Merger Control

Jurisdictional comparisons **Second edition 2014**

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

New Zealand

Chapman Tripp
Neil Anderson & Jessica Birdsall-Day

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 Commerce Act 1986 regulates the competition elements of merger control in New Zealand. As well as setting out the relevant rules and standards, the Act establishes New Zealand's competition regulatory authority, the Commerce Commission (the Commission).

The Commerce Act prohibits mergers or acquisitions which will have, or are likely to have, the effect of substantially lessening competition in New Zealand markets (section 47). The Act sets out the regime for obtaining clearance or authorisation of a proposed merger or acquisition (sections 66 to 69B).

On application from the acquiring party, the Commission may give 'clearance' of a proposed merger or acquisition if it is satisfied that the acquisition will not breach section 47. Obtaining clearance gives comfort to the vendor and purchaser that the acquisition will not later be subject to enforcement action for a breach of section 47. Importantly, clearance applications cannot be made retrospectively. The Commission's *Mergers and Acquisitions Guidelines* (*M&A Guidelines*) broadly set out how the Commission processes and assesses clearance applications. The document is publicly available on the Commission's website.

On application from the acquiring party, the Commission may grant an 'authorisation' of a proposed merger or acquisition if it is satisfied that, despite competition concerns, the merger or acquisition is likely to result in a public benefit that outweighs any lessening of competition, and so should be allowed to proceed. The Commission's *Authorisation Guidelines* outline how the Commission processes and assesses authorisation applications. This document is also publicly available on the Commission's website.

The Overseas Investment Act 2005 regulates certain international transactions. Overseas Investment Office consent is required where an 'overseas person' seeks to acquire 25 per cent or more direct or indirect ownership and/or control of interests in:

- 'significant business assets' (broadly, where the value of the deal exceeds NZ$100 million);
- 'sensitive' and 'special' New Zealand land;
- farm land; and
- fishing quota.

There are industry-specific prohibitions on mergers, but these are rare. One example is the Fisheries Act 1996, which limits a firm's ability to aggregate holdings of fishing quota.

The Commerce (Cartels and Other Matters) Amendment Bill (the Amendment Bill) is currently before Parliament, and is likely to be enacted. The Amendment Bill, if enacted in its current form, will affect the merger control rules by:

- extending the Commission's timeframe for assessing clearance applications;
- limiting the categories of person entitled to appeal against a clearance decision; and
- setting up a regime relating specifically to acquisitions by overseas persons of a controlling interest in a New Zealand body corporate, where that acquisition has the effect, or likely effect, of substantially lessening competition in a New Zealand market.

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

The Commerce Commission is New Zealand's competition law enforcement body. It is an independent statutory authority and (among other things) is responsible for merger control, including determining clearance or authorisation applications. The Commission takes enforcement proceedings to the New Zealand courts, and the New Zealand courts can also hear appeals against the Commission's clearance or authorisation decisions.

Contact details for the Commission:
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New Zealand
T: +64 4 924 3600
E: contact@comcom.govt.nz
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3. What types of transactions are potentially caught by the relevant legislation?

Any acquisition of a business' assets or shares that would have, or would be likely to have, the effect of substantially lessening competition in a New Zealand market is prohibited by merger control legislation. The analysis is entirely contextual with no prescribed thresholds or proportions that trigger the merger control regime. However, minority interest acquisitions will seldom raise concerns because the necessary level of control to lessen competition will usually be lacking. An example of when a minority stake may raise competition concerns is where a small 'blocking stake' (such as a 10 per cent holding) is acquired which may give the acquirer the power to foreclose a subsequent pro-competitive acquisition by another party.

The Commission's *M&A Guidelines* state that a business acquisition is unlikely to substantially lessen competition in a market where, after the proposed acquisition:

- the three-firm concentration ratio in the relevant market is below 70 per cent and the market share of the merged firm will be less than 40 per cent; or
- the three-firm concentration ratio in the relevant market is 70 per cent or above and the market share of the merged firm will be less than 20 per cent.

The *M&A Guidelines* refer to these ratios as 'concentration indicators' (formerly referred to as 'safe harbours'). These market share ratios are only guidelines and are not determinative of whether an acquisition will lessen competition.

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

Joint ventures are subject to the merger control regime. Examples of joint ventures that may be caught by the merger control regime include:

- where shares in an existing company are transferred to two or more companies;
- where assets of a business are acquired by a new company and the shares in that company are issued to two or more companies; or
- where the parties contribute assets to the joint venture that they previously owned individually.

A purely contractual joint venture that does not involve an acquisition of shares or assets will still be subject to the Commerce Act's restrictive trade practices rules. The substantive legal test for such joint ventures is that any contracts, arrangements or understandings that have the purpose, or are likely to have the effect, of substantially lessening competition in a market will be prohibited.

The Amendment Bill proposes a new regime for obtaining clearance of 'collaborative activities' (other than mergers) which are not carried out for the dominant purpose of lessening competition between the parties. This mechanism is potentially available to joint venture parties worried about the competition effects of any joint venture.

5. What are the jurisdictional thresholds?

The only jurisdictional threshold for the New Zealand merger control regime is whether the transaction affects a market in New Zealand. There is no requirement for a business to have a subsidiary, branch or assets in New Zealand or for the business to have direct sales into New Zealand.

There are no monetary thresholds, either in relation to the value or the turnover of the merger parties or the size of the market.

Enforcing New Zealand competition law in the context of decisions relating to foreign-to-foreign transactions can be difficult for the Commission. The Amendment Bill takes steps to ameliorate this difficulty by granting the courts the power to declare that an acquisition by an overseas person of a controlling interest in a New Zealand body corporate (whether incorporated in overseas or in New Zealand) has, or is likely to have, the effect of substantially lessening competition in a market in New Zealand. If a declaration is made, the Court may make an order affecting that New Zealand body corporate, including requiring the body corporate to:

- cease carrying on business in New Zealand in the affected market;
- dispose of shares or other assets; or
- take any other action that the Court considers is consistent with the purpose of the Commerce Act.

The Commission has assessed large-scale foreign-to-foreign transactions in the past, but has not yet pursued remedies against such transactions. It is possible for the Commission to intervene if the particular facts demand it.

6. Are these thresholds subject to regular adjustment?

Not applicable.

7. Are there any sector-specific thresholds?

The Fisheries Act 1996 specifies 'aggregation limits' regarding fishing quota assets. These limits apply alongside the Commerce Act prohibition against mergers that substantially lessen competition.

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

Filing an application for clearance or authorisation is voluntary.

A clearance application is usually registered where anti-competitive effects may arise from a transaction (ie, there is some market share aggregation), but those effects can be can be shown not to lessen competition in the affected market.

An authorisation application is usually registered where it is probable that the transaction will substantially lessen competition, but there is scope to argue that the competition concerns are outweighed by the wider public benefits. The 'public' refers to the public of New Zealand, so benefits to foreign parties are only relevant to the extent that they benefit New Zealanders.

9. If parties proceed with an acquisition without first gaining clearance or authorisation and the Commission believes that the transaction breaches section 47, the Commission can take enforcement action in the Court. Can a notification be avoided even where the thresholds are met, based on a 'lack of effects' argument?

Because applying for clearance or authorisation is voluntary, notification can be avoided. An informal 'courtesy' notification can be made but it has no legal standing.

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

There are no special rules for notification of foreign-to-foreign transactions.

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

The Commission may initiate a review of any transaction in its enforcement capacity. If the Commission determines that a transaction breaches section 47, it may apply to the Court seeking various remedies, including:

- injunctive relief;
- substantial pecuniary penalties (of up to NZ$500,000 for an individual and up to $5 million in the case of a body corporate); and/or
- an order for divestment of shares or assets.

The Commission also has the power to issue a 'cease and desist' order, which can be used to restrain anti-competitive conduct or to require a person to do something to restore competition in the market. Acting in contravention of an order can result in pecuniary penalties of up to NZ$500,000.

See question 5 for further information regarding foreign-to-foreign transactions.

NOTIFICATION REQUIREMENTS, TIMING AND POTENTIAL PENALTIES

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

Clearance or authorisation applications cannot be made after the point in time at which the transaction becomes unconditional. In practice, any voluntary application will need to be filed allowing time for processing by the Commission prior to closing the New Zealand aspects of the transaction.

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

A clearance or authorisation application can be registered prior to the parties signing an agreement. However, if the Commission is of the view that the parties are unlikely to proceed with the transaction, it has the discretion to decline the application. The Commission will want comfort that there is a good-faith intention to proceed. Often, an agreement will be conditional on receiving Commerce Commission clearance.

14. Who is responsible for notifying?

The purchaser is the only party able to register an application for clearance. However, in many cases, aside from hostile takeovers, the vendor, purchaser and/or the target will work together to complete the application. In these situations it is important to manage the process so as to ensure that the parties are not given access to each other's confidential, commercially sensitive information.

Crucially, if a transaction proceeds without clearance and is subsequently found to breach section 47, liability could apply to a number of parties. Penalties, damages and injunctions can apply to a wide range of entities and individuals, including:

- any party that has acquired assets or shares or attempted to do so;
- anyone that has aided, abetted, counselled, procured, induced or

attempted to induce, or conspired with a party to unlawfully acquire assets or shares; and/or

- anyone who has been, directly or indirectly, knowingly concerned in or party to the unlawful acquisition of assets or shares. Penalties and injunctions can also be awarded against the same range of parties in relation to a contravention of a divestment undertaking.

Accordingly, penalties for implementing an unlawful transaction could potentially be imposed on both the acquirer and the seller, or, in the case of a merger, on all merging parties as well on shareholders, directors, employees and agents of the parties (including legal advisors and facilitating bankers).

15. What are the filing fees, if any?

The filing fees (to be paid at the time the application is registered with the Commission) are:

- for clearance, NZ$2,000 (plus GST, if any); and
- for authorisation, NZ$20,000 (plus GST, if any).

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

Because applying for clearance or authorisation is voluntary, notification is never strictly ‘necessary’. However, if an application has been made, the parties would normally be expected to suspend completion of the transaction until the Commission has made a clearance or authorisation decision.

There has been one instance in recent years where a party filed a clearance application and subsequently withdrew it with a view to proceeding without clearance. The Commission successfully brought proceedings in the High Court to restrain the applicant completing the acquisition on the grounds that the acquisition would substantially lessen competition in the relevant market. This was upheld by the Court of Appeal. *Commerce Commission v New Zealand Bus Limited* (2006) 8 NZBLC 101 774 and *New Zealand Bus Limited, Infratil Limited v Commerce Commission* and *Blairgowrie Investments Limited & Ors v Commerce Commission* [2008] 3 NZLR 433.

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?

The Commission is not authorised to suspend a transaction. The parties can proceed, but the transaction will be subject to potential enforcement action under section 47.

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

Because the clearance and authorisation processes are voluntary, parties are free to complete their transactions without obtaining clearance or authorisation. An application can be withdrawn at any time, in which case the parties are free to close the transaction, subject to potential subsequent enforcement action under section 47.

If there are competition concerns in New Zealand, a foreign party will often ‘carve out’ local aspects of the transaction, pending consideration by the Commission, and proceed with global closing.

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

Because the clearance and authorisation processes are voluntary, there is no penalty for failing to notify the Commission of a transaction of any size. However, if the parties proceed without obtaining clearance, there is a risk that the Commission might launch an investigation into the transaction in its enforcement capacity.

If the Commission is concerned that a transaction may breach section 47, and it is of the view that the parties are not intending to seek clearance, the Commission may apply to the Court for an injunction. For the Court to grant an injunction, the Commission must prove, on the balance of probabilities, that the proposed transaction is likely to have the effect of substantially lessening competition in the relevant market. The Commission will likely seek a stay of the transaction pending full consideration by the Court of this substantive matter.

The Commission may also seek a declaration with an injunctive effect. In *Commerce Commission v New Zealand Bus Limited* the judge handed down a declaration that the acquisition was likely to substantially lessen competition in the relevant market(s). The transaction was not completed and pecuniary penalties were applied.

The Commission engages in surveillance to monitor the transaction landscape through the media and its contact with other competition authorities. It may also learn of transactions through complaints from third parties or in the context of a review of an unrelated transaction.

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

Again, there are no specific sanctions for implementing a transaction without obtaining clearance. However, because the Commission cannot give clearance retrospectively, parties run the risk that the merger might be found to breach section 47.

The transaction parties also need to be careful that their conduct prior to implementing a transaction does not breach the restrictive trade practices provisions of the Commerce Act. These provisions can potentially be breached through disclosure of commercially sensitive information (such as pricing information) or agreements not to compete in the period prior to closing.

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?

Where a party has been declined clearance and proceeded to implement a transaction, or breached a divestment undertaking, the Commission may take enforcement action.

One option is for the Commission to issue a 'cease and desist' order. An order will only be made if a Cease and Desist Commissioner is satisfied that there is a *prima facie* breach of merger control rules and it is necessary to act urgently in the public interest or to prevent serious loss or damage.

The Commission also has the power to issue court proceedings seeking a number of sanctions. See the response to question 11 for further information on the relevant sanctions.

In relation to foreign acquisitions that affect competition in New Zealand, the Amendment Bill provides the Commission with the power to seek a declaration from the Court. See the response to question 5 for further information on the Court's powers of declaration.

The maximum monetary penalty for breaching a divestment undertaking (forming part of a clearance or authorisation) is NZ$500,000 for each act or omission. A breach of a divestment undertaking results in the relevant clearance or authorisation becoming void from the date it was given.

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

The timetable for the clearance or authorisation process formally starts running when the Commission registers a completed and signed Notice Seeking Clearance or Notice Seeking Authorisation.

The Commerce Act provides that the Commission must issue a clearance decision within 10 working days and an authorisation decision within 60 working days. The Commission can extend these prescribed periods by agreement with the applicant.

In practice, the Commission is seldom able to undertake a sufficient level of inquiry within 10 working days to enable it to make an informed decision on a clearance application. Invariably, the Commission will ask the applicant to agree to an extension of time. If the applicant refuses, the Commission is likely to decline to grant clearance. This is because the Commerce Act allows the Commission to grant a clearance only if it is 'satisfied' that the acquisition will not substantially lessen competition. The Commission will generally seek extensions allowing sufficient time to determine whether it is 'satisfied' that a substantial lessening of competition will not result.

The *M&A Guidelines* state that the Commission has committed to deciding clearance applications within an average of 40 working days. The Commission has designed its process around this intended timeframe. Obviously, however, timeframes may be shorter or longer depending on the complexity of the case and other issues such as the availability of resources.

Within 10 working days from registration, the Commission will provide the applicant with a draft investigation timeline and accordingly request an extension.

Within 15 working days from registration, the Commission aims to issue (and usually publish on its website) a 'Statement of Preliminary Issues', outlining the Commission's preliminary view of potential competition issues with the transaction.

Within 25 working days from registration, the Commission will either grant clearance for the transaction or send a letter of issues to the applicant. The letter of issues raises concerns the Commission has with the transaction following its initial investigation. The applicant is invited to provide further information that might address the Commission's concerns.

Within 30 working days from registration, the Commission aims to meet with the applicant to provide an updated timeline of the process.

Within 40 working days from registration, the Commission aims to grant, or decline to grant, clearance for the transaction. If the clearance application is exceptionally complex, the Commission may raise further issues and extend the consultation with the applicant.

The Amendment Bill proposes to replace the current 10 working days statutory clearance period to 40 working days as reflected in the *M&A Guidelines*.

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

There is no 'simplified' procedure for obtaining clearance. All clearance applications must be registered in the prescribed form.

For authorisations, there is a 'streamlined authorisation process' which enables determination of straightforward authorisation applications as quickly as possible. The streamlined process is discussed in the Commission's *Authorisation Guidelines*. The factors which the Commission will consider in exercising its discretion to apply the 'streamlined authorisation process' include:

- the number of markets that are affected;
- the number and complexity of the issues;
- the number of interested or affected parties;
- the size of the market;
- the level of market share aggregation; and
- the transparency of the benefits (ie, whether the benefits appear to be obvious, and if there is a need for complex quantitative analysis).

In the *Authorisation Guidelines*, the Commission states that these (and other) factors are only indicative and are designed to be pragmatic and flexible. There are separate application forms for the general authorisation process and the streamlined version.

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

In order to apply for a clearance or authorisation, the acquiring party must register a completed application form. The forms are available on the Commission's website. In addition to administrative and governance information about the transaction parties, an application for clearance requires:

- transaction details, including copies of the most recent versions of transaction documents;
- information on the relevant goods and services and the industry(ies) affected;

- information on market definition, including any horizontal aggregations or vertical integration;
- a view of the counterfactual/possible counterfactuals (ie, in the event that the proposed merger does not take place, what is likely to happen to the parties' business operations and the market/industry);
- competition analysis, including potential competitors, the countervailing power of buyers and efficiencies; and
- clearly indicate any confidential information contained in the application.

If authorisation is being sought, evidence to support the claimed public benefits must be provided, as well as discussion of any detriments that may result from the acquisition.

Where commercially sensitive or confidential information is included in an application, parties can request that the Commission treat that information as confidential. In that case, two copies of the application must be filed (one full version and one redacted version).

The applicant must confirm by signature that all information relevant to the application has been disclosed.

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

A clearance or authorisation application can be submitted in English or Te Reo Māori.

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

Applications for clearance or authorisation must be accompanied by copies of the most recent versions of any documents bringing about the transaction (ie, sale and purchase agreements or offer documents if it is a public bid) and copies of the most recent annual reports and accounts of the transaction parties or, if annual reports are not available, copies of the audited financial statements of the transaction parties. If the transaction relates to a segment of the business only, a copy of any management accounts for the relevant business segment may be required.

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

Failure to provide complete information, or the provision of incorrect or misleading information, in a clearance or authorisation application could give rise to criminal penalties if done with intent to deceive or mislead the Commerce Commission. It is an offence to attempt to deceive or knowingly mislead the Commission in any matter before it, including in relation to an application for clearance or authorisation.

It is also an offence to refuse or fail, without reasonable excuse, to comply with a notice under section 98 of the Commerce Act. Section 98 empowers the Commerce Commission to require the provision of information or documents to the Commission or to require a person to appear before the Commission. The provision of information or a document in purported compliance with a section 98 notice knowing it to be false or misleading is also an offence.

Any person who commits any of the above offences is currently liable on summary conviction to a fine not exceeding NZ$10,000 in the case of an individual, or NZ$30,000 in the case of a body corporate. The Amendment Bill proposes to increase these penalties tenfold to NZ$100,000 and NZ$300,000 respectively.

These offences apply to both the applicant and third parties in respect of information provided by them.

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

Applicants are able to request pre-notification discussions with the Commission. These discussions are customary in the sense that they are encouraged by the Commission. The Commission points out in its *M&A Guidelines* that pre-notification discussions can benefit the Commission and the applicant by:

- educating the Commission's investigation team about markets that may be complex/unfamiliar;
- setting the scene for the transaction at an early stage;
- clarifying what information and evidence the Commission is likely to need, and identifying useful evidence that may assist the Commission's analysis, such as economic evidence;
- providing the Commission with an opportunity to indicate further information which should be included in the application; and
- allowing the applicant and the Commission to discuss likely competition issues.

The Commission will engage in pre-notification discussions where it is satisfied that the applicant has a good-faith intention to proceed with the merger.

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

In its *M&A Guidelines*, the Commission states that it treats the fact and content of all pre-notification discussions (including any documents provided) as confidential until an application for clearance is registered. The Commission does not seek third-party views at the pre-notification stage.

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

Shortly after a clearance or authorisation application has been registered, the Commission issues a media release advising that the application has been received (including the names of the parties, some background information about the parties and the sectors they are active in). At the same time (or shortly thereafter), a public version of the application which omits commercially sensitive and confidential information is published on the Commission's website.

Applicants are not always consulted on the contents of the public version of the report so it is prudent to ensure that agreement is reached with the Commission with regard to confidentiality of specified information as and when it is provided to the Commission.

Parties may make a confidential application, but in practice such applications will not progress until they can be made public because the Commission needs to conduct market inquiries.

The Commission can still be required to disclose redacted information which is requested under the Official Information Act 1982. However, there are a number of reasons for which information can be withheld, including if the public interest in making the information available is outweighed by the fact that disclosure would prejudice the supply of similar information to the Commission and it is in the public interest that such information continues to be supplied to the Commission.

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

The Commission's clearance and authorisation decisions, including its written reasons, are available to the public via the Commerce Commission website.

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 legality of a notified transaction is assessed by whether the transaction will, or will be likely to, have the effect of substantially lessening competition in a New Zealand market. The Commission applies this test when it assesses clearance applications and in the enforcement process. The Commission compares competition under the factual (the state of competition if the transaction proceeds) with competition under the counterfactual (the state of competition if the transaction does not proceed).

If a transaction is not, or is not likely to be, cleared by the Commission, the applicant may nonetheless seek authorisation for the transaction. Authorisation will only be granted if the Commission is satisfied that the public benefit from the transaction outweighs any lessening of competition caused by the transaction.

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)?

Theories of harm relevant to determining whether the transaction is likely to have the effect of substantially lessening competition will be considered by the Commission. Relevant theories of harm include unilateral effects, coordinated effects, conglomerate or portfolio effects, vertical concerns and elimination of competition or potential competition.

In practice, the Commission focuses on horizontal aggregation and vertical integration. Guidance on how the Commission assesses horizontal and vertical effects can be found in the Commission's *M&A Guidelines*. While conglomerate effects are also mentioned, these have not featured heavily in the Commission's clearance decisions to date.

Where mergers or acquisitions involve joint ventures, the Commission will assess whether the joint venture may lead to coordination of the behaviour of parent companies outside of the joint venture. For example, Decision 559 relates to an application for clearance for the proposed merger, through the establishment of three joint-venture companies, of the diagnostic laboratory services businesses of New Zealand Diagnostic Group Limited and Sonic Healthcare (New Zealand) Limited and their subsidiaries in six District Health Board districts. The Commission considered that if the three joint ventures were to proceed, a strong relationship would be established between the joint-venture parties and the parties would no longer have the incentive they would otherwise have to compete in districts outside the joint-venture districts. The Commission was not satisfied that the increased likelihood for coordinated effects would not substantially lessen competition in other regional markets not involved with the joint-venture proposals.

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

In general, non-competition issues are relevant to an authorisation application, but not to an application for clearance. However, to the extent that wider industry trends affect the competition analysis (ie, the factual and/or the counterfactual), the Commission will turn its mind to these factors.

When applying for authorisation, an applicant must demonstrate that the benefit to the public outweighs any potential lessening of competition. The Commission's approach to analysing public benefits and detriments is set out in its *Authorisation Guidelines*. The Guidelines reference the following definition of public interest (as put forward by New Zealand courts):

'…anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.'

The Commerce Act directs the Commission to consider efficiencies when assessing whether or not conduct will result in a benefit to the public, but does not refer to any other considerations. While the Commission has generally focused on wider economic efficiencies (such as productive and dynamic efficiencies), it also references 'other benefits' in its Guidelines. The Commission gives the example of a transaction which 'results in other benefits valued by the community generally which could include, eg, environmental improvements or health improvements'.

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

Economic efficiencies are relevant in the substantive assessment of the merger control rules, particularly for authorisation applications.

In assessing a clearance application, the types of efficiencies the Commission will look for are variable cost savings or product enhancements that increase product demand or, in the case of vertical mergers, an improvement in allocative efficiency. The Commission's *M&A Guidelines* state that:

'The applicant must satisfy us that efficiencies would be realised in a timely fashion, that they would not likely be realised without the merger, and that they would be passed on to buyers sufficiently to prevent a finding of a substantial lessening of competition.'

In contrast, economic efficiencies are central to an authorisation application. See the response to question 34 for further information on consideration of efficiencies in an authorisation application.

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

The Commission works with equivalent agencies in other jurisdictions. However, the Commission cannot transfer its jurisdiction to a foreign agency. The relevant parties may grant a waiver to the Commission to allow confidential information about a transaction to be disclosed to other competition authorities.

The Commission's recently published *Guidelines for Overseas Requests for Compulsorily Acquired Information and Investigative Assistance* state that the Commission may gather information, or provide already gathered information, to assist recognised overseas regulators that are a party to a cooperation arrangement with the Commission. The Commission may not provide information that has been provided by parties to the Commission on a voluntary basis, or information that has been gathered for the purposes of Part 4 of the Commerce Act (concerning regulated goods and services), unless the information is already in the public domain or the party who provided the information agrees.

The Commission has a particularly strong relationship with the Australian Competition and Consumer Commission (ACCC). For trans-Tasman mergers, the Commission has entered the *Cooperation Protocol for Mergers Review* with the ACCC to assist investigations in both jurisdictions. If a transaction affects both the Australian and New Zealand markets, members of the Commission may occasionally sit as ACCC members and vice versa.

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

As soon as third parties become aware of a clearance or authorisation application (usually via public notification), they can engage in the process. The Commission will seek the views of affected parties, but often affected parties will proactively approach the Commission.

When filling out a clearance application, applicants must provide contact details for competitors, customers, suppliers and relevant trade associations. The Commission actively seeks information from some or all of them, either through face-to-face interviews, telephone interviews, letters or emails. If the information is not provided voluntarily, the Commission may invoke its powers under section 98 to require the information to be provided. Failure to comply with a notice under section 98 is an offence. See the response to question 27 for further information on the possible sanctions for providing incorrect, misleading or incomplete information to the Commission.

Third parties frequently make submissions opposing the granting of clearance. Those submissions, with confidential information redacted, can usually be obtained from the Commission through a request made under the Official Information Act.

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

The applicant can offer an undertaking to divest particular assets and shares at any time during the process of an application for clearance or authorisation. The Commission will not usually propose remedies itself. Undertakings are usually offered towards the end of the application process, once the Commission has identified its specific concerns. The competition consequences of an undertaking will need to be tested, which may delay the Commission's final determination.

Undertakings must be provided in written form by, or on behalf of, the applicant.

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

The Commerce Act prohibits the Commission from accepting anything other than an undertaking to dispose of specific assets or shares. In practice, this means 'behavioural' undertakings cannot be submitted. A divestment will remedy competition concerns if the divestment will result in sufficient additional competitive constraint on the merged firm so that a substantial lessening of competition is no longer likely. If any undertaking accepted by the Commission in connection with a clearance or authorisation is breached, the clearance or authorisation becomes void from the date it was given. See the response to question 21 for further information on the possible sanctions when an applicant implements a transaction in breach of an undertaking.

If the Commission accepts a divestment undertaking, the applicant must negotiate the terms with the Commission. The Commission will usually require the divestment to be made to an unrelated purchaser within six months of the undertaking (the timeframe for divestment is adjusted depending on the risks associated with the divestment).

The Commission does not have a prescriptive divestment process nor has it sought to design divestment undertakings. The Commission's current view is that applicants are best placed to decide whether to offer divestment undertakings and the scope and nature of the undertakings. There is some divestment undertaking guidance set out in the Commission's *M&A Guidelines*.

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

The Commission can issue proceedings in the High Court to seek a range of remedies. See the response to question 21 for further information on the possible sanctions for an applicant which has been declined clearance and proceeds to implement a transaction, breaches a divestment undertaking or fails to comply with a 'cease and desist' order.

JUDICIAL REVIEW

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

A decision of the Commission to grant or decline clearance or authorisation can be appealed or can be subject to judicial review proceedings in the High Court (and subsequently, with leave, in the Court of Appeal and Supreme Court).

Under the Commerce Act, the following parties may appeal against a clearance or authorisation decision by the Commerce Commission:

- the person who applied for clearance or authorisation;
- any person whose assets or shares are proposed for acquisition; and
- any person who participated in any Commission conference relating to the clearance or authorisation (conferences are usually held for authorisations, but not clearances).

The Amendment Bill proposes to limit the right of appeal against a clearance decision to the first two categories of person stated above, effectively reducing the scope for 'tactical' appeals by third parties.

Judicial review is the only option available to parties affected by, but not involved in, a merger or acquisition that has received Commerce Commission clearance or authorisation.

42. What is the typical duration of a review on appeal?

There is no prescribed duration of a review on appeal. The duration will vary depending on the complexity of the issues and court availability at the time the appeal is made. It is usually possible to secure a sufficient hearing time within a few months of the Commission issuing its written report.

An appeal must be filed within 20 working days of the Commission's decision. An applicant may apply for an extension of the appeal filing period where the circumstances warrant an extension. Extensions are commonly granted to allow 20 working days from the release by the Commission of its written reasons for declining clearance.

The total time between the Commission issuing its decision and the High Court reaching a decision on an appeal or judicial review has ranged from two to 23 months for appeals and around 12 to 21 months for judicial review.

43. Have there been any successful appeals?

Since the Commerce Act came into effect in 1986, there have been eight appeals and five judicial reviews of Commerce Commission clearance decisions. Four of the appeals and three of the judicial reviews were successful.

STATISTICS

44. Approximately how many notifications does the authority receive per year?

The number of clearance applications received by the Commission each year varies. The Commission received 11 applications for clearance in 2013, 12 in 2012, eight in 2011, 13 in 2010, five in 2009 and 17 in 2008. Only two applications for authorisation have been made in the last decade. Both authorisation applications were made in 2011 and both succeeded.

45. Has the authority ever prohibited a transaction? How many prohibition decisions has the authority issued in the past five years?

From 2008 to 2013, the Commission declined to grant clearance in four cases. This represents less than 10 per cent of the total number of clearance decisions issued during that period.

46. Over the past five years, in what percentage of cases have binding commitments been required in order to obtain clearance for a transaction?

The only form of binding commitment that the Commerce Commission is able to accept in relation to a merger or acquisition is an undertaking to divest assets or shares. From 2008 through 2013, three of the 59 clearances granted involved divestment undertakings.

47. How frequently has the authority imposed fines in the past five years?

In the last five years, the Commerce Commission has sought penalties for breach of section 47 in one case: *Commerce Commission v New Zealand Bus Limited* (2006) 8 NZBLC 101 774. See the responses to questions 16 and 19 for further information on this case.

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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.