +32 2 740 03 29
E: rosenfeld@redeker.de
steinbarth@redeker.de
hemler@redeker.de
W: www.redeker.de

GREECE

Anastasia Dritsa
Kyriakides Georgopoulos Law Firm
28, Dimitriou Soutsou Str
GR 115 21
Athens, Greece
T: +30 210 817 1561
F: +30 210 685 6657, 8
E: a.dritsa@kglawfirm.gr
W: www.kglawfirm.gr

HUNGARY

Dr Chrysta Bán
Bán S. Szabó & Partners
József nádor tér 5-6
1051 Budapest
T: +36 1 266 3522
F: +36 1 266 3523
E: cban@bansszabo.hu
W: www.bansszabo.h

ICELAND

Gunnar Sturluson & Helga Óttarsdóttir
Logos Legal Services
Efstaleiti 5
103 Reykjavík
Iceland
T: +354 5 400 300
F: +354 5 400 301
E: gunnar@logos.is
helga@logos.is
W: www.logos.is

INDIA

Farhad Sorabjee, Amitabh Kumar & Reeti Choudhary
J. Sagar Associates
Vakils House,
18 Sprott Road,
Ballard Estate
Mumbai 400 001
India
T: +91 22 4341 8600
F: +91 22 4341 8617
E: farhad@jsalaw.com
amitabh.kumar@jsalaw.com
reeti@jsalaw.com
W: www.jsalaw.com

INDONESIA

HMBC Rikrik Rizkiyana, Vovo Iswanto, Anastasia Pritahayu R. Daniyati & Ingrid Gratsya Zega

Assegaf Hamzah & Partners
Menara Rajawali 16th Floor
Jalan DR. Ide Anak Agung Gde
Agung Lot # 5.1
Kawasan Mega Kuningan
Jakarta 12950
Indonesia
T: +62 21 2555 7800
F: +62 21 2555 7899
E: rikrik.rizkiyana@ahp.co.id
anastasia.pritahayu@ahp.co.id
ingrid.zega@ahp.co.id
W: www.ahp.co.id

IRELAND

John Meade
Arthur Cox
Earlsfort Centre, Earlsfort Terrace
Dublin 2,
Ireland
T: +35 3 8 72427205
F: +35 3 1 6180618
E: john.meade@arthurcox.com
W: www.arthurcox.com

ISRAEL

Eytan Epstein, Mazor Matzkevich & Shiran Shabtai
Epstein Knoller Chomsky Osnat Gilat Tenenboim & Co. Law Offices
Rubinstein House, 9th floor
20 Lincoln St, Tel Aviv
67134 Israel
T: +972 3 5614777
+972 3 5617577
F: +972 3 5614776
+972 3 5617578
E: epstein@ekt-law.com
mazorm@ekt-law.com
shirans@ekt-law.com
W: www.ekt-law.com

ITALY

Enrico Adriano Raffaelli & Elisa Teti
Rucellai & Raffaelli
Via Monte Napoleone 18
20121 Milan,
Italy
T: +39 02 76 45 771
F: +39 02 78 35 24
E: e.a.raffaelli@rucellaieraffaelli.it
e.teti@rucellaieraffaelli.it
W: www.rucellaieraffaelli.it

JAPAN

Setsuko Yufu & Tatsuo Yamashima
Atsumi & Sakai
Fukoku Seimei Building
2-2-2, Uchisaiwaicho, Chiyoda-ku
Tokyo 100-0011
Japan
T: +813 5501 1165 (Yufu)
+813 5501 2297 (Yamashima)
F: +813 5501 2211
E: setsuko.yufu@aplaw.jp
tatsuo.yamashima@aplaw.jp
W: www.aplaw.jp

LATVIA

Dace Silava-Tomsone, Ugis Zeltins & Sandija Novicka
Raidla Lejins & Norcous
Valdemara 20, LV-1010
Riga, Latvia
T: +371 6724 0689
F: +371 6782 1524
E: dace.silava-tomsone@rln.lv
ugis.zeltins@rln.lv
sandija.novicka@rln.lv
W: www.rln.lv

LITHUANIA

Irmantas Norkus & Jurgita Misevičiūtė
Raidla Lejins & Norcous
Lvovo 25, LT-09320
Vilnius
Lithuania
T: +370 5 250 0800
F: +370 5 250 0802
E: irmantas.norkus@rln.lt
jurgita.miseviciute@rln.lt
W: www.rln.lt

LUXEMBOURG

Léon Gloden & Céline Marchand
Elvinger Hoss & Prussen
2, Place Winston Churchill
L-1340 Luxembourg
BP 245, L-2014
Luxembourg
T: +352 44 66 44 0
F: +352 44 22 55
E: leongloden@ehp.lu
celinemarchand@ehp.lu
W: www.ehp.lu

MALTA

Simon Pullicino & Ruth Mamo
Mamo TCV Advocates
103, Palazzo Pietro Stiges
Strait Street
Valletta, VLT 1436, Malta
T: +356 21 231345/2124 8377
F: +356 21 231298/2124 4291
E: simon.pullicino@mamotcv.com
ruth.mamo@mamotcv.com
W: www.mamotcv.com

THE NETHERLANDS

Erik Pijnacker Hordijk
De Brauw Blackstone Westbroek N.V.
Claude Debussylaan 80
1082 MD Amsterdam
The Netherlands
P.O. Box 75084
1070 AB Amsterdam
The Netherlands
T: +31 20 577 1804
F: +31 20 577 1775
E: erik.pijnackerhordijk@debrauw.com
W: www.debrauw.com

NEW ZEALAND

Neil Anderson & Matt Sumpter
Chapman Tripp
23 Albert Street, Auckland
PO Box 2206, Auckland 1140
New Zealand
T: +64 9 357 9000
F: +64 9 357 9099
E: neil.anderson@chapmantripp.com
matt.sumpter@chapmantripp.com
W: www.chapmantripp.com

NORWAY

Thea S. Skaug, Espen I. Bakken & Stein Ove Solberg
Arntzen de Besche Advokatfirma AS
Bygdøy allé 2,
0257 Oslo
Norway
P.O. Box 2734 Solli
T: +47 23 89 40 00
F: +47 23 89 40 01
E: tss@adeb.no
eib@adeb.no
sos@adeb.no
W: www.adeb.no

POLAND

Jarosław Sroczyński
Markiewicz & Sroczyński GP
ul. Sw. Tomasza 34
Dom Na Czasie
Suite 12, 31-027
Cracow, Poland
T: +48 12 428 55 05
F: +48 12 428 55 09
E: jaroslaw.sroczynski@mslegal.com.pl
W: www.mslegal.com.pl

PORTUGAL

Diogo Coutinho de Gouveia & Eduardo Morgado Queimado
Gómez-Acebo & Pombo Abogados, S.L.P.
Avenida da Liberdade nº 131
1250-140 Lisboa
T: +351 213 408 579
F: +351 213 408 609
E: dgouveia@gomezacebo-pombo.com
W: www.gomezacebo-pombo.com

ROMANIA

Gelu Goran & Razvan Bardicea
Biriş Goran SCPA
47 Aviatorilor Boulevard
RO-011853
Bucharest
Romania
T: +40 21 260 0710
F: +40 21 260 0720
E: ggoran@birisgoran.ro
rbardicea@birisgoran.ro
W: www.birisgoran.ro

RUSSIA

Vladislav Zabrodin
Capital Legal Services
Chaplygina House
20/7 Chaplygina Street
Moscow 105062
Russia
Bolloev Center, 4 Grivtsova Lane
St. Petersburg 190000
Russia
T: +7 (495) 970 10 90
F: +7 (495) 970 10 91
E: vzabrodin@cls.ru
W: www.cls.ru

SINGAPORE

Lim Chong Kin & Ng Ee Kia
Drew & Napier LLC
10 Collyer Quay, #10-00
Ocean Financial Centre
Singapore 049315
T: +65 6531 4110
+65 6531 2274
F: +65 6535 4864
E: chongkin.lin@drewnapier.com
eekia.ng@drewnapier.com
W: www.drewnapier.com

SLOVAKIA

Jitka Linhartová & Claudia Bock
Schoenherr
Nám. 1. mája 18 (Park One)
811 06 Bratislava
Slovakia
T: +421 257 10 07 01
F: +421 257 10 07 02
E: j.linhartova@schoenherr.eu
c.bock@schoenherr.eu
W: www.schoenherr.eu

SLOVENIA

Christoph Haid & Eva Škufca
Schoenherr
Tomšiceva 3
SI-1000 Ljubljana
Slovenia
T: +386 (0)1 200 09 80
F: +386 (0)1 426 07 11
E: c.haid@schoenherr.eu
e.skufca@schoenherr.eu
W: www.schoenherr.eu

SOUTH AFRICA

Desmond Rudman
Webber Wentzel
10 Fricker Road
Illovo Boulevard
Illovo, Johannesburg
2196, South Africa
PO Box 61771
Marshalltown, Johannesburg
2107, South Africa
T: +27 11 530 5272
F: +27 11 530 6272
E: desmond.rudman@
webberwentzel.com
W: www.webberwentzel.com

SOUTH KOREA

Sanghoon Shin & Ryan Il Kang
Bae Kim & Lee, LLC
133 Teheran-ro
Yoksam-dong, Kangnam-gu
Seoul 135-723, South Korea
T: +82 2 3404 0230
F: +82 2 3404 7688
E: shs@bkl.co.kr
sanghoon.shin@bkl.co.kr
ik@bkl.co.kr
il.kang@bkl.co.kr
W: www.bkl.co.kr

SPAIN

Rafael Allendesalazar & Paloma
Martínez-Lage Sobredo
Martínez Lage, Allendesalazar &
Brokelmann Abogados
Claudio Coello, 37
28001 Madrid
Spain
T: +34 91 426 44 70
F: +34 91 577 37 74
E: rallendesalazar@mlab-abogados.com
pmartinezlage@mlab-abogados.com
W: www.mlab-abogados.com

SWEDEN

Rolf Larsson & Malin Persson
Gernandt & Danielsson Advokatbyrå
Hamngatan 2, Box 5747
SE-114 87 Stockholm
Sweden
T: +46 8 670 66 00
F: +46 8 662 61 01
E: rolf.larsson@gda.se
malin.persson@gda.se
W: www.gda.se

SWITZERLAND

MEYERLUSTENBERGER LACHENAL
Christophe Rapin & Dr Pranvera
Këllezi
65 Rue Du Rhône
1211 Genève 3
Switzerland
T: +41 22 737 10 00
F: +41 22 737 10 01
E: christophe.rapin@mll-legal.com
pranvera.kellezi@mll-legal.com

Dr Martin Ammann
Forchstrasse 452
8032 Zurich
Switzerland
T: +41 44 396 91 91
F: +41 44 396 91 92
E: martin.ammann@mll-legal.com

Christophe Petermann
222 Av. Louise
1050 Brussels
Belgium
T: +32 2 646 0 222
F: +32 2 646 75 34
E: christophe.rapin@mll-legal-com
christophe.petermann@mll-legal.com
W: www.mll-legal.com

TAIWAN

Stephen C. Wu, Yvonne Y. Hsieh
& Wei-Han Wu
Lee and Li, Attorneys-at-Law
9F, No. 201
Tun-Hua N. Road
Taipei, Taiwan
Republic of China
T: +886 2 2715-3300
F: +886 2 2713-3966
E: stephenwu@leeandli.com
W: www.leeandli.com

TURKEY

Gönenç Gürkaynak, Esq.,
ELIG Attorneys-at-Law
Çitlenbik Sokak No.12 Yıldız
Mahallesi Besiktas
34349 Istanbul
Turkey
T: +90 212 327 1724
F: +90 212 327 1725
E: gonenc.gurkaynak@elig.com
W: www.elig.com

UKRAINE

Igor Svechkar
Asters Law Firm
Leonardo Business Center
19–21 Bohdana Khmelnytskoho St
Kiev 01030
Ukraine
T: +380 44 230 6000
F: +380 44 230 6001
E: igor.svechkar@asterslaw.com
W: www.asterslaw.com

UNITED KINGDOM
Bernardine Adkins &
Samuel Beighton
Wragge & Co LLP
3 Waterhouse Square
142 Holborn
London EC1N 2SW
UK
T: +44 (0) 870 733 0649
+44 (0) 207 864 9509
F: +44 (0) 870 904 1099
E: bernardine_adkins@wragge.com
samuel_beighton@wragge.com
W: www.wragge.com

UNITED STATES OF AMERICA
Steven L. Holley
& Bradley P. Smith
Sullivan & Cromwell LLP
125 Broad Street
New York,
New York 10004
USA
T: +1 (212) 558-4000
F: +1 (212) 558-3588
E: holleys@sullcrom.com
smithbr@sullcrom.com
W: www.sullcrom.com

Merger Control

Provisions on merger control are a key element of almost all competition laws around the globe, from the United States to the European Union, from China to Brazil.

Today, the need to obtain merger control approvals is often the number one factor delaying the closing of M&A deals worldwide. While more countries have merger control laws than ever before, merger control regimes differ dramatically from one another, not only with regard to notification requirements, but also in other key elements such as timing and costs.

Managing multiple filings with a variety of competition authorities requires important skills in terms of knowledge, organisation and coordination.

This second edition of ‘Merger Control’ provides valuable insights and guidance to these complicated processes and will be of great assistance to corporations and their counsel.