Merger Control

Jurisdictional comparisons **Second edition 2014**

General Editors:
Jean-François Bellis & Porter Elliott,
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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

Norway

ARNTZEN de BESCHE Advokatfirma AS
Thea S. Skaug, Espen I. Bakken & Stein Ove Solberg

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?

Mergers and acquisitions are subject to control under Chapter 4 of the Norwegian Competition Act of 5 March 2004 no. 12 ('the Competition Act'). More detailed provisions on notification requirements are provided in the Regulation on notification of concentrations of 11 December 2013 ('Regulation on Notification') and the Regulation on Partial Exceptions from the Rule on Suspension of Concentrations of 9 March 2009 no. 0292 ('Regulation on Exceptions'). The Norwegian Competition Authority ('NCA') has also issued a Best Practices for merger control proceedings and guidelines on notifications of a concentration. Relevant legislation and guidelines are available in English on the NCA's webpage (*www.konkurransetilsynet.no*).

Norway is a part of the 1992 Agreement on the European Economic Area ('EEA agreement'). It has implemented Regulation (EC) 139/2004 on the control of concentrations between undertakings ('EUMR') as part of this agreement. Therefore, mergers with an EU or EEA dimension are governed exclusively by EU or EEA merger control provisions, and are not subject to national merger control. A one-stop shop approach applies also under the EEA agreement.

There is no pending legislation that would affect the merger control rules as described. Please note that there has recently been amendments and changes to the merger chapter of the Competition Act, which entered into force January 2014. The most notable change is a substantial increase of the notification thresholds.

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

The first instance in respect of merger control in Norway is the Norwegian Competition Authority (NCA). The contact details for the NCA are:

P.O. Box 439 Sentrum,
NO-5805 Bergen, Norway
T: (+47) 55 59 75 00
F: (+47) 55 59 75 99
W: *www.konkurransetilsynet.no*
E: post@konkurransetilsynet.no

Merger control decisions can be appealed to the Ministry of Trade, Industry and Fisheries ('Ministry'). The contact details for the Ministry are:

P.O. Box 8090 Dep, NO-0032 Oslo, Norway
T: (+47) 22 24 90 90
F: (+47) 22 24 01 30
W: *http://www.regjeringen.no/nb/dep/nfd*
E: postmottak@nfd.dep.no

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

Chapter 4 of the Competition Act applies to any 'concentration' between undertakings. The definition of concentration in section 17 of the Competition Act corresponds to the definition of concentration in the EUMR, and the Commission's case law and notices on mergers are highly relevant. The following types of transactions are covered by the Competition Act:

- a merger between two or more undertakings or parts of undertakings;
- an acquisition, where one or more undertaking(s) acquire control (*de facto* and *de jure*) in one or more other undertakings, including minority position in given circumstances:
    - to acquire control, the acquirer must exercise a decisive influence on the undertaking in question:
        - through ownership or the right to use assets on a contractual basis; or
        - through voting or decisions of the undertaking's bodies;
    - the acquisition must result in control on a lasting basis;
- a creation of a full-function joint venture (see question 4 for further information).

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

A full-function joint venture is regarded as a concentration in the meaning of the Competition Act and is subject to the ordinary merger control procedure. If the joint venture is not regarded as being full-function, it will not constitute a concentration in the meaning of the Competition Act, and thus not be subject to a merger notification.

According to section 17 of the Competition Act, a full-function joint venture must perform all the functions of an autonomous economic entity on a lasting basis. The rules on joint ventures correspond to Article 3 no. 4 in the EUMR and the Commission's case law is relevant when assessing the criteria.

The first criterion is that there must be a 'creation of a joint venture'. It is required to constitute joint control between two or more undertakings for there to be a joint venture in the meaning of the Competition Act. The wording 'creation' will include both the creation of a new joint venture and an acquisition of an existing undertaking which implies joint control.

To perform 'all the functions of an autonomous economic entity', the

joint venture must be sufficiently independent from the owners, meaning that it leads to a change of the market structure. This means that a joint venture which only regulates the behaviour of the parent companies or simply takes over parts of the parent companies' functions will not be a full-function joint venture in the meaning of the Act.

5. What are the jurisdictional thresholds?

Pursuant to section 18 of the Competition Act, there is a requirement to notify transactions provided that the undertakings concerned achieve a combined annual turnover in Norway of more than NOK 1 billion (approx. €120 million) and if at least two of the undertakings concerned each has an annual turnover in Norway exceeding NOK 100 million (approx. €12 million).

Turnover in the meaning of the Competition Act corresponds to the word 'sales income' in the Act of 17 July 1998 nr. 56 on accounting ('the Accounting Act'), and must be interpreted on this background. Revenue must be allocated according to where the customer is located. This means that sales to customers abroad will not impact the relevant turnover, while revenue originating from sales to Norwegian customers from abroad will impact the relevant turnover when assessing the duty to notify a merger.

6. Are these thresholds subject to regular adjustment?

No, the thresholds are not subject to regular adjustment. As already mentioned, in January 2014 the thresholds were substantially raised. This was done in order to increase the effectiveness of the Norwegian merger control, and was not a result of a regular adjustment plan. There are no regular adjustments as such.

7. Are there any sector-specific thresholds?

No, there are no sector-specific thresholds in effect to date. It should be noted that the Ministry has an authorisation in the Act to issue further regulations requiring mandatory notification below the thresholds in certain markets where structural conditions makes it vulnerable to a further market concentration and prevention of competition. Such a regulation would apply to any undertaking operating in the market concerned. However, so far the Ministry has not used this possibility.

However, the NCA has imposed a duty on nine large national companies to inform the NCA of any potential transactions they may be involved in, notwithstanding the notification thresholds. The nine selected companies are all operating in markets which are identified by the NCA as concentrated, and the NCA thus intends to follow these markets closely. The nine companies affected by this specific information requirement are Norske Shell, Norsk Gjenvinning, Nor Tekstil, Norgesgruppen, Plantasjen, Sector Alarm, Securitas Direct, Statoil Fuel and Retail and Telenor. Most of these companies operate in markets where the NCA has previously intervened and prohibited mergers. The duty consists of sending a short and simple notice to the NCA with information on the coming transaction, with a short

description of the merger and the expected time of implementation. This information requirement is based on the general duty to provide the NCA with information given in section 24 of the Competition Act.

If this short information notice results in a complete notification requirement, the undertakings concerned must be given notice and a possibility to give a statement on the matter. If the NCA requires a complete notification, the regular time limits, as described in question 11, will apply starting to run from the day the ordinary notification is received by the NCA. The standstill obligation will apply from the day the parties receive the NCA's requirement to file.

A standstill obligation applies as with a regular notification below the thresholds. See further on this subject in question 11.

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

If the relevant thresholds are met, a filing is mandatory. Do note that the NCA has the power to initiate a review even though the thresholds are not met and that a voluntary notification may be filed notwithstanding the notification thresholds (see further question 11).

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

There are no exceptions from the duty to notify under the Competition Act if the thresholds are met. However, certain transactions with potentially limited effect in Norway, might qualify for a simplified notification (see question 23).

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 exceptions from the mandatory notification as long as the thresholds are met. It is thus irrelevant if both undertakings are foreign as long as they have the required turnover in Norway to trigger the thresholds. As described in question 5, it is sufficient to have turnover originating from sales to Norwegian customers, it is not a requirement to have a Norwegian entity or presence as such.

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

Yes, pursuant to section 18, third paragraph of the Competition Act, the NCA has the authority to initiate review of transactions which do not meet the thresholds for mandatory notification.

This possibility is given mainly as a protection of competition in local and niche markets which could fall outside the scope of the current regime due to the increased thresholds. Without this option, the NCA would not have been able to intervene in competition problems in local and niche markets in the same manner, and the undertakings which operate in these

markets would not have the same incentives to not distort competition through mergers. The NCA's option to intervene below the thresholds was a prerequisite for the substantial increase of the thresholds from 1 January 2014, and this is emphasised in the preparatory works to the Competition Act.

To protect the undertakings' legal certainty, a review of transactions under the notification thresholds can be initiated no later than three months after a final agreement is signed or control is acquired, whichever comes first in time. Furthermore, the NCA may only intervene in transactions where it is reasonable to assume that competition is affected or other special considerations require a further investigation. If the NCA chooses to intervene, it must give a reasoned statement on why these criteria are fulfilled in each transaction. It is emphasised that the option to intervene below the notification thresholds is a narrow one, and it is not likely for the NCA to frequently intervene without the markets being defined as local or regional, or in the case of niche markets.

The NCA's power to intervene below the thresholds leaves the parties in uncertainty for three months. This implies that the parties prior to the completion of a concentration should assess the risk of intervention by the NCA. In order to achieve a quicker clarification, the parties may choose to submit a voluntary notification.

If the NCA intervenes in a transaction below the notification thresholds, the ordinary procedural rules for merger filings will apply.

It should be noted that the standstill obligation comes into effect in these situations as well. This means that if a merger is already completed, and the NCA intervenes within three months, the involved parties must freeze any steps taken in relation to implementing the transaction. The NCA has the power to reverse all measures already carried out by the parties, if the transaction is found as harming the competition in the relevant market. It is thus important for the parties in a planned transaction below the notification thresholds to assess the risk of being caught by the NCA, and to consider a voluntary notification.

NOTIFICATION REQUIREMENTS, TIMING AND POTENTIAL PENALTIES

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

There is no deadline for filing in Norway, but given the standstill obligation, the transaction cannot be completed until the final NCA approval has been obtained. If the involved undertakings violate the standstill obligation, they risk being given an administrative fine by the NCA pursuant to section 29 of the Competition Act (see question 20).

Provided that the parties do not take any step in order to implement the transaction, the notification may be filed at any stage in the transaction period, provided that the transaction can be described accurately enough to fulfil the content requirements of a notification. If the conditions for a concentration change post-submission of the notification, and such changes

are material to the NCA's assessment, a new notification must be submitted.

13. Can a notification be made prior to signing a definitive agreement?
Yes, a notification can be made prior to signing a definitive agreement, though there are some small issues that the merging parties should be aware of.

First, it is the parties' responsibility to give an accurate enough description of the merger to fulfil the content requirements of the notification. If a notification is sent, and the contract is altered at a later stage, the parties must bear the risk of this. There is also a risk of being fined for giving unsatisfactory documentation to the NCA. The NCA has the power to dismiss a notification as being incomplete if the content requirements are not met.

Second, it is important to bear in mind that the NCA will publish information about the transaction on its webpage (*http://www.konkurransetilsynet.no/en/mergers-and-acquisitions/Currently-reviewed/*). There could be possible harmful effects for the involved undertakings if the merger then collapses at a later stage, and no contract is signed or if, for instance, stock-sensitive information is revealed.

14. Who is responsible for notifying?
The party/parties acquiring control is responsible for notifying the NCA. This means that both parties are responsible in a classic merger filing, the buyer is responsible in an acquisition and the controlling parents are responsible in the case of joint control.

15. What are the filing fees, if any?
There are no filing fees in Norway.

16. Where a notification is necessary, is approval needed before the transaction is closed/implemented (is there a waiting period or a suspension requirement)?
A standstill obligation is automatically in force when a merger is subject to mandatory notification. The standstill obligation means that no measures can be taken to implement the transaction until the merger eventually is approved by the NCA.

Voluntary notifications are subject to a standstill obligation from the NCA's reception of such notification.

In a situation where the NCA has required a notification below the filing thresholds, the standstill obligation starts to run the moment this requirement has come to the parties' knowledge.

Violations of the standstill obligation may trigger sanctions from NCA (see question 20).

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?
Yes, it is possible to apply for a derogation from the standstill obligation

pursuant to section 19, second paragraph of the Competition Act.

The NCA has the power to decide upon applications to derogate in individual cases. The preparatory works to the Competition Act points out that this provision should be interpreted as a restricted derogation possibility used in special cases only. It is further said that it may be relevant to derogate from the standstill obligation in transactions where a standstill will cause major consequences for the parties or society in general. It is not sufficient to derogate that the obligation is seen as troublesome by any of the parties. Case law from the Commission regarding the corresponding Article in the EUMR is relevant when assessing the possibility to derogate pursuant to section 19 second paragraph of the Competition Act. This case law shows that this must undergo a very strict interpretation.

The past year there has been partial derogation from the standstill obligation in four cases in Norway, typically in cases where the target business has filed for bankruptcy.

In addition to the NCA's power to derogate in individual cases, the Regulation on Exceptions contains specific derogations. The Regulation on Exceptions section 1 states that the standstill obligation in section 19 of the Competition Act shall not prevent the implementation of a public takeover bid or a series of transactions in securities which are converted on a regulated market. The Regulation corresponds to the EUMR article 7 nr. 2 and should be interpreted likewise.

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

In theory, it might be possible to implement the transaction abroad without violating the standstill obligation if such implementation does not affect the Norwegian parts of the transaction.

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

If a transaction which meets the notification thresholds is not notified to the NCA, this failure will be subject to sanctions pursuant to Chapter 7 of the Competition Act.

Section 29 states that a company violating section 18 (notification of mergers) is subject to administrative fines. Pursuant to section 32, any company breaching section 18 through culpable negligence or intent may be subject to personal fines or imprisonment.

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

As with failure to notify, breaching the standstill obligation will be subject to sanctions in Chapter 7 of the Competition Act. Administrative fines are given pursuant to section 29 and criminal sanctions may be given if the breach is negligent or done by intent pursuant to section 32 of the Competition Act. The NCA actively enforces breach of the standstill obligation. The maximum administrative fine is 10 per cent of the annual turnover of the company.

In 2012, the NCA fined four companies in the auditing, power, construction and retail markets between NOK 250,000 and 350,000 (approx. €30,000–41,000) each for completing mergers before notifying the NCA.

In 2013, the NCA fined three companies in the IT, print and construction markets between NOK 200,000 and 350,000 (approx. €24,000–41,000) each for breaching the standstill obligation.

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?

As with the two latter questions, implementing a transaction despite a prohibition decision or in breach of a condition/obligation imposed by a conditional clearance decision will be subject to sanctions as described in Chapter 7 of the Competition Act. Day penalties (section 28), administrative fines (section 29), personal fines and prison (section 32) are the potential sanctions, depending on the severity of the breach and type of transaction.

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

As a starting point, Phase 1 lasts for 25 working days from the time of notification. If remedies are offered within the first 20 working days, Phase 1 will be extended by 10 working days. This means that Phase 1 can last maximum 35 days.

At the end of Phase 1 there are three alternative ways of progress. If the NCA approves the transaction after a closer review, it may give written notice that the case is closed and that the transaction can be implemented. Second, the NCA may come to a decision where any remedies put forward by the parties are accepted, and the transaction may be given a conditional clearance. The third option available is that the NCA initiates Phase 2. The NCA must show that there are *'reasonable grounds to believe'* that the transaction would create or strengthen a significantly impede competition.

In Phase 2, the NCA shall as soon as possible or 70 working days after receipt of the notification at the latest either confirm the remedies suggested by the parties or issue a statement of objections (SO). If remedies are offered later than 55 working days after the notification, Phase 2 will be extended by an equivalent amount of working days. For example, if remedies are offered on day 65, the deadline will be extended by 10 days, bringing the total to 80 working days from the time of notification.

The parties have 15 working days to respond to the SO and the NCA has thereafter 15 working days to conclude on a final decision.

If remedies are offered after a reasoned proposition is sent, the NCA receives an extra 15 working days to make the final decision.

In total this makes a maximum time of the procedure of 100 days, and may stretch up to 130 working days if all possible extensions are given.

There are no remedies available to speed up the process in general. That said, the NCA is always under an obligation to reach its decision as soon as possible. In addition, there are possibilities of a short-form notification as

described in question 23, and pre-notification discussions with the NCA as described in question 28, which could speed up the notification process.

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

A short-form notification procedure is available pursuant to section 3 of the Regulation on Notification of concentrations.

According to the Regulation on Notification the short-form notification is available in three instances:

- joint ventures with an annual turnover and current assets transferred to the joint venture below NOK 100 million in Norway;
- where a party acquires sole control of an undertaking that was already controlled by that party together with one or more parties (from joint to sole control); and
- transactions where the involved parties do not have any horizontal or vertical overlap, transactions where the involved parties do have a horizontal overlap but the parties' total market share does not exceed 15 per cent or transactions where the parties do have a vertical overlap, but the parties' market share does not exceed 25 per cent, neither individually or in combination.

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

The requirements to the contents of a notification are established in section 18a of the Competition Act.

A notification requires a relatively high level of detail. On a general level, the parties must be able to describe the transaction accurately enough for the NCA to assess the merger.

The following information must be included:

- contact information of each undertaking involved in the transaction;
- description of the merger;
- description of the undertakings concerned and other companies in the same group of companies;
- the name of the five most important competitors, customers and suppliers in the relevant markets;
- description of the markets which are affected by the transaction;
- description of horizontal connected markets if two of the parties involved are active in the same market and the parties' total market share exceeds 15 per cent;
- description of markets where at least two parties are vertically connected and their total market share exceeds 25 per cent in the respective market;
- description of barriers to entry in the affected markets;
- description of possible efficiency gains resulting from the concentration; and
- whether the transaction is being reviewed by other competition authorities.

In a simplified notification (see question 23), the following information must be included pursuant to the second paragraph of section 3 in the Regulation on Notification:

- name and address of all parties of the merger, or the undertaking acquiring control;
- information on the characteristics of the merger;
- description of the involved entities and undertakings in the same group, including the undertakings' area of activity;
- name of the five most important competitors, customers and suppliers in the relevant markets;
- a description of how the conditions for a simplified notification in the first paragraph of section 3 in the Regulation on Notification are fulfilled; and
- in the case of joint ventures which fulfil the requirements to file a simplified notification, a description of whether or not the parent company is active in the same market as the joint venture must be given.

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

The main rule is that the notification must be written in Norwegian. However, the parties may apply to the NCA for an approval to submit the notification in English.

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

The latest version of the merger agreement must be submitted along with the notification. The same applies to the latest annual report and financial statement of the undertakings concerned. These requirements also apply to a short-form notification.

It is the parties' responsibility to clearly identify any business secrets in the notification and the enclosures. A proposal for a public (non-confidential) version of the notification must be attached to the notification in order for it to be complete.

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

The possible sanctions for providing incorrect, misleading or incomplete information to the NCA are fines, both personal and to the company, or prison.

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

Informal contact with the NCA pre-filing is possible. However, the NCA will not give any legally binding decisions at this stage. Pre-notification consultations will be governed by best practices guidelines, which are expected to be issued by the NCA. At the time of writing, these are not yet updated.

Pre-notification consultations are customary in complex cases. Pre-notification contact is encouraged by the NCA.

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

If the concentration is not publicly known, information provided during pre-notification consultations will normally not be subject to public access. However, the information could be published at a later stage, if the conditions for business secrets no longer are present.

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

When a notification is submitted, essential information on the transaction will be made public on the NCA's webpage shortly after the notification is received by the NCA. The announcement includes the identification of the undertakings concerned and the relevant affected markets. This public announcement is regarded as a confirmation that the notification is received.

As described earlier, it is the parties' responsibility to clearly state which parts of the notification which must be regarded as business secrets.

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

The Authority's decision is made publicly available in its entirety, with the exception of business secrets, which will be redacted.

This implies that major parts of the information in the notification will be public available. The NCA is required to make an independent assessment of what is regarded as a business secret in their own decision, as opposed to the notification, where the notifying parties have this responsibility. In practice, however, the NCA will normally consult the parties to get their opinion on which information constitutes business secrets.

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 for assessing the legality of a notified transaction is a two-step test. The Competition Act states that a concentration which will 'create or strengthen a significant restriction on competition, contrary to the purpose of the Act' shall be prohibited. The purpose of the Act, as stated in section 1, is to encourage competition and thereby contribute to the efficient utilisation of the society's resources. This means that the NCA cannot intervene against a merger which restricts competition if that merger has significant efficiency gains. That being said, this option is a narrow one, and the threshold is very high for the NCA to accept efficiency gains outweighing the restriction on competition.

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)?

The NCA considers both horizontal and non-horizontal effects, and both coordinated and non-coordinated effects. To this date, there are not any cases in which conglomerate effects have been decisive. The theories of harm considered correspond to the principles used under the EUMR, and guidance may be found in the Commission's notice and practice.

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

In cases where there are fundamental or major social considerations, the King in Council (the government as a collegium) may accept a merger against which the NCA has intervened (see section 21 of the Competition Act). To this date, this is employed in a single case (*Prior/Norgården*) where the government annulled a decision because of agricultural policy reasons.

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

Economic efficiencies are considered as a mitigating factor in the substantive assessment, which can be demonstrated by the fact that efficiency gains are part of the purpose of the Competition Act stated in section 1 (see question 32 on this matter).

According to the preparatory works behind the Competition Act, potential socio-economic efficiency gains must be weighed against the efficiency loss which is a result from the distorted competition. It is further important to consider the consumers when assessing the socio-economic efficiency gains and this is underlined by the second paragraph of section 1 in the Competition Act which states that particular considerations should be taken to consumers when employing the Act. Even though the consumers are to be considered, it should be noted that the Competition Act is based on a total welfare standard, not a consumer welfare standard.

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

The NCA has a close cooperation with the competition authorities in the other Nordic countries. An agreement has been made between the authorities of Norway, Sweden, Denmark and Iceland on competition law cases and an exchange of information regarding pending cases.

Norway is part of the International Competition Network (ICN). The NCA is not a formal member of the European Competition Network (ECN), but attends meetings about policy issues and receives information that is exchanged in the network.

When an acquisition is considered by the European Commission, the

NCA will initially not consider the concentration. However, the NCA may assist the Commission upon their inquiry, or ask the Commission to have the case transferred to the NCA if it primarily affects Norwegian interests. The *Orkla/Rieber* case and *Sats/Elixia* are examples of cases which have been transferred from the Commission to the NCA.

Further, a case may be transferred from Norwegian jurisdiction to the Commission's jurisdiction. This transfer may be initiated by the NCA itself, one of the affected EU Member States or the undertakings concerned. The NCA will not always accept to join a transfer request to the Commission, and the *IRIS/Canon* case is an example of the NCA refusing to join a request for referral initiated by the Belgian Competition Authority. The NCA closed the Norwegian part of the transaction without any further investigation.

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

Third parties are regularly involved in merger procedures before the NCA, primarily as sources of information. As mentioned above, the NCA is required to publish on its webpage a brief notice of all concentrations being notified. The notice shall contain information concerning the identity of the undertakings concerned, the transaction and the affected markets, in addition to the date of submission and the date of the expiry of the 25-working days deadline. One purpose of this notice is to give third parties a chance to provide comments to the NCA. Third parties may also ask for access to a non-confidential version of all notifications filed with the NCA.

The NCA will normally discuss the information identified as confidential with the parties before giving third parties access to the information. Additionally, the NCA may also order third parties to provide information and comments to the notification.

A decision by the NCA regarding the right to access the notification (eg, refusal of access) may be appealed to the Ministry. The appeal must be addressed to the Ministry, but sent to the NCA. Then, if the NCA does not reverse their decision, it must forward the appeal to the Ministry. Both the NCA and the Ministry must consider independently what type of information which may be regarded as business secrets. According to former case law and preparatory works to the Competition Act, very little information is regarded as business secrets.

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

The parties may propose and negotiate all kinds of remedies, both structural and behavioural, with the NCA. It is possible to propose remedies at any stage of the regulatory process. However, this will normally occur after the NCA has investigated the case for a period and has made a preliminary statement on its serious objections against the transaction. The preparatory works to the Competition Act emphasise the possibility for the parties to propose remedies at an early stage of the transaction. This results in a more effective merger control procedure.

The NCA will normally examine the market effects of the proposed

remedies, eg by consulting third parties. According to section 20, third paragraph of the Competition Act, the notifying parties must suggest relevant remedies themselves. The NCA tends to accept behavioural remedies in quite a lot of the cases.

Failure to comply with the remedies will constitute failure to observe a decision of the NCA and will be subject to administrative fines of up to 10 per cent of the turnover of the parties, or criminal fines or imprisonment.

The NCA may appoint a trustee to oversee the parties' compliance with both structural and/or behavioural remedies. The rules on the trustee arrangement are given in section 16, fourth paragraph of the Competition Act and in the Regulation on Trustee.

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

The NCA tends to accept both structural and behavioural remedies, and there are several examples of both from the NCA's decisions over the past years:

- *Lemminkäinen/Mesta*
  The asphalt merger from 2011 was accepted on the condition that Lemminkäinen sold one of its asphalt plants in northern Norway.
- *Mekonomen/Meca*
  Mekonomen's acquisition of the automotive spare-parts chain Meca was approved by the NCA subject to substantial behavioural remedies in order to restore the competition in the market for wholesale of spare-parts to independent repairers.
- *A-pressen/Edda Media*
  The media house A-Pressen's acquisition Edda Media was approved subject to conditions. The NCA found that the concentration would create significant restrictions on competition in certain parts of the local markets for newspaper advertising. A-Pressen was required to divest two alternative newspapers in order to resolve the competition concerns.

If a merger is accepted by the NCA on the condition of remedies, these remedies will normally be given for a period of five years, and for a maximum of 10 years (see section 6 of the Competition Act). If the conditions for intervention are still in place when the period has expired, the NCA has the power to give a new decision prolonging the time period for the commitments.

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

The NCA has the power to prohibit a proposed merger. The NCA does not need further court orders to exercise their power, and as described in question 21, the NCA may sanction any breach by fines or imprisonment.

JUDICIAL REVIEW

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

Yes, a prohibition decision may be appealed to the Ministry of Trade, Industry and Fisheries pursuant to section 20a of the Competition Act. The appeal must be sent to the NCA which will then forward it to the Ministry. A decision by the Ministry upholding the NCA's intervention decision may be further summoned for the regular courts.

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

A decision from the NCA may be appealed within 15 days from the time of the decision. The NCA must then forward the appeal to the Ministry within another 15 days after reception. The Ministry must come to a final decision within 60 days after reception of the appeal from the NCA. The maximum time thus totals 90 days from the day of the NCA's original decision.

43. Have there been any successful appeals?

Yes, there have been three successful appeals to this date. These were the *National Oilwell/Varco* case from 2005, the *Swarco* case from 2005 and the *Gilde/Prior* case from 2006.

STATISTICS

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

In 2008–12, the average number of notifications received per year by the NCA was 384.

These numbers will not be relevant as a standard because the new merger control regime in Norway has led to a significant increase in the very low notification thresholds. The new thresholds came into effect from 1 January 2014. It is thus expected that the numbers will be significantly lower from 2014 onwards.

An overview of the material which forms the basis of the statistics shows that a use of the new notification thresholds in the same years would have led to an average decrease of approximately 70–80 per cent of the notifications. In clean numbers, the average notifications in the same period would be 73 with the new thresholds. On this basis, the expected number of notifications will vary from 60 to 90 per year.

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

Yes, the NCA has prohibited several transactions. In the past five years, four prohibition decisions have been issued, of which three were made in 2012 and 2013.

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

Over the past five years there have been six cases where binding commitments have been required in order to obtain clearance for the transaction. When seen in proportion to the total amount of notifications made over the same period (384 on average per year), this is a small amount, and only about 2.5 per thousand notifications have required binding commitments.

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

There has been an average of 3.4 fines in merger control cases per year over the past five years: 17 in total in 2009–13. They are all given on the basis of either breaching the standstill obligation or giving misleading information to the NCA. An example of the latter is the *ISS* case from 2009.

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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.